

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**AR 651**

In the Matter of )  
 )  
Rulemaking Regarding Direct Access Including ) COMMENTS OF THE ALLIANCE OF  
2021 HB 2021 Requirements. ) WESTERN ENERGY CONSUMERS  
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**I. INTRODUCTION**

The Alliance of Western Energy Consumers (“AWEC”) submits the following comments in the above-referenced docket regarding the Notice of Proposed Rulemaking, filed February 24, 2023. Pursuant to the instructions of Administrative Law Judge Allwein at the April 4, 2023 Hearing, AWEC also submits its comments filed prior to October 2022 for inclusion in the record in this proceeding, included herein as Attachment A. AWEC recognizes Staff’s efforts to resolve outstanding issues and efforts to bring this rulemaking to a close in a timely manner. Nonetheless, AWEC cautions against adopting the proposed rules prior to the contested case proceeding. As explained in detail below, proposed rule OAR 860-038-0290 is plagued by timing issues and vague language, thereby raising more questions than answers. Such issues lead AWEC to reiterate its foremost recommendation that these rules be adopted only upon the conclusion of the contested case so that such issues may be resolved.

**II. COMMENTS**

Staff provided an updated proposal regarding the preferential curtailment rules on December 16, 2022 that AWEC commented on and hereby incorporates. As relevant to AWEC’s

comments herein, differences between the December 16<sup>th</sup> proposal and the proposed OAR 860-038-0290 preferential curtailment rule contained in the Notice of Proposed Rulemaking include additional language regarding when an electric company may not preferentially curtail the load of a direct access customer; new rule language that limits a direct access consumer's right to return from standard offer service to direct access; language regarding direct access election timing and load designation; and the addition of a rule effective date of June 1, 2024.

As explained in detail below, AWEC does not oppose adopting the OAR Chapter 860, Division 038 rules other than OAR 860-038-0290 governing preferential curtailment. Tabling adoption of the preferential curtailment rules allows for the Commission to provide guidance that will aid parties in the contested case and furthers one of the Commission's main goals for this rule development – “guid[ing] contested case arguments in UM 2024.”<sup>1</sup>

**A. Although AWEC generally supports the establishment of a cap on non-curtable loads, proposed rule OAR 860-038-0290(7) is vague and confusing.**

Proposed rule OAR 860-038-0290(7) states that “[t]he Commission will establish a cap on non-curtable direct access load to protect cost-of-service customers from the risks and costs associated with direct access consumers' return to an electric company's system.” AWEC has consistently provided feedback on the subject of caps and incorporates previous recommendations. However, given Staff's revisions of the December 16<sup>th</sup> proposed language, AWEC provides the following additional recommendations. OAR 860-038-0290(7) as drafted is somewhat confusing and raises questions of flexibility and applicability. For example, if OAR

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<sup>1</sup> Docket No. AR 651, Staff Presentation, at 2 (April 4, 2023).

860-038-0290(7) is adopted as drafted, it is unclear whether the Commission retains flexibility to impose a cap on non-curtable load. Ultimately, the Commission does not need a rule to allow it to impose a cap on any direct access load. It only needs an evidentiary record to support a cap and the level of the cap adopted, which can be developed in UM 2024.

**B. The preferential curtailment rule as drafted contains undefined terms that are likely to result in confusion and inconsistent results when applied.**

OAR 860-038-0290(4)(c) includes new and vague language, stating that “[a]n electric company may not preferentially curtail the load of a direct access consumer when...the preferential curtailment of a direct access consumer would negatively affect cost-of-service consumers.” This is confusing in several respects.

First, it is unclear whether this rule is providing guidance for whether a customer may be categorized as preferentially curtable or not. If so, then it is unclear that a utility or the Commission would know at this determination point whether preferentially curtailing a customer would negatively affect cost-of-service customers. Alternatively, this rule could be interpreted as allowing a utility the discretion *not* to curtail a customer that has chosen to be preferentially curtailed if it determines in a particular circumstance that doing so would negatively affect cost-of-service customers. If that is the case, then the rule gives the utility undue discretion over this determination with very little recourse for the customer. In this scenario, when the utility does not preferentially curtail the customer, it would presumably assess costs on that customer that preferentially curtable customers otherwise avoid. This customer would then need to file a complaint at the Commission to reverse this charge, which would involve a fact-intensive, lengthy, and costly contested case process.

Although AWEC has previously identified concerns regarding vague rule language,<sup>2</sup> the problematic rule language of OAR 860-038-0290(4)(b) not only remains but is exacerbated by OAR 860-038-0290(4)(c). These issues exemplify that the proposed preferential curtailment rules require refinement during the contested case proceeding, during which parties may present evidence-based arguments.

**C. Additional fact-finding is needed before the Commission adopts OAR 860-038-0290(15)(b).**

OAR 860-038-0290(15) addresses instances in which both a preferentially curtailable consumer and a non-curtable consumer return to service without the requisite notice, including charges for non-curtable consumers. However, OAR 860-038-0290(15)(b) limits a direct access consumer's right to return from the utilities' standard offer service to direct access in the instance that "[t]he consumer remains on default supply for longer than the time period necessary to select an ESS and return to direct access service."

Once again, it is unclear how much time is "necessary to select and ESS," which creates the potential for controversy over how this rule is implemented and enforced. Additionally, further information is required to understand whether a returning direct access customer should be required to return to service from an ESS at all. Currently, a direct access customer has the option to take standard offer service from the utility indefinitely. It may be that such customers impose additional costs on COS customers in this circumstance – such as through the Western Resource Adequacy Program – but whether this warrants a requirement that they return to ESS service or whether these costs can be determined and allocated to customers on standard offer service has not

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<sup>2</sup> See AWEC Comments on Preferential Curtailment Rules Updated Proposal, at 6 (Feb. 3, 2023).

been fleshed out. Again, developing a factual record in the contested case process before enacting the preferential curtailment rules is the clearest, most prudent, and most efficient course of action.

**D. If the Commission adopts the preferential curtailment rules, it should make special accommodations for existing direct access customers.**

Pursuant to OAR 860-038-0290(3), a direct access consumer is mandated to determine whether a given load will be preferentially curtailable or non-curtailable at the time the consumer makes its direct access election. Failure to do so will result in an automatic designation of non-curtailable. Proposed rule OAR 860-038-0290(5) requires that such an election must happen “during the first annual election window that takes place at least 12 months after the effective date of this rule.”

If the Commission does adopt these preferential curtailment rules, contrary to AWEC’s primary recommendation, AWEC proposes that existing direct access consumers should have 12 months following receipt of notice from their serving utility of the new rules to either decide to return to cost of service or remain on direct access. Providing direct access consumers with a grace period is necessary given the importance and complexity of this decision. Additionally, if a direct access consumer decides to return to cost of service, it should be exempted from the preferential curtailment rules during the notice period of return. This is fair and reasonable because it holds these customers harmless against significant changes to their direct access terms imposed after they transitioned to direct access.

**E. Inclusion of the effective date as drafted is problematic.**

The proposed rules include an effective date of June 1, 2024. This is concerning and raises timing issues. Given the length of this rulemaking and the unresolved issues to be

discussed in the contested case, it is possible, if not likely, that the contested case will not conclude by June 1, 2024.

**F. Adoption of the proposed rules precludes parties from exploring additional solutions.**

Finally, approval of the rules prior to the contested case proceeding inhibits parties' ability to explore solutions that may not have yet been fully fleshed out. For example, AWEC has consistently advocated for contractual curtailment, which achieves the same result of physical curtailment while avoiding unnecessary capital investment. However, this option has yet to be discussed in detail. Adoption of these rules will have far reaching effects on utilities, direct access consumers, ESSs, and cost of service customers. It is therefore imperative that parties to this rulemaking and the contested case explore all options available and seek solutions that are financially viable in the long term.

**III. CONCLUSION**

AWEC appreciates the opportunity to comment on the Notice of Proposed Rule and looks forward to further engaging with stakeholders on these issues.

Dated this 25th day of April, 2023.

Respectfully submitted,

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