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October 26, 2018

Via Electronic Filing

Public Utility Commission of Oregon
Attn: Filing Center
201 High St. SE, Suite 100
Salem OR 97301

Re: In the Matter of PORTLAND GENERAL ELECTRIC CO.
2018 Request for a General Rate Revision
Docket No. UE 335

Dear Filing Center:

Please find enclosed the Alliance of Western Energy Consumers' Reply Brief on Direct Access Issues in the above-referenced docket.

Thank you for your assistance. If you have any questions, please do not hesitate to call.

Sincerely,

/s/ Jesse O. Gorsuch
Jesse O. Gorsuch

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 335

In the Matter of)
)
 PORTLAND GENERAL ELECTRIC) REPLY BRIEF OF THE ALLIANCE OF
 COMPANY) WESTERN ENERGY CONSUMERS
) ON DIRECT ACCESS ISSUES
)
 Request for a General Rate Revision.)
)

I. INTRODUCTION

Pursuant to the Administrative Law Judge’s August 14, 2018 Ruling, the Alliance of Western Energy Consumers (“AWEC”) files this reply brief in support of its objection to the partial stipulation resolving direct access issues (“Partial Stipulation”).

AWEC’s objection to the Partial Stipulation is to its retention of the 300 aMW hard cap (“Participation Cap”) on Portland General Electric Company’s (“PGE” or “Company”) long-term opt-out program. AWEC has objected on legal grounds. It argues that the Participation Cap excludes two customer accounts without any basis for treating these two eligible accounts differently from all other eligible accounts and, consequently, unduly prejudices the customer to which these accounts belong, in violation of ORS 757.325. It also argues that the only basis for the Participation Cap – that it limits unwarranted cost-shifting – is unsupported by the evidence and, therefore, the Commission has a duty to eliminate it consistent with its obligations in ORS 757.646(1) to “eliminate barriers to the development of a competitive retail market” and to “mitigate the vertical and horizontal market power of incumbent electric companies.”

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Neither PGE nor any other party even mentions the laws AWEC argues the Partial Stipulation violates, let alone rebuts AWEC's legal position. Instead, PGE – the only party that even attempted to rebut AWEC's positions – relies primarily on policy arguments that are not only irrelevant to the legal issues AWEC raises but, if accepted, would themselves justify the Commission rejecting the Partial Stipulation as they allege that the very program the Partial Stipulation would perpetuate causes unlawful cost-shifting. As a consequence, the Company's arguments rest on legally infirm grounds and have largely already been addressed in AWEC's Objections and Opening Brief.

II. ARGUMENT

A. PGE has failed to provide a legal justification for the Participation Cap's exclusion of otherwise eligible accounts.

In response to AWEC's objection to the Partial Stipulation's retention of the Participation Cap, PGE makes the following arguments in its Opening Brief: (1) the long-term opt-out program is within PGE's discretion to offer and the Participation Cap is a reasonable limit on this discretionary program; (2) the Participation Cap is not discriminatory because, like all caps, room to participate under it will eventually run out and this will affect the largest customers first; (3) the one customer who has accounts larger than the remaining room under the Participation Cap can participate with other, smaller, accounts and could have participated with its larger accounts in previous opt-out windows when there was more room; and (4) the Participation Cap is necessary to protect customers from undue cost-shifting.

1. Whether the long-term opt-out program is discretionary or not is irrelevant

PGE states that its "long-term opt out program is not necessary to meet any particular requirement of the Commission's rules" and, therefore, "it is well within the

Commission’s authority to set limits in the form of a participation cap to limit cost shifting.”^{1/} AWEC does not necessarily agree that the long-term opt-out program is discretionary given the Commission’s statutory mandate “to eliminate barriers to the development of a competitive retail market structure” and to “mitigate the vertical and horizontal market power of incumbent electric companies”^{2/} PGE’s long-term opt-out program is the only direct access program that has furthered these statutory requirements.^{3/} Furthermore, the long-term opt-out program is a tariffed offering and, therefore, PGE *is* required to offer this program so long as the relevant tariffs remain in place. And, were PGE to file to rescind these tariffs, such a filing would likely violate prior Commission orders. In Order 12-500, for instance, the Commission required PacifiCorp to file tariffs implementing a five-year permanent opt-out program because it found “no basis to maintain this difference in the [direct access] programs of the two utilities.”^{4/} Now that PacifiCorp has a five-year opt-out program, PGE would create a difference between the two utilities’ programs by rescinding its program.

Regardless, though, the Commission’s discrimination statutes are not limited to mandatory offerings. They prohibit undue preferences and prejudices “in any respect.”^{5/} Thus, even if PGE’s long-term opt-out program is discretionary, that does not mean that the Commission has the discretion to make it discriminatory. “[A]n administrative body possesses only those powers the legislature grants, and [] it cannot exercise authority that it does not

^{1/} PGE Opening Brief at 9-10.

^{2/} ORS 757.646(1).

^{3/} AWEC/200 at 45:2-4.

^{4/} Docket No. UM 1587, Order No. 12-500 at 9 (Dec. 30, 2012). In this order, the Commission also authorized PacifiCorp to “tailor its program to fit its circumstances” and ultimately adopted a transition adjustment period with ten years’ worth of transition charges based on the record in that case.

^{5/} ORS 757.325(1).

possess.”^{6/} The Legislature has prohibited the Commission from authorizing unduly prejudicial treatment “in any respect.” The discretionary nature of a utility offering is irrelevant to whether it is unlawfully discriminatory.

2. That room under the Participation Cap decreases over time does not mean it is not discriminatory.

PGE next argues that the Participation Cap is not discriminatory because its very purpose is to establish an outer bound on participation in the long-term opt-out program and, by definition, this means that the largest accounts will be excluded from the program first.^{7/} “[A]ny cap would be discriminatory,” PGE argues, if the Commission accepts AWEC’s position.^{8/}

PGE is incorrect. It is not the case that any program cap is necessarily discriminatory. As AWEC noted in its Opening Brief, the original cap on the long-term opt-out program was large enough to allow all eligible customers to participate, thus making discriminatory treatment impossible.^{9/} Furthermore, there may be perfectly legitimate reasons for establishing a hard cap on participation in a program that ultimately means some customers will not be able to participate. But those reasons need to be articulated and supported by evidence to demonstrate that, while such a cap may prejudice customers that cannot participate, it does not “unduly” prejudice those customers in violation of the law.^{10/} The rationale for limiting the long-term opt-out program to 300 aMWs has never been articulated or justified – not when the program was being discussed in workgroups with interested stakeholders;^{11/} not when

^{6/} Coquille School Dist. v. Castillo, 212 Or. App. 596, 607 (2007).

^{7/} PGE Opening Brief at 10.

^{8/} Id.

^{9/} AWEC Opening Brief at 8.

^{10/} ORS 757.325(1).

^{11/} AWEC/503.

it was first implemented;^{12/} not in the record of this case; not *ever*. It is the utter lack of evidence supporting the exclusion of certain otherwise eligible customers from the opt-out program that renders it “unduly” prejudicial to these customers.

3. Eligibility for the opt-out program applies at the account level.

Next, PGE argues that it is “significant that the single customer [that the Participation Cap excludes from the opt-out program] is not precluded from going to direct access” because that customer has smaller accounts that do fit under the program limit.^{13/} Actually, this is *insignificant* and beside the point. Eligibility for the long-term opt-out program is determined at the account level, not the customer level. Each “Service Point” “must have a Facility Capacity of at least 250 kW.”^{14/} There are only two accounts (or “Service Points”) that meet this criterion (as well as the other minimum criteria for eligibility) but are nevertheless prevented from transitioning to the long-term opt-out program by the Participation Cap. Again, neither PGE nor any other party has provided any evidence that would justify singling out these accounts.

4. Whether the Participation Cap “limits” cost-shifting is irrelevant to whether it is discriminatory.

Finally, PGE argues that “[t]he very purpose of the cap is to limit the amount of load that can leave cost of service – a head nod to the prevention of undue cost shifting That is not discriminatory, but the cap doing just what it was intended to do.”^{15/} There “is real harm to customers without a reasonable cap,” the Company continues. “If large blocks of load could

^{12/} AWEC/504.

^{13/} PGE Opening Brief at 10.

^{14/} PGE Schedules 485, 489, 490.

^{15/} PGE Opening Brief at 10.

leave, that would leave large blocks of resources behind. Existing customers must be protected from undue cost shifting.”^{16/} AWEC has already addressed this argument. As AWEC noted in its Opening Brief, this position is a non sequitur. It has nothing to do with whether the Participation Cap is discriminatory or not. PGE’s position is that, despite it joining a settlement maintaining the parameters of the current opt-out program, this program unlawfully shifts costs to non-participating customers and the Participation Cap limits the amount of unwarranted cost-shifting that can occur. But for the Participation Cap to be non-discriminatory, PGE would need to show that unwarranted cost-shifting would *only* occur if *only* the customers that exceed the Participation Cap in the Partial Stipulation opted out. Neither PGE nor any other party has ever maintained that position.

PGE’s reliance on the Commission’s order in AR 614 establishing a New Load Direct Access (“NLDA”) program is also misplaced. The Company cites a policy statement by the Commission in adopting a cap on the NLDA program that “cost-of-service customers are increasingly relied upon to finance system improvements that impose near-term costs to adapt the system to new utility and customer-sited technology intended to lead to long-term economic and environmental benefits for all customers.”^{17/} Like PGE’s other arguments, the Commission’s statement PGE quotes in AR 614 is not relevant to the legal issues here. Even if this statement were applicable to the long-term opt-out program, why would it justify excluding only two accounts from this program? There is nothing to support this discriminatory behavior.

Furthermore, AR 614 was a rulemaking docket. In contrast to a contested case

^{16/} [Id.](#) at 11.

^{17/} [Id.](#) at 12 (citing Order No. 18-341 at 7-8 (Sept. 14, 2018)).

like this one, the Commission was not constrained to base its decision for the rules it adopted exclusively on the evidence in that docket.^{18/} There is no evidence in this docket to support a finding similar to the one the Commission made in establishing the NLDA program cap in AR 614. Indeed, there is reason to conclude the opposite. To the extent, for instance, that “system improvements” are made to the transmission and distribution system, direct access customers will pay their fair share for those. Further, as RPS requirements increase, greater direct access participation is likely to reduce compliance costs for cost-of-service customers. Rather than placing a requirement on PGE and its cost-of-service customers to meet up to 50% of a particular customer’s load with renewable resources, by going to direct access that customer will take on that burden itself and relieve cost-of-service customers from this cost and obligation.^{19/}

Another crucial difference between the NLDA cap and the Participation Cap in the Partial Settlement is that the Commission allowed customers to request a waiver of the NLDA cap if such a customer could show that the concerns the Commission articulated in creating the cap were not warranted with respect to that customer.^{20/} By contrast, the Participation Cap in the Partial Stipulation is a hard cap – no customer larger than the remaining room under the cap can participate for any reason. To be non-discriminatory, the Commission must articulate some “reasonable consideration” for why these customers should be categorically excluded from the long-term opt-out program.^{21/} The record in this case gives the Commission nothing to rely on for such a finding.

^{18/} Compare ORS 183.400(3) with ORS 183.482(8).

^{19/} AWEC also wishes to point out the apparent inconsistency with PGE’s position here, as it is currently in the process of seeking to acquire new RPS resources not because they are needed, but solely on the basis that cost-of-service customers will save money over the long-term. Docket UM 1934.

^{20/} Docket AR 614, Order No. 18-341 at 7-8.

^{21/} ORS 757.230.

Even allowing customers to request a waiver of the Participation Cap, as in the NLDA program, would likely be unduly prejudicial to the customers obligated to seek such a waiver since it imposes this obligation on them (along with the attendant Commission process) while customers smaller than the cap may simply leave as a matter of course. Without a reason for having a cap in the first place (and more precisely a reason for setting the cap at 300 aMW as opposed to some other level), requiring customers larger than the cap to undertake a separate process and inquiry from all other customers is baseless and unduly prejudices them.^{22/}

B. CUB's concerns are not with PGE's long-term opt-out program but with the Company's resource planning process.

CUB is the other party to object to the Partial Stipulation. CUB objects on the basis that the Partial Stipulation maintains a five-year transition period rather than imposing the ten-year period for which PGE originally advocated.^{23/} In response to parties' arguments that CUB did not present any evidence to support its position, CUB responds that it showed "that PGE's residential load is declining due to energy efficiency" and that "the primary source of load growth in PGE's system is anticipated to be in the industrial class."^{24/} This is important, CUB asserts, because PGE will acquire new resources to serve this growing industrial load, but these same industrial customers "will undoubtedly continue to leave PGE's system to test the direct access market."^{25/}

^{22/} A separate process to waive the cap also would likely prove administratively burdensome, especially as room under the cap continues to diminish and greater numbers of customers will need to seek waivers to participate in the long-term opt-out program.

^{23/} AWEC notes that, while CUB lacks the evidence to support its argument, it is at least taking a legally consistent position. AWEC continues not to understand how PGE could argue that a five-year transition period causes unwarranted (and therefore unlawful) cost-shifting and then turn around and join a stipulation that maintains this very transition period.

^{24/} CUB Opening Brief at 4-5.

^{25/} Id. at 7.

Taking CUB’s argument at face value, its dispute is not with industrial customers and direct access, it is with PGE’s resource planning process. As AWEC noted in its Objections, PGE has repeatedly forecast load growth in its integrated resource plans (“IRP”) even though its load has gone in the opposite direction (primarily because of energy efficiency, not direct access).^{26/} The Company cannot have it both ways: reap the financial benefits of building “almost two gigawatts of generation”^{27/} that were justified through an IRP process that assumed continuous load growth and then insulate itself from competition with lower cost providers by complaining that these resources are being stranded because this load growth did not materialize. It is not clear to AWEC why any customer – including industrial cost-of-service, direct access, and residential – should be penalized because of the Company’s own poor planning.

If CUB’s apparent implication is correct – that PGE will lose all of the industrial load growth its IRP projects to direct access – then residential customers would be materially better off if PGE would simply stop forecasting load growth that has not materialized. Conversely, effectively eliminating the long-term opt-out program by imposing a ten-year transition charge is not in residential customers’ (or any other cost-of-service customer’s) best interest because, as AWEC showed in its Opening Brief and in AWEC/500, cost-shifting is not dependent on the presence or absence of load growth;^{28/} it is dependent on PGE’s ability to achieve a load/resource balance, neither of which are “monotonic.”^{29/} The credible evidence in the record of this case is that cost-of-service customers benefit from the long-term opt-out

^{26/} AWEC Objections at 8-9.

^{27/} PGE/2500 at 5:14-15.

^{28/} AWEC Opening Brief at 11; AWEC/500 at 4-13.

^{29/} CUB Opening Brief at 6.

program.^{30/}

CUB also appears to take an inconsistent position by arguing on the one hand that new resources will be built to serve growing industrial loads that will transition to direct access and claiming on the other hand that “industrial load [will] continue[] to expand” in years 6-10 of a ten-year transition period.^{31/} CUB does not reconcile these positions and offers no evidence that connects cost-shifting from the long-term opt-out program (or lack thereof) to industrial load growth in this 6-10 year period.

III. CONCLUSION

For the foregoing reasons, AWEC continues to request that the Commission modify the Partial Stipulation to either eliminate the Participation Cap or increase it to 550 aMWs so that all eligible customers can participate.

Dated this 26th day of October, 2018.

Respectfully submitted,

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^{30/} AWEC/200 at 46:12-48:21; Staff/800 at 41:19-42:6; Calpine Solutions/100 at 15:15-19:8; AWEC/500 at 4-13; Calpine Solutions/200 at 4:4-6:15.

^{31/} CUB Opening Brief at 7.