ORDER NO. 12 500

ENTERED DEC 30 2012

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1587

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Investigation of Issues Relating to Direct Access.	ORDER

DISPOSITION: PGE AND PACIFIC POWER TO UNBUNDLE FRANCHICE FEES AND NOTIFY CITIES WHEN A CUSTOMER ELECTS DIRECT ACCESS; PACIFIC POWER TO OFFER FIVE-YEAR OPT-OUT PROGRAM

I. INTRODUCTION

We opened this docket to address certain issues relating to direct access.[1] Following various filings and motions by the parties, this proceeding was limited to two issues: (1) changes necessary to reduce or eliminate franchise fee-related disincentives to both potential direct access customers and utilities; and (2) consideration of a "Puget Sound Energy-type" open access program for customers with peak demand of 10 MW or greater.

Petitions to intervene were granted on behalf of PacifiCorp, dba Pacific Power (Pacific Power); Noble Americas Energy Solutions LLC (Noble); Portland General Electric Company (PGE); Shell Energy North America (Shell); Wal-Mart; the COMPETE Coalition; Direct Energy Business (Direct Energy); Safeway, Inc.; Constellation NewEnergy, Inc. (Constellation); the Industrial Customers of Northwest Utilities (ICNU); the League of Oregon Cities (the League); Freepoint Commodities LLC; Northwest and Intermountain Power Producers Coalition; the City of Portland (Portland); the City of Hillsboro (Hillsboro); and Cascades. The Citizens' Utility Board of Oregon (CUB) intervened by right.

[1] *See In the Matter of Portland General Electric Company*, Docket No, UE 236, Order No. 12-057 (Feb 23, 2012).

Opening comments were filed by Commission Staff; PGE; the League, Portland and Hillsboro, filing jointly (the Cities); ICNU; Noble; and jointly by Shell, Direct Energy, and Constellation (Joint Parties). Reply comments were filed by PGE, the Cities, ICNU, Noble, the Joint Parties, Staff, Pacific Power, and CUB.

II. DISCUSSION

A. Franchise Fees

1. Introduction

The connection between franchise fees and direct access was described in a stipulation that lead to the opening of this docket. That stipulation, discussing the matter with regards to PGE, provided as follows:

> [O]ne or more cities within PGE's service territory have indicated that they may seek to impose franchise fees on energy service suppliers (ESSs). Currently, PGE recovers the costs related to franchise fees that are not directly assigned through its system usage charge. The system usage charge applies to all large customers, regardless of whether they are on direct access. If a city imposes a franchise fee on an ESS (which will be passed on to the customer) and PGE continues to collect the system usage charge, the direct access customer could be required to effectively pay twice for franchise fees, which could create an inappropriate disincentive to elect direct access.[2]

In his ruling July 13, 2012 the Administrative Law Judge (ALJ) invited parties to submit comments on two possible solutions: (1) the utility collects franchise fees from all customers, including direct access customers (imputing its tariff rates, applied to the customer's billing detail); or (2) ESSs collect franchise fees from direct access customers and remit payments to the local governments. Parties also were allowed to submit their own proposals.

2. Positions of Parties

a. The Cities

The comments filed by the Cities state that only one city—Hillsboro—has been adversely affected under the current program. When one or more customers in Hillsboro switched to direct access, the city lost about $3 to 4.5 million in franchise fee revenues over the course of three years. Hillsboro addressed the issue using its home rule charter to enact an ordinance requiring gas and electric utilities providing service in the city without

[2] Order No. 12-057, Appendix A at 4.

franchise agreements to pay a public utility tax. Hillsboro expects the tax revenue to make up for the lost franchise fee revenue.[3]

Although the Cities believe that cities in Oregon can use their existing legal authority to make themselves whole, they ask that the Commission assist in two ways. First, they ask the Commission to require a utility to notify a city when a customer in that city switches to direct access. The notice would allow cities either to adjust their budgets to reflect lower revenues or to enact ordinances to replace the franchise fee revenues with tax revenues. Second, they ask the Commission to include, as a requirement for ESS certification, that every ESS attest that it will comply with all applicable laws.[4] Unless and until the extent of direct access increases dramatically, the Cities state they are content with their two proposals.

With regard to other comments, the Cities object to the use of the term "double taxation" to describe the effect on a customer who pays fees to a city in addition to franchise fees in utility rates. According to the Cities, there are two separate services provided by two separate entities, each of which is taxable.

b. ICNU

According to ICNU, the current method for recovering franchise fees from direct access customers creates the potential for overpayment by customers and over recovery by utilities. When customers move to direct access, they continue to pay franchise fees in their utility rate, but utilities reduce their payments to the city. If the city attempts to recover the lost revenue by taxing the ESS, the direct access customer is assessed the tax twice. ICNU believes that such potential double taxation raises a barrier to direct access. ICNU proposes that the Commission sponsor a collaborative process to find the most equitable solution to this complex issue.

c. Suppliers

Supplier comments were filed individually by Noble, and collectively by the Joint Parties (Shell, Direct Energy, and Constellation). Noble contends that ORS 221.655, the statute governing imposition of franchise fees on distribution utilities, can be read to allow a utility to collect franchise fees from direct access customers based on a proxy tariff rate. If ESSs were required to collect fees and remit them to the cities, Noble states, that all franchise fees and privilege taxes would be directly assigned to customers in the cities that levy these charges. Although this approach would be direct access neutral, Noble contends it would raise rates for customers who reside in the affected cities, who would lose a subsidy from customers located outside those cities (who now pay a part of the franchise fees).

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[3] Hillsboro has not yet received any revenue from its tax. According to the comments, the ESS subject to the tax has cited this proceeding as one basis for delaying payments.

[4] Citing OAR 860-038-0400(6)(b).

The Joint Parties did not make a specific proposal, but offered the following recommendations: (1) collection and remittance of franchise fees should be administratively efficient, as an ESS serving customers within multiple territories would face a complex administrative burden if it were required to collect franchise fees; (2) because the prices charged by an ESS are not uniform, it would be an administrative burden to prepare a separate franchise fee statement for each customer; and (3) because contracts prices are sensitive, the process must ensure that confidential information is not disclosed.

The Joint Parties note that it would be relatively straightforward for the utility to continue to collect franchise fees from all of its customers, based on its tariff rates. However, the use of that proxy rate may not be viewed favorably by customers or cities. The Joint Parties add that PGE's preferred approach results in double payment of franchise fees by direct access customers. PGE's approach should not be adopted, Joint Parties believe, unless the franchise fee component is unbundled from direct access customers' rates. The Commission must ensure that a direct access customer does not pay the fees twice.

d. PGE and Pacific Power

PGE and Pacific Power believe the most straightforward way to deal with the franchise fee problem is for cities to impose a fee on ESSs. Pacific Power also agrees with the Cities that Oregon cities have the ability to address adverse effects so that further investigation into this issue is not warranted.

Pacific Power would not oppose a rulemaking to consider the Cities' requests to require that utilities give notice when a customer switches to direct access and to affirm an ESS's obligation to comply with the law.

e. Staff

Staff proposes that the Commission schedule a workshop to consider the franchise fee issue. The workshop would include review of specific options, including relevant statutes and rules, and document the impacts of each option on interested parties. The object would be to select the best option and indentify the steps necessary to move forward.

3. Resolution

We take at face value the Cities' claim that they have the legal authority to make up their lost revenue from lower franchise fees by imposing a tax directly on ESSs serving loads within municipal boundaries. While that approach makes the cities whole, it might create a disincentive for customers to elect direct access.

Given the expectation that the cities will look after themselves, the disincentive to direct access can be addressed by unbundling all franchise fees collected by each utility and recovering those costs through a variable charge that is avoided by a direct access

customer. We direct PGE and Pacific Power to work with interested parties to calculate the appropriate franchise fee rate element in their next respective general rate cases.

We note that the franchise fee rate element may not match exactly the in lieu tax collected by the local government. We expect that the difference in these values will be *de minimis* in terms of whether a customer will choose direct access.

The Cities requested that the utilities be directed to inform a local government whenever a customer elects direct access. The utilities did not object to that condition. We direct PGE and Pacific Power to work with the League of Oregon Cities to establish the protocol for giving such notice.

B. "Puget Sound Energy Model"

1. Introduction

As described by the parties, the Puget Sound Energy approach entails a one-time election by eligible large customers to purchase their energy from the wholesale market in a manner similar to Puget Sound Energy's Schedule 449 program. In his ruling dated July 13, 2012, the ALJ stated:

> There are numerous questions that need to be addressed before the Commissioners can make an informed judgment regarding the adoption of the Puget Sound Energy model for Oregon. It is not clear just how closely the parties propose to mimic the Puget Energy program. Should there be a one-time election? Is a one-time election permissible under Oregon law? What customers would be eligible to participate? Where would the power be purchased? If the power is purchased in Oregon, what regulatory treatment would apply? How would the power be delivered? Would the deliveries displace lower cost power that otherwise would serve the general body of ratepayers? What are the differences between PGE and [Pacific Power] in terms of their access to the wholesale markets and availability of transmission? Should transition charges be assessed to participants? Should transition charges be assessed to customers that return to retail service?[5]

The ALJ invited parties to explain in their comments how they envision the Puget Sound approach would be implemented in Oregon and to address the questions posed in his ruling, and later clarified that parties could also address the expansion of the existing multi-year cost-of-service opt-out programs and amendment of OAR 860-038-0275(5).[6]

[5] ALJ Ruling at 2 (July 13, 2012).
[6] ALJ Ruling (July 27, 2012).

2. *Positions of Parties*

a. Suppliers

Noble believes that PGE's existing multi-year opt-out program provides a useful model, and recommends that the rules be modified to require both PGE and Pacific Power to offer all commercial and industrial customers the option to elect a multi-year direct access program with a fixed transition adjustment that ends at a specified time. Noble proposes that this program be made available at least once each year.

The Joint Parties support a multi-year opt-out, and believe that a key element for the success of direct access is the release of customers from further responsibility for their utility's stranded costs. For a customer choosing direct access, the transition cost charge should terminate after a period of two to three years.

The Joint Parties further argue that direct access should be available to more customers. They propose to reduce the threshold eligibility requirement to nonresidential customers with a minimum peak demand of 20 kW. They also propose that the shopping window be expanded, so that customers would be able to elect direct access at any time, upon 30 days' notice.

The Joint Parties propose two alternatives for direct access customers to return to utility sales service. A customer should be allowed to switch to utility sales service at a market price index, or should be allowed to return to a cost-of-service rate with one year prior notice. Under the second option, the customer would have to stay on the costs-of-service rate for a minimum one-year term.

b. ICNU

ICNU proposes that PGE and Pacific Power be required to offer permanent opt-out programs that phase out transition adjustments. According to ICNU, the adoption of a permanent opt-out program, free of transition charges, would stimulate a robust retail market. ICNU cites ORS 757.603(3)(b) as giving the Commission authority to limit or even prohibit customers who have chosen direct access from returning to cost-of-service rates.[7]

ICNU further proposes that each utility remove its participation cap. ICNU argues that the utilities should not plan to serve all of their customers that are eligible for direct access, because that would cause the utilities to overbuild. According to ICNU, new customers should have the option of direct access service with no transition costs, because the utility never had to plan for their loads and they have not caused any stranded costs.

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[7] ORS 757.603(3)(b) provides: "The commission may prohibit or otherwise limit the use of a cost-of-service rate by retail electricity consumers who have been served through direct access, and may limit switching among portfolio options and the cost-of-service rate by residential electricity consumers."

c. PGE

PGE contends that allowing a one-time election would require significant revisions to a number of direct access regulations to clarify the utilities' obligations. If allowed, PGE proposes that its three- and five-year programs be discontinued.

PGE believes that only very large customers should be allowed to participate in the one-time election, and that transition charges should apply to all participants. PGE also believes that participants should be held to the standards of the Oregon Renewable Energy Act and be responsible for public purpose charges.

PGE believes that any changes should not occur until 2015 at the earliest, and proposes the following changes to OAR 860-038-0275(5), effective January 1, 2015:

1. Specify that the annual multi-year direct access program be open solely to customers with 10 MW or greater peak load at a site; and

2. Specify that customers smaller than 10 MW peak load at a site and larger than 250 kW peak load at a site, with meters that aggregate to 1 average MW, be offered the multi-year direct access program once every five years.

PGE states that it proposes these changes because offering the multi-year direct access option to numerous smaller customers has become an administrative burden.

PGE questions whether an annual permanent opt-out of cost-of-service pricing would be consistent with the utility's long term resource planning process, which by its nature is a multiple year process. According to PGE, the current annual long term direct access option combined with the necessary multi-year utility resource planning process places unnecessary risks on cost-of-service customers.

d. Pacific Power

According to Pacific Power, many of the proposals would shift costs to other customers. The potential impact on other customers must be thoroughly considered.

Pacific Power posits that parties have fashioned remedies for barriers to direct access without proving that such barriers exist. Noting the different rates of participation among the customers of the two utilities, Pacific Power asks whether it is the structure of PGE's program that accounts for the difference or might it be other factors, such as differences in customer characteristics, or Pacific Power's lower rates.

If customers choose permanent direct access, Pacific Power believes such customers should not be able to return as cost-of-service customers, and should be subject to a one-time valuation in place of an ongoing valuation to avoid shifting costs.

e. CUB

CUB states that broadening the array of options available to large customers is a good idea, provided that other customers are protected from cost shifts. To that end, CUB expresses concerns with some of the proposals, and contends that there should not be any incentives for customers to switch back and forth based on market conditions.

CUB recommends the current five-year requirement for transition costs be retained. Thereafter, customers should not be allowed to come back to cost-of-service rates. CUB supports PGE's recommendation that direct access program participants should honor the renewable energy and public purpose requirements imposed on the utilities.

f. Portland

Portland proposes that non-residential customers larger than 30 kW demand should be allowed to participate in multi-year direct access, including unmetered customers (street lighting and traffic signals), plus all medium-large sized customers of PGE under the company's Schedules 83 and 85. From a customer's perspective, maximum bill savings are achievable only on a multi-year basis because only under the multi-year opt-out do the transition cost adjustments decline over time. Portland also supports a longer shopping window to elect direct access.

g. Staff

Staff proposes that the Commission schedule a workshop to consider direct access issues. The workshop would include review of the Puget Sound Energy model and parties would discuss options that would allow large customers to elect direct access and avoid transition costs. The discussion would include customer size and open seasons.

3. Resolution

In their comments, the parties note that PGE serves significantly more direct access load customers than does Pacific Power. The difference in the programs was explained by Staff in its comments filed May 16, 2012. As described by Staff,

> Large customer and ESS representatives have advocated that customers be allowed to go to direct access and eventually be exempt from transition adjustments, either payments or receipts. This is not currently possible under [Pacific Power's] program, as set out in Tariff Schedule 295. Under this structure, a qualified [Pacific Power] customer can go to direct access, subject to three years of fixed transition adjustments, which are payments under current market electric prices. At the end of that three-year period, to continue on direct access, the customer would have to agree to another three years of transition adjustments, fixed at the time of the second decision. However, a qualified PGE customer can go to direct access, and eventually be exempt from transition adjustments. PGE's program is set

> out in Tariff Schedules 485, 489, and 129. Under current market conditions, a qualified PGE customer can go to direct access and pay fixed transition charges for each of the next five years, and then no longer be subject to transition adjustments.[8]

As noted by the parties, PGE's five-year opt out program is in PGE's tariff. If the program were in the Commission's rules, it would apply equally to Pacific Power. Pacific Power has chosen, however, not to offer a program similar to the PGE program.

We find no basis to maintain this difference in the programs of the two utilities. Accordingly, we adopt a PGE-type model for Pacific Power. We direct Pacific Power to file a tariff for a five-year opt out program that allows a qualified customer to go to direct access and pay fixed transition charges for the next five years, and then to be no longer subject to transition adjustments—for so long as that customer remains a direct access customer (on the Pacific Power system).

We acknowledge Pacific Power's concerns that any program that allows customers to elect direct access permanently be tailored for each utility, be designed to protect other customers from cost-shifting, and be limited to large, sophisticated customers.[9] In its tariff filing Pacific Power may tailor its program to fit its circumstances.

We do not expand the class of eligible customers. No party has alleged that PGE's program results in cost shifting to other customers, and we expect Pacific Power's filing to conform to that standard.

III. ORDER

IT IS ORDERED that:

1. In their respective next general rate cases Portland General Electric Company and PacifiCorp, dba Pacific Power, must each cooperate with interested parties to develop a volumetric franchise fee rate element that would be avoided by any customer taking direct access service.

2. Portland General Electric Company and PacifiCorp, dba Pacific Power, must each cooperate with the League of Oregon Cities to devise a protocol for giving notice to affected local governments whenever one of their retail customers chooses direct access service.

[8] Staff's Comments at 1 (May 16, 2012).
[9] *See* Pacific Power's Reply Comments at 5 (Sept 14, 2012).

3. Within 60 days of the date of this order PacifiCorp, dba Pacific Power, must file a tariff offering to provide a five-year opt-out program that allows a qualified customer to go to direct access and pay fixed transition charges for the next five years, and then to be no longer subject to transition adjustments.

Made, entered, and effective DEC 30 2012.

Susan K. Ackerman
Chair

John Savage
Commissioner

COMMISSIONER BLOOM WAS UNAVAILABLE FOR SIGNATURE

Stephen M. Bloom
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.