

NIPPC supports the preferential curtailment concept for this purpose but does not believe that implementation of preferential curtailment is *necessary* to move forward with expanding the DA Program at this time. Once a resource adequacy program is in place, preferential curtailment may be viewed as a secondary, redundant solution and no longer necessary.

It bears repeating that the Commission maintains a statutory obligation to develop policies to eliminate barriers to the development of a competitive retail market between electricity service suppliers and electric companies.¹ Yet, more than two decades after the DA program was initiated, it is still subject to caps and constraints borne of different circumstances, at levels imposed on the initial nascent program. For each programmatic concern raised against expanding the DA, real or perceived, NIPPC and its ESS members have worked diligently to eliminate the issue and allow for program expansion. For example, NIPPC supports imposition of appropriate RA requirements on the Direct Access program and has worked diligently towards the development of a fair regional program under which all load serving entities – utility and competitive power providers – must meet the same level of RA obligations. Similarly, NIPPC supports the concept that ESSs should be required to meet the same renewable power goals as utilities, and the same carbon reduction goals as utilities. NIPPC also supports the concept that Direct Access customers bear their share of policy costs through a non-bypassable surcharge. NIPPC submits that if the DA program participants are (1) paying an appropriate share of reasonable non-bypassable surcharges; (2) paying transition charges to compensate utilities for capacity purchased before a long-term direct access customer left the utility system (as they already do); and (3) *either* (a) meeting the same RA requirements as the utilities (once mandated to do so by the Commission or the State Legislature) or (b) are subject to preferential curtailment should they return to the utility system and there is not sufficient capacity to

¹ See ORS 757.646 (1) “The duties, functions and powers of the Public Utility Commission shall include developing policies to eliminate barriers to the development of a competitive retail market between electricity service suppliers and electric companies. The policies shall be designed to mitigate the vertical and horizontal market power of incumbent electric companies and prohibit preferential treatment, or the appearance of such treatment, by the incumbent electric companies toward generation or market affiliates. ...”

serve all customers, *there is no basis to maintain strict participation caps on the long-term direct access programs.*

When ESS's are meeting the same resource adequacy requirements as a utility there should not be a circumstance where there is insufficient energy available in the marketplace to serve all customers. Even if an ESS fails and exits the market, and its customers return to a utility or select a new supplier, the capacity provided by that ESS prior to its failure and departure from the market will still be available to cover those departing customers.

Similarly, pending implementation of RA programs, allowing for preferential curtailment avoids the need for a utility to acquire additional capacity to meet provider of last resort obligations for market scenarios that fall far outside of the standard 1-in-10-year loss of load RA protocols. This preferential curtailment proposal is already a tertiary safeguard on top of existing protections:

- **Safeguard 1: *Long Term Direct Access Customers are unlikely to ever return to the utility system:*** it is NIPPC's understanding that no long-term customers have ever returned to utility service during the more than two decades the DA program has been in place. In the unlikely event that an ESS fails, its customers will likely seek service from another ESS, thus avoiding any return to utility service. Any preferential curtailment program should assume that a DA customer whose ESS fails to provide service has the option to seek service from another ESS and should not be bound to return to utility service. Return to utility service should not be presumed, anticipated, or required.
- **Safeguard 2. *Utilities serve returning customers with emergency default service rates and are compensated therefore.*** The Commission requires that a utility serve a returning customer with emergency default service rates for a period of time, after which the customer is eligible to receive service under a market-based rate program.² The rules are specific that each utility "*must* design emergency service rates to

² See OAR 860-038-0280; OAR 860-038-005

recover its costs of providing such service.”³ It is therefore incumbent on the utility to design rates to recover costs incurred to serve a returning customer during the emergency period. Utilities are also authorized to demand a deposit before providing customers with emergency default service,⁴ and can terminate service if the customer does not pay such deposit.⁵ Arguably, imposing additional costs and fees to participate in a preferential curtailment program – or for any capacity contributions for customers that do not or not eligible for preferential curtailment – is directly contrary to this requirement, and would amount to a double contribution. Currently such emergency default service rate is limited to 5 days, but NIPPC supports (and proposes below) extending this window if it helps ameliorate concerns.

- **Safeguard 3. *Market purchases will be available absent catastrophic events beyond the scope of utility RA planning.*** As noted above, after receiving emergency default service, a returning customer would be subject to market rates for the duration of their return period, where they will join with any other customer that affirmatively selected to participate in the market rate program. It is highly unlikely that the return of load from the DA program will have any significant impact on market pricing – especially given that the RA obligations to serve such returning load mean that capacity is available even if an individual ESS may fail. But even assuming arguendo the return of a DA customer could impact market rates, any affected utility customer that chose market rate service did so knowing that markets fluctuate and have accepted the risk of a fluctuating market.

³ OAR 860-038-0280 (3)(b).

⁴ Rule 860-038-0280 (5): An electric company may require a deposit from a consumer applying to receive emergency default service or standard offer service. The electric company may disconnect a consumer receiving default service or standard offer service subject to OAR 860-021-0305 (Grounds for Disconnecting Utility Service) and 860-021-0505 (Disconnection Procedures for All Commercial Electric and Gas Utility customer and All Customers of Large Telecommunications Utilities).

⁵ Rule 860-021-0305: Utility service may be disconnected by an energy utility or large telecommunications utility:

- (1) When the applicant or customer fails to pay a deposit or make payments in accordance with the terms of a deposit payment arrangement.

- **Safeguard 4: *Direct Access Contribution to Resource Adequacy mitigates the problem:*** ESS already maintain some level of resource adequacy for the loads they serve. Even if an individual ESS fails, the capacity acquired to serve its customers will still exist in the broader marketplace across the Western Interconnection. This will be especially true once all load serving entities are contributing to resource adequacy through the regional RA program (or such other program ultimately imposed on the Direct Access program by the Commission). At that juncture, ESS's will have acquired capacity necessary to meet the load they serve, as well as a contribution of excess capacity, to the same extent as the utilities. Requiring the DA program to bear extra costs for resource adequacy beyond this contribution is a double burden on Direct Access beyond that imposed on utility customers and is inappropriate.
- **Safeguard 5: Preferential Curtailment.** Finally – to the extent real risks remain that are not covered by the prior safeguards, due to a concern that market power will not be available at *any* price, and pending implementation of a resource adequacy program applicable to Direct Access providers, NIPPC believes that a properly-designed preferential curtailment program may be an appropriate solution. To reach this point -- where insufficient power is available to purchase on the market at any price, there must have been an extreme market disruption that went beyond all resource adequacy planning standards. NIPPC submits that such an event would unlikely be caused by, or in any way limited to, the Direct Access program, and it would not be appropriate to require Direct Access customers to bear higher costs for this level of resource adequacy than borne by the utility's customers. Nonetheless, if a properly designed preferential curtailment burden removes the remaining hurdles to expanding the Direct Access program, NIPPC supports including it as part of the program. After all, NIPPC submits that the risks of curtailment are negligible, and they are risks a Direct Access customer can evaluate for itself.

2. NIPPC Preferential Curtailment Proposal.

NIPPC offers the following as a workable approach to preferential curtailment that could be put in place until the RA program is fully implemented. This NIPPC proposal builds on the framework proposed by PacifiCorp in its October 19 proposal, with appropriate modifications and clarifications:

- a. *Curtailable/Non-Curtailable Customers:* The Direct Access program will provide for two separate classes of customers: curtailable customers and non-curtailable customers, as addressed below.
- b. *Applicability of Program Caps:* Long term Direct Access program caps will not apply to curtailable load. Long term Direct Access program caps will apply to non-curtailable load as adjusted periodically through evidentiary hearings with the burden on cap proponents to demonstrate the program caps remain necessary.
- c. *Criteria for Curtailable Customers:*
 - i. *Minimum Size Threshold for curtailment:* Curtailable customers must meet a minimum size threshold to qualify. NIPPC proposes that the program start with a minimum threshold of 2 megawatts (“MW”) for curtailable customers, rather than the minimum of 25 MW as initially proposed by PacifiCorp.
 - ii. *Load Shedding.* Curtailable customers must be able to demonstrate that it is able to shed load in 20 minutes or less. Where the utility does not have remote curtailment ability, failure to shed load will result in substantial liquidated damages obligations.
- d. *Curtailment Events:*
 - i. *Mandatory curtailment:* Curtailment of a returning DA customer shall occur in a circumstance where:
 - i. One or more DA customers returns to utility service without adequate notice due to failure of an ESS.
 - ii. The utility is able to demonstrate that it does not have excess capacity or energy and cannot acquire energy at the emergency default rate or market rates to meet its obligations.

- ii. *Duration of Curtailment Obligation:* A curtailable customer that returns to utility service without appropriate notice shall be subject to potential curtailment for a period equal to the remaining time for notice of return under a given utility's DA program tariff; provided, nothing shall limit a curtailable customer's ability to return to Direct Access service.
- iii. *Optional Curtailment:* A curtailable customer will have the option, but not the obligation, to participate in demand response programs to be developed.
- e. *Non-Curtailable Customers.* Customers ineligible for, or that elect against participating in, the preferential curtailment program, will be subject to program caps pending implementation of RA requirements on load-serving entities. Such caps shall be updated periodically through an evidentiary hearing process.
- f. *Extension of Term for Emergency Service.* Section 860-038-0280(6) will be modified to extend the period by which a utility must move a returning Direct Access customer from emergency default service to standard offer service will be extended from five days to fifteen days.⁶

Respectfully submitted this 18th day of November, 2022.



Carl Fink (OSB # 980262)
Suite 200
628 SW Chestnut Street
Portland, OR 97219
Telephone: (971)266.8940
CMFINK@Blueplanetlaw.com

One of Counsel for Northwest and
Intermountain Power Producers
Coalition

⁶ NIPPC proposes this 15-day window as compromise to address concerns raised by parties and could support other reasonable timeframes.