

BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON

AR 651

In the Matter of: AR 651:
Informal Rulemaking for Direct Access
Regulations

)
) COMMENTS OF THE NORTHWEST
) AND INTERMOUNTAIN POWER
) PRODUCERS COALITION ON
) UPDATED PREFERENTIAL
) CURTAILMENT SECTION OF STAFF’S
) STRAW PROPOSAL FOR DIVISION 38
) RULE LANGUAGE
)

The Northwest and Intermountain Power Producers Coalition (“**NIPPC**”) respectfully submits these comments regarding preferential curtailment of Direct Access customers that return to utility service without adequate notice, as addressed in the Updated Straw Proposal filed by Commission Staff on December 16, 2022¹ and discussed at the Staff workshop held January 6, 2023.² NIPPC appreciates the efforts of Staff and the other parties in this proceeding to reach a reasonable compromise on these complex issues. Included with these comments are NIPPC’s specific recommendations for Proposed Division 038 Preferential Curtailment Rules, as further described below and as redlined to Staff’s Updated Proposal as set forth in Attachment A hereto.

The following is a summary of NIPPC’s major proposed modifications:

- **Physical or Contractual curtailment:** Customers shall be eligible for preferential curtailment under two circumstances:
 - Physical curtailment: Upon installation of the system upgrades that allow for the electric company to curtail service to a specified load upon requisite notice.
 - Contractual Curtailment enforced with Liquidated Damage Provisions: Upon execution of a binding agreement requiring self-curtailment upon requisite

¹ Staff’s December 16, 2022 Proposal (the “**Updated Proposal**”) is available at <https://edocs.puc.state.or.us/efdocs/HAH/ar651hah153923.pdf>

² NIPPC previously submitted a variety of comments in this docket, including comments filed November 18, 2022, incorporated for reference herein, and available at: <https://edocs.puc.state.or.us/efdocs/HAC/ar651hac164323.pdf>

notice, with such binding agreement containing liquidated damages provisions of sufficient magnitude to ensure compliance.

- Curtailment elections load-specific, not customer-specific: A customer should be entitled to make differing curtailment elections for different qualifying loads.
- Timely cost estimate to be provided upon request: An electric company must provide a timely, good-faith estimate of costs necessary to install system upgrades for preferential curtailment upon request.
- Preferential curtailment customers not subject to cap applicable to non-curtable customers:
 - Customers that elect to participate in preferential curtailment shall not be subject to the cap applicable to non-curtable customers.
 - A customer previously electing preferential curtailment shall be entitled to return to non-preferential curtailment service upon election during the annual election period, provided that the load is within available cap space.
- Thresholds: NIPPC submits that the thresholds for participating in the preferential curtailment program shall be no higher than applicable for a utility's demand response program. The issue of whether a threshold should exist at all is a factual question and NIPPC does not believe it should be addressed within the proposed rules.

1. Preferential Curtailment: General Comments and Perspective

NIPPC continues to believe that no caps on direct access programs are appropriate to the extent that ESSs are participating in a regional (or other state-mandated) resource adequacy program) and bearing their share of non-bypassable surcharges. As NIPPC explained in its prior comments, incorporated herein by reference, existing regulations are already in place that require a customer returning from direct access without adequate notice pay market prices for energy (including a steep premium in addition to the market price for a period of time). The combination of these two items – the contribution of resource adequacy to the system and the obligation to bear market prices (and a premium) upon unexpected return – for all practical purposes mitigates the concern that a utility will be called upon to meet provider of last resort obligations in a manner that increases costs to general system customers. No regulatory commission in the country requires a level of redundant facilities that would be necessary to ensure service in all cases, no matter how extreme the circumstance. The same should be true here. If the current system (including

contribution by ESSs of resource adequacy) is sufficient to meet the resource adequacy metric for utility service, imposing further costs and/or limitations on the direct access programs is not reasonable, and discriminates against the program.

That said, NIPPC strongly supports a preferential curtailment program if that is a necessary step to break the current impasse on modifications of the Direct Access program, including relief on the existing stringent caps.

2. **Specific Comments on Proposed Regulations.**

NIPPC appreciates the effort undertaken in developing the Proposed Division 038 Preferential Curtailment Rules as provided by Staff, and the helpful and elucidating comments from parties during the January 6 workshop. NIPPC proposes the following additional thoughts and concepts, along with modifications to the proposed rules text.

a. **The Commission should allow for both physical and contractual curtailment**

NIPPC encourages the Commission to allow ESS customers to participate in preferential curtailment through one of two paths: (1) installation of physical facilities at the customer's expense to allow for curtailment within a specified timeframe by the utility; or (2) through a contractual agreement requiring a customer to self-curtail within a specified timeframe, with such agreement containing liquidated damages requirements for failure to comply that are sufficient to strongly induce cooperation. Specifically, NIPPC proposes that section 860-038-0290(1) be amended to read as follows:

- (1) Except as provided in sections (4), (5) and (6), each electric company shall offer preferential curtailment for New Large Load Program participants and long-term opt-out direct access consumers with respect to specific loads that meet the criteria of Sections (a) or (b) below

(a) **Physical Curtailment.** A customer shall be eligible for preferential curtailment upon installation of the system upgrades that allow for the electric company to curtail service to a specific load pursuant to specified notice. An electric company shall provide a good faith cost estimate for installation of such facilities promptly upon request.

(b) **Contractual Curtailment**: A customer shall be eligible for preferential curtailment for a specified load upon execution of a curtailment agreement requiring shedding of such load upon specified notice, with liquidated damages to apply in the event of failure the consumer to shed load as required.

NIPPC submits that some issues related to this language, such as how much notice prior to curtailment is appropriate, and the level of liquidated damages that may be necessary to promote compliance, are factual issues that may be best decided through a litigated proceeding, rather than embedded in rules, but encourages the Commission to establish safe harbor provisions pending such litigation to allow the program to move forward. For example, the Commission may allow curtailment to require two hour notice as a policy decision pending a factual determination that a different timeframe is appropriate.

b. **Caps and curtailability elections**:

As noted above, NIPPC does not believe caps³ are necessary or appropriate to the extent direct access participants are meeting resource adequacy requirements and contributing to non-bypassable surcharges. NIPPC believes this to be true whether or not such load is subject to preferential curtailment, but acknowledges that parties have raised a concern that non-curtailable load should remain subject to caps. NIPPC proposes a modification to the proposed rules that makes it explicit that loads subject to preferential curtailment shall not be included within the existing caps, which NIPPC anticipates may be retained with respect to non-curtailable customers pending further action in other direct access dockets. NIPPC's proposed language neither precludes nor includes the imposition of a temporary cap on curtailable load pending finalization of a Commission policy on resource adequacy and related issues, but makes it clear that such caps (if any) would be separate from any caps on non-curtailable customers. NIPPC recommends that the caps for non-curtailable customers be preliminarily set at least at the level of the current enrollment limits for the LTDA and NLDA programs (if not greater) until the details of the curtailment options are finalized in the contested case and a permanent cap level established. New direct access customers would have the option of agreeing to the forthcoming curtailment requirements to the extent

³ NIPPC notes that there are separate caps in place for standard long term direct access and the new large load direct access programs.

that their load exceeds the existing caps. NIPPC further notes that reduction in the cap levels for non-curtable customers below the existing caps would not be appropriate and should not be considered, as existing customers have elected to participate in the direct access programs that did not include a curtailment option. Any modifications to the existing caps for non-curtable customers should not be implemented until the details regarding the costs and curtailment timing for curtable customers choices are established in contested proceedings so that customers would have the opportunity to evaluate the costs and consequences of an election.

As a related matter, NIPPC submits that customers should be entitled to elect whether given *load* should be curtable or non-curtable at any annual election window, , but such elections must be made consistent with any cap on non-curtable load. For example, if a new customer desired to move into the direct access program, but there was insufficient capacity within the cap for that customer to elect non-curtable service, such customer would be required to elect curtable service in order to participate in the direct access program.⁴ Specifically, NIPPC proposes that Sections [860-038-0290](#) (2) and (3) be restated as follows:

- (2) During the annual election window, existing (or prospective) direct access consumers with eligible load shall elect whether a given load will be curtable or non-curtable in the event such load returns to emergency default service. Any election for non-curtable service shall be subject to available capacity within the specified cap, if any
- (3) The Commission may establish a cap on non-curtable direct access load that is separate from any cap on curtable direct access load.

c. **Simplification and Clarification of when Curtailment may occur**

NIPPC appreciates the discussion at January 4 Workshop raising concerns regarding the definition of “excess generation” and questions regarding when a utility may curtail a customer that has elected voluntary curtailment and has returned to system service without adequate notice. NIPPC recommends simplifying these sections by framing the language to

⁴ NIPPC also recommends that such customers be permitted to file for waiver of the cap pursuant to Commission rules.

address when the utility may curtail service, and avoids the term excess generation.

Specifically, NIPPC recommends that proposed Sections 860-038-0290 (5)-(7) be combined and restated as follows:

(5) An electric company may curtail service to customer if the following conditions are met:

- a. Such customer has elected to be preferentially curtailed.
- b. Such customer returned to system service without requisite notice.
- c. The electric company cannot serve such customer through market purchases or with available generation without a material impact on its ability or costs to serve system customers.

(6) If a returning curtailable consumer is served through market purchases or available generation, the consumer will be charged rates for that service as defined in OAR 860-038-0280 (3)(b) or OAR 860038-0250.

d. **Clarification of Cost Responsibilities for Returning Non-Curtailable Customers.**

NIPPC supports the concept that, in the event a non-curtailable customer returns to the utility system without adequate notice, it should be subject to *appropriate and prudent costs actually incurred* by the utility for providing service. At the same time, NIPPC is mindful that (1) such customers will already be paying a price that initially includes the costs of market purchases and an additional adder during the period of emergency service that is intended to keep the utility and its cost of service customers whole; (2) such returning customers may still be paying transition costs for capacity acquired prior to their election of direct access service, and should not be required to pay for such capacity twice; and (3) it is unlikely that a utility will incur any prudent costs to serve a returning customer in most circumstances, particularly if such customer does not intend to remain on the utility system beyond a short window. For example, assume an ESS serving two small 1 Mw loads defaults on its obligations and the customers return to utility service without prior notice, pending an opportunity to select a different ESS. It would not be prudent for the utility to incur any costs to serve such customer (other than pursuant to the market purchases for which it will be reimbursed), especially if it already holds sufficient capacity.

NIPPC proposes that Sections 860-038-0290 (9)-(10) be combined and restated accordingly as follows:

(9) If a non-curtable consumer returns to the electric company's service on less than the time for notice of return under an electric company's direct access program tariff and does not return to Direct Access service within a period of ninety days, the electric company shall, in addition to charges recovered pursuant to emergency default service, charges the non-curtable consumer for any new, prudently incurred costs necessary to serve such customer over and above existing system capacity.

e. **Extension of Term for Emergency Service.**

As previously proposed, NIPPC recommends that the Commission use this rulemaking docket as an opportunity to extend the timeframe under which a utility must move a returning Direct Access customer from emergency default service to standard offer service from five days to a longer period of time, such as fifteen days. Section 860-038-0280(6) could 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, or some other timeframe as the Commission deems appropriate.⁵

Respectfully submitted this 3rd day of February, 2023.



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⁵ NIPPC proposes this 15-day window as compromise to address concerns raised by parties and could support other reasonable timeframes.

ATTACHMENT A
REDLINE OF PROPOSED RULES

860-038-0290

Preferential Curtailment

- ~~(4)~~ Except as provided in sections (4), (5) and (6), each electric company shall ~~provide~~ offer preferential curtailment ~~for~~ of New Large Load Program participants and long-term opt-out direct access consumers with respect to specific loads that meet the criteria of Sections (a) or (b) below
- a Physical Curtailment. A customer shall be eligible for preferential curtailment upon installation of the system upgrades that allow for the electric company to curtail service to a specific load pursuant to specified notice. An electric company shall provide a good faith cost estimate for installation of such facilities promptly upon request.
- ab Contractual Curtailment: A customer shall be eligible for preferential curtailment for a specified load upon execution of a curtailment agreement requiring curtailment of such load upon specified notice, with liquidated damages to apply in the event of failure the consumer to curtail load as required.
- ~~(4)~~(5) During the annual election window, ~~consumers existing (or prospective) direct access consumers with eligible load electing to transition to direct access and current direct access customers will elect~~ shall elect whether a given load will be ~~to be~~ curtailable or non-curtailable in the event they such load returns to emergency default service. Any election for non-curtailable service shall be subject to available capacity within the specified cap, if any.
- ~~(5)~~(6) The Commission may establish a cap on non-curtailable direct access load that is separate from any cap on curtailable direct access load.
- ~~(6)~~(7) An electric company may collect a reasonable charge from a direct access consumer to recover necessary costs for system upgrades that operationalize preferential curtailment of that consumer, using a Commission approved methodology. ~~Consumers who elect to be curtailable will be considered non-curtailable until the system upgrades are implemented and curtailment is operational~~
- ~~(7)~~ An electric company will not preferentially curtail non-residential direct access consumers that have elected to be non-curtailable during the election period, are infeasible to curtail, or whose curtailment would negatively affect the electric system's reliability.
- (8) An electric company may curtail service to customer if the following conditions are met:
- a Such customer has elected to be preferentially curtailed.
- b Such customer returned to system service without requisite notice.
- ac The electric company cannot serve such customer through market purchases or with available generation without a material impact on its ability or costs to serve system customers. ~~If an ESS is no longer providing service, the electric company must make best efforts to serve a returning curtailable consumer with market purchases or the electric company's excess~~

~~generation. Excess generation must be generation that is beyond any requirements to serve cost of service load, to comply with reliability standards, or to meet contractual obligations related to contingency reserves.~~

~~(8)~~(9) If a returning curtailable consumer is served through market purchases or ~~excess available~~ generation, the consumer will be charged rates for that service as defined in OAR 860-038-0280 (3)(b) or OAR 860038-0250.

~~(9) If an ESS is no longer providing service, and neither market energy nor excess generation is available, the electric company may preferentially curtail returning nonresidential direct access consumers of that ESS that elected to be curtailable.~~

(10) A curtailable consumer that returns to the electric company's service on less than the time for notice of return under the electric company's direct access program tariff shall be subject to potential curtailment for a period equal to the remaining time for notice of return. This provision does not limit a consumer's right to return from emergency default service or standard offer service to direct access.

(11) If a non-curtailable consumer returns to the electric company's service on less than the time for notice of return under an electric company's direct access program tariff and does not return to Direct access service within a period of ninety days, the electric company shall, in addition to charges recovered pursuant to emergency default service, -charge the non-curtailable consumer for any new, prudently incurred costs necessary to serve such customer over and above existing system capacity charge the non-curtailable consumer the greater of the incremental capacity and energy costs or retail energy costs required to serve on less than notice of return. The consumer must remain on default service for the remaining time for notice of return, except as defined in OAR 860-0380290(11).

(12) If a non-curtailable consumer on an electric company's default supply option elects to return to direct access service during the period equal to the remaining time for notice of return, the consumer must pay transition charges that recover the electric company's costs of planning to serve that consumer

860-038-0590

Transmission and Distribution Access

- (1) An electric company may be relieved of some or all of the requirements of this rule by placing its transmission facilities under the control of a regional transmission organization consistent with FERC Order No. 2000 and obtaining Commission approval of an exemption.
- (2) An ESS may request transmission service, distribution service or ancillary services under standard Commission tariffs and FERC-approved tariffs. The electric company shall coordinate the filings of these tariffs to ensure that all retail and direct access consumers are offered comparable services at comparable prices.

- (3) Except as otherwise directed by OAR 860-038-0290, each electric company shall provide nondiscriminatory access to transmission, distribution, and ancillary services, including transmission into import-limited areas and local generation resources within import-limited areas, to serve all retail consumers. An electric company shall not give preference or priority in transmission and distribution pricing, transmission and distribution access, or access to, pricing of, or provision of ancillary services and local generation resources, to itself or its affiliate relative to persons or entities requesting transmission or distribution access to serve direct access consumers. No preference or priority may be given to, nor any different obligation assigned to, any consumer based solely on whether the consumer is purchasing service from an electric company or an ESS.
- (a) Any transmission or distribution capacity to which an electric company has entitlements, by ownership or by contract, for the purpose of serving its Oregon load shall be made available to an electric company and ESSs that are serving such load on at least a pro rata basis. An electric company shall describe in its tariff filings how it proposes to provide substantively comparable transmission and distribution service to all retail consumers at the same or similar rates if:
- (A) Access to the electric company's transmission or distribution facilities or entitlements is restricted by contract or by regulatory obligations in other jurisdictions; or
- (B) If providing transmission or distribution service on a pro rata basis would result in stranding generating capacity owned or provided through contract by the electric company;
- (b) Except for those ancillary services required by FERC to be purchased from an electric company, an ESS may acquire, on behalf of the retail loads for which it is responsible, all ancillary services required relative to the transmission of electricity by any combination of:
- (A) Purchases under the electric company's Open Access Transmission Tariff;
- (B) Self-provision; or
- (C) Purchases from a third party;
- (c) Energy imbalance obligations, including the pricing of imbalances and penalties for imbalances, shall be developed to reasonably minimize imbalances and to meet the needs of the direct access market environment. The electric company shall address such energy imbalance obligations in its proposed FERC tariffs. Energy imbalance obligations imposed upon ESSs, including the entity serving the standard offer load, and consumers purchasing service from the electric company, shall comply with the following:
- (A) The obligations shall impose substantively comparable burdens upon ESSs, including the entity serving the standard offer load, and consumers purchasing service from the electric company, and shall not unreasonably differentiate between consumers that are entitled to direct access on the basis of customer class, provider of the service, or type of access;
- (B) The obligations shall recognize the practical scheduling and operational limitations associated with serving retail consumer loads in the direct access environment, but shall require ESSs, including the entity serving the standard offer load, to make reasonable efforts to minimize their energy imbalances on an hourly basis;

- (C) The obligations shall be designed with the objective of deterring ESSs, including the entity serving the standard offer load, and consumers purchasing service from the electric company from burdening electric system operation or gaining economic advantage by under-scheduling, over-scheduling, under-generating or over-generating. The obligations shall not be punitive in nature; and
- (D) The obligations shall enable an electric company and ESSs, including the entity serving the standard offer load, to settle for energy imbalance obligations on a financial basis, unless otherwise mutually agreed to by the parties.
- (d) Where local generation is required to operate for electric system security or where there is insufficient transmission import capability to serve retail loads without the use of local generation, the electric company shall make services available from such local generation under its ownership or control to ESSs consistent with the electric company's provision of services to standard offer consumers, residential consumers, and other retail consumers. The electric company shall also specify such obligations in appropriate sales contracts prior to any divestiture of such resources;
- (e) The electric company's tariffs shall specify prices, terms, and conditions for scheduling, billing, and settlement. Other functions may be specified as needed;
- (f) An electric company's tariffs shall include a dispute resolution process to resolve issues between the electric company and the ESSs that serve the retail load of an electric company in a timely manner. Such processes shall provide that unresolved disputes related to such retail access matters may be appealed to the Commission.
- (4) If adherence to OAR 860-038-0590 requires FERC approval of tariff or contract provisions, the electric company must petition FERC for the approval of the tariff or contract provisions within 90 days of the effective date of this rule. Subsequent tariffs or contracts requiring FERC approval will be made in a timely manner.