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February 12, 2010

Via Electronic and U.S. 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 THE PUBLIC UTILITY COMMISSION OF OREGON Investigation into Pilot Programs to demonstrate the use and effectiveness of Volumetric Incentive Rates for Solar Photovoltaic Energy Systems.
Docket No. UM 1452

Dear Filing Center:

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

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 Closing Comments of the Industrial Customers of Northwest Utilities upon the parties on the service list, shown below, by causing the same to be sent by electronic mail to all parties, as well as, deposited in the U.S. Mail, postage-prepaid, to parties which have not waived paper service.

Dated at Portland, Oregon, this 12th day of February, 2010.

/s/ Brendan E. Levenick
Brendan E. Levenick

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1452

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Investigation into Pilot Programs to Demonstrate the Use and Effectiveness of Volumetric Incentive Rates for Solar Photovoltaic Energy Systems	)	CLOSING COMMENTS OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES

I. INTRODUCTION

The Industrial Customers of Northwest Utilities ("ICNU") submits these Closing Comments to the Public Utility Commission of Oregon ("OPUC" or the "Commission") regarding Commission Staff's ("Staff") proposal for an initial Commission Order in this Docket. The Order will implement certain aspects of House Bill 3039 ("HB 3039"), which provides for the establishment of Solar Photovoltaic ("PV") Pilot Programs. Matters pertaining specifically to the proposed rules promulgating HB 3039 are addressed in separate Closing Comments filed in the rulemaking docket, AR 538. ICNU presently takes no positions concerning issues and questions raised by the Commission in the January 22 Ruling, beyond what has already been conveyed in previous comments.

ICNU strongly believes that the OPUC should allocate pilot capacities to primarily benefit residential and commercial customers and direct each utility to allocate pilot costs in excess of the resource value in proportion to customer class participation. Residential

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and commercial customers should reap the benefits of the Solar PV Pilot Programs; however, it is not fair, just or reasonable to compel industrial customers to subsidize the pilot in disproportion to industrial class benefit.

II. COMMENTS

ICNU maintains the positions stated in its Opening Comments. These Closing Comments address two of those positions in more detail, in light of recent workshops and Opening Comments submitted by other parties: 1) proportionate cost recovery and allocation across customer classes; and 2) pilot capacity allocation in conformance with the statute.

A. Pilot Cost Recovery Should Be Allocated According to Customer Class Benefit and Pilot Participation

HB 3039 does not specify the mechanism for Solar PV Pilot Programs cost recovery. Conversely, the legislature expressly directed that all costs prudently incurred by an electric company in complying with the 2020 capacity standard are eligible for recovery through an explicit mechanism—i.e., an automatic adjustment clause ("AAC") pursuant to ORS § 469A.120. HB 3039 § 3(5). In order to address the legislative omission of an express pilot recovery mechanism, under the proposed rules "[m]echanisms for recovery of cost associated with compliance will be established by Commission order." OAR § 860-084-0390.

1. Cost Allocation in Proportion to Class Benefit Accords with HB 3039

The difference between capacity standard and pilot cost recovery treatment in the statute is telling. First, the capacity standard does not concern incentive or above resource value rates; it only implements a new solar generation requirement. The benefit of the HB 3039 solar capacity standard will, therefore, equally accrue to all customers who receive basic electric company generation. Accordingly, such costs will be generally recoverable across rate schedules receiving such generation via an AAC. HB 3039 § 3(5).

In contrast, however, the Solar PV Pilot Programs contain two separate components which are recoverable in rates, which the legislature separately delineated in the statute. HB 3039 § 2(10).[1/] First, the legislature provides that "costs associated with *the resource value* are recoverable in the rates of all retail electricity consumers." Id. (emphasis added). Second, the legislature separately provides that "[p]rudently incurred costs *in excess of the resource value* are recoverable from customer classes eligible for the pilot programs . . . ." Id. (emphasis added).

In brief, there are additional prerequisites for recovery of costs in excess of the resource value: 1) the costs must be prudently incurred; and 2) the costs may only be recovered from an eligible customer class. The legislature separately specified two express prerequisites for recovery of excess costs because equal customer benefit cannot just be presumed in such case. Customer benefit must first be established before recovery of excess costs is allowed.[2/]

Moreover, ICNU does not agree with the conclusions reached by either Staff or Portland General Electric Company ("PGE")—i.e., that all customer classes will be eligible for participation in the Solar PV Pilot Programs. Staff Opening Comments at 26; PGE Opening Comments at 8. For instance, if the Commission adopts only the net metering alternative to the FERC preemption issue, then direct access customers will probably *not* be able to legally

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[1/] This citation is to subsection 2(10) as originally enacted by the legislature in 2009. At the time of this writing, legislative amendments are being considered which may significantly modify the cost recovery standard of the Solar PV Pilot Programs by eliminating two-thirds of the subsection. HB 3690 § 2(10). If these changes are enacted into law, Commission discretion over cost-recovery would increase significantly, making consideration of this issue all the more imperative in the initial order.

[2/] Subsection 2(10) provides that "[a]ll prudently incurred costs associated with compliance with this section are recoverable in the rates of an electric company." Prudency is assumed in resource value recovery, as the legislature does not state that a showing of prudency is required for such recovery—i.e., it is a statutorily obligatory cost "associated with compliance," and there is no discretion that could be exercised which would implicate avoiding a prudency determination. The legislature does, however, mandate that costs in excess of resource value must be prudently incurred in order to be recoverable. This explicit mandate signifies that excess costs are not automatically considered as prudently incurred "costs associated with compliance," but that prudency must be affirmatively demonstrated because the discretionary decisions involved in the incurrence of such costs are open to challenge.

participate in the pilot. That is, an electric company cannot net the volume of energy received from a direct access customer because the company does not generate any energy for direct access consumption. As an initial matter, therefore, the equal "benefit" accruing to an industrial customer class that is only *partially* eligible for the pilot would be in serious question.

The best and easiest way to determine which customer classes benefit from and should be chargeable for excess costs is according to class participation in the Solar PV Pilot Programs. As explained below, there has been no question over months of workshops, a hearing, and comment filings that the pilot will primarily, if not almost exclusively, benefit the residential and commercial customer classes. Moreover, as also explained below, electric companies will not incur any appreciable burden in first segregating resource value costs from excess costs, and then allocating excess costs by customer class.

2. The Residential and Commercial Classes Are Intended as the Primary Beneficiaries of the Solar PV Pilot Programs

Throughout the entire course of this Docket, including the Commissioner workshop on January 20, 2010, no party has even attempted to argue that industrial customers were intended as primary beneficiaries of the Solar PV Pilot Programs. In fact, in the scores of Opening Comment pages filed, there are only a few references by other parties to industrial customer participation in the pilot. E.g., Staff Opening Comments at 22; PGE Opening Comments at 8. In short, when acknowledged at all, industrial class involvement with the pilot is incidental at best.

On the contrary, the record focuses on pilot impacts upon the residential and commercial customer classes. Indeed, the parties have debated for months whether "smaller systems" means residential systems or residential *plus* commercial systems. Compare Staff Opening Comments at 23 (noting that DOJ research shows that "smaller systems" were largely

portrayed as residential in legislative testimony), with Renewable Northwest Project and Partners ("RNP") Opening Comments at 7–8 (*citing* legislative history to argue that "smaller systems" includes both residential and commercial systems.) While this debate continues, there should be no question that the primary beneficiaries of the Solar PV Pilot Programs are the residential and commercial classes.[3/]

In fact, the legislative intent to primarily benefit the residential and commercial classes may soon be conclusively decided. The legislature is presently considering modifications to the statute which would expressly state that the Solar PV Pilot Programs must be designed to attain a goal of 75% capacity by "residential qualifying systems and small commercial qualifying systems." HB 3690 § 2(6). Plainly, the pilot benefit to other customer classes will be minimal, at best.

3. Excess Cost Allocation Proportionate to Pilot Participation is Fair, Just and Reasonable and Can Be Implemented with Ease

In light of the unquestioned accrual of primary pilot benefit to residential and/or commercial classes, the Commission should apply the basic principle of cost causation in establishing mechanisms for recovery of pilot costs in excess of resource value. A rate mechanism in which class participation in the pilot directly equates to a proportionate allocation of cost recovery is fair, just and reasonable. ORS § 757.210(1). Conversely, a rate which subsidizes certain classes who primarily benefit from the pilot at the expense of other classes would be an unjust exaction. ORS § 756.040.

In the present docket, allocation of excess costs across customer classes, based upon pilot participation, is neither complex nor technical, as explained below. There is no

[3/] No party has yet ventured to elaborate upon the potential benefits of the pilot to the street and traffic lighting class or the irrigation class.

justification for anything other than a straightforward rate recovery mechanism allocating excess costs according to the principle of cost causation.

The proposed rules require each electric company to file an estimate of the 15-year levelized resource value by July 1, 2010. OAR § 860-084-0370. Thus, barring rule revision or legislative amendment, in just a few months each electric company will have *already* segregated the resource value from excess costs for purposes of pilot cost recovery. In short, no appreciable effort will be required to separately delineate resource value recovery from excess cost recovery in rates. Moreover, separate rate treatment is consistent with the separate and distinct delineation of these two cost recovery components in HB 3039 § 2(10), as previously explained.

Likewise, the allocation of excess costs in proportion to pilot participation will pose no appreciable burden on utilities. Obviously, net metering necessitates identification of customer class in order to net generation and consumption volumes and to calculate revenues. Further, Staff maintains that Commission jurisdiction does not allow for aggregation of meters "across differing retail rates," so an especially careful identification of customer class is imperative to the establishment of a legal and enduring pilot. Staff Opening Comments at 17. Also, the proposed rules strictly require that detailed information must be collected from all pilot participants, including a non-exclusive itemization of thirteen different data points. OAR § 860-084-0400. The rules positively *forbid* an electric company from even making incentive payments unless and until such data is both collected and verified by the electric company. OAR § 860-084-0430.

In sum, each electric company will have absolutely precise data regarding the allocation of Solar PV Pilot Programs participants, according to customer class, from the very

inception of the pilot and continually thereafter. Therefore, on July 1, 2010, once the first mandatory resource value filing is made by each electric company, the utilities will have all necessary data, at ready access, to separate resource value and excess costs, and to allocate excess costs in proportion to pilot participation.

In fact, deferring actual cost recovery until all of this information is obtained is fully consonant with Staff and utility proposals. Staff's original and revised proposals for the Commission Order each state that "utility filings on resource value . . . are *foundational* to the determination of compliance costs." Staff Opening Comments, Addendum A: Staff Proposal at 9 (emphasis added). Thus, the sound course is to defer cost recovery until such a "foundational" component is actually calculated. PacifiCorp has advocated for deferral of all pilot costs and recovery through a deferral mechanism. Joint Comments of PacifiCorp d/b/a Pacific Power and Idaho Power Company at 10. Likewise, PGE does not propose to file rate revisions to recover actual costs until November 2010. PGE Opening Comments at 10. Hence, a Commission Order requiring a deferral of cost recovery until *after* the utilities have the full ability separate resource value and excess costs, and to allocate excess costs according to pilot participation, is in keeping with fairness, good sense, and with multiple major party proposals to date.

Also, deferring cost recovery until the utilities can separately allocate costs according to the above factors is also prudent in light of the FERC preemption question looming over the Solar PV Pilot Programs. Simply put, if a preemption challenge is filed and successful with the FERC, it will be far easier for the Commission to just address the matter of invalidated pilot payments than to also oversee multiple ratepayer refund dockets. Further, the preemption potential amplifies the prudency of segregating cost recovery between resource value and excess

costs—the former will be protected from FERC preemption, while the latter, if invalidated, can be dealt with far more expeditiously if already delineated and segregated in rate mechanisms.

B. Pilot Capacity Allocation Must Be Aligned with the Statute

The legislature positively requires the Commission to establish a pilot which is designed to achieve 75% energy generation from smaller-scale solar PV systems. HB 3039 § 2(6). Although this mandate is not in question, the parties do not agree about the scale of systems which qualify for accounting under this 75% figure. ICNU maintains the position that the text and context of HB 3039 establish that "small-" and "smaller-scale systems" are interchangeable terms. Id.; see also ICNU Opening Comments at 4.[4/]

If the Commission determines that small- and smaller-scale systems refer to the same size-scale of systems, the remaining question is whether Staff's proposed allocation across the size-scale systems conforms to statutory requirements. Unfortunately, Staff is now advocating an increased allocation to medium-scale solar PV systems, which would result in a mere 50% of energy generation from small- or smaller-scale systems—a design which is a full *25 percent less* than the 75% design goal for small- or smaller-scale systems which the Commission "shall establish." HB 3039 § 2(6); compare Staff Opening Comments at 24, Table 3 (displaying the "obsolete" proposal of 60% total pilot allocation to "smaller" systems), with id. at 25, "NEW" Table 3 (*decreasing* the total pilot allocation to "smaller" systems to just 50%, while *increasing* the allocation to "medium" systems to 30%). Plainly, an allocation which is expressly designed to achieve less than the statutory requirement is invalid.

[4/] The question of original legislative intent here may be completely moot if modifications presently under consideration are adopted; the legislature is now considering whether to delete the use of "small-" and "smaller-scale" to refer to the 75% generation design goal, and to insert "residential" and "small commercial qualifying systems," defined as systems of 100 kilowatts or less, in their place. HB 3690 § 1(4), (7); HB 3690 § 2(6).

The statute provides that "[t]he commission *by rule shall define the size of a small-scale qualifying system* and may adjust the definition of size for small-scale qualifying systems based upon the costs of the energy generated, the feasibility of attaining the goal and other factors." HB 3039 § 2(6) (emphasis added).[5/] The proposed rules define "Smaller systems" as ten kilowatts or less. OAR § 860-084-0190(2)(a). Conversely, there is no definition in the rules for "small system." Under the approach advocated by RNP, the proposed rules violate the statute by failing to define a purportedly distinct class of "small-scale" systems. RNP Opening Comments at 4–5. This is not a problem, however, under ICNU's interpretation and the implicit interpretation of Staff in drafting the proposed rules, i.e., that small and smaller are interchangeable terms in the context of subsection 2(6).

III. CONCLUSION

ICNU appreciates the opportunity to submit these Closing Comments and respectfully requests that the Commission:

1. Order each electric company to separately recover resource values and costs in excess of resources values, and to allocate recovery of excess costs across customer classes in proportion to pilot participation; and
2. Order a pilot capacity allocation of 75% to small- or smaller-scale systems, defined as 10kW or less in size under the proposed rules.

[5/] While subsection 2(6) of the statute gives the Commission authority to adjust system size definitions, this delegation contemplates *future* adjustments; in the very same sentence of the statute, the legislature requires the Commission to first define small-scale systems size by rule. HB 3039 § 2(6). The modifications to the statute presently before the legislature would allow the Commission to modify the 75% design goal *only* by rule, i.e., with no ability to make later modifications by order. HB 3690 § 2(6).

Dated this 12th day of February, 2010.

Respectfully submitted,

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