

1 Having said that, as a policy matter, the Commission staff recommends the Commission
2 permit third-party ownership for the following reasons.

3 Net metering facilities rely upon renewable resources for the source of their generation.
4 *See* ORS 757.300(1)(d)(A). The renewable energy systems that are installed will reduce the
5 need for energy from fossil-fuel plants, mitigating risks associated with fuel price volatility and
6 future regulation of environmental pollutants. Further, most of the net metering facilities that are
7 expected to be installed will be solar energy systems. Such systems operate almost exclusively
8 during peak hours, reducing peak demand for energy, transmission and distribution. Thus, net
9 metering facilities provide benefits to utilities and their ratepayers by reducing the need for
10 additional fossil-fuel generating capacity and transmission and distribution facilities.

11 Development of renewable resources is important for the state to meet future energy
12 needs but the capital costs for these types of resource projects are often very high. Tax credits,
13 which can help with the project costs, are one of the main incentives used to aid renewable
14 resource project development. However, many utility customers who have a desire to install a
15 net metering facility on their premises, for a variety of reasons, may not be able to take
16 advantage of the tax credits and other incentives that may be available, such as accelerated
17 depreciation. The ability of these customers to work with other entities, that can use these
18 incentives, aids in the development of net metering facilities.

19 Staff understands that many of the solar projects in the state are dependent on the third-
20 party ownership model set forth in the assumed facts. These projects include municipal and
21 governmental projects, which have high visibility in the community. As such, these projects are
22 expected to demonstrate renewable energy as a viable option to members of a community, and
23 hopefully encourage more development of such renewable resources. Thus, allowing third-party
24 ownership projects to qualify for net metering may lead to a proliferation of net metering
25 facilities.

26 ///

1 A possible, but ultimately invalid, concern that is that third-party ownership of net
2 metering facilities could result in “too many” net metering facilities. This concern is based on
3 the notion that a subsidy, from utility ratepayers to customer-generators, could occur under net
4 metering. However, the legislature earlier recognized, and remedied, this risk when it enacted
5 ORS 757.300(6), which provides in relevant part:

6 The commission...may not limit the cumulative generating capacity of solar,
7 wind, fuel cell and microhydroelectric net metering systems to less than one-half
8 of one percent of a utility’s...historic single-hour peak load. After a cumulative
9 limit of one-half of one percent has been reached, the obligation of a public
utility...to offer net metering to a new customer-generator may be limited by the
commission...to balance the interests of retail customers.

10 Thus, the Commission retains the right to oversee the net metering program to balance the
11 interests of customer-generators and the utility’s retail customers. Additionally, ORS
12 757.300(1)(d)(D) offers protection by ensuring the net metering facility is sized primarily to
13 meet the customer-generator’s needs.

14 Finally, staff notes that the interaction between the utility and the customer-generator is
15 not functionally dependent on who owns the net metering facility. The utility should be
16 indifferent, from an operational aspect, to the financial arrangements the customer-generator has
17 entered into to be able to use the net metering facility that is located on its premises, on the
18 customer’s side of the meter.

19 (4) *Does ORS 757.300 place any limitations on third-party ownership of net-metering*
20 *facilities?*

21 Answer

22 No, the statute does not place any limitations on third-party ownership of net metering
23 facilities.¹

24 ///

25 _____

26 ¹ This answer recognizes and incorporates requirements set forth generally under ORS 757.300. *See e.g.*,
ORS 757.300(1)(d).

1 (5) Who is responsible for the costs of installing the metering arrangement for a facility
2 provided by Honeywell?

3 Answer

4 If the Commission determines as a policy matter that Honeywell's customer is a
5 customer-generator, then costs for metering between the customer-generator and the utility are
6 determined by ORS 757.300 and OAR 860, Division 039. If the Commission determines as a
7 policy matter that Honeywell's customer is not a customer-generator, then the utility would treat
8 the metering costs between itself and Honeywell's customer in the same manner as it would for
9 any other non-net metering customer. Finally, regardless of whether the Commission determines
10 as a policy matter that Honeywell's customer is, or is not, a customer-generator, the utility is not
11 responsible for metering costs between Honeywell and Honeywell's customer.

12 **Transaction Between Honeywell and Customer**

13 (1) If the customer does not qualify for net metering under ORS 757.300, is the transaction
14 between Honeywell and the customer considered a retail sale?

15 Answer

16 Preliminarily, staff observes that at the June 18, 2008, pre-hearing conference, the
17 Administrative Law Judge (ALJ) struck as being beyond the scope of ORS 756.450 various
18 PacifiCorp questions that concerned possible outcomes under federal law, how FERC may view
19 these matters, whether the Commission would support PacifiCorp in a possible future proceeding
20 before FERC, etc. The entire series of questions under this subsection seems to raise these very
21 same issues, just revised to eliminate the express references to federal law and FERC. As such
22 staff questions their appropriateness given the ALJ's previous ruling.

23 Assuming the questions are appropriate to address, the answer to question (1) is
24 Honeywell is clearly selling power to its customer pursuant to the Energy Service Agreement
25 (ESA). If the question's use of the phrase "retail sale" is intended to have a particular legal
26 meaning or effect, staff reserves the right to address this question further in its Reply Brief.

1
2 (2) *If the customer does qualify for net metering under ORS 757.300, does a portion of the*
3 *transaction between the customer and Honeywell become a sale for resale (i.e. the*
4 *energy that the customer buys from Honeywell that is delivered to the utility)?*

4 Answer

5 Staff reserves the right to further address this question after reviewing the other parties'
6 Opening Briefs. However, staff's initial conclusions are (1) the Commission has jurisdiction
7 over net metering; and (2) no sale occurs under net metering when the customer-generator feeds
8 back electricity to the utility. See *MidAmerican Energy Company*, 94 F.E.R.C. P61; 2001 FERC
9 LEXIS 630 (March 28, 2001). As such, should the Commission allow a customer to qualify for
10 net metering when a third party owns the facility, the Commission has the jurisdiction and
11 authority to view the customer-generator, rather than Honeywell, as the source of the energy
12 being provided to the utility. Of course, only FERC can state what it may conclude based on
13 these facts and the law.

14 (3) *If some portion of the transaction between Honeywell and the customer is a sale for*
15 *resale, what authority does the state and the Commission have over that sale for resale?*

16 Answer

17 See staff's response to question (2) immediately above.

18 (4) *If some portion of the transaction between Honeywell and the customer is not a sale for*
19 *resale, what is the source of the energy being delivered to the grid to qualify for net*
20 *metering?*

20 Answer

21 See staff's response to question (2) above.

22 **Electric Service Suppliers/Utilities**

23 (1) *Does Honeywell offer "electricity services available pursuant to direct access to more*
24 *than one retail electricity consumer" under ORS 757.600(16)?*

25 Answer

26 ///

1 While the Honeywell business plan does not necessarily constitute the traditional
2 “electricity service supplier” (ESS) scenario, Honeywell would be operating as an ESS offering
3 electricity services pursuant to direct access under the assumed facts. There are several statutory
4 definitions that need to be analyzed in order to arrive at this conclusion.²

5 Preliminarily, staff wishes to note that, even though Honeywell is an ESS under the
6 assumed facts, it may petition to waive certain rules pertaining to ESS requirements under OAR
7 860-038-0001(4). Staff stands ready to expedite the processing of such a petition. Further, staff
8 reserves the right to amend its answers to this, and any other, question as necessary and
9 appropriate after reviewing the other parties’ Opening Briefs.

10 ORS 757.600(16) defines an ESS as:
11 [A] person or entity that offers to sell electricity services available pursuant to
12 direct access to more than one retail electricity consumer. “Electricity service
13 supplier” does not include an electric utility selling electricity to retail electricity
14 consumers in its own service territory.

15 ORS 757.600(15) states that “electricity services” means “electricity distribution,
16 transmission, generation or generation-related services.”

17 ORS 757.600(6) defines “direct access” as:
18 [T]he ability of a retail electricity consumer to purchase electricity and certain
19 ancillary services, as determined by the commission for an electric company or
20 the governing body of a consumer-owned utility, directly from an entity other
21 than the distribution utility.

22 ORS 757.600(2) states that “ancillary services” means
23 [S]ervices necessary or incidental to the transmission and delivery of electricity
24 from generating facilities to retail electricity consumers, including but not limited
25 to scheduling, load shaping, reactive power, voltage control and energy balancing
26 services.

21 ///

22 ///

23

24 ² As discussed at length in ODOT’s Opening Brief, the statutory analysis is governed by *PGE v. Bureau*
25 *of Labor and Industries*, 317 Or 606 (1993). In brief, for the series of questions under this subsection,
26 there is no need to resort to legislative history as the relevant statutes are unambiguous. Nonetheless,
staff did perform an extensive review of the legislative history concerning the direct access statutes and
did not find anything illuminating regarding the present questions.

1 “Electric company” means “an entity engaged in the business of distributing electricity to
2 retail electricity consumers in this state, but does not include a consumer-owned utility.” ORS
3 757.600(11).

4 Finally, “retail electricity consumer” means:
5 [T]he end user of electricity for specific purposes such as heating, lighting, or
6 operating equipment, and includes all end users of electricity served through the
7 distribution system of an electric utility on or after July 23, 1999, whether or not
8 each end user purchases the electricity from the electric utility.

9 ORS 757.600(29).

10 Applying these statutory definitions to the assumed facts shows that Honeywell is
11 operating as an ESS offering electricity services pursuant to direct access to more than one retail
12 electricity consumer.

13 First, Honeywell is selling electricity under the ESAs, generated by a facility that
14 Honeywell owns, to its customers. As such, Honeywell is selling “electricity services.” *See*
15 ORS 757.600(15).

16 Second, while the assumed facts are not entirely complete, staff’s Opening Brief assumes
17 Honeywell’s customers are “retail electricity consumers” as that term is used in ORS
18 757.600(29).

19 Third, under the assumed facts, Honeywell is serving five customers, so it is necessarily
20 serving “more than one retail electricity consumer.” *See* ORS 757.600(16).

21 Fourth, Honeywell’s customers are engaging in “direct access” because they have the
22 ability to purchase electricity directly from Honeywell, which is an entity other than a
23 distribution utility. *See* ORS 757.600(6).

24 Under the assumed facts, Honeywell does not provide any ancillary services. Question
25 (2) in this subsection asks about the impact of this fact and staff will address it now in order to
26 fully answer question (1).

 Two statutes relate to question (2). First, ORS 757.600(6) provides that direct access
 “means the ability of a retail electricity consumer to purchase electricity and certain ancillary

1 services, as determined by the commission...” ORS 757.600(6). This phrase authorizes the
2 Commission to determine which ancillary services a retail electricity consumer may purchase
3 under direct access from an entity that is not a distribution utility. Second, “Ancillary services”
4 mean services that are necessary or incidental to the transmission and delivery of the electricity
5 that is being purchased. ORS 757.600(2).

6 Read together, these two statutes authorize the Commission determine which ancillary
7 services are necessary to ensure delivery of the purchased electricity to the consumer and to
8 ensure the consumer has the ability to purchase such necessary ancillary services. In other
9 words, the Commission is authorized to ensure that a retail electricity consumer has the ability to
10 purchase the ancillary services it “needs” to have the electricity it has purchased from a seller
11 (who is not a distribution utility) transmitted or delivered to it. Stated differently, an entity that
12 sells electricity to multiple retail electricity consumers cannot claim it is not an ESS simply
13 because it does not also offer ancillary services that its customers do not need or want under that
14 entity’s business model. This interpretation is supported by OAR 860-038-0340, the rule the
15 Commission promulgated under ORS 757.600(6):

16 “(2) The Commission may require an electric company to provide ancillary
17 services to facilitate direct access to consumers.

18 (3) The Commission may decide which ancillary services a direct access
19 consumer may purchase directly from electricity service suppliers.”

20 While the assumed facts here are that Honeywell does not provide ancillary services, the
21 assumed facts are silent as to how the electricity Honeywell generates and sells to its customers
22 is actually delivered to those customers. Nonetheless, even though the assumed facts are silent
23 on the matter, either (1) Honeywell is providing facilities necessary to deliver the electricity from
24 its generating facility to its customers; or (2) its customers have made other satisfactory
25 arrangements to ensure the electricity they are purchasing from Honeywell is delivered as
26 required (such as providing as the necessary delivery facilities themselves). If the actual facts
are as stated in (1) above, the assumed facts are incorrect and Honeywell is an ESS because it is

1 selling electricity and providing the ancillary services necessary to ensure its delivery to its
2 customers. Conversely, if the actual facts are as stated in (2) above, Honeywell is an ESS
3 because it is selling electricity and its customers still have the ability to purchase all the ancillary
4 services they need (in this case, no ancillary services are required because the customers are
5 providing such services themselves).

6 It is also necessary to address question (4) of this subsection to complete the analysis
7 under question (1). Under the assumed facts, Honeywell does not serve 100 percent of the load
8 for its five customers. Question (4) asks whether Honeywell is required to serve 100 percent of
9 its customer's load. Staff anticipates that one or more parties may argue that an ESS must serve
10 all of its customer's load under the direct access statutes, and if Honeywell is not doing so, it is
11 not an ESS under ORS 757.600 *et. seq.*

12 Staff disagrees with this argument because its premise is faulty – staff is unable to locate
13 a statute, or a Commission rule, that imposes a requirement that, for an entity to be an ESS, it
14 must serve all of its customers' loads. Indeed, ORS 757.649, which sets forth requirements
15 placed upon an ESS, strongly suggests that a retail electricity consumer may be served by a
16 combination of ESSs and electric utilities. ORS 757.649(5)(c) states, in relevant part:

17 Upon the request of a retail electricity consumer of an electric company, an
18 electricity service supplier shall consolidate the bills for all electricity services
19 into a single statement, and electric utilities and other electricity service suppliers
to prepare a consolidated statement.

20 This statutory language clearly contemplates that a retail electricity consumer may be
21 receiving “electricity services,” a statutorily-defined term that includes generation service, from
22 multiple ESSs and the electric utility. Honeywell is still an ESS even though it is not providing
23 100 percent of its customers' loads.³

24

25 ³ Staff notes it is possible that a utility may have a Commission-approved tariff on file that requires an
26 ESS to serve 100 percent of the load of a direct access customer located in the utility's territory. While
not commenting on the lawfulness of such a tariff, if it exists, it would be faulty logic, in light of ORS
757.649(5), to argue that Honeywell cannot be an ESS simply because it does not intend to abide by the

1 (2) *If Honeywell sells electricity directly to the customer, but does not offer any ancillary*
2 *services for purchase, does Honeywell’s service constitute “direct access” under ORS*
3 *757.600?*

3 Answer

4 Yes, for the reasons explained in (1) immediately above.

5 (3) *Is Honeywell a public utility as defined in ORS 757.005(1)?*

6 Answer

7 No. Under ORS 757.005(1)(b)(C)(iii), a “public utility” does not include an entity that
8 provides power from solar or wind resources to any number of customers. Further, the definition
9 of “public utility” also excludes an ESS as defined in ORS 757.600.

10 (4) *Is Honeywell required to serve 100 percent of its customer’s load?*

11 Answer

12 No, for the reasons discussed under question (1) in this subsection. Staff’s footnote 4
13 observes that if utility’s tariff contains such a requirement, the Commission may want to direct
14 the utility to address it.

15 (5) *Is the utility required to sell electricity to the customer for any portion of load not served*
16 *by Honeywell? If so, what rates apply to the portion of the customer’s load not served by*
17 *Honeywell?*

17 Answer

18 If Honeywell’s customer qualifies for net metering, which staff recommends on a policy
19 basis, the utility has the obligation to serve that customer just as it would any other net metering
20 customer. If the Commission decides to not allow third party ownership of net metering
21 facilities, then Honeywell’s customer would be served like a partial requirements customer if
22 such a tariff is otherwise applicable to the customer.

23 ///

24 ///

25 _____
26 tariff requirement. Rather, should the Commission agree that Honeywell is an ESS, the Commission may
request that the tariff be immediately revised to accommodate business plans like Honeywell’s.

1 (6) *Is the utility required to sell electricity to the customer for the customer's total load when*
2 *the Honeywell facility is not generating electricity? If so, should the customer be placed*
3 *on a partial requirements rate schedule?*

3 Answer

4 See staff's response to question (5) immediately above as its answer to this question.

5 (7) *In its IRP, is the utility required to plan to serve the portion of the customer's load not*
6 *served by Honeywell?*

6 Answer

7 If Honeywell's customer qualifies for net metering, then the utility should plan for that
8 customer in its IRP process the same as it would plan for any other net metering customer. If the
9 Commission decides to not allow third party ownership of net metering facilities, then the utility
10 should plan for the customer's load like it would for a partial requirements customer. Staff notes
11 that, if the Commission agrees Honeywell is an ESS, the Commission has previously determined
12 in the context of IRP planning "An electric utility's load-resource balance should exclude
13 customer loads that are effectively committed to service by an alternative electricity supplier."

14 See Order No. 07-002 at 19.

15 (8) *Does the utility have an obligation to determine who owns generation facilities installed*
16 *on the customer's side of the meter?*

16 Answer

17 If the Commission determines third-party ownership of a net metering facility is
18 permissible, the utility has no obligation to make an inquiry as to the ownership of the facility. If
19 the Commission determines third-party ownership of a net metering facility is not permissible,
20 the Commission has the authority to decide whether it will require the utility to inquire as to the
21 ownership of the facility.

22 **Credits**

23 (1) *Does OAR 860, Division 39 apply when a facility is receiving three other subsidy*
24 *mechanisms for the same facility (federal tax credit, state tax credit, and ETO funding)?*

24 Answer

25 ///

26 ///

1 Staff does not fully understand the question as nothing in Division 039 limits its
2 applicability based upon subsidy mechanisms. Staff reserves the right to address this question in
3 its Reply Comments as necessary.

4 (2) *Who is entitled to any renewable energy credits associated with the output of the facility*
5 *if the customer qualifies for net metering?*

6 Answer

7 The Commission has previously determined that renewable energy credits from net
8 metering are retained by the owner of the net metering facility. See Commission Order No.
9 05-1229 at 7-9.

10 **Similarly-Situated Businesses**

11 *Would the Commission's answer to any of the questions above differ if:*

12 (1) *The customer and third-party provider of a facility create a separate entity for each*
13 *project, under which the third-party provider and customer share ownership of the*
14 *facility?*

14 Answer

15 If the Commission determines as a policy matter to allow third-party ownership of net
16 metering facilities, then the Commission could allow partial ownership of the facility by
17 Honeywell's customer to qualify for net metering as well. As to the ESS issue, there are
18 insufficient facts to give a definitive answer to this question. Depending upon the precise legal
19 arrangement that created the new entity, and how, and if, the power is being sold by the new
20 entity to Honeywell's customer, the new entity, or Honeywell, or both, may, or may not, be an
21 ESS under these facts.

22 (2) *The third-party provider uses outside sources, such as a bank or finance company, to*
23 *finance the project?*

24 Answer

25 There are insufficient facts to give a definitive answer to this question, but this new fact
26 probably does not change the answers to any of the previous questions. Assuming the

1 Commission permits third-party ownership of the facility, the Commission has equal authority to
2 allow the third-party owner to use outside resources to finance the project. Honeywell would
3 likely still be an ESS under this scenario. Of course, such financing arrangements could easily
4 become very complex, and the Commission may reach a different conclusion in a particular case.
5 Parenthetically, staff notes the existence of ORS 757.005(2) that suggests a legislative policy to
6 encourage third-party financing of renewable energy systems.

7 *(3) The facility uses a net-metering fuel other than solar?*

8 Answer

9 No.

10 *(4) The facility uses a non net-metering fuel?*

11 Answer

12 Yes. If the facility uses a fuel that does not qualify under ORS 757.300(1)(d)(A), then
13 the facility does not qualify as a net metering facility. If the facility does not qualify as a net
14 metering facility, then Honeywell’s customer does not qualify as a “user of a net metering
15 facility.” However, Honeywell would still need to be certified as an ESS provider.

16 *(5) The customer leases the equipment from the third party rather than paying for the*
17 *electricity it provides?*

18 Answer

19 As discussed under the Net Metering subsection, the Commission has authority to permit
20 third-party ownership. As such, as a general matter, the Commission has authority to permit a
21 lease of the equipment from the third party as well. Of course, there are many types of leases,
22 and the answer(s) may differ depending on the circumstances of a particular lease. For example,
23 depending on the lease arrangement, it is possible that the third party would not be an ESS if it is
24 leasing the facility to its customer rather than selling the electricity generated by the facility.

25 ///

26 ///

1 (6) *The third-party provider is a registered electricity service provider under ORS*
2 *757.600(16)?*

3 Answer

4 No. Staff fully explored this question under the Electric Service Supplier/Utilities
5 subsection.

6
7 DATED this 30th day of June 2008.

8 Respectfully submitted,

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1 **CERTIFICATE OF SERVICE**

2
3 I certify that on June 30, 2008, I served the foregoing upon all parties of record in this
4 proceeding by delivering a copy by electronic mail and by mailing a copy by postage prepaid
5 first class mail or by hand delivery/shuttle mail to the parties accepting paper service.

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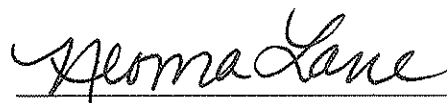
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