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VIA ELECTRONIC AND U.S. MAIL

PUC Filing Center
Public Utility Commission of Oregon
PO Box 1088
Salem, OR 97308-1088

Re: UE 267 – In the Matter of PacifiCorp Transition Adjustment, Five-Year Cost-of-Service Opt-Out

Attention Filing Center:

Enclosed for filing in the captioned docket are an original and five copies of PacifiCorp's Opening Brief. A copy of this filing was served on all parties to this proceeding as indicated on the attached Certificate of Service.

Very truly yours,

Katherine McDowell

cc: Service List

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

In the Matter of PACIFICORP d/b/a PACIFIC POWER Transition Adjustment, Five-Year Cost-of-Service Opt-Out.	**UE 267**

PACIFICORP'S OPENING BRIEF

July 1, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 267

In the Matter of PACIFICORP d/b/a PACIFIC POWER Transition Adjustment, Five-Year Cost-of-Service Opt-Out.	**PACIFICORP'S OPENING BRIEF**

I. INTRODUCTION

PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) respectfully submits this Opening Brief to the Public Utility Commission of Oregon (Commission). PacifiCorp and the Stipulating Parties[1] agree that the most important issue in this case is whether the Company's proposed Five-Year Cost-of-Service Opt-Out program (Five-Year Program) should include a Consumer Opt-Out Charge to recover transition charges from departing direct access customers.[2] PacifiCorp's Opening Brief focuses on this issue, making only limited arguments on other issues still in controversy.[3]

The Consumer Opt-Out Charge in PacifiCorp's Five-Year Program is necessary to minimize the shifting of transition costs from departing direct access customers to all other customers. The Stipulating Parties deny this and in their Pre-Hearing Brief claim in conclusory fashion that "[t]he Company will fully recover any stranded costs within five years without the need to engage in the inaccurate exercise of estimating generation and

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[1] The intervenors are: Noble Americas Energy Solutions LLC, Industrial Customers of Northwest Utilities (ICNU), Wal-Mart Stores, Inc., Constellation NewEnergy, Inc., Shell Energy North America (US) L.P., Safeway Inc., The Kroger Co., Vitesse LLC, and the Northwest and Intermountain Power Producers Coalition.

[2] Stipulating Parties' Pre-Hearing Brief at 13 ("most important" change in Stipulation is elimination of Consumer Opt-Out Charge).

[3] On these points, PacifiCorp relies on the arguments contained in its Prehearing Brief and reserves its right to offer reply arguments in its Rebuttal Brief.

market costs beyond that timeframe."[4] But the Stipulating Parties completely fail to: (1) address PacifiCorp's evidence demonstrating nearly $60 million in transition costs connected to the Five-Year Program in years six to 10; and (2) reconcile this amount with both the statutory prohibition against unwarranted cost-shifting and the long-time Commission rule requiring 100 percent recovery of transition costs.

The Stipulating Parties rely on two primary arguments to support their opposition to PacifiCorp's recovery of transition adjustments for years six through 10. First, they argue that Portland General Electric Company (PGE) does not collect transition costs beyond five years in its long-term direct access program. But in Order No. 12-500, the Commission specifically allowed PacifiCorp to design a long-term direct access program tailored to its circumstances, even if the program was different than PGE's.[5] And just last fall, the Commission refused to change PacifiCorp's transition adjustment to match PGE's, reasoning that PGE's methodology did not capture the complex and multi-dimensional nature of PacifiCorp's system operations.[6]

The Stipulating Parties also argue that PacifiCorp's forecast system load growth will fully mitigate PacifiCorp's transition costs after five years. There is no Commission precedent supporting this load growth exception and its adoption would represent a significant policy change, one potentially fraught with unintended consequences. Moreover, PacifiCorp presented undisputed evidence that the Company forecasts no load growth in Oregon and the Commission's current approach to PacifiCorp's inter-jurisdictional cost

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[4] Stipulating Parties' Pre-Hearing Brief at 13.

[5] *In the Matter of Public Utility Commission of Oregon Investigation of Issues Relating to Direct Access*, Docket UM 1587, Order No. 12-500 at 9 (Dec. 30, 2012).

[6] *In the Matter of PacifiCorp, dba Pacific Power, 2014 Transition Adjustment Mechanism*, Docket UE 264, Order No. 13-387 at 13-14 (Oct 28, 2013) (rejecting argument that PacifiCorp should be required to use PGE's transition adjustment calculations).

allocation effectively forecloses consideration of system load growth as a stranded cost mitigation factor in Oregon.

The Stipulating Parties are left with one main point, which is that it is harder for customers to elect direct access if they have to pay transition costs. The Commission long ago decided, however, that its job in setting transition adjustments was to prevent cost-shifting, not to promote direct access.[7] Applying that rationale here supports approval of PacifiCorp's Five-Year Program, including the Consumer Opt-Out Charge.

II. ARGUMENT

A. The Stipulation Does Not Change the Legal Standards Applicable to Resolution of this Case.

This case presents several unique procedural issues because Staff and intervenors filed a stipulation purporting to resolve the case, to which PacifiCorp objects.[8]

First, the Stipulation should not be accorded deference under the Commission's policy encouraging voluntary resolution of issues.[9] The Stipulating Parties argue that the Commission should "approve the Stipulation as a 'compromise of different positions' which represents 'a reasonable resolution' of the issues."[10] When admitting the Stipulation into the record, however, Administrative Law Judge (ALJ) Kirkpatrick specifically found that the Stipulation did not "*resolve* any issues as it fails to include Pacific Power[.]"[11] Rather, the

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[7] *Id.* at 12 (citing the Commission's statement in UE 179 that the "'purpose of the TAM is not to promote direct access,' but rather 'to capture costs associated with direct access', and prevent unwarranted cost shifting").

[8] There are no reported Commission cases involving litigation of a stipulation excluding the utility that made the tariff filing. In one prior case, the Commission rejected a stipulation that did not "represent a compromise between parties with adverse interests." *In the Matter of Portland General Electric Company SB 408 Tax Report for Calendar Year 2007*, Docket UE 178(1), Order No. 09-126 at n. 4 (April 10, 2009).

[9] Stipulating Parties' Pre-Hearing Brief at 7.

[10] *Id.*

[11] *In the Matter of PacifiCorp, dba Pacific Power, Transition Adjustment, Five-Year Cost of Service Opt-Out*, Docket UE 267, Ruling at 3 (Nov. 15, 2013).

Stipulation simply has "value in terms of administrative efficiency by narrowing the range of positions on issues and further developing the record."[12] Because the Stipulation does not represent a compromise resolution of the adverse interests of PacifiCorp and the Stipulating Parties, it is not entitled to policy deference.

Second, the Commission should reject the Stipulating Parties' argument that the Commission should approve a particular term of the Stipulation (such as a credit for freed-up Bonneville Power Administration (BPA) transmission), because it is a compromise position included in an integrated stipulation.[13] The Stipulated Parties "have the burden of producing evidence to support their argument in opposition to the utility's position."[14] This burden is not negated or lessened by the fact of the Stipulation.[15]

Third, if the Commission approves PacifiCorp's Five-Year Program, this order should conclude the case. The Stipulating Parties argue that if the Stipulation is rejected or modified, "further hearings should be held to fully address the issues in this case because, by entering into [the] Stipulation at this stage in the proceedings prior to hearing and legal briefing, the Stipulating Parties have foregone the ability to fully develop and present their

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[12] *Id.*

[13] Stipulating Parties' Pre-Hearing Brief at 13 ("the BPA transmission credit is part and parcel with the other elements of the Stipulation.")

[14] *In the Matter of Portland General Electric Company Application to Amortize the Boardman Deferral*, Docket UE 196, Order No. 09-046 at 8 (Feb. 5, 2009).

[15] *Id.* at 7-8; *In the Matter of Portland General Electric Company 2012 Annual Power Cost Update Tariff (Schedule 125)*, Docket UE 228, Order No. 11-432 at 3 (Nov. 2, 2011) ("Once a utility has met the initial burden of presenting evidence to support its request, 'the burden of going forward then shifts to the party or parties who oppose including the costs in the utility's revenue requirement.' Although the burden of production shifts, the burden of persuasion is always on the utility."); *see In the Matter of PacifiCorp, dba Pacific Power, Request for a General Rate Revision*, Docket UE 210, Order No. 10-022 at 6 (Jan. 26, 2010) ("We may accept a non-unanimous settlement agreement so long as we make an independent finding, supported by substantial competent evidence in the record as a whole, that the settlement will establish just and reasonable rates."); *see also In the Matter of PacifiCorp*, Docket UM 995/UE 121/UC 578, Order No. 02-469 at 75 (July 18, 2002) ("Where some parties oppose a stipulation . . . we will adopt a stipulation only if competent evidence supports it.").

individual positions."[16] But the Commission previously advised that it intended to hold only one hearing in this case, addressing both the Stipulation and the individual parties' positions.[17] On this basis, PacifiCorp responded to both the Stipulation and individual parties' positions in its filings. Given this record, it is unreasonable to allow the Stipulating Parties to re-litigate their original positions if the Commission rejects their Stipulation.

B. The Consumer Opt-Out Charge is Required to Ensure the Legality and Fairness of PacifiCorp's Five-Year Program.

The Consumer Opt-Out Charge is required to recover the Company's transition costs in years six to 10 after a direct access load departs under the Five-Year Program. Based upon PacifiCorp's most recent forecast, this charge would be $5.75/MWh for Schedule 47/48 customers.[18] Oregon law and the Commission's rules require full recovery of transition costs from direct access customers to credit to remaining customers to protect them from cost-shifting. Without a Consumer Opt-Out Charge, the Five-Year Program could illegally shift transition costs of nearly $60 million to PacifiCorp's Oregon customers (including non-direct access eligible customers).

1. The Prohibition Against Cost-Shifting is a Fundamental Principle of Oregon Direct Access.

Senate Bill 1149 (SB 1149) specifically prohibits "unwarranted shifting of costs to other [non-participating] retail electricity consumers of the electric company." Cost-shifting occurs when transition costs resulting from direct access are not recovered from departing

[16] Stipulating Parties' Pre-Hearing Brief at 5-6.

[17] *In the Matter of PacifiCorp, dba Pacific Power, Transition Adjustment, Five-Year Cost of Service Opt-Out*, Docket UE 267, Prehearing Conference Memorandum (Nov. 19, 2013).

[18] PAC/400, Duvall/2 (as corrected by errata filed on May 13, 2014).

customers and become the responsibility of all remaining customers. The Commission has never allowed direct access to shift costs to PacifiCorp's non-participating customers.[19]

In docket UM 1587, the investigation that led to PacifiCorp's filing in this case, the Citizens' Utility Board (CUB) emphasized the importance of protecting non-direct access eligible customers against cost-shifting from permanent direct access programs:

> Direct access in Oregon has always been based on the idea that it would be offered in a way that did not shift costs to customers who are not eligible for direct access. CUB believes that this principle must be retained, and that transition charges are an important means of preventing this from happening.[20]

In its final order in docket UM 1587, the Commission agreed that PacifiCorp's Five-Year Program should "be designed to protect other customers from cost-shifting[.]"[21]

Importantly, the Commission's steadfast refusal to allow direct access cost-shifting has served as an important deterrent to cost-shifting that could occur in other contexts, such as from municipalization in PacifiCorp's Oregon service territory.[22] Under well-established precedent, the Federal Energy Regulatory Commission (FERC) allows utilities to recover stranded costs from retail-turned-wholesale customers (i.e., newly formed municipal

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[19] *In the Matter of Pacific Power & Light Company, dba PacifiCorp, Request for a General Rate Increase in the Company's Oregon Annual Revenues*, Docket UE 170, Order No. 05-1050 at 21 (Sept. 28, 2005).

[20] *In the Matter of Public Utility Commission of Oregon Investigation of Issues Relating to Direct Access*, Docket UM 1587, Reply Comments of the Citizens' Utility Board of Oregon at 2-3 (Sept. 14, 2012). As noted on PacifiCorp's Exhibit List, filed on May 16, 2014, the parties have agreed that the Commission may take official notice of documents filed in dockets UM 1587 and UM 1050, as referenced in the parties' briefs.

[21] Order No. 12-500 at 9.

[22] The Commission has previously recognized the cost-shifting concerns associated with municipalization in approving special contracts designed to head-off such efforts. *See Wah Chang v. PacifiCorp*, Docket UM 1002, Order No. 01-873 (Oct. 15, 2001) (noting that Commission approved Wah Chang's special contract because of the threat of municipalization from the City of Millersburg; explaining that: "If a large customer ceases to receive service from a utility company, or significantly reduces service, that customer's contribution toward fixed costs is lost. Other customers could be called on to increase their contribution to fixed costs.") The City of Millersburg is again exploring municipalization of PacifiCorp's service territory, including Wah Chang and other large customers, so the cost-shifting and stranded cost recovery issues remain relevant to the Commission policies implicated by this case. See http://www.millersburgcitypower.com/

utilities).[23] While the FERC has primary jurisdiction in such cases, it looks to state commission policies for guidance.[24] The Oregon Commission's strong policy against direct access cost-shifting reinforces the FERC's stranded cost policy for retail-turned-wholesale customers and prevents a new municipal utility from evading its stranded cost liability. Any change to the Commission's policy in this docket could have the unintended consequence of encouraging municipalization in a manner that shifts stranded costs to remaining customers.

2. The Commission's Transition Adjustment Design Demonstrates Zero Tolerance for Cost-Shifting, Even if this Inhibits Direct Access.

Transition adjustments prevent cost-shifting by charging direct access customers for the cost differential between market prices and a utility's cost-of-service prices.[25] The Commission's rules require direct access customers to pay transition charges "equal to 100 percent of the net value of the Oregon share of all [investments] as determined pursuant to an auction, an administrative valuation, or an ongoing valuation."[26] While the Stipulating

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[23] In connection with shifting to open-access transmission, the FERC announced in Order 888, and refined in subsequent Orders 888-A and 888-B, a policy allowing utilities to petition the FERC to recover stranded costs where a departing municipal utility uses FERC-mandated transmission access to obtain a new power supply. Costs are recoverable over the period for which the utility had a reasonable expectation of continuing to serve the municipality. *See* Order No. 888, 61 FR 21,540-01, 21,542 (1996) ("Order 888"); Order No. 888-A, 62 FR 12,274-01, 12,279 (1997) ("Order 888-A"); Order No. 888-B, 62 FR 64,688, 64,709 (1997) ("Order 888-B"). For example, in *City of Las Cruces v. El Paso Electric Company*, 87 FERC 61,201, 61,750 (1999), the FERC awarded stranded costs for the 20-year horizon the utility used for resource planning.

[24] While the FERC has primary jurisdiction to determine the stranded costs obligation of a departing municipality, it has indicated a willingness to defer to relevant state determinations in limited circumstances. *See Alliance for Mun. Power v. F.E.R.C.*, 94 FERC 61,083, 61,374 (Jan. 25, 2001) (finding the New York Commission had provided a forum for the determination of the departing municipality's stranded cost obligation, including arbitration, further mediation or a more formal litigation proceeding); *and see* Order 888-A at 12,406 (the FERC reasoning, "this Commission should be the primary forum because, without the open access provided by the Rule, the new municipal utility would not be able to reach a new supplier" but noting "we will give great weight in our proceedings to a state's view of what might be recoverable"); *and see* Order 888-B at 64,710 (the FERC clarifying that it "will take into account state findings on cost determinations associated with retail-turned-wholesale situations").

[25] PAC/404, Duvall/10-11.

[26] OAR 860-038-0160(1) ("each Oregon retail electricity consumer of an electric company will receive a transition credit or pay a transition charge equal to 100 percent of the net value of the Oregon share of all economic utility investments and all uneconomic utility investments of the electric company as determined

Parties' Pre-Hearing Brief nowhere mentions the rule of 100 percent transition cost recovery, individual stipulating parties have previously acknowledged the rule.[27]

PacifiCorp's transition adjustment is determined annually in its Transition Adjustment Mechanism (TAM) proceeding using the "ongoing valuation methodology," which calculates the difference between the Company's cost-of-service rate and the market value of the energy previously used to serve direct access customers.[28] The Commission adopted PacifiCorp's current transition adjustment methodology in docket UE 170. In that case, Staff described the method as follows:

> By simultaneously setting PacifiCorp's cost-of-service energy rates and transition adjustment rates **the Commission can shield both PacifiCorp's cost-of-service customers and PacifiCorp's shareholders from unwarranted cost shifts.** PacifiCorp's cost-of-service energy rates should be based on projected NVPC given the assumption of no direct access participation. **This ratemaking shields PacifiCorp's cost-of-service customers from direct access cost shifts.** .... **Importantly this combined ratemaking does not provide**

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pursuant to an auction, an administrative valuation, or an ongoing valuation. The transition charge or credit applicable to a retail electricity consumer may change to reflect the duration of the service option chosen by the consumer but will not change based on the supplier of the electricity services chosen by the consumer."); *see also* ORS 757.607(2) (direct access programs may include transition charges or credits that "reasonably balance the interests of retail electricity consumers and utility investors").

[27] *In the Matter of Public Utility Commission of Oregon Investigation of Issues Relating to Direct Access*, Docket UM 1587, Noble Americas Energy Solutions LLC's Opening Comments at 4 (Aug. 16, 2012) (". . . Direct Access customers receive a transition credit or pay a transition charge equal to 100 percent of the net value of the Oregon share of all economic and uneconomic utility investments, as prescribed in O.A.R. 860-038-0160(1)"); *In the Matter of PacifiCorp, dba Pacific Power, Request for a General Rate* Revision, Docket UE 246, Pre-Hearing Brief of The Kroger Co. at 3 (Oct. 4, 2012) (". . . Direct Access customers receive a transition credit or pay a transition charge equal to 100 percent of the net value of the Oregon share of all economic and uneconomic utility investments, as prescribed in OAC 860-038-0160(1))."

[28] ORS 757.607(2); OAR 860-038-0005(67)-(69). "Ongoing valuation" is defined in the Commission's rules as the "process of determining transition costs or benefits for a generation asset by comparing the value of the asset output at projected market prices for a defined period to an estimate of the revenue requirement of the asset for the same time period." OAR 860-038-0005(41). In the original rules, the ongoing valuation examined a single year. The rules were subsequently amended and "one-year" was replaced with "defined." *In the Matter of the Rulemaking Proceeding to Permanently Amend Rules Pertaining to Resource Plans, Resource Valuation, and Service Options in OAR 860, Division 038*, Docket AR 417/AR 441, Order No. 02-702 at 3 (Oct. 15, 2002).

incentives to direct access eligible customers on their choice to go direct access or remain with the company.[29]

In Order No. 05-1050 in docket UE 170, the Commission approved the transition adjustment proposed by Staff "to prevent unwarranted cost shifting."[30] The Commission specifically rejected ICNU's argument that the transition adjustment might hinder retail competition, noting that "[t]he purpose of the TAM is not to promote direct access."[31]

3. The Consumer Opt-Out Charge is a Necessary Transition Adjustment.

The Consumer Opt-Out Charge in the Five-Year Program is designed to recover the Company's transition costs for a reasonable time horizon beyond the five-year transition term and credit those costs to remaining customers.[32] The Consumer Opt-Out Charge is a valuation of the Company's fixed generation costs, offset by the value of the freed-up power made available by the departing customers.[33] The Company will calculate the Consumer Opt-Out Charge using the same "ongoing valuation" methodology the Commission adopted in docket UE 170 for PacifiCorp's annual transition adjustment in the one- and three-year direct access options.[34]

In the Multi-State Process (MSP), the Oregon Coalition (Staff, ICNU and CUB) described the transition adjustment for permanent opt-out programs as follows: "When a

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[29] *In the Matter of Pacific Power & Light, dba PacifiCorp, Request for a General Rate Increase in the Company's Oregon Annual Revenues,* Docket UE 170, Surrebuttal Testimony of Maury Galbraith, Staff/700, Galbraith/16-17 (emphasis added). The Company requests that the Commission take official notice of this testimony under OAR 860-001-0460(1)(d).

[30] Order No. 05-1050 at 21.

[31] *Id.*

[32] PAC/200, Duvall/6; PAC/400, Duvall/3-4. PacifiCorp believes that its original proposal for a 20-year time horizon for measuring transition costs is the most reasonable approach because this time horizon matches PacifiCorp's resource planning cycle. Given all of the terms and conditions of the Five-Year Program, however, especially the fact that it is no longer a permanent direct access program (because customers may return to cost of service rates with notice), PacifiCorp proposed the 10-year horizon as a compromise position.

[33] PAC/200, Duvall/5.

[34] PAC/400, Duvall/3-4.

consumer chooses to leave the system permanently through direct access, the consumer is responsible for the stranded costs or benefits at the time the consumer leaves the system."[35] Further, the stranded costs should be calculated by comparing "the cost of the Company's mix of resources . . . to the projected market price for power[.]"[36] This is exactly how PacifiCorp's Consumer Opt-Out Charge is calculated in this case.

The Stipulating Parties claim that PacifiCorp will have no stranded costs after year five—without ever mentioning PacifiCorp's well-documented calculations proving the exact opposite.[37] PacifiCorp's Opt-Out Charge is based on a comparison of the Company's embedded generation costs and forward market prices for the next ten years.[38] This comparison establishes the existence of transition costs between years six to 10 of approximately $58.9 million on a nominal basis, or $35.4 million on a net present value basis.[39] The Stipulating Parties' did not rebut PacifiCorp's calculation of these stranded costs.[40] Rather, the Stipulating Parties' claim that new load growth outside of Oregon and scaling back front office transactions will fully mitigate these stranded costs.[41] These arguments are flawed on many levels.

First, the Commission has never recognized load growth as an offset to 100 percent stranded cost recovery. The Commission's direct access guidelines issued before SB 1149 made prudence the appropriate standard for mitigation (rather than a more aggressive standard, which could have included a load growth offset), and suggested that the

[35] PAC/404, Duvall/61.

[36] *Id.*

[37] Stipulating Parties' Pre-Hearing Brief at 13.

[38] PAC/200, Duvall/5.

[39] PAC/402, Duvall/1 (as corrected by errata filed on May 13, 2014).

[40] PAC/400, Duvall/4.

[41] Stipulating Parties' Pre-Hearing Brief at 14.

Commission contemplated *less than* 100 percent recovery only when a utility was imprudent in mitigating costs.[42] In implementing SB 1149, the Commission adhered to the same standard.[43]

Second, new load growth does not eliminate stranded costs, it merely shifts those costs to current and new customers.[44] In criticizing the FERC's suggestion in Order 888-A that it might allow load growth to mitigate stranded costs in the retail-turned-wholesale customer context (an approach that the FERC has never actually applied[45]), experts from the Brattle Group made the following observations:

> Mathematically, one cannot allow load growth to absorb all costs if the overarching policy is to avoid shifting costs, allocated equally to all customers, onto remaining customers. The intuition underlying this result is obvious. For either the utility's growing system or for the municipality that breaks away, the next increment of power obtained is going to be lower in costs than the existing average. This is the reason why stranded costs exist in the first place. If the customer group stays part of the utility and the latter supplies its next

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[42] *In the Matter of an Investigation of Transition Costs for Electric Utilities*, Docket UM 834, Order No. 98-353 (Aug. 24, 1998). In the order, the Commission considered comments from Staff, ICNU and PGE about a utility's obligation to mitigate transition costs and concludes, "Utilities should expect to show they have maximized the value of their assets and minimized the costs associated with those assets. We may allow less than full recovery of transition costs to ensure that mitigation takes place." ICNU argued that the standard for mitigation should be even more aggressive than the prudence standard, but the Commission replied, "We expect the utilities to be aggressive in finding ways to mitigate transition costs, but we will not depart from our basic standard."

[43] *In the Matter of a Rulemaking Proceeding to Implement SB 1149 Relating to Electric Restructuring*, Docket AR 380, Order No. 00-596 at 7 (Sept. 28, 2000). The Commission's September 2000 order implementing OAR 860-038-0160 said the rule "provides that all Oregon retail electric consumers of an electric company will receive a transition credit or pay a transition charge equal to 100 percent of the net value of the Oregon share of all economic utility investments and all uneconomic utility investments of the company as determined pursuant to the various valuation methods set out in other portions of the rules."

[44] PAC/400, Duvall/5.

[45] FERC case law on retail-turned-wholesale customer stranded costs makes clear that load growth is to be considered only in limited circumstances—which it has never found to exist. *See City of Las Cruces v. El Paso Electric Company*, 87 FERC 61,201, 61,760-61 (1999); *City of Alma, Michigan,* 96 FERC 61,163, 61,721-22 (2001). In both cases, the utility was capacity deficient, but concerns about cost-shifting and state stranded cost policies caused the FERC to reject a load growth offset. This underlines the importance of the Oregon Commission adhering to its strong stance against cost-shifting (including the rejection of a load-growth exception) in preserving stranded cost recovery from municipalizing customers at FERC.

> increment of load growth with cheaper power, the benefits of the cheaper power are shared by all customers. If instead, the municipality leaves, it supplies itself entirely with cheaper power and the remaining customers no longer have an opportunity to blend power from their existing high-cost resources with new low-cost supplies, thus lowering costs.[46]

Third, it is inconsistent for the Stipulating Parties to argue that load growth (i.e., new customers) will fully absorb PacifiCorp's transition costs, while at the same time reserving their rights to argue that new PacifiCorp customers should be able to elect permanent direct access without any transition cost liability. In other words, one cannot argue that load growth allows fixed costs to be spread to new customers, while at the same time allowing these new customers to avoid any responsibility for such costs. The effect of such a position, if adopted, would be to shift PacifiCorp's transition costs to an even smaller group of new customers (i.e., only direct access ineligible or non-electing new customers), increasing the magnitude of the cost shift to these and all other customers.

Fourth, PacifiCorp presented undisputed evidence that the Company is not experiencing load growth in Oregon and does not expect to add 175 aMW of Oregon load in a forecasted 20-year horizon.[47] While the Stipulating Parties point to PacifiCorp's system load growth in support of their argument, as discussed below, Section X of the 2010 Protocol currently precludes such an argument.[48]

Fifth, reduced front office transactions will not mitigate stranded costs in years six through 10 because these are already fully accounted for in the calculation of the $58.9

[46] G. Basheda, et al, *The FERC, Stranded Cost Recovery and Municipalization*, Vol. 19 Energy Law Journal 351, 374 and App. B (1998).

[47] Staff/103, Compton/2 (PacifiCorp Response to OPUC Data Request 2).

[48] PAC/400, Duvall/5.

million transition charges.[49] The Stipulating Parties have never addressed or controverted this fact.

4. The Stipulating Parties' Continued Reliance on PGE's Five-Year Program is Misplaced.

The Stipulating Parties continue to rely heavily on comparisons to PGE's opt-out program, claiming that "PacifiCorp's proposed Consumer Opt Out Charge contradicts the Commission's directive that PacifiCorp adopt a PGE-type five-year program."[50] But, as the Commission has previously recognized,[51] PacifiCorp differs from PGE in material ways, including its embedded costs, its load and resource balance, its status as a multi-state utility, and its complex system operations.[52] The Commission's order in docket UM 1587 specifically allowed PacifiCorp to deviate from PGE's program design to accommodate PacifiCorp's individual circumstances.[53]

In addition, the history of SB 1149 shows that parties originally considered a permanent opt-out without payment of stranded costs in 2002, because "the current market price strips appear to be close to the long-term costs of utility resources."[54] This is when PGE introduced its five-year opt-out.[55] In other words, when PGE first proposed its five-year opt-out program, its transition adjustments were close to zero, so it was not unreasonable for PGE's program to lack a Consumer Opt-Out Charge *at that time*. When market prices changed and the transition charges increased, PGE could not terminate its five-year opt-out

[49] PAC/400, Duvall/6.

[50] Stipulating Parties' Pre-Hearing Brief at 16.

[51] Order 13-387 at 13-14 (rejecting argument that PacifiCorp should be required to offer a BPA transmission credit because PGE's transition adjustment includes one).

[52] PAC/400, Duvall/15-18.

[53] Order No. 12-500 at 9.

[54] PAC/400, Duvall/16.

[55] *Id.*

because it had stipulated to continue it through 2010 as a part of the transaction to turn PGE into a stand-alone utility.[56]

PGE now recognizes that its opt-out program does, in fact, result in cost-shifting to non-participating customers. In docket UM 1587, PGE observed that when direct access customers leave cost-of-service pricing for the multi-year direct access option, PGE's fixed generation costs are shifted to all remaining cost-of-service customers, including residential customers:

> During periods where market energy prices are similar to embedded variable power costs, no unit reduction in variable power costs occurs but this does not address fixed generation costs. Hence, the remaining COS customers are left with a rate increase that results from spreading the existing fixed generation costs over less COS energy.[57]

PGE recognized that this cost-shifting has "potential negative impacts on nonparticipants."[58]

Similarly, in docket UM 1587, Staff also observed that in today's market conditions, the lack of a transition adjustment will result in cost-shifting:

> [F]reeing direct access customers from transition adjustments impacts other parties, most likely other customers. Under current electric market conditions, the effect would be to increase costs for other customers.[59]

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[56] PAC/400, Duvall/17.

[57] *In the Matter of Public Utility Commission of Oregon Investigation of Issues Relating to Direct Access*, Docket UM 1587, Reply Comments of Portland General Electric Company at 8-9 (Sept. 14, 2012).

[58] *See also In the Matter of Public Utility Commission of Oregon Investigation of Issues Relating to Direct Access*, Docket UM 1587, Comments of Portland General Electric Company at 4-5 (August 16, 2012) ("When wholesale power prices are lower than PGE's embedded costs, transition charges should apply because these transition charges are credited to nonparticipating customers in order to mitigate the impact of re-spreading fixed generation costs over less energy to nonparticipants. In instances where wholesale power prices exceed PGE embedded costs, transition credits should apply; otherwise customers would have a strong disincentive to participate.").

[59] *In the Matter of Public Utility Commission of Oregon Investigation of Issues Relating to Direct Access*, Docket UM 1587, Staff Comments at 2 (May 16, 2012).

In summary, PacifiCorp presented undisputed evidence that the Company will have substantial unrecovered transition costs, and substantial cost-shifts, without a Consumer Opt-Out Charge.

5. The Consumer Opt-Out Charge is Consistent with the Commission's Definition of "Ongoing Valuation."

The Stipulating Parties claim that the Consumer Opt-Out Charge is inconsistent with the definition of "ongoing valuation" found in OAR 860-038-0005(41) because it recovers 10 years of transition charges during the five-year transition period.[60] This argument misreads the rule, which requires only that the calculation of the transition charge compares market prices and revenue requirement over the same period:

> "Ongoing valuation" means the process of determining transition costs or benefits for a generation asset by comparing the value of the asset output at projected market prices for a defined period to an estimate of the revenue requirement of the asset for the same time period.[61]

PacifiCorp has complied with this rule by calculating the Consumer Opt-Out Charge by comparing both market prices and revenue requirement over the same 10-year period.[62]

C. Revising Section X of the 2010 Protocol is Insufficient to Prevent Cost-Shifting.

The Stipulating Parties acknowledge that without a revision of Section X, non-participating customers could be harmed if the Stipulation is approved.[63] To prevent this harm, the Stipulating Parties' claim that revisions to Section X of the 2010 Protocol are sufficient to resolve the cost shifting issues raised by their proposal.[64] While a revision to

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[60] Stipulating Parties' Pre-Hearing Brief at 16.

[61] OAR 860-038-0005(41).

[62] PAC/200, Duvall/5-6. *See also* OAR 860-038-0160(1) (". . . The transition charge or credit applicable to a retail electricity consumer may change to reflect the duration of the service option chosen by the consumer.").

[63] PAC/400, Duvall/12; Exhibit PAC/403, Duvall/1; Stipulating Parties/100, Joint/24.

[64] Stipulating Parties' Pre-Hearing Brief at 15.

Section X could *lessen* cost-shifting to Oregon customers (by allowing the costs to be shifted to customers in other states), it will not *eliminate* cost-shifting altogether. As described above in Section B.4., even without Section X, the lack of a Consumer Opt-Out Charge will result in cost shifting, as it has for PGE.

The Stipulating Parties claim that Section X is outdated because it was designed to allow Oregon to transfer freed-up resources from one customer class to another, something in which there is now little interest.[65] However, the Stipulating Parties failed to produce any evidence demonstrating that this was the intended purpose of Section X. The Company, on the other hand, presented several statements by Staff, ICNU, and CUB—the parties that proposed Section X—making clear that the purpose of the provision was to facilitate direct access by allowing Oregon to retain the costs and benefits of resources freed up due to departing direct access load.[66]

Further, when the Commission adopted the Revised Protocol in 2005, it specifically found that Section X was in the public interest and necessary for implementation of direct access in Oregon.[67] There have been no amendments or revisions to Oregon's direct access laws, rules or policies since 2005, and no other change in circumstance rendering Section X

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[65] *Id.*

[66] PAC/400, Duvall/9-10.

[67] *In the Matter of PacifiCorp's Request to Initiate an Investigation of Multi-Jurisdictional Issues and Approve an Inter-Jurisdictional Cost Allocation Protocol*, Docket UM 1050, Order No. 05-021 at 8 (Jan. 12, 2005) ("Staff testified that the Revised Protocol . . . provisions which enhance Oregon's ability to implement direct access provisions, meet the "public interest" test. . . We agree with Staff and hold that ratification of the Revised Protocol is in the public interest.").

obsolete.[68] Section X was re-adopted as part of the 2010 Protocol only three years ago, based on an unopposed stipulation among PacifiCorp, Staff and other parties.[69]

The Stipulating Parties also claim that the Commission should not consider Section X's operation because Staff has proposed amendments to the 2010 Protocol.[70] Until it is clear how direct access loads will be treated for inter-jurisdictional cost allocation purposes, however, customers should not be permitted to opt-out of cost of service rates without paying the Consumer Opt-Out Charge. Otherwise, the Company might be in the position of needing to honor customers' opt-out elections, even though these elections clearly cause unwarranted cost shifts.

The Stipulating Parties further argue that "even in the absence of changes to Section X . . . nothing binds the State of Oregon and the OPUC to continue to adhere to" Section X.[71] This overstates the Commission's ability to unilaterally repudiate a provision in the 2010 Protocol. Section XIII of the 2010 Protocol grants parties a limited right to disregard the Protocol "in the event that unforeseen or changed circumstances cause that party to conclude that the 2010 Protocol no longer produces just and reasonable results." As noted above, no such change in circumstances has occurred.

Further, Section XIII of the 2010 Protocol requires that, consistent with their legal obligations, Commissions and parties will endeavor to reach a multilateral resolution before unilaterally departing from the terms of the agreement. The 2010 Protocol is the legally

[68] PAC/400, Duvall/13.

[69] *In the Matter of PacifiCorp, dba Pacific Power, Petition for Approval of Amendments to Revised Protocol Allocation Methodology,* Docket UM 1050, Order No. 11-244 (July 5, 2011); PAC/400, Duvall/13.

[70] Stipulating Parties' Pre-Hearing Brief at 15.

[71] *Id.*

required allocation methodology in Oregon unless and until it is changed through these approved procedures.[72]

The Commission is also constrained by its own governing statutes. Under ORS 756.568, the Commission may only amend its order approving the 2010 Protocol after providing notice and an opportunity for hearing to all interested parties, including all parties to the MSP. Without this notice and hearing, the Commission cannot amend the 2010 Protocol.

Moreover, unilaterally disregarding Section X is inconsistent with the Commission's stated goals when approving the Revised Protocol. The Commission's goal was to ensure that Oregon's share of PacifiCorp's costs is equitable in relation to other states.[73] The Commission explained that "equitable" means that "all states concerned [are] dealt with fairly and equally . . ."[74] When the Commission approved the Revised Protocol, it recognized that the method was a compromise among the various states. It would be fundamentally unfair for Oregon to now repudiate Section X—particularly when Section X was proposed by Oregon to implement Oregon state energy policy and Oregon's repudiation of the term would result in cost-shifting to other states.

Repudiating Section X is also inconsistent with the Oregon Coalition's stated principle for inter-jurisdictional allocation: "Policy decisions and activities by one state should not affect other states either positively or negatively."[75] Indeed, when the Oregon Coalition first addressed the treatment of direct access in the MSP they indicated that they

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[72] Order No. 11-244. Importantly, even though the 2010 Protocol will expire in 2016, if there is no new protocol adopted, it will revert back to the Revised Protocol. And the Revised Protocol includes the same Section X. PAC/400, Duvall/13-14.

[73] Order No. 05-021 at 6.

[74] *Id.*

[75] PAC/404, Duvall/53.

had crafted a proposal (Section X) that met one of their "key objectives," which was "to allow states to implement their energy policies without harming or benefitting other states."[76]

Oregon's decision to unilaterally disregard Section X could also have significant unintended consequences if other states likewise disregard provisions of the 2010 Protocol that benefit Oregon or when other states implement direct access programs that, without the protections afforded by Section X, could result in significant cost-shifting to Oregon.[77]

Finally, the Stipulating Parties' argument that the Revised Protocol unfairly treats direct access loads differently from other new or lost loads ignores the multitude of reasons for this different treatment.[78] First, Oregon law and Commission policy have always distinguished between normal load fluctuations and load changes resulting from direct access. Second, it is disingenuous for Staff and ICNU to now claim that there is no basis for the term of the Revised Protocol that they crafted, and argued was in the public interest and necessary to implement direct access in Oregon.[79] Third, the Stipulating Parties' claim that Section X unfairly singles out direct access load and "traps the costs of the departing load" in Oregon is at odds with their admission that the "trapped" costs are transition costs under the Commission's rules.[80] The law is clear that departing direct access customer must pay 100 percent of transition costs.[81] There is nothing arbitrary about including this requirement in the Five-Year Program; indeed, the failure to do so would violate Oregon law.

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[76] PAC/404, Duvall/41.

[77] PAC/400, Duvall/14.

[78] Stipulating Parties' Pre-Hearing Brief at 15.

[79] PAC/400, Duvall/9-10; PAC/404, Duvall/62 (Oregon Coalition argues it is "imperative" that Section X be adopted).

[80] PAC/405, Duvall/1 ("The 'trapped costs' are transition costs," as defined in OAR 860-038-0005(68)).

[81] OAR 860-038-0160(1).

D. There is No Basis for Imputing a Credit for Freed-Up BPA Transmission in the Transition Adjustment Calculation.

The Stipulating Parties assert that a BPA transmission credit should be included in the Schedule 296 transition adjustment calculation.[82] This position was litigated and lost in the last two TAM proceedings.[83] The Stipulating Parties fail to distinguish this case from the previous adverse decisions in any meaningful way—in fact, their Pre-Hearing Brief does not even cite the controlling cases.

The Stipulating Parties contend that the Commission should reject the Company's claim that its status as the emergency supplier for long-term opt-out customers makes a transmission credit unwarranted.[84] But Exhibit PAC/500 makes clear that the Company is the provider of last resort for customers in PacifiCorp's West Balancing Authority Area.[85] For this reason, PacifiCorp cannot readily monetize BPA transmission that is freed-up by departing direct access customers. Imputing a credit for freed-up BPA transmission in this context will only add to the cost-shifting already inherent in the Stipulation.

E. The Stipulating Parties' Proposal on the Election Window Ignores the Commission's Direct Access Framework.

The Stipulating Parties propose a one-month election window starting November 1 each year.[86] By statute and regulation, however, November 15 is the "Announcement Date" on which all electric companies announce their estimated prices for the next calendar year.[87]

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[82] Stipulating Parties' Pre-Hearing Brief at 10.

[83] *In the Matter of PacifiCorp, dba Pacific Power, 2013 Transition Adjustment Mechanism*, Docket UE 245, Order No. 12-409 at 17 (Oct. 29, 2012); Order No. 13-387 at 13-14.

[84] Stipulating Parties' Pre-Hearing Brief at 12.

[85] *See* Exhibit PAC/500 at 1.

[86] Stipulating Parties' Pre-Hearing Brief at 19.

[87] ORS 757.609(1) (requiring the Commission to "set a date on which all electric companies must announce prices that will be charged for electricity by the companies in the subsequent calendar year"); OAR 860-038-

This date is inflexible and would require a formal rulemaking for any change.[88] As a result, even if the Company agreed to file Schedule 296 two weeks early as the Stipulating Parties propose, by virtue of the statutory November 15 "Announcement Date," the Company would still not announce its prices until November 15. The Stipulating Parties' proposal is unworkable because November 15 is a fixed date.

The Company's proposal—a three-week election window beginning November 15—provides customers time to arrive at a reasoned decision. Including the week with the indicative transition adjustments posted, customers will have four weeks to work through the details. The Stipulating Parties' position that they would agree to a November 15 start date only if the election window remains open for a month[89] is inconsistent with the Commission's direct access framework, which assumes that Direct Access Service Requests (DASR) are made by early December to facilitate a January 1 commencement of direct access service.[90]

F. Returning Direct Access Customers Should Not Be Eligible to Again Participate in the Five-Year Program.

PacifiCorp agreed to allow direct access customers to return to cost-of-service rates with four years' notice, with the proviso that returning customers should not be eligible to participate in the Five-Year Program in the future. The Stipulating Parties object to the

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0275(1) (establishing November 15 as the "Announcement Date" on which each electric company must announce the prices to be charged for electricity services in the next calendar year).

[88] *See* ORS 183.335(1)-(3) (requiring notice and the opportunity for comment before the amendment or repeal of any rule). Although OAR 860-038-0001(4), which implements ORS 757.609, provides that the Commission may waive any of the Direct Access Regulations "for good cause shown" we do not believe that good cause exists here, given that November 15 aligns with the Company's other price announcement obligations and corresponds with the Announcement Date for other electric companies).

[89] Stipulating Parties' Pre-Hearing Brief at 20.

[90] OAR 860-038-0445(8)-(9) (specifying that (i) an electricity service supplier (ESS) must obtain acceptance of its DASR at least 10 business days before the effective date of the change; (ii) an electric company must accept or reject a DASR within 3 business days of submission and (iii) upon acceptance of a DASR, the electric company must notify the current supplier of the change within 3 business days).

future ineligibility of returning direct access customers, arguing that this limitation will discourage participation in the Five-Year Program and that PGE does not have such a limitation.[91]

Oregon's direct access statutes allow the Commission to control customer switching to and from direct access to prevent cost-shifting.[92] As CUB explained in docket UM 1587, transition adjustments discourage direct access customers from harming non-participating customers by switching back and forth:

> The transition charges also serve to discourage customers from frequently switching between retail and direct access service by reducing the differential between cost of service (COS) rates and market wholesale rates for a defined period, since the act of switching back and forth adds costs to other customers. When a large customer leaves because the market price of power is lower, other customers have to pick up the cost of the departing customer's share of high-priced resources. When that customer comes back to the system when the wholesale market price is higher, remaining customers' share of the existing lower cost resources is then diluted. There should not be any incentives for customers to frequently switch back and forth based on market conditions. [93]

PacifiCorp's proposal to prevent returning direct access customers from participating in future Five-Year Programs is a reasonable limitation on switching and fully consistent with the polices of SB 1149.

III. CONCLUSION

PacifiCorp's Five-Year Program complies with Order No. 12-500 and Oregon's direct access laws and policies by allowing customers the opportunity to move to long-term direct access, while assigning to them the costs related to their departure. The Consumer

[91] Stipulating Parties' Pre-Hearing Brief at 18-19.

[92] ORS 757.603(3)(b) ("The commission may prohibit or otherwise limit the use of a cost-of-service rate by retail electricity consumers who have been served through direct access . . .").

[93] Docket UM 1587, Reply Comments of the Citizens' Utility Board of Oregon at 2-3 (Sept. 14, 2012).

Opt-Out Charge requires departing customers to pay reasonable transition costs, measured over a ten-year horizon, and avoids shifting up to $58.9 million in transition costs to other customers. The Commission should approve the Consumer Opt-Out charge and all other aspects of PacifiCorp's proposed Five-Year Program.

Respectfully submitted this 1st day of July, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document in Docket UE 267 on the following named person(s) on the date indicated below by email addressed to said person(s) at his or her last-known address(es) indicated below:

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