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October 10, 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 Reply 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	)	
	)	
	)	REPLY BRIEF OF THE INDUSTRIAL
PUBLIC UTILITY COMMISSION OF OREGON	)	CUSTOMERS OF NORTHWEST UTILITIES
	)	
	)	
Investigation into the Treatment of New Facility Direct Access Load.	)	

I. INTRODUCTION

Pursuant to the Administrative Law Judge's July 11, 2017 ruling in the above-referenced matter, the Industrial Customers of Northwest Utilities ("ICNU") files this reply brief with the Oregon Public Utility Commission ("Commission").

Of the numerous parties who filed opening briefs addressing whether the Commission has the legal authority to exempt new direct access loads from transition charges, including both Portland General Electric Company ("PGE") and PacifiCorp, only the Oregon Citizens' Utility Board ("CUB") concluded that the Commission lacked such legal authority.

ICNU continues to agree with the vast majority of parties that the Commission has authority to eliminate transition charges for new direct access loads under current Oregon law. In fact, creating such a program would likely further the Commission's legislative mandate to "eliminate barriers to the development of a competitive retail market structure."[1/]

[1/] ORS § 757.646(1).

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II. ARGUMENT

A. The Commission May Permit Utilities to Charge Different Rates to Customers within the Same Class.

In its opening brief, CUB concludes that the Commission may never allow different rates to be charged within the same customer class.[2/] With respect to review of utility rates, the Commission's fundamental obligation is to ensure that no "undue or unreasonable preference" is given to any person, and that utilities charge equal rates "for a like and contemporaneous service under substantially similar circumstances."[3/] CUB misapplies this statutory standard. As this Commission has noted, these statutory obligations necessarily imply a "term of comparison."[4/] While customers in the same rate class are often similarly situated, the Commission can, and should, inquire further.

The cases CUB cites assume, and do not determine, that each customer within a class is always in a similar economic situation and therefore must be treated equally. CUB's chosen cases discuss rate design and cost allocation between classes. For instance, American Can v. Lobdell discusses the Commission's authority to use a long-run incremental cost method ("LRIC") to set rates instead of a cost of service model. [5/] Publishers Paper Company v. Davis addresses the same issue.[6/] In both cases, customers challenged the Commission's LRIC models, arguing that it led to unfair allocation of costs *between* rate classes. At no point do either of

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2/ CUB Opening Brief at 2-4.
3/ ORS §§ 757.325, 757.310.
4/ Nw. Nat. Gas Co., Docket No. DR 11, Order No. 93-1273, 1993 WL 417547 (Or. P.U.C.) (Sept. 7, 1993), aff'd, Chase Gardens, Inc. v. Oregon Pub. Util. Comm'n, 131 Or. App. 602 (1994).
5/ 55 Or. App. 451, 462-63 (1982).
6/ 28 Or. App. 189, 197-99 (1977).

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these cases address whether customers within the same rate class are always similarly situated; they simply assume as much for the sake of comparison with allocation between rate classes. American Can Company v. Davis is even less persuasive: there, the Court of Appeals again affirmed the Commission's authority to choose from a variety of rate design options.[7/] And the Court also found that the Commission did not necessarily have to obligate utilities to charge identical rates within single rate classes in all circumstances.[8/]

Just as the statutes themselves do not require the Commission to treat customers within the same rate class identically, these cases do not infer such a black and white limitation into their language, as CUB appears to argue. If such an interpretation were to be made, the Commission or a court should do so explicitly.

Rather, distinctions between customers, even those in the same rate classes, may justify charging distinct rates.[9/] A determination that a rate is either "unjust and unreasonable" or "unduly discriminatory" must be based on all the facts of a particular situation, not just a solitary finding that the rates charged are different.[10/] It is not enough to show that a utility has treated two customers differently, because "the disparate treatment must also, of course, be undue or unreasonable."[11/] This is a two-step review: to violate ORS § 757.310 or ORS § 757.325, a rate or charge must differ from customer to customer, and that difference must be "undue or unreasonable." CUB's analysis of the Commission's authority does not take this second step into consideration.

[7/] 28 Or. App. 207, 217 (1977).
[8/] Id. at 226.
[9/] Chase Gardens, 131 Or. App. at 608.
[10/] Springfield Educ. Ass'n v. Springfield Sch. Dist., 290 Or. 217, 228-29 (1980).
[11/] Id.

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The difference between customer types that justifies disparate treatment is clear in this proceeding: new direct access customers have never taken service from the incumbent utility, and therefore, have no previous service away from which to "transition." On this basis alone, a clear "term of comparison" justifies disparate treatment, even if customers take service in the same rate class.

B. Even if the Commission Cannot Authorize Different Rates within the Same Customer Class, it Can Create New Customer Classes to Accomplish Similar Goals.

Even if the Commission could not allow utilities to charge different rates within the same customer class, it could accomplish the same goal by creating new customers classes in this case.[12/] 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."[13/] By all appearances, the Commission could find sufficient economic justification for treating these new loads differently from existing loads transitioning to direct access.

In fact, it may have to do this. Both PGE and PacifiCorp's direct access tariffs do not appear to apply to a new load. PGE's Schedule 489, for instance, applies to "each Large Nonresidential Customer whose Demand *has exceeded* 4,000 kW more than once within the preceding 13 months." It continues, "[t]o obtain service under this schedule, Customers must initially enroll a minimum of 1 MWa determined *by a demonstrated usage pattern* …."

12/ ORS § 757.230.

13/ Re Portland General Electric Company, Docket Nos. UE 101/DR 20, Order No. 97-408, 1997 WL 913205 (Or. P.U.C.) at *5-*6 (Oct. 17, 1997).

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Similarly, PacifiCorp's Schedule 748 is "applicable to Consumers who have chosen to receive electricity from an ESS, to electric service loads which *have registered* 1,000 kW or more, more than once in a preceding 18-month period." A new load, by definition, cannot have exceeded the usage thresholds in these tariffs, and cannot have a demonstrated usage pattern necessary to qualify for service. Thus, a new direct access load would not in any event appear to be eligible for inclusion in the same rate class as existing customers electing to take direct access. This further demonstrates that there are rational economic distinctions between existing load transitioning to direct access and new load taking service for the first time and doing so under a direct access program.

C. The Commission Has Sufficient Authority to Prevent Cost Shifting.

In its opening brief, CUB argued that allowing new direct access customers to avoid transition charges will inevitably shift costs to current customers.[14/] In CUB's view, current utility practices are insufficient to prevent cost shifting. These are factual issues better suited for comment at a later stage. At this point in the proceeding it is sufficient to note that the Commission has ample legal authority to ensure that the utilities' "other customers" do not bear any shifted costs if new direct access customers are exempted from transition charges. The factual issues that CUB raises are worthy of discussion, but CUB's mere allegation of the possibility of cost-shifting does not, by itself, strip the Commission of the legal authority to establish a direct access program without transition charges for new customers.

[14/] CUB Opening Brief at 4.

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III. 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 continues to conclude that there is no prohibition against exempting new customer loads from paying transition charges.

Dated this 10th day of October, 2017.

Respectfully submitted,

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