

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

DR 40

In the Matter of

HONEYWELL INTERNATIONAL, INC.
and HONEYWELL GLOBAL FINANCE
LLC and PacifiCorp, dba PACIFIC
POWER

**REPLY BRIEF OF RENEWABLE
NORTHWEST PROJECT, BACGEN
SOLAR GROUP, THE CITIZENS'
UTILITY BOARD OF OREGON,
ENVIRONMENT OREGON,
NATURAL RESOURCES DEFENSE
COUNCIL, GERDING EDLEN
SUSTAINABLE SOLUTIONS,
OREGON SOLAR ENERGY
INDUSTRIES ASSOCIATION,
COMMERCIAL SOLAR
VENTURES AND SUNENERGY
POWER CORPORATION**

This Reply Brief is filed on behalf of the Renewable Northwest Project, BacGen Solar Group, the Citizens' Utility Board of Oregon, Environment Oregon, the Natural Resources Defense Council ("NRDC"), Gerding Edlen Sustainable Solutions, the Oregon Solar Energy Industries Association ("OSEIA"), Commercial Solar Ventures and SunEnergy Power Corporation.

The parties filing opening briefs reflect a broad range of public utilities, solar industry businesses and various trade association groups, environmental groups, consumer advocates, and governmental agencies, including the Commission staff. Remarkably, the parties reached almost complete consensus on every important issue in this proceeding. A cloud, however, hangs over the resolution of one critical issue—whether Honeywell is an ESS subject to regulation under the direct access statutes and regulations. The vast majority of the parties concluded that, under the Assumed Facts, Honeywell is not an ESS. Nevertheless, this conclusion was not universally endorsed; Staff in particular tentatively reached the opposite conclusion. Because the issue is so important, we devote the entire reply brief to it.

We acknowledge that this issue is difficult and the answer is not immediately self-evident based on the text of the statutes. The Legislature could have expressed itself better and removed any doubt. However, the uncertainty reflects the specialized nature of issues addressed and the inherent malleability of the English language, not the Legislature's intent. No one can seriously contend that it was the Legislature's intent to make solar businesses like Honeywell subject to the same regulations that govern ESSs that use a completely different business model and offer an entirely different type of service.

The opening briefs offer excellent analyses of the statutes, showing how under the Assumed Facts and the applicable definitions, Honeywell is not an ESS. *See* Opening Brfs of Honeywell at 19-29, PGE at 7-8, and RNP et al at 7-9. In this Reply Brief, we offer another perspective on the direct access provisions, reaching the same conclusion: that Honeywell is not an ESS.

Consider an electric utility in Oregon under Commission regulation in 2002. The 1999 Legislature enacted SB 1149 requiring all non-residential customers be allowed direct access by March 1, 2002. ORS 757.601. Assume that a utility was to propose a tariff under which any of its customers could apply for net metering through a third party on-site generator. The customer could acquire part or all of its energy needs from the third party generator, in the same manner as the Assumed Facts. Any excess on-site generation at the customer's location could flow back onto the grid and be used as an offset against the customer's consumption of electricity from the utility, just as under the Assumed Facts. On an annual basis, any excess generation would be credited to the utility's low-income assistance program. *See* Assumed Facts. Now assume that the utility argued to the Commission that it had thereby discharged its obligation to offer direct access by March 1, 2002. What would the Commission have determined?

We think the Commission's response would have been clear: the utility has failed to offer direct access. If that is true, then the answer must be the same under the Assumed Facts. The service Honeywell offers is not direct access and, as such, Honeywell is not an ESS because it does not offer electricity services pursuant to direct access. ORS 757.600(16).

The context of the statutes reveals two common sense reasons for this conclusion. First, as a number of parties observed, an ESS offering service pursuant to direct access uses the distribution facilities of the utility. Many of the definitions and statutes describing direct access service underscore the importance of the distribution system of the utility to an ESS. *See* ORS 757.600(6), (9), (29), and 757.632; PGE Opening Brf. at 8. However, a net metering facility provides electricity to the customer directly using on-site generation. As we noted in our opening brief, electrons flow in exactly the opposite direction than a direct access service. RNP Opening Brf. at 9.

Second, the statutory provisions and regulation that apply to ESSs make no sense for a net metering facility. For example, ORS 757.609(2) requires ESSs (along with the electric utility) to post each year in the fall estimated electricity prices for the upcoming calendar year. This requirement makes sense for ESSs that offer competing energy service options with the electric utility so customers may make a meaningful comparison. It makes no sense for a net metering facility, which serves to offset all or a part of the customer's load. Similarly, ORS 757.607(2) permits the application of "transition charges or credits" for direct access service when such terms make no sense for the service Honeywell offers. ORS 757.632 provides ESS with access on a non-discriminatory basis to the electric utility's distribution facilities. As noted earlier, ESSs need such access to deliver their service; net metering facilities require no access. Finally, a 3% public purpose charge applies to ESSs (ORS 757.612(2)), which makes no sense as a required charge for net metering projects.

Making Honeywell subject to the 3% public purpose charge would have a perverse effect, namely erecting barriers to the development of renewable energy projects—the very same projects the public purpose charge was designed to foster and encourage. The Commission’s ESS regulations similarly make no sense when applied to net metering facilities. *See* RNP et al Opening Brf. at 9. This complete disconnect between ESS regulations and net metering suggests to us that the Legislature never intended that Honeywell and other third party owners of net metering facilities be deemed ESSs.

That is how we conclude, based on the context of the statutes, that Honeywell is not an ESS. How does the language of the statute support this analysis? As noted above, the text of the statutes could be clearer but, with the above context in mind, we think the language of the statute is consistent with our conclusion. Honeywell does not offer "electricity services available pursuant to direct access to more than one retail electricity consumer" because Honeywell does not offer direct access. The phrase used in ORS 757.600(16) "pursuant to direct access" is restrictive in nature and provides an essential component of the definition. Honeywell and others similarly situated do not qualify because they do not offer to sell electricity pursuant to direct access, which is defined as "the ability of a retail electricity consumer to purchase electricity and certain ancillary services, as determined by the commission for an electric company or the governing body of a consumer-owned utility, directly from an entity other than the distribution utility" (emphasis added). ORS 757.600(6). The word "and" should be afforded its normal meaning of the conjunction of two or more elements or requiring both elements. To offer direct access, a company, other than the distribution utility, must offer both electricity and ancillary services.

Here, under the Assumed Facts, Honeywell provides no ancillary services. The statute defines "ancillary services" in a manner completely inconsistent with the Assumed Facts. Ancillary services are those services "necessary or incidental to the

transmission and delivery of electricity from generating facilities to retail electricity consumers, including, but not limited to, scheduling, load shaping, reactive power, voltage control and energy balancing services." ORS 757.600(2). As an on-site generator of electricity, Honeywell provides none of these services that relate to the transmission and delivery of power using the utility's distribution grid. Accordingly, under the plain terms of the statute, Honeywell does not offer direct access, and because it does not offer direct access, it does not satisfy the definition of "electricity service supplier."

The Commission Staff tentatively reached a different conclusion for reasons we find unpersuasive. First, Staff claims Honeywell cannot avoid being an ESS by electing not to offer "ancillary services" because the Commission "may require an electric company to provide ancillary services" and "may decide which ancillary services a direct access consumer may purchase directly from electric service suppliers." *See* OAR 860-038-0340. We fail to see the relevance of the regulation Staff cites. This regulation is inapplicable given that the Commission has not, and should not, determine that ancillary services are required from either the electric utility or anyone else for net metering facilities. Moreover, the regulation does not authorize the Commission to require a particular provider itself to offer the ancillary service at issue. The provider may use another company to offer the ancillary services.

Second, Staff posits that either (1) the Assumed Facts are wrong and Honeywell provides ancillary services or (2) the Assumed Facts are true and "Honeywell is an ESS because it is selling electricity and its customers still have the ability to purchase all the ancillary services they need (in this case, no ancillary services are required because the customers are providing such services themselves)." Staff Opening Brf. at 9. We see no basis for assuming the Assumed Facts are wrong. The declaratory ruling statute expressly states that a Commission ruling is binding based on the "state of facts alleged."

ORS 756.450. The law provides no mechanism or basis for creating and resolving factual disputes.

Accordingly, we must assume that (2) applies, in which case Honeywell offers no ancillary services. In that case, Honeywell is not an ESS because it is not offering electricity pursuant to direct access. We are not sure what it means to say the customer “still has the ability to purchase all the ancillary services they need” in this context or the basis for that statement in the Assumed Facts. The Assumed Facts make no statement regarding ancillary services offered by other third parties or provided by the Honeywell customer. In any event, it is beside the point. To qualify as direct access, the electricity and ancillary services must be provided by “an entity” other than the distribution utility.” *See* ORS 757.600(6). The same entity must offer both electricity and ancillary service. Under the Assumed Facts, Honeywell offers only the first, but not the second, service. It therefore does not qualify as offering electricity service pursuant to direct access.

As we mentioned at the outset, we appreciate that this issue is difficult to resolve. It requires both consideration of the overall context and the text of the statutes. Nevertheless, we think the better authority and reasoning are on the side of finding that Honeywell is not an ESS. We are grateful for the Commission’s willingness to address these issues on an expedited basis. We respectfully request that the Commission resolve the issues in the manner set forth in our opening and reply briefs.

* * *

* * *


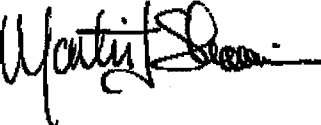
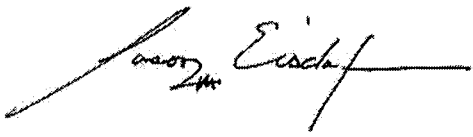
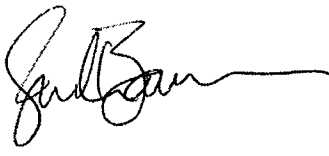
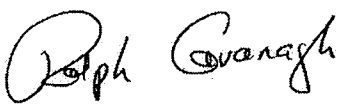


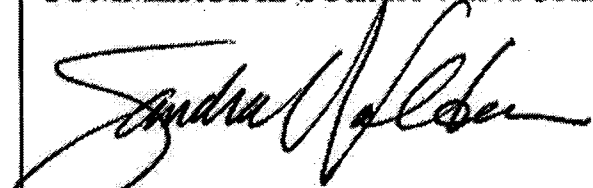
* * *

* * *

* * *

* * *

DATED this 11th day of July, 2008.

<p>RENEWABLE NORTHWEST PROJECT</p>  <p>David F. White</p>	<p>BACGEN SOLAR GROUP</p>  <p>Martin Shain</p>
<p>CITIZENS' UTILITY BOARD OF OREGON</p>  <p>Jason Eisendorfer</p>	<p>ENVIRONMENT OREGON</p>  <p>Jeremiah Baumann</p>
<p>NATURAL RESOURCES DEFENSE COUNCIL</p>  <p>Ralph Cavanagh</p>	<p>GERDING EDLEN SUSTAINABLE SOLUTIONS</p>  <p>Dennis Wilde</p>
<p>OREGON SOLAR ENERGY INDUSTRIES ASSOCIATION</p>  <p>John Patterson</p>	<p>COMMERCIAL SOLAR VENTURES</p>  <p>Sandra Walden</p>

For

SUNENERGY POWER
CORPORATION



Douglas J. Parsons

097204\00001\1050326 V001

CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **REPLY BRIEF OF RENEWABLE NORTHWEST PROJECT, BACGEN SOLAR GROUP, THE CITIZENS' UTILITY BOARD OF OREGON, ENVIRONMENT OREGON, NATURAL RESOURCES DEFENSE COUNCIL, GERDING EDLEN SUSTAINABLE SOLUTIONS, OREGON SOLAR ENERGY INDUSTRIES ASSOCIATION, COMMERCIAL SOLAR VENTURES AND SUNENERGY POWER CORPORATION** by e-mail and/or mailing a copy thereof, to each party that has not waived paper service, in a sealed, first-class postage prepaid envelope, addressed to each party listed below and depositing in the US mail at Portland, Oregon.

Waives Paper Service
Theodore C. Falk
Sr. Assistant Attorney General
State of Oregon
Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
theodore.c.falk@doj.state.or.us

Waives Paper Service
Bill Nessly
Sr. Assistant Attorney General
State of Oregon
Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
william.nessly@doj.state.or.us

J. Richard George
Assistant General Counsel
Portland General Electric Company
121 S. W. Salmon Street, 1WTC13
Portland, OR 97204
richard.george@pgn.com

Randall Dahlgren
Portland General Electric Company
121 SW Salmon, 1WTC 0702
Portland, OR 97204
pge@opuc.filings@pgn.com

Michelle R. Mishoe, Legal Counsel
Pacific Power & Light
825 NE Multnomah Ct., Suite 1800
Portland, OR 97232
michelle.mishoe@pacificcorp.com

Waives Paper Service
Joseph Reinhart
OREGON SOLAR ENERGY
INDUSTRIES ASSOCIATION
833 SE Main St., MB #206
Portland, OR 97214
joe@oseia.org

Waives Paper Service
James Whitty
Office of Innovative Partnerships
Transportation Bldg., Rm 115
355 Capitol Street NE
Salem, OR 97310
jim.whitty@odot.state.or.us

Waives Paper Service
Kip Pheil
Oregon Department of Energy
625 Marion Street NE, Suite 1
Salem, OR 97301-3737
kip.pheil@state.or.us

Waives Paper Service
Scott Winkels
League of Oregon Cities
PO Box 928
Salem, OR 97308
swinkels@orcities.org

Waives Paper Service
Fritz Feiten
Honeywell Building Solutions
9685 NE Beachcrest Drive
Bainbridge Island, WA 98110
fritz.feiten@honeywell.com

Waives Paper Service
Kim T. Buckley
Esler Stephens & Buckley
700 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2021
buckley@eslerstephens.com

Waives Paper Service
John W. Stephens
Esler, Stephens & Buckley
700 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2021
stephens@eslerstephens.com

Debbie Goldberg Menashe
Senior Counsel
Energy Trust of Oregon
1 SW Sixth Avenue, Suite 1200
Portland, OR 97204

John M. Volkman, General Counsel
Energy Trust of Oregon
851 SW Sixth Avenue, Suite 1200
Portland, OR 97204
john.volkman@energytrust.org

Waives Paper Service
James B. Murphy
Department of Justice
Natural Resources Section
1162 Court Street NE
Salem, OR 97301-4096
james.b.murphy@doj.state.or.us

Waives Paper Service
Janet L. Prewitt
Assistant Attorney General
Department of Justice
1162 Court Street, NE
Salem, OR 97301-4096
janet.prewitt@doj.state.or.us

Waives Paper Service
Michael T. Weirich
Department of Justice
Regulated Utility & Business Section
1162 Court Street NE
Salem, OR 97301-4096
michael.weirich@doj.state.or.us

Paul Nolte, City Attorney
City Hall
3860 Fisher Rd
Roseburg, OR 97401
law@ashlandhome.net

Waives Paper Service
Paul Davies, Manager
Central Lincoln PUD
PO Box 1126
Newport, OR 97365-0090
pdavies@cencoast.com

Waives Paper Service
Thomas M. Grim
Cable Huston Benedict
Haagensen & Lloyd LLP
1001 SW Fifth Avenue, Suite 2000
Portland, OR 97204-1136
tgrim@cablehuston.com

DATED this 11th day of July, 2008.

TONKON TORP LLP

By 

DAVID F. WHITE, OSB No. 01138
Attorneys for Renewable Northwest Project

097204\00001\1057062 V003