BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1837

In the Matter of	)	
	)	REPLY COMMENTS OF NORTHWEST AND
PUBLIC UTILITY COMMISSION OF OREGON,	)	INTERMOUNTAIN POWER PRODUCERS
	)	COALITION
Investigation into the Treatment of New Facility Direct Access Load	)	
	)	
	)	

The Northwest and Intermountain Power Producers Coalition ("**NIPPC**") respectfully submits these limited Reply Comments on the Oregon Public Utility Commission (the "**Commission**") Investigation into the Treatment of New Facility Direct Access Load. The Opening Comments overwhelmingly demonstrate that the Commission should exercise its discretion to eliminate transition charges for new load. It is a core principle for NIPPC that customers with the ability to directly access the market not harm the remaining captive customers. This principle is met with respect to new load as long as a utility has not invested in generation to serve that load. The utilities have confirmed that their planning protocols do not include providing service to new loads in excess of 1 average megawatt ("aMW") absent certain kinds of notice that such new loads are actually going to materialize.[1] As such, as long as load elects to move directly to Direct Access prior to the utility planning window, such election will never cause the utility to incur unrecoverable investments necessitating transition costs.

No party has demonstrated how cost-of-service customers will be adversely affected by exempting new load from transition charges, and indeed they may benefit when new loads receive such exemptions. For example, the utilities can fulfill their responsibilities as the

[1] *See*, *e.g.,* PacifiCorp's November 6, 2017 Workshop Presentation on Forecasting New Loads, included as Attachment 1 to NIPPC's Opening Comments, page 3 of 6, specifying that PacifiCorp generally completes an Engineering Services Study Agreement, an Engineering Material Procurement Agreement, and a Master Electric Service Agreement prior to initiating any work on new load interconnections.

provider of last resort to new load in a manner that places the costs and risks of that service directly on new load, without relying upon transition charges to protect cost-of-service customers. This eliminates the potential need for expensive new generation being built for that load, which imposes costs on remaining cost-of-service customers. Most Parties agree that treating new customers differently does not amount to undue discrimination as a matter of law or as applied to any of the specific proposals.

NIPPC continues to recommend that the Commission adopt a straightforward approach to identifying new load that would be eligible to receive Direct Access Service without payment of transition charges (henceforth "**Exempt New Load**"). NIPPC's proposal specifies that Exempt New Load should include:

> (1) All load at a **new meter** that required execution of an Electric Service Requirements Agreement ("**ESRA**") or similar written commitment; and
>
> (2) the portion of load at an **existing or upsized meter** where the increase in load is serving new commercial or industrial infrastructure added behind the meter; and is **the larger of** (a) 10 aMW or (b) 20 percent above the highest two-month period of use during the prior three years.

This proposal is fully consistent with the utility-planning process and ameliorates all of the valid concerns expressed in opening comments by the Parties. It is predictable, easy to implement, avoids gamesmanship, and will allow Oregon to encourage business and economic development. Exempt New Load should not be included in existing Direct Access caps, or limited to green energy.

1. NIPPC'S TWO-PART NEW LOAD TEST IS CONSISTENT WITH THE UTILITY PLANNING PROCESS AND WOULD NOT CAUSE UNECONOMIC UTILITY INVESTMENT OR UNREASONABLE COST SHIFTS

The Commission should exempt all new load from transition charges, unless a customer has affirmatively informed the utility of its intention to purchase power under cost-of-service rates to serve that new load. It is axiomatic that, if a utility has neither included new load in its planning nor incurred costs to serve such load, then such load moving to Direct Access cannot create uneconomic utility investment that could give rise to transition charges. Oregon's Direct

Access statute only allows imposition of transition charges for recovery of "Uneconomic Utility Investment." Uneconomic Utility Investment, in turn, is expressly defined in Oregon's Direct Access statute, and only apply to *previously incurred* costs and otherwise unrecoverable investments made by the utility.[2] Provided that the utility is given notice by the customer prior to investing in new generation, no uneconomic utility investment should ever result.

a. Utilities do not plan for new large load in advance of binding agreements and will not incur uneconomic utility investment if such load moves to Direct Access

The Opening Comments in this proceeding make it clear that the utilities do not plan for large new load until after such load executes binding agreements, including a Master Electric Service Agreement ("**MESA**"). This is true whether the large new load is at a new location, or an existing meter. As such, because large new loads are not incorporated in the utilities' planning in advance of the MESA, utilities do not incur any uneconomic utility investment related to such loads, and no transition charges are appropriate.

Both PacifiCorp and PGE recognize that large load can be exempt from transition charges without leading to significant cost shifting. PacifiCorp notes that "[u]ntil new customer load is included in the load forecasting process, potential adverse impacts to cost-of-service customers is limited" and goes on to state that "[w]hen a large significant incremental customer load that is otherwise unplanned-for would elect direct access and only receive delivery service from the company, there is less potential for cost shifting to other customers from permanent direct access participation, since no investments have been previously made to accommodate supply for this load."[3] Similarly, PGE notes that "[i]n order to mitigate against cost shifting, the customer size must be large enough that it would not be embedded within the utility planning process." PacifiCorp notes that it requires execution of a MESA for any load above 1 aMW, and that "[t]he execution of a MESA typically indicates that the probability of new customer load occurring is high."[4] As Staff notes, "there is likely a correlation between the size of the load and

[2] CUB suggests in its opening comments that, within a regulated utility, it is not clear what "un-economic" means. CUB Opening Comments at 3. Given the definition of uneconomic utility investment in the statute, NIPPC is not clear about the source of CUB's confusion.
[3] PacifiCorp Opening Comments at 7.
[4] PacifiCorp Opening Comments at 4.

the length of notice of the load coming online." Staff goes on to note that "[t]he largest loads are individually forecast by both PGE and PacifiCorp on an annual basis using information from the customer themselves and the knowledge of the employees who work with these businesses. The likelihood of a large load being expected to come online, but going straight to direct access without the utility's prior knowledge, is low." [5]

Requiring load desiring to participate in New Load Direct Access provide notice at the time the MESA is executed, as NIPPC has proposed, means that the utility would never plan for load above 1 aMW that has elected Direct Access. By providing customers the opportunity to provide adequate notice, the likelihood that the utility would have planned for such load, but not have it join the system, would go from "low" to "non-existent."

b. All Load at New Meters that provide adequate notice should be entitled to Exempt New Load treatment

All load at new meters, regardless of load size, should be eligible for Exempt Direct Access to the extent it provides sufficient notice to the utility. PacifiCorp indicates that "[o]nce [its] load forecast has been completed by the load forecasting group in July, it is sent to the integrated resource planning team, among other departments in the company. [I]n some cases, the load forecast is updated after it has been completed in July to account for new information on customer loads."[6] To the extent a customer informs the utility that it intends new load to move directly to Direct Access service prior to the completion of the utility's load forecast, it should have the presumption that it is not included in that forecast plan. Execution of a MESA will likely be prior to this timeframe.

As an alternative, NIPPC believes that a six-month advance commitment, as proposed by Calpine Solutions, and deemed to be an acceptable time period by the California Public Utilities

[5] Staff Opening Comments at 7.
[6] *Id.* at 5.

Commission when faced with a similar utility planning exercise,[7] is also reasonable. Parties may disagree as to what constitutes reasonable notice to the utilities. Calpine's proposal allows Exempt New Load additional time to consider its resource options, but also provides the utility additional opportunities to compete for the New Load's business.

NIPPC strongly disagrees with PacifiCorp's assertions that "[a]s a threshold matter, new customer load less than 10 [aMW]) will not be considered 'new' because the company has already planned for these customers." This statement is without foundation and plainly incorrect. PacifiCorp has acknowledged that load above 10 aMW will likely be in excess of its baseline forecast, but that does not mean that load below such threshold necessarily will be included. As PacifiCorp notes, "[u]ntil new customer load is included in the load forecasting process, potential adverse impacts to cost-of-service customers is limited."[8] Where a customer provides notice to the utility *not* to plan for its increased load, continuing to do so would be imprudent. This is true for loads of all sizes.

Nor should utilities be allowed to make their own determination whether new load is entitled to Exempt New Load status based on the its own internal balancing test, as PacifiCorp proposes.[9] PacifiCorp's balancing test provides it with unfettered discretion that would effectively allow the company to unilaterally determine whether new load is entitled to Exempt New Load treatment. The current utility model provides incumbent utilities with a significant financial interest in preventing customers from taking Direct Access service, and allowing the utilities discretion to exempt some new load from transition charges and not to others will

[7] *See* Rulemaking regarding whether, or subject to what Conditions, the suspension of Direct Access may be lifted consistent with Assembly Bill 1X and Decision 01-09-060, CPUC Rulemaking Docket 07-05- 025, CPUC Decision 11-12-018, slip op. at pp. 49-51, 2011 Cal. PUC LEXIS 529 at ** 73-77 (Dec. 1, 2011).
[8] PacifiCorp Opening Comments at 7.
[9] *Id.* at 2 ("PacifiCorp will employ a balancing test to determine whether new customer load exceeding 10 aMW has already been planned for and should therefore be considered new for the purposes of direct access. With this balancing test, PacifiCorp will consider: (1) the anticipated timing of the new customer load coming online; (2) whether there is a new meter; (3) whether the load is located on a new site; (4) whether the new load includes a new facility; (5) whether the customer has executed a Master Electric Service Agreement (MESA); and (6) whether the new customer load exceeds the regression model's projected growth.").

create marketplace confusion and frustration. Instead, the Commission should adopt the clear guidelines proposed by NIPPC so that prospective businesses considering siting or expanding in Oregon have certainty with respect to their expected costs.

c. A substantial increase in load at an existing meter should be entitled to an irrebuttable presumption that it is Exempt New Load

In the case of an existing meter for an existing customer, an increase of load of at least 10 aMW should be entitled to an ***irrebuttable presumption*** that it qualifies as Exempt New Load. Industrial Customers of Northwest Utilities ("**ICNU**") similarly proposes a 10 aMW threshold "because it is large enough to exclude normal variations and minor increases in customer loads that would otherwise be captured within a utility's system planning, and because 10 aMW represents the amount necessary to be designated as a 'New Large Single Load' ('NLSL') under the Northwest Power Act." This 10 aMW level is appropriate for the initial years of any new load Direct Access program, and is so large as to merit an irrebuttable presumption that such load will be entitled to take Direct Access service without transition charges, if it timely elects such treatment.

NIPPC is cognizant of concerns as to whether an increase in load at an existing meter is truly new load, rather than simply a fluctuation based on economic cycles. To alleviate this concern, NIPPC's proposal also specifies that new load at existing meters must be the larger of 10 aMW *or* 20 percent above the highest two-month period of use during the prior three years. This additional test will help ensure that load at an existing meter is truly new, and not simply a factor of economic fluctuations.

Over time, the 10 aMW threshold irrebuttable presumption should be reduced, as the Commission, Staff, and market participants gain experience with this program.

NIPPC believes that its proposal that load at existing meters be entitled to an irreputable presumption that it be considered exempt new load if it meets the two part test of (a) 10 aMW or (b) 20 percent above the highest two-month period of use during the prior three years, and a

rebuttable presumption otherwise, is easy to implement and meets all of the concerns raised by parties to this proceeding. NIPPC acknowledges that other criteria may be reasonable and this approach is not the only possibility. The Commission should not limit its program in a manner that does not allow for Exempt New Load at existing meters under any circumstance.

d. The utility should bear the burden to demonstrate it planned for new load at an Existing Meter required to execute a MESA

Any load required to execute a MESA, whether at a new or an existing meter, should be entitled to a rebuttable presumption that it is Exempt New Load if the prospective customer has provided sufficient notice to the utility. For example, if a customer informs the utility that it intends to add facilities behind its existing meter requiring an additional 5 aMW, which will go into service three years later, there should be a presumption that the utility has not planned for such load, and it is entitled to Exempt New Load treatment. It should be the utility's obligation to rebut the presumption by demonstrating that it had already invested in generation facilities to serve such load, and that it was prudent to do so. For example, a utility may be able to rebut the presumption that load is new by demonstrating that it previously served load at that level in past years, prior to an economic downturn. But this burden of proof should be on the utility, not the customer.

2. ADVERSE IMPACTS ON COST-OF-SERVICE CUSTOMERS ARE GENERALIZED, THEORETIC AND HAVE NOT BEEN DEMONSTRATED OR QUANTIFIED BY ANY PARTY

Some Parties appear to have generalized concerns about adverse impacts to cost-of-service customers, but these concerns should not preclude elimination of transition charges for eligible new load. First, absent the removal of transition charges, many new loads may never materialize, and there is simply no way to know whether any such load would have come to Oregon. Parties may speculate about the effects of the New Load treatment and compare what cost-of-service rates might look like without a new program, but that presupposes that the new load would come to Oregon and would have paid traditional cost-of-service rates. This may not be a reasonable assumption. Instead, the assumption should be that at least *some* of the new

load would not have come to Oregon *but for* exemption from current transition charges. Second, any adverse effects necessarily assume that the Exempt New Load would have cross-subsidized old customers, if forced to pay either cost-of-service rates or transition fees. Regardless of whether this assumption is reasonable, the Commission should not force new customers to subsidize old customers.

3. EXISTING CUSTOMERS ALSO BENEFIT FROM NEW LOAD

There are several areas where New Load treatment is likely to provide benefits to existing cost-of-service customers. First, Exempt New Load will lower distribution costs for existing customers by contributing to the overall distribution costs and therefore lowering average distribution costs for everyone. This is especially true for load that would not have otherwise located in Oregon. Second, Exempt New Load will ultimately lower costs for existing cost-of-service customers by deferring the need to acquire the next increment of generation capacity, *i.e.* the next Carty, Tucannon facilities, etc. Any such new resource acquisitions inevitably increase rates above the otherwise depreciating capital costs. Alternatively, Exempt New Load may mean that utilities need not replace existing facilities as they retire. Finally, Exempt New Load could lower the utilities' costs associated with renewable energy certificates ("**RECs**") and Renewable Portfolio Standard ("**RPS**") compliance. In the context of rapidly declining costs for renewable resources, one could reasonably conclude that the above-market acquisition of yesteryear helped drive down current costs. As the market for renewable resources become increasingly more competitive, and demand for renewable resource rises accordingly, renewable costs may continue to decrease in the future. Thus, allowing New Load more optionality to procure renewable resources (potentially at above-market costs) could further economic trends that make renewable acquisitions more cost-effective for everyone.

4. EXISTING DIRECT ACCESS SYSTEM CAPS SHOULD NOT BE APPLIED TO EXEMPT NEW LOAD

Exempt New Load should not be included in the existing Direct Access program caps. Those caps were designed to protect against a large number of existing customers moving off the utilities' systems, especially all at once, and have no applicability to New Load, where the load was never previously served by the utility. Essentially, the current caps were designed to address an entirely different problem. In addition, existing cost-of-service customers' rights to select Direct Access should not be further limited by allowing Exempt New Load to "use up" their limited remaining available opportunities to elect to permanently select Direct Access. Staff and CUB suggest that some kind of cap for Exempt New Load designations may be appropriate, at least initially, but Staff agrees with the majority of the parties that applying the current caps to Exempt New Load is not warranted.[10]

Only the utilities have argued that Exempt New Load should be included in the existing Direct Access caps. PGE notes that there is still "room" available under its Direct Access cap and that using the same cap would allow PGE "to mitigate unforeseen challenges in planning and negative impacts on remaining customers."[11] As described above, as long as the utilities have notice that new load desires to move directly to Direct Access, there are no negative impacts on remaining customers, and it would not be appropriate to limit this important program based on ephemeral, unidentified "unforeseen challenges." PacifiCorp reasoned that using the current caps would limit potential risk of cost shifting from potential provider of last resort requirements.[12] This rationale ignores that cost shifting can be avoided by simply providing provider of last resort services to Exempt New Load at market rates. Both utilities advocate for an overly harsh remedy to alleviate speculative, or improbable cost-shifting problems. Exempt New Load should not be unreasonably limited.

[10] CUB Opening Comments at 6; Staff Opening Comments at 14.
[11] PGE Opening Comments at 12.
[12] PacifiCorp Opening Comments at 8.

5. EXISTING DIRECT ACCESS SYSTEM CAPS SHOULD NOT BE APPLIED TO NEW LOAD

PacifiCorp and PGE urge the Commission to limit Exempt New Load to renewable generation, ostensibly because the proposed legislation that led to this investigation included preferential treatment of renewable Direct Access.[13] This proposal to "cherry-pick" a single aspect of SB 979 in isolation, while ignoring all of the other aspects of SB 979, is a thinly veiled attempt to limit the applicability of a program that the utilities do not like.

As a policy matter, the Commission should not impose limitations on the Exempt New Load Direct Access program related to source of energy or program size, even though many entities seeking to take advantage of the New Load Direct Access program will likely be interested in obtaining renewable energy products.[14] Indeed, one of the significant benefits that Direct Access can offer to customers is the ability to provide power from specified renewable sources. However, it is not appropriate to limit the New Load Direct Access Program based on type of energy source. This program will help attract businesses to Oregon, and businesses need the ability to tailor products to meet their business objectives, such as the ability to purchase a hybrid of renewable and thermal power resources, as well as demand response resources that allow for sophisticated price hedging based to address weather conditions, to lock in a fixed price for power over a long term, or have power rates be lower in initial years than in later years, in order to facilitate debt financing. And, as Staff notes, "requiring green energy could be construed as running counter to the direct access principle of promoting competition and customer choice. SB 1149 does not contemplate the resource choice of ESS's and imposing a requirement of green energy in a potential new program could run counter to the intent of the legislature."

[13] See, e.g., *id.* at 8 ("Although the legislative history of SB 979 is not binding on the Commission, requiring that any new direct access program for new customer load be served by green energy options is consistent with the intent of SB 979."); PGE Opening Comments at 11 ("if the issue expands beyond just renewable power options, it is more appropriate to consider the transmission adjustment question through the SB 978 process rather than this docket").

[14] *See* SB 979 Testimony from various supporters demonstrating that businesses are looking for options to increase their renewable energy use, available at https://olis.leg.state.or.us/liz/2017R1/Measures/Exhibits/SB979; *see also* PGE Opening Comments at 11 (confirming that PGE's customers desire a renewable tariff).

SB 979 was an integrated proposal that contained a number of significant changes to the existing Direct Access statute. These changes went beyond transition costs for new load taking renewable generation. The Commission is not bound by the proposals in SB 979. As PGE notes, "SB 979 didn't pass the legislature and this docket doesn't restrict the question around changes in transition adjustment to renewable power options." To the extent the Commission believes that SB 979 should be given weight in this docket, however, it should consider all of SB 979. In fact, the Commission could adopt virtually all of the major provisions of SB 979 with its existing authority. If the Commission is considering SB 979, it should:

- Adopt the definition of New Commercial Load set out in SB 979:

  "New Commercial Load" means

  (a) An increase in the load of a nonresidential retail electricity consumer at a specific point of delivery during a calendar year in an amount that exceeds five percent of the maximum load of the nonresidential retail electricity consumer during the previous calendar year, or

  (b) The load of one or more nonresidential retail electricity consumers at a new delivery point that was created through the development of commercial or industrial infrastructure.

- Clarify that "uneconomic utility investments" only include the remaining undepreciated costs of such investments, to the extent they cannot be reasonably mitigated by the utility, (see SB 979, Section 39(a)), and that the utility has used diligent efforts to mitigate the costs (see SB 979, Section 3(d)).

- Eliminate all transition changes from new direct access load purchasing renewable generation, and define transition charges for existing load using renewable direct access at a lower rate than direct access taking standard generation, in order to take into account the various environmental benefits created therefrom.

- Limit transition charges for existing customers taking renewable Direct Access to five years of costs.

Each of these policies was part of SB 979 as an overall package, and all are based on sound policy in the best interests of Oregon. To the extent the Commission determines that any of the specific provisions of SB 979 should inform its decision in this docket, it should ensure that

the policies espoused therein are adopted to the maximum extent possible, and not allow the utilities to cherry pick limited sections while excluding others.

6. PGE'S VOLUNTARY TARIFF PROPOSAL IS OUTSIDE THE SCOPE OF THIS PROCEEDING

In addition to advocating for limiting Exempt New Load to renewable power, the utilities also suggest that they should be allowed to propose a renewable tariff. For example, PGE argues that a renewable tariff would allow the utility to provide a "cost-based alternative for customers" and would "ensure a more level playing field with electricity service suppliers.[15] PGE notes that the Commission's order in UM 1690 requires voluntary renewable energy tariff ("**VRET**") terms and conditions to mirror those for Direct Access.

The proposal to consider a VRET option in this proceeding is misguided. Procedurally, it is beyond the scope of limited issues that were identified early on in this process and was not thoroughly vetted. Substantively, the utilities are free to file a proposed VRET, consistent with the VRET policies and standards set by the Commission, in a separate proceeding at any time. NIPPC supports fair competition and does not want to limit the utilities' opportunity to compete for Exempt New Load. That said, the utilities have adequate direction and authority (from both the Legislature and the Commission) to participate in the Direct Access market through an affiliate, and/or propose a VRET consistent with Commission's order in UM 1690 and this investigation does not have any bearing on the utility's option to do so.

7. CONCLUSION

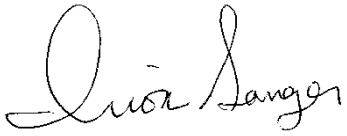
For the reasons described above, NIPPC recommends that the Commission adopt a new Direct Access program to allow Exempt New Load to obtain Direct Access service without being subject to current Direct Access transition fees or caps. Because customers seeking large amounts of new load are already required to provide adequate notice to utilities before obtaining cost-of-service rates, the existing system could easily be modified to provide

[15] PGE Opening Comments at 11.

adequate notice before obtaining Exempt New Load Direct Access rates as well. Oregon needs to have policies in place to allow for the economic development needs of businesses with true new loads in order to grow its economy.

Respectfully submitted,

Carl Fink
Blue Planet Energy Law
Suite 200, 628 SW Chestnut Street
Portland, OR 97219
971.266.8940
CMFink@Blueplanetlaw.com



Irion A. Sanger
Sidney Villanueva
Sanger Law, PC
1117 SE 53rd Avenue
Portland, OR 97215
Telephone: 503-756-7533
Fax: 503-334-2235
irion@sanger-law.com

Of Attorneys for the Northwest and Intermountain Power Producers Coalition