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June 30,2008

The Honorable Michael Grant
Public Utility Commission of Oregon
P.O. Box 2148
Salem, Oregon 97308-2148

Re: In the Matter of Honeywell International, Inc., and Honeywell Global Finance,
LLC, and PacifiCorp dba Pacific Power, DR 40

Dear Judge Grant:

Enclosed please find an original and five copies of Opening Brief of Petitioners
Honeywell International and Honeywell Global Finance.

Thank you.

Very truly yours,



Kim T. Buckley

KTB/mec
cc: Service List
Enclosures

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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

DR 40

In the Matter of)
) OPENING BRIEF OF PETITIONERS
HONEYWELL INTERNATIONAL, INC.,) HONEYWELL INTERNATIONAL AND
and HONEYWELL GLOBAL, FINANCE,) HONEYWELL GLOBAL FINANCE
LLC,)
)
and)
)
PACIFICORP, dba PACIFIC POWER.)

The Joint Petition describes Honeywell International, Inc., its Honeywell Building Solutions unit, and its financial services subsidiary, Honeywell Global Finance LLC. In this Opening Brief, these parties are referred to collectively as "Honeywell" unless more specificity is appropriate. The Joint Petition also contains Honeywell's and PacifiCorp's narrative statements of facts. Subsequently, Chief ALJ Michael Grant and the parties prepared a revised set of Assumed Facts ("the Assumed Facts"). This opening brief is written with the understanding that the reader has first read the Assumed Facts. As a part of that same process, Chief ALJ Michael Grant and the parties prepared a revised set of questions for the Commission to rule on. This brief addresses those questions. Honeywell answers some of the sub-questions in groups, and others individually.

I. NET METERING

(1) Is a facility that Honeywell provides as described above a "net-metering facility" under ORS 757.300(1)(d)?

(2) Is Honeywell's customer as described above a "customer-generator" under ORS 757.300(1)(a)?

(3) Does ORS 757.300 require a customer to own a net-metering facility or a portion of the facility to be considered a "customer-generator"?

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

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

A. CORE PROVISIONS OF ORS 757.300

Like the Commission (see *infra* p. 8), the people of Oregon have recognized the benefits of distributed generation, particularly from zero-emission solar resources. To that end, in 1999, the Oregon Legislative Assembly enacted ORS 757.300 (HB3219) providing for net metering.

The two core provisions of the act are found in ORS 757.300(2)(a) and (c). Subsection (2)(a) provides that electric utilities must allow net metering facilities to be interconnected to two-way meters—meters that spin forwards or backwards, depending on the direction of the flow of electricity: "An electric utility that offers residential and commercial electric service: (a) Shall allow net metering facilities to be interconnected using a standard meter that is capable of registering the flow of electricity in two directions." (Emphasis added). Subsection (2)(c) provides a default rule that the electric utility cannot increase the minimum monthly charge paid by "customer-generators" over and above the charge paid by other customers in the same rate class: The electric utility "[m]ay not charge a customer-generator a fee or charge that would increase the customer-generator's minimum monthly charge to an amount greater than that of other customers in the same rate class as the customer-generator." (Emphasis added). ORS 757.300(1)(a) defines "customer-generator" as "a user of a net metering facility." (Emphasis added.)

The act does give the Commission the authority to create exceptions to the default rule found in subsection (2)(c), but only where "the electric utility's direct costs of interconnection and administration of the net metering outweigh the distribution system, environmental and

public policy benefits of allocating such costs among the electric utility's entire customer base." ORS 757.300(2)(c). To Honeywell's knowledge, the Commission has not authorized any Oregon electric utility to charge a fee of this type that is greater than that paid by other customers in the same rate class as the "customer-generator" beyond what the Commission has allowed for in OAR 860-039-0045 (Net Metering Interconnection Fees and Costs) and OAR 860-039-0040(8) (Level 3 Interconnection).

1. Answer To Sub-questions (1), (3), And (4): The Facilities That Honeywell Provides Are Net Metering Facilities — Ownership Is Irrelevant

Under ORS 757.300(2)(a), PacifiCorp has an obligation to allow net metering facilities located on the customer-generator's premises, but owned by Honeywell, to be interconnected using a standard meter that is capable of registering the flow of electricity in two directions.

Under ORS 757.300(2)(a), PacifiCorp's obligation to allow the interconnection of the net metering facilities turns on whether the facilities located on the customer-generators' premises are "net metering facilities." They are. Nothing in the definition of "net metering facility" turns on the issue of who "owns" the net metering facility. There being no provisions on ownership, it follows there are no "limitations" on ownership either, ORS 757.300(1)(d) defines "net metering facility" as follows:

"Net metering facility" means a facility for the production of electrical energy that:

(A) *Generates electricity using solar power, wind power, fuel cells, hydroelectric power, landfill gas, digester gas, waste, dedicated energy crops available on a renewable basis or low-emission, nontoxic biomass based on solid organic fuels from wood, forest or field residues;*

(B) *Is located on the customer-generator's premises;*

(C) *Can operate in parallel with an electric utility's existing transmission and distribution facilities; and*

(D) *Is intended primarily to offset part or all of the customer-generator's requirements for electricity.* (Emphasis added.)

From the Assumed Facts, the facilities used by the customer-generators-generate electricity using solar power. The facilities are located on the customer-generator's premises, The facilities do operate in “parallel” with an electric utility's existing transmission and distribution facilities. That is, the facilities do not make use of the electric utility's existing transmission and distribution facilities to transmit and distribute the electricity to the customer-generator.

Finally, the facilities are intended primarily to offset *part* or all of the customer-generator's requirements for electricity. The capacities of these solar facilities are significant, but they are still modest: "City of Hillsboro (100 kW, PGE); Lewis & Clark College (100 kW, PGE), City of Pendleton I (100 kW, PPL), City of Pendleton II (200 kW, PPL), and Mt. Hood Community College (100 kW, PGE)." Depending on the customer and the application, these solar facilities produce between .8% and 18% of the electricity used by the customer served by the meter through which the solar facility is interconnected. Assumed Facts.

Incidentally, this last factor, distinguishes a distributed-type net metering facility from a "Qualifying Facility" ("QF") to which the Public Utility Regulatory Policies Act of 1978 ("PURPA") applies. As PUC Staff (Lisa Schwartz) noted in its Opening comments,' dated April 11,2007, in Rulemaking to Adopt Rules Related to Net Metering, AR 515 (OPUC Order 07-319):

[S]taff notes that under Oregon law, net metering “[i]s intended primarily to offset part or all of the customer-generator's requirements for electricity.” See ORS 757.300(1)(d)(D). That distinguishes the net metering law from PURPA, which requires electric utilities to

¹ <http://edocs.puc.state.or.us/efdocs/HAC/ar515hac133237.pdf>

offer to purchase electric energy from QFs. As the Commission noted, "A basic purpose of PURPA is to provide a *market* for the electricity produced by small power producers and cogenerators." See Order No. 05-584 (Docket UM 1129) at 1 (emphasis added [in original]).

Opening Comments, at 4.

This last factor is also *one* of the factors that distinguishes net metering facilities from "direct access." More on this below. See *infra* p. 24.

2. Answer To Sub-Question (2): The Customer Is A "Customer-Generator" Because The Customer Uses Net Metering Facility

Under ORS 757.300(2)(c), as a default matter, PacifiCorp may not increase the minimum monthly charge paid by a customer-generator that uses electricity produced by a net metering facility located on its premises but is owned by Honeywell. Under ORS 757.300(2)(c), PacifiCorp's obligation not to charge a customer-generator a fee or charge that would increase the customer-generator's minimum monthly charge to an amount greater than that of other customers in the same rate class as the customer-generator, depends on whether the customers are "customer-generators." They are. Nothing in the definition of "customer-generator" turns on the issue of who "owns" the net metering facility. As noted above, **ORS757.300(1)(a)** defines "customer-generator" as follows: "'Customer-generator' means a user of a net metering facility."

From the Assumed Facts, the customers are users of a net metering facility. Each customer uses the net metering facility because it uses the electricity generated by the facility that is located on the customer's premises that operates in parallel with an electric utility's existing transmission and distribution facilities, and is intended primarily to offset part or all of the customer-generator's requirements for electricity

3. Answer To Sub-Question (5): PacifiCorp Is Responsible For The Costs Of Installing The Meters For Net Metering Facilities — Ownership Is Irrelevant.

ORS 757.300(2)(a) requires an electric utility to interconnect net metering facilities "using a *standard* meter that is capable of registering the flow of electricity in two directions." ORS 757.300(2)(b) provides that a public utility "[m]ay at its own expense install one or more additional meters to monitor the flow of electricity in each direction." ORS 757.300(3) provides that an electric utility "[m]ay not charge a customer-generator a fee or charge that would increase the customer-generator's minimum monthly charge to an amount greater than that of other customers in the same rate class as the customer-generator." ORS 757.300(3) further provides an exception, but only where "the electric utility's direct costs of interconnection and administration of the net metering outweigh the distribution system, environmental and public policy benefits of allocating such costs among the electric utility's entire customer base." There has been no such showing here.

The Commission may take notice that electric meters are installed at PacifiCorp's cost. PP&L's Rule 8, I. states: "Company will install and maintain all meters and other equipment necessary for measuring the electric power and energy used by Consumer and will inspect such installations to maintain a high standard of accuracy." PacifiCorp is responsible for the costs of installing meters. Meters are capital items and they are a part of PacifiCorp's rate base. PacifiCorp's revenue requirement includes a depreciation expense for the meters and a return on the undepreciated historic cost of the meters.

No different rule applies to net metering facilities. PacifiCorp must use a *standard* meter. ORS 757.300(2)(a). If PacifiCorp did apply a different ratemaking treatment of the meters connected to net metering facilities, then PacifiCorp would be charging a customer-generator a

"charge" that would increase the customer-generator's minimum monthly charge to an amount greater than that of other customers in the same rate class as the customer-generator. ORS 757.300(3). PacifiCorp may not charge a greater amount unless it makes the required showing under ORS 757.300(3) *and* the Commission so orders. There is nothing in the Assumed Facts that provides a basis for such a showing.

Finally, OAR 860-039-0045 governs "Net Metering Interconnection Fees and Costs." Nothing in that rule provides for charging customer-generators for the cost of installing meters. OAR 860-039-0040(8) permits electric utilities, in the case of Level 3 interconnections, to charge for "the actual installed cost of the facilities needed to interconnect as identified in the interconnection facilities study." Meters are not one of the items listed in OAR 860-039-0040(3). Consequently, one would ordinarily expect PacifiCorp to be responsible for the cost of installing the meter, even for a Level 3 net metering interconnection.

B. COMMISSION RULES ARE CONSISTENT WITH HONEYWELL'S CONSTRUCTION OF NET-METERING STATUTES

As noted, in Order No. 07-319, the Commission adopted rules governing net metering facilities. Nothing in those rules imposes any sort of ownership requirement. The Commission made a point of using the same definitions found in the statutes. *See e.g.*, Order No. 07-319, at 3. For its part, PacifiCorp interpreted those rules "to permit the owner of a net metering facility and the customer-generator or user to be different entities." PacifiCorp was simply concerned about "complexities" that could arise in such situations for which it wanted additional rules. *Id.* The Commission refused to adopt those additional rules because they had not been adequately vetted. Order No. 07-319, at 5.

C. GENERAL BENEFITS OF NET METERING FACILITIES DO NOT TURN ON OWNERSHIP

Distributed generation produces electricity at or near the place where it is used.

Distributed generation technologies include systems that use renewable energy resources, such as solar electric systems, wind turbines, and small hydroelectric generators, to generate electricity without producing any waste heat. Lisa Schwartz, Distributed Generation in Oregon: Overview, Regulatory Barriers and Recommendations Generators (February 2005), at 1.²

Many of these technologies can be more energy-efficient and cleaner than central-station power plants. Their smaller size can better match gradual increases in utility loads. Distributed generation also can reduce demand during peak hours, when power costs are highest and the grid is most congested. If located in constrained areas, distributed generation can reduce the need for distribution and transmission system upgrades. Adding small generators to the grid also can increase reliability. Customers can install generation to cap their electricity costs, sell power, participate in demand response programs, provide backup power for critical loads and supply premium power to sensitive loads.

Id. Given these benefits, in 2002, the Commission established as one of its objectives the identification and removal of regulatory barriers to the development of distributed generation.

Id.; Oregon Public Utility Commission, 2002 Objectives, at 7.³ Now, at a time when barriers have come down and Oregon is beginning to see progress in the development of distributed generation — 500 MW in 2005⁴—PacifiCorp has raised questions apparently attempting to erect new barriers where none exist or should exist.

The benefits from the use of net metering facilities to customer-generators, electric utilities, other customers, and the public in general, do not turn on who owns the net metering facility. Lisa Schwartz identified the benefits of a net metering facility in her report. None of

² <http://www.oregon.gov/PUC/meetings/pmemos/2005/030805/reg3.pdf>

³ <http://www.oregon.gov/PUC/meetings/pmemos/2002/012902/ca12.pdf>.

⁴ Schwartz, Distributed Generation in Oregon: Overview, Regulatory Barriers and Recommendations Generators (February 2005), at 1, Table 1 (attached at end of report).

those benefits depend on ownership by the "customer-generator." The net metering facility, here a solar facility, is just as energy-efficient and just as clean, no matter who owns the facility. The small size of the facility can still better match gradual increases in utility loads, no matter who owns the facility. Electricity generated by the facility still reduces demand during peak hours, when power costs are highest and the grid is most congested, no matter who owns the facility. If located in constrained areas, the facility still reduces the need for distribution and transmission system upgrades, no matter who owns the facility. Adding small facilities to the grid still increases reliability, no matter who owns the facilities. Customers are still installing facilities to cap their electricity costs, sell power, participate in demand response programs, provide backup power for critical loads and supply premium power to sensitive loads, no matter who owns the facilities.

Everything the legislature and the people of Oregon have hoped to accomplish by enacting ORS 757.300 is accomplished regardless who owns the net metering facility. What is important is the *use* of the net metering facility, *not ownership*.

D. THIRD-PARTY OWNERSHIP ENCOURAGES DISTRIBUTED GENERATION

Recognition of third-party ownership encourages distributed generation through solar electric systems in two ways.

First, many "customer-generators" do not have the financial resources to pay for a facility at the time it is built. In those cases, a third-party owner builds a facility that otherwise would never have been built, and the "customer-generator" pays instead for the energy generated by the facility over the period of the contract.

Second, third-party ownership allows private companies to use federal tax incentives that are useless to State and local governments and non-profit corporations. State and local

governments and non-profit colleges and universities are large users of electricity. Because they do not pay federal income taxes, state and local governments and non-profit corporations (*e.g.* colleges and universities) cannot take advantage of the federal tax incentives. A third-party owner can take advantage of the federal tax incentives, and then, through competitive market pricing mechanisms (price = marginal cost), the benefits of the federal tax incentives are passed on to the state and local governments and non-profit corporations in the form of lower rates for the energy generated.

In order to encourage the development of particular energy resources, the federal and state governments have made available certain tax benefits in the form of investment tax credits and accelerated depreciation. Under § 48 of the Internal Revenue Code, 26 USC § 48, a taxpayer is allowed as a credit against the income taxes imposed (§ 38) an energy credit of 30% of the basis of each energy property placed in service during the taxable year. § 48(a)(1), (a)(2)(A)(i)(II), (a)(3)(A)(i). Energy property expressly includes "equipment which uses solar energy to generate electricity." § 48(a)(3)(A)(i). The 30% credit expires at the end of 2008, so it is critical to Honeywell and similarly-situated parties that the facility be placed in service by the end of 2008. (The codified versions of this law provide that the 30% credit is only available with respect to periods ending before January 1, 2008, and then the credit drops to 10% (§ 48(a)(1), (a)(2)(A)(i)(II), (a)(2)(A)(ii)). This period, however, was extended to January 1, 2009 by § 207 of the Tax Relief and Health Care Act of 2006, 120 Stat 2905,2946.)

In addition to the energy credit, owners of solar facilities can deduct depreciation for the cost of the facility over an accelerated five-year period under the Modified Accelerated Cost-

Recovery System provided in Internal Revenue Code, § 168(e)(3)(B)(vi)(I), 26 USC § 168(e)(3)(B)(vi)(I).⁵

Because State and local governments and non-profit corporations do not pay federal income taxes, they cannot take advantage of these incentives. If ORS 757.300 did not permit third-party ownership of net metering facilities, the incentives would be lost, and as a consequence, meaning the net metering facilities would not be built, and Oregon taxpayers and students end up paying more. Neither consequence benefits Oregonians.

II. TRANSACTION BETWEEN HONEYWELL AND CUSTOMER

PacifiCorp was the source of the next set of questions. Honeywell does not believe that these are "correct" questions in that either they are not correctly framed in the terms of the relevant Oregon statutes, or they are not the kind of questions the Commission answers under its declaratory ruling statute, ORS 756.450.

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

Sub-question (1) is not correctly framed in the terms of the relevant Oregon statutes and is not the kind of question that the Commission answers. *Customers* do not *qualify* for *net metering* under ORS 757.300. Rather, if a *facility* is a *net metering facility*, then an electric

⁵ In addition to the federal energy credit and accelerated depreciation, Oregon has had a Business Energy Tax Credit program since 1979. Current Oregon law provides for a BETC of 50% of the eligible project costs (certified cost of the facility) of a renewable energy resource generation facility. The tax credit is taken over five years at 10% per year. ORS 315.354(1)(c), (4)(a), 315.356, 469.185 et seq.; HB 3619 (2008). The program is described by the Oregon Department of Energy, Conservation Division, at <http://www.oregon.gov/ENERGY/CONS/BUS/BETC.shtml>. Finally, Energy Trust of Oregon, Inc. offers cash incentives for eligible commercial solar electric systems. <http://www.energytrust.org/solar/commercial/standard.php>. Unlike the federal incentives, the Business Energy Tax Credit and the Energy Trust of Oregon cash incentives provide mechanisms that would make the benefits available to State and local governments and non-profit corporations.

utility that provides residential and commercial service must allow the net metering facility to be interconnected. ORS 757.300(2)(a). If a customer uses a net-metering facility, then the customer is a *customer-generator* and the electric utility cannot increase the minimum monthly charge paid by the customer-generator over and above the charge paid by other customers in the same rate class. ORS 757.300(2)(c).

Whether a sale is at "retail" is of no consequence under any *Oregon* statute or OPUC rule that Honeywell is aware of. By contrast, the Federal Power Act applies to "the transmission of electric energy in interstate commerce and to the sale of electric energy at *wholesale* in interstate commerce." Federal Power Act § 201(b), 16 USC § 824(b). Apparently, PacifiCorp is asking this Commission to rule whether the "sales" are "retail," by which it means they are not "wholesale." Because the Commission's declaratory ruling statute, ORS 756.450, gives the Commission the authority to "issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the commission," and because the question does not relate to a rule or statute that the Commission enforces, it follows this is not the kind of question the Commission should answer.

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

Sub-question (2) is not a correctly framed in the terms of the relevant Oregon statutes and is not the kind of question the Commission answers. The same analysis that applies to sub-question (1) applies to sub-question (2). *Customers* do not *qualify* for *net metering* under ORS 757.300. Rather, if a *facility* is a *net metering facility*, then an electric utility that provides residential and commercial service must allow the net metering facility to be interconnected.

ORS 757.300(2)(a). If a customer uses a net-metering facility, then the customer is a *customer-generator* and the electric utility cannot increase the minimum monthly charge paid by the customer-generator over and above the charge paid by other customers in the same rate class. ORS 757.300(2)(c).

Whether a sale is a “*sale for resale*” is of no consequence under any *Oregon* statute or OPUC rule that Honeywell is aware of. By contrast, the Federal Power Act applies to “the transmission of electric energy in interstate commerce and to the sale of electric energy at *wholesale* in interstate commerce.” Federal Power Act § 201(b), 16 USC § 824(b). “The sale of electric energy at wholesale” is defined as “*a sale of electric energy to any person for resale.*” Federal Power Act § 201(d), 16 USC § 824(d). Because the Commission's declaratory ruling statute, ORS 7576.450, gives the Commission the authority to “issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the commission,” and where, as here, the question does not relate to a rule or statute that the Commission enforces, it follows this is not the kind of question the Commission should answer.

That said, in *MidAmerican Energy Co.*, 94 FERC ¶ 61,340 (2001), FERC ruled that when a customer-generator “accounts for its dealings with the utility through the practice of netting,” “no sale occurs.” Because the customer-generator is not selling electricity to the utility, it follows that when Honeywell sells electricity to the customer-generator, Honeywell is not selling the electricity for “resale.”

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

The same analysis that applies to sub-question (2) applies to sub-question (3). This is not the kind of question the Commission should answer, and in any case, there is no sale for resale.

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

The same kind of analysis that applies to sub-question (2) applies to sub-question (4). Sub-question (4) is not correctly framed in the terms of the relevant Oregon statutes and is not the kind of question the Commission answers. Sources *of energy being* delivered to the grid do not *qualify* for net metering under ORS 757.300. Rather, if a *facility* is a *net metering facility*, then an electric utility that provides residential and commercial service must allow the net metering facility to be interconnected. ORS 757.300(2)(a). What the source of energy being delivered to the grid is, is not the proper question. Whether a sale is a "*sale for resale*" is not of consequence under any Oregon statute or OPUC rule that Honeywell is aware of. This is not the kind of question the Commission should answer.

III. ELECTRIC SERVICE SUPPLIERS/UTILITIES

A. SUB-QUESTIONS (1) AND (2)

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

(2) If Honeywell sells electricity directly to the customer, but does not offer any ancillary services for purchase, does Honeywell's service constitute "direct access" under ORS 757.600?

Honeywell is not an "electricity service supplier" because Honeywell does not offer to sell electricity services available pursuant to "direct access" to more than one retail electricity consumer. ORS 757.600(16). I-Honeywell's electricity services are not available pursuant to direct access because its customers do not have the ability to purchase electricity and certain

ancillary services directly from an entity other than the distribution utility. ORS 757.600(6). At the most, its customers only ~~have~~ the ability to purchase *electricity* directly from an entity other than the distribution utility.

1. Federal Energy Regulatory Commission Order No. 888 Provides Context for ORS 757.600, et seq.

The appropriate starting point for any discussion of Oregon's direct access statutes, ORS 757.600, et seq., is FERC Order No. 888. FERC's authority to issue Order No. 888 was affirmed in *New York v. FERC*, 535 U.S. 1 (2002)(FERC acted within its authority to include unbundled retail transmissions of electricity within the scope of its open access requirements for interstate transmission, and FERC's choice not to assert jurisdiction over bundled retail transmissions was a permissible policy choice). Although the Supreme Court's opinion was issued after the enactment of ORS 757.600 et seq., it contains a good historical discussion that explains the context in which Oregon's direct access statutes (SB 1149) were enacted in 1999.

In the 1990s, policymakers had come to the conclusion that they could "'encourage lower electricity rates by structuring an orderly transition to competitive bulk power markets.'" 535 US at 10. Prices for airline, railroad, and motor transportation were deregulated in the 1970s and 1980s, and natural gas markets had been unbundled, opened, and at the production and supplier level, deregulated in the 1980s.

The principal obstacle that stood in the way of competitive bulk power markets was the public utilities' "ownership of the transmission lines that must be used by their competitors to deliver electric energy to wholesale and retail customers. The utilities' control of transniission facilities gives them the power either to refuse to deliver energy produced by competitors or to

deliver competitors' power on terms and conditions less favorable than those they apply to their own transmissions." 535 U.S. at 8-9.

In 1992, Congress enacted the Energy Policy Act of 1992, which "authorized FERC to order individual utilities to provide transmission services to unaffiliated wholesale generators (*i.e.*, to 'wheel' power) on a case-by-case basis." FERC did so 12 times, but found the "individual proceedings were too costly and time consuming to provide an adequate remedy for undue discrimination throughout the market." 535 US at 9-10.

In 1995, FERC initiated a rulemaking proceeding and "proposed a rule that would 'require that public utilities owning and/or controlling facilities used for the transmission of electric energy in interstate commerce have on file tariffs providing for nondiscriminatory open-access transmission services.'" 535 US at 10. In its Notice of Proposed Rulemaking ("NPRM"), FERC said:

The key to competitive bulk power markets is opening up transmission services. Transmission is the vital link between sellers and buyers. To achieve the benefits of robust, competitive bulk power markets, all wholesale buyers and sellers must have equal access to the transmission grid. Otherwise, efficient trades cannot take place and ratepayers will bear unnecessary costs. Thus, market power through control of transmission is the single greatest impediment to competition. Unquestionably, this market power is still being used today, or can be used, discriminatorily to block competition.

Id.

Following hearings, FERC issued Order No. 888 in 1996. In the order, FERC ordered unbundling of wholesale generation and transmission services, and it ordered open access to transmission in interstate commerce, including retail transmission, on a non-discriminatory basis.

The Supreme Court described it as follows:

First, FERC ordered "functional unbundling" of wholesale generation and transmission services. ...FERC defined "functional unbundling" as requiring each

utility to state separate rates for its wholesale generation, transmission, and ancillary services, and to take transmission of its own wholesale sales and purchases under a single general tariff applicable equally to itself and to others.

Second, FERC imposed a similar open access requirement on unbundled retail transmissions in interstate commerce. Although the NPRM had not envisioned applying the open access requirements to retail transmissions, but rather "would have limited eligibility to wholesale transmission customers," FERC ultimately concluded that it was "irrelevant to the Commission's jurisdiction whether the customer receiving the unbundled transmission service in interstate commerce is a wholesale or retail customer."

535 US at 11

There are two things to note here: First, although FERC unbundled *wholesale* generation and transmission services, FERC refused to unbundle *retail* generation and transmission services. Among other things, FERC was concerned that ordering unbundling of retail generation and transmission services would potentially bring FERC regulation into conflict with state utility regulation. The Supreme Court said:

...FERC rejected a proposal that the open access requirement should apply to "the transmission component of bundled retail sales." ...Although FERC noted that "the unbundling of retail transmission and generation ... would be helpful in achieving comparability," it concluded that such unbundling was not "necessary" and would raise "difficult jurisdictional issues" that could be "more appropriately considered" in other proceedings.

535 US at 12. The Supreme Court affirmed FERC's policy choice. 535 US at 28.

Second, although FERC imposed an open access requirement on *unbundled* retail transmissions in interstate commerce, it did not order the unbundling of retail transmission. Rather, the open access requirement on *unbundled* retail transmissions applied "'if a public utility voluntarily offers unbundled retail access,' or if a State requires unbundled retail access." If the public utility voluntarily offered unbundled retail access or a State required unbundled retail access, then, in either case, "the affected retail customer must obtain its unbundled

transmission service under a non-discriminatory transmission tariff on file with the Commission." 535 US at 11-12.

2. ORS 757.600 et. seq.—SB 1149

The whole point of FERC Order No. 888, and thus, the context for SB 1149, was the belief that (1) electricity rates could be lowered by structuring an orderly transition to competitive bulk power markets; (2) the principal obstacle that stood in the way of competitive bulk power markets was the public utilities' ownership and control of the transmission lines that must be used by their competitors to deliver electric energy to customers; and (3) it was up to the *States* to order the unbundling of *retail* generation and transmission services and retail access. It is against that backdrop that in 1999, the Oregon Legislative Assembly enacted ORS 757.600 *et. seq.* ("Direct Access Regulation"), or SB 1149 as it is commonly known. (In this brief, the Act is cited both ways.)

Under ORS 757.601(1), all retail electricity consumers must be "allowed" "direct access" beginning March 1, 2002, *but not before that date*. In fact, "Retail electricity consumers *shall not be allowed direct access before that date.*" (Emphasis added.)

On and after March 1, 2002, electric companies "shall provide" all retail electricity consumers that are connected to the companies' distribution systems a "regulated, cost-of-service rate option." ORS 757.603.(1)(a). The Commission must establish terms and conditions for providing "default electricity service" for nonresidential electricity consumers in an emergency, and for when the consumer is receiving electricity services through direct access and elects instead to receive the services through the default service. ORS 757.622. "Electricity service suppliers" (ESSs) are "authorized" to use the "distribution facilities" of electric companies on a nondiscriminatory basis after the retail electricity consumers are "afforded" direct access. ORS

757.632. Distribution facilities presumably include "local area power poles, transformers, conductors, meters, substations and other equipment." ORS 757.600(8). The Commission is required to ensure that an electric company that "offers" direct access provides ESSs and retail electricity consumers with comparable access to, and information about, its transmission facilities and distribution system. ORS 757.637. Finally, not later than March 1,2002, electric companies are (were) required to unbundle the costs of electricity services into power generation, transmission, distribution and retail services. ORS 757.642(1).

3. Honeywell Is Not An "Electricity Service Supplier"

Under ORS 757.600(16), an ESS is "an entity that offers to sell electricity services available pursuant to direct access to more than one retail electricity consumer." Honeywell is not an ESS because Honeywell does not offer to sell electricity services available pursuant to "direct access" to more than one retail electricity consumer. Honeywell's electricity services are not available pursuant to "direct access" because its customers do not have the ability to purchase electricity and certain ancillary services directly from an entity other than the distribution utility. ORS 757.600(6). At most, its customers only have the ability to purchase electricity directly from an entity other than the distribution utility.

"Electricity service supplier" is defined in ORS 757.600(16) as follows:

As used in ORS 757.600 to 757.689, unless the context requires otherwise:

(16) "Electricity service supplier" means a person or entity that offers to sell electricity services available pursuant to direct access to more than one retail electricity consumer. "Electricity service supplier" does not include an electric utility selling electricity to retail electricity consumers in its own service territory.

"Electricity services" includes electricity generation. ORS 757.600(15).

Consistent with the idea that "direct access" was intended and understood to mean that the electricity was delivered to the retail electricity consumer through an electric utility's distribution system or a transmission system—that the purpose of SB 1149 was to eliminate electric utilities' ownership and control of transmission and distribution systems as an obstacle standing in the way of competitive bulk power markets—"direct access" only exists where a retail electricity consumer has the ability to purchase both electricity *and* ancillary services *directly* from an entity *other than the distribution utility*. ORS 757.600(6) states: "'Direct access' means 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."

Ancillary services are part and parcel of the transmission and distribution of electricity, and are fundamental to system reliability. In fact, in Order Nos. 888, 888-A, and 888-B, FERC determined that "ancillary services" are a part of, not separate from, transmission services, and it expressly required transmission utilities in their pro forma transmission tariff to offer "ancillary services." In Order No. 888-B, FERC said:

Ancillary services as defined in Order Nos. 888 and 888-A are part of the costs of transmission services. In Order No. 888, we defined ancillary services as those services "that must be offered with basic transmission service under an open access transmission tariff." We noted that these services are those "needed to accomplish transmission service while maintaining reliability within and among control areas affected by the transmission service." Thus, there is no question that ancillary services are part of the cost of transmission and therefore are included among the interconnection costs a QF is responsible for.

Order No. 888, at 35-36; Order No. 888, at 206 (Part IV. D. 1.). Not only did FERC require transmission utilities to *offer* ancillary services, but it also required customers to *purchase* at least some of those ancillary services from those transmission utilities: Regulation and

Frequency Response, Energy Imbalance, Operating Reserves – Spinning, and Operating Reserve – Supplemental. Order No. 888, at 235-236,238,254 (Part IV. D. 2. and 6.).

That means that a retail electricity consumer who is purchasing electricity from an independent power producer and purchasing transmission services from the transmission utility will necessarily be purchasing both electricity *and* ancillary services directly from an entity other than the distribution utility. In those cases where the retail electricity consumer is purchasing service directly from just the independent power producer — electricity and transmission — the same will still necessarily hold, except the entity from whom the retail electricity consumer is directly purchasing the electricity and ancillary services will be the same entity.

The definition of "ancillary services" found in SB 1149 is consistent with the foregoing and with the idea that "direct access" was intended and understood to mean that the electricity was delivered to the retail electricity consumer through an electric utility's distribution system or a transmission system. ORS 757.600(2): "'Ancillary services' means 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."

4. **Other Parts of Text of SB 1149 Support Construction that Honeywell Is Not an ESS**

That "direct access" was intended and understood to mean that the electricity was delivered to the retail electricity consumer through a distribution system or a transmission system—*i.e.*, that the retail electricity consumer had to have the ability to purchase both electricity and certain ancillary services directly from an entity other than the distribution utility, is apparent from other sections of SB 1149 and the Commission's rules for direct access, as well.

a. ORS 757.649

ORS 757.649(1)(a) provides that a person or entity cannot act as an ESS unless it has been certified by the Commission. ORS 757.649(2) and (3) then provide that every electric utility shall maintain the integrity and safety of its transmission facilities and distribution system and provide safe, reliable service to all retail electricity consumers. That the primary statute dealing with ESSs also contains a subsection requiring electric utilities to maintain system reliability and safety of their transmission facilities and distribution system is consistent with this understanding that direct access means the electricity is delivered to the retail electricity consumer through a distribution system or a transmission system.

ORS 757.649(5) provides that unless a retail electricity consumer requests otherwise, an electric company is required to consolidate the bills for all electricity services, including those provided by an ESS, into a single statement, the Commission is required to adopt rules addressing collection, disconnection, and reconnection, and the distribution utility is "solely responsible for actual reconnection and disconnection." Again, the fact that statute provides for bill consolidation by default and contemplates disconnection for nonpayment of the consolidated bill evidences an understanding that direct access means the electricity is delivered to the retail electricity consumer through a distribution system or a transmission system. OAR 860-038-0445(19)-(20).

b. Commission's Rules On Direct Access

The Commission has issued its own rules regulating direct access. OPUC Order 00-596; OAR 860, Div. 38. It is apparent from the Commission's rule regarding scheduling ESSs and non-scheduling ESSs, and its requirement that every direct access transaction include a scheduling ESS, that the Commission understood an "electricity service supplier" to mean

someone who delivers electricity to a retail electricity consumer through an electric utility's distribution system or a transmission system, and to mean someone *other than* the owner of a "net metering facility" used by a "customer-generator." OAR 860-038-0410 states:

(1) Each ESS *shall* be certified as either scheduling or nonscheduling.

(2) *Each scheduling ESS shall schedule the resources to serve the direct access loads for which it has scheduling responsibility with the appropriate control area operators. Scheduling shall be in accordance with all generally accepted regional and Western Electricity Coordinating Council rules and guidelines.*

(a) *Only a single scheduling ESS may schedule all the resources and other services for any single direct access consumer. Multiple ESSs may provide services to any individual direct access consumer, but only through a single scheduling ESS;*

(b) *Each scheduling ESS shall be responsible for ensuring that all necessary point-to-point transmission services have been acquired across the facilities of third parties, above and beyond the network integration transmission service provided on the facilities of the electric company to serve the direct access loads for which it has scheduling responsibility;*

(c) *Each scheduling ESS shall be responsible for forecasting the requirements for serving the direct access loads for which it has scheduling responsibility and arranging for resources;*

(d) *Each scheduling ESS shall be responsible for settling imbalances with electric companies for the total resources and direct access loads for which it has scheduling responsibility.*

(3) *A nonscheduling ESS must contract with a scheduling ESS or control area operator for all scheduling services.*

(Emphasis added.)

It should also be noted that "scheduling" is an "ancillary service." ORS 757.600(2); OAR 860-038-0005(5). By requiring there to be at least one scheduling ESS for each ESS, the Commission's rules are also consistent with the understanding that when a retail electricity consumer has "direct access," the consumer necessarily has the ability to purchase both

electricity (non-scheduling or scheduling ESS) *and* ancillary services (scheduling ESS) *directly* from an *entity other than the distribution utility*.

In the case of a "net metering facility" used by a "customer-generator." whether or not the facility is owned by the customer-generator or by a third-party, it makes no sense to suppose that "scheduling" would ever be required. Neither the Commission nor the legislature ever intended the use of a "net metering facility" by a "customer-generator" to be "direct access."

5. Net Metering Facilities Statutes Also Provide Context for Direct Access Statutes: Direct Access and Using a Net Metering Facility Are Two Different Things

ORS 757.300, dealing with net metering facilities, and ORS 757.600 *et. seq.*, dealing with direct access, were passed during the same 1999 Session of the Legislative Assembly. So far as Honeywell can determine, the bills were heard separately, and no legislators or witnesses ever connected the two or suggested that using a net metering facility was a form of direct access.

It was understood that when a retail electricity consumer takes "direct access," the consumer was purchasing all of its electricity from someone other than the distribution utility. This is different from using a net metering facility, which is intended primarily to offset *part* of the customer's requirements for electricity, as is the case with a net metering facility. ORS 757.300(1)(d)(D). (Even in those cases where a customer-generator is using the net metering facility to offset all of the customer's requirements for electricity (ORS 757.300(1)(d)(D)), the net metering facility is still interconnected with the electric utility's facilities using a standard meter that is capable of registering the flow of electricity *in* two directions. ORS 757.300(2)(a).)

It was understood that when the retail electricity consumer took "direct access" that the service was *not* intended primarily to offset *part* of the consumer's requirements for electricity,

as is the case with a net metering facility. ORS 757.300(1)(d)(D). That "direct access" was understood to be different is apparent from the fact that under ORS 757.603(a), electric companies were required to "provide all retail electricity consumers that are connected to the electric company's distribution system with a regulated, cost-of-service rate option," and that under ORS 757.622, the Commission was required to "establish the terms and conditions for providing default electricity service for nonresidential electricity consumers in an emergency" and "for providing default service to a nonresidential electricity consumer in circumstances when the consumer is receiving electricity services through direct access and elects instead to receive such services through the default service."

ORS 757.603(a) indicates that "direct access" and the "regulated, cost-of-service rate option" are service alternatives. ORS 757.603(a) does not indicate that a retail electricity consumer would be taking *part* of the consumer's requirements for electricity by "direct access" and the rest of the service by a "regulated, cost-of-service rate option." Likewise, ORS 757.622 suggests that "direct access" and "default electricity service" are also service alternatives. ORS 757.622 does not suggest that a retail electricity consumer would be taking part of the consumer's requirements for electricity by "direct access" and the rest of the service by "default electricity service." After all, "default electricity service" is something a nonresidential electricity takes in an "emergency" or "instead" of "direct access."

The PUC's administrative rules on the Cost-of-Service Rate, OAR 860-038-0240, the Nonresidential Standard Offer, OAR 860-038-0250, and Default Supply, OAR 860-038-0280, are consistent with the foregoing analysis that when a retail electricity consumer takes "direct access," the consumer takes all, *not part*, of the consumer's requirements for electricity. Taking direct access and using a net metering facility are two different things.

Likewise, PacifiCorp understood the two to be different. PP&L's rules on Direct Access are based on the understanding that when a consumer takes direct access, the consumer does not take *part* of its requirements for electricity by "direct access" and the rest of the service under some ordinary PP&L rate schedule as is the case when a customer is using a net metering facility. PP&L's Rule 21 on Direct Access Part I. A. provides that "ESSs are responsible for purchasing sufficient amounts of Electricity to meet the electric power needs of their Direct Access Consumers and the delivery of such purchases to designated receipt points as arranged with the Company through a Scheduling ESS." Part I. C. provides that "Consumers requesting Direct Access Services may not partition the electric loads at a point of delivery among Service Elections or Service Options. The entire load at a point of delivery must be nominated to only one set of Service Elections or Service Options."

6. "Direct Access" Was Not Allowed Until March 1,2002

The fact that, under ORS 757.601(1), retail electricity consumers "*shall not be allowed direct access before*" March 1,2002 is important because, as will be seen, *prior* to March 1, 2002, in Oregon (1) customer-generators could use net metering facilities owned by third-parties; and (2) a host customer could use electricity generated by a qualifying cogeneration or small power production facility owned by a third-party. No one in the legislature or anywhere else suggested that either of these uses was a form of "direct access" that could not be allowed until March 1,2002.

a. Net Metering Facilities

As noted above at page 24, the net metering facilities statute and the direct access statutes were both enacted by the 1999 Legislative Assembly. ORS 757.300 is a part of the context of ORS 757.600 *et seq.* The fact that the net metering facilities statute does not prohibit third-

parties from owning net metering facilities (see *supra* p. 3), and that the net metering facilities statute went into effect in 1999, rather than after March 1, 2002, is evidence that no one considered a customer-generator's use of a net metering facility owned by a third-party to be a form of "direct access."

b. Qualifying Cogeneration And Small Power Production Facilities

Oregon first adopted statutes permitting qualifying facilities, both cogeneration facilities and small power production facilities, in 1981. ORS 758.505 *et seq.* These statutes were adopted with reference to the federal Public Utility Regulatory Policies Act of 1978 (PURPA), 16 USC § 824a-3. Following the adoption of ORS 758.505 *et seq.* in 1981, the Commission adopted its Division 29 rules governing electric utilities' interconnection with electric cogeneration and small power production facilities. FERC has adopted administrative rules as well. 18 CFR § 292.101 *et seq.*

What is significant here is that those statutes and rules contemplate that a qualifying cogeneration facility or a small power production facility may be owned by a third-party and that the electricity generated by the facility may be used by a "host customer" on whose site the facility is located. The only restriction on ownership of those facilities is that they "must be at least 50 percent owned by a person who is not an electric utility, an electric utility holding company, an affiliated interest, or any combination thereof." OAR 860-029-0010(6) and (25). FERC rules contain the same limitation. 18 CFR § 292.206(b). In addition, those rules contemplate that there may be a non-owner customer for the cogeneration facility or a small power production facility, presumably a "host customer" located on the same site. This is apparent from the fact that electric utilities are required to provide "back-up power" (OAR 860-029-0050(3)(b)), meaning "electric energy or capacity supplied by a public utility to replace

energy ordinarily generated by a qualifying facility's own generation equipment during an unscheduled outage of the facility." OAR 860-029-0010(2).

In 1985, well before 1999, FERC determined that a third-party **may** build, own, and operate a QF located on the host customer's premises and that the host customer can use power generated by the QF. *Alcon (Puerto Rico), Inc.*, 32 FERC ¶ 61,247 (1985), mod on *reconsid.*, 38 FERC ¶ 61,042 (1987)), *aff'd*, *Puerto Rico Elec. Power Auth. v. FERC*, 848 F2d 243 (DC Cir 1988). In the first order, FERC determined that the project was a QF even though it was not owned or operated by the host customer. On reconsideration, FERC determined that the host customer was eligible to receive standby power from the electric utility. On review, the DC Circuit noted that "Congress also was aware of the possibility that cogeneration projects might involve third-party financing in which different parties owned the producing and consuming equipment." 848 F2d at 248.

The facts that the qualifying facilities statutes permit third parties to own a qualifying facility that provides electricity on-site to a non-owner customer, and that the statutes were in effect 20 years before March 1, 2002, indicate that no one considered a host customer's use of electricity generated by a qualifying facility to be a form of "direct access."

7. In ORS 757.600(6), "And" Really Means "And"

In the case of the definition of "direct access" found in ORS 757.600(6), the "and" really means and. For there to be "direct access," the retail electricity consumer must have the ability to purchase both electricity and ancillary services directly from an entity other than the distribution utility. For there to be "direct access," the electricity at issue must be delivered to the retail electricity consumer through an electric utility's distribution system or a transmission system. In this case, the customers to whom Honeywell sells electricity do not have the ability to

purchase both electricity and ancillary services *directly* from an entity *other than the distribution utility*. Honeywell is not offering to sell electricity services available pursuant to direct access. Honeywell, therefore, is not an "electricity service supplier." ORS 757.600(16).

B. SUB-QUESTION 3

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

No. Honeywell is not a public utility as defined in ORS 757.005. ORS 757.005(b) provides that "'public utility' does not include: ...(C) Any corporation...providing heat, light or power: ...(iii) From solar or wind resources to any number of customers:"

C. SUB-QUESTION 4

(4) Is Honeywell required to serve 100 percent of the customer's load?

No. As discussed above at pages 24-26, when a customer takes direct access, the customer receives 100% of its electricity from an ESS, and none from its distribution utility. As noted, that is one reason why using a net metering facility is not direct access.

In addition, conceptually, this is not a proper question. (Again, this is a question asked by PacifiCorp.) Honeywell is not a public utility. Honeywell sells the electricity produced by the net-metering facility. Honeywell does not "serve" the "customer's load."

D. SUB-QUESTION 5

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

Under ORS 757.205 and ORS 757.300, PacifiCorp has an obligation to provide service to customer-generators and to interconnect with net metering facilities. Under ORS 757.300(2)(c), PacifiCorp "[m]ay not charge a customer-generator a fee or charge that would increase the customer-generator's minimum monthly charge to an amount greater than that of other

customers in the same rate class as the customer-generator." The rates that apply are the same rates that PacifiCorp charges other customers in the same rate class as the customer-generator.

In addition, conceptually, this is not a proper question. Honeywell is not a public utility. Honeywell sells the electricity produced by the net-metering facility. Honeywell does not "serve" the "customer's load."

E. SUB-QUESTION 6

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

Under ORS 757.205 and ORS 757.300, PacifiCorp has an obligation to provide service to customer-generators and to interconnect with net metering facilities. Under ORS 757.300(2)(c), PacifiCorp "[m]ay not charge a customer-generator a fee or charge that would increase the customer-generator's minimum monthly charge to an amount greater than that of other customers in the same rate class as the customer-generator." The rates that apply are the same rates that PacifiCorp charges other customers in the same rate class as the customer-generator. The customer should not be placed on a partial requirements schedule unless other customers in the same rate class as the customer-generator are on a partial requirements rate schedule. Beyond that general statement, the Commission does not have enough information to answer this question.

F. SUB-QUESTION 7

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

Under ORS 757.205 and ORS 757.300, PacifiCorp has an obligation to provide service to customer-generators and to interconnect with net metering facilities. In general, PacifiCorp must

plan to serve customer-generators. OAR 860-038-0080.

In addition, conceptually, this is not a proper question. Honeywell is not a public utility. Honeywell sells the electricity produced by the net-metering facility. Honeywell does not "serve" the "customer's load."

G. SUB-QUESTION 8

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

Assuming this question is referring to "net metering facilities," the answer is no.

Ownership is irrelevant. *See supra* p. 3.

IV. CREDITS

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

Nothing in OAR 860, Division 39 provides that the rules do or do not apply depending on whether "a facility is receiving three other subsidy mechanisms for the same facility (federal tax credit, state tax credit, and ETO funding)." ⁶ "Subsidy mechanisms" are irrelevant. What matters under OAR 860, Division 39 is whether the facility is a "net metering facility," and whether the customer is a "customer-generator." OAR 860-039-0005(1):

OAR 860-039-0010 through 860-039-0080 (the "net metering rules") establish rules governing net metering facilities interconnecting to a public utility as required under ORS 757.300. Net metering is available to a customer-generator only as provided in these rules. These rules do not apply to a public utility that meets the requirements of ORS 757.300(9).

⁶ Whenever Honeywell uses an Energy Trust of Oregon (ETO) incentive, Honeywell contractually agrees that the Renewable Energy Credits are assigned to ETO. Honeywell understands that ETO retires these credits in favor of the utility serving that customer.

Nothing in the definitions of either of those terms in Division 39 turns on who or what is receiving "subsidy mechanisms for the same facility." OAR 860-039-0005(3)(d), (n).

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

Honeywell, the owner of the facility, is entitled to any renewable energy credits associated with the output. This issue was addressed and decided in Docket No. AR 455, OPUC Order No. 05-1229 (2005). There, the Commission rejected PacifiCorp's arguments in opposition and adopted OAR 860-022-0075(2): "Unless otherwise agreed to by separate contract, the owner of the renewable energy facility retains ownership of the non-energy attributes associated with electricity the facility generates and sells to an electric company pursuant to: (a) The provisions of a net metering tariff;" In Order No. 05-1229, the Commission said: "As modified, this rule would recognize any green tag produced under a future energy purchase contract as a discrete commodity to be owned and managed by the owner of the generating renewable energy facility." Order No. 05-1229, at 7. There is no reason to revisit this issue here.

V. SIMILARLY-SITUATED BUSINESSES

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

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

To the extent that the similarly-situated business is a limited liability company described in ¶ 13 of the Joint Petition (customer and an investor form an LLC that acquires the facility and sells the power to the customer), in that case, there would be an additional reason why the LLC would not be an ESS. ORS 757.600(16) provides that an "'Electricity service supplier' means a

person or entity that offers to sell electricity services available pursuant to direct access *to more than one retail electricity consumer.*" (Emphasis added.) In the case of an LLC described in ¶ 13 of the Joint Petition, the person or entity offering to sell electricity services would not be doing so to more than one retail electricity consumer

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

As with ownership, who "finances the facility" is irrelevant under all of the Oregon statutes and all of the PUC administrative rules at issue in this docket. It does not matter whether a third-party provider uses outside sources, such as a bank or finance company, to finance a facility.

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

ORS 757.300(1)(d)(A) provides that for a facility to be a "net metering facility," the facility must "[g]enerate[] electricity using solar power, wind power, fuel cells, hydroelectric power, landfill gas, digester gas, waste, dedicated energy crops available on a renewable basis or low-emission, nontoxic biomass based on solid organic fuels from wood, forest or field residues." If a facility uses one of those other fuels listed in ORS 757.300(1)(d)(A), and all other things are otherwise the same, then the same outcome that applies to solar net metering facilities applies to other net metering facilities.

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

If a facility uses a fuel other than solar power, wind power, fuel cells, hydroelectric power, landfill gas, digester gas, waste, dedicated energy crops available on a renewable basis or low-emission, nontoxic biomass based on solid organic fuels from wood, forest or field residues, then, the facility is not "net metering facility" and ORS 757.300 does not apply. It would be too

speculative under this set of facts to determine whether an electric utility could interconnect with the facility on some sort of netting basis or whether an electric utility could be required to interconnect with the facility on some ~~sort~~ of netting basis.

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

As with ownership, whether a customer leases the equipment from the third-party rather than paying for the electricity it provides is irrelevant under all of the Oregon statutes and all of the PUC administrative rules at issue in this docket.

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

For the reasons described above starting on page 14, the sale of electricity from the net-metering facility to the customer-generator would not be a sale of "electricity services available pursuant to direct access." Therefore, it would not matter whether a third-party provider is a registered ESS.

DATED this 30th day of June, 2008.

ESLER, STEPHENS & BUCKLEY

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **OPENING BRIEF OF PETITIONERS HONEYWELL INTERNATIONAL AND HONEYWELL GLOBAL FINANCE** on the following persons on June 30, 2008, by hand-delivering, faxing, e-mailing, or mailing (as indicated below) to each a copy thereof, and if mailed, contained in a sealed envelope, with postage paid, addressed to said attorneys at the last known address of each shown below and deposited in the post office on said day at Portland, Oregon:

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