BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1837

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

Pursuant to the Prehearing Conference Memorandum dated July 11, 2017, in this docket, the Northwest and Intermountain Power Producers Coalition ("**NIPPC**") submits its reply brief on the limited issue whether the Oregon Public Utility Commission (the "**Commission**") has the legal authority to reduce or eliminate the applicability of transition charges for new load, *i.e.,* load desiring to take service through Direct Access that has not previously been served by its interconnected distribution utility.[1] All parties to this proceeding (save one) are in uniform agreement that the Commission has full authority to do so, and the opening briefs in this proceeding provide the substantive legal argument supporting this conclusion. NIPPC briefly addresses the arguments made by the Citizens' Utility Board of Oregon ("**CUB**"), the sole entity that does not support this premise, and explains why CUB's arguments are misplaced.

[1] The Commission's May 16, 2017 Order opening this proceeding (Order 17-171) adopts Staff's May 4, 2017 recommendation (as amended) that this proceeding address a number of specific factual issues, such as what constitutes new customer load. Pursuant to the June 26, 2017 prehearing conference and the Administrative Law Judge's July 11, 2017 Memorandum, NIPPC is limiting this Reply Brief to specified threshold legal issues. NIPPC reserves the right to address all remaining issues at the appropriate time.

1. Different Transition Charges for New and Existing Customers Is Economically Justified and Not Undue Discrimination

CUB cites a series of cases from Oregon's appellate courts to assert that different rates for customers within the same customer class would be unlawful discrimination.[2] However, none of the cited cases actually found any unlawful discrimination occurring within a customer class. Each cited case addressed alleged discrimination occurring where rates were different for one customer class as compared to another customer class. These cases do not establish a per se bar against different rates for customers within the same customer class, as CUB appears to assert. The only statement from these cases that comes close to establishing the point asserted by CUB appears in *American Can Co. v. Lobdell*, where the Court of Appeals stated: "ORS chapter 757 prohibits discrimination among members of the *same* consumer class, but does not disallow discrimination among *classes*, unless that discrimination is unjust."[3] This statement, however, is merely dicta in support of the Court's rejection of allegedly unlawful discrimination between different classes.[4] The dicta merely posits – as a general matter – that unlawful discrimination is more likely to occur if rates were different for customers in the same customer class. The court ultimately rejected the challenge to the Commission's rate allocations, reasoning it would not "choose between two economic theories" to override the Commission's decision.[5]

Likewise, none of the statutes cited by CUB establish a per se rule against different rates applying under different circumstances within a customer class. Instead, the statutes generally prohibit "*undue or unreasonable* preference or advantage to any particular person."[6] So long as the distinction is

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[2] CUB Initial Brief at 3 (citing *American Can Co. v. Lobdell*, 55 Or. App. 451, 463 (1982); *Publishers Paper Co. v. Davis*, 28 Or. App. 189, 197 (1977); *American Can Co. v. Davis*, 28 Or. App. 207, 227-228 (1977)).
[3] 55 Or. App. At 463 (emph. in original).
[4] *Id.*
[5] *Id.*
[6] ORS 757.325(1) (emph. added).

reasonable it is not unlawful. CUB states that ORS 757.310(2) prohibits "charging different rates to customers within the same customer class."[7] But that is incorrect. The statute does not use the words "customer class" and instead it states 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*."[8] There is no statutory bar against different charges for different customers in the same customer class if the different charges are based upon different circumstances.

Therefore, the legal issue is whether there is a rational economic justification for charging the new customers different transition charges from existing customers, and CUB's argument that customers in the same customer class must pay the same transition charges has no basis in the statutory requirements or case law. The briefing of NIPPC and other parties establishes that there is an economic justification for exempting new customers from transition charges for generation resources they never used.

Additionally, other states have found economic justification for eliminating stranded cost charges for new customers locating for the first time in the state. Just recently, the Public Utilities Commission of Nevada found that a new large customer should not pay that state's stranded cost charges for the incumbent utility's previously acquired generation resources.[9] In the circumstance of the new large customer moving directly to the market for generation services, the Nevada Commission construed its laws "to protect Nevada ratepayers and those businesses who exist and operate under Nevada's current regulatory compact with NV Energy and the investments *already made* under the existing paradigm."[10]

[7] CUB Initial Brief at 3.
[8] ORS 757.310(2) (emph. added).
[9] *Petition of Google Inc. for a Declaratory Order regarding the impact analysis that will be performed if Google seeks to obtain service from a provider of new electric resources pursuant to NRS Chapter 704B*, Nevada Public Utilities Commission Docket No. 17-04019, 2017 Nev. PUC LEXIS 105 (Sept. 8, 2017).
[10] *Id.* at *11.

In doing so, it concluded those laws "should not be used to burden new businesses to Nevada where no meaningful relationship with NV Energy exists. Ratepayers should feel no financial impact."[11]

There is no basis in Oregon law to reach a contrary result for new customers seeking to locate in Oregon regardless of what category of customer class they might otherwise be required to enter if they chose to purchase generation services from the incumbent utility.

2. The Commission Can Treat New Load as a Separate Customer Class

As noted above, CUB's argument that the Commission does not have authority to differentiate transition charges between existing and new load is premised entirely on the assumption that new and old load must be of the same customer class. NIPPC disputes CUB's argument that Oregon law contains a per se bar against different rates within a customer class. But even assuming *arguendo* such a bar exists, CUB provides no explanation of why the Commission cannot create a new customer class for new customers that have never taken service and commit not use the interconnected distribution utility's generation services. Doing so is within the Commission's discretion and would moot CUB's arguments.

CUB recognizes that "the Commission may authorize differential rates among classes of customers, but argues that the law 'prohibits discrimination among members of the *same* consumer class…'" (emphasis original).[12] As demonstrated in NIPPC's initial brief in this docket, the Commission has broad authority to create a new service classification for new load, as existing and new load has its own distinct set of circumstances. *See Publishers Paper Co. v. Davis*, 28 Ore. App. 189, 197 (1977) (upholding differential rates based on customer class because each class "receives its own distinct form of service and has its own distinct set of circumstances"); *American Can Co. v. Davis*, 28 Ore. App. 207, 227-228 (1977) (affirming differential rates among classes of customers). In addition, NIPPC, the

[11] *Id.*
[12] CUB Initial Brief at 3.

Industrial Customers of Northwest Utilities, and Vitesse recognized that the Commission has already determined that direct access customers can be treated differently.[13] Even PacifiCorp and Portland General Electric (the "**Joint Utilities**") recognized that the Commission can approve different transition adjustments for new customer loads at new sites.[14] Treating customers differently based on when they initiate service is consistent with longstanding regulatory policy and therefore creating a new customer class for new customers choosing direct access is reasonable and lawful.[15]

3. The Commission Retains the Ability to Prevent Unwarranted Cost Shifts

CUB's subsidiary argument is that, even if eliminating transition adjustments was not discriminatory, the Commission would still have to find that elimination "would not shift *any* unwarranted costs to the other utility customers." CUB Initial Brief at 4 (emphasis CUB's). In highlighting the term "any," CUB glosses over the fact that cost shifts resulting from Direct Access are not prohibited; rather, they are expressly allowed, so long as they are not "*unwarranted*." The legislature understands how to draft language that would eliminate all cost shifting, as they did in House Bill 4126, regarding voluntary renewable energy tariffs,[16] but they did not do so with respect to Direct Access.

The statutes provide that transitions charges are one tool that the Commission has the *discretion* to utilize "to reasonably balance the interests of retail electric consumers and utility investors."[17] The

[13] NIPPC Initial Brief at 11-13, ICNU Initial Brief at 3-5, Vitese Initial Brief at 4-5 (all citing *In re Portland General Electric Co*., Docket No. UE 101/DR 20, Order No. 97-408 (Oct. 17, 1997).
[14] Joint Utilities Initial Brief at 2.
[15] For example, the Federal Energy Regulatory Commission – and the courts – have long approved differing treatment of utility customers based on timing of service. *See, e.g., Hughes v. Talen Energy Marketing*, 136 S. Ct. 1288 (2016) at 1294 (describing PJM's new-entrant and minimum offer rule); *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 (2009) (allowing merchant transmission developer to offer different rates based on time of customer commitment); *Certification of New Interstate Natural Gas Pipeline Facilities*, *Statement of Policy*, 88 FERC ¶ 61,277, *clarified*, 90 FERC 61,128 (1999), *further clarified*, 92 FERC 61,094 (2000) (setting policy for interstate pipelines to charge different rates for new facilities).
[16] See HB 4126, Section 3(4) "All costs and benefits associated with a voluntary renewable energy tariff shall be borne by the nonresidential customer receiving service under the voluntary renewable energy tariff."
[17] ORS 757.607(2).

statute goes on to make clear that the Commission has *no obligation to allow for recovery of a utility's uneconomic utility investments at all*, specifying that "the commission *may* determine that full or partial recovery of the costs of uneconomic utility investments … is in the public interest."[18] This fact alone dictates that the Commission has authority to determine that the public interest requires elimination of transition charges from new load.

Finally, NIPPC contests CUB's apparent assumption that allowing new load to avoid transition charges will cause any form of cost shift. Consider the example of a new market entrant considering construction of a new data center either in Oregon or Mississippi. If that entity chose to locate in Mississippi, they would make no contribution to the utility's embedded generation costs, and all such costs would be borne by existing customers. If they chose to locate in Oregon, by contrast, they would contribute to the costs of the utility's distribution system. *Because the load was never going to contribute to the utility' generation costs*, allowing it to receive service through Direct Access *does not create any cost shift*. Instead, this new load reduces costs for all the utility's remaining customers.

This is true whether or not the utility had planned for some level of load growth. And, even if the utility did plan for such growth, but lost out to competition in the retail market, the Commission has the ability "to reasonably balance the interests of retail electric consumers and utility investors" and not require reimbursement for such costs. Whether or not the Commission chooses such a policy is outside of the scope of this portion of the proceeding. But the fact that it is an option available to the Commission underscores the fact that the Commission has full authority to reduce or eliminate transition charges for new load seeking Direct Access service.

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[18] Id. Emphasis supplied.

4. Conclusion

NIPPC submits that the Commission has full authority to allow new load to take Direct Access service without paying transition charges. The law makes it clear that application of transition charges is discretionary, not mandatory; the Commission "may" allow them, but is not required to do so. The law is clear that new load is not similarly situated to existing load, and can be served under different rates without creating undue discrimination.

Dated this 10th day of October 2017.

Respectfully submitted,

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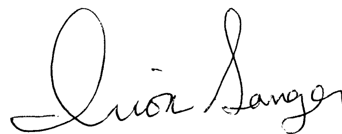

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