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VIA ELECTRONIC FILING

Public Utility Commission of Oregon
Attn: Filing Center
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RE: Docket AR 651 — PacifiCorp’s Comments for the Commission’s April 4, 2023 Workshop.

PacifiCorp d/b/a Pacific Power (“PacifiCorp” or “Company”) appreciates the opportunity to provide comments on the proposed direct-access rules submitted to the Secretary of State’s office with the Public Utility Commission of Oregon’s (“Commission”) Notice of Proposed Rulemaking (“NOPR”).¹ These comments provide context and support for the discussion at the Commission’s hearing scheduled for April 4, 2023.

PacifiCorp appreciates Staff’s diligent leadership in this docket and acknowledges that Staff has incorporated into its Proposed Rules several of the Company’s previous recommendations. While PacifiCorp thanks Staff for considering and adopting these proposals, the Company continues to believe that some key changes are crucial to create a workable preferential curtailment paradigm that will allow electric companies to satisfy their provider of last resort obligations to returning direct-access customers while avoiding the reliability concerns that may arise in the event that significant load from those customers is suddenly returned to the utility’s system. To continue the productive discussions that have occurred to-date, PacifiCorp focuses these comments on the key revisions that the Company believes should be incorporated into the Proposed Rules.

A. Certain Terms Used in the Proposed Preferential Curtailment Rules Require Additional Clarity.

As a general matter, PacifiCorp supports many of the revisions that Staff have incorporated into the Proposed Rules. However, certain terms have not been defined and, without specific definitions, the Company cannot assess how these rules will be implemented and, for that reason, cannot voice either support or disagreement with certain provisions.

What seems clear, however, is that the rules are unlikely to be implemented successfully without additional definition for key terms—either in the rules themselves or in utility tariffs. To the extent

¹ Notice of Proposed Rulemaking (Feb. 24, 2023) (“NOPR”).

the Commission intends for the terms to be defined uniformly (as rules of general applicability), the terms should presumably be defined in the rule themselves. If, on the other hand, the Commission prefers them to be defined on a case-by-case basis, they should presumably be defined in utility tariffs. Without clarity *somewhere*, however, undefined key terms will lead to uncertainty, administrative inefficiency, and increased likelihood of disputes.

1. “Infeasibility” Should Be Defined.

Throughout the various iterations of these rules, the Commission has always stated that an electric company would never be required or allowed to curtail a consumer's load if it would be “infeasible” to do so.² In the current Proposed Rules, the Commission continues to state that “[a]n electric company may not preferentially curtail the load of a direct access consumer when . . . direct access consumer's load is infeasible to curtail[.]”³

However, to date Staff has not defined what it means for a consumer's load to be “infeasible” to curtail. Staff has indicated infeasibility should be considered “from a cost, engineering, or system reliability standpoint,”⁴ but this leaves many questions unanswered.

It is also unclear when the electric company should assess whether curtailability is feasible. For example, does the electric company determine whether it is feasible when the consumer first elects to be curtailable or is the assessment specific to each curtailment event? PacifiCorp continues to believe that the standards governing infeasibility must be clearly defined in these rules. To that end, the Company has previously proposed that consumers should be considered feasibly curtailable only if the consumers' load satisfies a certain size threshold and may be curtailed within ten minutes.⁵ PacifiCorp continues to support incorporating these size and timing thresholds into the criteria for establishing which consumers are eligible for curtailment.

If the Commission does not incorporate requirements addressing these issues into the rules, PacifiCorp asks the Commission to clarify that these issues will be addressed in individual utility tariffs.

Relatedly, PacifiCorp continues to stress its opposition to any regulation or policy that would address reliability crises by preferentially curtailing essential facilities like hospitals. Preferential curtailment is a problematic policy for a utility under any circumstances; but asking a utility to cut off power to a hospital ahead of other cost-of-service customers simply because a hospital's management has opted to defect from the system creates a moral dilemma. On the one hand, as a matter of public policy, vulnerable customers should not be put at risk because of a customer's poor decision. On the other hand, the remaining cost-of-service customers must not be harmed by that customer's *decision* to defect from and then return to the system. Indeed, a customer

² See Order No. 22-364, Appendix A at 35 (Oct. 7, 2022) (proposing OAR 860-038-0290(5), which would read “[a]n electric company will not preferentially curtail non-residential direct access consumers if it is infeasible to do so or curtailment would negatively affect the electric system's reliability.”).

³ Proposed OAR 860-038-0290(4)(b).

⁴ Order No. 22-364, Appendix A at 5.

⁵ PacifiCorp's Comments on Staff's AR 651 Draft Rule Revisions at 3 (Nov. 18, 2022). PacifiCorp selected this ten-minute requirement to ensure compliance with NERC standards for contingency reserves. PacifiCorp's Supplemental Comments on Staff's Revised Proposal at 3 (Feb. 3, 2023).

dependent on electricity for life-saving medical equipment or life-saving air conditioning could be on *any* utility feeder.

For this reason, PacifiCorp continues to believe that certain facilities should be designated as *per se* non-curtable unless and until the Commission affirmatively approves their applications to be deemed curtable. Such applications should demonstrate that the defecting customer has backup systems adequate to protect vulnerable customers in the event of service disruptions. The rules should provide greater clarity around this important policy issue and should be further developed beyond a simple reference to curtailment being "infeasible."

2. It Is Not Clear When Curtailment Would "Negatively Affect Cost-of-Service Customers."

In the most recent Proposed Rules, the Commission added a provision prohibiting electric companies from preferentially curtailing consumers "[w]hen the preferential curtailment of a direct access consumer would negatively affect cost-of-service consumers."⁶ PacifiCorp has concerns regarding the broad language of this rule. Curtailing industrial or large commercial consumers' load could negatively impact cost-of-service customers in myriad ways, both in terms of potential grid impacts but also because cost-of-service customers likely use the facilities that would be curtailed—e.g., in the hospital example discussed above, many patients would be cost-of-service customers and if the hospital is curtailed those patients would be negatively affected, or in a less extreme example, even if a cost-of-service customer could not go to a hardware store and pick up a hammer because the store is curtailed, an argument could be made that the customer was negatively impacted.

In any event, the purpose of the new language is unclear; it does nothing to solve problems caused by the defection of too much curtable load (to the extent that is its intent), and it is too vague to pass muster as a valid rule.

a. *The purpose of the new language is unclear.*

PacifiCorp can only speculate about the origin of this new language, but the Commission may have inserted the language in response to PacifiCorp's assertion that the Commission should cap *curtable load* due to reliability or other concerns that could arise if a huge swath of curtable load departed and required the utility to energize and deenergize significant portions of the utility system.⁷ The ability to instantaneously shed unplanned load during a system emergency can mitigate reliability concerns for utilities, but only to a point. There remain myriad risks that may result from preferential curtailment that will be difficult to predict until the policy is actually put in place. As PacifiCorp explained, turning significant pockets of an integrated utility system on and off is not how a utility would choose to operate its system, and the disruption could be problematic from an operational standpoint or for other reasons.

In order to cautiously approach these risks, PacifiCorp has proposed caps on curtable load as a matter of good regulatory policy, consistent with the Commission's historical practice of capping

⁶ Proposed OAR 860-038-0290(4)(c).

⁷ PacifiCorp's Supplemental Comments on Staff's Revised Proposal at 3.

direct-access load to mitigate unknown, or known but unquantifiable, risks to customers.⁸

The new language may be an attempt to address this issue by broadly prohibiting curtailment when curtailment is needed if that curtailment would cause other undefined issues. But some direction on the purpose of this new language is needed. As PacifiCorp will explain, if this provision is intended to address problems caused by the absence of caps, it simply does not work.

It is unclear when the prohibition is intended to apply from a timing perspective, and how a utility is meant to decide when it applies and/or enforce it. From a substantive perspective, the phrase "negatively affect" is undefined, unmeasurable, and, depending on when it is meant to apply, may render the Commission-proposed reliability tool of preferential curtailment incapable of implementation.

- b. *If the prohibition is intended to apply to prevent a consumer from electing preferential curtailment in the first place, more guidance is required.*

The Commission should clarify whether this rule is intended to apply at the time a consumer makes an election to be preferentially curtailed, or sometime later. If it applies at the time a consumer makes an election, it presumably creates a duty for the utility to unilaterally reject a consumer's preferential curtailment election when it is triggered.

Assuming this is the intent, the rule should provide additional guidance to utilities. At a minimum, the Commission should provide examples of the types of harm this provision is intended to address, clarify the measure of harm that would trigger the prohibition, and clarify the presumptions that should apply in the event a risk is apparent but the consequences are unknown. The Commission should also explain how this prohibition will be implemented. Does the utility have the duty to unilaterally reject an application if it believes this prohibition applies? If not, what should happen?

When the rule refers to negative impacts, is it referring to financial harm to cost-of-service customers? Operational harm? Social, economic, or personal harm?

With respect to the measure of harm, is the utility prohibited from granting a preferential curtailment election if the election would cause de minimis harm to cost-of-service customers? Significant harm? Something else?

How is the utility meant to measure or predict a negative impact? PacifiCorp has explained that allowing an uncapped amount of curtailable load to defect would create a *complex and untested operational scenario*. Given the existence of unknowns and the duty of a utility to operate its system safely and reliably, should the utility assume that the possibility of a negative impact will trigger this prohibition?

In other words, must the "negative" impact be known with certainty, or does the Commission also

⁸ See, e.g., *In re Portland Gen. Elec. Co. Request for a Gen. Rate Revision*, Docket No. UE 335, Order No. 19- 128 at 3 (Apr. 11, 2019) ("We routinely use caps and limits to place bounds on potential negative outcomes, particularly where future system impacts for a course of action are unknown or unknowable. Caps can act as a tool used to balance policy priorities and protect against potential negative impacts.").

intend to protect customers from harm that is likely? What if the possible negative impacts are unknown but the risk is apparent? Should the utility err on the side of protecting cost-of-service customers, or should the utility err on the side of protecting defecting consumers?

In addition, because the draft rules frequently refer to a consumer that has “elected” to be preferentially curtailed, the rules should also clarify that a customer election for preferential curtailment that is rejected by a utility due to this prohibition will be a nullity, and the consumer will not be considered a consumer that has “elected” to be preferentially curtailed.

- c. *If the prohibition on curtailment is intended to prevent implementation of preferential curtailment in real time with respect to a consumer that has successfully elected to be curtailable, the rule is even more problematic.*

The idea that the utility, in an emergency situation, would know when or how curtailment in such a scenario “would negatively affect cost-of-service customers”—in real time—is not realistic. The potential problems that could be caused by implementing “too much” curtailment are novel and untested—which is precisely the point of imposing a cap. As PacifiCorp explained, it does not know how to define or address these issues.

Moreover, a prohibition applied in this manner would be circular and problematic. Preferential curtailment is intended as a tool to help address reliability issues that can occur when departing customers return without notice and the utility lacks power to serve them. Allowing an uncapped amount of load to defect, return without adequate notice, and then ordering the utility *not to curtail that curtailable returning load* under certain conditions that would otherwise *require curtailment for reliability purposes*, leaves the utility with no tools for reliability at all. This circular policy loop, in and of itself, creates a significant risk of harm to cost-of-service customers.

If the Commission allows load to defect based on the premise that preferential curtailment will solve provider of last resort issues, but then prohibits use of curtailment because the Commission has allowed so much load to defect that curtailment creates its *own* reliability issues, the rules have simply created an unworkable circular loop of reliability issues that ensures the preferential curtailment rules do nothing when they are needed most.

If, instead, the language is intended to be a proxy for a cap, the rules should plainly state this. The rules should state that the Commission will evaluate whether to implement a cap on curtailable load based on the evidence for or against such a cap. In the contested-case phase of this proceeding, expert witnesses can respond to discovery about risks associated with curtailable load, answer Commission questions, and provide the Commission with an evidentiary foundation for deciding whether a cap should be imposed, and if so, how that cap should be determined.

Unlike the proposed new language, a cap—if deemed appropriate by the Commission after review of facts—can actually “protect cost-of-service customers from the risks and costs associated with direct access consumers’ return to an electric company’s system.”⁹ A thoughtful cap is a time-tested, operationally implementable approach to a real issue—one that will allow the Commission to expand direct access while protecting cost of service customers from unforeseen or presently

⁹ Proposed OAR 860-038-0290(7).

unquantifiable harm.

d. Regardless of the new language's purpose, it is too vague to be workable.

As a matter of law, regulations must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit.¹⁰ The proposed new prohibition would prohibit preferential curtailment in conditions that are not defined and pursuant to a standard that cannot be measured. And, depending on *when* the Commission intends the provision to apply, it may require a utility to interpret and apply the standard in real-time, in a scenario where lives and property are at risk. This is unrealistic. No utility reading the new rule language will have adequate notice of the conduct the rule intends to prohibit, let alone the ability to implement it.

The problems caused by a vague and unmeasurable "prohibition" in this context seem evident. These problems are only heightened by the fact that the very reliability problems the utility will be striving to resolve with preferential curtailment will have been greatly exacerbated if new Commission policy allows an uncapped amount of curtailable load to leave the system.

B. Election Window Concerns

1. Existing Consumers Should Elect to Participate in Preferential Curtailment 12 Months After the Effective Date of Utilities' Tariffs.

In the NOPR, the Commission's proposed preferential curtailment rules would take effect June 1, 2024.¹¹ Customers currently participating in the electric companies' New Large Load Direct Access Program and long-term opt-out direct access programs must then elect whether their load will be eligible for preferential curtailment "during the first annual election window that takes place at least 12 months after" June 1, 2024.¹²

PacifiCorp assumes that the Commission has selected this effective date to allow sufficient time for the Commission to complete the contested case that is expected to proceed following this rulemaking. However, as PacifiCorp explained in previous comments,¹³ after the remaining issues in this docket have been resolved the electric companies will still have to prepare and submit for Commission approval tariffs implementing this preferential curtailment program. Given the complicated issues to be included in these tariffs and the multitude of sophisticated customers that will be affected, it is possible that the proceedings in which the Commission considers the proposed tariffs may take time to address. The Commission-approved tariffs will include important information regarding the specifics of each utility's program, and existing direct-access customers should have sufficient time to review and consider this information when determining whether they wish to participate in preferential curtailment. For this reason, rather than requiring these customers to make their election in the first election window 12 months after the effective date of the rules, PacifiCorp proposes requiring this election 12 months after the effective date of the

¹⁰ See *Grayned v. City of Rockford*, 408 US 104, 108, (1972); *Gen. Elec. Co. v. United States EPA*, 53 F3d 1324 (DC Cir 1995); *Gates & Fox Co., Inc. v. OSHRC*, 790 F2d 154, 156 (DC Cir 1986).

¹¹ *Proposed OAR 860-038-0290(1)*.

¹² *Proposed OAR 860-038-0290(5)*.

¹³ PacifiCorp's Supplemental Comments on Staff's Revised Proposal at 6.

utilities' tariffs implementing the new rules.

2. Allowing Customers to Alternate Between Preferential Curtailment in Each Election Window Will Be Unworkable.

The Commission's Proposed Rules would allow a consumer to alternate between being preferentially curtailable in each annual election window.¹⁴ Effectively, a consumer could vacillate between being curtailable or potentially requiring backstop utility service each year. Given the planning obligations that the electric companies must undertake to ensure they will be able to satisfy their provider of last resort obligations, PacifiCorp does not believe a system in which the consumers may frequently and repeatedly change their eligibility for curtailment is workable.

PacifiCorp generally does not support this policy. However, the Company believes this proposal could be revised to accomplish both the utilities' need to plan for potentially returning load and consumers' desire for flexibility by incorporating a notice period for direct-access consumers who no longer wish to be curtailable. Specifically, if any consumer elects to be preferentially curtailable, then the consumer must provide the electric company advanced notice before amending its position and electing to no longer be curtailable. For consistency with other provisions of the Proposed Rules, PacifiCorp proposes that this notice period should be equal to the notice period required before returning to utility-service under the electric company's direct access tariff.¹⁵ In the case of PacifiCorp customers, this proposal would require that customers who have elected to be curtailable must provide four years' notice if they seek to change that election.¹⁶

This notice is especially important for consumers seeking to amend their load from curtailable to non-curtailable. A customer electing to be non-curtailable will need to ensure that their load will fit within the cap for non-curtailable direct access.¹⁷

C. Curtailment Must Include Limitations on Liability for the Electric Companies.

The Proposed Rules require that an electric company "must make best efforts to serve" any returning direct access consumer with the electric company's Uncommitted Supply.¹⁸ The Proposed Rules further indicate that the Commission "will establish criteria the electric company may use to demonstrate that it sought to serve a preferentially curtailable consumer with Uncommitted Supply before curtailing that consumer."¹⁹ PacifiCorp agrees with and supports this proposal to identify specific processes that electric companies must follow before curtailing eligible customers.

¹⁴ Proposed OAR 860-038-0290(6).

¹⁵ See Proposed OAR 860-038-0290(13) ("A preferentially curtailable consumer that returns to the electric company's service without the required 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.").

¹⁶ Pacific Power Schedule 293.

¹⁷ Proposed OAR 860-038-0290(7).

¹⁸ Proposed OAR 860-038-0290(9).

¹⁹ Proposed OAR 860-038-0290(10).

However, PacifiCorp believes that the Commission's rules must go further and shield electric companies from liability in the event that they follow the prescribed processes in their respective tariff(s) but nonetheless have to curtail customers. As the Company explained in prior comments:

Curtailing a customer is another phrase for cutting off the customer's electric service. Electricity is an essential service and a public good. Unless Commission policy clearly defines the utility's right and/or obligation to implement preferential curtailment, the utility may be hesitant to implement the policy for fear of liability. A policy intended to mitigate reliability risk that cannot be effectively deployed for fear of liability is poorly designed.²⁰

To address this concern, PacifiCorp proposes adding an eligibility criterion that would require any consumer electing to be curtailable to agree to hold the electric company harmless from any and all liability or damages caused by curtailment so long as the electric company follows the Commission's approved process.

Relatedly, proposed OAR 860-038-0290(10) would benefit from additional clarity. That provision is intended to provide much-needed specificity to the requirement that utilities use "best efforts" to serve a returning customer with Uncommitted Supply. In the event a utility needs to preferentially curtail an early-returning consumer, some sort of objective criteria must be available to guide the utility's obligations to seek out supply for early returning customers. Moreover, in the event a utility is sued for any damages caused by cutting off a consumer's power, the rules must provide a utility with the ability to objectively demonstrate compliance with the rules. OAR 860-038-0290(10) currently states:

The Commission will establish criteria the electric company may use to demonstrate that it sought to serve a preferentially curtailable consumer with Uncommitted Supply before curtailing that consumer.

PacifiCorp would note that different utilities have very different system needs, different system resources, and different resource procurement practices. The options and limitations that guide a utility's "best efforts" to seek out supply for early-returning consumers will likely look different for different utilities. Consequently, PacifiCorp would recommend this provision be modified to reflect that this must be a utility-specific determination. PacifiCorp would recommend that utility-specific criteria be detailed in individual utility tariffs.

D. Electric Companies' Planning Obligations Must Be Expressly Established in the Commission's Rules.

One of the issues raised throughout this docket is how electric companies should or should not plan for the load of potentially returning direct access consumers. Generally, stakeholders have stressed that the electric companies should not build additional capacity to serve potentially returning consumers due to the unlikelihood of their return.²¹ The Commission's Proposed Rules

²⁰ PacifiCorp's Supplemental Comments on Staff's Revised Proposal at 5.

²¹ See, e.g., Comments of the Oregon Citizens' Utility Board on Staff's Division 38 Preferential Curtailment Rules

indicate that, after a consumer has returned to a utility's default service and remained on that service for a certain period of time, the utility must begin planning for that consumer's load.²² The Proposed Rules further state that the Commission will determine the specific time period after which the electric company must begin planning for the consumer to remain on default service.²³

PacifiCorp interprets the Proposed Rules to mean that that the Commission intends to specify in the contested case the time frame after which an electric company must incorporate returned consumers' load into its long-term capacity planning. However, the Company strongly believes that this timeframe should be incorporated into the preferential curtailment rules to provide certainty to the electric companies and enable them to incorporate the most accurate load predictions into their planning. In previous comments, PacifiCorp proposed a three-month limit, after which the returning consumer will be deemed to have given the utility a notice of intent to return to utility service.²⁴ However, the Company may support other timeframes so long as the specific planning requirements are addressed in the Commission's rules.

E. Conclusion

PacifiCorp appreciates the continued opportunities to participate in this docket addressing the important topic of preferential curtailment and electric companies' provider of last resort obligations.

Sincerely,



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Updated Proposal at 3 (Feb. 3, 2023) ("CUB wants to avoid a scenario wherein the IOUs have over-built capacity on their system to serve a need that is unlikely to materialize.").

²² *Proposed* OAR 860-038-0290(15)(b) ("Sections (13) and (14) of this rule do not limit a New Large Load Direct Access Program participant or long-term opt-out direct access consumer's right to return from default supply to direct access unless . . . consumer remains on default supply for longer than the time period necessary to select an ESS and return to direct access service.").

²³ *Id.* ("This time period will be determined by the Commission.").

²⁴ PacifiCorp's Supplemental Comments on Staff's Revised Proposal at 4.