

1 **BEFORE THE PUBLIC UTILITY COMMISSION**  
2 **OF OREGON**

3 UM 1837

4 In the Matter of

5 PUBLIC UTILITY COMMISSION OF  
6 OREGON,

7 Investigation into the Treatment of New  
8 Facility Direct Access Load.

STAFF'S REPLY BRIEF

8 **I. INTRODUCTION**

9 Pursuant to Administrative Law Judge Power's July 11, 2017 Prehearing Conference

10 Memorandum, Staff of the Public Utility Commission of Oregon (Staff) hereby submits its Reply  
11 Brief in docket UM 1837. Staff's brief responds to the briefs filed by Calpine Energy Solutions,  
12 LLC (Calpine), Vitesse, LLC (Vitesse), Northwest and Intermountain Power Producers Coalition  
13 (NIPPC), Industrial Customers of Northwest Utilities (ICNU), Oregon Citizens' Utility Board  
14 (CUB), and Portland General Electric and PacifiCorp (Joint Utilities).

15 All parties, with the exception of the Oregon Citizens' Utility Board (CUB), generally  
16 agree that the Commission has the ability, under existing statutes, to approve direct access  
17 programs that include reduced or eliminated transition charges and credits for new non-  
18 residential direct access load at a new site so long as there is no unwarranted cost shifting and no  
19 unwarranted or unjust discrimination.<sup>1</sup> Parties diverge more sharply on whether and how the  
20 Commission should exercise its discretion. Staff will address specific policy considerations and  
21 recommendations in comments scheduled to be filed in this proceeding after briefing.

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25 <sup>1</sup> CUB's opening brief concludes that the Commission does not have "the legal authority to  
26 eliminate transition adjustments for new commercial utility customers." CUB Opening Brief at  
5. Staff notes that CUB's brief does not specifically address reduced transition charges for these  
customers.

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## II. ARGUMENT

(A) **Additional facts are necessary to determine whether service provided is “substantially similar,” and the disparate treatment of customers is “undue” or “unreasonable.”**

CUB argues that because “there is no authority for a utility to give preferential treatment or discriminate among members of the *same* customer class, the Commission cannot eliminate transition charges for select commercial customers because they are new to the utility’s system.”<sup>2</sup> CUB’s argument rests on the assumption that new direct access customers and existing customers transitioning to direct access are necessarily considered the same customer class, and that the Commission lacks the discretion to permit different rates for customers within the same class. Vitesse, NIPPC and ICNU, on the other hand, argue that there is a basis for the Commission to determine that new direct access customers are substantially dissimilar from existing customers.<sup>3</sup> Vitesse goes so far as to argue that “each Direct Access customer exists within its own customer class.”<sup>4</sup> The Joint Utilities note that the “Commission may approve different treatment of transition charges for new customer load at a new site so long as the proposal does not violate the Commission’s non-discrimination statutes,” and that the Commission must have a reasonable and rational basis to establish a new rate class.<sup>5</sup>

Staff generally concurs with the legal conclusions drawn by the Joint Utilities, Vitesse, NIPPC and ICNU.<sup>6</sup> Namely, that ORS 757.310(2) prohibits a utility from charging different rates for like and contemporaneous service *under substantially similar circumstances*, but that the Commission retains flexibility under ORS 757.230 to create service classifications based on a number of factors, including “other reasonable consideration” as determined by the Commission. This means that there is no blanket legal prohibition to allowing different treatment among

24 <sup>2</sup> CUB Opening Brief at 3.

25 <sup>3</sup> Vitesse Opening Brief at 2-7; NIPPC Initial Brief at 6-9; ICNU Opening Brief at 3-5.

26 <sup>4</sup> Vitesse Opening Brief at 5.

<sup>5</sup> Joint Utilities Opening Brief at 4.

<sup>6</sup> *See also* Staff’s Opening Brief at 7.

1 customers despite some shared characteristics; however, determining whether circumstances are  
2 “substantially similar” and whether the creation of a new service classification is appropriate  
3 requires additional fact-finding and analysis. Accordingly, Staff finds that the Commission has  
4 the ability to allow for reduced or eliminated transition charges and credits for new direct access  
5 customers at new sites so long as the Commission finds the particular rate is justified by different  
6 circumstances, is based on a legitimate service classification, and does not result in a particular  
7 customer or location receiving unreasonable preference or advantage. The comments portion of  
8 this proceeding is intended to address the factual and policy questions that would underlie such a  
9 finding by the Commission.

10 **(B) The Commission has the authority to permit cost-shifting, but additional facts are**  
11 **necessary to determine whether any such cost-shift would be “unwarranted.”**

12 Whether the elimination of transition charges would result in a cost shift, and then  
13 secondarily, whether that cost shift is unwarranted, are questions of fact and policy for the  
14 Commission to determine. CUB argues that elimination of transition charges would shift costs  
15 to other utility customers, which would constitute an unwarranted cost shift under ORS  
16 757.607(1).<sup>7</sup> On the opposite end, NIPPC argues that it is likely impossible that there would be  
17 *unwarranted* cost-shifts because the utility may not ever have “uneconomic utility investments,”  
18 which are the basis for transition charges, and in light of SB 1149’s goals to encourage new  
19 investment in the state and to eliminate barriers to a competitive retail market.<sup>8</sup> Similarly,  
20 Vitesse argues that this docket will demonstrate that “new Direct Access load does not shift costs  
21 to other customers because it is not load that the incumbent utility has previously acquired  
22 resources to serve.”<sup>9</sup>

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25 <sup>7</sup> CUB Opening Brief at 4-5.

26 <sup>8</sup> NIPPC’s Initial Brief at 6-9.

<sup>9</sup> Vitesse Opening Brief at 7.

1 While Staff agrees that the Commission is legally required to remove barriers to the  
2 development of a competitive market, as required by ORS 757.646,<sup>10</sup> Staff does not find that  
3 transition charges for new load are *de facto* contrary to the goals of SB 1149 or significantly  
4 harms Oregon's economic growth. Whether the elimination of transition charges would result in  
5 unwarranted cost-shifts requires additional fact-finding. Specifically, Staff's comments in this  
6 proceeding will address whether, and to what extent, there may be cost-shifts, and if so, whether  
7 those cost shifts are warranted given the goals of SB 1149 and the Commission's general  
8 obligation to protect the public interest.


9 **III. CONCLUSION**

10 As discussed in its Opening Brief, Staff continues to find that the Commission has broad  
11 authority under current Oregon law to reduce or eliminate transition charges and credits for new  
12 direct access load at a new site, so long as doing so does not result in unjust or unwarranted cost  
13 shifting, and allows the utility to continue to meet provider of last resort obligations as  
14 determined by the Commission.

15 DATED this 10<sup>th</sup> day of October, 2017.

16 Respectfully submitted,

17 ELLEN F. ROSENBLUM  
18 Attorney General

19   
20 Sommer Moser, OSB # 105260  
21 Assistant Attorney General  
22 Of Attorneys for Staff of the Public Utility  
23 Commission of Oregon

22 <sup>10</sup> Specifically, ORS 757.646(1) provides:

23 The duties, functions and powers of the Public Utility Commission shall include  
24 developing policies to eliminate barriers to the development of a competitive  
25 retail market structure. The policies shall be designed to mitigate the vertical and  
26 horizontal market power of incumbent electric companies, prohibit preferential  
treatment, or the appearance of such treatment, of generation or market affiliates  
and determine the electricity services likely to be competitive. The commission  
may require an electric company acting as an electricity service supplier do so  
through an affiliate.