Oregon Citizens' Utility Board
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April 20, 2023

Via electronic filing

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

Re: ***AR 651 – Comments of the Oregon Citizens' Utility Board***

Dear Mr. Bolton:

Pursuant to the February 24, 2023 Notice of Proposed Rulemaking filed in Public Utility Commission of Oregon (Commission) Docket No. AR 651, the Oregon Citizens' Utility Board (CUB) files these final comments on the rules proposed in the Direct Access (DA) Rulemaking. These comments provide written documentation of oral comments presented by CUB at the April 4, 2023 rulemaking hearing. Additionally, per the instruction of Administrative Law Judge Allwein, attached are all written comments CUB filed in this docket prior to October 2022 for inclusion in the administrative rulemaking record in this proceeding.

CUB appreciates the opportunity to provide these comments, as well as the leadership of Commission Staff throughout this proceeding. CUB appreciates the hard work of all stakeholders to date. These comments will briefly address the discrete issue regarding the use of "uncommitted supply" to serve returning DA customers.

CUB continues to stress that the rules should ensure that that the provision of DA service to some retail electricity customers not cause the unwarranted shifting of costs to other retail electricity customers.[1] In this context, the "uncommitted supply" that is used to serve returning DA customers should ensure that existing cost of service customers are held harmless. At the hearing, CUB raised a concern that has been reiterated in our advocacy throughout this proceeding—that any unused energy or capacity on a utility's system is typically optimized for the benefit of cost of service customers. If sold to returning DA customers, the effect of using this energy or capacity should be the same for cost of service customers as if the resources were sold into the prevailing market. To CUB, a foregone benefit that cost of service customers would otherwise incur is the same as an unwarranted cost shift, which would run counter to the Commission's obligation in administering the DA program.

[1] ORS 757.607(1).

As drafted in the notice of proposed rulemaking, CUB believes OAR 860-038-0290(11) captures the spirit of CUB's desired outcome, and therefore recommends no change to this section. CUB appreciates Staff's proposed change on p. 5 of its March 31, 2023 comments to attempt to address the issue CUB had flagged in this proceeding. Should the Commission wish to accommodate some of Staff's proposed changes to OAR 860-038-0290(11), CUB respectfully recommends that it keep "the greater of" language that Staff seeks to delete while retaining the additional sentence Staff has added that the end. To provide the Commission with additional options, CUB is comfortable with any rule language indicating that returning DA customers would be charged the prevailing retail market cost for uncommitted supply, as that is the amount that the utility would be able to recoup from the market if the DA customer were not returning—essentially holding cost of service customers harmless.

Sincerely,

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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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April 21, 2022

Via electronic filing

Scott Gibbens
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 Proposed Division 38 Rules***

Dear Mr. Gibbens:

The Oregon Citizens' Utility Board (CUB) appreciates the opportunity to provide comments on Staff of the Public Utility Commission of Oregon's (Staff) proposed Division 38 rule language in AR 651. CUB would like to applaud Staff's diligent work throughout this proceeding in balancing divergent interests to bring forth a thoughtful and defensible set of draft rules for stakeholder consideration. Staff's overarching plan for the scope and process of this proceeding is sound, and CUB is hopeful that parties will be able to reach agreement on a broad subset of issues in this rulemaking before the contested case phase of this proceeding.

While a relatively long amount of time has passed since the UM 2024 Petition for Investigation into Long-Term Direct Access Programs was filed by the Alliance of Western Energy Consumers (AWEC) on June 10, 2019, agreement has been reached on several issues CUB raised in UM 2024 opening comments.[1] Electricity service suppliers (ESSs) and the direct access (DA) customers that they serve have assumed responsibility for acquiring adequate capacity to serve customer demand under individual and regional resource adequacy requirements. While details regarding the scope of non-bypassable charges assessed to ESSs and their DA customers still need to be ironed out, CUB is encouraged by the conversation to date.[2]

However, contentious issues will undoubtedly need to be addressed in the later phase of this proceeding. As Staff and stakeholders are aware, the Public Utility Commission of Oregon (Commission) has a binding statutory obligation to ensure the provision of DA to some retail customers not cause the unwarranted shifting of costs to other retail electricity consumers.[3] It is

[1] UM 2024 – CUB's Opening Comments (Mar. 16, 2020).
[2] *See, e.g.,* AR 651 – Calpine Energy Solutions, LLC's Comments on Staff's Straw Proposal at 5 (Feb. 14, 2022) ("Calpine Solutions supports Staff's proposal with some limited clarifications. In general, parties appear to be in agreement that the Commission should develop a general standard in its rules for determining which charges should be non-bypassable . . . .").
[3] ORS 757.607(1).

through this lens that the Commission and Staff should consider any potential changes to the existing long-term direct access (LTDA) program. Most utility customers—including the residential customers that CUB represents by statute—are truly captive. Unlike DA customers that can avail themselves to the benefits of a more competitive marketplace, residential customers under the purview of the Commission's regulatory apparatus can only receive service from monopoly utilities. This—combined with the Commission's statutory mandate to ensure there is no unwarranted cost shifting—is a critical and core issue that must be at the forefront of the conversation in both this rulemaking proceeding and the later contested phase.

Oregon's DA program was established by 1999's SB 1149. Since that time, several key elements envisioned in the bill have not come to fruition.[4] In order to ensure Oregon's DA program aligns with the reality we are currently in, changes are necessary. CUB continues to believe that this investigation is timely and looks forward to working with Staff and other stakeholders to design a LTDA program that is fair and holds cost-of-service customers harmless for actions taken by other customers to purchase power on the wholesale market.

These comments will now address several key issues raised in Staff's most recent draft rules.

OAR 860-038-0170 – Non-bypassable Charges

CUB appreciates and supports Staff's proposed rule language relating to non-bypassable charges. It is appropriate to define the term at a broad level in this phase of the proceeding with the understanding that a more nuanced exploration of individual potential non-bypassable charges will be undertaken in the contested phase of this proceeding. Given this phased approach, it is appropriate for definitions contained in the rules to be broad. Since individual charges will not be determined to be "non-bypassable" until after the contested phase of the proceeding, other parties' concerns about the breadth of language are unpersuasive. Individual potentially non-passable charges will be similarly assessed by the Commission at a later date if they are not explicitly considered in the contested phase of this proceeding.

Utility customers are required to fund utility programs that are mandated by the Oregon legislature to further public policy goals or otherwise further the public interest. DA customers should not be able to sidestep requirements that further the public interest in the state by going to the wholesale market—these are costs that benefit the electric system and Oregonians as a whole. CUB supports the inclusion of costs related to the public interest in both the definition of "non-bypassable charges" as well as in the criteria for Commission consideration of whether a charge should be non-bypassable. CUB similarly supports Staff's draft rule language related to criteria for Commission consideration of non-bypassable charges.

Should Staff choose to include language related to rate spread in its draft rules, CUB supports the additional language considered by Staff that non-bypassable charges be allocated to a DA customer in the same manner as they would be to a similar utility retail customer. Rate spread is a fact-based exercise typically undertaken using the results of a system-wide cost of service study. CUB cautions Staff against using language in rule that would presuppose any specific rate spread methodology.

[4] UM 2024 – CUB's Opening Comments at 1-2 (Mar. 16, 2020).

OAR – 860-038-0270 – Direct Access Program Caps

CUB supports Staff's decision not to include detailed rules regarding program caps at this time. To CUB, DA program caps are an essential captive customer protection component of the DA program that must be retained. As CUB has detailed in UM 2024 comments, unwarranted cost shifting is already occurring within Oregon's DA program through a variety of avenues.[5] While it encouraging that ESSs and DA customers will begin to be assessed some level of non-bypassable costs and RA requirements, the level to which DA 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. CUB looks forward to exploring this issue in the next phase of the proceeding.

OAR 860-038-0280 – Default Supply

CUB similarly supports Staff's decision not to include changes to the current default supply rules. According to Staff, in the presence of comprehensive RA requirements, a charge for utility "backstop" capacity is duplicative for ESS customers. While CUB supports this theory, we note that whether ESS RA requirements are sufficient to warrant such treatment is a factual determination that must be made by the Commission. RA requirements within the scope of the DA program must be sufficiently comprehensive to protect cost of service customers.

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

Sincerely,

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