McDOWELL RACKNER GIBSON PC
419 SW 11th Ave, Suite 400 | Portland, OR 97205

LISA HARDIE
Direct (503) 290-3629
Lisa.Hardie@mrg-law.com

April 25, 2023

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
Attn: Filing Center
201 High Street SE, Suite 100
Salem, OR 97301-3398

RE: Docket AR 651 — PacifiCorp's Closing Comments and Proposed Rule Revisions.

PacifiCorp d/b/a Pacific Power ("PacifiCorp" or "Company") appreciates the opportunity to provide comments on the proposed direct-access rules submitted to the Secretary of State's office with the Public Utility Commission of Oregon's ("Commission") Notice of Proposed Rulemaking ("NOPR") and proposed rule revisions.[1]

A. General Comments on Preferential Curtailment

Because this is the last opportunity to comment before the rulemaking is finished, PacifiCorp would like to briefly revisit some of its more general comments about direct access and preferential curtailment.

Direct access advocates frequently point to the direct access statutes passed in 1999 to suggest that the Oregon Legislature has unequivocally endorsed a right to move to retail competition. This misconstrues both the law and its relevant historical context. In 2001, the Oregon Legislature pulled back sharply from its initial efforts to deregulate the retail electricity sector it had begun in 1999,[2] expressing profound uncertainty about the impacts of deregulation, including "*considerable uncertainty about the extent to which electric companies will be called upon to supply electricity to Oregon consumers at cost-based rates*."[3]

Indeed, time has made clear that the Oregon Legislature is not moving the state to full retail access. Instead, it has doubled down on transitioning the state's energy system largely through the efforts of this Commission and regulated utilities through legislative efforts such as House Bill ("HB") 2021. At the same time, it is becoming increasingly difficult for a utility to plan for its own load. The decreasing availability of regional capacity, the statutory requirements to rapidly decarbonize, and the existence of more extreme weather events and wildfires, as well as the challenging efforts needed to balance an increasingly complex set of loads and resources on the system, are increasing

[1] Notice of Proposed Rulemaking (Feb. 24, 2023) ("NOPR").
[2] SB 1149, 70th Or. Leg. Assemb., Reg. Sess. (1999) (preamble).
[3] HB 3696, 71st Or. Leg. Assemb., Reg. Sess. (2001) (preamble).

the challenges associated with serving existing load. And yet, in the midst of all this, a utility's duty to offer provider of last resort service means that a large block of unplanned load can land on the utility's system on any given day. How big might that block of load be? That is a question for this Commission to answer. A utility's obligation to serve customers who elected to leave, but now are suddenly back, may be harmless if the need arises in April and that load quickly finds another provider, but it could cause enormous problems on an unseasonably hot day in July. And as defections increase, the risks increase.

In general, PacifiCorp continues to oppose the idea that the utility regulatory system should be unduly fractured by hybrid regimes at a time of increased risk and uncertainty in the Western Interconnection. Access to some competition is still Oregon policy, but one with major caveats. Customers who choose to leave the utility's system must not harm customers who stay.

From the outset of this proceeding and in docket UM 2024, PacifiCorp has noted that provider of last resort risk is one of the primary challenges associated with maintaining a bifurcated electric system. Provider-of-last resort issues and supply shortfall issues have caused massive financial harm in multiple jurisdictions in the past.[4] These risks are only increasing in a time of anticipated regional supply shortfall and rapid utility transition under HB 2021.

While PacifiCorp appreciates the Commission's efforts to develop solutions to this issue in the draft preferential curtailment rules, significant work remains to be done on provider of last resort issues in general, and on preferential curtailment in particular. As PacifiCorp previously noted, its constructive engagement on preferential curtailment stems from its faith in the Commission's clear, unequivocal assertion that direct access customers choosing to leave the system are sophisticated parties who must, by virtue of their choices, remain responsible for *all* of the costs and risks their individual choices impose on the system and their fellow Oregonians.

A policy of preferential curtailment must be designed to be maximally effective to ensure that any harm caused by a utility's provision of provider of last resort service is minimized.[5] Otherwise, a policy of preferential curtailment will serve as meaningless camouflage to hide new reliability risks imposed by expansion of direct access.

B. Certain Terms Used in the Proposed Preferential Curtailment Rules Require Additional Clarity

As PacifiCorp has noted, implementation of preferential curtailment rules will be confusing, disruptive, or spur litigation unless additional key terms are well defined—either in the rules themselves or in utility tariffs. During the April 4, 2023 public meeting, Staff and the Commission appeared to acknowledge that much work needs to be done before the rules can be implemented.

---

[4] *See* PacifiCorp's Comments on Staff's AR 651 Division 38 Direct Access Regulation Straw Proposal at 2-3 (Sept. 15, 2022) (hereinafter, "PacifiCorp Comments on Straw Proposal") (noting some of the massive, negative impacts that have battered state utility systems and economies due to the risks PacifiCorp has raised here, which stakeholders in this docket have dismissively described as remote) . PacifiCorp hereby incorporates those comments, filed publicly in this docket, into this set of comments by reference.

[5] This means that a utility must be able to rapidly implement preferential curtailment (1) when needed, (2) without undue operational burden, and (3) without fear of liability. Anything less is unworkable.

As the Commission finalizes this set of rules, PacifiCorp would urge the Commission to consider and articulate when and where these steps for greater clarity should occur, to make sure they actually do occur. Additional detail needed to implement preferential curtailment rules could come in this set of rules, in utility tariffs, or in amended rules developed in a follow-up rulemaking after the contested case is completed. As a general matter, rules of general applicability should be defined in the rules themselves. Terms the Commission seeks to define on a case-by-case basis should be defined in utility tariffs.

1. "Infeasibility" Should Be Defined.

The proposed rules continue to state that "[a]n electric company may not preferentially curtail the load of a direct access consumer when . . . direct access consumer's load is infeasible to curtail[.]"[6] To date, the rules have not defined what it means for a consumer's load to be "infeasible" to curtail. Staff has indicated infeasibility should be considered "from a cost, engineering, or system reliability standpoint,"[7] but this leaves many questions unanswered. As the investigation into long-term direct access moves forward, PacifiCorp would make the following recommendations:

a. Consumers should be considered feasibly curtailable only if the consumers' load satisfies a certain size threshold and may be curtailed within ten minutes.[8]

i. Size and timing criteria must be established for determining which consumers are eligible for curtailment, whether they are categorized as "feasibility" criteria, eligibility criteria, or something else. Certainty of rapid curtailment is also critical, making contractual curtailment problematic and inherently infeasible.

ii. The size thresholds and other details appropriate for feasible preferential curtailment should be utility-specific, investigated in the contested case, and detailed in individual utility tariffs.

b. Certain critical facilities and other important facilities should be designated as per se non-curtailable unless and until the Commission affirmatively approves their applications to be deemed curtailable.[9]

i. Without this step, the idea that critical facilities should be curtailed <u>first</u> raises significant additional public policy concerns. Identification of such facilities, and the showing they should be required to make before they can be deemed curtailable, should occur in the contested case.

---

[6] *Proposed* OAR 860-038-0290(4)(b).
[7] *See* Order No. 22-364, Appendix A at 5 (Oct. 7, 2022).
[8] *See, e.g.,* PacifiCorp's Comments on Staff's AR 651 Draft Rule Revisions at 3-4 (Nov. 18, 2022). PacifiCorp selected this ten-minute requirement to ensure compliance with NERC standards for contingency reserves. PacifiCorp's Supplemental Comments on Staff's Revised Proposal at 3-4 (Feb. 3, 2023).
[9] *See, e.g.,* OAR 860-300-0010(10) (noting that certain facilities, because of their function or importance, have the potential to threaten life safety or disrupt essential socioeconomic activities if their services are interrupted).

ii. Applications for designating such facilities as "preferentially curtailable" should be utility specific.

2. The Vague Language Prohibiting a Utility from Preferentially Curtailing a Consumer When Doing So Would "Negatively Affect Cost-of-Service Customers" Must Be Tightened.

The proposed rules prohibit electric companies from preferentially curtailing consumers "[w]hen the preferential curtailment of a direct access consumer would negatively affect cost-of-service consumers."[10] As PacifiCorp has noted, the purpose of this language is unclear; the rule does nothing to solve problems caused by the defection of too much curtailable load, and the rule is simply too vague to pass muster as a valid rule. PacifiCorp proposes language throughout the rules to correct these issues. Specifically, a collection of changes to section (4), a new section (16), clarifications to sections (9) and (10), and inclusion of a standard for capping curtailable load in section (7) are all necessary to address this issue with the specificity necessary to effectuate this critical goal.

a. OAR 860-038-0290(4) should make clear that certain decisions about preferential curtailment must be made at the time a customer seeks to be designated preferentially curtailable.

At the outset, the rules should make clear that there are two separate points at which a utility makes a decision about curtailment: (1) at the election stage, when a utility needs clear criteria for accepting or rejecting a request from a consumer to be designated as preferentially curtailable; and (2) at the implementation stage, when a utility needs clear criteria for making a decision about whether to curtail (or not curtail) in any given moment.

PacifiCorp's proposed revisions to 860-038-0290(4) make clear that the criteria in this subsection (4) apply at the election stage. The proposed revisions also eliminate problematic subsection (c) ("would negatively impact cost of service customers") and instead reference a new subsection (16), which attempts to implement the concepts embedded in Staff's problematic subsection (c) in a legally and policy-appropriate manner.

(4) An electric company may not grant a consumer's election to be designated preferentially curtailable ~~the load of a direct access consumer when~~unless:

(a) The direct access consumer~~,~~ has elected to be ~~non-~~curtailable during the election period;~~, or,~~

(b) The direct access consumer's load is ~~in~~feasible to curtail; and

(c) The direct access consumer agrees to the conditions established under section (16) of this rule.~~, or;~~

~~(c) When the preferential curtailment of a direct access consumer would negatively affect cost-of-service consumers.~~

[10] *Proposed* OAR 860-038-0290(4)(c).

b. *New section (16) includes details about how the utility's decision to accept or not accept a customer's application to be deemed "curtailable" will be implemented and the standards guiding the drafting of those tariffs.*

PacifiCorp proposes the following language, which describes the minimum detail that PacifiCorp believes is necessary to include in utility tariffs to allow for appropriate implementation of the process of determining how a consumer is deemed "curtailable." This proposed rule provides the Commission with flexibility to include additional detail, while making clear that certain provisions are necessary to ensure the rules are effective—and thus protective.

(16) Each utility will develop a process for implementing preferential curtailment in individual utility tariffs or program rules that include at least the following details:

(a) A consumer seeking to be preferentially curtailable must sign an agreement with the utility agreeing to be curtailed consistent with the provisions of this rule and with utility tariffs and program rules. As part of the agreement, the consumer must agree to hold the electric company harmless from all liability or damage caused by curtailment.

(b) Utility tariffs or program rules will specify how the utility will evaluate and assess the costs of installing infrastructure or equipment necessary to curtail the customer; how the utility will collect costs from a departing customer; the criteria the utility will use to preferentially curtail the customer; and other details necessary to implement this rule.

Utility tariffs implementing this rule will be designed to hold cost-of-service customers harmless from the potential reliability impacts of the returning consumer's unplanned load.

Where Staff's proposed section (4)(c) was broad and undefined, this section (16) contemplates specific tariff provisions intended to effectuate the Commission's policy goals and includes the appropriate standard governing those tariffs, which will be reviewed and approved by the Commission.

c. *Sections (9) and (10) should be modified to eliminate ambiguity about when a utility may curtail a consumer that has already been designated preferentially curtailable.*

PacifiCorp appreciates Staff's inclusion of section (10) in the rules. This provision was added at PacifiCorp's request on the theory that a utility will need to be able to rely on clear, objective, operationally workable criteria when deciding whether it can preferentially curtail a consumer at any given time. While the addition of section (10) is helpful, there is some risk of a conflict with section (9). PacifiCorp proposes the following additional language to reconcile this potential conflict or ambiguity:

(9) If a preferentially curtailable consumer returns to default supply without providing the required time for notice of return under the electric company's direct access program tariff, the electric company must make ~~best~~ efforts to serve the consumer with Uncommitted Supply consistent with the criteria established under section (10) of this rule.~~.~~

(10) ~~The Commission will establish criteria the~~Each utility's tariff or program rules will specify criteria an electric company may use to demonstrate that it sought to serve a preferentially curtailable consumer with Uncommitted Supply before curtailing that consumer.

The additions to section (9) are important to ensure there is no inconsistency or conflict between the phrase "best efforts" to serve a returning consumer with Uncommitted Supply and the criteria established in section (10) for demonstrating that a utility has tried to serve a returning consumer with Uncommitted Supply. There should be no daylight between the two.

The changes to section (10) simply clarify that these details will be included in a utility tariff. As PacifiCorp has noted in prior comments, different utilities have very different system needs, different system resources, and different resource procurement practices. The details will be inherently utility-specific, and thus should reside in a utility-specific tariff. The Commission reviews and approves utility tariffs, so the language stating that the Commission will establish the criteria is both awkward and unclear about when or how the criteria will be established and should be deleted.

C. Caps Are Critical

PacifiCorp agrees with Staff that caps must be set for non-curtailable load. PacifiCorp disagrees with the notion, however, that the rules should say *nothing* about curtailable load. If the Commission is not inclined to mandate a cap for curtailable load, it should include a provision articulating the appropriate legal standard for determining whether such a cap is appropriate.

(7) Caps on departing load.

(a) The Commission will establish a cap on non-curtailable direct access load ~~to~~ at a level intended to minimize costs and risks to ~~protect~~ cost-of-service customers ~~from the risks and costs~~ associated with direct access consumers' return to an electric company's system~~.~~;

(b) The Commission will establish a cap on curtailable load to protect cost-of-service customers from the risks and cost associated with direct access consumers' early return to the electric company's system unless the Commission finds, after investigation, that an uncapped level of departing curtailable load poses no harm to cost-of-service customers;

(c) Any caps established under this section will be reviewed by the Commission periodically in a manner to be determined by the Commission.

Staff's proposed section (7)(a) generally recognizes that a cap must be set for non-curtailable load at a level that minimizes the reliability risk to cost-of-service customers should non-curtailable

load return to the utility's system. PacifiCorp appreciates Staff's inclusion of this provision and adds additional language for more clarity.

PacifiCorp has repeatedly argued that a cap is also necessary for curtailable load. Staff did not accept this recommendation. After hearing comments made during the April 4, 2023 public meeting, PacifiCorp proposes a new section (7)(b) that does not mandate a cap for curtailable load, but instead articulates the legal standard for imposition of such a cap, as well as a new section (c) that would require the Commission to review caps from time-to-time.

As a practical matter, it is extremely important to cap curtailable load. Preferential curtailment is a radical, untested new policy for addressing provider of last resort risk. PacifiCorp previously articulated some of the potential risks posed by the policy and would observe that additional risks are likely to be identified during the contested case phase. Without caps, the genie cannot be put back in the bottle with respect to this and other planning and service risks associated with defection of customer load.[11]

At the same time, PacifiCorp also recognizes that the Commission may not be ready to make the determination that caps are necessary without evidence presented in a contested case. Consequently, PacifiCorp's proposed new section (7)(b) simply articulates the correct legal standard for determining whether caps are necessary.[12]

While initial implementation details can provide some protections, the fact is, preferential curtailment is an untested tool that in certain instances could require very different and even more complex system operations with potentially problematic implications. Imposition of a cap—or, at a minimum, the evaluation of the need for cap—is consistent with the Commission's historical practice of using caps to mitigate unknown, or known but unquantifiable, risks to customers.[13]

Some new direct access stakeholders may be unaware of this Commission precedent. Indeed, some stakeholders seemed to argue during the April 4, 2023 public meeting that protecting customers from "unknown" or "unquantifiable" risks in the context of substantial new Commission policy is a frivolous argument for caps, rather than recognizing this concern for what it is: the most important regulatory purpose for a cap. Nor do some direct access stakeholders

[11] Does the Commission know what percentage of utility load would be eligible to defect from the utilities' systems if no caps existed? Does the Commission control the economic swings that could drive decisions to leave the system?
[12] ORS 757.607(1) states that:

> The Public Utility Commission shall ensure that direct access programs offered by electric companies meet the following conditions: (1) The provision of direct access to some retail electricity consumers must not cause the unwarranted shifting of costs to other retail electricity consumers of the electric company.

ORS 757.607 (emphasis added). In other words, if the Commission is uncertain about whether an element of a direct access program will cause unlawful cost shifting, that element of direct access may not be adopted. *See* PacifiCorp's Comments on Straw Proposal at 9-12 for a more detailed discussion of this issue.
[13] *See, e.g., In re Portland Gen. Elec. Co. Request for a Gen. Rate Revision*, Docket No. UE 335, Order No. 19-128 at 3 (Apr. 11, 2019) ("We routinely use caps and limits to place bounds on potential negative outcomes, particularly where future system impacts for a course of action are unknown or unknowable. Caps can act as a tool used to balance policy priorities and protect against potential negative impacts.").

appear to be engaging substantively on the hard issues when it comes to addressing concerns about how cost-of-service customers may fare in the wake of their departure.

D. Election Window Issues Should Be Addressed

1. Existing Consumers Should Elect to Participate in Preferential Curtailment 12 Months After the Effective Date of Utilities' Tariffs.

PacifiCorp proposes the following revision to proposed OAR 860-038-0290(5):

> (5) Consumers already participating in a New Large Load Direct Access Program or long-term opt-out direct access service must make the election defined in section (3) of this rule during the first annual election window that takes place at least 12 months after ~~the effective date of this rule~~ the date a utility has implemented tariffs and program rules necessary to implement this rule.

The Commission's proposed preferential curtailment rules would take effect June 1, 2024.[14] Customers currently participating in the electric companies' New Large Load Direct Access Program and long-term opt-out direct access programs must then elect whether their load will be eligible for preferential curtailment "during the first annual election window that takes place at least 12 months after" June 1, 2024.[15]

Staff has explained that this effective date will allow sufficient time for the Commission to complete the contested case that is expected to proceed following this rulemaking. However, as PacifiCorp explained in previous comments,[16] after the remaining issues in this docket have been resolved the electric companies will still have to prepare and submit for Commission approval tariffs implementing this preferential curtailment program. Staff's articulation of its reasons for the June 1, 2024, date did not appear to take into account the need for significant compliance filings. Given the complicated issues to be included in these tariffs and the presence of sophisticated customers that will be affected, as well as uncertainty about what will arise in the scoping phase of the contested case, PacifiCorp does not believe a June 1, 2024 effective date is realistic.

The Commission can presumably address this issue simply by staying the effectiveness of the preferential curtailment rule through some sort of waiver, as necessary. But with respect to the election required for consumers already participating in a New Large Load Direct Access Program or long-term opt-out direct access program, PacifiCorp proposes the language above to help minimize timing issues.

2. Allowing Customers to Alternate Between Preferential Curtailment in Each Election Window Will Be Unworkable.

The Commission's proposed rules would allow a consumer to alternate between being

[14] *Proposed* OAR 860-038-0290(1).
[15] *Proposed* OAR 860-038-0290(5).
[16] PacifiCorp's Supplemental Comments on Staff's Revised Proposal at 6.

preferentially curtailable and not curtailable in each annual election window.[17] Effectively, a consumer could vacillate between being curtailable or potentially requiring backstop utility service each year. Given the planning obligations that the electric companies must undertake to ensure they will be able to satisfy their provider of last resort obligations, PacifiCorp does not believe a system in which the consumers may frequently and repeatedly change their eligibility for curtailment is workable.[18] The Commission appeared to recognize this problem during the April 4, 2023 public meeting. PacifiCorp proposes the following language instead:

> (6) A consumer may change ~~their~~ its curtailment election during the annual election window, so long as the consumer has given the utility notice of its intent to change its election -consistent with the time period required for returning to utility-service under the electric company's direct access tariff~~each year~~.

This language recognizes both the utilities' need to plan for potentially returning load and consumers' desire for flexibility by incorporating a notice period for direct-access consumers who no longer wish to be curtailable.

E. Curtailment Must Include Limitations on Liability for the Electric Companies.

PacifiCorp proposes the following new section (18):

> (18) Consistent with ORS 757.730, a utility shall not be liable for damages to persons or property resulting from a curtailment of service in accordance the implementation of this rule.

PacifiCorp has repeatedly noted that a utility must be shielded from liability from preferential curtailment if the policy of preferential curtailment is meant to have any value whatsoever. To date, neither Staff nor the Commission have appeared to recognize the criticality of this issue. To the extent a policy of preferential curtailment has any value as a reliability tool in the first place, that value is extinguished if a utility might face a lawsuit simply for using it. While direct access advocates may not have concerns if a utility finds preferential curtailment too risky to implement, the cost-of-service customers who may find themselves curtailed instead presumably will.

Existing Oregon law, ORS 757.730—a statute addressing curtailment of cost-of-service customers—requires utilities to implement curtailment plans in the event of emergencies and holds utilities harmless from the consequences of that curtailment. The Oregon Legislature obviously recognized the profound disruption that can be caused by load shedding and found it important to shield utilities from the consequences of shutting off customers' power even when the utility finds it necessary to do so under a plan approved by the Commission.

If it is necessary to protect utilities from liability in the event of curtailment for unavoidable emergencies, it is arguably even more important in the event of emergency conditions driven by the Commission's voluntary loosening of direct access restrictions. PacifiCorp's proposed

[17] *Proposed* OAR 860-038-0290(6).
[18] This notice is especially important for consumers seeking to amend their load from curtailable to non-curtailable. A customer electing to be non-curtailable will need to ensure that their load will fit within the cap for non-curtailable direct access.

language recognizes that a utility's obligation to serve as provider of last resort for voluntarily defecting consumers can create emergency conditions that threaten reliability for *all* customers. It recognizes that in such instances, curtailment is appropriate, that the Commission's preferential curtailment policy creates an addition to utilities' existing curtailment plans, and makes clear that utilities will not face liability for its implementation. If, on the other hand, the Commission disagrees with PacifiCorp's position that utilities should be shielded from liability for implementation of preferential curtailment, PacifiCorp would ask the Commission to make that position clear.

F. Electric Companies' Planning Obligations Must Be Expressly Established in the Commission's Rules.

One of the issues raised repeatedly during this rulemaking is how electric companies should or should not plan for the load of potentially returning direct access consumers.

Generally, stakeholders have stressed that the electric companies should not build additional capacity to serve potentially returning consumers due to the unlikelihood of their return.[19] The Commission's proposed rules indicate that, after a consumer has returned to a utility's default service and remained on that service for a certain period of time, the utility must begin planning for that consumer's load.[20] The proposed rules further state that the Commission will determine the specific time period after which the electric company must begin planning for the consumer to remain on default service.[21] PacifiCorp proposes the following language instead:

> (17~~5~~) Sections (13) and (14) of this rule do not limit a New Large Load Direct Access Program participant or long-term opt-out direct access consumer's right to return from default supply to direct access unless:
>
> (a) The consumer has provided a notice of return to the electric company's service, or;
>
> (b) The consumer remains on default supply for longer than ~~the time period necessary to select an ESS and return to direct access service~~six~~three~~ months. ~~This time period will be determined by the Commission.~~

The original language requires the Commission to determine "the time period needed to select an ESS." This is not a manageable task for the Commission or anyone else. It is likely to be a case-specific, consumer-specific question. What if the consumer has bad credit and will not be accepted by an ESS? Can that consumer stay on default supply for years? What if another consumer has great credit and happens to have lots of options? Does that consumer have *less* time to move to an

---

[19] *See, e.g.*, Comments of the Oregon Citizens' Utility Board on Staff's Division 38 Preferential Curtailment Rules Updated Proposal at 3 (Feb. 3, 2023) ("CUB wants to avoid a scenario wherein the IOUs have over-built capacity on their system to serve a need that is unlikely to materialize.").

[20] *Proposed* OAR 860-038-0290(15)(b) ("Sections (13) and (14) of this rule do not limit a New Large Load Direct Access Program participant or long-term opt-out direct access consumer's right to return from default supply to direct access unless . . . consumer remains on default supply for longer than the time period necessary to select an ESS and return to direct access service.").

[21] *Id.* ("This time period will be determined by the Commission.").

ESS before a utility should start planning for them? For each consumer, the "time period necessary to select an ESS" could be very different. Teeing up case-specific questions through these rules will mean case-specific administrative processes, increased potential for litigation, and ongoing utility planning uncertainty. It may also be challenging for a timely resolution to be reached which could create uncertainty and challenges for both the utility and the affected customer.

In previous comments, PacifiCorp proposed a three-month limit, after which the returning consumer would be deemed to have given the utility a notice of intent to return to utility service.[22] Some stakeholders suggested this time period was too short. PacifiCorp does not believe the rules should spur uncertainty or administrative churn. Thus, PacifiCorp proposes giving the consumer an extended period of time—six months—to remain on default service before the returning consumer will be deemed to have given the utility notice of intent to return to utility service. In this instance, PacifiCorp believes certainty is more important than expediency.

G. Other issues

PacifiCorp's proposed redlines, attached hereto, include additional changes to the draft preferential curtailment rule for clarity. PacifiCorp would highlight just a few of them:

- A utility will not be able to preferentially curtail customers without understanding the order in which it can curtail those customers to obtain the load shedding it needs. Proposed new language in section (12) adds language indicating that utility tariffs will include detail on this issue.

- Proposed section (15) states that the Commission will establish threshold eligibility criteria for consumers seeking to become preferentially curtailable. As noted, PacifiCorp believes establishing these criteria is critical, but is open to when or how the Commission or utilities develop the details.

- Sections (11) and (14) have been modified numerous times. The important thing from PacifiCorp's perspective is that the rules ensure that early returning customers are not subsidized by cost-of-service customers. To that end, PacifiCorp agrees with Staff that the need to serve early returning consumers should not deprive cost-of-service customers of the financial benefits associated with market sales of power they would otherwise enjoy. Returning consumers must pay the costs associated with ensuring cost-of-service customers remain whole.

H. Conclusion

PacifiCorp appreciates the continued opportunities to participate in this docket and looks forward to developing these issues further in docket UM 2024.

[22] PacifiCorp's Supplemental Comments on Staff's Revised Proposal at 4.

Sincerely,

____

Lisa Hardie
McDowell Rackner Gibson PC
419 SW 11th Ave., Suite 400
Portland, OR 97205
503-595-3925
dockets@mrg-law.com

Attorney for PacifiCorp d/b/a Pacific Power

AMEND: 860-038-0005
RULE TITLE: Definitions for Direct Access Regulation
RULE SUMMARY: This rule adds ~~a~~ definitions ~~for~~ necessary for "Preferential Curtailment," deletes unnecessary definitions, arranges the definitions alphabetically, and renumbers the rule provisions.
RULE TEXT:

As used in this Division:

[****]

(42) "Uncommitted Supply" is generation reasonably available to the electric company in the market or through the electric company's own resources. Uncommitted Supply excludes any generation needed to meet the electric company's firm load service obligations, anticipated near-term load obligations, contractual obligations, and federal reliability standards. For multi-jurisdictional utilities, this determination will be made in a manner that holds customers in other jurisdictions harmless from Oregon's implementation of its direct access policy.

Commented [A1]: This is important for implementation for multi-jurisdictional utilities.

STATUTORY/OTHER AUTHORITY: ORS 183, ORS 756, ORS 757
STATUTES/OTHER IMPLEMENTED: ORS 756.040, ORS 757.600 - 757.667

ADOPT: 860-038-0170
RULE TITLE: Non-bypassable Charges
RULE SUMMARY: This rule articulates criteria used in Commission determinations on whether a charge should not be able to be bypassed as a result of taking Direct Access service.
RULE TEXT:

(1) In determining whether a cost is appropriate for recovery as a non-bypassable charge, the Commission shall consider the following factors:

(a) whether it is required by statute;

(b) whether it is an uneconomic cost of implementing a public policy goal such as those identified in ORS 469A.465 or similar public policy goals related to reliability, equity, decarbonization, resiliency or other public interest for which retail consumers served by electricity service suppliers otherwise would not meaningfully contribute;

(c) whether or not it confers a demonstrable electric system benefit on some customers over others;

(d) whether it is in the public interest;

(e) whether it is necessary to be non-bypassable under the Commission's discretion in order to establish fair, just, and reasonable rates and prevent unwarranted cost shifting.

(2) All retail electricity consumers served by Direct Access are responsible for paying Non-bypassable Charges as determined by the Commission.

STATUTORY/OTHER AUTHORITY: ORS 183, ORS 756, ORS 757
STATUTES/OTHER IMPLEMENTED: ORS 756.040, ORS 757.600 - 757.667

ADOPT: 860-038-0290
RULE TITLE: Preferential Curtailment
RULE SUMMARY: This rule directs utilities to curtail returning customers on emergency default service in specific scenarios.
RULE TEXT:

(1) This rule becomes effective June 1, 2024.

(2) Except as provided in sections (4), (8), and (9) of this rule, each electric company must provide preferential curtailment of New Large Load Direct Access Program participants, as defined in OAR 860-038-0700(2)(d), and long-term opt-out direct access consumers, subject to the limitations in this rule.

(3) At the time a consumer makes its direct access election, New Large Load Direct Access Program participants and long-term opt-out direct access consumers must elect whether a given load will be preferentially curtailable or non-curtailable. A consumer that makes no such election will be deemed non-curtailable.

(4) An electric company may not grant a consumer’s election to be designated preferentially curtailable ~~the load of a direct access consumer when~~unless:

(a) The direct access consumer~~,~~ has elected to be ~~non-~~curtailable during the election period;~~, or,~~

(b) The direct access consumer’s load is ~~in~~feasible to curtail; and

(c) The direct access consumer agrees to the conditions established under section (16) of this rule.~~, or;~~

~~(c) When the preferential curtailment of a direct access consumer would negatively affect cost-of-service consumers.~~

(5) Consumers already participating in a New Large Load Direct Access Program or long-term opt-out direct access service must make the election defined in section (3) of this rule during the first annual election window that takes place at least 12 months after ~~the effective date of this rule~~ the date a utility has implemented tariffs and program rules necessary to implement this rule.

(6) A consumer may change ~~their~~ its curtailment election during the annual election window, so long as the consumer has given the utility notice of its intent to change its election -consistent with the time period required for returning to utility-service under the electric company’s direct access tariff~~each year~~.

(7) Caps on departing load.

(a) The Commission will establish a cap on non-curtailable direct access load ~~to~~ at a level intended to minimize costs and risks to ~~protect~~ cost-of-service customers ~~from the risks~~

Commented [A2]: The utilities have expressed concern about the practicality of this date. PacifiCorp would propose the Commission state in the order adopting the rules its intention to stay the effectiveness of this rule should implementation details remain incomplete at this date.

Effective implementation of this policy involves not only completion of the contested case but also compliance filings by the utilities that establish many implementation details. A premature effective date may lead to messy proceedings to address "interim" criteria and associated complaints.

Commented [A3]: The rules should make clear that there are two separate points at which a utility makes a decision about curtailment: (1) at the election stage, when a utility needs clear criteria for accepting or rejecting a request from a consumer to be designated preferentially curtailable, and (2) at the implementation stage, when a utility must needs clear criteria for making a decision at any given moment to curtail (or not curtail) a customer that has successfully elected to be designated preferentially curtailable.

Commented [A4]: Numerous commenters have explained that this provision is too unclear to be implementable. The details must appear somewhere for them to take effect, presumably in a subsequently amended rule, or in a utility tariff.

Commented [A5]: This provision is too unclear to be implementable. Please see PacifiCorp's comments on this provision. Please see PacifiCorp's proposed new section (16).

Commented [A6]: For reasons stated in its comments, PacifiCorp does not believe a system in which the consumers may frequently and repeatedly change their eligibility for curtailment is workable. PacifiCorp proposes this new language to accommodate both the consumer's desire for flexibility and the utility's need to plan its system.

and costs associated with direct access consumers' return to an electric company's system.;

(b) The Commission will establish a cap on curtailable load to protect cost-of-service customers from the risks and cost associated with direct access consumers' early return to the electric company's system unless the Commission finds, after investigation, that an uncapped level of departing curtailable load poses no harm to cost-of-service customers;

(c) Any caps established under this section will be reviewed by the Commission periodically in a manner to be determined by the Commission.

(8) Using a Commission approved methodology, anAn electric company may will collect a reasonable charge from a direct access consumer to recover any costs that are reasonably necessary costs for system upgrades that operationalize preferential curtailment of that consumer. Any given load that a consumer elects to be curtailable will be considered non-curtailable until the system upgrades required to curtail the load are installed, tested, and properly functioning.

(9) If a preferentially curtailable consumer returns to default supply without providing the required time for notice of return under the electric company's direct access program tariff, the electric company must make best efforts to serve the consumer with Uncommitted Supply consistent with the criteria established under section (10) of this rule..

(10) The Commission will establish criteria theEach utility's tariff or program rules will specify criteria an electric company may use to demonstrate that it sought to serve a preferentially curtailable consumer with Uncommitted Supply before curtailing that consumer.

(11) If a returning preferentially curtailable consumer is served with Uncommitted Supply, the consumer will be charged the greater of the incremental capacity and energy costs or the retail energy market costs required to serve on less than the required notice of return in the electric company's direct access program tariff.

(12) If Uncommitted Supply is not available, the electric company may preferentially curtail returning nonresidential direct access consumers' load that has been elected to be curtailable.

(a) Preferentially curtailable consumers for whom the electric company has not begun planning will be curtailed in an order and in a manner consistent with the utility's Commission-approved tariffs, in a manner that is operationally workable for the electric company;

(b) Preferentially curtailable consumers who have notified the electric utility of their intent to return to cost-of-service, and for whom the electric company has begun planning, will be curtailed in an order and in a manner consistent with the utility's Commission-approved tariffs; provided, however, that such consumers will be curtailed only after the electric company has curtailed consumers for whom the electric utility has not begun planning.

(13) A preferentially curtailable consumer that returns to the electric company's service without the required notice of return under the electric company's direct access program tariff shall be subject to potential curtailment for a period equal to the remaining time for notice of return.

Commented [A7]: Please see PacifiCorp's comments on this issue.

Commented [A8]: Per new section (15), this methodology will be established in utility tariffs (the only place to establish it other than in this rule), and thus will be de facto reviewed and approved by the Commission. Also, the word "reasonably" has been added to reflect the common industry standard.

Commented [A9]: Please see PacifiCorp's comments.

Commented [A10]: If the utility needs 25 MW of preferentially curtailable load, how should it get that 25 MW? Criteria must be established to make clear when and how the utility should make this decision. As with all things in this rule, the criteria must be practical and operationally implementable, not just theoretical.

(14) If a non-curtailable consumer returns to the electric company's service without the required notice of return under an electric company's direct access program tariff, the electric company shall charge the non-curtailable consumer the greater of the incremental capacity and energy costs or the retail energy market costs required to serve on less than the required notice of return.

(15) Individual utility tariffs will detail threshold eligibility criteria for consumers seeking to become preferentially curtailable.

(16) Each utility will develop a process for implementing preferential curtailment in individual utility tariffs or program rules that include at least the following details:

(a) A consumer seeking to be preferentially curtailable must sign an agreement with the utility agreeing to be curtailed consistent with the provisions of this rule and with utility tariffs and program rules. As part of the agreement, the consumer must agree to hold the electric company harmless from all liability or damage caused by curtailment.

(b) Utility tariffs or program rules will specify how the utility will evaluate and assess the costs of installing infrastructure or equipment necessary to curtail the customer; how the utility will collect costs from a departing customer; the criteria the utility will use to preferentially curtail the customer; and other details necessary to implement this rule.

Utility tariffs implementing this rule will be designed to hold cost-of-service customers harmless from the potential reliability impacts of the returning consumer's unplanned load.

(175) Sections (13) and (14) of this rule do not limit a New Large Load Direct Access Program participant or long-term opt-out direct access consumer's right to return from default supply to direct access unless:

(a) The consumer has provided a notice of return to the electric company's service, or;

(b) The consumer remains on default supply for longer than the time period necessary to select an ESS and return to direct access servicesixthree months. This time period will be determined by the Commission.

(18) Consistent with ORS 757.730, a utility shall not be liable for damages to persons or property resulting from a curtailment of service in accordance the implementation of this rule.

STATUTORY/OTHER AUTHORITY: ORS 183, ORS 756, ORS 757
STATUTES/OTHER IMPLEMENTED: ORS 756.040, ORS 757.600-757.667

Commented [A11]: Necessary agreements, details, criteria, etc. must still be developed. Although the details need not appear in the rule, the rule should state minimum details and identify some key criteria or standards.

Commented [A12]: If a utility will be subject to liability for preferential curtailment, it will not preferentially curtail when needed. If a utility does not preferentially curtail when needed, any emergency efforts needed to ensure reliability will be pushed to cost-of-service customers. This would completely undermine the intent of this rule and violate Oregon's direct access statutes.

Commented [A13]: Please see PacifiCorp's comments. The Commission should simply establish a time period here. There seems to be no reason to adopt a rule drafted in a way to increase, rather than reduce, planning uncertainty and litigation risk.