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August 12, 2008

Via Electronic and US Mail

Public Utility Commission
Attn: Filing Center
550 Capitol St. NE #215
P.O. Box 2148
Salem OR 97308-2148

Re: In the Matter of Rulemaking to Adopt Rules Related to Small Generator Facility Interconnection
Docket No. AR 521

Dear Filing Center:

Enclosed please find the original and one copy of the Comments of the Industrial Customers of Northwest Utilities in the above-referenced docket.

Thank you for your assistance.

Sincerely yours,

/s/ Brendan E. Levenick
Brendan E. Levenick

Enclosures
cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Comments of the Industrial Customers of Northwest Utilities upon the parties, on the service list, by causing the same to be deposited in the U.S. Mail, postage-prepaid, and via electronic mail to those parties who have waived paper service.

Dated at Portland, Oregon, this 12th day of August, 2008.

/s/ Brendan E. Levenick
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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 521

In the Matter of Rulemaking to Adopt Rules Related to Small Generator Facility Interconnection	))))))))	COMMENTS OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES

I. INTRODUCTION

The Industrial Customers of Northwest Utilities ("ICNU") submits the following comments regarding the Oregon Public Utility Commission's ("OPUC" or the "Commission") proposed rule requiring small interconnection customers of 10 megawatts ("MW") or less to pay all interconnection costs regardless of whether those costs are reasonable, and to pay for all system upgrades (the "Proposed Rule"). ICNU proposes changes to OAR § 860-082-0035 which, if adopted, would further public policy and correct several inconsistencies between the Proposed Rule and Oregon law.

II. COMMENTS

The current rule allocating interconnection costs declares that "[t]he public utility shall be reimbursed by the qualifying facility for any *reasonable* interconnection costs[.]" OAR § 860-029-0060(2) (emphasis added). The Proposed Rule, conversely, declares that "[a]n applicant or interconnection customer must pay *all expenses*, including overhead expenses, associated with constructing, owning, operating, maintaining, repairing, and replacing its

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interconnection equipment." Proposed OAR § 860-082-0035(3) (emphasis added). Essentially, under the Proposed Rule, the interconnection customer is liable for all interconnection costs, regardless of whether they are reasonable, legal, or were incurred through the negligent acts of the utility.

For the reasons set forth below, it is improper to fail to incorporate the reasonableness standard for allocating interconnection costs. Accordingly, the Commission should reinsert the reasonableness standard for generator interconnections and, therefore, require interconnection customers to pay only *reasonable* interconnection costs. In the alternative, the Commission must, at the very least, modify the Proposed Rule to prevent utilities from recovering interconnection costs incurred through gross negligence or illegal conduct on the part of the utility. Finally, for the reasons set forth below, the Commission should clarify that it is not reasonable to require interconnection customers to pay the full cost of system upgrades which primarily benefit other interconnection customers or were installed for the future benefit of the utility.

A. The Proposed Rule Permits Utilities to Discriminate Against Interconnection Customers, Erect Barriers to Market Entry, and Escape Liability for Negligently Incurred Interconnection Costs

The Proposed Rule would allow a utility to impose unreasonable interconnection costs on any power generator, and potentially to use interconnection costs as a barrier to market entry. Utilities could also be permitted to charge low interconnection costs to their own affiliates or resources, but charge higher costs against independent power producers, cogenerators and qualifying facilities. The use of unreasonable interconnection costs as a barrier to market entry

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contravenes public policy against discrimination and undermines the Commission's ability to protect "customers, and the public generally, from unjust and unreasonable exactions and practices[.]" ORS § 756.040(1).

Further, the Proposed Rule deprives customers of protection against the negligent acts of the utility in the context of interconnection costs. For example, interconnection customers reasonably rely on utility interconnection cost and timing estimates in making future commitments. The Proposed Rule, nonetheless, would allow utilities to ignore such agreements because utilities would be free to recover negligently incurred costs even if they greatly exceed the price in the contract. Accordingly, in the interest of public policy, the Commission should modify the Proposed Rule to require interconnection customers to pay only *reasonable* interconnection costs.

B. The Proposed Rule Contradicts Oregon Statutory Law

The Commission cannot promulgate an administrative rule that contradicts a specific Oregon statutory provision. See ORS § 183.400(4)(b) (the court must declare a rule invalid if it exceeds the statutory authority of the agency). See also Merrick v. Bd. of Higher Educ., 116 Or. App. 258, 264 (1992) (administrative rules that conflict with a statute are not authorized unless the statute prohibiting them is invalid). Further, "[a]n administrative agency may not, by its rules, alter or limit the terms of a legislative enactment." Fajer v. Dep't of Human Res., 51 Or. App. 105, 111 (1981). The plain language of the Proposed Rule, nonetheless, contradicts a number of Oregon statutory provisions. For example, ORS § 757.310(2) declares that: "A public utility may not charge a customer a rate or *an amount for a*

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service that is different from the rate or amount the public utility charges any other customer ...." ORS § 757.310(2) (emphasis added). As noted previously, the Proposed Rule may permit utilities to impose unreasonable interconnection costs on certain interconnection customers. Thus, the proposed rule contradicts the plain language of ORS § 757.310(2) which prevents utilities from charging a different "amount for a service" than that which they "charge[] any other customer[.]" ORS § 757.310(2).

Additionally, the Proposed Rule undermines ORS § 756.185(1) which provides customers with a means to recover damages from a utility for a violation of Oregon utility law. See ORS § 756.185(1). Specifically, under the Proposed Rule, interconnection customers may not be able to recover damages and may be forced to pay for illegal interconnection costs. Thus, the Proposed Rule could be read as preventing customers from exercising a statutory right to recover damages against the utility. Further, the current rule requiring reimbursement for only reasonable interconnection costs is lawful because interconnection costs imposed in violation of Oregon law are inherently unreasonable. Accordingly, the Commission should reinsert the reasonableness standard into the Proposed Rule.

C. The Proposed Rule Grants Utilities Total Immunity from Gross Negligence and Illegal Conduct

Under Oregon law, the Commission cannot "purport to grant immunity or limit liability for gross negligence." Garrison v. Pac. Nw. Bell, 45 Or. App. 523, 531 (1980); also Hoeck v. U.S. W. Commc'ns, 1997 U.S. App. LEXIS 9067, at *7 (9th Cir. Mar. 4, 1997) ("[T]he Public Utility Commissioner does not have the authority to limit liability of a utility for gross negligence."). Further, "[g]ross negligence is characterized by conscious indifference to or

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reckless disregard of the rights of others." Garrison, 45 Or. App. at 532. Because the Commission cannot grant immunity from gross negligence, the Commission also cannot grant immunity from illegal conduct.

The Proposed Rule could be used to ensure that an interconnection customer has no cause of action against a utility for interconnection costs incurred as a result of the utility's conscious indifference to, or reckless disregard of, the rights of the customer. Essentially, the Proposed Rule could be read to grant the utility immunity from gross negligence and illegal actions that increase its interconnection costs during the period in which the utility interconnects the customer to the grid. Because the Commission does not have the authority to grant immunity from gross negligence or illegal conduct, the Commission must, at the very least, insert into the Proposed Rule a provision ensuring that interconnection customers do not pay any costs due to the utility's gross negligence or illegal conduct.

D. The Proposed Rule May Require Individual Interconnection Customers to Sponsor System Upgrades that Primarily Benefit Other Customers or Were Installed Primarily for the Future Benefit of the Utility

Under the Proposed Rule, "[t]he applicant must pay the costs of *any* system upgrades." Proposed OAR § 860-082-0035(4) (emphasis added). ICNU urges the Commission to clarify that it is not reasonable to require interconnection customers to pay all the costs for system upgrades which primarily benefit other interconnection customers or were installed for the future benefit of the utility. Interconnection customers should only be responsible for paying their portion of interconnections that primarily benefit other customers or that would have already been built.

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Requiring the individual interconnection customer to pay the cost of all system upgrades may allow certain utility customers to receive the benefits of system upgrades without paying for them. In effect, a utility could compel an interconnection customer to sponsor system upgrades beyond those minimum upgrades necessary to connect that individual customer.

Further, the Proposed Rule requires interconnection customers to pay for system upgrades, even if those upgrades primarily benefit other utility customers, were already planned, or were installed exclusively for the future benefit of the utility. For example, utilities often install system upgrades in order to facilitate future expansion. The Proposed Rule allows a utility to unjustly recover the cost of system upgrades necessary for current and future expansions, even if those system upgrades would have been made regardless of whether the interconnection customer sought to interconnect to the utility's system. Accordingly, ICNU urges the Commission to clarify that utilities must reimburse interconnection customers or not charge interconnection customers for system upgrades installed primarily for the future benefit of the utility because such upgrades are not reasonable.

This approach to allocating the cost of system upgrades is similar to that applied by the Federal Energy Regulatory Commission ("FERC"). FERC's interconnection standards declare that "[t]he Interconnection Customer initially funds the cost of any required Network Upgrades (i.e., Upgrades to the Transmission System at or beyond the Point of Interconnection) and it is then subsequently reimbursed for this upfront payment by the Transmission Provider." Standardization of Small Generator Interconnection Agreements and Procedures, 111 FERC ¶ 61,220, at P 40 (2005). In justifying this approach, FERC emphasizes "that its policy has been

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that all transmission customers must share the costs of network upgrades because the integrated transmission grid is a cohesive network, and the upgrades benefit *all* users, not just the newly interconnecting generator." Energy Servs., Inc. v. FERC, 319 F.3d 536, 539, 544 (D.C. Cir. 2003) (emphasis in original). For the foregoing reasons, ICNU urges the Commission to clarify the proposed rule and recognize that it may be unreasonable to require an interconnection customer to pay the full cost of system upgrades.

E. The Proposed Rule May Grant Utilities Double Recovery for System Upgrades

Because utilities already recover the cost of system upgrades through their existing distribution rates, allowing utilities to recover the cost of all system upgrades directly from the interconnection customer could amount to double recovery. As a general rule, the Commission does not authorize double recovery of costs by a utility. See, e.g., Re Portland General Electric Co., UP 232, Order No. 06-184 at 5 (Apr. 14, 2006) (OPUC ensures that costs already recovered will not be included in future rates); Re Northwest Natural, UM 1156, Order No. 04-390 at 7 (July 13, 2004) (companies must demonstrate that expenditures were not already included in base rates to avoid double recovery). ICNU's proffered revisions and clarifications to the Proposed Rules will prevent utilities from recovering the costs of certain system upgrades that the utilities will already be reimbursed through their base rates.

III. CONCLUSION

For the foregoing reasons, ICNU urges the Commission to reinsert the reasonableness standard into proposed OAR § 860-082-0035 and, therefore, require small interconnection customers of 10 MW or less to pay only *reasonable* interconnection costs. The

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Commission must, at the very least, modify proposed OAR § 860-082-0035 to protect interconnection customers from being charged illegal and grossly negligent costs. Further, the Commission should clarify proposed OAR § 860-082-0035 by acknowledging that system upgrades which primarily benefit other interconnection customers or were installed for the future benefit of the utility should not be the complete responsibility of the interconnection customer. ICNU appreciates the opportunity to comment on this important rule and appreciates the Commission's consideration of its comments.

Dated this 12th day of August, 2008.

Respectfully submitted,

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