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August 1, 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 Administrative Hearings Division's Revised Draft Proposed Rules 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

AR 614

In the Matter of Rulemaking Related to a New Load Direct Access Program.	)))))	COMMENTS OF THE ALLIANCE OF WESTERN ENERGY CONSUMERS

I. INTRODUCTION

The Alliance of Western Energy Consumers ("AWEC") appreciates the opportunity to comment on the Commission's Draft Rules for a new load direct access ("NLDA") program. AWEC strongly supports the creation of a NLDA program and appreciates Staff's and the Administrative Hearings Division's ("AHD") efforts in developing rules for an initial NLDA program. AWEC's comments below are on the Revised Draft Proposed Rules provided by AHD to the Commission at the June 17, 2018 Public Meeting. Overall, AWEC supports the revised draft rules, but has concerns with a few provisions, which are discussed below. AWEC also responds to other parties' recommendations.

Preliminarily, AWEC wishes to reemphasize that a NLDA program, properly designed, is in the public interest. Portland General Electric Company's ("PGE") and PacifiCorp's (collectively, the "Utilities") comments filed prior to the June 21st public meeting leave the impression that this program presents nothing but risks and potential costs to non-participating cost-of-service customers. In fact, a NLDA program has the potential to significantly benefit such customers. It will do so in at least four ways.

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First, assuming it is designed in a way that attracts participation, it will *increase* cost-of-service load. As PGE notes, such increased load benefits existing customers by spreading fixed costs across more kilowatt-hours.[1/] PGE suggests that a NLDA program will reduce load growth and, consequently, increase costs to other customers because large customers will take direct access instead of cost-of-service.[2/] But this position depends on a false assumption – that these customers will locate in PGE's service territory either way. They will not. The point of a NLDA program is to attract customers with the pricing and optionality the market provides that would otherwise locate elsewhere, while simultaneously recognizing that reduced or eliminated transition charges for these customers will not impact non-participating customers because the utility has not planned for their load. When these customers come to PGE's service territory, they will prompt the development of supporting infrastructure – new small commercial and residential construction – which will become new cost-of-service load to the utility that would not exist but for the NLDA program. That is a benefit of a NLDA program that inures directly to cost-of-service customers, including many AWEC members.

Second, a NLDA program will increase development and consumption of renewable resources. Electric Service Suppliers ("ESSs") are subject to the same renewable portfolio standard ("RPS") requirements as the Utilities (including bundled energy requirements beginning in 2021). Thus, it is impossible for a NLDA program to result in reduced renewable procurements, and many NLDA customers are likely to pursue renewable purchases beyond RPS requirements to meet corporate sustainability and similar goals.

1/ PGE Comments at 5 (June 18, 2018).

2/ Id. at 6.

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Third, NLDA customers will pay their share of transmission, distribution, and administrative costs, which should reduce these costs for all customers overall.

Fourth, a NLDA program will place additional competitive pressure on the Utilities that will incentivize them to innovate and reduce costs for existing customers. This is evident from the fact that the Utilities themselves want to participate in the NLDA program and compete for these loads.[3/]

The Commission opened this rulemaking because nearly all parties, including the Utilities, supported a NLDA program that included reduced or eliminated transition charges for new loads for which the Utilities had not planned. The benefits of this program inure to all customers, but only if it is designed in way that avoids erecting unnecessary barriers to participation. The Commission should be cognizant of this as it crafts the final rules.

II. COMMENTS

A. Summary Recommendations

AWEC's recommended changes to AHD's draft NLDA rules are discussed more thoroughly below. For the Commission's convenience, AWEC summarizes those recommendations here and attaches a redline of the AHD version of the rules to these comments.

- The Commission should eliminate the Existing Load Shortage payment mechanism in favor of the affidavit approach Calpine Solutions has proposed. This is a far simpler and equally effective means of ensuring customers do not shift load from cost-of-service sites to direct access sites and avoids imposing a host of complex and burdensome obligations on customers;
- AWEC strongly supports the draft rules' eligibility requirements allowing incremental load at existing sites to participate in the NLDA program so long as the incremental increase is at least 10 aMWs. There is no distinction from a planning and transition charge perspective between an increase of 10 aMWs at a new site and an

3/ PacifiCorp Comments at 3-4 (June 18, 2018).

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increase of 10 aMWs at an existing site. Additionally, AWEC supports the rules' flexibility in measuring the new load to accommodate specific customer circumstances;

- The Commission should eliminate the rules that would assign cost impacts to returning direct access customers. There is nothing in the record to show that any such costs would be different than costs incurred to serve a new cost-of-service customer. In any event, it is impossible for existing customers to be impacted by a returning NLDA customer in the near term – such impacts are necessarily years away. Therefore, the Commission should defer these issues until phase 2 of this rulemaking where a better record on costs and reliability/provider-of-last-resort issues can be developed;

- The Commission should maintain separate caps between the NLDA and existing direct access programs as the rationales for these caps are different. It should also ensure that the NLDA program cap is a soft cap to allow any size customer to participate;

- Customers who enroll in the NDLA program but ultimately do not meet the 10 aMW size threshold to qualify should be placed on the appropriate cost-of-service schedule rather than in an existing direct access program;

- The draft rules appropriately do not restrict the generation source for NLDA customers to renewable energy. Any such restriction would be discriminatory and unduly prejudicial to NLDA customers as compared with existing direct access customers.

- The Commission should eliminate the "coal-by-wire" provisions in the AHD version of the rules. It is questionable whether the law these provisions are intended to effectuate applies to ESSs and, in any event, the rules as drafted exceed the Commission's jurisdiction. If the law prohibits ESSs from purchasing coal for their customers, existing legal mechanisms exist to address a violation of this prohibition; and

B. OAR 860-038-0720(2) (Existing Load Shortage Transition Adjustment)

AWEC appreciates AHD's revisions to the draft rules with respect to the "Existing Load Shortage" payment mechanism. These revisions clarify that a load shortage payment is contingent on actual load-shifting to a NLDA site and appear to address AWEC's

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concerns related to normal monthly load variations being caught up in the load shortage payment.

Nevertheless, AWEC remains opposed to the existing load shortage transition adjustment and supports Calpine's recommendation that customers sign an affidavit that they will not engage in such load-shifting. Calpine's recommendation is far less complex administratively and avoids putting substantial and unnecessary burdens on customers.

Preliminarily, it is important to retain perspective on this issue. For the existing load shortage payment to be relevant, not only must a customer bring a major (10 aMWs or more) new load to the system, but it must also have existing cost-of-service load. The number of customers to which such a payment would even potentially be applicable is necessarily tiny.

Further, AWEC is concerned that the rules do not contemplate numerous likely scenarios that could unfairly trigger a load shortage payment. For instance, as AWEC understands the rules, a load shortage is calculated by comparing current cost-of-service load with the 5-year historical average cost-of-service load.[4/] Five years is a long time and a customer's load five years ago may bear little resemblance to its load today. By taking the average over this five-year period, it could build in a bias that effectively requires a load shortage payment that the customer must rebut (or, alternatively, the customer's load could have declined over this 5-year period, providing room for the customer to shift load to a NLDA site without triggering a payment). Additionally, other than for energy efficiency and demand response, there is no mechanism for updating the 5-year historical average cost-of-service load. A customer's cost-of-service load may drop for any number of legitimate reasons, including changes in

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[4/] Proposed Rule OAR 860-038-0700(2)(g).

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production, weather, or even taking a cost-of-service site to traditional direct access and paying transition charges. A customer should not be locked in to a 5-year historical average forever and constantly be justifying any deviations, which is what the rules would require.

By contrast, an affidavit is simple to administer and understand. In their tariffs, the Utilities could require execution of such an affidavit and specify the penalties for breaking it. AWEC sees no justification for making it any more complicated than that.

If, however, the Commission determines to retain the existing load shortage payment, then it should at a minimum make the following additional changes:

- Change the "Average Historic Cost-of-Service Load" to the most recent 12-month historical average rather than a 60-month historical average. This will better reflect a customer's cost-of-service load as it exists at the time it joins the NLDA program;

- Create a deviation band that relieves a customer from justifying any change from the historical average, no matter how small. Under the draft rules, a customer would need to make an existing load shortage payment if its existing cost-of-service load is, for instance, 100 kWhs less than its historical average. A customer would likely just make this payment rather than go through the trouble of justifying the difference. Thus, the difference should be large enough to capture material changes. AWEC recommends a deviation band of 10% such that any change that is less than 10% of the historical average in any given year does not require a load shortage payment. Such changes could be cumulative so that if a customer's existing cost-of-service load is 3% less than the historical average in year 1, 4% less in year 2, and 5% less in year 3, the customer would then need to justify the difference in year three because its cumulative shortfall would be 12% over this three-year period;

- Create a mechanism for modifying the historical average cost-of-service load based on any known changes to the existing cost-of-service load that do not include load-shifting to a NLDA site. This will ensure that customers will not constantly need to justify the level of their electricity consumption at cost-of-service sites when they have made perfectly legitimate changes that impact their load; and

- Sunset the existing load shortage payment for a customer after 10 years. Businesses and economies change; it makes no sense to require a customer to justify the level of its cost-of-service load forever, which is what the rules currently require. Moreover, a 10-year limitation period for the load shortage payment is consistent with OAR 860-038-0160(7), which provides that the "Commission will determine the period of

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payment or recovery of transition costs or transition credits, provided such period will not exceed 10 years."

C. OAR 860-038-0700(2)(k) ("New Large Load" Definition), and OAR 860-038-0730(1)(a) (Metering for New Large Loads)

1. <u>The rules should continue to allow for load increases at existing facilities.</u>

AWEC generally supports the draft rules' definition of "New Large Load" and the eligibility requirements provided in OAR 860-038-0730(a). In particular, AWEC strongly supports the eligibility of expansions at existing sites under the draft rules so long as that expansion is at least 10 aMWs. PGE, conversely, opposes applying the NLDA program to expansions of existing sites, arguing that if "existing load growth is eligible, the customer will be incented to not discuss growth plans with the company or delay such discussions, and could lead to the lack of planning and system impacts when load is brought on the system."[5/] It is unclear what PGE's concern is here. The point of the NLDA program is that PGE will not need to plan for this load, so it should not matter if the customer does not communicate its growth plan. Moreover, PGE's concerns would not seem to be limited to growth at an existing facility. If the rules limited the NLDA program to new load at a new site, it would still be an expansion of load that a customer would presumably be just as disincentivized to discuss with the utility. The only difference is the customer would be forced to make a potentially uneconomic decision to build a new site to house this incremental load rather than locating it at an existing site.

As the Commission may recall, AWEC's position in this proceeding from the beginning (in UM 1837) was that a 10 aMW threshold should apply to incremental load

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5/ PGE Comments at 7 (June 18, 2018).

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increases at existing sites.[6] AWEC has not taken a position on what the threshold should be for new load of new customer.[7] This large threshold was intended to ensure that routine load increases were ruled out from eligibility under the NLDA program. The draft rules recognize that there is no distinction for utility planning and transition adjustment purposes between a new 10 aMW load at a new site and a new 10 aMW load at an existing site. Both should be equally eligible for the program.

2. The rules should not be overly prescriptive in how new load is measured.

AHD's version of OAR 860-038-0730(1)(a) provides that "New Large Load must be separately metered unless the consumer can demonstrate an alternative means of measuring the New Large Load with comparable accuracy." This language regarding an alternative means of measuring the new load reflects AWEC's recommendation on this issue, and AWEC appreciates AHD's attention to AWEC's previous comments. AWEC continues to support this language because it ensures flexibility in the rule to accommodate differing customer circumstances.

That said, at the July 19th workshop with the stakeholders to this rulemaking, some expressed concern with this language, including PGE and Staff. As a consequence, AWEC had further discussions with PGE on this issue, and both organizations have agreed that, as an alternative to the language in the AHD rules, OAR 860-038-0730(1)(a) could acceptably read as follows: "The New Large Load must be separately metered or be measured based on a determination that has comparable accuracy and is mutually agreeable between the electric

[6] UM 1837, ICNU Opening Comments of Dr. Benjamin Fitch-Fleishmann at 3-4 (Nov. 22, 2017).
[7] Id. at 3.

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company and the customer." AWEC understands that this alternative language is acceptable to Staff as well.

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

AWEC appreciates AHD's revisions to OAR 860-038-0740 and believes they are an improvement. For instance, they require a "significant" rate increase before such an increase can be assigned to returning direct access customers, rather than a 0.1% increase, which AWEC considers to be *in*significant. Nevertheless, AWEC continues to oppose assignment of any such costs to returning direct access customers.

First, if a customer provides the required notice period for returning to cost-of-service (three years for PGE; four years for PacifiCorp), that customer should never be assigned such costs. The notice period is designed to allow the Utilities time to plan for this returning load and makes it indistinguishable from a new cost-of-service load. If a new load that joins the system is not directly assigned costs incurred to serve it, there is no justification for directly assigning such costs to a returning direct access customer that provides the required notice.

Second, if a customer does not provide the required notice, then existing rules already require it to pay for the costs necessary to serve it and then some. The customer first goes on an emergency default service for five days where it pays a market rate plus 25%,[8] then migrates to standard offer supply service, which is a market rate plus a markup.[9] In other words, existing rules and tariffs are designed to ensure that the returning customer pays for the energy it consumes. There is no cost or cost-shift to other customers no matter how much load returns.

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[8] See, e.g., PGE Schedule 81.
[9] See, e.g., PGE Schedule 489.

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The Utilities have raised the possibility that NLDA customers will return to their service and there will be no market power available to purchase for them, forcing them to curtail all of their customers in accordance with their curtailment plans.[10] While AWEC notes that this concern has nothing to do with costs imposed by a returning direct access customer, the Commission could review the Utilities' curtailment plans as part of phase 2 of this rulemaking. If the Commission determines to impose some charge on returning direct access customers, perhaps these customers could avoid that charge by agreeing to be curtailed first in a reliability event. Because issues associated with a NLDA customer's return from direct access is necessarily years away, however, the Commission does not, and should not, resolve these complex issues in this expedited rulemaking.

Third, PGE's recommendations that ESSs be required to demonstrate firmness of supply and transmission, and demonstrate resource adequacy, are unnecessary and of questionable legality. As AWEC understands, most direct access customers enter into firm energy and capacity contracts with their suppliers, similar to WSPP's Schedule C. This contractually obligates ESSs to acquire the necessary resources to provide firm power to the customer and to acquire the necessary transmission to deliver it. Moreover, to the extent a customer enters into an interruptible agreement with its supplier, that is a choice it should be allowed to make since it does not mean that every time that customer is interrupted they default to the Utilities' service. They are, in fact, interrupted (and even if they did default, it would be to the Utilities' emergency schedule, which would not be in the customer's interest). Further, the Commission does not regulate ESSs and PGE does not identify what legal authority the

[10] PGE Comments at 14 (June 18, 2018).

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Commission would have to require them to demonstrate resource adequacy (whatever that means in this context).

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

1. The NLDA program cap should be a soft cap to allow any sized load to participate and should be separate from the existing direct access cap.

The proposed rules, as revised by AHD, create a program cap at 6% of each Utility's 2017 weather normalized annual load, with the cap sunsetting after five years.[11/] Based on discussion at the July 17th Public Meeting, AWEC further understands that this cap is to be combined with the caps on the Utilities' existing direct access programs. AWEC makes two recommendations regarding the NLDA cap.

First, AWEC supports the official draft rules' NLDA cap of 12% of load, but regardless of what level the Commission picks for the cap, it is critical that this cap be a soft cap to ensure that any size customer may participate. Six percent of PGE's 2017 load is somewhere between 115 and 150 aMWs. It is quite possible that a single new load could exceed this cap – PGE has loads on its system today that are larger than this. Thus, if there is room under the cap and a customer proposes to bring a new load to the system that exceeds the remaining cap space, it should be allowed to participate in the NLDA program, after which the program would be closed until the Commission determines to increase the cap. It would be a shame if a customer were prepared to bring a large new economic development to the state and was prevented from doing so simply because of an artificial cap on the NLDA program. At a minimum, such a customer should be allowed to request to be excepted from the cap.

[11/] Proposed Rule 860-038-0750.

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Second, the cap for the NLDA program should be separate from the cap on the existing direct access program. The rationales for these caps are distinct. The cap on the existing direct access program exists because of the concern that enough load would depart the utility's system to create issues with fixed cost recovery.[12] That concern is, by definition, inapplicable to new loads because the Utilities have incurred no fixed costs to serve them. By contrast, the cap for the NLDA program, as AWEC understands it, is to ensure that any unintended consequences from a new and untested program will be mitigated. By combining the caps, it compromises the rationales for both. For instance, while it is not AWEC's position, if the Commission believes that limiting PGE's existing direct access program to 300 aMWs is important to protect remaining customers, combining the caps will undermine this decision by making another 150 aMWs available to existing load. Conversely, if the Commission believes that 150 aMWs is appropriate to manage unknown risks from the NLDA program, combining the cap will undermine this decision by making the remaining space in the existing direct access cap available for new load. Further, future decisions on either cap will necessarily implicate both programs even though a decision to increase the cap may relate exclusively to one of the programs.

2. New loads that do not meet the 10 aMW threshold should be placed on the appropriate cost-of-service schedule.

PGE raises a concern regarding what would occur if a NLDA customer did not meet the 10 aMW threshold, forcing the NLDA customer into an existing direct access program under the draft rules, but the existing direct access program cap had been reached. There is a

[12] See, Docket No. UE 267, PacifiCorp Application at 2 (Feb. 28, 2013); Docket No. UE 236, Order No. 12-057 at 2 (Feb. 23, 2012).

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simple solution to this concern, which is to have these customers default to cost-of-service rather than the existing direct access program. The rationale for establishing a 10 aMW threshold for the NLDA program is that these loads are large enough to fall outside of the Utilities' normal planning process. This suggests that a customer that sought to participate in the NLDA program but turned out to be insufficiently large to qualify was incorporated into the load forecasting process by default and should be a cost-of-service customer. AWEC recommends that the Commission modify OAR 860-038-0730(3) accordingly.

F. The Commission cannot legally require NLDA customers to purchase 100% renewable energy

Appropriately, the draft rules do not restrict NLDA customers' options with respect to the source of power they purchase. PacifiCorp, however, continues to insist that the Commission require NLDA customers to purchase 100% "renewable" energy.[13/] AWEC is frankly confused by what PGE's position currently is on this issue. It initially joined PacifiCorp in arguing for a 100% renewable energy requirement.[14/] It then backtracked on this position, noting that ESSs will be subject to the same RPS requirements as the Utilities.[15/] Therefore, it will be impossible for a NLDA program to result in less renewable energy consumption, and it will very likely result in more such consumption as these customers can choose to go above and beyond the RPS. Now, in its most recent comments, PGE includes a rambling section on public policy considerations that seems to suggest it once again supports a 100% renewable purchase

13/ PacifiCorp Comments at 3.
14/ UM 1837, PGE Opening Comments at 11 (Nov. 22, 2017).
15/ PGE Comments at 2 (Apr. 18, 2018).

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obligation for NLDA customers.[16] Regardless of what its position is, however, neither PGE nor PacifiCorp have articulated a legal basis for this requirement.

The Utilities have argued for a 100% renewable purchase requirement since they filed opening comments in UM 1837 on November 22, 2017. In response comments, both AWEC (then ICNU) and Staff questioned the legal basis for such a restriction. AWEC argued that restricting NLDA customers' generation sources while traditional direct access customers have no such restriction would be unduly prejudicial and discriminatory.[17] Staff noted that the source of generation has no impact on whether a utility has planned for new load and that limiting generation sources was not contemplated by the direct access law.[18] Since that time, parties have waited – even invited[19] – the Utilities to identify a legal basis for their requested restriction. Instead, PacifiCorp's most recent comments essentially reiterate its initial position, that Senate Bill 979 from the 2017 legislative session – a bill that did not pass – would have instituted a renewable direct access program, and that the Commission has "broad authority."[20] In other words, PacifiCorp has failed to respond to Staff's position by pointing to anything in the direct access law (SB 1149) that would authorize restricting a direct access customer's generation source. AWEC is unfamiliar with any court precedent or legal theory that allows reliance on legislative history from legislation that was not enacted into law.

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[16] PGE Comments at 4-5 (June 18, 2018).
[17] UM 1837, ICNU Reply Comments (Dec. 19, 2017).
[18] UM 1837, Staff Reply Comments at 10 (Dec. 19, 2017).
[19] AR 614, Order No. 18-031, Appen. A at 1 (Jan. 30, 2018) (adopting Staff's recommendation to "direct parties to brief or otherwise address the two outstanding legal issues regarding resource choice and utility participation").
[20] PacifiCorp Comments at 2-3 (June 18, 2018).

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PacifiCorp has also failed to respond to AWEC's position that restricting a NLDA customer's source of generation supply would be unduly prejudicial and discriminatory. While the Legislature has the authority to create such a restriction, the Commission does not. ORS 757.310(2) prohibits utilities from charging customers rates for services that are different from the rates that they charge other customers for "like and contemporaneous service under substantially similar circumstances." Nor may the Commission allow utilities to "give undue or unreasonable preference or advantage to any particular person."[21] Direct access customers pay utilities for the right to use their transmission and distribution systems to deliver power purchased from electricity service suppliers. When transition charges are imposed, they recover the direct access customers' share of the utility's fixed costs that would otherwise be recovered from customers who remain bundled customers. The source of a direct access customer's power makes no difference when determining transmission and distribution charges, and it has no impact on the size of any transition charge. That is, direct access customers who choose to purchase renewable power, and those that do not, are receiving "like and contemporaneous service under substantially similar circumstances" from the utility. These customers are paying the utility to deliver their power and for their share of the costs of the utility's existing generation plant. These payments are in no way related to the power these customers purchase from ESSs. There are no non-discriminatory grounds for distinguishing direct access customers based on the source of their power.

[21] ORS 757.325(1).

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AWEC agrees with PacifiCorp that the Commission has "broad authority to design the [NLDA] program."[22] But "broad authority" is not synonymous with "unlimited" authority. "It is a fundamental principle of administrative law that an administrative body possesses only those powers that the legislature grants, and that it cannot exercise authority that it does not possess."[23] The Commission may have discretion in developing many aspects of a NLDA program, but it does not have discretion to make that program discriminatory and unduly prejudicial to the program's participants without explicit legislative authorization. Rate classes must be based on "reasonable economic justification[s],"[24] and there is no economic difference between direct access customers who choose to buy renewable power and those that do not. As Staff recognizes, "generation source has no impact on whether the utility has planned for new load," and "[l]imiting the generation source does not affect the potential costs or risks to [cost of service] customers."[25] Absent such an economic justification or explicit statutory authorization, the Commission cannot authorize different transition charges for direct access customers simply because they commit to purchasing renewable power.

G. OAR 860-038-0730(b)-(c) (Coal-Fired Electricity Prohibition)

AWEC is concerned that proposed OAR 860-038-0730(1)(b)-(c), which prohibits NLDA customers from purchasing coal-generated electricity after 2029, and related filing and information requirements, may be outside of the Commission's authority. The proposed rule relies on ORS 757.518 for authority, but it is unclear whether this statute extends to ESSs and

[22] PacifiCorp Comments at 3 (June 18, 2018).
[23] Coquille School Dist. 8 v. Castillo, 212 Or. App. 596, 607 (2007).
[24] In Re Portland Gen. Elec. Co., 97-408, 1997 WL 913205 (Oct. 17, 1997)
[25] UM 1837, Staff's Reply Comments at 10 (Dec. 19, 2017).

direct access customers, and the draft rules' provisions for ensuring compliance almost certainly exceed the Commission's jurisdiction. AWEC recommends that these subsections of OAR 860-038-0730 be removed.

ORS 757.518 is a section of Senate Bill 1547 ("SB 1547"), which prohibits "electric companies" (defined as the Utilities and Idaho Power) from including coal-fired power in their "allocation of electricity" after January 1, 2030. By its terms, the statute applies exclusively to utilities the Commission regulates – not to ESSs or direct access customers. This suggests that there is, in fact, no restriction on the type of electricity an ESS can procure in 2030.

That said, ORS 757.518 could conceivably be read to indirectly restrict ESSs' authority to sell coal-generated power to direct access customers in Oregon. The statute requires that each of the Utilities eliminate coal-fired resources from its "allocation of electricity," meaning "the costs and benefits associated with the resources used to provide electricity to an electric company's retail electricity consumers" in Oregon.[26] Direct access customers are "retail electricity consumers" as defined by ORS 757.600(29), so any electricity sold to direct access customers by ESSs is necessarily part of each utility's "allocation of electricity." By this logic, ESSs could not sell any coal-fired generation after 2029, or the *Utilities* would be in violation of ORS 757.518(2). At best, this is an awkward argument that seems to place liability for a violation on the wrong party (the Utilities rather than an ESS).

In any event, even if the Commission felt this argument was persuasive, the proposed rules' penalty provisions would not address a violation. They state that NLDA customers who violate this rule by contracting for coal-fired resources "must be enrolled in the

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[26] ORS 757.518 (1)(a).

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general cost-of-service opt out program in the following direct access enrollment window."[27]
Either contracting for coal-fired generation as a direct access customer is illegal or it is not. Nothing in this law differentiates a NLDA customer that would resolve a violation by enrolling them in the existing direct access program. On this point, it is also worth noting that, if the Commission is to include in its rules a prohibition against NLDA customers from purchasing coal-fired electricity, then it should open yet another rulemaking to include this prohibition in the existing direct access rules.

Related provisions of the rules are also concerning. Proposed OAR 860-038-0730(c)(A) and (B) create filing and compliance requirements for direct access customers and ESSs. Subsection (A) requires direct access customers to provide contracts or other information to the Commission upon request to "investigate compliance" with this coal prohibition. The Commission's jurisdiction is limited to "public utilities" and does not extend to customers.[28]
Absent express statutory authorization, the Commission cannot require a customer to disclose a contract to it. Similarly, subsection (B) requires ESSs supplying NLDA customers to file an "annual report" confirming the source of power used to serve the new load. ESSs are likewise not "public utilities" and, thus, the Commission's jurisdiction over ESSs is limited to that expressly spelled out in statute. The Commission may require ESSs to be certified before operating in Oregon,[29] and it may require ESSs to file reports documenting compliance with the

[27] Proposed Rule 860-038-0730(1)(c).
[28] ORS 756.040.
[29] ORS 757.649.

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RPS.[30] But nothing in Oregon law authorizes the Commission to examine every source of an ESS's electrical supply.

Whether or not the Commission crafts rules expressly prohibiting an ESS from supplying coal to NLDA customers post-2030 has no impact on the legality of this action. AWEC noted the potential ambiguity in the statute above, and if it is illegal for an ESS to procure coal in 2030, that is because the statute makes it so. If an ESS violates that statute, the law already provides adequate recourse to anyone with a cognizable injury from that violation. Rules are not necessary to effectuate this law.

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 the Commission, however, to reevaluate the rules AWEC addresses above to ensure a fair and workable NLDA program.

Dated this 1st day of August, 2018.

Respectfully submitted,

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[30] ORS 469A.170.

860-038-0700
Definitions for New Large Load Direct Access Program

(1) Unless otherwise defined in section (2), the definitions set forth in OAR 860-038-0005 are applicable to New Large Load Direct Access Programs.

(2) As used in the New Large Load Direct Access Program rules:

~~(a) “Affiliated Consumer” means a consumer, 50 percent or more of the voting shares of which are held by another consumer, engaged in the same line of business as the 50 percent or greater shareholder.~~

~~(b) “Average Historic Cost-of-Service Load” means the average monthly Cost-of-Service Eligible Load during the 60 month period beginning five years prior to the date a consumer gives binding notice of participation in the New Large Load Direct Access Program.~~

(c) “Cost-of-Service ~~Eligible~~ Load” means the load of a consumer that is a retail electricity consumer of an electric company and is ~~eligible for~~served at a cost-of-service rate.

(d) “Electric company” has the meaning provided in ORS 757.600(11).

~~(d) “Existing Consumer” means a consumer that is or has been a cost-of-service consumer of an electric company within the prior five calendar years.~~

~~(f) “Existing Site” means a site that receives or has received energy in the last five years that is eligible for a cost-of-service rate.~~

~~(g) “Existing Load Shortage” means the larger of zero or a consumer’s Average Historic Cost-of-Service Load plus Incremental Demand Side Management less the average Cost-of-Service Eligible Load during the previous 60 months.~~

~~(h) “Existing Load Shortage Transition Adjustment” means a charge or credit equal to:~~

~~(A) 7580 percent of fixed generation costs plus net variable power cost transition adjustments during the first five years after enrollment in the New Large Load Direct Access Program; and~~

~~(B) 100 percent of fixed generation costs plus net variable power cost transition adjustments after the first five years of enrollment in the New Large Load Direct Access program.~~

~~(i) “Incremental Demand Side Management” means the effective net impact of energy efficiency measures and demand response implemented at a facility after a consumer gives binding notice of participation in the New Large Load Direct Access Program.~~

(j) “Load Shifting” means the relocation of facilities, equipment, processes, manufacturing, employees or any economic activity for the deliberate purpose of increasing load at locations participating in the New Load Direct Access Program from ~~locations not subject to the New Load Direct Access Program~~Cost-of-Service Load.

(k) “New Large Load” means any load associated with a new facility, an existing facility, or an expansion of an existing facility, which:

(A) Has never been contracted for or committed to in writing by a cost-of-service consumer with an electric company; and

(B) Is expected to result in a 10 average megawatt or more increase in the consumer’s power requirements ~~during the second and third~~in any 12-month consecutive period during the first three years after new operations begin.

(l) “New Large Load Direct Access Program” means a direct access program offering by an electric utility that meets the requirements set forth in the New Large Load Direct Access Program section of the Division 38 rules.

(m) “New Large Load Direct Access Service Transition Rate” means a rate that is applied to load served under the New Large Load Direct Access Program.

(n) “Retail electricity consumer has the meaning provided in ORS 757.600(29).

860-038-0710
Requirement to Enable a New Load Direct Access Program

An electric company that enables direct access service must enable a New Load Direct Access Program for New Large Load consumers, subject to the requirements set forth in this New Large Load Direct Access Program section of the Division 38 rules.

860-038-0720
Transition Rates

(1) In addition to all other charges applicable to a New Large Load, an electric company must charge New Large Load Direct Access consumers a New Large Load Direct Access Service Transition Rate that recovers the following:

(a) 20 percent of the fixed generation costs for five years; and

(b) All reasonable costs of administering the New Load Direct Access Program.

~~(2) Consumers receiving service under the New Large Load Direct Access program must also pay an Existing Load Shortage Transition Adjustment on the sum of the Existing Load Shortage for the consumer and the Existing Load Shortage of all of the consumer's Affiliated Consumers. A consumer may be exempted from charges made under this section if the consumer can demonstrate that the change in load in question is not due to load shifting activity. The electric company tariff must include provisions detailing procedures and requirements for the demonstration.~~

860-038-0730
New Large Load Eligibility Requirements

(1) Only New Large Loads that meet the following requirements are eligible to participate in the New Large Load Direct Access Program:

(a) The New Large Load must be separately metered or be measured based on a determination that has~~unless the consumer can demonstrate an alternative means of measuring the New Large Load with~~ comparable accuracy and is mutually agreeable between the electric company and the customer.

~~(b) New Large Load Direct Access Program is only available for consumers contracting for energy resources that do not include any allocation of coal-fired resources as defined in ORS 757.518 (1)(b)(B) after January 1, 2030.~~

~~(c) New Large Load Direct Access consumers that are found in violation of the provisions of this section must be enrolled in the general cost-of -service opt out program in the following direct access enrollment window.~~

~~(A) A New Large Load Direct Access consumer must provide to the Commission upon request contracts or other materials necessary to investigate compliance with this section.~~

~~(B) An Electric Service Supplier that contracts for or supplies resources in the New Load Direct Access Program must provide an annual report to the Commission confirming the source of resource supplies for customers participating in the New Load Direct Access Program.~~

(~~d~~b) Each New Large Load consumer must notify the electric company of its intent to enroll in the New Large Load Direct Access Program and opt out of cost-of-service rates at the earlier of either:

(A) A binding written agreement with the utility to receive distribution service for eligible new load, or

(B) One year prior to the expected starting date of the incremental load.

(c) Each New Large Load consumer must execute an affidavit certifying that the New Large Load consumer will not engage in Load Shifting. Each electric company's tariffs implementing the New Large Load Direct Access Program shall specify reasonable penalties for any Load Shifting activity.

(2) Subsection (1)(d) is waived for the eligible New Large Load consumer that has entered into a written agreement with an electric company prior to September 30, 2018, indicating its intent to receive distribution service from an electric company and for which the electric company has not planned to provide generation supply service.

(3) If the actual load of a facility served under the New Large Load Direct Access Program does not meet or exceed 10 average megawatts in any 12 month period during the first 36 months of receiving service, and the shortfall in load is not attributable to equipment failure, energy efficiency, load curtailment or load control, or other causes outside the control of the New Large Load Direct Access Program consumer, the consumer must be enrolled in ~~a direct access program of the consumer's choice~~the appropriate cost-of-service rate schedule.

(a) The electric company must petition the Commission to de-enroll the consumer under this provision, and

(b)The consumer will be provided an opportunity to demonstrate to the Commission that its reduction in load to less than 10 average megawatts was the result of equipment failure, energy efficiency, load curtailment or load control, or other causes outside the control of the New Large Load Direct Access Program consumer.

860-038-0740

Nonresidential Standard Offer, Default Supply and Return to Cost of Service

(1) New Large Load Direct Access Program consumers are subject to the requirements set forth in OAR 860-038-0250 and OAR 860-038-0280~~, except as set forth in section (3) of this rule~~.

(2) A New Large Load Direct Access Program consumer may return to cost-of-service rates under the same rates and terms of service as the electric company's current cost-of-service opt-out offers for direct ~~service~~ access consumers~~, except as set forth in section (3)~~.

~~(3) To mitigate the rate impact to existing cost-of service consumers, an electric company must request Commission approval of a forward-looking rate adder applicable to New Large Load Direct Access Program consumers returning to cost-of-service rates or rates under OAR 860-038-0250 and 860-038-0280 when the electric company forecasts that:~~

~~(a) The return to rates under OAR 860-038-0250 and 860-038-0280 for an individual or group of New Large Load Direct Access Program consumers will result in a significant increase to existing cost-of-service rate; or~~

~~(b) The return to a cost-of-service rate for an individual or group of New Large Load Direct Access Program consumers will result in a significant increase to existing cost of service rate.~~

~~(4)The Commission will consider the rate adder under Section (3) of this rule as part of a tariff filing.~~

~~(5) The electric company must file annual updates that justify any rate adder developed according to this rule or any updates to the approved rate adder.~~

860-038-0750
New Large Load Direct Access Program Caps

(1) Each electric company must make at least ~~6~~12 percent of the electric company's weather normalized annual load in calendar year 2017 available to New Large Load~~ and Affiliated New Large Single Load~~.

(2) If available space exists under the cap imposed under subsection (1) of this rule and a New Large Load requests to participate in the New Large Load Direct Access Program that would cause an exceedance of this cap, such New Large Load shall be allowed to participate in the New Large Load Direct Access Program.

(3~~2~~) Section (1) of this rule sunsets following the fifth calendar year that the New Large Load Direct Access Program has been in place.

(3) Each electric company must file a status report to the Commission within two months of total enrollment in New Large Load Direct Access Programs reaching 25 MWa, 50 MWa, 100 MWa and 80 percent of the enrollment limit.