

BEFORE THE  
PUBLIC UTILITY COMMISSION OF OREGON

**AR 651**

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**In the Matter of: AR 651:  
Direct Access Rulemaking**

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) COMMENTS OF THE NORTHWEST  
) AND INTERMOUNTAIN POWER  
) PRODUCERS COALITION ON  
) NOTICE OF PROPOSED  
) RULEMAKING FOR CHAPTER 860  
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The Northwest and Intermountain Power Producers Coalition (“**NIPPC**”) respectfully submits these comments on the Notice of Proposed Rulemaking filed February 24, 2023 in this docket (the “**NOPR**”).

**I. Introduction and Recommended Actions and Policy Decisions**

This docket – when evaluated alongside the related dockets regarding Oregon’s Direct Access program, such as Dockets UE 399 and UM 2024, from which this docket arose<sup>1</sup> – has now been ongoing for more than 5 years. During this time, access to the competitive retail market for electricity has been limited for a significant portion of Oregon, in large part due to caps originally imposed years or decades in the past. The Commission has a responsibility to develop policies that eliminate barriers to the development of a competitive retail market between electricity service suppliers and electric companies<sup>2</sup> and

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<sup>1</sup> See, e.g., Docket UE 399, Order No. 19-129 at 19 (Apr 12 2019), in which modified the Commission’s final order in Portland General Electric Company’s (“**PGE**”) 2018 general rate case that approved a stipulation resolving issues with PGE’s long-term direct access program, and expressly noted that “the stipulating parties have agreed to review and investigate direct access issues over the next two years;” see also the Initial Application, Complaint, and Petition filed by the Alliance of Western Energy Consumers filed at Docket UM 2024 on June 10, 2019; see also the October 21, 2021 Order issued in UM 2024 phasing that docket and initiating this Rulemaking docket AR 651, noting that “the Commission has determined that a phased approach, with a non-contested case portion of the investigation occurring first is appropriate. These phases are intended to allow a more effective definition, narrowing, and processing of the issues in this proceeding . . . .”

<sup>2</sup> See ORS 757.646 (1), as restated in HR 2021 (2021): (1) The duties, functions and powers of the Public Utility Commission shall include developing policies to eliminate barriers to the development of a competitive retail market between electricity service suppliers and electric companies. The policies shall be designed to mitigate

should act as swiftly as possible to modify its regulations in a manner that allows an appropriate expansion of the retail market through the Direct Access program.

NIPPC appreciates that the Commission and participants interested in the mechanics of the Direct Access program have been facing a chicken and egg scenario throughout these dockets: On one hand, it has been difficult to make some of the important policy decisions absent additional facts and detail that can only be garnered through time-consuming and expensive evidentiary hearings; and, on the other, it has been difficult to have meaningful evidentiary hearings without reasonable policy guiderails. NIPPC also recognizes that important intervening developments have occurred in regional capacity markets and state law during the period that the Direct Access program has been under review, specifically with respect to ensuring resource adequacy and passage of HB 2021 (2021). However, NIPPC submits that we have reached a point where many of the important policy decisions can be made, and some very clear guiderails that can be put in place that will allow the Commission, consistent with Oregon law, to eliminate some of the major barriers to the development of a competitive retail market *now*, while still allowing for further proceedings to hone the program going forward.

NIPPC asks that the Commission adopt the proposed rules set forth in the NOPR (preferably as modified by NIPPC pursuant to the comments herein) without further delay, along with the following minimum terms and specific guidance, which terms may be honed through further evidentiary proceedings not requiring suspension of, or re-opening, of this rulemaking proceeding.

**Recommended Actions and Policy Decisions:**

- (1) **Non-bypassable surcharges:** The Commission should adopt the proposed language for non-bypassable surcharges (subject to the minor comments herein) and provide guidance as to how such provisions should be implemented. While NIPPC understands that an evidentiary hearing may be necessary to determine the full extent

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the vertical and horizontal market power of incumbent electric companies and prohibit preferential treatment, or the appearance of such treatment, by the incumbent electric companies toward generation or market affiliates. The commission may require an electric company acting as an electricity service supplier do so through an affiliate.

of costs that may be included within a non-bypassable surcharge, and the calculation of such surcharge for given utilities, there is no basis to delay expansion of the Direct Access program now, pending such determinations. After all, such determinations essentially will be ongoing as new public policies are adopted over time and as utility obligations and cost structures change.

- (2) **Preferential Curtailment and Cap Issues**: The Commission should adopt the proposed language for Preferential Curtailment, subject to the minor changes proposed herein. The Commission should also provide the following guidance:
- a. **Existing cap for non-curtable load**. The cap on non-curtable direct access load shall initially be at the same level as currently exists for each utility. Such cap shall be increased (or removed) at the conclusion of an evidentiary proceeding evaluating the topic to be completed within twenty-four months.
  - b. **No cap on curtable load**. There shall be no cap on direct access capacity subject to preferential curtailment provided such load meets any resource adequacy obligations imposed by the State. Pending determination of State Resource Adequacy obligations, meeting the regional program requirements shall be deemed sufficient.
  - c. **Eligibility for Preferential Curtailment**. Load shall be eligible for Direct Access with Preferential Curtailment if it meets the following conditions:
    - i. **Physical or Contractual Curtailment allowed**:
      1. **Physical/electronic curtailment systems** are in place that can be operated remotely by the utility such that load can be reduced by 95 percent within a time window to be established through an evidentiary hearing. Pending conclusion of such hearing, the time window shall not be less than 15 minutes; or
      2. **Contractual curtailment shall be permitted** provided that the customer demonstrates the ability to shed at least 95 percent of its load within a specified time frame, and with failure to do so subject to liquidated damages, with both the curtailment timeframe and the level of liquidated damages to be established through an evidentiary hearing. Pending conclusion of such hearing, the time window shall not be less than 15 minutes and the level of liquidated damages shall not be more than twice the costs the electric company incurs as a direct result of the customer's failure to curtail.
    - ii. **Participation Threshold**. All load eligible for Direct Access Programs shall be eligible for Direct Access with preferential curtailment, without the need to establish a minimum size threshold in the evidentiary proceeding, *provided*,

*however*, if the Commission determines that a minimum size threshold should be established, such threshold shall be no greater than the threshold applicable for a utility's demand response program, or some other reasonable initial minimum initial size, pending completion of such hearing. Under no circumstance should the program be delayed for litigation to determine minimum thresholds that are not likely to impact the majority of prospective Direct Access program customers that may elect voluntary curtailment.

iii. **Critical Infrastructure Customer Eligibility**: Critical Infrastructure load shall be eligible to participate in the preferential curtailment Direct Access program without limitation. To the extent the Commission believes an evidentiary record is necessary to determine whether all such load shall be eligible, any critical infrastructure load that maintains back up power systems shall be deemed eligible from the outset, pending a determination by the Commission as to whether critical infrastructure load that does not otherwise maintain back up power systems shall be eligible.<sup>3</sup> Again, under no circumstance should the program be delayed for litigation that would, at most, impact only a very minor subset of prospective direct access customers.

d. **Immediate Program Availability for Prospective Large New Load Direct Access customers**. Prospective large new load Direct Access customers shall be entitled to elect non-curtable service *upon rule publication*. The Commission should offer policy guidance to ensure prospective new load direct access customers can make appropriate investment decisions knowing that the program will be available.

NIPPC submits that each of these recommendations are common-sense proposals and can be put in place without further delay. To the extent the Commission does not adopt some or all such proposals, NIPPC asks that the Commission include within its order a specific explanation with respect to the rationale for such rejection, on each item and how such action is consistent with developing policies that eliminate barriers to the development of a competitive retail market.

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<sup>3</sup> NIPPC notes that it does not have any information as to whether or not there is potential load that may be considered as critical infrastructure that desires long-term direct access and would be willing to be subject to voluntary curtailment. NIPPC addresses this issue as it has been raised by other parties to this proceeding. While NIPPC believes its proposal with respect to these potential customers is reasonable and easy to implement, the potential need for further evidentiary information as to this minor subset of prospective customers should not drive any determination with respect to the broader program.

In addition to these recommendations, NIPPC proposes some specific, and relatively minor, modifications to the regulatory language proposed in the NOPR (and expressly adopts and supports the proposals made by Brookfield Renewable Trading and Marketing LP (“**BRTM**”)<sup>4</sup> to provide additional clarity to certain definitions relating to preferential curtailment and non-bypassable charges to improve clarity and cover unaddressed issues. While NIPPC believes that each of these proposals is important and should be adopted, we reiterate the need for the Commission to move forward promptly through adoption of appropriate language and policy guidance, and not further delay this process.

## **II. DISCUSSION**

NIPPC provides the following additional commentary and discussion regarding the proposed rulemaking.<sup>5</sup>

### **a. Program Caps and Preferential Curtailment.**

NIPPC continues to believe that caps on long term Direct Access programs are not consistent with the Commission’s competitive retail market mandate. This is especially true 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,<sup>6</sup> Direct Access program caps were initially put in place more than two decades ago, when the program was nascent. Since that time, the caps have directly prevented further development of the retail market for a significant portion of Oregon. Parties opposing expansion of the Direct Access program caps have raised amorphous concerns about the potential for negative system impacts if the Direct Access program cap were expanded. NIPPC believes these concerns have been addressed and that there no longer is a basis for retaining such caps:

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<sup>4</sup> BRTM is a member of NIPPC and is filing comments separately hereto.

<sup>5</sup> NIPPC notes that it has addressed many of these issues during the informal phase of this (and previous) proceedings, and will not restate each argument in full, but incorporates the comments identified below into the formal record in this proceeding.

<sup>6</sup> NIPPC expressly incorporates into the record herein its comments on the policy issues of Preferential Curtailment filed in the informal phase of this docket on November 18, 2022, available at <https://edocs.puc.state.or.us/efdocs/HAC/ar651hac164323.pdf>

- Concerns about non-bypassable charges have been resolved. One of these concerns - contribution by Direct Access program participants to policy costs borne by utility ratepayers-- is covered by this rulemaking through the non-bypassable surcharge provisions.

- Concerns about Resource Adequacy have been resolved. The second concern -- that Direct Access Program participants must contribute to resource adequacy (“RA”) – is being addressed in Docket UM 2143, as well as through Electricity Service Suppliers (“ESSs”) operating in Oregon voluntarily participating in the regional RA program.

- Concerns about returning customers/provider of last resort obligations have been resolved. The third concern generally expressed by parties opposing expansion of the Direct Access program is the suggestion that a sizeable amount of Direct Access program load could suddenly return to a utility’s system without sufficient notice, and in circumstances where there is insufficient power available in the market *at any price* to serve such customers. NIPPC continues to submit that this concern is unfounded. First, in the more than two decades that the Direct Access program has operated, no long term Direct Access program customers have *ever* returned to the utility’s system without sufficient notice. Second, a Direct Access program customer that does return without notice would be served by power acquired at a market price – whatever that price may be – with a steep premium on top of that price to defray the utility’s costs. The likelihood that a circumstance could occur in which both (1) Direct Access program load returns to a utility system without prior notice and (2) there is no market power available to serve such returning customer *at any price* – particularly if Direct Access program participants are bearing their share of RA -- is extremely remote. NIPPC submits that such likelihood is so remote that it does not justify the existing cap limits on the Direct Access Program, especially in light of the Commission’s responsibility to eliminate barriers to the development of a competitive retail market. However, *even if this concern were realistic* (and it is not), two things are apparent: (a) the caps for non-curtable load – if they should exist at all -- should increase to the extent non-bypassable surcharges and RA obligations remove the

major basis for retaining such caps; and (b) the preferential curtailment proposal eliminates the concern for qualifying load going forward, so there is no basis whatsoever to impose any cap on Direct Access Program load that voluntarily agrees to accept curtailment in the extremely unlikely circumstance that they return to utility service without adequate notice *and* market power is not available at any price.

While NIPPC does not believe the existing cap on curtailable load is supportable, it does not oppose retaining such cap on existing, non-curtable load pending further evidentiary hearings if necessary to move forward with program expansion for curtable capacity without further delay. However, given that there is no factual predicate to impose a cap on the non-curtable load, the language of the regulation should be restored to the version in the final Staff Straw proposal prior to issuance of the NOPR, specifying that the Commission “*may*” establish a cap, as opposed to “*will*” establish a cap, as mandating a cap through the use of “*will*” presumes facts not before the Commission.<sup>7</sup>

With respect to the specific provisions of the preferential curtailment language set forth in the rulemaking, NIPPC reiterates the recommendations made in the introduction to this pleading, including:

- Allowing for both physical and contractual curtailment. While the exact parameters of physical and contractual curtailment may be appropriately explored in an evidentiary hearing, the Commission should set minimum guidelines at this time that allows the program to proceed prior to completion of a full litigated hearing.
- Allowing all load eligible for Direct Access to be eligible for preferential curtailment, regardless of load size, or, at the least, the Commission should set minimum guidelines equal to the size threshold for a utility’s own demand response program or some other threshold that allows the program to proceed prior to completion of a full evidentiary hearing.
- Critical Infrastructure load shall be eligible to participate in the preferential curtailment direct access program without limitation. To the extent the Commission believes an evidentiary record is necessary to determine whether all such load shall be eligible, any critical infrastructure load that maintains back up power systems shall be deemed eligible from the outset, pending a determination by the

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<sup>7</sup> NIPPC supports the BRTM’s comments on this issue.

Commission as to whether critical infrastructure load that does not otherwise maintain back up power systems shall be eligible.

- Prospective Direct Access customers shall be entitled to elect non-curtable service upon rule publication. The Commission should offer policy guidance to ensure prospective new load direct access customers can elect curtable service at the outset. This is particularly important for new loads (regardless of size) that have never been served by a utility and which may need time to construct facilities. Specifically, NIPPC is concerned that, absent such clarification, a utility may determine it needs to plan for prospective new load for such customers, driving up potential transition charges, notwithstanding the fact that such customers never desired utility service.

In addition, NIPPC recommends modification and additional policy guidance with respect to the proposed NOPR language in Section 860-038-0290(15)(b) that specifies that limits a customer's right to return to Direct Access if "[t]he consumer remains on default supply *for longer than the time period necessary* to select an ESS and return to direct access service. This time period will be determined by the Commission." NIPPC submits that the phrase "time period necessary to select an ESS" should be modified to state the "time period reasonably necessary to select an ESS" to ensure that the customer has reasonable time to evaluate potential offers. The Commission should also provide policy guidance at the outset of the minimum time period that would be accepted pending further analysis for this matter so that a customer is not obligated to accept the first new ESS option offered, with no opportunity for negotiation, out of for fear of falling out of compliance. For example, pending a final determination, the Commission could articulate that a period of ninety days is a reasonable period of time for an ESS to select a new ESS and negotiate new supply terms.<sup>8</sup>

With respect to the market prices borne by a Direct Access program customer that returns to a utility without proper notice, NIPPC supports the comments filed by BRTM in this docket. In addition, NIPPC takes this opportunity to respond to concerns raised by parties suggesting that the return of a Direct Access program customer could drive market prices higher, to the detriment of other customers that have elected a market rate. NIPPC

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<sup>8</sup> This issue is raised in greater detail in comments by BRTM and BRTM proposes more specific changes to Section 860-038-0290. NIPPC supports BRTM's proposed modifications to this section as well.



submits that this concern is unfounded. Any customer that has elected to take service under a market-based rate does so at its own risk, and must accept the risk that market prices may rise or fall. Such customers are welcome to choose a standard utility rate if they prefer, or perhaps they would be interested in negotiating with an ESS to receive direct access service at prices that float with the market, but have specified caps. But to the extent such customer chooses a market rate, it cannot simultaneously argue complain that it should be protected from market fluctuations.

NIPPC submits that the recommendations set out here represent a common-sense approach that is simple to implement, fully within the Commission’s authority, and consistent with the Commission’s responsibility to eliminate barriers to the development of a competitive retail market between electricity service suppliers and electric companies.

**b. Non-Bypassable Charges.**

NIPPC generally supports the proposed regulatory language with respect to non-bypassable charges, subject to certain limited modifications and clarifications.

First, NIPPC does not believe the proposed definition of “Uneconomic Costs of Implementing a Public Policy Goal” is appropriate as drafted because it introduces needless ambiguity and is not needed for the purposes of the rules. Deleting that definition, and simply modifying the proposed language in Section OAR 860-038-0170(1)(b) to require the Commission to consider “whether it is **a an-uneconomic cost of implementing a public policy goal such as those** identified in ORS 469A.465 or similar public policy goals related to reliability, equity, decarbonization, resiliency or other public interest for which retail consumers served by electricity service suppliers otherwise would not meaningfully contribute” avoids this ambiguity and retains the intended meaning of that section.<sup>9</sup>

Second, NIPPC also supports the proposed changes to Section OAR 860-038-0170

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<sup>9</sup> This issue is raised in greater detail in comments by BRTM and BRTM proposes more specific changes to these sections. NIPPC supports and adopts BRTM’s proposed modifications.

proposed by BTRM, which received favorable consideration at the Open Meeting on October 4, 2022.<sup>10</sup> NIPPC has included these changes in the attachment hereto.

**c. EMISSION PLANING REPORTS**

NIPPC supports the proposed ESS Emission Planning Report language as set in Section 860-0380-0405 of the proposed rulemaking. The proposed language is materially similar to agreed-upon language proposed by multiple parties in this proceeding, including NIPPC, the Citizen’s Utility Board, and environmental organizations with respect to confidentiality protocols for ESS Emission Planning Reports that place an appropriate balance between ensuring information is provided but limiting access to certain confidential information. NIPPC submits that these basic protections are the minimum necessary to allow ESSs to provide meaningful reports as required by the regulations without unfairly compromising their competitive stance, both with respect to competing ESSs and independent power developers and competing utilities.

NIPPC also supports the proposed rule language that requires ESS’s to initiate its reports beginning in 2027. As noted by Staff, some parties continue to urge the Commission to require ESS reporting to begin in 2024. NIPPC agrees with Staff that an earlier reporting date than 2027 would show an incomplete trajectory toward the first compliance period, and would require information that is not required by statute. Moreover, because of the nature of the ESS business model, reporting prior to 2027 will not yield meaningful, actionable information.

**III. CONCLUSION**

NIPPC supports adoption of the proposed regulations, preferably with the minor changes recommended herein. NIPPC also ask that the Commission provide the express policy guidance as described herein to allow parties to move forward with an expansion of

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<sup>10</sup> See, e.g., comments by Commissioner Thompson at the April 4, 2022 meeting (“I did like that Brookfield language changes proposed to the rules but I don’t need to necessarily – we don’t need to wordsmith that today. I can just indicate that I like those comments and they’re kind of already in the record perhaps;” follow up comments by Chair Decker (“Ya, and I think it is good to indicate that that’s the direction you’d be leaning so if people have written comments during the formal phase that they should address those.”)

the Direct Access Program at this time, without the delay that would occur if further evidentiary hearings were required prior to moving forward with these rules.

In particular, NIPPC asks that the Commission consider – and explain – the impact of any proposal assuming the following scenario:

- A prospective large new electricity customer desires to locate and construct a new facility in Oregon to be powered by carbon-free energy.
- Such customer intends to have redundant back-up power supplies in place.
- Such customer is willing to include in its facilities the systems necessary to allow for remote shut off of system power in the event of curtailment, and has already accounted for such facilities in its engineering designs.
- Such customer would prefer to contract for capacity pursuant to the Direct Access program, and has no interest in purchasing power from the utility..
- Such customer understands that it (or its ESS supplier) will be responsible for payment of any non-bypassable surcharges imposed on service to such customer.
- Such customer must make an investment decision, including whether it will be eligible for the Direct Access program, no later than January 1, 2024 (if not before).

NIPPC submits that there are no material concerns or issues of fact that need to be resolved in order to adopt the proposed rulemaking and provide policy guidance necessary to expand the Direct Access Program for customers such as this illustrative one without further delay.

Respectfully submitted this 25th day of April, 2023.



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ATTACHMENT 1  
NIPPC PROPOSED SPECIFIC CHANGES TO NOPR REGULATORY LANGUAGE

1. Modify the proposed language for Section 860-038-0290(7) as follows:

(7) The Commission ~~will~~ may 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.

2. Modify the proposed language for Section 860-038-0290(15)(b) as follows:

(b) The consumer remains on default supply for longer than the time period reasonably necessary to select an ESS and return to direct access service. This time period will be determined by the Commission based on the period prior to which an electric company would not reasonably be expected to incur costs that would otherwise be stranded as a result of the customer's return from default supply to direct access. This time period may be waived by application of the direct access customer if the customer demonstrates that return from default supply to direct access will not leave additional stranded costs not otherwise absorbed by load or customer growth of the electric company.

3. Modify Section 860-038-0005(25) by deleting the final sentence, which is a substantive obligation covered elsewhere and not appropriate for a definition:

(25) "Preferential Curtailment" refers to the electric company's obligation to curtail eligible direct access consumers that return to the electric company service without providing the electric company with the full period of notice required by the electric company's direct access program tariff. ~~The electric company must curtail such consumers when necessary to protect cost-of-service customers from the impacts of the returning consumer's unplanned load.~~

4. Delete the proposed definition of Uneconomic Cost of Implementing a Public Policy Goal in proposed section 860-038-0005(43) and modify proposed section OAR 860-038-0170(1)(b) as follows:

~~860-038-0005(43) (43) "Uneconomic Cost of Implementing a Public Policy Goal" means the difference between the cost of implementing the public policy goal and the regulated costs that are avoided as a result of implementing the public policy goal.~~

OAR 860-038-0170(1)(b) whether it is a an uneconomic cost ~~of implementing a public policy goal such as those~~ identified in ORS 469A.465 or similar public policy goals related to reliability, equity, decarbonization, resiliency or other public interest for which retail consumers served by electricity service suppliers otherwise would not meaningfully contribute;

5. Modify proposed Section OAR 860-038-0405(3)(c) as follows:

(c) A load forecast for each of the following three consecutive years, ~~aggregate for all Oregon~~ aggregated across the ESS's Direct Access customers.

6. NIPPC also supports and adopts the following recommendations made by BRTM, including the proposed changes to Section AOR 860-038-0179 that were previously at the October 4, 2022 meeting:

(a) whether ~~it~~the charge proposed to be non-bypassable is required by statute

(b) whether ~~it~~the charge proposed to be non-bypassable is ~~a~~ an uneconomic cost ~~of implementing a public policy goal such as those~~ identified in ORS 469A.465 or similar public policy goals related to reliability, equity, decarbonization, resiliency or other public interest for which retail consumers served by electricity service suppliers otherwise would not meaningfully contribute.

(c) whether or not ~~it~~the utility action associated with the charge proposed to be non-bypassable confers a demonstrable electric system benefit on some customers over others

(d) whether ~~it~~designating the charge as non-bypassable is in the public interest

(e) whether ~~it~~the charge is necessary to be non-bypassable under the Commission's discretion in order to establish fair, just, and reasonable rates.