

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 UE 358

4 In the Matter of

5 PORTLAND GENERAL ELECTRIC
6 COMPANY,

7 Advice No. 19-02, New Load Direct Access
8 Program.

9 STAFF'S REPLY BRIEF

10 **I. INTRODUCTION**

11 Staff continues to agree that resource adequacy is a legitimate issue that should be
12 considered by the Commission as it relates to direct access programs, including New Load Direct
13 Access (NLDA).¹ Portland General Electric (PGE) proposes to address resource adequacy
14 concerns in this case through its Resource Intermittency Charge (RIC) and its Resource
15 Adequacy Charge (RAD). As evident by PGE's Opening Brief, the basis of its proposal is in
16 what it considers to be sound policy, but its proposal suffers from either misapplication of the
17 law or fails altogether to address significant legal concerns raised by Staff and other parties. In
18 effect, PGE is asking the Commission to take on the role of the legislature in crafting policy
19 without adequate regard for limitations in the Commission's jurisdiction.

20 This is not to say that the Commission has no authority to consider other ways of
21 addressing resource adequacy concerns, and the parties to this case have begun engaging in
22 discussion about potential alternatives. But that conversation requires additional information and
23 analysis, and should have the benefit of all perspectives in a generic proceeding given the
24 changes and additions required to current Commission policy. For these reasons, Staff continues
25 to recommend the Commission approve most aspects of PGE's NLDA program to go into effect
26 following the conclusion of this proceeding, with the following changes and clarifications to
27 PGE's proposals in this case:

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29 ¹ Staff's Opening Brief at 9.

- 1 • Direct the parties to investigate resource adequacy and capacity-related charges in a
- 2 generic investigation, such as the currently pending UM 2024 investigation.
- 3 • Deny PGE's proposed RAD charge, without prejudice, pending further investigation.
- 4 • Deny PGE's proposed RIC charge, without prejudice, pending further investigation.
- 5 • Deny PGE's proposal to add the Long-Term Energy Offer to its standard offer
- 6 options available to NLDA customers, without prejudice.
- 7 • Direct PGE to apprise NLDA eligible customers of the Commission's policy to
- 8 consider waivers to program cap requirements on a case-by-case basis.
- 9 • Affirm the Commission's policy to limit NLDA customer eligibility to load that has
- 10 not been energized prior to taking NLDA service.

11 II. ARGUMENT

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13 **(A) Capacity-related charges for direct access programs should be considered in a**

14 **general investigation, such as OPUC Docket No. UM 2024.**

15 The Commission should consider resource adequacy issues, including capacity-related

16 charges, in a generic proceeding in which all potentially affected parties have notice and an

17 opportunity to participate and make recommendations to the Commission. A generic

18 proceeding, such as UM 2024, would allow for development of a record and consideration of

19 policy that would apply to all direct access customers and all utilities offering direct access

20 programs. Absent that, the Commission is forced to address resource adequacy and capacity-

21 related charges in a piecemeal fashion, which raises issues related to due process, discriminatory

22 rates and consistent treatment among similarly situated utilities. No party opposes further

23 investigation of resource adequacy issues and capacity charges in a generic proceeding such as

24 UM 2024.² Given the adversarial nature of the parties' positions and interests, the potential

25 effect of the decision on parties not before the Commission, judicial economy and the

26 ² Staff's Opening Brief at 9-10; AWEC's Opening Brief at 2; PGE's Opening Brief at 24-25; CUB's Opening Brief at 4; NIPPC Opening Brief at 2; Calpine's Opening Brief at 9-10.

1 importance of the issues raised, the Commission should decline to consider capacity-related
2 charges in this case.³

3 ***1. Resource adequacy concerns do not necessitate Commission consideration of the***
4 ***RIC and the RAD in this case.***

5 PGE and CUB argue that the RIC and the RAD should be approved in this proceeding, at
6 least on an interim basis, should the Commission move forward with implementing PGE's
7 NLDA program at the conclusion of the suspension period in this case.⁴ Staff, AWEC, NIPCC
8 and Calpine argue that PGE's NLDA program should be implemented without the RIC and the
9 RAD, subject to change following a generic investigation.⁵ PGE's Opening Brief provided no
10 additional basis or argument for why a delay in implementing capacity charges, if warranted,
11 would place the Company at substantially increased risk for resource adequacy costs compared
12 to approval in the current proceeding.⁶ The RAD charge is not designed to be calculated until
13 PGE's next general rate case, which at the earliest would have a rate-effective date of January 1,
14 2021 if the Company files a general rate case next year. Further, NLDA customers must provide
15 substantial notice prior to energizing, which means that load will not be realized on PGE's
16 system immediately. One year is ample time for the Commission to investigate this issue, even
17 in a generic proceeding such as UM 2024. PGE's concerns about the "protracted" timing could
18 be addressed by including resource adequacy in an initial phase in the proceeding.

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22 ³ See *Eastern Oregon Mining Association v. Department of Environmental Quality*, 285 Or App
23 821, 830 (2017) (In considering whether to exercise discretion in deciding issues in a case, courts
24 consider several factors including "the adversarial nature of the parties' interests, the effect of the
decision on both the parties and others not before the court, judicial economy, and the extent of
the public importance of the issues presented.").

25 ⁴ CUB's Opening Brief at 4-5; PGE's Opening Brief at 23-25.

26 ⁵ Staff's Opening Brief at 11-12; NIPCC's Opening Brief at 3-7; Calpine's Opening Brief at 5-6;
AWEC's Opening Brief at 2.

⁶ PGE's Opening Brief at 23-25.

1 **2. *It is not possible to address due process concerns in a subsequent proceeding, and***
2 ***judicial economy weighs in favor of consideration in a generic proceeding.***

3 Staff, AWEC and Calpine all raise due process concerns with the Company’s proposed
4 reliability charges in this case.⁷ In response, PGE argues that any due process concerns will be
5 addressed in subsequent proceedings, based in part on the fact that NLDA customers and LTDA
6 customers are “fundamentally distinct and subject to different program rules.”⁸ Despite these
7 differences, however, PGE also asserts that the RIC and the RAD “should apply to LTDA
8 customers in the future.”⁹ This is a fundamental inconsistency in PGE’s position. While there
9 are distinctions and differences in rules that apply to each program (though not completely),¹⁰ by
10 PGE’s own admission those differences are not such that there should be a distinction in the
11 application of the RIC and the RAD. It is immaterial that the Commission’s decision in this case
12 will not affect LTDA rates in this case—the Commission would still be making a policy
13 determination that likely would affect parties not noticed in this case in a future ratemaking case.
14 Further, it is more efficient for the Commission to make a single policy determination about
15 reliability charges in a generic proceeding, such as UM 2024, as it would avoid a potential
16 situation in which the Commission makes a decision in this case only to potentially change in
17 future cases based on new or additional evidence not part of this proceeding.

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22 ⁷ Staff’s Opening Brief at 21 and 25; AWEC’s Opening Brief at 9-10; Calpine’s Opening Brief at
23 16.

24 ⁸ PGE’s Opening Brief at 10.

25 ⁹ PGE’s Opening Brief at 10.

26 ¹⁰ Staff notes that the Commission’s rules for New Large Load Direct Access Programs refer
back to and otherwise rely on or reference several rule provisions in the direct access rules. *See*
e.g. OAR 860-038-0700(1) (“Unless otherwise defined in section (2), the definitions set forth in
OAR 860-038-005 are applicable to New Large Load Direct Access Programs.”); OAR 860-038-
0720 (referring to nonresidential standard offer, default supply and return to cost of service).

1 (B) **Regardless of whether capacity-related charges may be warranted for NLDA**
2 **customers, the Commission should deny the RIC and the RAD.**

3 **1. PGE has failed to provide a legal basis for the Commission to adopt the RIC and**
4 **the RAD.**

5 Regarding the RAD, Staff agrees with PGE that the Commission generally has broad
6 discretion to implement laws in the public interest and the discretion to implement many aspects
7 of Oregon’s direct access law.¹¹ PGE’s proposal in this case ignores or otherwise reclassifies
8 capacity as a non-competitive service under Oregon direct access law.

9 PGE relies on the definition of “direct access” as the basis for Commission discretion to
10 “implement direct access policies consistent with the directive to maintain safe, reliable service,
11 while also balancing other statutory considerations of unwarranted cost-shifting.”¹² ORS
12 757.600(6) defines direct access as “the ability of a retail electricity consumer to purchase
13 electricity and certain ancillary services, as determined by the commission for an electric
14 company or the governing body of a consumer-owned utility, directly from an entity other than
15 the distribution utility.” Specifically, PGE relies on the phrase “as determined by the
16 commission for an electric company.”¹³ PGE’s brief does not address that “electricity” is also a
17 defined term, which includes electric capacity and categorizes it as a competitive service under
18 Oregon direct access law.¹⁴

19 ORS 174.010 requires interpreting a statute to ascertain and declare what is—not adding
20 or subtracting—and to give effect to all provisions of the statute, to the extent possible.¹⁵ Oregon
21 courts have determined three categories of statutory terms—exact, inexact and delegative.¹⁶

22 ¹¹ PGE’s Opening Brief at 16.

23 ¹² PGE’s Opening Brief at 17.

24 ¹³ PGE’s Opening Brief at 17.

¹⁴ See Staff’s Opening Brief at 13-14; AWEC’s Opening Brief at 7-8; Calpine’s Opening Brief at
10-11.

¹⁵ ORS 174.010 (“In the construction of a statute, the office of the judge is simply to ascertain or
declare what is, in terms or in substance, contained therein, not to insert what has been omitted,
or to omit what has been inserted; and where there are several provisions or particulars such
construction is, if possible, to be adopted as will give effect to all.”).

¹⁶ *Springfield Educ. Ass’n v. Springfield Sch. Dist. No. 19*, 290 Or 217, 223 (1980).

1 Exact statutory terms convey a relatively precise meaning, and their applicability in a given
2 context depends upon agency fact-finding.¹⁷ Statutory definitions are exact statutory terms.¹⁸
3 The agency's role is to make policy determinations within the parameters of the legislative
4 policy.¹⁹

5 PGE fails to address or even acknowledge that non-residential customers can procure
6 electricity, defined as both energy and/or capacity, from a competitive market through direct
7 access as those terms are defined in direct access law. Rather, the Company would require direct
8 access customers to purchase capacity from PGE. The fact that this charge can be offset, at least
9 partially, does not remedy this issue. PGE provides no legal basis for the Commission to
10 exercise discretion in the manner requested in this case, effectively re-defining "electricity" to
11 exclude electric capacity.

12 PGE also relies on its obligations as a provider of last resort (POLR) to argue that it
13 should provide capacity to direct access customers, but fails to acknowledge ORS 757.622
14 requires the Commission to establish terms and conditions for default electricity service to
15 nonresidential consumers, which "shall provide for viable competition among electricity service
16 suppliers." Requiring direct access customers to purchase capacity from PGE simply because it
17 has POLR obligations appears to be contrary to ORS 757.622.

18 PGE also fails to provide a credible legal basis for the Commission's authority to approve
19 the RIC. PGE argues that the Commission has jurisdiction to approve the RIC because the
20 Commission retains jurisdiction over ESS scheduling practices.²⁰ PGE does not assert, because
21 it is not true, that the Commission retains jurisdiction over setting wholesale rates.²¹ As Staff,
22 AWEC, and Calpine argues, the RIC is a charge appropriately attributed to the ESS, not

23 ¹⁷ *Id.* at 223-224.

24 ¹⁸ *See e.g. Comcast Corp. v. Department of Revenue*, 356 Or 282, 295 (2014) ("When the
legislature provides a definition of a statutory term, we of course use that definition.").

25 ¹⁹ *See Blachana, LLC v. Bureau of Labor and Indus.*, 354 Or 676, 687 (2014).

26 ²⁰ PGE's Opening Brief at 22.

²¹ *See* PGE's Opening Brief at 22-23.

1 customers. PGE attempts to disguise a wholesale rate (intra-hour capacity provided to ESSs) as
2 a cost-of-service rate, without a rational relationship between the cost-driver and the rate. Costs
3 for intra-hour capacity provided by PGE to an ESS are squarely within the jurisdiction of
4 FERC.²² Limited regulation of an ESSs' conduct and certification requirements does not provide
5 the Commission with ratemaking authority to assess a charge to retail customers for the intra-
6 hour capacity that PGE provides to an ESS.

7 **2. PGE has failed to demonstrate that Commission approval of the RIC and the RAD**
8 **charge in this proceeding will not be unduly discriminatory to other direct access**
9 **customers.**

10 PGE argues that the Commission has the authority to approve the RIC and the RAD for
11 NLDA customers because they are different customer classes, and because NLDA customers
12 place a unique resource adequacy risk on the system because their load is unplanned.²³

13 No party has argued that NLDA and LTDA are not distinct customer classes that place
14 different costs and risks on the system. But that is not the basis for either PGE's RIC or RAD
15 charge. For the RIC, the charge is intended to address scheduling issues which are the same for
16 ESSs providing service to LTDA customers as to NLDA customers. For the RAD, PGE itself
17 admits that all customers place resource adequacy costs on the system, and therefore, even
18 current assets should be assigned a capacity charge. PGE has provided no credible basis for
19 treating NLDA customers and LTDA customers differently, despite being different customer
20 classes.

21 **(C) PGE's Long-Term Energy Offer should be evaluated in a general rate case**
22 **proceeding or general direct access investigation.**

23 Staff continues to recommend that the Commission reject, without prejudice, both of
24 PGE's standard offer proposals in this case, as they raise concerns with due process and
25 discriminatory rates as discussed in Staff's Opening Brief. Additionally, PGE's proposed Long-

26 ²² Staff's Opening Brief at 14-15; AWEC's Opening Brief at 12-15; Calpine's Opening Brief at 21-23.

²³ PGE's Opening Brief at 7-10.

1 Term Energy Offer also appears to violate the Commission's policy against special contracts.
2 The Commission should evaluate proposed changes to PGE's standard offer in its next general
3 rate case proceeding or generic direct access investigation as appropriate.

4 **(D) The Commission should direct PGE to make ineligible customers aware of their**
5 **right to seek a waiver of the participation cap.**

6 Though not addressed by PGE in its Opening Brief, Staff continues to recommend the
7 Commission order PGE to inform customers of program requirements and related Commission
8 policies, including the possibility of a program cap waiver. PGE should act to inform customers
9 of the Commission's policy, in the circumstance that the only reason a customer is ineligible is
10 due to the remaining room under the cap.

11 **(E) NLDA-eligible customers in the queue that energize prior to program**
12 **implementation should be deemed ineligible for the NLDA program.**

13 Staff remains generally supportive of PGE's proposed queue implementation and
14 management, with the exception of PGE's proposal to allow previously-energized NLDA
15 customers in the queue to remain eligible for NLDA program participation. Allowing energized
16 customers to elect NLDA service raises issues related to cost-shifting and resource adequacy
17 planning that are not meaningfully addressed in this case, and will likely cause further
18 complication in ensuring that rates remain just and reasonable for all customers.

19 III. CONCLUSION

20 Staff continues to recommend the Commission adopt PGE's proposed NLDA program,
21 with the following exceptions, clarifications or future actions:

- 22 • Direct the parties to investigate resource adequacy and capacity-related charges in a
23 generic investigation, such as the currently pending UM 2024 investigation.
- 24 • Deny PGE's proposed RAD charge, without prejudice, pending further investigation.
- 25 • Deny PGE's proposed RIC charge, without prejudice, pending further investigation.

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