August 30, 2018

Via Email

Chair Megan Decker
Commissioner Steve Bloom
Commissioner Letha Tawney
Public Utility Commission of Oregon
201 High Street SE, Suite 100
Salem, Oregon 97301

RE: Senate Bill 978 Comments

Dear Commissioners:

The Northwest and Intermountain Power Producers Coalition ("NIPPC"), the Renewable Energy Coalition ("Coalition"), and the Community Renewable Energy Association ("CREA," and collectively with NIPPC and the Coalition, the "joint commenters") submit these comments in response to the Oregon Public Utility Commission (the "Commission" or "OPUC") draft Senate Bill ("SB") 978 report ("Draft Report") to the Legislature. The joint commenters were pleased with the Commission's SB 978 process overall but are disappointed by the conclusions in the Commission's Draft Report. In sum, the Draft Report does not go far enough in re-envisioning the regulatory system; it should recognize that the Commission can do more to create a more competitive market in Oregon, establish a settled and uniform institutional climate for Oregon qualifying facilities ("QFs") under the Public Utility Regulatory Policy Act of 1978 ("PURPA"), and benefit community-based renewable energy projects.

The following comments identify key areas where the Commission has demurred to offer leadership in the rapidly changing power sector. First, the Commission downplayed central aspects of its current mission, particularly its role in implementing SB 1149's mandate for competition and retail choice. Second, the Commission bypassed the opportunity offered it to re-envision the regulatory compact and its own role in responding to industry trends, such as dramatic declines in the cost of renewable energy, which were thoroughly explained in the SB 978 process. And finally, the Draft Report reflects Commission's unduly narrow and constrained view of its enabling statutes and extant legal authority. The bottomline result is that the Commission failed to seize the unique opportunity offered by SB 978 to convey a vision of a comprehensive, forward thinking energy policy.

The Commission's Draft Report focuses on four areas and suggests modest action on three. With its Draft Report to the Legislature, the Commission commits to design performance-based ratemaking, and work with the Legislature to improve under represented constituencies' participation in its proceedings and increase the Commission's role in addressing climate change. It also promises to work with other states to develop an organized regional market, which is curious given that the Commission has led this effort among neighboring states for 20 years.

Notably, the Commission made no commitments to enhance customer choice. It justifies its posture by citing a "lack of consensus" among SB 978 stakeholders. This passivity condones the utilities resistance to any erosion of their monopsony control in the SB 978 deliberations. This failure to seriously consider real changes to the utility business model and associated regulatory compact leaves a gapping hole in the SB 978 process and is a disappointment to those who hoped to see creative responses from the Commission.

The Draft Report conflates different aspects of customer choice. It confuses options provided by utilities as opposed to independent power producers, and robust retail access as opposed to limited, conservative options provided by SB 1149.[1] And then in adding insult to injury, concludes that restructuring is too complicated.[2] The Commission did not provide any rational basis for *not* investigating enhancements to choice or, at the very least, meaningfully implement SB 1149.

Unfortunately, the Commission ignored the opportunity presented by SB 978 to meaningfully engage on any of the customer choice topics raised during the public process including those raised by its own consultants. In the end, except for modest considerations related to equity, social justice and climate change, the Draft Report embraces a "stand pat" energy policy. The result: findings which resist rather than promote innovation and customer choice thereby forestalling improved resilience, deep decarbonization, and the promise of lower power costs.

The joint commenters hoped the Commission would use the SB 978 process to identify what regulated monopolies can *uniquely* do.[3] The Commission's Draft Report

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1 The joint commenters note that no stakeholder recommended full retail choice, inclusive of residential customers, while most non-utility stakeholders expressed support for the more modest goals for SB 1149: full choice for larger commercial and industrial customers.

2 Draft Report at 20 ("we did observe two themes that lead us not to recommend further exploration of this direction at this time. The first is that the state does not have an organized market, which would provide a critical backbone for increased competition. The second is that outcomes on cost, reliability, and customer choices from restructured markets are mixed.").

3 NIPPC's Comments at 2 (July 10, 2018) ("the guiding principle of regulatory innovation should address the question: what can regulated monopolies uniquely do?").

fails to even ask the question; it does not capture what most participants openly acknowledged—that generation is no longer a natural monopoly. This is a conclusion the Legislature reached in enacting SB 1149. The preamble of that landmark legislation, which remains in place, expressly found that "the divestiture or functional separation of electrical power generation from the distribution functions is the most effective means of stimulating competition, providing depth and liquidity to the wholesale market and facilitation of the transition to a fully competitive market by alleviating horizontal and vertical monopoly market power and providing a more accurate estimation and mitigation of stranded costs."[4] The Commission's website explains that restructuring was "designed to give consumers more options while at the same time encouraging the development of a competitive energy market."[5]

The Commission is silent on this unfulfilled mandate. Nearly two decades after SB 1149, the Commission's Draft Report suggests with chicken and egg logic that the development of a competitive market is a pre-condition for the Commission to allow for increased competition.[6] It is erroneous for the Commission to link its delaying the infusion of competition into Oregon's power sector to the long-awaited adoption of the "backbone" of an integrated power market. The Commission's predictable preference for command and control may do itself service but is in stark contrast to restructured states where independent power producers, electricity service suppliers and other entrepreneurs provide low cost, low-carbon and innovative products to consumers.

The Draft Report professes to "identify evolving regulatory tools that the Commission can use to meet the objectives the Legislature sets for us" and "areas where legislative action may be required for the Commission to incorporate new objectives into our regulatory authority."[7] Yet, the Commission spends only a single paragraph addressing the right provided to commercial and industrial customers in SB 1149 without recognizing its own failure to establish accurate and defensible exit fees.[8] Rather than ignore the topic, the Commission should explain to the Legislature why direct access under SB 1149 has never taken hold in Oregon even as its promise for spurring economic activity is smothered. In direct contradiction to the testimony of large energy users, cities, rural development advocates, independent power producers, and others, the Draft Report blithely finds that "[i]t is unclear whether customers have an overall preference for utility or non-utility providers."[9]

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4 SB 1149 (1999), *available at* https://www.oregonlegislature.gov/bills_laws/lawsstatutes/1999orLaw0865.html.

5 OPUC, Restructuring Law SB 1149, *available at* https://www.puc.state.or.us/Pages/electric_restruc/consumer/summary.aspx.

6 Draft Report at 2, 7, 14 and 20 ("the state does not have an organized market which would provide a critical backbone for increased competition").

7 Id. at 3.

8 Id. at 6.

9 Id. at 14.

The joint commenters also recommend the Commission do more to protect the integrity of Federally-mandated PURPA QFs, which bring competitive resources to the IOUs. The Commission's distaste for implementing PURPA is palatable even as QFs tap into and deliver the benefits of rapidly declining renewable technology at prices below what utilities would need to collect from ratepayers to deploy the same capacity.

The Legislature unequivocally determined Oregon policy must increase the marketability of QF power and create a settled and uniform institutional climate for Oregon QFs.[10] Here too the Commission has failed. No one would describe the trench warfare utilities wage against QFs as a settled institutional climate where the OPUC encourages the marketability of these small independent power projects. This policy failure could have been identified in the SB 978 process. The Draft Report limply confirms the obvious: "customers benefit when utilities can avoid new generation expenses by purchasing from the market instead of building a generation resource."[11] But the sentiment is window dressing since there is scant evidence of the Commission defending PURPA developers from the sustained onslaught of utility opposition and insidious efforts against competitors, which sadly are funded by ratepayers. The Commission's Draft Report does acknowledge "serious frustrations" with its PURPA policy and seems to be satisfied with a promise to engage in an upcoming investigation into QF pricing,[12] in other words, more of the same.

Overall, the Draft Report conveys a jaundiced view of competition in electricity policy despite its demonstrable benefits. On one hand, the Commission recognizes that the cost of market power is lower than what the utilities can offer, but blames this on higher utility fixed costs and collective policy requirements. Predictably, given the Commission's history with implementing direct access, the Draft Report reserves its passion for enunciating the threat commercial and industrial consumers who leave cost of service pose to those unable to depart their utility.[13] Meanwhile, the Draft Report recognizes the value of avoided cost as a cost depression, "benchmark price," a dynamic driven by independent power producers that benefits everyone except utility shareholders.[14] An abiding theme in the Draft Report is the twisted formulation that while market competitors lower energy costs, pressuring utilities is a threat. After congratulating itself on its competitive procurement rules, which have overwhelmingly favored utility self-builds, the Commission fails to seriously consider putting competition to work for Oregon power consumers as SB 1149 and other more recent legislative directives would have it do.

The Draft Report's casual dismissal of community choice aggregation ("CCA") reflects the Commission's preference for the status quo. CCAs are the leading edge of

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10 NIPPC's Comments at 5 (citing ORS 785.515).
11 Draft Report at 10.
12 Id. at 11, 20.
13 Id. at 12-13.
14 Id. at 11.

progressive change in the power sector, a movement that would likely appeal to many Oregon jurisdictions. But the preoccupation with how to manage the stranded costs of obsolete utility investments overrides any creative response from the Commission. The transition cost of communities leaving full cost of service and assuming greater responsibility over their power supply is manageable as the California Public Utilities Commission is now demonstrating. The obligation to herd Oregon's share of white elephants be it Trojan, Centralia, Boardman or Colstrip is a task to be sure but it should not be the all-encompassing preoccupation that it is.

Finally, NIPPC recommended the Commission expand its mission statement and/or regulatory powers to earnestly spur competition in resource acquisition, promote innovation, and implement direct access.[15] Notably, the Commission merely treats competition as if it were an unknown. The Draft Report promises that the Commission will "actively [s]eek to improve regulatory tools to value the system costs and benefits of customers and competitive resources … and encourage utilities to integrate service relationships with innovative third parties."[16] With utilities rewarded for building and owning assets, the Commission's commitment to "encourage" the IOUs to collaborate with their competitors is nothing more than a transparently empty promise.

The Commission listened to the stakeholders during the SB 978 process, but missed the opportunity to genuinely participate in conversation.

For example, the Commission determined "[p]articipants in the SB 978 process made clear that reducing greenhouse gas emissions is a societal goal that should be integrated into legal requirements on the utilities and a role for the PUC. However, currently Oregon lacks legislative mandates to reduce greenhouse gas emissions."[17]

Commission action generally and the Draft Report in particular rely heavily upon a 1992 Department of Justice ("DOJ") memorandum, but notably this document was not explicitly shared during the SB 978 process. The memorandum is antiquated, unnecessarily restrictive, and should not be treated as sacrosanct. In contrast, NIPPC and other stakeholders pointed out that the Commission already has the legal authority to address climate change, but has declined to do so. The Commission also missed the opportunity to reconsider what "safe and reliable" electricity service at "just and reasonable rates" means in the modern context, or what it could mean in the future. The joint commenters hoped the Commission would think big and be bold, but it has chosen to cling to exceedingly restrictive views of its authority.

The Commission's opaqueness falls away when it addresses issues of particular concern to advocates of competition. For example, the Commission notes "significant controversy about whether utility access to transmission supported by customer rates gives utility projects an unfair competitive advantage and limits options for customer

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15 NIPPC's Comments at 9.
16 Draft Report at 2.
17 Id. at 9.

access to a broad pool of diverse resources."[18] But, the Commission does not acknowledge that it has repeatedly declined to delve deeply into this important issue or hold the utilities accountable in how they leverage ratepayer-financed transmission assets to their advantage in so called competitive solicitations. In a sort of confession, the Draft Report cites problems with the utilities' preparations of their integrated resources plans and asymmetry of knowledge between the utilities and those charged with regulating them, i.e., the Commission.

The joint commenters appreciate this opportunity to submit written comments responding to the Commission's Draft Report. Unfortunately, after superbly managing the SB 978 stakeholder process itself, the Commission has failed to capture many of the stakeholders' positions. It has also effectively ignored its consultants' observations ducking every opportunity to face up to the transformative changes enveloping the power sector. Moreover, the Draft Report fails to account for the Commission's own shortcomings in managing legislative directives.

One area of agreement between the joint commenters and the Commission worth noting is that further Legislative action will be needed to address failures in the regulatory model; failures which add costs to consumer bills, fail to advance economic development and inhibiting the addition of cost-effective renewable resources to the grid beyond that mandated by the Legislature.

Sincerely,

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Executive Director	Executive Director	Managing Director
Northwest and Intermountain	Renewable Energy	Community Renewable
Power Producers Coalition	Coalition	Energy Assoiciation

cc: Jason Eisdorfer
Julie Peacock

[18] Id. at 14.