

PAUL NOLTE, LAWYER

3860 FISHER ROAD
ROSEBURG, OREGON 97470
PHONE 541-821-2271
FAX 541-672-2134
law@ashlandhome.net

July 10, 2008

via electronic filing and hand delivery

Oregon Public Utility Commission
550 Capitol Street NE, Suite 215
Salem, OR 97301-2551

Attention: Vikie Bailey-Goggins
Administrator, Regulatory Operations

Re: In the Matter of the Honeywell International, Inc. and Honeywell
Global Finance, LLC and Pacificorp dba Pacific Power
Docket No. DR 40

Enclosed for filing in the above-captioned proceeding is the League of Oregon
Cities Reply Brief in the above-referenced matter.

Paul Nolte

cc: Service List,

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

DR 40

In the Matter of the)	
)	
HONEYWELL INTERNATIONAL,)	REPLY BRIEF
INC., AND HONEYWELL GLOBAL)	LEAGUE OF OREGON CITIES
FINANCE, LLC,)	
)	
and)	
)	
PACIFICORP, dba PACIFIC POWER)	

Introduction

In its Reply Brief, the League of Oregon Cities has chosen to address a limited number of issues. This Reply Brief follows the organizing questions posed by the ALJ. The League disagrees with Pacific Power’s characterization that “[t]his proceeding is not about solar energy”.¹ This proceeding is entirely about solar energy; from the various tax credits and other incentives to promote solar energy, such as “Federal Income Tax Credits and accelerated depreciation, the Oregon Business Energy Tax Credit (either directly or using the pass-through), and any other available incentives, such as those provided by the Energy Trust of Oregon”, to the market response by Honeywell and its various customers, to the net metering arrangements “generat[ing] electricity using solar power”, to the statutory exemption from Commission regulation of any person generating electricity by solar power as a “public utility”. This proceeding is binding upon the Commission and the petitioners as to the alleged facts, which clearly turn on

¹ Pacific Power Opening Brief, page 1.

the use of solar energy to generate electricity. ORS 756.450. The central aspect of solar energy in this proceeding could not be more clear.

Net-Metering

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

As noted by the Renewable Northwest Project, this docket has given rise to significant uncertainty for the Oregon cities with either projects in the pipeline or ready to be put on-line, such as Medford, Pendleton, Hillsboro and Portland. The League hopes that the Commission continues to follow the decisional schedule identified by the ALJ, so that the issues presented by this proceeding will be decided quickly.

As aptly characterized by ODOT, Honeywell’s “five [factual] fingers fit the definitional glove literally and precisely.” ODOT Opening Brief, page 6. Even Pacific Power has had to acknowledge that the facilities installed by Honeywell qualify under the statutory definition. Pacific Power Opening Brief, page 8.

(2) Is Honeywell’s customer as described above a “customer-generator” under ORS 757.300(1)(a)?

As defined by statute, a “customer-generator” is a “user of a net metering facility”. ORS 757.300(1)(a). If the statutory term is not defined, the courts ascertain its “plain and ordinary meaning” by commonly referring to *Webster’s Third New International Dictionary*. State v. Jessen, 162 Or App 662, 667, 986 P2d 684 (1999). As defined by *Webster’s*, “user” means “one that uses” or “the enjoyment of a right of use”. *Webster’s Third New International Dictionary*, 2524 ((unabridged edition 1993). This definition is consistent with the one identified by other parties. See, Renewable Northwest Project. RNP Opening Brief, page 4; PGE Opening Brief, page 5. As noted by PGE,

“Honeywell’s customers ‘use’ the facility by consuming the energy produced by the facility and thereby reducing the energy provided to the customer by the utility.” PGE Opening Brief, page 4.

Pacific Power mischaracterizes the responsibilities given to Honeywell’s customers, stating “the customer has no role in operating or maintaining the net metering facilities.” Pacific Power Opening Brief, page 9. However, as identified in the assumed facts: “The customer provides its premises for the facility and is responsible for providing physical security. The customer, in addition to Honeywell, monitors the operation of the facility, including its power output.” This is not merely a power purchase agreement, but a transaction in which the customer has on-going responsibilities for the solar facility located on the customer’s premises. The cities of Pendleton and Hillsboro are not merely “casual tenants”, but are the owners of the premises upon which the solar facility is located, such as the rooftop of a municipal building or water reservoir property.

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

The positions advocated by Pacific Power are contrary to the stated objectives of the Oregon Legislature. Pacific Power Opening Brief, pages 9-10. The League supports the arguments laid out by ODOT – that the legislature did not intend to turn qualifying for net metering on a determination of who was the owner of the solar facility. ODOT Opening Brief, pages 13-18. As noted by the OPUDA, the legislature did not place any “ownership” requirements into the statutory scheme under ORS 757.300. OPUDA Opening Brief, page 3. See also, PGE Opening Brief, page 5.

The statute was first enacted by the Oregon Legislature in 1999. Oregon Laws 1999, Chapter 944 (HB 3219). As stated in the 1999 legislation, the legislative purpose in enacting the bill was to “encourage[] private investment in renewable energy resources, stimulate[] in-state economic growth, enhance[] the continued diversification of this state’s energy resources and reduce[] utility interconnection and administrative costs”. Id.

In the proceeding to develop the administrative rules currently under consideration, “PacifiCorp interpret[ed] the proposed rules to permit the owner of a net metering facility and the customer-generator or user to be different entities.” In re Adoption of Rules Related to Net Metering, AR 515, Order No. 07-319, 2007 WL 2174006, (July 24, 2007) (discussion of “user” v. “owner”). Pacific Power’s change of position was noted by Renewable Northwest Project in its opening brief. RNP Opening, page 2. Now, Pacific Power is advocating for interpretations of the administrative rule that are 180 degrees in the other direction.

The Commission should be “indifferent” to whatever financial arrangements the customer-generator has entered into to be able to develop a net metering facility located on its premises, on the customer’s side of the meter. See, OPUC Staff Brief, page 3, lines 14-18.

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

The League agrees with Honeywell’s answer to this question – the utility is responsible for the costs of the meter, as provided under ORS 757.200(2)(a); OAR 860-039-0020(5) (“The public utility will install the required metering equipment at the utility’s expense.”).

The League agrees with PGE that any additional metering required between the customer and Honeywell, on the customer's side of the service drop would be appropriately addressed between those parties. PGE Opening Brief, page 6. The general questions posed by Pacific Power would be more appropriately addressed in the context of a rulemaking proceeding, not a declaratory ruling. Pacific Power Opening Brief, page 11.

Transaction Between Honeywell and Customer

(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?

The League agrees with the observation by OPUC Staff that the questions related to the FERC's jurisdiction over "wholesale" transactions, as "sale for resale", have been previously determined as being outside the scope of this proceeding. OPUC Staff Opening Brief, at page 4. The prior, limiting determination is appropriate, given the limited scope of a declaratory ruling under ORS 756.450. The Commission does not have authority in declaratory ruling to issue final and binding determinations on issues over which it does not have administrative authority, such as interpretation of federal statutes. As such, the Commission need not and should not address these issues.

Pacific Power's characterization of the transactions involved is inverted. Pacific Power Opening Brief, page 11. The primary sale is by the utility, which is the baseline provider of electricity to the customer. As noted by PGE, Honeywell is essentially "a hardware provider" in these transactions. PGE Opening Brief, page 3. Honeywell provides merely a portion of the customer's electricity, "generat[ing] between 0.5 percent and 18 percent of the annual electricity used by the customer at the project served by the solar facility." There is no "waiver" of charges for "bundled" electric

service by the utility, rather the utility is able to distribute that electricity to its other customers, avoiding the generating costs that it would otherwise incur for those kilowatts.

(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)?

Despite the early limitations placed upon this proceeding, Pacific Power continues to argue that the Commission must address whether the Federal Power Act applies. Pacific Power Opening Brief, page 11. In any event, Pacific Power's arguments are wrong.

Under the net metering scenario, there is no sale when "the customer-generator feeds electricity back to the utility." OPUC Staff Opening Brief, page 5. As noted by the Renewable Northwest Project, the transactions between Honeywell and its customers are not "sale for resale" because there is no "resale" of the electricity that is surplus to the customer's demand. RNP Opening Brief, page 6. "The utility does not purchase, or compensate the customer for, any electricity in excess of the customer's load." PGE Opening Brief, page 7.

Under net-metering, there is no "resale" – there is a credit to the customer's utility billing. This concept is hard-wired into the statutory scheme. ORS 757.300(2)(a). Net excess generation is carried over to the customer's next bill as a kilowatt-hour credit for a 12-month period. ORS 757.300(3)(c); OAR 860-039-0055(1). Any net excess generation remaining at the end of a 12-month period is credited at the utility's avoided-cost rate to customers enrolled in Oregon's low-income assistance programs. ORS 757.300(3)(d); OAR 860-039-0060(1).

Pacific Power asserts that the MidAmerican decision stands for the proposition that “there may be circumstances where the FERC will choose to exercise its jurisdiction [over wholesale rates].” Pacific Power Opening Brief, page 13. However, Pacific Power misstates the FERC’s conclusion: the FERC actually indicated that it would defer to the states on net-metering determinations. MidAmerican Energy Co., 94 FERC ¶ 61,340 at 62,263, Docket EL-99-3-00, 2001 WL 306484 (2001) (footnotes omitted).

Subsequent to denying MidAmerican’s petition “to interfere with the Iowa Board’s determination to permit net metering”, the FERC clarified its position, stating: “[U]nder most circumstances the Commission does not exert jurisdiction over a net energy metering arrangement when the owner of the generator receives a credit against its retail power purchases from the selling utility . . . Only if the Generating Facility produces more energy than it needs and makes a net **sale** of energy to a utility over the applicable billing period would the Commission assert jurisdiction”

Standardization of Generator Interconnection Agreements and Procedures, 106 FERC ¶ 61220, Docket No. RM02-1-001 2004 WL 436282, at ¶ 747 (March 5, 2004)

(emphasis added). However, as noted by the Renewable Northwest Project, net metering is the “measurement of the net flow of energy as a basis for calculating the customer’s electricity bill, which in no circumstances can go negative (*i.e.*, the utility paying the customer for the net flow of electricity.) RNP Opening Brief, page 6. In this context, there is never any “sale” of electricity by the customer to the utility.

Electric Service Suppliers/Utilities

(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?

The League disagrees with the OPUC Staff's position on "ancillary services" in the context of "direct access" under ORS 757.600(6). OPUC Staff Opening Brief, pages 6-10. Even Pacific Power acknowledges that "Honeywell does not appear to offer ancillary services" as contemplated by the statutes. Pacific Power Opening Brief, page 14. And as PGE notes, Honeywell "is distinguishable from ESSs in that they do not need to use the utility's distribution [or transmission] system to sell generation to their customers." PGE Opening Brief, page 8.

The League agrees with the conclusions of the Renewable Northwest Project that Honeywell does not offer ancillary services as contemplated as defined in ORS 757.600(2), and in its reading of the definition of "direct access" under ORS 757.600(6). "And" is a conjunctive word, not disjunctive. The Commission should decline the Staff's invitation to simply read "and ancillary services" out of the statute altogether.

"Generally, the words 'and' and 'or,' as used in statutes, are not interchangeable, being strictly of a conjunctive or disjunctive nature . . . There is no justification for using 'or' as meaning 'and', unless the failure to do so would leave a statute meaningless or absurd." Lommasson v. School Dist. No. 1, 201 Or 71, 79, 261 P2d 860, adhered to in part on rehearing, 201 Or 90, 91, 267 P2d 1105 (1954); Ollilo v. Clatskanie P.U.D., 170 Or 173, 180, 132 P2d 416 (1942) ("and" and "or" should not be construed interchangeably unless necessary to implement the legislative intent or to avoid an absurd or unreasonable result.) In the context of ORS 757.600(2), "and" must be read in the conjunctive form in order to achieve the intended legislative intent. Reading it in the disjunctive form would lead to an unreasonable result.

The OPUC Staff suggests that the assumed facts are insufficient, as they do not identify how the electricity is “distributed” to the customer by Honeywell. OPUC Staff Opening Brief, page 8-9. However, this discussion leaves out one essential fact – all of Honeywell’s solar photovoltaic facilities are “located on a customer’s premises, such as a roof or vacant land.” For each of the Honeywell customers that are Oregon municipalities, the electricity is either consumed on site or is “net-metered” for the meter for that particular facility. In other words, there is no distribution or transmission facility that is involved – the “delivery” takes place on the customer’s side of the service drop.² To take Staff’s position to its logical conclusion, a person connecting an electricity generator by an extension cord to an RV at a campsite would be engaged in “direct access” due to the ancillary service of “delivery” of electricity.

Credits

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

The Commission has previously noted that the FERC has held that “states have the exclusive authority to determine [the] ownership of ‘green tags’”. In re Energy Service Supplier Certification Requirements, AR 495, Order No. 05-1229, 2005 WL 3747726 (November 28, 2005) (citing American Ref-Fuel Company, 105 FERC ¶ 61,004 at 61,007. (October 1, 2003)). The Commission has adopted rules specifically anticipating this question and providing an unambiguous answer. “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

² The Commission has defined distribution as meaning “that portion of an electric system which delivers electricity from transformation points on the transmission system to points of connection at a customer’s premises.” OAR 860-039-0005(3)(e).

electric company pursuant to [t]he provisions of a net metering tariff.” OAR 860-022-0075(2)(a); RNP Opening Brief, page 12. Pacific Power’s suggestion that ownership of non-energy attributes of renewable energy should flow through to the utility has already been considered and rejected. Pacific Power Opening Brief, pages 19-20.

Dated July 10, 2008

Paul Nolte, OSB No. 69129
3860 Fisher Rd.
Roseburg, OR 97401
541-821-2271
law@ashlandhome.net

Attorney for League of Oregon Cities

CERTIFICATE OF SERVICE

I certify that I have on this day served the foregoing document upon all parties of record in this proceeding via electronic mail and /or by mailing a copy properly addressed with first class postage prepaid.

Michael L. Weirich, Esq.
michael.weirich@doj.state.or.us
Department of Justice
Reg Utility & Business Section
1162 Court Street N.E.
Salem, Oregon 97301 -4096

Michelle R. Mishoe, Esq.
michelle.mishoe@,pacificcorp.com
Pacific Power & Light
825 N.E. Multnomah, Suite 1800
Portland, Oregon 97232

Theodore Falk, Esq.
theodore.c.falk@,doi.state.or.us
DOJ GC Transactions
1162 Court Street N.E.
Salem, Oregon 973 0 1-4096

William F. Nessly, Jr., Esq.
william.nessly@doj.state.or.us
DOJ GC Transactions
1162 Court Street N.E.
Salem, Oregon 97301-4096

James Whitty
jim.whitty@odot.state.or.us
Office of Innovative Partnerships
Oregon Department of Transportation
115 Transportation Building
355 Capitol Street N.E.
Salem, Oregon 973 10

Lori Koho
lori.koho@state.or.us
Oregon Public Utility Commission
P.O. Box 2148
Salem, Oregon 97308

Joseph Reinhart
joe@oseia.org
Executive Director
Oregon Solar Energy Industries
Association
833 S.E. Main, MB #206
Portland, Oregon 97214

Peter West
peter(peter@energytrust.org
Director of Renewable Energy
Energy Trust of Oregon, Inc.
85 1 S.W. Sixth Avenue, Suite 1200
Portland, Oregon 97204

John M. Volkman, Esq.
john.volkman@,energytrust.org
General Counsel
Energy Trust of Oregon, Inc.
851 S.W. Sixth Avenue, Suite 1200
Portland, Oregon 97204

Debbie Goldberg Menashe, Esq.
debbie@energqrust.org
Senior Counsel
Energy Trust of Oregon, Inc.
85 1 S.W. Sixth Avenue, Suite 1200
Portland, Oregon 97204

Fritz Feiten
fritz.feiten@honeywell.com
Honeywell Building Solutions
9685 N.E. Beachcrest Drive
Bainbridge Island Washington 98110

Kim T. Buckley, Esq.
buckley@eslerstephens.com
Esler Stephens & Buckley
888 S.W. Fifth Avenue, Suite 700
Portland, Oregon 97204-2021

Kip Pheil
kip.pheil@state.or.us
Oregon Department of Energy
625 Marion Street N.E., Suite 1
Salem, Oregon 97310-373 7

James Murphy
james.b.murphy@doj.state.or.us
Oregon Department of Justice
Natural Resources Section
1162 Court Street N.E.
Salem, Oregon 97301-4096

Janet L. Prewitt, Esq.
janet.prewitt@doj.state.or.us
Oregon Department of Justice
Natural Resources Section
1162 Court Street N.E.
Salem, Oregon 97301-4096

Paul Davies
pdavies@cencoast.com
Central Lincoln People's Utility District
2129 North Coast Highway
P.O. Box 1 126
Newport, Oregon 97365-0090

Thomas M. Grim, Esq.
t.grim@cablehuston.com
Cable Huston et al.
1001 S.W. Fifth Avenue, Suite 2000
Portland, Oregon 97204-1136

Oregon Dockets
oregondockets@pacificorp.com
PacifiCorp
825 N.E. Multnomah, Suite 2000
Portland, Oregon 97232

Lori J. Cooper, Esq.
lori.cooper@cityofmedford.org
411 W. 8th Street
Medford, Oregon 97501

Martin Shain
martin@bacgensolar.com
BacGen Solar Group
One World Trade Center
121 S.W. Salmon, 11th Floor
Portland, Oregon 97204

Lowrey R. Brown
lowrey@oregoncub.org
Jason Eisdorfer
jason@oregoncub.org
Robert Jenks
bob@oregoncub.org
Citizens Utility Board of Oregon
610 S.W. Broadway, Suite 308
Portland, Oregon 97205

Dennis Wilde
dennis.wilde@gerdingedlen.com
Gerding Edlen Sustainable Solutions
1120 N.W. Couch Street, Suite 600
Portland, Oregon 97209

Kevin T. Fox, Esq.
kfox@keyesandfox.com
Keyes & Fox, LLP
5727 Keith Avenue
Oakland, California 94618

Scott Winkels
swinkels@orcities.org
League of Oregon Cities
P.O. Box 928
Salem, Oregon 97308

Ralph Cavanagh
rcavanagh@nrdc.org
NW Energy Program Director
Natural Resources Defense Council
111 Sutter Street, Floor 20
San Francisco, California 94104

Randall Dahlgren
pge.opuc.filings@pgn.com
121 S.W. Salmon, 1WTC0702
Portland, Oregon 97204

J. Richard George
richard.george@pgn.com
121 S.W. Salmon, 1WTC1301
Portland, Oregon 97204

Suzanne Liou
suzanne@rnp.org
Renewable Northwest Project
917 S.W. Oak, Suite 303
Portland, Oregon 97205

Doug Parsons
dparsons@sunenergypower.com
SunEnergy Power Corporation
1133 N.W. Wall Street, Suite 305
Bend, Oregon 97701-1968

Danelle Romain
dromain@teleport.com
The Romain Group, LLC
707 S.W. Washington, Suite 927
Portland, Oregon 97205

David F. White, Esq.
davidw@tonkon.com
Tonkon Torp, LLP
1600 Pioneer Tower
888 S. W. Fifth Avenue
Portland, Oregon 97204

Dated July 11, 2008

Paul Nolte, OSB No. 69129
3860 Fisher Rd.
Roseburg, OR 97470

