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February 12, 2019

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 PORTLAND GENERAL ELECTRIC COMPANY,
Request for a General Rate Revision
Docket No. UE 335

Dear Filing Center:

Please find enclosed the Alliance of Western Energy Consumers' Application for Reconsideration and Rehearing 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

UE 335

In the Matter of	)	
	)	THE ALLIANCE OF WESTERN
PORTLAND GENERAL ELECTRIC	)	ENERGY CONSUMERS'
COMPANY	)	APPLICATION FOR
	)	RECONSIDERATION AND
Request for a General Rate Revision.	)	REHEARING
	)	

I. INTRODUCTION

Pursuant to ORS 756.561 and OAR 860-001-0720, the Alliance of Western Energy Consumers ("AWEC") files this Application for Reconsideration and Rehearing of the Oregon Public Utility Commission's ("Commission") Final Order No. 18-464 ("Final Order") in the above-referenced docket.[1/]

AWEC requests reconsideration of the Commission's decision to approve the multiparty stipulation covering issues related to Portland General Electric Company's ("PGE" or "Company") long-term direct access program ("Direct Access Stipulation"). In approving the Direct Access Stipulation, the Commission committed "error[s] of law … that [were] essential to the decision."[2/] Therefore, the Commission should reconsider its Final Order, as well as the basis for its approval of this stipulation, for the following reasons.

[1/] The Final Order was subsequently corrected and supplemented by Order No. 18-467. The corrections identified in that order are not relevant to this Application for Reconsideration.

[2/] OAR 860-001-0720(3)(c).

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First, the Final Order lacks the findings of fact required in all Commission orders in contested cases that would allow a party or reviewing court to understand the basis for the Commission's decision to approve the Direct Access Stipulation. The absence of such findings violates the Commission's obligations under ORS 756.558(2).

Second, it is undisputed that the Direct Access Stipulation institutes a participation cap that categorically excludes customers who otherwise meet all eligibility criteria for PGE's long-term opt-out program. They are prejudiced by this stipulation. The state's anti-discrimination laws require that the Commission, at a minimum, provide these customers with an explanation for why they should not be allowed to participate in this program. The Final Order provides none and, therefore, violates ORS 757.325.

Third, in approving the Direct Access Stipulation without evidentiary support, the Commission unlawfully absolved PGE of its burden of proof, in violation of ORS 757.210(1)(a).

Fourth, in approving the Direct Access Stipulation, the Commission expressly "reach[ed] no legal conclusion regarding cost-shifting."[3/] It consequently failed to "ensure that … [t]he provision of direct access … must not cause the unwarranted shifting of costs," as required by ORS 757.607(1).

II. BACKGROUND

The Direct Access Stipulation establishes the terms for PGE's long-term opt-out program through 2021.[4/] PGE's long-term opt-out program, which has been in place since 2003, allows all customers with loads over one average megawatt ("aMW") and facility capacity

[3/] Final Order at 18.
[4/] Direct Access Stipulation ¶ 6.

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ratings of at least 250 kW to leave the Company's cost-of-service rates permanently upon payment of transition charges for five years.[5/] A hard cap on participation in the long-term opt-out program of 300 aMWs has also been in place since its inception.[6/] The Direct Access Stipulation maintains all of these criteria for participation, including the 300 aMW participation cap.[7/] However, because approximately 236 aMWs of load has permanently transitioned to the long-term opt-out program since 2003, in maintaining the same hard cap, the Direct Access Stipulation effectively establishes a participation cap of 64 aMWs through 2021.[8/]

Unlike in 2003, the remaining room under the participation cap is now small enough to exclude customers who otherwise meet all of the eligibility criteria for the program.[9/] Moreover, as additional load transitions to the long-term opt-out program, more eligible customers are likely to be excluded in future years. As a consequence, AWEC objected to the Direct Access Stipulation on two grounds.

First, it argued that this stipulation was discriminatory because it prohibited otherwise eligible customers from participating in the long-term opt-out program without any evidentiary basis for such a prohibition.[10/] In support of this argument, AWEC showed that the only justification in the record for maintaining the participation cap was PGE's testimony that this cap was "specifically designed to restrict the cost shifting of existing generation resources. Increasing these limits would only serve to exacerbate potential cost shifts."[11/] In its initial

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5/ Exh. AWEC/504 at 2-3.
6/ Id. at 2.
7/ Direct Access Stipulation ¶¶ 2, 4.
8/ Exh. AWEC/502.
9/ Exh. AWEC/506.
10/ AWEC Objections at 5-14; AWEC Opening Br. on Direct Access Issues at 6-17; AWEC Reply Br. on Direct Access Issues at 2-8; AWEC/500, Mullins/4-13.
11/ PGE/2500 at 16:18-20; AWEC Objections at 5-6.

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testimony, PGE had proposed to require participants in the long-term opt-out program to pay transition charges for ten years rather than five on the grounds that a five-year transition charge resulted in cost-shifting to non-participating customers.[12/] The Commission, however, recognized that PGE failed to support its position and recommendation with any convincing evidence, holding in the Final Order that "we do not feel that [] the record before us supports a 10-year transition charge."[13/] This eliminated the only justification in the record for the participation cap.

Second, AWEC argued that the Direct Access Stipulation violated ORS 757.646(1) by unjustifiably creating "barriers to the development of a competitive retail market structure" and enhancing "the vertical and horizontal market power of incumbent electric companies …."[14/] Again, because the only justification provided for the participation cap – that it "restrict[ed] the cost shifting of existing generation resources" – was unfounded, maintaining this cap was inconsistent with the requirements of this statute.[15/]

AWEC filed its Objections and two briefs fully presenting its legal arguments, which were also supported by the testimony of Bradley Mullins, Exhibit AWEC/500, and accompanying exhibits. This testimony evaluated what PGE's production costs would have been in the absence of the long-term opt-out program. In doing so, it demonstrated that "remaining customers have not been harmed as a result of Oregon's direct access program, and in fact, have benefitted from the direct access program."[16/] AWEC also filed cross-examination exhibits

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12/ PGE/1300 at 39:15-41:7.
13/ Final Order at 19.
14/ ORS 757.646(1); AWEC Objections at 14-16; AWEC Opening Br. on Direct Access Issues at 17; AWEC Reply Br. on Direct Access Issues at 1-2.
15/ AWEC Objections at 14-16.
16/ AWEC/500, Mullins/10:7-9.

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supporting its objections to the Direct Access Stipulation, the admission of all of which were stipulated to by all parties.[17/]

In its Final Order, the Commission states:

> We reject AWEC's contention that we cannot approve this stipulation due to an insufficient record. PGE and the stipulating parties provided support for the stipulation in the form of joint testimony, which discusses the reasonableness of the ultimate compromise between the parties. By approving the Direct Access Stipulation as a reasonable compromise of the parties' positions, we reach no legal conclusion regarding cost-shifting and reject AWEC's arguments to the contrary.[18/]

The Final Order does not address the statutes AWEC cites, which the Direct Access Stipulation violates, nor does it respond to AWEC's supporting arguments. Other than its uncited reference to the stipulating parties' joint testimony, the Final Order identifies no facts or other evidence supporting the Commission's decision to approve the Direct Access Stipulation "as a reasonable compromise."

III. ARGUMENT

A. Standard of Review

Under ORS 756.561(1), "[a]fter an order has been made by the [Commission] in any proceeding, any party thereto may apply for rehearing or reconsideration thereof within 60 days from the date of service of such order. The commission may grant … reconsideration if sufficient reason therefor is made to appear."

OAR 860-001-0720(3) identifies the "sufficient reason[s]" for which the Commission may grant an application for reconsideration. These include "[a]n error of law or

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17/ AWEC/600-AWEC/607.
18/ Final Order at 18.

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fact in the order that is essential to the decision."[19/] This rule requires the applicant for reconsideration to make two showings. First, it must show that the order includes an error of law or fact. Second, it must show that this error of law or fact was essential to the decision. In this case, both elements are met and reconsideration is not only warranted, but required to ensure a lawful Final Order.

B. The Final Order Contains at Least Four Errors of Law

1. The Final Order failed to enter findings of fact supporting its decision to adopt the Direct Access Stipulation.

The Commission approved the Direct Access Stipulation because it found that it "is a reasonable resolution of the issues presented …."[20/] In doing so, the Commission "reject[ed] AWEC's contention that we cannot approve this stipulation due to an insufficient record."[21/] The Commission determined, instead, that "the stipulating parties provided support for the stipulation in the form of joint testimony, which discusses the reasonableness of the ultimate compromise between parties."[22/] This generic, uncited reference to the stipulating parties' joint testimony in support of the stipulation represents the entire factual basis the Commission provides for its decision to adopt the Direct Access Stipulation over AWEC's objections.

The necessary implication from the Commission's decision is that the stipulating parties' joint testimony satisfactorily rebuts AWEC's reasons for objecting to this stipulation – that it is unduly prejudicial and erects unnecessary barriers to the development of a competitive

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19/ OAR 860-001-0720(3)(c).
20/ Final Order at 18.
21/ Id.
22/ Id.

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retail market, in violation of ORS 757.325 and 757.646. For if the stipulation violates either of these statutes, it is illegal and must be rejected.[23/] There must be something in the joint testimony, therefore, that addresses these issues to the Commission's satisfaction. Yet, what this something is goes unanswered, and this failure to articulate the factual basis for the Commission's conclusion violates its statutory obligation under ORS 756.558(2) to "prepare and enter findings of fact and conclusions of law upon the evidence received in the matter and [to] make and enter the order of the commission thereon."

In a longstanding decision, the Oregon Supreme Court stated that:

> [T]he findings [in a Commission order] ought to set forth sufficient facts so that the reviewing court can prudently discharge its duty and not experience a sense of frustration through inability to get at the facts. The circumstance that the evidence is in the transcript and that the court, by weighing it, can determine for itself "the facts" does not suffice. The agency is the fact finder, and the undigested transcript is not a substitute for a set of findings of fact. The provisions requiring the commissioner to enter findings and the courts to grant judicial review should afford the commissioner a dependable chart indicating the scope to which his findings should extend. His knowledge of the issues which the parties presented to him should indicate still further the needed breadth and sweep of his findings. Leaving an issue of fact in such a state that the agency's reaction to the issue can be discerned only through implication does not suffice …. Nor should a court be put in a position wherein it is forced to ferret out the facts or seek them through engaging in mathematical calculations of a kind for which special training is required.[24/]

The Court of Appeals, in Publishers Paper Co. v. Davis, clarified this ruling, noting that, while the Commission "is not required to discuss every reason, issue or bit of evidence produced in the hearing,"[25/] the "recitation of finding must be sufficiently specific in order that the reviewing court does not have to delve into the record to discern the inferences the commissioner may have

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23/ ORS 183.482(8).

24/ Valley & Siletz R. Co. v. Flagg, 195 Or. 683, 711-12 (1952) (citations omitted); see also, American Can Co. v. Davis, 28 Or. App. 207, 216-17 (1977).

25/ 28 Or. App. 189, 200 (1977).

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drawn in arriving at his conclusion."[26] The Court specified that it is not required to "agree with the inferences drawn or the reasoning expounded by the agency whose order we are reviewing," but there must be "sufficient findings of fact and conclusions of law to allow testing of the agency's actions against its grant of power and to determine if '… an agency's reasoning (is) rational, that is not irrational, nonrational or fallacious.'"[27]

Oregon courts have not hesitated to remand Commission orders that do not meet these legal requirements. In Bekins Moving & Storage Co. v. Public Utility Comm'r, for instance, the Court of Appeals remanded a Commission order when it found that "[n]owhere in the order is there any statement by the Commissioner as to what factual conclusions he drew from the evidence."[28] Also, in Pacific Tel. & Tel. Co. v. Hill, the Supreme Court remanded a Commission order for failure to enter sufficient findings of fact and law, as required by ORS 756.558(2).[29]

Here, the Final Order makes no factual finding other than that the "joint testimony … discusses the reasonableness of the ultimate compromise between parties."[30] Like the other Commission orders overturned on judicial review, even assuming this generic assertion of reasonableness constitutes evidence, the Final Order is devoid of any "statement … as to what *factual conclusions* [the Commission] drew from [this] evidence" that enabled it to find that the Direct Access Stipulation was reasonable despite its asserted legal flaws.[31]

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[26] Id. at 194.
[27] Id. at 196 (quoting McCann v. OLCC, 27 Or. App. 487, 503 (1976)).
[28] 19 Or. App. 762, 768 (1974).
[29] 229 Or. 437, 471-72 (1961). At the time of this decision, ORS 756.558(2) was codified at ORS 756.550(3).
[30] Final Order at 18.
[31] Bekins Moving & Storage Co., 19 Or. App. at 768 (emphasis added).

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The need to articulate a sufficient factual basis for the Commission's conclusions is a matter of due process – a party is entitled to know why the Commission adopted a position over that party's objections – and the Commission cannot hide behind unexplained statements to satisfy this obligation:

> The substantial evidence rule is a safeguard for anyone faced with the possibility of adverse consequences from a decision of an administrative agency. The rule loses its meaning if it is interpreted as leaving to the internal "expertise" of agency personnel, rather than to the external scrutiny of appellate courts, the critical question whether the facts of the case permit the administrative choice involved.[32/]

For this reason, "[b]are conclusions by agency experts cannot be used as a substitute for evidence presented at a contested case hearing."[33/] That the "bare conclusions" in the joint testimony the Final Order relied on here as evidence of the Direct Access Stipulation's reasonableness come from agency and non-agency experts alike is immaterial. Either way, the critical questions remain unanswered, and the Commission's statutory obligations require that they be answered:

1. Does PGE's long-term opt-out program cause unwarranted cost-shifting?
2. If it does not, on what basis are customers larger than 64 aMW prohibited from participating in this program?
3. Why does the Direct Access Stipulation's participation cap not erect unnecessary barriers to the development of a competitive retail market?

To answer these questions, a reviewing court would need to "discern[] only through implication" the factual basis for the Commission's decision, and "to ferret out the facts" that might support

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[32/] Drew v. Psychiatric Sec. Review Bd., 322 Or. 491, 499 (1991).
[33/] WaterWatch of Oregon, Inc. v. Water Resources Dept. 268 Or. App. 187, 218 (2014).

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the Commission's conclusion that the Direct Access Stipulation is a "reasonable compromise"[34/] so that it can ensure that the Commission's reasoning was "not irrational, nonrational or fallacious."[35/] ORS 756.558(2) requires a more detailed evidentiary finding than the Final Order provides.

2. The Commission authorized unjust discrimination.

Three separate times in this docket – in its Objections, its Opening Brief, and its Reply Brief – AWEC argued that the Direct Access Stipulation unduly prejudices those customers who are eligible for the long-term opt-out program but are nevertheless excluded from it because of the participation cap, in violation of ORS 757.325. Yet, the Final Order fails to even mention, let alone address, AWEC's arguments on this issue. The Commission's unexplained, and therefore unjustified, decision to approve prejudicial treatment of these customers is unlawful.

In its previous filings in this docket, AWEC has fully developed its arguments on why the Direct Access Stipulation unduly prejudices those eligible customers that the participation cap excludes and incorporates those arguments by reference here.[36/] In summary, ORS 757.325(1) provides that "[n]o public utility shall make or give undue or unreasonable preference or advantage to any particular person or locality, or shall subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect." The statute

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[34/] Flagg, 195 Or. at 712.

[35/] Davis, 28 Or. App. at 196. Indeed, even if a court were inclined "to delve into the record" "to determine for itself 'the facts,'" there is nothing in the joint testimony that would support the Commission's conclusion. That testimony does not even mention the statutes AWEC argued the Direct Access Stipulation violated, let alone provide evidence against AWEC's arguments. See Stipulating Parties/500.

[36/] AWEC Objections at 5-14; AWEC Opening Br. on Direct Access Issues at 6-17; AWEC Reply Br. on Direct Access Issues at 2-8; AWEC/500, Mullins/4-13.

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specifies that any utility that violates this provision "is guilty of unjust discrimination."[37/] The Commission, therefore, *can* discriminate and subject customers to prejudices and preferences, but it cannot do so "undu[ly]" or "unjust[ly]."[38/] And the Commission "must apply [these] terms … to a particular set of facts."[39/] In other words, the Commission must have a reason for any prejudicial or discriminatory practices it authorizes.[40/]

In Chase Gardens, Inc., for instance, the Oregon Court of Appeals upheld a Commission declaratory ruling, finding that, among other things, a lien Northwest Natural placed on the plaintiff's crops was not unduly prejudicial to the plaintiff.[41/] In its declaratory ruling, the Commission found that, while the plaintiff "certainly suffered disadvantage from the lien," the assumed facts in the declaratory ruling stated nothing about how Northwest Natural treated customers that were similarly situated to the plaintiff.[42/] Thus, the Commission concluded that "the assumed facts are insufficient to support a finding that [Northwest Natural] subjected [plaintiff] to disparate treatment."[43/] In affirming this decision, the Court noted that the Commission "*articulated the reasons* why it concluded that a condition precedent to establishing a violation of ORS 757.325 is that a particular person or locality must be treated differently from other, similarly situated persons or localities."[44/]

37/ ORS 757.325(2).
38/ Chase Gardens, Inc. v. Oregon Public Utility Commission, 131 Or. App. 602, 608 (1994).
39/ Id.
40/ Docket Nos. DR 20/UE101, Order No. 97-408, 1997 WL 913205 at *5-*6 (Oct. 17, 1997) (finding that the Commission "can use any economic justification – so long as it is a reasonable one – in the creation of customer classes").
41/ Chase Gardens, Inc., 131 Or. App. at 609.
42/ Id.
43/ Id.
44/ Id. (emphasis added)

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Similarly, in American Can Co. v. Davis, the Oregon Court of Appeals, in response to a challenge of discrimination, affirmed a Commission order aligning Pacific Power's rates in the Portland metro area with its rates outside of this area.[45/] Lower rates in Portland had previously been authorized on the basis that Pacific Power competed with PGE in this area.[46/] Following an exchange of service territories between the utilities, the Commission found that this competition no longer existed, and authorized an increase to Pacific Power's Portland area rates to align them with its rates in the rest of the state.[47/] The Court rejected a challenge to the increase in Portland area rates, finding that "substantial evidence exists in the record … to support the Commissioner's finding that competition between Pacific and PGE no longer exists or, if any does, it is not sufficient to support maintenance of the separate … rates."[48/]

In this case, there is no question that customers larger than the cap are being prejudiced. They meet all of the eligibility criteria for the long-term opt-out program, but they are prohibited from participating due solely to the participation cap. No party ever disputed this. Unlike in the previous Commission decisions courts have upheld on judicial review, however, the Commission's Final Order articulates no reasons, and makes no findings, that justify this disparate treatment. It simply allows prejudice to occur without explanation. That is precisely the type of treatment ORS 757.325 forbids.

3. The Final Order unlawfully absolved PGE of its burden of proof.

ORS 757.210(1)(a) makes clear that, in any proceeding to establish new rates, "the utility shall bear the burden of showing that the rate or schedule of rates proposed to be

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45/ 28 Or. App. at 225-28.
46/ Id. at 225.
47/ Id. at 226.
48/ Id. at 227-228.

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established or increased or changed is fair, just and reasonable." This burden of proof does not change when the utility is defending a stipulation.[49/] Indeed, as the applicant, PGE "never relinquishes its burden of proof," even if it is a party to a proposed settlement.[50/] Therefore, "if PGE makes a proposed change that is disputed by another party, *PGE still has the burden to show, by a preponderance of evidence, that the change is just and reasonable*."[51/]

Further, to satisfy this burden, the evidentiary requirements necessary to approve a stipulation, discussed above in section A.1, are no different from the requirements necessary to support any Commission decision. That is, the Commission "must review the terms of any stipulation for reasonableness and accord with the public interest."[52/] "When considering a stipulation, we have the statutory duty to make an independent judgment as to whether any given settlement constitutes a reasonable resolution of the issues."[53/] Thus, recently in UG 344, the Commission rejected a contested stipulation resolving issues related to Northwest Natural's pension balancing account. There, the Commission "recognize[d] that the parties entering into the second stipulation negotiated in good faith" but was "not convinced that there is a sufficient record to support approval of the second stipulation."[54/] In effect, the Commission determined that Northwest Natural had not satisfied its burden to justify the reasonableness of the position it was supporting as a stipulating party.

49/ ORS 757.210(1)(a).

50/ Re Long Butte Water System, Inc., Docket No. UW 110, Order No. 06-027 at 9 (Jan. 23, 2006); see also, Re Portland General Electric, 2012 Annual Power Cost Update Tariff, Docket No. UE 228, Order No. 11-432 at 3 (Nov. 2, 2011).

51/ Re Portland General Electric Co., Proposal to Restructure and Reprice its Services in Accordance with the Provisions of SB 1149, Docket No. UE 115, Order No. 01-777 at 6 (Aug. 31, 2001) (emphasis added).

52/ Docket No. UE 267, Order No. 15-060 at 4 (Feb. 24, 2015).

53/ Docket No. UE 210, Order No. 10-022 at 6 (Jan. 26, 2010).

54/ Docket No. UG 344, Order No. 18-419 at 18 (Oct. 26, 2018).

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Yet, here, the Final Order ignores AWEC's objections to the Direct Access Stipulation and appears to use the bare fact of compromise between some, but not all, parties as the rationale for the stipulation's reasonableness. The Commission expresses concern that "AWEC's arguments against the stipulation, if accepted, might discourage parties from pursuing stipulations in the future. Specifically, were we to use the existence of the stipulation to find that PGE cannot cap direct access participation, we could unintentionally make settlement of complicated or difficult issues less likely in the future …."[55/] This argument absolves PGE of its burden of proof. It establishes a presumption of reasonableness for a stipulation – the Direct Access Stipulation is reasonable because it is a stipulation – between only some of the parties even though PGE, the party with the burden of proof, is required to demonstrate its reasonableness through evidence in the record. AWEC clearly explained and provided evidence why the Direct Access Stipulation was *un*reasonable – it violated the antidiscrimination and direct access laws – and it was incumbent on PGE to rebut these arguments, to "show, by a preponderance of evidence, that the [Direct Access Stipulation] is just and reasonable."[56/]

PGE failed to meet this burden. Despite the Commission's expressed fear that AWEC's arguments might mean that "PGE cannot cap direct access participation," AWEC, in fact, never argued that PGE could not cap participation in the long-term opt-out program. (Indeed, one of AWEC's alternative proposals was to increase the cap to allow all eligible customers to participate, thus eliminating any claim of undue prejudice.)[57/] AWEC simply

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55/ Final Order at 18.
56/ Docket No. UE 115, Order No. 01-777 at 6.
57/ AWEC Objections at 1. Presumably, the Commission was referring to capping the long-term opt-out program, because a cap on direct access itself would likely violate ORS 757.601.

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argued that PGE and the other stipulating parties must have a *rationale* for capping it in a manner that excludes otherwise eligible customers.[58/] But the joint testimony provides no rationale at all for this cap. Instead, it simply asserts that the Direct Access Stipulation is reasonable overall.[59/] As discussed above, this is nowhere near the evidentiary baseline necessary to demonstrate reasonableness and, therefore, it is insufficient to meet PGE's burden of proof.

By alleging that the value of compromise alone overcomes AWEC's opposition to the Direct Access Stipulation, the Commission unlawfully absolved PGE of its burden to prove this stipulation's reasonableness, in violation of ORS 757.210(1)(a).

4. The Commission must affirmatively find that the Direct Access Stipulation does not cause unwarranted cost-shifting.

In the Final Order, the Commission "reach[ed] no legal conclusion regarding cost-shifting."[60/] ORS 757.607, however, states that "[t]he Public Utility Commission *shall ensure* that direct access programs offered by electric companies … *must not cause* the unwarranted shifting of costs to other retail electricity consumers of the electric company."[61/] The Commission's failure to reach a conclusion regarding cost-shifting is contrary to its statutory mandate.

As the Commission has recently stated, "[w]hen interpreting a statute, our goal is to determine the legislature's intent – that is, what purpose it 'had in mind' when it enacted the

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58/ Id. at 11-14.
59/ See, generally, Stipulating Parties/500.
60/ Final Order at 18.
61/ ORS 757.607(1) (emphasis added).

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statute in question."[62/] In performing this inquiry, while a court may consider legislative history in its interpretation of a statute,[63/] the Oregon Supreme Court has made clear that a plain and unambiguous statute will be interpreted as such: "When the text of a statute is truly capable of having only one meaning, no weight can be given to legislative history that suggests – or even confirms – that legislators intended something different."[64/]

In this case, it is difficult to imagine a clearer and more unambiguous statutory mandate from the legislature – the Commission "shall ensure" that direct access "must not cause" unwarranted cost-shifting. And not only is the language of ORS 757.607(1) clear and unambiguous, the Commission itself has previously recognized this statute's mandate. In DR 49, the Commission confirmed that it "must approve all direct access programs to ensure they do not cause unwarranted shifting of costs to other customers that remain on the utility's system."[65/]

Just as ORS 757.607(1)'s requirement to ensure that direct access must not cause unwarranted cost-shifting is clear, it is also clear that the Commission failed to fulfill this mandate in the Final Order. Indeed, by expressly "reach[ing] no legal conclusion regarding cost-shifting," the Commission did precisely what the statute forbids – it disclaimed any finding on this issue.

In fact, despite the Commission's express statement, the Final Order could be interpreted as an implicit finding that the Direct Access Stipulation will not cause unwarranted cost-shifting. Only two positions were ever advanced in this docket: (1) a five-year transition

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62/ Docket No. UM 1909, Order No. 18-423 at 5 (Oct. 29, 2018) (citing State v. Johnson, 339 Or. 69, 81 n. 7 (2005)).
63/ ORS 174.020(3).
64/ State v. Gaines, 346 Or. 160, 173 (2009).
65/ Docket No. DR 49, Order No. 15-299 at 11 (Sept. 29, 2015).

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period causes unwarranted cost-shifting and a ten-year period is, therefore, necessary to prevent such cost-shifting; and (2) a five-year transition period does not cause unwarranted cost-shifting. The Commission expressly rejected the former argument, stating that "we do not feel that [] the record before us supports a 10-year transition charge."[66/] Thus, the evidence only supports one conclusion: a five-year transition period does not cause unwarranted cost-shifting. Rather than expressly avoiding this conclusion, ORS 757.607(1) requires the Commission to make this finding explicit.

C. The Commission's Errors of Law Were Essential to its Decision

There is no doubt that the Final Order's approval of the Direct Access Stipulation could not have occurred absent its legal errors. The record in this case allows for only two conclusions. Either: (1) a five-year transition charge in the long-term opt-out program causes unwarranted cost-shifting; or (2) it does not. As discussed above, ORS 757.607(1) requires the Commission to make one of these two findings based on evidence in the record.

If it concludes the former, then it must reject the Direct Access Stipulation as illegal for causing unwarranted cost-shifting in violation of ORS 757.607(1). It must also explain how the record supports its determination,[67/] particularly considering that it has already found that the record does not support a 10-year transition charge.[68/]

If it concludes the latter, then it must either reject the Direct Access Stipulation as unduly prejudicial or explain why the prejudice it imposes on those customers the participation cap excludes from the long-term opt-out program is not undue.[69/] It must also explain why this

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66/ Final Order at 19.
67/ ORS 756.558(2).
68/ ORS 183.482(8)(b)(B).
69/ ORS 757.325.

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stipulation does not erect unnecessary barriers to the development of a competitive retail market. Again, it must articulate the record evidence that supports its determination.[70/] Regardless, the Final Order cannot stand as is.

D. Good Cause Exists for Rehearing if the Commission Believes the Record Contains Insufficient Evidence of Whether Cost-Shifting is Occurring

OAR 860-001-0720(3) authorizes rehearing "if the applicant shows that there is: … (d) Good cause for further examination of an issue essential to the decision." Further, "[i]f a rehearing is granted, the proceedings thereupon shall conform as nearly as possible to the proceedings in an original hearing, except as the commission otherwise may direct."[71/]

The Commission has a full record on which to base a decision regarding whether a five-year transition charge in the long-term opt-out program causes unwarranted cost-shifting. It has testimony and exhibits from AWEC, PGE, Staff, CUB, NIPPC, Calpine Solutions, Fred Meyer, and Albertsons on this issue.[72/] It also has argument in the form of two objections to the stipulation filed by AWEC and CUB, and two rounds of briefing. Based on this evidence, the Commission can also make a finding on whether the Direct Access Stipulation unduly prejudices the eligible customers the participation cap excludes, and on whether the Direct Access Stipulation imposes unnecessary barriers to the development of a competitive retail market. The Commission, therefore, can fulfill its obligations under ORS 756.558(2), 757.607(1), 757.210(1)(a), and 757.325 on the existing record in this docket through reconsideration of the Final Order.

70/ ORS 756.558(2).

71/ ORS 756.561(3).

72/ Exhs. PGE/1300 at 36-43; PGE/1308; PGE/2500-2505; AWEC/200 at 41-48; AWEC/500-507; AWEC/600-607; Staff/800 at 38-43; Calpine 100-103; Fred Meyer/100, NIPPC/100-104; Albertsons-Safeway/100; Stipulating Parties/500; Stipulating Parties/600.

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If, however, the Commission believes that it does not have a sufficient record to make these findings, then good cause exists to grant rehearing. Because the Commission must "ensure that … [t]he provision of direct access … must not cause the unwarranted shifting of costs," and cannot approve unduly prejudicial treatment, and because the Commission must support its conclusions with a sufficient factual basis, rehearing is necessary to allow the Commission to fulfill its legal mandates if it concludes that the current record is insufficient.

IV. CONCLUSION

For the foregoing reasons, AWEC respectfully requests that the Commission reconsider its decision to adopt the Direct Access Stipulation. At a minimum, the Commission must: (1) articulate sufficient "findings of fact … upon the evidence received" to provide a basis for its decision; (2) ensure that this stipulation does not result in "any undue or unreasonable prejudice or disadvantage in any respect;" (3) hold PGE to its burden of proof in supporting the stipulation; and (4) "ensure" that this stipulation does "not cause the unwarranted shifting of costs to other retail electricity consumers." If the Commission does not believe it has a sufficient record to discharge these obligations currently, then good cause exists to grant rehearing on the Direct Access Stipulation to ensure a lawful Final Order.

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Respectfully submitted,

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