



1 there is only one customer-generator per net metering facility.” Staff Supplemental Comments  
2 at 2.

3 In its Order No. 07-319, the Commission, while summarizing various net metering  
4 questions and scenarios such as that illustrated in staff’s Supplemental Comments, did not reach  
5 a decision about the applicability of the law to each cited circumstance. Rather, the Commission  
6 stated, in relevant part:

7 Our intent in this rulemaking is to adopt rules implementing an increase to the  
8 eligible net metering facility size for customers of PGE and PacifiCorp, pursuant  
9 to SB 84. All interested persons agree that proposed OAR 860-039-0010  
10 significantly raises the nonresidential limit, and as Staff points out, the residential  
11 limit remains consistent with typical residential demand. We adopt proposed  
12 OAR 860-039-0010. In so doing, we observe that, as the Commission’s rules  
13 may be modified at any time, we can revisit the appropriateness of the size limits  
14 as necessary.

15 Order No. 07-319 at 7.

16 For the purposes of this docket, staff’s stresses that: (1) its AR 515 Supplemental  
17 Comments were intended to illustrate the complex, open questions surrounding the application of  
18 ORS 757.300; (2) DR 40 is an important next step to clarifying an issue that was not fully  
19 resolved in AR 515; and (3) staff agrees with the analysis submitted by the Oregon Department  
20 of Transportation (ODOT) on the question of whether Honeywell may qualify as a customer-  
21 generator.

### 22 **Electric Service Suppliers/Utilities**

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

25 *(2) If Honeywell sells electricity directly to the customer, but does not offer any ancillary  
26 services for purchase, does Honeywell’s service constitute “direct access” under ORS  
27 757.600?*

### 28 Answers

29 Staff reserved the right in its Opening Brief to amend its answers to these two questions  
30 as necessary and appropriate after reviewing the parties’ Opening Briefs. For the following  
31 reasons, staff revises its earlier answers and now concludes: (1) Under the assumed facts,

1 Honeywell is not offering “electricity services available pursuant to direct access to more than  
2 one retail electricity consumer” under ORS 757.600(16); and (2) Honeywell’s sale of electricity,  
3 which does not require ancillary services, does not constitute “direct access” under ORS  
4 757.600.

5 Preliminarily, staff observes that the answers to these two questions are not easily  
6 reached, and depend in part on the type of analysis employed. Staff’s Opening Brief essentially  
7 used the first part of the interpretive methodology set forth in *PGE v. Bureau of Labor and*  
8 *Industries*, 317 Or 606 (1993), and examined the text and context of the relevant statutes to  
9 determine legislative intent. However, based partly on the parties’ helpful analyses, including  
10 their recitation of the historical framework surrounding creation of the direct access concept, and  
11 partly on review of other related statutes, staff concludes Honeywell is not an “electricity service  
12 supplier” (ESS) when it sells electricity under a business model that does not require its  
13 customers to use the transmission and distribution network (“grid”) to receive the electricity.  
14 Because of the potential impact of this conclusion, and the fact that it is not easily reached, staff  
15 suggests parties may want to seek clarification of the matter at the next legislative session.

16 Staff earlier set forth in its Opening Brief the key direct access statutes, which it  
17 reproduces as follows:

18 ORS 757.600(16) defines an ESS as:

19 [A] person or entity that offers to sell electricity services available pursuant to  
20 direct access to more than one retail electricity consumer. “Electricity service  
21 supplier” does not include an electric utility selling electricity to retail electricity  
22 consumers in its own service territory.

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

25 ORS 757.600(6) defines “direct access” as:

26 [T]he 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.

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

6           “Electric company” means “an entity engaged in the business of distributing electricity to  
7           retail electricity consumers in this state, but does not include a consumer-owned utility.”

8           ORS 757.600(11).

9           Finally, “retail electricity consumer” means:

10           [T]he end user of electricity for specific purposes such as heating, lighting, or  
11           operating equipment, and includes all end users of electricity served through the  
12           distribution system of an electric utility on or after July 23, 1999, whether or not  
13           each end user purchases the electricity from the electric utility.

14           ORS 757.600(29).

15           In addition to these direct access statutes, it is important to consider ORS 758.450(4)(c),  
16           which exempts from the territorial allocation statutes (ORS 758.400 to ORS 758.475) companies  
17           that provide electricity generated from certain resources as follows:

18           The provisions of ORS 758.400 to 758.475 do not apply to any corporation,  
19           company, individual or association of individuals providing heat, light or power:

20           ...

21           (c) From solar or wind resources to any number of customers.

22           Staff’s analysis begins with ORS 758.450(4)(c). This statute was enacted with the same  
23           legislation that provides a similar exemption from the definition of “public utility.” *See* ORS  
24           757.005(1)(b)(C)(iii).<sup>1</sup> Importantly, these statutes show that there is not a “gap” in regulation for  
25           companies selling electricity from wind or solar resources. Rather, by enacting these two  
26           statutes, the legislature expressly chose to allow companies to sell electricity from solar and wind  
27           resources in Oregon with minimal regulation.<sup>2</sup>

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30           <sup>1</sup> *See* Oregon Laws 1985, Chapter 779 §§1, 2.

31           <sup>2</sup> While it is not an issue to be addressed in this docket, staff notes that sales of electricity in Oregon are  
32           subject to applicable safety laws and accompanying rules. *See generally* ORS 757.035.

1 This leads to consideration of the direct access statutes. ORS 757.600(16) defines an  
2 ESS, in part, as a company that offers to sell (or does sell) “electricity services.” “Electricity  
3 services” include, in part, generation services. ORS 757.600(15). But, under ORS 757.450(4)(c)  
4 and ORS 757.005(1)(b)(C)(iii), it is clear the legislature decided that a sale of electricity from  
5 solar or wind resources, without “more,” is subject to only minimal regulation in Oregon.

6 The “more” that is needed before a sale of electricity from a wind or solar resource  
7 triggers regulation as an ESS is that, under ORS 757.600(16), the electricity sale must be made  
8 “pursuant to direct access.” In turn, “direct access” means the ability of a customer to purchase,  
9 from an entity other than distribution utility: (1) electricity, and (2) ancillary services. ORS  
10 757.600(6). In other words, a company that sells electricity that is generated from a wind or  
11 solar resource, which does not also involve the need for its customer to use “ancillary services,”  
12 is only subject to the minimal regulation provided by ORS 757.450(4) and ORS  
13 757.005(1)(b)(C)(iii); the same company would not be considered an ESS under ORS  
14 757.600(16).

15 The next step is to review the definition of “ancillary services.” “Ancillary services” are  
16 those services necessary or incidental to the transmission and delivery of electricity from  
17 generating facilities to customers “including but not limited to” a list of activities such as  
18 “scheduling, load shaping, reactive power, voltage control and energy balancing services.” ORS  
19 757.600(2).

20 Under the interpretive principle of *ejusdem generis*, when a law lists specific classes of  
21 things and also refers to them in general, the court construes the statute as referring only to other  
22 items of the same kind. *See Liberty v. State Dept. of Transportation*, 342 Or 11 (2006). In  
23 construing the list of ancillary services set forth in ORS 757.600(2), staff understands that each  
24 of the items delineated in the statute are activities associated with the use of the transmission  
25  
26

1 grid, or the distribution system that connects the transmission grid to the customer.<sup>3</sup> For  
2 example, using its authority provided under ORS 757.600(6) to determine necessary ancillary  
3 services, the Commission adopted a rule regarding “scheduling.” In general terms, “scheduling”  
4 relates to the coordination-type of activities necessary when moving power over the grid. *See*,  
5 *e.g.* OAR 860-038-0410. Under this same rule, the Commission has further declared that an ESS  
6 must either be a “scheduling ESS” or contract with a scheduling ESS or control area operator for  
7 all scheduling services. OAR 860-038-0410(3). Again, the point is the statutorily delineated  
8 activities all involve use of the grid to move and deliver the electricity being sold under direct  
9 access.

10 In conclusion, upon further review, aided by the parties’ Opening Briefs and  
11 incorporating the notion that ORS 758.450(c) and ORS 757.005(1)(b)(C)(iii) expressly allow  
12 sales of electricity in certain circumstances with minimal regulation, staff concludes that an  
13 entity is not an ESS as that term is used under ORS 757.600(16) when it sells electricity  
14 generated from a solar or wind resource under a business model that does not require its  
15 customers to use the transmission or distribution network to receive the power.

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

17 Answer

18 Staff’s Opening Brief analyzed this question under its earlier conclusion that Honeywell  
19 was an ESS. Having reached a different conclusion in this Reply Brief on the ESS issue, the  
20 answer is still “no.” If the Commission exercises its authority to allow third-party ownership of  
21 net metering facilities, the utility must serve Honeywell’s customer as it would any other  
22 customer-generator.

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25 <sup>3</sup> “Distribution” means the delivery of electricity to customers through a distribution system consisting of  
26 local power poles, transformers, etc. ORS 757.600(8). “Distribution utility” means an electric utility that  
owns and operates a distribution system connecting the transmission grid to the customer.

1 **Similarly-Situated Businesses**

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

3 Answer

4 The exemption from the territorial allocation statutes provided under ORS 758.450(4)(c)  
5 and from the definition of public utility provided under ORS 757.005(1)(b)(C)(iii) only applies  
6 to electricity generated from a wind or solar resource, (which are also eligible net-metering  
7 generation resources).

8 DATED this 11<sup>th</sup> day of July 2008.

9

Respectfully submitted,

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12

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1 **CERTIFICATE OF SERVICE**

2 I certify that on July 11, 2008, I served the foregoing PUC Staff Reply Brief upon all  
3 parties of record in this proceeding by delivering a copy by electronic mail and by mailing a  
4 copy by postage prepaid first class mail or by hand delivery/shuttle mail to the parties accepting  
5 paper service.

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