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.	OPENING BRIEF OF VITESSE, LLC

I. I. INTRODUCTION

Vitesse, LLC (Vitesse), a wholly-owned subsidiary of Facebook, Inc. (Facebook), owns and operates a data center in Prineville, Oregon, where it is a customer of Pacific Power & Light Company (Pacific Power).

In addition to the data center in Prineville, Vitesse currently owns and operates data centers in Forest City, North Carolina, Altoona, Iowa, Fort Worth, Texas and Lulea, Sweden. Facebook data centers that are under construction include Los Lunas, New Mexico, Papillion, Nebraska, New Albany, Ohio, Clonee, Ireland and Odense, Denmark. Facebook is continually assessing how to efficiently expand data center capacity, which often involves constructing new facilities relatively near existing facilities.

Facebook has a long-term goal of powering its operations with 100 percent clean and renewable resources and a near-term objective of reaching 50 percent clean and renewable energy in 2018. The availability of a wide range of reliable and cost-effective renewable energy options is an important factor in Facebook's decisions regarding where to locate new data center facilities.

In early 2014, Facebook commissioned ECONorthwest, to measure the economic impacts

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of the Prineville Data Center. According to ECONorthwest, the economic impact resulting from just the five-year construction phase included 3,592 jobs in Oregon, of which 651 were in Central Oregon. The personal income tax generated during that period was roughly $6.5 million. Capital expenditures during the construction phase totaled $573 million. As of early 2014, the post-construction operations in Prineville accounted for 266 jobs throughout the State of Oregon including 207 jobs in Central Oregon. Just between 2011 and early 2014, Facebook awarded $965,000 to Crook County schools and qualified non-profit organizations through the company's community action grant program and local donations, including the support of STEM (Science, Technology Engineering and Mathematics) education. In 2016, this number increased to $1,265,000.

Facebook appreciates the opportunity to participate in this important proceeding addressing the treatment of new commercial and industrial load under Direct Access, specifically whether customers with new load should be allowed to purchase power from non-utility electricity services suppliers (ESS) without being required to pay the same transition fees that customers with existing load must pay for the opportunity to select power sources.

The Public Utility Commission of Oregon (Commission) opened this docket by adopting the amended recommendations set forth in the May 4, 2017 Staff Report (Order 17-171). Pursuant to the July 11, 2017 Pre-Hearing Conference Memorandum and subsequent communication amongst the parties led by Staff, the Opening Briefs are limited to "the threshold legal question [of] whether, under existing Oregon law, the Commission can modify the applicability of transition charges to new customer Direct Access loads." Accordingly, Facebook expressly reserves the right to address the important remaining issues such as what constitutes "new load" in subsequent comments and briefing.

II. THE COMMISSION HAS THE AUTHORITY TO MODIFY THE APPLICABILITY OF TRANSITION CHARGES TO NEW LOAD.

The Commission has not only the ability but also an obligation to encourage the development of a truly competitive retail energy market structure, including through excepting new load from the transition charges imposed under the Direct Access program.[1] Facebook and

[1] *See, e.g.*, OR Laws 1999, ch 865, Section 6(1).

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other businesses are naturally drawn to states that provide the means to help them achieve important goals such as Facebook's goal of meeting its energy needs with clean and renewable resources. The outcome of this docket, specifically whether transition charges are imposed for new load electing Direct Access, will be an important factor in future company decisions including whether to locate new data center facilities near the existing facilities in Prineville.

A. Excepting new load from the transition charges imposed under the Direct Access program does not result in unjust rate discrimination.

New and existing loads served under Direct Access present markedly different circumstances for the incumbent utility. For example, in the case of new load, the utility will not have invested in generation resources to serve the specific large new load since the new load customer could have decided to locate elsewhere.

Oregon law does not prohibit rate differentiation, but does prohibit "unjust" discrimination.[2] Unjust discrimination is a limited, statutory prohibition that does not bar dissimilar treatment of differently-situated customers. ORS 757.310 provides:

> (2) A public utility may not charge a customer 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*[3] *service under substantially similar circumstances*.
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> (3) A difference in rates or amounts charged does not constitute a violation of subsection (2) of this section if the difference is based on:
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> (a) Service classification under ORS 757.230; . . . (emphasis added).

As recognized by the Oregon Attorney General: "The Commission discriminates among ratepayers whenever it establishes different schedules for industrial, commercial and residential

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[2] ORS 757.325 (any public utility giving undue preference or prejudice is "guilty of unjust discrimination").

[3] By the statutory definition, for discrimination to be "unjust," it must occur for "contemporaneous" service. No unjust discrimination occurs simply because a rate changes over time. It is not unjust if in one year a new load is assessed a transition charge and, in the next year, the tariff is revised and a subsequent new load is not assessed a transition charge. Markets change and rates change; there is no unjust discrimination for non-contemporaneous services.

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customers based on the different costs of serving each of these classes. This does not constitute 'unjust discrimination' within the meaning of the statute."[4] The different customer classes receive service under sufficiently dissimilar circumstances.

The Commission carefully considered the issue of possible rate discrimination in the context of service classifications among Direct Access customers in the pilot program. In *In re Portland General Electric Co.*, (Docket No. UE 101/DR 20), the Commission analyzed the statutory constraints on the development of customer classes and the ability of each individual Direct Access customer to negotiate its own individual "rate." Specifically, within the context of Direct Access, the Commission found:

> The law allows discrimination between customer classes, but not within customer classes. Under ORS 757.230, the Commission "may authorize classifications or schedules of rates applicable to individual customers or groups of customers." That statute allows the agency to require different groups of customers to pay different charges. For years, the Commission has used its authority under the statute to develop different rates for industrial customers, for commercial customers, and for residential customers. More recently, it has used the authority given under ORS 757.230 for special contracts tailored for the needs of individual industrial customers.
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> By contrast, ORS 757.310 through 757.330 deal with discrimination within a customer class. ORS 757.310 is particularly relevant. It prevents a public utility from charging different people different amounts "for a like and contemporaneous service under substantially similar circumstances." In other words, ORS 757.310 prohibits discrimination within a customer class.
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> ORS 757.230 and 757.310, when read together, make clear that the Commission may authorize discrimination, except when the discrimination is within a customer class.
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> It is important to note that there is language in ORS 757.310 that shows how ORS 757.310 through 757.330 fit together with ORS 757.230. ORS 757.310 states, "A difference in rates or charges based upon a difference in classification pursuant to ORS 757.230 shall not constitute a violation . . ." of the law.
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> In simple English, the above language tells the Commission that if it is acting consistent with ORS 757.230 in creating customer classes, then it is not acting against the prohibitions of ORS 757.310 through 757.330. The question, then, is

[4] Or. Op. Atty. Gen. OP-6475 (June 28, 1993).

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> how far the agency can go under ORS 757.230 in developing customer classes for a direct access pilot program. . . .
>
> ORS 757.230 allows the Commission to consider a number of factors in establishing customer classes. The agency's authority is broad, for the last of the factors mentioned is "any other reasonable consideration." The Commission believes the language means that it can use any economic justification —so long as it is a reasonable one—in the creation of customer classes. As mentioned above, the authority given the agency by ORS 757.230 is broad enough to allow it to permit rates tailored to the need of individual customers—again, so long as there is a reasonable economic justification for doing so.

The Commission concluded that it "believes that there is reasonable economic justification for establishing individual customer classes in the open market that will exist in a Direct Access pilot program. . . . Having anything other than individual customer classes is simply antithetical to the idea of an open market."[5] Thus, the Commission has already determined that the only way to have effective market competition is to classify each Direct Access customer within its own "customer class." If that were not the case, there would be no market and no ability for one customer to negotiate a unique transaction based on that customer's distinctive requirements, be it renewable resource goals, price constraints or quality demands. As the Commission observed "the possibilities are endless."[6]

Understanding that each Direct Access customer exists within its own customer class, the question is not whether different Direct Access customers can be treated differently – they can and must – but whether they should be treated the same given that the circumstances of existing and new load are entirely different. From this perspective, a modification to the transition charges applicable to new load will not result in any discrimination, whether "unjust" or otherwise. The purpose of transition charges and credits is to avoid discrimination:

> Transition adjustment rates were instituted so that when electricity consumers substitute third-party energy sources for retail utility service, each such consumer will (rarely) receive a transition credit or pay a transition charge as set forth in detail in OAR 860-038-0160. *These rates are adjusted regularly to prevent net*

[5] *In re Portland General Electric Co.*, Docket No. UE 101/DR 20, Order No. 97-408 (Oct. 17, 1997).

[6] *Id.*

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revenue shortfalls or windfalls arising from the Direct Access option.[7]

The purpose of this docket is to determine whether new load, associated with a new customer or a new facility, served by Direct Access should be treated the same as previously existing load *transitioning* to Direct Access. If treating new and existing load the same results in a net revenue windfall to the customers remaining on the incumbent utility's generation system, the transition charge for new load should be adjusted or eliminated to prevent that windfall.

The Commission has broad discretion in how it implements transition charges and credits:

> 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.[8]

The legislature placed no limitation on the Commission's methodology for calculating transition charges or credits. In fact, the Commission's ratemaking authority is legislative itself "subject only to constitutional limits and those of the Commission's express, legislatively-delegated broad powers" and it is not tied to any "specific formulae."[9] As demonstrated by the "regular" adjustment to these charges,[10] the applicable methodology and calculations are continually in flux as the market evolves, utilities adjust to competition, and more data becomes available to better determine where shortfalls and windfalls occur. Thus, the Commission should proceed with determining how new load should be treated differently than existing load for

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[7] *In re Portland General Electric Co.*, Docket No. UE 312, Order No. 16-331 (Aug. 31, 2016) (emphasis added).

[8] ORS 757.607(2) (emphasis added).

[9] *American Can Co. v. Lobdell*, 55 Or App 451, 461, 638 P2d 1152 (1982).

[10] *In re Portland General Electric Co.*, Docket No. UE 312, Order No. 16-331 (Aug. 31, 2016); *In re PacifiCorp*, Docket No. UE 245, Order No. 12-409 (Oct. 29, 2012) (PacifiCorp 2013 TAM Proceeding); *In re PacifiCorp*, Docket No. UE 296, Order No. 15-394 (Dec. 11, 2015) (PacifiCorp 2016 TAM Proceeding).

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purposes of Direct Access.[11]

B. The Commission has the Express Obligation to Set Transition Charges or Transition Credits to Avoid Unwarranted Cost Shifting.

Not only does the Commission have the authority to set transition charges or credits generally, it has the express mandate to avoid "unwarranted shifting of costs."[12] This is not a question of the Commission's authority or of the Commission's ability to set transition charges and credits differently for new and existing load. Rather, the question is how the Commission determines and best accounts for those differences. As will be demonstrated throughout this proceeding, new Direct Access load does not shift costs to other customers because it is not load that the incumbent utility has previously acquired resources to serve. It would be imprudent for an incumbent utility to plan for new load particularly in circumstances of year-over-year flat or even declining load. To require the same transition charges on new Direct Access load that are imposed on prior existing load that has switched to Direct Access would result in cost shifting to the new load customer and subsidization of the customers remaining on the utility's generation system.

C. A Utility's Provider-of-Last-Resort Obligations Do Not Justify the Imposition of Transition Charges for New Load.

Finally, eliminating transition adjustments for new commercial and industrial loads will not affect risks associated with an incumbent utility's provider-of-last-resort obligations. In seeking to create a competitive electricity supplier market with the enactment of SB 1149, the legislature expressly empowered the Commission to set reasonable terms and conditions for any customers returning to a default supplier from an ESS, whether in emergency circumstances or in

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[11] It should be noted that the region has long recognized that new loads differ from existing loads for utility cost, planning and rate making. Since 1979, the concept of "new large single load" has been embedded in the Pacific Northwest Electric Power Planning and Conservation Act. 16 USC § 839a(13). Due to constraints on low cost power available to the Bonneville Power Administration, new large single loads of a preference customer (in excess of 10 aMW in a twelve month period) are not eligible for BPA preference power. 16 USC 839(e)(b)(4).

[12] ORS 757.607(1).

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cases of voluntary elections.[13] Recognizing that unduly burdensome terms for returning to default service would discourage customers from trying Direct Access and inhibit market growth, the legislature mandated that any reasonable terms and conditions must "provide for viable competition among electricity service suppliers."[14] The legislature, however, also specifically authorized the Commission to prohibit or limit the use of cost-of-service rates for customers returning from Direct-Access service.[15]

The Commission's authority to set reasonable terms and conditions for return to default services—including its authority to prohibit or limit the use of cost-of-service rates—protects against any risks associated with a utility's provider-of-last-resort obligations without the need for additional transition charges for new load.

Although terms and conditions for returning to default service may not be overly burdensome, a customer opting to use a Direct Access service bears the risk of the costs if a utility is required to make additional market purchases in an emergency.[16] In non-emergency circumstances, a customer is required to provide notice of intent to return to default services consistent with the governing tariff provision, allowing time for a utility to acquire additional power supplies.[17] A commercial customer returning to default services also is not entitled to a

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[13] *See* ORS 757.622 (providing the Commission "shall establish the terms and conditions for providing default electricity service" in emergencies, as well as "shall establish reasonable terms and conditions for providing default service to a nonresidential electricity consumer in circumstances when the consumer is receiving electricity services through direct access and elects instead to receive such services through the default service").

[14] ORS 757.622.

[15] *See* ORS 757.603(3)(b) ("[t]he commission may prohibit or otherwise limit the use of a cost-of-service rate by retail electricity consumers who have been served through direct access").

[16] OAR 860-038-0280(3)(b) ("An electric company must design emergency service rates to recover its costs of providing such service").

[17] OAR 860-038-0280(4).

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cost-of-service rate and, instead, may be served through market-rate purchases.[18] In compliance with SB 1149, both Pacific Power and Portland General Electric have adopted tariffs that allow Direct Access customers to return to default service while protecting the utility and the utility's other customers.[19] As a result of those rules, there is no reason for a utility to maintain unnecessary generation capacity based on the possibility of some future need for service; a utility can respond to needs by acquiring more generation capacity if and when it receives notice of the impending needs.[20]

The Commission's authority to protect the provider-of-last resort and its customers from the costs associated with a Direct Access customer returning to default service was demonstrated in the case of *Wah Chang v. Public Utility Commission*.[21] While involving a special contract executed prior to the implementation of SB 1149, the Commission denied Wah Chang's request to return to Pacific Power's cost-based service even though the market rate under the special contract had dramatically increased during the "Western Energy Crises of 2000-1."[22] The Commission reasoned that as between the utility's remaining customers, the utility's shareholders and Wah Chang, it was Wah Chang that assumed the market risk.[23] The Oregon Court of Appeals upheld the Commission's allocation of the risk and its authority to set the conditions upon which a customer receiving non-cost based service can return to a utility's

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[18] ORS 757.603(3)(b).

[19] *See* Pacific Power Schedules 201(Net Power Costs – Cost Based Supply Service), 220 (Standard Offer Supply Service), and 230 (Emergency Supply Service); and Portland General Electric Schedules 81 (Emergency Service), 83, 85, 89 and 90 (Standard Service). Idaho Power is currently exempt from the direct access requirements of SB 1149.

[20] *See* OAR 860-034-0260(2)(d) ("direct access rates must exclude electric company costs that are avoided when a customer chooses to be served under the direct access rate option").

[21] 256 Or App 151, 301 P3d 934 (2013).

[22] *Id.* at 153.

[23] *Id.* at 158.

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standard rates.[24]

SB 1149 has only enhanced the Commission's authority to address the costs of Direct Access customers returning to the provider-of-last-resort and there is nothing in the provider-of-last resort obligations that limit the Commission's authority to modify or eliminate transition charges on new non-residential load.

III. CONCLUSION

Facebook respectfully submits that the Commission has not only the authority but also an obligation to modify the applicability of transition charges to new customer Direct Access load. Facebook looks forward to soliciting and providing evidence to support excepting new load from the transition charges imposed under the Direct Access program.

Dated this 8th day of September, 2017.

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[24] *Id.* at 166-167.

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