

# Davison Van Cleve PC

Attorneys at Law

TEL (503) 241-7242 • FAX (503) 241-8160 • jog@dvclaw.com  
Suite 450  
1750 SW Harbor Way  
Portland, OR 97201

May 21, 2018

## *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 the PUBLIC UTILITY COMMISSION OF OREGON,  
Rulemaking Related to a New Load Direct Access Program  
**Docket No. AR 614**

Dear Filing Center:

Please find enclosed the Comments of the Alliance of Western Energy Consumers on the May 17, 2018 Staff Report 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

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**AR 614**

In the Matter of	)	COMMENTS OF THE ALLIANCE OF
	)	WESTERN ENERGY CONSUMERS
Rulemaking Related to a New Load Direct	)	ON THE MAY 17, 2018 STAFF
Access Program.	)	REPORT
_____	)	

**I. INTRODUCTION**

The Alliance of Western Energy Consumers (“AWEC”) appreciates the opportunity to comment on the May 17, 2018 Staff Report in the above-referenced docket, which includes proposed rules for a new load direct access (“NLDA”) program. AWEC strongly supports the creation of a NLDA program and appreciates Staff’s efforts in developing rules for an initial NLDA program. Overall, AWEC supports the draft rules, but has concerns with a few provisions, which are discussed below. For ease of reference, these comments are ordered based on the sequence of the rules and not necessarily in order of significance.

**II. COMMENTS**

**A. OAR 860-038-0700 (Definitions)**

1. “Cost of Service Eligible Load”, “Existing Load Shortage”, and “Historic Cost of Service Load”

As AWEC understands the proposed draft rules, these definitions work together to prevent cost-shifting to bundled service customers if a NLDA customer shifts load from its cost-of-service site to its NLDA site. The “Historic Cost of Service Load” is a customer’s peak load

on cost-of-service rates in the previous five years. The “Cost of Service Eligible Load” is the current customer load on cost-of-service rates at any given time once a customer also has a NLDA site. Any positive difference when the “Cost of Service Eligible Load” is subtracted from the “Historic Cost of Service Load” constitutes the “Existing Load Shortage” for which the NLDA customer must pay the equivalent of a short-term transition adjustment.

AWEC does not object to the goal underlying these definitions – preventing gaming of the system by transferring existing cost-of-service load to direct access, and potential cost-shifting as a consequence – but questions whether these safeguards are necessary and, even if they are, has concerns with how Staff has proposed to address this goal.

There is no similar restriction on load-shifting for customers that have sites in existing direct access programs even though the potential and incentives for customers to do this are, in theory, present to the same extent. This raises serious questions over whether an Existing Load Shortage payment would be discriminatory and unduly prejudicial to NLDA customers. NLDA customers would be subject to “an amount for a service [the bundled rate applicable to their cost-of-service facilities] that is different from the ... amount the public utility charges any other customer for a like and contemporaneous service under substantially similar circumstances.”<sup>1/</sup> Existing direct access customers would be receiving “a like and contemporaneous service under substantially similar circumstances” without being subject to the Existing Load Shortage payment.

Just as importantly, there is no evidence to suggest that an Existing Load Shortage payment will be necessary. AWEC is unaware of any claims that load-shifting is occurring

---

<sup>1/</sup> ORS 757.310(2).

under existing direct access programs. This is likely because it is neither simple nor inexpensive to shift load from one site to another as it usually involves moving infrastructure as well. There is no reason to believe this would be any different with a NLDA site. The proposed rules requiring an Existing Load Shortage payment create a solution in search of a problem.

In addition to the legal and practical problems with the Existing Load Shortage payment, the proposed definitions establishing this payment have other shortcomings as well. First, by pegging the benchmark to the five-year historic peak load of a customer, the draft rules would require a transition payment for any reduction from this peak, regardless of the reason. This would discourage energy efficiency at these cost-of-service sites because any direct cost savings associated with such energy efficiency would be offset by “Existing Load Shortage” payments. AWEC does not believe such an outcome is in the best interest of other cost-of-service customers, nor would it be reflective of state policy, which requires acquisition of all cost-effective conservation.<sup>2/</sup> Moreover, there may be any number of other legitimate reasons for a customer to reduce its cost-of-service load that does not involve shifting that load to a direct access site. A customer may decide to reduce its production capacity for economic reasons or may decide to move that production to a different state altogether. If a customer is economically penalized for this decision this raises significant interstate commerce concerns.<sup>3/</sup>

Second, the draft rules would penalize customers with more variable loads without an economic justification for doing so. Customers with normal and consistent load

---

<sup>2/</sup> SB 1547 § 19. AWEC notes that the proposed draft rules would not invalidate a site from the NLDA program if it dropped below 10 aMW due to the acquisition of energy efficiency, among other things. Proposed OAR 860-038-0730(3).

<sup>3/</sup> See, e.g., Pike v. Bruce Church, 397 U.S. 137, 142 (1970) (creating balancing test that examines, among other things, whether a legitimate state interest could be “promoted as well with a lesser impact on interstate activities”).

variations both before and after participation in the NLDA program would need to make “Existing Load Shortage” payments for any difference from their five-year historical peak load after they joined the NLDA program even though their load variations are substantially identical to those they experienced prior to the NLDA program. This shifts risk and cost responsibility for load variations that have always been on the utility (and will continue to be on the utility with respect to customers that do not have a NLDA site) to NLDA customers.

Third, the draft rules would apply an “Existing Load Shortage” payment in perpetuity. At some point it becomes speculative and administratively burdensome to continue to track individual customer load changes on the basis that they are shifting load to direct access. As the economy and technology changes, adjustments in load that have nothing to do with direct access are to be anticipated. It is unreasonable to hold customers to a constant load expectation forever.

AWEC, therefore, recommends that the Commission remove these definitions from the proposed rules, as well as subsection (2) of OAR 860-038-0720 implementing these definitions. As Staff notes in its Report, these rules represent only phase one of the rulemaking process, with phase 2 addressing more complicated aspects of a NLDA program. Stakeholders could investigate the likelihood of load-shifting in this second phase, as well as the best way to address it.

If, however, the Commission wishes to retain some safeguards against load-shifting, then without waiving its legal arguments above, AWEC makes the following recommendations. First, the “Historic Cost of Service Load” should be the average load over the most recent one-year period. Any “Existing Load Shortage” payments would then be based on

reductions from the one-year average rather than calculated on a monthly basis, as Staff has proposed.<sup>4/</sup> Using an average load rather than a peak load will account for normal variations over the course of a year. AWEC recommends a one-year period because there may be significant load increases or decreases over a five-year period as a customer grows or shrinks, which would improperly skew the data. The most recent one-year period would provide the most accurate benchmark.

Second, any reduction to cost-of-service load from the one-year average should be accompanied by a corresponding increase to direct access load. This would provide presumptive evidence that a customer is inappropriately moving load from cost-of-service to direct access. Alternatively, the rules could provide the customer with the opportunity to demonstrate that the reduced load is due to factors other than load-shifting to a direct access site.

Third, any reduced cost-of-service load that results in an “Existing Load Shortage” payment should be net of verifiable conservation savings or other demand-side investments the customer makes in order to ensure state policies are promoted.

Fourth, any obligation to make an “Existing Load Shortage” payment should terminate after five years. AWEC submits that this is a reasonable period of time to verify whether load-shifting is occurring, after which time the correlation between loads on cost-of-service and direct access become too attenuated to justify tracking it.

Finally, AWEC recommends renaming “Cost of Service Eligible Load” to “Existing Cost of Service Load” as this phrase would seem to better reflect the intent of the definition, which is to capture actual cost-of-service load at the relevant time. The word

---

<sup>4/</sup> Proposed OAR 860-038-0720(2).

“eligible” is confusing because NLDA load is itself “eligible” for cost-of-service rates, but it is not a component of the definition as AWEC understands it.

2. “New Large Load”

Under OAR 860-038-0700(2)(h)(B), there is an apparent inconsistency where the definition of “New Large Load” includes a requirement that there be an increase in power requirements of at least 10 aMW “in any consecutive 12 month period.” Proposed OAR 860-038-0730(3), however, disqualifies a NLDA customer if the facility “is less than [10 aMW] per year in the *second or third year* of receiving service” (emphasis added). Consequently, under the definition of New Large Load, a facility must only reach the 10 aMW threshold in any 12-month period, but would be disqualified under a separate rule if it fell below this threshold in a particular year. AWEC recommends reconciling these definitions, with the requirements of Proposed OAR 860-038-0730(3) prevailing.

**B. OAR 860-038-0710 (Requirement to Offer a New Load Direct Access Program)**

AWEC recommends striking the phrase “cost-of-service consumers” from this proposed rule, as it appears confusing. A New Large Load consumer will not be a “cost-of-service consumer.”

**C. OAR 860-038-0720 (Transition Rates)**

As noted above, AWEC recommends removing subsection (2) of this rule related to the Existing Load Shortage Transition Adjustment. Additionally, AWEC has concerns with Staff’s proposal to require NLDA customers to pay a transition charge equal to 25% of the fixed

generation costs for five years.<sup>5/</sup> At no point during the pre-rulemaking process or in UM 1837 has any party identified any amount of cost-shifting that could occur from a NLDA customer. Indeed, many of Staff’s proposed rules are designed specifically to prevent such cost-shifting, including the requirement to notify the utility of a customer’s intention to take service under the NLDA program,<sup>6/</sup> the “Existing Load Shortage” payment,<sup>7/</sup> and the NLDA customer’s responsibility to bear costs related to its return to cost-of-service pricing.<sup>8/</sup>

AWEC understands that there may be a rationale for requiring some level of payment from NLDA customers both to cover what are likely to be limited incremental administrative costs of the program and to recognize an additional economic benefit available to these customers for which other customers are ineligible. It is unclear, however, why any such payment should be reflected as a percentage of fixed generation costs or why it should be related to fixed generation costs at all. AWEC instead proposes that the rules require a fixed transition rate of \$0.002/KWh over the five-year period. A fixed transition rate recognizes that the only potential cost associated with a NLDA customer are incremental administrative costs that are likely to be relatively constant and predictable, and is a reasonable method of sharing the economic benefits of the program with cost-of-service customers.

If, however, the Commission supports Staff’s proposal to base a transition charge on a percentage of fixed generation costs, then it should not impose a separate charge to cover administrative costs, as the proposed rules would do. A single 11 aMW NLDA customer that

---

<sup>5/</sup> Proposed OAR 860-038-0720(1)(a).  
<sup>6/</sup> Proposed OAR 860-038-0730(1)(d).  
<sup>7/</sup> Proposed OAR 860-038-0720(2).  
<sup>8/</sup> Proposed OAR 860-038-0740.



pays twenty-five percent of the current transition adjustment for PGE’s Schedule 489 Primary customers, for example, would pay almost \$700,000 per year.<sup>9/</sup> Such a charge is more than enough to cover any potential administrative costs from the program and provide an incremental economic benefit to cost-of-service customers.

**D. OAR 860-038-0730 (New Large Load Eligibility Requirements)**

In general, AWEC supports Staff’s proposed eligibility requirements for the initial phase of the NLDA program. AWEC has one concern, however, with subsection (1)(a), which requires that loads be separately metered. As AWEC has noted in prior workshops, some customers may be large enough to have dedicated substations, which makes the installation of wholly separate metering infrastructure unnecessarily expensive and complicated. AWEC, therefore, proposes creating an exception in the rule to account for individual customer circumstances while still adhering to the goal of the requirement that new large loads be separately metered. Specifically, AWEC proposes the following modification: “Load must be separately metered unless the consumer can demonstrate an alternative means of measuring the New Large Load with comparable accuracy.”

AWEC also reiterates the apparent inconsistency between the definition of New Large Load and the requirement in subsection (3) that such loads demonstrate achievement of at least 10 aMWs “in the second or third year of receiving service ....”<sup>10/</sup>

---

<sup>9/</sup> PGE Schedule 129 (showing existing transition cost adjustment of 2.886 cents/KWh for Schedule 489 Primary customers).

<sup>10/</sup> Supra at 6.

**E. OAR 860-038-0740 (Nonresidential Standard Offer, Default Supply, and Return to Cost of Service)**

In general, AWEC supports the proposed rules with respect to the requirements for NLDA customers to return to cost-of-service rates. AWEC has one concern with the language in subsection (3). This provision states that if a NLDA customer returns to cost-of-service rates and this “results in an increase to existing cost-of-service rates of more than one tenth of one percent *within any one year*,” then the NLDA customer is directly assigned the cost of that increase. This provision raises a number of complicated issues.

Use of the phrase “in any one year” raises ambiguity over when a NLDA customer will be responsible for rate increases to bundled service customers. A determination of whether NLDA customers have increased bundled customer rates should be made only once and in the utility’s next rate filing that includes this increase, where evidence of such an impact can be provided. Similarly, AWEC recommends that, in this rate filing, the rules specify that the utility must demonstrate through “clear and convincing” evidence that the rate increase is directly attributable to a NLDA customer returning to cost-of-service rates. AWEC recommends this high standard for two reasons. First, the NLDA customer will be at an inherent disadvantage in arguing against cost assignment to it because it will lack the information and expertise the utility has to rebut the utility’s claims. Second, AWEC believes there will be a general willingness on the part of all stakeholders to assign cost increases to a returning customer since that will avoid assigning such increases to other customers, putting the NLDA customer at a further disadvantage.

Additionally, the rule does not specify for how long a NLDA customer will be responsible for cost increases. Should a utility need to acquire additional capacity to serve a

returning NLDA customer, it seems punitive and illogical to require the NLDA customer to pay for the cost of that capacity in perpetuity. Eventually, it is likely that the utility would need to acquire that capacity anyway. Because this concept is similar to the one underlying transition adjustments for existing customers that elect direct access, the Commission could adopt a transition adjustment for NLDA customers that impact bundled customer rates upon returning to cost-of-service, which phases out over time.

Ultimately, however, these issues deserve to be more fully examined and understood before the Commission adopts rules addressing them. Further, it is unlikely that a NLDA customer will return to cost-of-service rates before the second phase of this rulemaking is complete (since these customers must provide at least three years' notice). AWEC, therefore, recommends that OAR 860-038-740(3) be stricken from the phase 1 rules and be considered more thoroughly during development of the phase 2 rules.

**F. OAR 860-038-0750 (New Large Load Direct Access Program Caps)**

AWEC supports Staff's decision to create a program cap that is separate from the utilities' caps for their existing direct access programs. AWEC is continuing to evaluate whether Staff's proposed cap size for the NLDA program is acceptable. It should be noted, however, that subsection (1) of this proposed rule applies the cap to the total annual load of a "New Large Load and Affiliated New Large Single Load ...." The proposed rules do not include a definition of "Affiliated New Large Single Load," and this phrase would seem to be redundant as the cap applies overall, regardless of whether load is affiliated or not.

### III. CONCLUSION

AWEC appreciates the opportunity to comment on the proposed NLDA rules and commends Commission Staff for its work throughout this process to develop an initial program that AWEC supports overall. AWEC encourages Staff and the Commission, however, to reevaluate the rules AWEC addresses above to ensure a fair and workable NLDA program.

Dated this 21st day of May, 2018.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Tyler C. Pepple

Tyler C. Pepple

1750 SW Harbor Way, Suite 450

Portland, Oregon 97201

Telephone: (503) 241-7242

Facsimile: (503) 241-8160

E-mail: tcp@dvclaw.com

Of Attorneys for the Alliance of  
Western Energy Consumers