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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

AR 394

In the Matter of a Rule making to Modify)
OAR 860-038-0005(23) Under the Process) ORDER
Defined in OAR 860-038-0080(5).)

DISPOSITION: RULE AMENDED

On November 7, 2000, the Public Utility Commission of Oregon (Commission) opened a rulemaking proceeding to consider amending the definition of large nonresidential consumer in OAR 860-038-0005(23).¹ Notice of the rulemaking and a statement of fiscal impact were filed with the Secretary of State on November 15, 2000. The notice was published in the Oregon Bulletin on December 1, 2000.

This docket was processed in two phases. The first phase was from December 2000 through February 2001. During that time, two public comment hearings were held in Salem, Oregon on January 4, 2001, and February 1, 2001, respectively. Two rounds of written comments were filed, with the second round completed on January 29, 2001. The participants who filed written comments were Portland General Electric Company (PGE), Fair and Clean Energy Coalition (FCEC), League of Oregon Cities, Oregon Restaurant Association (ORA), Associated Oregon Industries (AOI), City of Portland (Portland), Building Owners and Managers Association – Portland (BOMA), and Staff.

After February 1, 2001, this docket was held in abeyance pending legislative inquiry into electric restructuring. The docket was not reactivated until passage of HB 3633,² which modified the start-up date for electric restructuring.

The second phase of the docket began on August 8, 2001, when the participants asked for the opportunity to submit comments addressing the effect, if any, of recently passed legislation on this docket. This request was granted, and the participants were given until September 11, 2001 to submit comments. This written comment period

¹ At the time this docket was opened, another Division 38 rulemaking docket (AR 390) was pending. New definitional rules were adopted in AR 390, causing a change in the numbering system. Order No. 01-073. Consequently, the definition of large nonresidential consumer is now found at OAR 860-038-0005(28).

² Or Law 2001, ch 819, §2.

was later extended to October 25, 2001. BOMA and Portland filed individual comments, while Staff, Northwest Energy Coalition, Oregon Office of Energy (OOE), PGE, PacifiCorp, and PG&E National Energy Group (PG&E) filed joint comments.

On January 8, 2002, the Commission deliberated on this matter at a regular public meeting in Salem, Oregon. Persons were given an opportunity to comment on the rule during this meeting. The Commission entered the decision set forth in this order.

Background

The Commission previously adopted OAR 860-038-0005(23),³ which states:

“Large nonresidential consumer” means a nonresidential consumer whose kW demand at any point of delivery is greater than 30 kW during any two months within a prior 13-month period, or any different level of consumption as may be established by the Commission pursuant to the proceeding identified in OAR 860-038-0080(5)(a).

OAR 860-038-0080(5) provides for the following process:

- (5) An electric company or any nonresidential consumer may propose to change the definition of “large nonresidential consumer” provided in OAR 860-038-0005(23), by making a written request to the Commission no later than October 15, 2000, in which the following shall apply;
- (a) The Commission shall initiate a proceeding open to all interested parties to determine on an expedited basis whether to change the definition of “large nonresidential consumer.” The schedule shall be set to obtain a Commission decision of this issue as soon as practical prior to March 1, 2001.
- (b) The Commission shall only change the definition of “large nonresidential consumer” if the Commission determines it is in the public interest based on the following factors, and such other factors as the Commission deems relevant:

³ Order No. 00-596, entered September 28, 2000.

- (A) Each electric company may have the same definition of large nonresidential consumer;
- (B) For each class of consumers deemed “large nonresidential consumers,” prices for electricity services, taking into account transition charges, transition credits and incentive payments, if any, should not materially exceed prices for electricity services such class of consumers would pay under a cost-of-service rate;
- (C) Consistent with ORS 757.646, the Commission should define large nonresidential consumers to encompass as many nonresidential consumers as is feasible; and
- (D) The potential benefits available due to new products, service options, and product innovations.

Pursuant to OAR 860-038-0080(5), Portland and BOMA filed requests to amend the definition of large nonresidential consumer on October 16, 2000.⁴

Legislative Changes

Before the Commission could address Portland and BOMA's request, the 2001 Legislative Assembly revisited electric restructuring. Under SB 1149 as originally enacted, large nonresidential consumers had to choose either direct access or a standard offer rate for their electricity. The standard offer rate, in theory, was to be the same as, or substantially similar to, the cost of service rate.

In June 2001, HB 3633 was signed. This new legislation, which modified SB 1149, provided for all customers to retain a cost of service option through at least July 1, 2003. HB 3633 also established specific guidelines under which the Commission can waive the cost of service requirement for certain customer classes after July 1, 2003.

Positions of the Participants

BOMA has consistently expressed concern over the 30 kW threshold. It believes that too many nonresidential consumers with limited market savvy are placed into an extremely volatile market. According to BOMA, this low threshold was

⁴ The requests were timely filed as October 15, 2000, fell on a Sunday.

established due to a concern that allowing large nonresidential consumers access to a cost of service rate would reduce benefits to other consumers. BOMA endorses a threshold of one MW.

Portland also believes that the 30 kW threshold is too low, and should be raised to 500 kW. It argues that increasing the threshold will reduce overall risk, will give the smaller businesses and municipals a choice as to entering the market or staying with a cost of service rate, and will still allow sufficient load for market-based prices. Based on information provided by PGE and PacifiCorp, Portland determined that raising the threshold from 30 kW to 500 kW reduced the amount of energy subject to direct access from approximately 2070 average megawatts (aMW) to approximately 1300 aMW. Although this is a substantial reduction, Portland contends that this change allows cost of service rates to over 99 percent of all nonresidential customers while sending over 55 percent of all nonresidential energy purchases to the market.

ORA and AOI argue that if the standard offer price is the same as the cost of service rate, then there is no need to change the threshold. The current 30 kW definition allows for a greater number of businesses to go to market and still be qualified for transition cost credits once the utilities have sold or administratively valued the generation assets no longer needed to service accounts. They urge that it is premature to make a change, and that the Commission should not change the 30 kW threshold. Neither participant filed comments after HB 3633 was enacted.

League of Oregon Cities suggests that raising the threshold would be in the public interest, although it does not recommend a specific cutoff. Specifically, the League contends that more municipal customers would have the protections of the cost of service rates, with a reduction in their exposure to unstable energy prices. As public entities are responsible and held accountable for expenditures of public funds, the ability to avoid high market prices is critical. The standard offer does not offer the same degree of stability as a cost of service rate. The League did not file comments after HB 3633 was enacted.

FCEC is concerned about the message sent to power marketers if the threshold is raised. With an increased threshold, the number of customers required to go direct access is too small to establish a viable market. It believes that the standard offer protects those nonresidential customers who do not choose direct access. FCEC did not file comments after HB 3633 was enacted.

PGE supports the current 30 kW threshold. However, if the threshold is to be changed by the Commission, PGE requests that the change be applied to both PGE and PacifiCorp.

Staff initially recommended raising the threshold to usage exceeding 100 kW. In its earlier comments, Staff believed that the standard offer rate would be comparable to the cost of service rate. Staff also pointed out that whether one is categorized as “small” or “large” nonresidential consumer makes little difference as long as ongoing valuation is used. The distinction between the two groups becomes important when the one time valuation process is completed, as large nonresidential consumers may⁵ receive a fixed credit. The tradeoff in changing the threshold, as seen by Staff, is the certainty of a cost of service rate for consumers versus the development of a competitive retail market.

In Staff's joint comments of September 12, 2001, however, it recommended retaining the 30kW threshold. Staff, along with the Northwest Energy Coalition, OOE, PGE, PacifiCorp and PG&E, based their recommendation on HB 3633, which provides for all customers to retain a cost of service option until at least July 1, 2003.

Discussion

In OAR 860-038-0080(5)(b), we set forth several factors to review prior to modifying the definition of large nonresidential consumer. In reviewing those factors, we agree that the same definition of large nonresidential consumers should apply to consumers of PGE and PacifiCorp. We also agree that it makes little difference as to the categorization of “small” or “large” nonresidential consumer until the one-time administrative valuation process occurs. So, our decision hinges on defining large nonresidential consumers “to encompass as many nonresidential consumers as is feasible,” and to take into account our general mandate to act in the public interest.

We found two of the exhibits to be particularly helpful. PGE Exhibit 3 set forth the kW demand of various commercial consumers in late 1999. This list encompassed larger retail stores, such as Target and Home Depot, fast food restaurants, banks, grocery stores and the PUC Building. All of the listed consumers, except for the PUC Building, had energy demands of less than 400 kW. Portland prepared an exhibit showing that a 500 kW threshold sends 55.2 percent of nonresidential energy purchases to the market, while a 30 kW threshold sends 87.5 percent to market.⁶

Prior to the enactment of HB 3633, there may have been some rationale for raising the threshold. However, because a cost of service option remains in place until July 1, 2003, there is little need to make a change in the threshold requirements at this time. We will not change the 30 kW threshold.

⁵ In the order adopted during the January 8, 2002 Commission meeting, this sentence stated that large nonresidential consumers "will" receive a fixed credit. Subsequent to the Commission meeting, Commissioners Hemmingway and Beyer determined that the word "may" should be used instead.

⁶ See, City of Portland Exhibit 1.

The participants' joint comments indicate that "it may be necessary to revisit the definition at such time as the Commission waives the cost of service requirement for some customers."⁷ We agree. As we undertake the process of determining whether to waive a regulated cost of service option for certain classes of customers, we will be mindful of whether we need to revisit this issue.

Finally, we delete the language "or any different level of consumption as may be established by the Commission pursuant to the proceeding identified in OAR 860-038-0080(5)(a)." We have now completed the OAR 860-038-0080(5)(a) process, and the language is simply surplusage.

ORDER

IT IS ORDERED that:

1. OAR 860-038-0005(28), attached as Appendix A and made part of this order, is adopted.
2. The rule shall become effective upon filing with the Secretary of State.

Made, entered, and effective _____.

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

Joan H. Smith
Commissioner

A party may petition the Commission for the amendment or repeal of a rule pursuant to ORS 183.390. A person may petition the Court of Appeals to determine the validity of a rule pursuant to ORS 183.400.

⁷ Joint comments filed September 12, 2001 at 2.

860-038-0005

Definitions for Direct Access Regulation

As used in this Division:

(1) "Above-market costs of new renewable energy resources" means the portion of the net present value cost of producing power (including fixed and operating costs, delivery, overhead, and profit) from a new renewable energy resource that exceeds the market value of an equivalent quantity and distribution (across peak and off-peak periods and seasonality) of power from a nondifferentiated source, with the same term of contract.

(2) "Advisory committee" means a group appointed by the Commission, consisting of representatives from Commission Staff, the Office of Energy, and the following:

- (a) Local governments;
- (b) Electric companies;
- (c) Residential consumers;
- (d) Public or regional interest groups; and
- (e) Small nonresidential consumers.

(3) "Affiliate" means a corporation or person who has an affiliated interest, as defined in ORS 757.015, with a public utility.

(4) "Aggregate" means combining retail electricity consumers into a buying group for the purchase of electricity and related services. "Aggregator" means an entity that aggregates.

(5) "Ancillary services" means those services necessary or incidental to the transmission and delivery of electricity from resources to retail electricity consumers, including but not limited to scheduling, frequency regulation, load shaping, load following, spinning reserves, supplemental reserves, reactive power, voltage control and energy balancing services.

(6) "Commission" means the Public Utility Commission of Oregon.

(7) "Common costs" means costs that cannot be directly assigned to a particular function.

(8) "Competitive operation" means any activities related to the provision of electricity services conducted by the electric company's nonregulated operation or the electric company's affiliate.

(9) "Consumer-owned utility" means a municipal electric utility, a people's utility district or an electric cooperative.

(10) "Default supplier" means an electric company that has a legal obligation to provide electricity services to a consumer, as determined by the Commission.

(11) "Direct access" means the ability of a retail electricity consumer to purchase electricity and certain ancillary services directly from an entity other than the distribution utility.

(12) "Direct service industrial consumer" means an end-user of electricity that obtains electricity directly from the transmission grid and not through a distribution utility.

(13) “Distribution” means the delivery of electricity to retail electricity consumers through a distribution system consisting of local area power poles, transformers, conductors, meters, substations and other equipment.

(14) “Distribution utility” means an electric utility that owns and operates a distribution system connecting the transmission grid to the retail electricity consumer.

(15) “Divestiture” means the sale of all or a portion of an electric company’s ownership share of a generation asset to a third party.

(16) “Economic utility investment” means all Oregon allocated investments made by an electric company prior to the date the electric company offers direct access under ORS 757.600 to 757.667, including plants and equipment and contractual or other legal obligations, properly dedicated to generation or conservation, that were prudent at the time the obligations were assumed but the full benefits of which are no longer available to consumers as a direct result of ORS 757.600 to 757.667, absent transition credits. “Economic utility investment” does not include costs or expenses disallowed by the Commission in a prudence review or other proceeding, to the extent of such disallowance, and does not include fines or penalties authorized and imposed under state or federal law.

(17) “Electric company” means an entity engaged in the business of distributing electricity to retail electricity consumers in this state but does not include a consumer-owned utility.

(18) “Electric company operational information” means information relating to the interconnection of customers to an electric company’s transmission or distribution systems, trade secrets, competitive information relating to internal processes, market analysis reports, market forecasts, and information about an electric company’s transmission or distribution system, operations, or plans or strategies for expansion.

(19) “Electric cooperative” means an electric cooperative corporation organized under ORS Chapter 62 or under the laws of another state if the service territory of the electric cooperative includes a portion of this state.

(20) “Electric utility” means an electric company or consumer-owned utility that is engaged in the business of distributing electricity to retail electricity consumers in this state.

(21) “Electricity” means electric energy, measured in kilowatt-hours, or electric capacity, measured in kilowatts, or both.

(22) “Electricity services” means electricity distribution, transmission, generation or generation-related services.

(23) “Electricity service supplier” or “ESS” means a person or entity that offers to sell electricity services available pursuant to direct access to more than one retail electricity consumer. “Electricity service supplier” does not include an electric utility selling electricity to retail electricity consumers in its own service territory. An ESS can also be an aggregator.

(24) “Emergency default service” means a service option provided by an electric company to a nonresidential consumer that requires less than five business days’ notice by the consumer or its electricity service supplier.

(25) “Fully distributed cost” means the cost of an electric company good or service calculated in accordance with the procedures set forth in OAR 860-038-0200.

(26) “Functional separation” means separating the costs of the electric company’s business functions and recording the results within its accounting records, including allocation of common costs.

(27) “Joint marketing” means the offering (including marketing, promotion, and/or advertising) of retail electric services by an electric company in conjunction with its competitive operation to consumers either through contact initiated by the electric company, its affiliate, or through contact initiated by the consumer.

(28) “Large nonresidential consumer” means a nonresidential consumer whose kW demand at any point of delivery is greater than 30kW during any two months within a prior 13-month period, ~~or any different level of consumption as may be established by the Commission pursuant to the proceeding identified in OAR 860-038-0080(5)(a).~~

(29) “Load” means the amount of electricity delivered to or required by a retail electricity consumer at a specific point of delivery.

(30) “Local energy conservation” means conservation measures, projects, or programs that are installed or implemented within the service territory of an electric company.

(31) “Low-income weatherization” means repairs, weatherization and installation of energy efficient appliances and fixtures for low-income residences for the purpose of enhancing energy efficiency.

(32) “Market transformation” means a lasting structural or behavioral change in the marketplace that increases the adoption of energy efficient technologies and practices.

(33) “Multi-state electric company” means an electric company that provided regulated retail electric service in a state in addition to Oregon prior to January 1, 2000.

(34) “Municipal electric utility” means an electric distribution utility owned and operated by or on behalf of a city.

(35) “Net system power mix” means the mix of all power generation within the state or other region less all specific purchases from generation facilities in the state or region, as determined by the Office of Energy.

(36) “New” as it refers to energy conservation, market transformation and low-income weatherization means measures, projects or programs that are installed or implemented after the date direct access is offered by an electric company.

(37) “New renewable energy resource” means a renewable energy resource project or a new addition to an existing renewable energy resource project, or the electricity produced by the project, that was not in operation on or before July 23, 1999. “New renewable energy resource” does not include any portion of a renewable energy resource project under contract to the Bonneville Power Administration on or before July 23, 1999.

(38) “Nonresidential consumer” means a retail electricity consumer who is not a residential consumer.

(39) “Office of Energy” means the Oregon Office of Energy created under ORS 469.030.

(40) “Ongoing valuation” means the process of determining transition costs or benefits for a generation asset by comparing the value of the asset output at forecast market prices for a one-year period to an estimate of the revenue requirement of the asset for the same time period.

(41) “One-time administrative valuation” means the process of determining the market value of a generation asset over the life of the asset, or a period as established by the Commission, using a process other than divestiture.

(42) “One average megawatt” means 8,760,000 kilowatt-hours of electricity per year.

(43) “Oregon share” means, for a multi-state electric company, an interstate allocation based upon a fixed allocation or method of allocation established in a Resource Plan or, in the case of an electric company that is not a multi-state electric company, 100 percent.

(44) “People’s utility district” has the meaning given that term in ORS 261.010.

(45) “Portfolio” means a set of product and pricing options for electricity.

(46) “Proprietary consumer information” means any information compiled by an electric company on a consumer in the normal course of providing electric service that makes possible the identification of any individual consumer by matching such information with the consumer’s name, address, account number, type or classification of service, historical electricity usage, expected patterns of use, types of facilities used in providing service, individual contract terms and conditions, price, current charges, billing records, or any other information that the consumer has expressly requested not be disclosed. Information that is redacted or organized in such a way as to make it impossible to identify the consumer to whom the information relates does not constitute proprietary consumer information.

(47) “Qualifying expenditures” means those expenditures for energy conservation measures that have a simple payback period of not less than one year and not more than 10 years and expenditures for the above-market costs of new renewable energy resources, provided that the Office of Energy may establish by rule a limit on the maximum above-market cost for renewable energy that is allowed as a credit.

(48) “Registered dispute” means an unresolved issue affecting a retail electricity consumer, an ESS, or an electric company that is under investigation by the Commission’s Consumer Services Division but is not the subject of a formal complaint.

(49) “Regulated charges” means charges for services subject to the jurisdiction of the Commission.

(50) “Regulatory assets” means assets that result from rate actions of regulatory agencies.

(51) “Renewable energy resources” means:

(a) Electricity-generation facilities fueled by wind, waste, solar or geothermal power or by low-emission nontoxic biomass based on solid organic fuels from wood, forest and field residues;

(b) Dedicated energy crops available on a renewable basis;

(c) Landfill gas and digester gas; and

(d) Hydroelectric facilities located outside protected areas as defined by federal law in effect on July 23, 1999.

(52) "Residential consumer" means a retail electricity consumer that resides at a dwelling primarily used for residential purposes. "Residential consumer" does not include retail electricity consumers in a dwelling typically used for residency periods of less than 30 days, including hotels, motels, camps, lodges, and clubs. As used in this section, "dwelling" includes but is not limited to single-family dwellings, separately metered apartments, adult foster homes, manufactured dwellings, recreational vehicles, and floating homes.

(53) "Retail electricity consumer" means the end user of electricity for specific purposes such as heating, lighting, or operating equipment and includes all end users of electricity served through the distribution system of an electric company on or after July 23, 1999, whether or not each end user purchases the electricity from the electric company. For purposes of this definition, a new retail electricity consumer means a retail electricity consumer that is unaffiliated with the retail electricity consumer previously served after March 1, 2002, at the site.

(54) "Self-directing consumer" means a retail electricity consumer that has used more than one average megawatt of electricity at any one site in the prior calendar year or an aluminum plant that averages more than 100 average megawatts of electricity use in the prior calendar year, that has received final certification from the Office of Energy for expenditures for new energy conservation or new renewable energy resources and that has notified the electric company that it will pay the public purpose charge, net of credits, directly to the electric company in accordance with the terms of the electric company's tariff regarding public purpose credits.

(55) "Serious injury to person" has the meaning given in OAR 860-024-0050.

(56) "Serious injury to property" has the meaning given in OAR 860-024-0050.

(57) "Site" means:

(a) Buildings and related structures that are interconnected by facilities owned by a single retail electricity consumer and that are served through a single electric meter; or

(b) A single contiguous area of land containing buildings or other structures that are separated by not more than 1,000 feet, such that:

(A) Each building or structure included in the site is no more than 1,000 feet from at least one other building or structure in the site;

(B) Buildings and structures in the site, and land containing and connecting buildings and structures in the site, are owned by a single retail electricity consumer who is billed for electricity use at the buildings and structures; and

(C) Land shall be considered to be contiguous even if there is an intervening public or railroad right of way, provided that rights of way land on which municipal infrastructure facilities exist (such as street lighting, sewerage transmission, and roadway controls) shall not be considered contiguous.

(58) "Small nonresidential consumer" means a nonresidential consumer that is not a large nonresidential consumer.

(59) “Special contract” means a rate agreement that is justified primarily by price competition or service alternatives available to a retail electricity consumer, as authorized by the Commission under ORS 757.230.

(60) “Structural separation” means separating the electric company’s assets by transferring assets to an affiliated interest of the electric company.

(61) “Total transition amount” means the sum of an electric company’s transition costs and transition benefits.

(62) “Traditional allocation methods” means, in respect to a multi-state electric company, inter-jurisdictional cost and revenue allocation methods relied upon in such electric company’s last Oregon rate proceeding completed prior to December 31, 2000.

(63) “Transition benefits” means the value of the below-market costs of an economic utility investment.

(64) “Transition charge” means a charge or fee that recovers all or a portion of an uneconomic utility investment.

(65) “Transition costs” means the value of the above-market costs of an uneconomic utility investment.

(66) “Transition credit” means a credit that returns to consumers all or a portion of the benefits from an economic utility investment.

(67) “Transmission grid” means the interconnected electrical system that transmits energy from generating sources to distribution systems and direct service industries.

(68) “Unbundling” means the process of assigning and allocating a utility’s costs into functional categories.

(69) “Uneconomic utility investment” means all Oregon allocated investments made by an electric company prior to the date the electric company offers direct access under ORS 757.600 to 757.667, including plants and equipment and contractual or other legal obligations, properly dedicated to generation, conservation and work-force commitments, that were prudent at the time the obligations were assumed but the full costs of which are no longer recoverable as a direct result of ORS 757.600 to 757.667, absent transition charges. “Uneconomic utility investment” does not include costs or expenses disallowed by the Commission in a prudence review or other proceeding, to the extent of such disallowance and does not include fines or penalties as authorized by state or federal law.

Stat. Auth.: ORS Ch. 183, 756 & 757

Stat. Implemented: ORS 756.040 & 757.600 through 757.667

Hist.: PUC 17-2000, f. & cert. ef. 9-29-00 (Order No. 00-596); PUC 2-2001, f. & ef. 1-5-01 (Order No. 01-073); PUC 21-2001 (Temp), f. & cert. ef. 9-11-01 thru 3-10-02 (Order No. 01-788); PUC 23-2001, f. & ef. 10-11-01 (Order No. 01-839)