



# Oregon CUB

610 SW Broadway, Suite 400

Portland, OR 97205

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UE 390**

In the Matter of	)	
	)	OREGON CITIZENS' UTILITY
PACIFICORP, dba PACIFIC POWER,	)	BOARD'S REPLY TO CALPINE'S
	)	RESPONSE TO CUB'S MOTION TO
2022 Transition Adjustment Mechanism.	)	ADMIT TESTIMONY AND EXHIBITS
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**I. INTRODUCTION**

Pursuant to OAR 860-001-0420(5), the Oregon Citizens' Utility Board (CUB) hereby files this Reply to Calpine Energy Solutions, LLC's (Calpine) Response to CUB's Motion to Admit Testimony and Exhibits (Motion). Calpine filed its Response on September 8, 2021, unpersuasively urging the Public Utility Commission of Oregon (Commission) to exclude CUB exhibits 300, 301, and 302 from the evidentiary record. Following the guidance of Administrative Law Judge (ALJ) Rowe,<sup>1</sup> CUB appropriately moved to include the three exhibits into the evidentiary record to further the Commission's stated preference for a robust evidentiary record.<sup>2</sup> For the reasons addressed herein, CUB respectfully requests that the Commission grant its Motion to Admit and allow CUB exhibits 300-302 into the evidentiary record.

As a preliminary matter, CUB is not proposing to use CUB/300 on the issue of the consumer opt-out charge (COOC). CUB understands Calpine does not object to the inclusion of CUB/300 if its "admission is expressly limited for purposes of some other use."<sup>3</sup> CUB intends

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<sup>1</sup> UE 390 – ALJ Rowe Memorandum Regarding Remote Hearing Procedures at 5 (Aug. 24, 2021) ("Counsel also has the option to skip the oral motion to admit and instead file a paper motion within a week of hearing.").

<sup>2</sup> *See, e.g., in re Public Utility Commission of Oregon Investigation to Determine the Resource Value of Solar*, OPUK Docket No. UM 1716, Order No. 16-404 (Oct. 19, 2016) ("[W]e do not believe it to be in the public interest to make findings unless the record is sufficiently robust to inform sound decisions and to provide meaningful guidance and direction.").

<sup>3</sup> UE 390 – Calpine's Response at 3, fn. 5.

to address CUB/300 in briefing in regards to an issue other than the COOC. Therefore, this Reply will address Calpine’s objection to the admission of CUB/301-302, because it is CUB’s understanding that Calpine does not object to CUB/300 under these circumstances.

## II. STANDARD OF REVIEW

Relevant evidence is “evidence tending to make the existence of any fact as issue in the proceeding more or less probable than it would be without the evidence.”<sup>4</sup> Relevant evidence is admissible “if it is a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.”<sup>5</sup> Commission rules state that relevant evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.<sup>6</sup>

## III. ARGUMENT

CUB/301-302 are directly relevant to live issues in this proceeding and will aid the Commission in rendering a decision via a more robust evidentiary record. Since CUB/301-302 are all publicly available and have been filed by regulated entities before this very tribunal, they are admissible since they are both relevant and “commonly relied upon by prudent persons in the conduct of their serious affairs.”<sup>7</sup> Therefore, relevant inquiry is whether the relevant evidence found in CUB/301-302 should be excluded if its probative value is “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.”<sup>8</sup> The exhibits have significant probative value that is not substantially outweighed by any of these considerations.

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<sup>4</sup> OAR 860-001-0450(1)(a).

<sup>5</sup> OAR 860-001-0450(1)(b).

<sup>6</sup> *In re PacifiCorp, dba Pacific Power, Request for a General Rate Revision*, OPUC Docket No. UE 374, ALJ Lackey Ruling at 2 (Dec. 16, 2020) citing OAR 860-001-0450.

<sup>7</sup> *Supra*, note 5.

<sup>8</sup> *In re PacifiCorp, dba Pacific Power, Request for a General Rate Revision*, OPUC Docket No. UE 374, ALJ Lackey Ruling at 2 (Dec. 16, 2020) citing OAR 860-001-0450.

Calpine's assertion that it will be unfairly prejudiced because it is "deprive[d] of its due process right to respond" is unavailing since Calpine will have an opportunity to respond in its cross-answering brief.

**1. CUB/301-302 were properly admitted, are relevant to this proceeding, and do not lack foundation.**

CUB/301-302 are directly relevant to this proceeding, and their significant probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay. Calpine argues that CUB's "proposed introduction of [CUB/301-302] into the evidentiary record, outside the hearing, is improper."<sup>9</sup> However, moving to include exhibits into the administrative record at the close of a hearing is commonplace.<sup>10</sup> This is especially true for exhibits whose veracity can be readily ascertained, such as discovery responses issued in a proceeding or, in this case, publicly available documents filed before this very Commission. Calpine argues that the exhibits "lack foundation because no witness has sponsored the exhibits."<sup>11</sup> In support of its contention, Calpine cites a string of Oregon Rules of Evidence, including a rule requiring witnesses to possess personal knowledge of matters to which they testify, rules requiring qualification as an expert to opine on technical or specialized matters, and rules around authentication of documents.<sup>12</sup> Calpine also cites to a Commission proceeding and an Oregon Court of Appeals case in which evidence was excluded due to lack of foundation from a sponsoring witness.<sup>13</sup>

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<sup>9</sup> UE 390 – Calpine's Response at 2.

<sup>10</sup> See, e.g., *in re PacifiCorp, dba Pacific Power, Request for a General Rate Revision*, OPUC Docket No. UE 374, CUB's Motion to Admit Pre-filed Testimony and Exhibits (Sep. 17, 2020); see also *in re PacifiCorp, dba Pacific Power, Request for a General Rate Revision*, OPUC Docket No. UE 374, AWEC's Motion to Admit Pre-filed Testimony and Exhibits (Sep. 16, 2020). In Commission Docket UE 374, both CUB and AWEC moved to admit a variety of exhibits into the evidentiary record, not all of which were used during cross-examination. These exhibits included periodicals, discovery requests, and utility testimony from different jurisdictions.

<sup>11</sup> UE 390 – Calpine's Response at 2.

<sup>12</sup> UE 390 – Calpine's Response at 2-3.

<sup>13</sup> *Id.*

The rules and cases Calpine sites are either irrelevant, unpersuasive, or not on point. CUB is not proposing to include CUB/301-302 because they represent “expert testimony,” as Calpine posits. Rather, CUB seeks to include the documents to provide incremental evidence for the Commission to consider in determining whether the COOC should be allowed to swing negative as a matter of policy. CUB 301 and 302 are comments filed by regulated entities in a Commission proceeding. The documents offer the Commission a more robust evidentiary record—consistent with its preference<sup>14</sup>— on a core issue to this proceeding. CUB’s position on the COOC is that it should not be allowed to swing negative while there are outstanding questions regarding unwarranted cost-shifting in the direct access program that are being examined in another docket. The comments in CUB/301-302 contain information that will aid the Commission in rendering a decision on issues that have already been addressed in this proceeding. By providing the Commission with the comments of two regulated entities—PacifiCorp and Portland General Electric—CUB’s hope was to provide the Commission with incremental evidence to help determine the proper policy to apply to the COOC in this case. Importantly, the Commission always retains discretion to determine how much weight to give different pieces of evidence.<sup>15</sup>

These exhibits were not relied upon by CUB witness Bob Jenks, so they do not require the foundation of a sponsoring witness. The Commission has previously allowed exhibits not used in testimony into the record at the close of an evidentiary hearing, and, indeed has even allowed utility filings from different jurisdictions into the evidentiary record.<sup>16</sup> It stands to

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<sup>14</sup> *Supra* note 3.

<sup>15</sup> *In re Application of US West Communications, Inc. for an Increase in Revenues*, OPUC Order No. 19-171 at 17 (May 19, 1997) (“The Commission’s role is to weigh the evidence on each issue in the case and determine where the preponderance lies.”).

<sup>16</sup> *See, e.g., supra* note 10.

reason that the Commission would allow filings from its own processes into the record. Further, CUB/301-302 meet the criteria for authentication or identification enumerated in the Oregon Rules of Evidence. Under ORS 40.505(1), “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent says it is.” These are filings made by regulated entities before the Commission. Many parties to this case are also parties to UM 2024. No party doubts the veracity of CUB/301-302. These exhibits are therefore capable of authentication and identification. They are relevant to this proceeding, and their probative value significantly outweighs any danger. CUB urges the Commission to admit CUB/301-302 to the evidentiary record.

**2. Inclusion of CUB/301-302 will not result in unfair prejudice, confusion of the issues, or undue delay.**

Inclusion of CUB/301-302 will not result in confusion of the issues on the record or cause undue delay. As Calpine notes, CUB referred to its own UM 2024 comments in testimony.<sup>17</sup> CUB’s intent in offering CUB/301-302 into the record is to provide additional context for the targeted, discrete references CUB made to its own UM 2024 comments in testimony. The intent is not to broaden the issues related to the COOC in this proceeding. CUB is not asking that the Commission adjudicate issues from UM 2024 in this docket. Rather, CUB’s intent is to demonstrate that many of its concerns are corroborated and shared by other parties and that there is an active proceeding that is investigating those issues. The exhibits do not significantly expand the opinions and assertions made thus far. Rather, they match evidence placed on the record by CUB in prior testimony. CUB intends to limit its use of CUB/301-302 in briefing to

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<sup>17</sup> UE 390 – Calpine Response at 5.

directly address issues that have already been addressed on the record in this proceeding.

Calpine cannot demonstrate that it will be unduly prejudiced by the inclusion of CUB/301-302, as it will have a procedural opportunity to respond to CUB's use of these exhibits in its cross-answering brief. Calpine is correct that factual issues regarding direct access and cost-shifting will be addressed in UM 2024. Until then, parties are left with uncertainty regarding the manner and scope of cost-shifting in the direct access program. CUB/301-302 indicate this uncertainty is shared by parties beyond CUB. Calpine will have ample opportunity to respond to policy arguments surrounding this uncertainty in its cross-answering brief. Because Calpine retains procedural due process rights and because factual determinations surrounding the direct access program are not at issue in this proceeding, Calpine cannot reasonably argue that it is prejudiced by incremental evidence about uncertainty surrounding cost-shifting.

CUB offered CUB/301-302 into the evidentiary record at an appropriate time, using Commission-approved processes. The Commission should not be persuaded by Calpine's selective arguments intended to buoy its own interest. The evidence in CUB/301-302 is highly relevant to this proceeding and this relevance is not substantially outweighed by any of the dangers Calpine asserts are present.

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#### IV. CONCLUSION

For the reasons discussed above, CUB respectfully urges the Commission to grant CUB's Motion to Admit in its entirety.

Dated this 15<sup>th</sup> Day of September, 2021.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Michael P. Goetz".

Michael P. Goetz, OSB #141465  
General Counsel  
Oregon Citizens' Utility Board  
610 SW Broadway, Ste. 400  
Portland, OR 97205  
T. 503.227.1984  
E. [mike@oregoncub.org](mailto:mike@oregoncub.org)