

**BEFORE THE PUBLIC UTILITY COMMISSION
OF THE STATE OF OREGON**

AR 651

IN THE MATTER OF

RULEMAKING REGARDING
DIRECT ACCESS INCLUDING 2021
HB 2021 REQUIREMENTS

COMMENTS OF
BROOKFIELD RENEWABLE TRADING AND
MARKETING LP

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Dated: April 21, 2022

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I. INTRODUCTION & SUMMARY

Brookfield Renewable Trading and Marketing LP (“BRTM”) hereby submits the following comments on the Oregon Commission Staff’s (“Staff”) draft rule language discussed during Staff’s April 11, 2022 workshop as part of the Commission’s ongoing investigation into long-term direct access (“DA”) programs. In addition, these comments provide further clarity on BRTM’s position on the various aspects of the draft rules. Representatives from BRTM will attend future workshops and BRTM welcomes the opportunity to further explain its positions, as detailed below.

II. COMMENTS

a. Non-Bypassable Charges

BRTM generally supports Staff’s stated approach to establish a going-forward process to review each utility proposal for authority to charge DA customers non-bypassable charges. As described in more detail below, however, such a process must include appropriate notice and process provisions to affected entities. Further, and most importantly, the Commission’s regulations should appropriately limit the types of charges that utilities can request to be recovered through non-bypassable charges in order to (1) protect the delicate competitive balance between

utilities and electricity service suppliers (“ESSs”) and (2) limit frequent litigation before the Commission. BRTM cautions that Staff, ESSs, and other parties may not be sufficiently resourced, and thus may be inappropriately burdened, by frequent Commission proceedings and litigation that may result from broadly defined rules.

i. Staff Proposal and Background

Staff’s proposed rules define non-bypassable charges as “costs that are directed by legislature to be recovered by all customers or determined by the Commission to be associated with implementing public policy goals related to reliability, equity, decarbonization, resiliency, or other public interests.” During Staff’s January 26, 2022 workshop, and again at Staff’s April 11, 2022 workshop, several parties expressed concern with the definition’s lack of specificity. Consistent with BRTM’s prior comments, BRTM shares these concerns.

As an initial matter, it is worth highlighting both the purpose and effect of non-bypassable charges. The purpose of non-bypassable charges has been discussed by the Legislature in codifying Or. Rev. Stat. § 469A.465. There, the Legislature stated:

The commission shall review and identify costs incurred by electric companies for obligations not similarly imposed on electricity service suppliers to comply with ORS 469A.400 to 469A.475 that retail electric consumers served by electricity service suppliers may avoid by obtaining electric power through direct access and ensure that the identified costs are recovered from all retail electricity consumers...

While largely limited to emission requirements, the Legislature provides cogent guidance on non-bypassability as being used to recover costs from DA customers for *obligations* not similarly imposed on an ESS. It matters not whether a utility is incurring a cost not incurred by an ESS; rather, the purpose of non-bypassability is to prevent a DA customer from obtaining service from an alternative provider and avoiding Commission or state mandates imposed on the utility but not the ESS.

The effect of non-bypassable charges is to permit a utility to collect revenue from a DA customer, even though the DA customer does not receive electric service from the utility. These costs only flow in one direction: from an DA customer to a utility. This ability to socialize costs to a broader customer group puts utilities at a competitive advantage over ESSs. In other words, an ESS cannot request that the costs associated with the construction of a new wind plant be socialized to bundled utility customers, even though the wind plant will provide reliability and resiliency benefits to the ESS's customers and the utility's system over which the power will flow.

The stated purpose and practical effect of non-bypassable charges should guide the Commission's drafting of any rule related to non-bypassable charges. Rules must ensure balance and avoid anti-competitive effects that would flow from non-bypassability being used as an end run to make DA service economically unviable.¹ While the factors included in Staff's proposed rules are a step in the right direction, the proposed rules leave significant risk of misuse, which guide BRTM's proposed revisions discussed immediately below.

ii. BRTM's Proposed Revisions

First, BRTM respectfully requests that the Commission's rules specifically require utilities that file applications requesting authority to charge DA customers a non-bypassable charge to notify all actively licensed ESSs in the State of Oregon at the time of their application. Given that Staff's proposed rules do not contemplate a specific proceeding during which a utility can request non-bypassable treatment, utilities can hide such requests in lengthy or unassuming applications. ESSs and their customers certainly have an interest in the outcome of such proceedings, and ESSs

¹ Or. Rev. Stat. § 757.646.

should be afforded explicit notice from the utility. As such, BRTM proposes the addition of the following language to Staff's proposed rule related to non-bypassability:

In the event that an electric utility files an application that requests authority to either (1) treat costs not considered to be non-bypassable immediately prior to the electric utilities application as non-bypassable consistent with this rule or (2) change the amount or allocation of an existing non-bypassable charge, the electric utility must provide written notice to all ESSs that are currently licensed in the State of Oregon pursuant to OAR 860-038-0400.

Second, and as addressed in BRTM's prior comments, BRTM recommends that "reliability" and "resiliency" be removed from the list of public policy goals. Specifically, reliability and resiliency, while certainly benefits to any properly maintained electric system, are exceedingly broad concepts that could cover just about any expense incurred to improve or maintain a transmission system. For example, these terms play a pivotal role in utility integrated resource plans to justify both generation and transmission capital expenditures, as well as general operation and maintenance costs. By explicitly endorsing "reliability" and "resiliency" investments as non-bypassable charges, the Commission's rules invite all manner of utility applications requesting non-bypassable cost recovery.

Moreover, Or. Rev. Stat. § 757.020 requires utilities to provide safe and reliable service. *See also* ORS §§ 757.669, 758.405; OAR 860-023 *et seq.* Similarly, ESSs' ability to survive in a competitive market relies on their ability to provide safe and reliable service. Indeed, reliability concerns are the subject of Commission proceeding UM 2143, where it is likely that reliability standards and planning will be implemented for all load serving entities. Because ESSs and utilities have the same obligation to provide safe and reliable service, allowing a utility to socialize charges for reliability and resiliency to DA customers for the same benefit is duplicative and inconsistent with the broader purpose of non-bypassability and such duplicative charges would be

unjust and unreasonable.² Accordingly, these bedrock requirements of utility service should not be transformed into a basis for non-bypassability.

Third, BRTM recommends an extension to the definition of non-bypassable charges as follows:

... costs that are directed by legislature to be recovered by all customers or determined by the Commission to be associated with implementing public policy goals related to ~~reliability~~, equity, decarbonization, ~~resiliency~~, or other public interests. Non-bypassable charges do not include costs related to obligations imposed on both the utility and ESSs.

Consistent with the discussion above, allowing a utility to collect revenues from a DA customer related to obligations similarly imposed on an ESS would result in double collection from DA customers and operate as a significant competitive disadvantage to ESSs.

Fourth, regarding the factors proposed for consideration when evaluating non-bypassability, BRTM has several comments. Primarily, it is unclear what an “above-market cost” means in this context. While BRTM does not have a specific recommendation at this time, it will continue to consider possible revisions for later workshops and comments. Further, BRTM proposes the following two additions to Staff’s proposed list of factors:

- “It does not result in an ESS customer’s contribution to a utility’s rate of return.”
- “It does not present barriers to the development of a competitive retail market between ESSs and electric companies.”

With regard to the first proposed addition, allowing a return on non-bypassable charges necessarily shifts costs from a regulated business to a competitive one, which the Legislature explicitly disfavors.³ If permitted, DA customers would be contributing towards utility shareholder profits

² Oregon law requires that rates for utility service be fair and reasonable. Or. Rev. Stat. § 756.040. “[E]very unjust or unreasonable charge for such service is prohibited.” Or. Rev. Stat. § 757.020.

³ The Commission is further required to “[m]inimize cross-subsidization between competitive operations and regulated operations.” Or. Rev. Stat. § 757.646(2)(c).

despite taking service from an alternative provider and without giving the ESS an ability to administer a comparable program. This would undermine the Legislature’s mandate to “eliminate barriers to the development of a competitive retail market between electricity service suppliers and electric companies.”⁴ And it is because of this mandate that BRTM requests that Staff also include BRTM’s second proposed factor, which simply makes explicit in the rule the Legislature’s directive to the Commission.

Finally, regarding the allocation of non-bypassable charges, BRTM proposes the following change to Staff’s proposed rule:

(3) All Direct Access customers are responsible for paying Non-bypassable Charges as determined by the Commission. In allocating costs, the Commission will strive to allocate costs based on the relative benefit the Direct Access customer receives as compared to the utility’s comparable retail customer class, but in no event shall the allocation to Direct Access customers be in a greater proportion than that allocated to the utility’s comparable retail customer class.

Rather than specifically addressing the allocation of non-bypassable charges by rule, the above revision maintains the Commission’s discretion to allocate non-bypassable charges based on the charge’s individual circumstances. However, BRTM’s proposed revisions provide some clarity and guidance to the Commission and stakeholders on the general framework to be applied to the non-bypassability evaluation, as well as a safeguard against excessive allocation of non-bypassable charges to DA customers. Based on comments made at the April 11, 2022 workshop, parties generally agreed that DA customers should only be charged non-bypassable charges to the extent that, and in no greater proportion than, the DA customer’s comparable bundled rate class was also being charged.

⁴ Or. Rev. Stat. § 757.646(1).

Therefore, while BRTM supports assessment of non-bypassable charges to DA customers for true public policy purposes, such charges, if not carefully administered, pose significant risk of cost shifting that will erode the competitiveness of DA service. As a result, BRTM recommends implementing the protections outlined above, at a minimum.

b. Publishing Energy Supply Mix

Staff's straw proposal includes a requirement that ESSs publish their aggregate energy supply mix on their website and update the information on an annual basis. As mentioned at Staff's April 11, 2022 workshop, BRTM has the following two revisions to Staff's proposed language:

(2) Within 90 days from the effective date of this rule, An an electricity service provider must post a summary of the aggregated energy supply mix and associated emissions for the Direct Access load served in Oregon in the previous year. ~~When historic data is unavailable, the ESS must use a reasonable estimate of future resource mix.~~ The summary must be updated annually on November 15 of each year and either included on or via a link on its indicative pricing website as required under OAR 860-038-0275.

The additions above simply make timing requirements explicit in the rule for ESS compliance tracking. November 15th is the date that ESSs are required to post indicative pricing, and because posting of aggregate energy supply mix is to occur on the same website as indicative pricing, BRTM believes this date to make the most sense. However, BRTM does not oppose an alternative date if desirable.

Further, BRTM requests that the requirement to post an estimate of future resource mix be removed. An estimate of future resource mix is not found in HB 2021 and would be mere conjecture on the part of an ESS that is not currently serving load in Oregon.

Accordingly, BRTM respectfully requests that Staff make the above revisions to its proposed rules.

c. ESS Reporting and Disclosure Requirements

Staff's proposed rules include a fairly comprehensive process for ESS reporting. Generally, BRTM supports Staff's proposed rule and proposes only a couple revisions for Staff's consideration.

First, proposed section (1) of 860-038-0405 should be revised to state:

(1) From the effective date of these rules through December 31, 2026~~May 30, 2023~~, each ESS certified pursuant to ORS 757.649 ...

This proposed revision makes clear that emission reports filed with the Oregon Department of Environmental Quality must also be filed with the Commission in each year until the Commission requires ESSs to file prospective plans starting in 2027.

Second, BRTM proposes to make the following revision to proposed section (4)(c) of 860-038-0405:

(c) Load forecast for each of the following three consecutive years, ~~aggregate for all Oregon Direct Access~~ aggregated across the ESS's Direct Access customers.

This proposed change does nothing more than to recognize that an ESS in its report cannot aggregate for all Oregon Direct Access customers unless that single ESS serves all Direct Access customers in the state. BRTM believes its proposed revision provides more specificity to an ESS's reporting requirements.

Therefore, BRTM respectfully requests that Staff make the above revisions to its proposed rules.

III. Conclusion

BRTM appreciates the thought and time put into developing the draft rules and looks forward to engaging with Staff and other parties in the forthcoming rulemaking process.

DATED this 21st day of April, 2022.

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