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September 8, 2017

## *Via Electronic Filing*

Public Utility Commission of Oregon  
Attn: Filing Center  
201 High St. SE, Suite 100  
Salem OR 97301

Re: In the Matter of PUBLIC UTILITY COMMISSION OF OREGON  
Investigation into the Treatment of New Facility Direct Access Load.  
**Docket No. UM 1837**

Dear Filing Center:

Please find enclosed the Opening Brief of the Industrial Customers of Northwest Utilities in the above-referenced docket.

Thank you for your assistance. If you have any questions, please do not hesitate to call.

Sincerely,

/s/ Jesse O. Gorsuch  
Jesse O. Gorsuch

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1837**

In the Matter of	)	
	)	
	)	OPENING BRIEF OF THE
PUBLIC UTILITY COMMISSION OF	)	INDUSTRIAL CUSTOMERS OF
OREGON	)	NORTHWEST UTILITIES
	)	
Investigation into the Treatment of New	)	
Facility Direct Access Load	)	

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**I. INTRODUCTION**

Pursuant to the Administrative Law Judge’s (“ALJ”) July 11, 2017 ruling in the above-referenced matter, the Industrial Customers of Northwest Utilities (“ICNU”) files this Opening Brief with the Oregon Public Utility Commission (“Commission”).

This docket will investigate whether the Commission should allow new nonresidential customer load to take direct access without paying transition charges (or receiving transition credits). At the prehearing conference in this docket, the parties agreed to a procedural schedule in which they first file briefs addressing threshold legal issues associated with exempting new loads from paying transition charges, and subsequently file comments addressing factual issues. The purpose of this procedural schedule, as ICNU understands it, is to ensure that there are no legal barriers to exempting new customer loads from paying transition charges before parties expend resources identifying whether, and under what conditions, the Commission

should authorize new customer load to transition to direct access without paying transition charges.

As ICNU discusses below, there are no such legal barriers. The Commission has authority to eliminate transition charges for new direct access loads under current Oregon law. Indeed, allowing this to occur may advance the Commission’s statutory responsibilities.

## II. ARGUMENT

### A. The Commission Has Statutory Authority to Exempt New Direct Access Loads From Transition Charges.

Fundamentally, the Commission is to regulate in the public interest and to ensure that the rates utility customers pay are fair and reasonable.<sup>1/</sup> For purposes of direct access, ORS 757.646(1) refines these general duties by providing that “[t]he duties, functions and powers of the [Commission] shall include developing policies to eliminate barriers to the development of a competitive retail market structure.” With respect to transition charges in particular, the legislature has provided the Commission with discretion over whether and when to impose such charges in a manner that best advances its policy prerogatives. The direct access law explains that the Commission “*may* include transition charges ... that reasonably balance the interests of retail electricity consumers and utility investors.”<sup>2/</sup> The Commission is further authorized to allow either full or partial recovery of stranded costs created by direct access programs, but again, is not required to do so.<sup>3/</sup>

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<sup>1/</sup> ORS 756.040.

<sup>2/</sup> ORS 757.607(2) (emphasis added).

<sup>3/</sup> Id.

The record in this proceeding does not yet contain evidence on whether and under what conditions a new customer load that takes direct access would impose costs on remaining customers or would place additional burdens on the utilities. ICNU understands these issues to be within the scope of comments to be filed in the next phase of this proceeding, as well as questions related to what constitutes a new customer load and what, if any, limitations there should be on the size and timing of new load transitions. However, after considering the full record of this proceeding, should the Commission determine that new customer load may take direct access without imposing undue harm on the utility or its customers, then the direct access law not only authorizes the Commission allow this, it encourages the Commission to take such action because this would further “eliminate barriers to the development of a competitive retail market structure.”<sup>4/</sup>

**B. Exempting New Direct Access Loads From Transition Charges Would Not Appear to Result in Rate Discrimination or an Undue Preference**

Nor does it appear that allowing new customer loads to take direct access without paying transition charges would result in rate discrimination or the provision of an unreasonable preference to these customers. ORS 757.310(2) provides that a “public utility may not charge a customer a rate or an amount for a service that is different from the rate or amount the public utility charges any other customer for a like and contemporaneous service *under substantially similar circumstances.*”<sup>5/</sup> Similarly, ORS 757.325 provides that no “public utility shall make or give *undue or unreasonable* preference or advantage to any particular person or locality, or shall

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<sup>4/</sup> ORS 757.646(1)

<sup>5/</sup> ORS 757.310(2) (emphasis added).

subject any particular person or locality to any *undue or unreasonable* prejudice or disadvantage in any respect.”<sup>6/</sup>

In the past, the Commission has interpreted ORS 757.310 to prohibit discrimination “within a customer class.”<sup>7/</sup> However, this was based on the assumption that each customer within a class is in a similar economic situation.<sup>8/</sup> The Commission has noted that “it can use any economic justification – so long as it is a reasonable one – in the creation of customer classes” and that it may “permit rates tailored to the need of individual customers – again, so long as there is a reasonable economic justification for doing so.”<sup>9/</sup> It is unclear at this point whether the Commission would need to establish a separate rate class for new direct access loads, but, regardless, there appears to be a reasonable economic justification for treating these loads differently from existing loads transitioning to direct access.

The purpose of transition charges is to prevent remaining customers from bearing higher fixed costs as a consequence of an existing customer electing direct access and, therefore, reducing its contribution to these fixed costs. To the extent the utility has not incurred costs to serve a new customer, then existing customers will not be harmed by that customer choosing to go straight to direct access. “Transition charges” are called this for a reason – a new customer load is not transitioning to anything. If the record of this proceeding supports this conclusion, then new customer loads are not in “substantially similar circumstances” to existing customer loads and, to the extent exempting new loads from the payment of transition charges constitutes a

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<sup>6/</sup> ORS 757.325 (emphasis added).

<sup>7/</sup> Re Portland General Electric Company, Docket Nos. UE 101/DR 20, Order No. 97-408, 1997 WL 913205 at \*5-\*6 (Oct. 17, 1997).

<sup>8/</sup> Id. at \*6.

<sup>9/</sup> Id.

preference in favor of these loads, it is not an “undue” or “unreasonable” preference. In fact, requiring new loads to pay transition charges in the face of a record that demonstrates an absence of cost-shifting associated with these loads would arguably constitute an undue and unreasonable prejudice against these customers, as there would be no economic justification for imposing such charges.

#### **IV. CONCLUSION**

Whether the Commission should exempt new customer loads from paying transition charges when these customers elect direct access awaits a full record in this proceeding. From a purely legal perspective, however, ICNU concludes that there is no prohibition against exempting new customer loads from paying transition charges.

Dated this 8th day of September, 2017.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Tyler C. Pepple

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