BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1837

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON, Investigation into the Treatment of New Facility Direct Access Load.	STAFF'S OPENING BRIEF

I. INTRODUCTION

Pursuant to Administrative Law Judge Power's July 11, 2017 Prehearing Conference Memorandum, Staff of the Public Utility Commission of Oregon (Staff) hereby submits its Opening Brief in docket UM 1837. The Commission opened this docket at its May 16, 2017 public meeting to investigate questions related to the appropriate treatment of direct access transition adjustment charges for new non-residential customer load at new sites.[1]

This docket is seeking to answer whether the Commission has the legal authority to treat new non-residential direct access load differently than is current practice, and if so, subject to what legal parameters under existing law. Staff finds that the Commission has broad discretion in setting transition charges and credits, subject to statutory requirements around unwarranted cost-shifting, unwarranted and unjust discrimination, and default energy suppliers.

Whether and to what extent the Commission should exercise its discretion is a matter of policy. In its public meeting memo recommending the investigation, Staff noted a number of policy issues that it expects will be addressed in the comment phase of this docket.[2] Therefore, Staff's Opening Brief is limited to the Commission's authority under current Oregon law. Staff recognizes that additional legal questions may be implicated by programmatic proposals from

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[1] May 4, 2017 Staff Report – Request for Investigation into the Treatment of New Facility Direct Access Loads (May 16, 2017 public meeting, Regular Agenda Item No. 4) ("Public Meeting Memo").

[2] Public Meeting Memo at 9.

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other parties; however, Staff believes that those issues are best addressed if and when the Commission considers specific proposals for transition charges (or lack thereof) for new non-residential customer load at new sites.

II. BACKGROUND

1. Senate Bill 1149

Direct Access regulation in Oregon was enacted by Senate Bill (SB) 1149 during the 1999 legislative session.[3] SB 1149 requires, among other things, electric utilities to allow certain customers to purchase energy directly from independent Electricity Service Suppliers (ESS), rather than the incumbent investor-owned utility.[4]

The preamble to SB 1149 clarifies the Legislature's intent to encourage opportunities for competitive electricity options while ensuring that unwarranted cost-shifting to non-participating customers does not occur. This policy is achieved, in part, through a grant of permission to the Commission to set both transition charges and transition credits for direct access customers.[5] In order to ensure that direct access customers have electricity service in an emergency, the legislature required the Commission to establish reasonable terms and conditions for the provision of default service that provide for viable competition among electricity service suppliers.[6]

2. Senate Bill 979

During the 2017 legislative session, the Oregon Legislature considered SB 979, which proposed a number of changes to Oregon's Direct Access program. One such change was amending ORS 757.607 to include language that would prohibit the Commission from allowing recovery, through a transition charge, of costs incurred and a return on utility investment unless

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[3] S.B. 1149, 70th Leg., Reg. Sess. (Or 1999).

[4] S.B. 1149, Section 2. Staff notes that the investor-owned utility may continue to provide distribution services. SB 1149, Section 7 (codified at ORS 757.632).

[5] S.B. 1149, Section 8 (codified at ORS 757.607).

[6] S.B. 1149, Section 4a (codified as ORS 757.622).

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the electric company demonstrates that it used diligent efforts to mitigate the costs.[7] SB 979 also proposed to add the definition of "new commercial load,"[8] and to eliminate transition charges for new commercial load subscribing to a renewable-only Direct Access offering.[9]

Upon adjournment of the 79th Oregon Legislative Assembly, SB 967 remained in the Senate Business and Transportation Committee, and was therefore not signed into law.

3. Docket UM 1837

In light of the public interest in SB 979, Commission Staff recommended that the Commission open an investigation pursuant to its general investigatory powers to investigate the appropriate treatment of direct access transition charges for new non-residential customer load at a new site.[10] The Commission adopted Staff's recommendation at its May 16, 2017 public meeting.

III. LEGAL STANDARD

The Legislature granted the Commission broad, general powers to ensure that rates are fair, just and reasonable.[11] While certain provisions of SB 1149 provide the Commission with specific directives on how it must implement the Legislature's goals in electric restructuring, other provisions provide the Commission with broad discretion to exercise its judgment in executing the Legislature's intended policy.

Oregon courts have determined three categories of statutory terms—exact, inexact and delegative.[12] Exact statutory terms convey a relatively precise meaning, and their applicability in a given context depends upon agency fact-finding.[13] Inexact terms are less precise, but are understood to embody a complete policy statement by the legislature and require the agency to

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[7] S.B. 979, 79th Leg., Reg. Sess. (Or 2017), Section 3.

[8] S.B. 979, Section 1.

[9] S.B. 979, Section 3.

[10] Public Meeting Memo at 1.

[11] ORS 756.040; ORS 757.210.

[12] *Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 290 Or 217, 223 (1980).

[13] *Id.* at 223-224.

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apply a definition of the word that is within the legislative policy.[14] Delegative terms express incomplete legislation, which the agency is then given the delegated authority to complete.[15] In short, the agency's role is to make policy determinations within the parameters of the legislative policy.[16]

Courts review an agency's rule or order involving a delegative term to "determine whether the agency's action was within the scope of authority conferred by the statute."[17] Courts typically afford greater weight to an agency's interpretation of delegative terms when a statute "assigns the agency's tasks in broad terms that delegate to the agency responsibility for completing a general legislative policy."[18] To determine the general legislative policy of a statute, courts employ the framework of statutory construction.[19] That framework begins with a review of the statute's text and context, and consideration of any proffered legislative history.[20] Finally, if the intent remains unclear, the court resorts to general maxims of statutory construction.[21]

The statutory provisions at issue in this investigation consist of delegative terms. Therefore, the Commission has the responsibility of refining and executing the legislative policy expressed in SB 1149.[22]

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[14] *Id.* at 225.

[15] *Id.* at 228.

[16] *See Blachana, LLC v. Bureau of Labor and Indus.*, 354 Or 676, 687 (2014) ("Finally, 'delegative' terms require the agency to make policy determinations in the first instance.").

[17] *Lombardo v. Warner*, 340 Or 264, 270 (2006).

[18] *1000 Friends of Or. V. Land Conservation & Dev. Comm'n, Lane County*, 305 Or 384, 390 (1988).

[19] *Bergeson v. Salem-Keizer Sch. Dist.*, 341 Or 401, 413 (2006).

[20] *State v. Gaines*, 346 Or 160, 171 (2009).

[21] *Id.* at 172.

[22] *Id.* ("The delegation of responsibility for policy refinement under such a statute is to the agency, not to the court."); *Ross v. Springfield School Dist.*, 294 Or 357, 367 n 7 (1982) ("The agency functions as more than mere interpreter; it may make rules within the range of discretion established by the statutory terms.").

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IV. ARGUMENT

(A) The Commission has the authority to approve direct access programs subject to considerations of unwarranted cost-shifting to other retail electricity consumers.

ORS 757.607 requires the Commission to ensure that direct access programs offered by electric companies meet certain conditions as set forth in the statute. Most notably, the Commission is required to ensure that there is no "unwarranted shifting of costs" from participation in direct access from some retail electricity consumers to remaining retail electricity consumers of the electric company.[23] In so doing, the Commission is permitted to consider and mitigate the rate impact on consumers from the reduction or elimination of subsidies in existing rate structures.[24] In order to prevent unwarranted cost-shifting, the Commission has the discretion to establish transition credits and charges:

> The direct access, portfolio of rate options and cost-of-service rates may include transition charges or transition credits that reasonably balance the interests of retail electricity consumers and utility investors. The commission may determine that full or partial recovery of the costs of uneconomic utility investments, or full or partial pass-through of the benefits of economic utility investments to retail electricity consumers, is in the public interest.[25]

The Commission also has the discretion to allow transition adjustments to include return on undepreciated plant in service.[26] Finally, the Commission is required to allow recovery, through transition charges, of any otherwise unrecoverable costs arising from or related to an electric company's legal obligations to Bonneville Power Administration (BPA).[27]

ORS 757.607 establishes two important parameters with regard to transition adjustments. First, the statute's prohibition on cost-shifting is qualified by the term "unwarranted." As such, the plain language of the statute does not prohibit cost-shifting on its face, but rather, only cost-

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[23] ORS 757.607(1).

[24] *Id.*

[25] ORS 757.607(2).

[26] ORS 757.607(4).

[27] ORS 757.607(3).

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shifting that would be deemed unwarranted.[28] "Unwarranted" is a delegative term, which as described above, means that the legislature did not express a complete legislative meaning, and therefore intended for the Commission to complete the policy decision as to what would constitute "unwarranted" cost-shifting. The legislative history of SB 1149 is replete with discussion of legislative intent. The preamble to SB 1149 also sets forth many legislative goals,[29] including among others "Whereas this state must adopt reasonable transition policies…that least to a competitive electricity market that is accessible to and benefits all classes of electricity customers" and "Whereas this state must adopt adequate electricity consumer protections." Whether a particular direct access program would constitute unwarranted cost-shifting is a question of policy for Commission determination. Therefore, the Commission has broad authority to approve direct access programs so long as it finds that those programs do not cause an unwarranted shifting of costs in light of the legislature's intent with electric restructuring.

Second, there is no statutory requirement that the Commission approve transition adjustment charges or credits at all, with the exception of those required to recover certain otherwise unrecoverable BPA costs. The language in ORS 757.607(2) is permissive, as it contains the term "may," rather than terms that do not allow the Commission to exercise discretion, such as "shall."[30] If included in rates, transition adjustment charges and credits must "reasonably balance" customers' and investors' interests. Therefore, the Commission has the authority to approve direct access programs that do not include transition charges or credits in rates, so long as the Commission finds that doing so strikes a reasonable balance between

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[28] *See Gaines*, 346 Or at 171. ("[T]he appropriate methodology for interpreting a statute is as follows. The first step remains an examination of the text and context.").

[29] Staff notes that the preamble to a statute, while informative, does not contain operative language conferring powers; however, it may be considered as part of its context review to support a particular construction if the text of the bill is ambiguous. *See e.g. Sunshine Dairy v. Peterson*, 183 Or 305, 317-318 (1948).

[30] *Associated Or. Veterans v. Dept. of Veterans' Affairs*, 70 Or App 70, 74 (1984) (Finding that "may" is generally a permissive term, whereas "shall" is generally construed as a mandatory term).

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customers' interests and investors' interests and fits within the overall policy of electric restructuring legislation.

(B) The Commission must ensure that direct access programs do not result in unwarranted and unjust discrimination.

The Commission must consider whether service provided by investor-owned utilities to new direct access load at a new site is substantially similar to service provided to existing direct access load and new load at existing sites, and whether a difference in transition adjustment charges for new load at new sites would constitute unjust discrimination.

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." Subsection (2) of the statute goes on to state that a utility found to have violated this section is guilty of unjust discrimination.

The Oregon Court of Appeals previously determined that the language in ORS 757.310 and ORS 757.325 contained delegative terms, such as "undue," "unreasonable," "like and contemporaneous service," and "substantially similar circumstances," and therefore require the Commission to make "a choice of policy which is essentially legislative in that it refines a general legislative policy."[31] As such, Oregon courts have determined that the Legislature intended the Commission to complete the policy decision with respect to what constitutes unjust and unreasonable discrimination in particular circumstances in light of its broad ratemaking authority. Whether a particular direct access program could be considered to result in unjust and unreasonable discrimination is a policy determination left to the Commission.

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[31] *Chase Gardens, Inc. v. Or. Pub. Util. Comm'n*, 131 Or App 602, 609 (1994) (Court affirmed PUC order that applied ORS 757.310 and ORS 757.325 to facts underlying a claim of unjust discrimination. Court found that the PUC appropriately exercised its choice of policy within the ranger of discretion allowed by the more general policy of ORS chapters 756 and 757).

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(C) The Commission has the discretion to determine the legal obligations of default suppliers.

ORS 757.622 requires the Commission to establish terms and conditions for default electricity service to nonresidential consumers, while providing for viable competition among ESSes. ORS 757.600(5) defines default supplier as "an electricity service supplier or electric company that has a legal obligation to provide electricity services to a consumer, as determined by the commission."[32] While default supplier is a defined term by the Legislature, the definition includes an express grant of power to the Commission to determine the legal obligation applicable to default suppliers. The Commission promulgated OAR 860-038-0280 in response to the Legislature's direction to determine default suppliers' obligations.[33] The Default Supply Rule sets forth requirements for two types of service—emergency default supply and standard offer default supply.[34] However, the Commission retains the discretion to change its policies for default suppliers, so long as it does so in a rulemaking proceeding,[35] and the substance of the rules continue to be within the general legislative policy of ORS 757.622.

V. CONCLUSION

The Commission is charged by the legislature with ensuring that rates remain fair, just and reasonable. With regard to direct access programs, the Commission similarly has broad discretion to approve programs that are within the policy objectives articulated by the legislature, and subject to considerations of unwarranted cost shifting, unwarranted and unjust discrimination, and imposing legal requirements on default energy suppliers. Subject to the

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[32] OAR 860-083-0005(12) defines "default supplier" as "an electric company that has a legal obligation to provide electricity services to a consumer, as determined by the Commission."

[33] *In the Matter of a Rulemaking Proceeding to Implement SB 1149 Relating to Electric Restructuring*, OPUC Docket No. AR 380, Order No. 00-596 (Sept. 28, 2000).

[34] OAR 860-038-0280.

[35] *Vier ex rel. Torry v. State Office for Services to Children and Families*, 159 Or App 369, 374 (1999) ("It is important to recognize at the outset that the APA imposes on agencies the obligation to adopt and implement policies that affect the public through formal rulemaking…Once an agency has done so, it must similarly use formal rulemaking to amplify or refine an existing rule.") (internal citations omitted).

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statutory requirements discussed above, Staff finds that the Commission has the discretion to approve direct access programs that allow for different transition adjustment charges than those currently in place for new non-residential load at a new site.

DATED this 8th day of September, 2017.

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