Oregon Citizens' Utility Board
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September 15, 2022

Via electronic filing

Madison Bolton
Public Utility Commission of Oregon
201 High St. SE
Salem, OR 97301

Re: ***AR 651 – Rulemaking Regarding Direct Access Including 2021 HB 2021 Requirements – Comments of the Oregon Citizens' Utility Board on Staff's Straw Proposal***

Dear Mr. Bolton:

The Oregon Citizens' Utility Board (CUB) appreciates the opportunity to provide comments on Staff of the Public Utility Commission of Oregon's (Staff) Straw Proposal in AR 651, filed September 1, 2022. CUB thanks Staff and all stakeholders for their thoughtful engagement in this proceeding. These comments will address discrete issues raised in Staff's straw proposal.

OAR 860-038-0170 – Non-bypassable Charges

CUB appreciates Staff's support for portions of the revisions to this rule section brought forth by various parties. The proposal CUB worked on with the Northwest & Intermountain Power Producers Coalition (NIPPC) was generally reasonable in our eyes, although we did reserve the right to consider changes to the proposal based upon feedback by various parties. CUB believes the changes incorporated by Staff help refine the language in a way that retains adequate Commission discretion, which is and has been an important aspect in CUB's eyes.

Specifically, CUB agrees that the inclusion of "factors" in OAR 860-038-0170(1) provides the Commission the ability to determine whether a certain aspect is irrelevant in rendering its decision. CUB notes that "consider" was intentionally included to achieve this same purpose. In Commission Docket No. UM 1811, the meaning of the word "consider" was litigated to discern the legislature's intent in including that language as part of the Commission's review of transportation electrification program applications. There, the Commission held:

> [t]he legislature's use of the word "consider," read in its immediate context, makes clear that we are to take in account these factors during our review, but that we retain discretion in our decision-making whether to approve a program.[1]

[1] *In re Portland General Electric Company, Application for Transportation Electrification Programs*, OPUC Docket No. UM 1811, Order No. 18-054 at 9 (Feb. 16, 2018).

CUB's intent in including this language was to ensure adequate Commission discretion and flexibility to determine whether a cost should be non-bypassable, and we believe the adjustments to the proposed language achieve that purpose.

CUB similarly supports Staff's proposal to retain the language regarding "fair, just, and reasonable rates" in (e) of this section. CUB's intent to include this catch-all provision was, again, to ensure adequate Commission discretion and flexibility to determine whether a cost should be non-bypassable. Absent a similar catch-all provision, costs may be argued to be bypassable if they do not meet one of the specific factors enumerated in this section. Given that the prevention of unwarranted cost shifting is a necessary piece of the Commission's core mandate to establish "fair, just, and reasonable rates" under ORS 757.607, CUB believes retaining this language is appropriate and thanks Staff for providing clarity by referencing the applicable statute.

On balance, CUB believes the changes made by Staff to this section are acceptable and provide some parties with certainty while retaining adequate discretion for the Commission to determine the scope of non-bypassable charges. Given that the future is uncertain, and the scope of costs that should be borne by all utility customers remains unclear, this discretion and flexibility provided by this section of the rules is paramount.

OAR – 860-038-0290 – Preferential Curtailment

The inclusion of specific rule language around investor-owned preferential curtailment in the event of an ESS default at this late stage in the rulemaking process is somewhat perplexing. This is especially true since Staff determined earlier in this rulemaking process that additional investigation into this topic is needed, and indicated that a contested case proceeding would be an appropriate venue to explore this issue. It is not clear to CUB whether an investor-owned utility (IOU) would actually curtail large customer load. Large industrial customers pressuring IOUs to cater to their desires is common, and it is likely that the decision to preferentially curtail a customer would be subject to significant political pressure from the customer to the IOU.

Given that this process has not investigated the merits and issues associated with preferential curtailment at all, CUB asks that the proposed rule language be stricken from the Staff straw proposal. If Staff and the Commission prefer to retain language related to preferential curtailment in the rules, it should be made clear that any cost increases associated with ESS default and customer return to service be borne entirely by the customer returning to IOU service. For example, if an ESS defaults and the IOU fails to preferentially curtail a customer returning to service, and that return brings any additional energy or capacity costs to the IOUs system, those costs should be entirely borne by the customer returning to IOU service.

OAR 860-038-0405(8) – ESS Emissions Planning Report – Availability of Information

CUB thanks Staff for including the language in its straw proposal. CUB's principal concern when engaging in the drafting of this language with NIPPC, Calpine, Climate Solutions, and the Green Energy Institute was to ensure that statutory requirements for public disclosure were met

while ensuring CUB, as a statutory party, was able to access all of the various layers of confidential information.

While the language furthers those goals, CUB understands that various parties may take issue with the designation of confidential information. CUB reserves the right to respond to concerns raised by any party in comments or at the forthcoming public meeting.

Direct Access Program Caps

CUB continues to believe that program caps are an essential captive customer protection component of the long-term direct access program that must be retained. As CUB has detailed in UM 2024 comments, unwarranted cost shifting is already occurring within Oregon's direct program through a variety of avenues.[2] While it encouraging that ESSs and DA customers will begin to be assessed some level of non-bypassable costs and resource adequacy requirements, the level to which direct access customers are shifting costs onto captive customers is inextricably linked to any conversation regarding caps. Unless and until CUB can be assured that no unwarranted cost shifting is occurring, caps remain necessary. This fact-based inquiry must be undertaken in a contested case setting.

While Staff appropriately continues to not propose rule language regarding caps, it is unclear exactly what Staff would like feedback on regarding program caps in its straw proposal. While Staff does not include rule language in the straw proposal, it indicates an openness to "what rule language could be included." CUB continues to believe that the direct access rules should not include language on caps until the issue is addressed in the contested phase of this investigation.

Staff's proposal "that the Commission may impose a cap" under certain findings such as an "increase in DA load shifts an unacceptable amount of cost to [cost of service] (COS) customers …" is concerning. By using permissive language like "may," it implies that the Commission may not impose a cap under some circumstances where it finds there is an unacceptable amount of cost shifting to COS customers. Program caps are a means of protecting COS customers from cost shifting. Program caps should remain in place unless the Commission finds that increasing the caps will not cause unwarranted shifting of costs or risks.

If, at a later date, Staff and stakeholders agree that the direct access program is structured in a way that may allow for certain exceptions to the cap, the applicant seeking to exceed the cap must bear the burden of proving that it will not result in unwarranted cost shifting to non-participating customers. The onus should not be on the Commission to consider imposing a cap of its own volition if certain parameters are met. While the criteria that Staff poses do offer some protection to cost-of-service customers, they should be affirmatively demonstrated by an applicant seeking to exceed the cap. The applicant seeking to expand the cap must bear the burden of proving that doing so would not result in unwarranted cost shifting and would further the public interest. Further, any application to exceed the cap must be reviewed on a timeline longer than 90 days. CUB recommends 180 days if a timeline is set, but again stresses that this issue should be addressed during the contested phase of this investigation. CUB is concerned

[2] UM 2024 – CUB's Opening Comments at 5-9 (Mar. 16, 2020).

that Staff's proposal is designed to shift the burden of proof to COS customers to demonstrate unwarranted cost shifting and does not provide sufficient time to do so.

CUB appreciates Staff's hard and thoughtful work throughout this proceeding.

Sincerely,

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