

PUBLIC UTILITY COMMISSION OF OREGON  
STAFF REPORT  
PUBLIC MEETING DATE: January 19, 2018

REGULAR  X  CONSENT \_\_\_\_\_ EFFECTIVE DATE \_\_\_\_\_ N/A \_\_\_\_\_

DATE: January 19, 2018

TO: Public Utility Commission

FROM: Lance Kaufman *LK*

THROUGH: *JE* Jason Eisdorfer and John Crider

SUBJECT: OREGON PUBLIC UTILITY COMMISSION STAFF:  
(Docket No. AR 614) Staff request to open a rulemaking proceeding related to new load direct access.

OREGON PUBLIC UTILITY COMMISSION STAFF:  
(Docket No. UM 1837) Staff update on the results of workshop and request for legal determination.

**STAFF RECOMMENDATION:**

Staff recommends that the Commission conclude that it has the legal authority to consider different transition charges for new direct access load. Staff further recommends that the Commission open an expedited rulemaking proceeding to adopt policies applicable to new load direct access programs, and direct parties to brief or otherwise address the two outstanding legal issues regarding resource choice and utility participation.

**DISCUSSION:**

Issues

Whether the Commission has authority to create a direct access program applicable to new load with transition adjustment charges that differ from current direct access programs.

Whether the Commission should open an expedited rulemaking to adopt rules related to a new load direct access program.

### Applicable Rule or Law

#### *Direct Access*

Oregon's direct access legislation was initially passed in 1999, and is included in ORS 757.600 to 757.691. As relevant to this proceeding, ORS 757.607 provides that the Commission ensure that direct access programs do not result in the "unwarranted shifting of costs" from participants to remaining retail consumers of the electric company, and gives the Commission authority to establish transition charges or transition credits to accomplish a reasonable balance of interests between utility shareholders and cost of service customers. ORS 757.622 requires the Commission to establish terms and conditions for default electricity service to nonresidential consumers, while providing for viable competition among electricity service suppliers. Definitions for direct access legislation are found in ORS 757.600.

#### *Discrimination*

Though not specific to direct access, ORS 757.310, ORS 757.325 and ORS 757.230 are applicable to the Commission's authority to approve direct access programs. ORS 757.310(2) prohibits public utilities from "charg[ing] a rate or an amount for a service that is different from the rate or amount the public utility charges any other customer for a like and contemporaneous service under substantially similar circumstances." ORS 757.325(1) prohibits a utility from "mak[ing] or giv[ing] undue or unreasonable preference or advantage to any particular person or locality," and from "subject[ing] any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect." Utilities found in violation of these requirements are guilty of unjust discrimination. ORS 757.230 permits the Commission to create service classifications based on a number of factors, including "other reasonable consideration" as determined by the Commission. Finally, ORS 756.040 and ORS 757.210 generally require the Commission to establish fair, just and reasonable rates.

### Analysis

The Commission opened this docket to investigate questions related to the appropriate treatment of direct access transition adjustments for new customer load at a new site.<sup>1</sup> These questions were contemplated because the stranded costs and benefits associated with new load direct access may be systematically different from those for existing load. This investigation has included two rounds of briefing, two rounds of comments, and two workshops. The questions explored in this investigation addressed the following issues:

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<sup>1</sup> *In re Public Utility Commission of Oregon*, OPUC Docket No. UM 1837, Order No. 17-171 (May 16, 2017).

1. Commission's authority to develop a new load direct access program;
2. Benefits, costs and risks of a new load direct access program;
3. Utility planning and resource acquisition associated with new load; and
4. Appropriate characteristics of a new load direct access program.

Staff's brief concluded that the Commission does have authority to allow a new load direct access (NLDA) program.<sup>2</sup> Furthermore, Staff finds that it is possible to create a NLDA program without undue cost shifts and that the Commission should adopt rules implementing such a program.

*Commission's Legal Authority to Develop a NLDA program*

Parties to this docket submitted two legal briefs that discussed the Commission's legal authority to enact a NLDA program that would allow for reduced or eliminated transition charges for applicable new load.<sup>3</sup>

There was general agreement among the parties that current law did not bar the Commission from approving a direct access program that includes reduced or eliminated transition charges and credits for new non-residential direct access load so long as there is no unwarranted cost-shifting and no unwarranted or unjust discrimination. CUB was the only party to conclude that the Commission lacked the legal authority to give preferential treatment or to discriminate among members of the same customer class, because it argues all direct access customers are necessarily considered the same customer class.

Staff and other parties argued in reply briefs that the Commission has the ability to allow for different treatment among customers, as long as the Commission finds that the particular rate: A) is justified by different circumstances, B) is based on a legitimate service classification, and C) does not result in a particular customer or location receiving unreasonable preference or advantage. Furthermore, the parties generally agreed that additional fact-finding would be necessary in order to determine whether any cost shifts were "unwarranted," whether there are appropriate grounds for service classifications, and what might constitute "unreasonable" preference and "unjust discrimination."

The parties also generally agree that default supply obligations are an issue that must be addressed in the context of designing a new load direct access program, but this does not present a legal barrier to the design of any such program.

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<sup>2</sup> UM 1837 – Staff Reply Brief at page 4.

<sup>3</sup> These briefs were filed under Docket No. UM 1837 on September 8, 2017 and October 10, 2017.

Therefore, Staff first recommends that the Commission conclude that it has the legal authority to consider different transition charges for new direct access load.

Staff notes that in its comments, PacifiCorp argued that a new load direct access program should be restricted to customers seeking green energy from green resources, and that the program should consider the utility's ability to compete to provide renewable options to new customer load. Similarly, PGE's comments recommended that different transition charges should only be available to customers with new load that choose a green energy option, and that it should be permitted to provide a renewable tariff in order to provide a cost-based alternative for customers and to ensure a more level playing field with electricity service suppliers.

These comments raise two further legal issues—whether the Commission has the authority to discriminate based on customer resource choice and whether a utility can offer its own green energy option for customers—which have not been briefed as yet. Staff recommends that the Commission direct the parties to address these legal issues in the rulemaking process.

#### *Benefits, Costs, and Risks of a NLDA program*

A NLDA program may have the following benefits:

- Economies of scale for utility administrative and distribution costs;
- Reduce utility load growth and need to add generation resources or replace coal resources;
- Reduce future average system cost by avoiding new resources;
- Reduce average system cost by sharing option value of NLDA with cost of service (COS) customers;
- Develop the competitive generation market; and
- Increase efficiency of regulated generation through competitive pressure.

It has been argued that a NLDA program could attract new industry to Oregon. Staff does not include economic development benefits when evaluating utility filings because general economic development is a state interest, not a ratepayer interest. This benefit should not be used by the Commission to approve the NLDA program.

A NLDA program may also result in costs and risks related to:

- Stranded generation costs;
- Administration and oversight of NLDA program;
- Additional planning and forecasting complexity;
- Foregone economies of scale in generation during periods of resource adequacy;
- Increased load uncertainty; and

- Customers in existing facilities may operate at higher costs than customers at new facilities.

Parties have explored characteristics of NLDA programs that address and balances benefits, costs, and risks of a NLDA program. The primary trade-off that parties have evaluated is between the costs associated with stranded generation costs and the size and scope of the NLDA program. The principal concept that would support a NLDA program is that utilities can minimize stranded costs associated with NLDA in a way that is not possible for existing load direct access customers. The utilities can accomplish this by making adjustments to the current planning and resource acquisition process.

#### *Utility Planning and Resource Acquisition Processes*

Parties explored utility planning and resource acquisition in order to understand how stranded costs and benefits due to new load direct access may differ from existing load direct access. Both PGE's and PacifiCorp's planning processes incorporate formulaic regression-based forecasts for smaller loads but their forecasting for larger loads is based largely on individual customer contact.

PGE's planning process is based on requests for service and regression based load forecasts.<sup>4</sup> PGE indicates that new incremental loads of sufficient size may not be included in the current load forecasts to the extent that they deviate from historic trends.<sup>5</sup> PacifiCorp's planning process follows an annual cycle which begins with regression based load forecasts and individual customer forecasts for some large customers. This forecast is updated in July for actual customer loads if such loads warrant an update. The load forecast is incorporated into PacifiCorp's integrated resource planning process.

Both PGE and PacifiCorp have an ongoing obligation to evaluate the need for new resources outside the planning cycle. This means that before a utility makes a final commitment to acquire new resources, the utility should evaluate whether there has been any substantial change in its load forecast and resource needs.

Staff concludes from its analysis that current utility planning and resource acquisition processes lend themselves well to modification for an NLDA program. The details of such process modifications will need to be explored in the recommended rulemaking process. Limiting the NLDA program to large loads that have custom, non-regression based forecasts may facilitate the planning changes required for a NLDA program.

#### *Appropriate characteristics of a new load direct access program*

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<sup>4</sup> UM 1837 – PGE's Opening Comments at page 7.

<sup>5</sup> UM 1837 – PGE's Opening Comments at page 7.

Over the course of this investigation, it became apparent that parties, with the exception of CUB, generally agreed that utilities should develop a new load direct access program. Staff initially recommended that the Commission direct utilities to file tariffs consistent with the conditions listed in Staff's second round of comments. However, the second round of comments showed that while parties may have general agreement, there continues to be significant differences regarding specific details of the new load direct access program. PGE also asked for additional process before filing tariffs.

Based on these two items raised by the utilities, Staff now recommends that the Commission open a rulemaking in order to continue refining the structure of a new load direct access program. Staff convened a final workshop with parties on January 10, 2018 to discuss this proposal. At the final workshop, all parties were willing to explore a rulemaking process for developing a NLDA program.

Parties also have worked to identify initial areas of general agreement regarding parameters for a NLDA program. Parties agreed on many general components of a NLDA program, although several key issues without agreement.

Parties generally agree that:

- NLDA program should be applicable to new facilities at new sites. Parties agree that there can also be a minimum threshold size to participate.
- The utilities should monitor customers on the NLDA program to ensure that they meet the threshold size.
- NLDA program should also be applicable to newly identified expansion of facilities at existing COS sites if the new load is separately metered or sub-metered. Expansions at existing facilities at existing sites should meet a minimum threshold size to participate in the NLDA program. The utility should be required to include sufficient reasonable conditions in the NLDA tariffs to ensure that customers do not shift load or energy from existing facilities to the expanded facilities.
- The NLDA program is applicable to existing facilities that have been dormant or operated at a substantially reduced level for some defined period of time. The reduced level of electrical usage should reflect the site not being used for its historical primary purpose for some period of time. There should be a minimum threshold size for existing facilities to participate in the NLDA program.
- NLDA tariffs should include sufficient reasonable conditions to ensure that customers participating in the NLDA program are not strategically changing behavior in order to circumvent the intent of the new load size conditions. The intent of these conditions are to limit the size of the transition adjustment necessary for the NLDA participants.

- Notification of enrolling in the NLDA program and opting out of COS rates must be given to utility simultaneously with the binding notification to utility of planned service of new load and must be given at some time prior to energizing the meter.
- Utility Provider of Last Resort obligations will be satisfied by the utility's emergency default service rate and the utility's standard offer service, which is a market rate. To the extent that a party can demonstrate that there are additional costs associated with provider of last resort obligations expressly associated with the NLDA program, these costs may be flowed through to NLDA customers. Such costs should be limited to costs identified or characterized at the time the NLDA customer opts out of COS rates.
- Customers enrolled in the NLDA program may return to cost of service rates under the same notice conditions as the LTDA programs of the respective utility.
- The NLDA program may incur administrative costs and may require transition adjustments. However the transition (stranded cost and benefit) adjustments will be lower than those that otherwise would apply for the existing LTDA program.
- The NLDA program could have some form of limit to total enrollment.

Staff notes that while there is general agreement on these items, some parties may not agree with all items. In addition, some parties only agree to these items to the extent that they may represent acceptable compromises, and that final agreement will depend on the specific parameters of the NLDA program, such as applicant size thresholds and participation enrolment limits.

*Key areas of continued disagreement*

1. Threshold size;
2. Relationship between NLDA enrolment limit and existing direct access enrolment limits;
3. Limits to generation sources for NLDA;
4. Planning vs. resource acquisition basis for denying NLDA applicants; and
5. Utility participation in NLDA programs.

For informational purposes only, this memo briefly describes Staff's understanding of these areas of disagreement; however, Staff recommends that the Commission make a determination about these issues, as well as the agreed-upon issues discussed above, in the recommended rulemaking proceeding. The rulemaking process includes steps for Commissioner engagement prior to and after Staff drafting proposed rules.

- Threshold Size

The threshold size for participation in the NLDA program will affect the number and type of customers that the NLDA program is applicable to. PacifiCorp contends that the threshold size should be at least 10 MWA in order to ensure that the utility has not planned for the NLDA load.<sup>6</sup> Other parties, including Staff, contend that the utility can modify its planning process to be consistent with any size threshold, and that the threshold should be set based on what utilities can plan for, rather than what utilities currently plan for.

Staff agrees that utilities can modify their planning processes. The size threshold does not need to be directly tied to the current planning process. However, Staff is also concerned that low size thresholds will result in greater uncertainty in the planning process and that this greater uncertainty would necessitate a larger transition adjustment. Staff views the threshold as a trade-off between the number and type of customers that can participate in the NLDA program, and the size of the transition charges that are associated with this program.

- NLDA Enrolment Limit

The key area of disagreement related to the enrolment limit is whether the NLDA enrolment should be grouped with the existing long term direct access enrolment and subject to the applicable caps for those programs, or if the programs should be evaluated separately. This decision can greatly impact the potential enrollment for an NLDA program since PGE is near the enrolment limit for existing direct access programs.<sup>7</sup> If the NLDA enrollment limit is grouped with existing direct access enrolment, PGE's NLDA program may not allow for meaningful participation.

- Generation Sources for NLDA

Some parties have proposed that the NLDA program only be available to customers receiving 100 percent renewable energy. The basis for this proposal is that SB 979 from the 2017 legislative session contemplated a renewable only direct access program. However, the cited legislation did not become law, and the investigation has progressed under the direct access framework under existing Oregon law. No party has shown that existing law contemplated limiting the generation source of direct access customers beyond any applicable renewable portfolio standard (RPS) requirements. Furthermore, the justification for developing a NLDA program is grounded in utility costs. No party has shown that a renewable only NLDA program would result in different stranded costs and benefits than an unrestricted NLDA program.

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<sup>6</sup> See UM 1837 – PacifiCorp's Opening Comments page 3.

<sup>7</sup> PacifiCorp enrollment in the existing long term direct access program is substantially lower than the current cap.



- Planning vs. resource acquisition

Staff and the utilities disagree on whether new load determination should be made from a planning perspective or from a resource perspective. Specifically, Staff proposes that the NLDA program be open to customers that the utility has not acquired resources to serve. The utilities contend that the NLDA program should not be open to customers that the utility has planned for, even if the utility has not committed any investments to serve those customers.

- Utility participation in NLDA program

Both PGE and PacifiCorp argue that utilities should be permitted to compete with electric service suppliers if a NLDA program is implemented through a new service offering. Both utilities also recommended that the NLDA program, including its own service offering, be restricted to renewable resources, as discussed above. Staff recommends that parties explore these areas of disagreement in a rulemaking process.

#### *Proposed Rulemaking*

Staff proposes that the issues raised in this investigation be decided and formalized in a rulemaking proceeding. The investigation in UM 1837 has shown that there is substantial agreement on several new load direct access issues, and the briefing, comments and workshops have provided much of the foundational work for a rulemaking. For this reason, the rulemaking could proceed on an expedited basis. Staff discussed whether a rulemaking was a reasonable next step at the workshop on January 10, 2018. Staff understood there to be general agreement that this was an agreeable approach.

However, parties raised three concerns:

1. The rulemaking may delay the implementation of a NLDA program;
2. The rulemaking may not allow parties access to important utility data that is normally available through a contested case process; and
3. The rulemaking should not be overly prescriptive.

The UM 1837 investigation has allowed parties to develop a comprehensive issues list. Staff believes that parties can leverage this groundwork to expedite the rulemaking process. However, there remains substantial room for parties to discuss and develop proposed rules. At this time Staff does not propose a specific schedule.

PacifiCorp questioned whether the rulemaking should have specific terms and conditions included and indicated a preference for rules that were not prescriptive. Staff

agrees that the rulemaking should not be overly prescriptive. However, properly prescriptive rules are valuable in order to prevent duplicative disputes in individual utility tariff filings. The proper level of prescriptive rulemaking can be reached through the rulemaking process.

### Conclusion

The briefings filed in this case support a Commission conclusion that it has the legal authority to consider different transition charges for new direct access load. The Commission should open a rulemaking proceeding to adopt rules applicable to NLDA programs and explore outstanding issues.

### **PROPOSED COMMISSION MOTION:**

Find that Commission has authority to create a direct access program applicable to new load with transition adjustment charges that differ from current direct access programs.

Open an expedited rulemaking to create rules related to a new load direct access program, and direct parties to brief or otherwise address the two outstanding legal issues regarding resource choice and utility participation.