BEFORE THE PUBLIC UTILITY COMMISSION
OF THE STATE OF OREGON

DR 40

In the Matter of HONEYWELL INTERNATIONAL, INC., and HONEYWELL GLOBAL FINANCE, LLC and PACIFICORP, dba PACIFIC POWER	REPLY BRIEF OF OREGON DEPARTMENT OF TRANSPORTATION, INTERVENOR

The Oregon Department of Transportation (ODOT) respectfully submits its Reply Brief in this declaratory ruling proceeding. ODOT will not expand on the position it took, in Part I of its Opening Brief, concerning the ability of the Honeywell solar generating system to qualify as a net metering facility under ORS 757.300. In accordance with ODOT's request for leave to amend its contentions in light of the presentations of the other parties and intervenors,[1] however, ODOT offers the following analysis in support of the contention that Honeywell does not, under the Assumed Facts, constitute an electricity service supplier (ESS) as that term is defined by ORS 757.600(16).

ODOT maintains that a Honeywell customer, under an Energy Services Agreement (ESA), does not need, use or acquire "ancillary services" (ORS 757.600(2)) when it uses a Honeywell net metering facility to offset part of its electricity requirements. Because ancillary services are a necessary element of direct access that is absent from this case, Honeywell does not satisfy the definition of an ESS.

I. Electricity Service Supplier under ORS 757.600(16).

Must Honeywell, as the solar generating equipment owner and provider under an ESA, register as an ESS? This question presents the issue whether every entity that owns more

[1] ODOT Opening Brief at 22-23.

than one solar net metering facility and sells the solar power to more than one retail consumer must be treated as an ESS.

An examination of the direct access statutes in the context of related laws manifests that the legislature did not contemplate that solar powered net metering facilities under ORS 757.300 also would constitute electricity service providers as defined by ORS 757.600(16). More significantly, the application of the statutory construction method prescribed by the Oregon Supreme Court[2] demonstrates that Honeywell does not fall within the definition of an ESS.

If a party who sells solar-generated electricity, under ESAs, to multiple customer-generators must be regarded as an ESS, the legislature's historical solicitude for the development of renewable electricity presents an incongruity in legislative policy. As noted at page 19 of ODOT's Opening Brief, the 1985 Legislative Assembly exempted generators of solar power from the public utility regulation that applied to distributors of electric power. *See* Oregon Laws 1985, chapter 779, §1(2)(d)(C) (attached as ODOT Exhibit A).[3] The legislature intended that exemption to encourage the development of electrical power production from solar and wind energy by freeing from regulation those who invested in that industry.[4] Consonant with that legislative purpose, section 2 of the same enactment exempted, from the strictures of the territorial allocation laws, entities that provide power from solar resources:

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[2] ***PGE v. Bureau of Labor and Industries***, 317 Or 606, 610-12, 859 P2d 1143 (1993).

[3] Oregon Laws 1985, chapter 779, §1(2)(d)(C) amended ORS 757.005 to exempt, from the definition of "public utility":

> (d) Any corporation, company, individual or association of individuals providing heat, light or power:
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> (C) From solar or wind resources to any number of customers.

[4] Comments of Representative Anderson on House Bill 2202 (1985), Minutes, Senate Committee on Energy and Natural Resources, June 6, 1985 at 2.

> The provisions of ORS 758.400 to 758.475 do not apply to any corporation, company, individual or association of individuals providing heat, light or power:
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> (c) From solar or wind resources to any number of customers;
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Oregon Laws 1985, chapter 779, §2(4)(c), *codified as* ORS 758.450(4)(c).

Against this background of a legislative design to encourage, by reducing regulatory impediments, the establishment of solar and wind generating facilities, the direct access legislation, Oregon Laws 1999, chapter 865 (Senate Bill 114), if construed as extending beyond its purposes, would subvert the policy of the 1985 exemptions. The direct access legislation addressed a different function - the importation, and direct consumer use, of power that originated from outside the distribution system on which the consumer originally depended.

The 1999 Legislative Assembly presumably was aware of the exempt treatment it had afforded solar energy providers, for in Oregon Laws 1999, chapter 865, it amended the statute that had granted that exemption, ORS 757.005, *supra*, to add a new concept - "electricity service supplier."[5] ODOT agrees with the Commission Staff conclusion that the legislative history of the 1999 enactment exhibits no suggestion that the legislature deliberated on whether the new exemption from the definition of "public utility" and the enactment of the 1999 ESS definition would subject solar or wind resource developers to the special regime of regulation then being instituted for ESSs.[6]

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[5] Section 21(1)(H) of Oregon Laws 1999, chapter 865, added, to the exemptions from the definition of 'public utility" in ORS 757.500:

> An electricity service supplier, as defined in Section 1 of this 1999 Act.

[6] *See* Staff of the Public Utility Commission of Oregon's Opening Brief, footnote 2 at 6.

The new definition in the 1999 legislation, ORS 767.600(16)[7] defined "electricity service supplier:"

> "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.

For the purposes of this case, the ESS definition presents a single issue.[8] That issue is whether a customer under a Honeywell ESA has the ability to purchase both the electricity generated by the solar system and "ancillary services" that constitute an essential element of direct access. To fall within the foregoing definition of an ESS, an entity must offer to make electricity services available "pursuant to direct access."

ORS 757.600(6) defines "direct access:"

> (6) "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.

(Emphasis added).

Thus, to acquire electricity services "pursuant to direct access," the consumer must have the ability to purchase both electricity and certain ancillary services. The "ancillary services" contemplated by the Legislative Assembly are those services that are necessary or incidental to both the transmission and the delivery of electricity:

> "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.

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[7] ORS 757.600(16) was enacted as Oregon Laws 1999, chapter 865, §1(16).

[8] This discussion assumes that a provider of solar energy generation facilities will offer the power the facilities produce to more than one retail electricity customer. This discussion also recognizes that the breadth of the term "electricity services" blocks any contention that the owner of a solar generating system does not, under an ESA, offer to sell electricity services. ORS 757.600(15) states:

> "Electricity services" means electricity distribution, transmission, generation or generation-related services.

ORS 757.600(2).

In ***Liberty v. State Dept. of Transportation***, 342 Or 11, 20, 148 P3d 909 (2006), the court interpreted a comparably structured definition statute,[9] holding:

> When the legislature uses "nonspecific or general phrases" as well as a list of items, this court, under the principle of *ejusdem generis*, construes the statute "as referring only to other items of the same kind." ***Vannatta v. Keisling***, 324 Or 514, 533, 931 P2d 770 (1997) (stating and applying principle). *See also* ***Lewis v. CIGNA Ins. Co.***, 339 Or 342, 350-51, 121 P3d 1128 (2005) (under *ejusdem generis* rule, court examines "basic characteristics" of enumerated items when construing more general words). With that principle in mind, we consider whether there is a characteristic trait among the "outdoor activities" listed in ORS 105.672(5) that also is shared by the act of crossing land to get to other land.[10]

In construing ORS 757.600(2) consistently with the application of the *ejusdem generis* principle, what is the "characteristic trait" among the activities the legislature listed to illustrate the scope of the general phrase "ancillary services"? That trait is that each of the enumerated activities - "scheduling, load shaping, reactive power, voltage control and energy balancing services" - constitutes an activity that is associated with the transmission of electric power to the consumer over the transmission grid or a utility distribution system. The ancillary services that are essential to the ability to acquire electricity "pursuant to direct access" are restricted to those services[11] that are directly related to the management of electric power that is delivered through the grid.

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[9] ORS 757.600(2) speaks in terms of "including but not limited to." The definitional provision construed in ***Liberty*** used the virtually indistinguishable phrase "includes, but is not limited to." The definition addressed in ***Liberty***, ORS 105.672(5), provided:

> "Recreational purposes" includes, but is not limited to, outdoor activities such as hunting, fishing, swimming, boating, camping, picnicking, hiking, nature study, outdoor educational activities, waterskiing, winter sports, viewing or enjoying historical, archaeological, scenic or scientific sites or volunteering for any public purpose project.

342 Or at 17.

[10] *See also* ***Baker v. City of Lakeside***, 343 Or 70, 76, 164 P3d 259 (2007) ("We ordinarily assume that a nonspecific term in a series, such as "any other provision," shares the same qualities as the specific terms that precede it" *citing* ***Liberty***, 342 Or at 20).

[11] This interpretation also is consistent with the internal structure of ORS 757.600(2) itself, which restricts ancillary services to those that are "necessary or incidental to the transmission and delivery of electricity * * * ."

The electrical power received by the host customer from the solar generating system under an ESA does not come to the customer over the transmission grid or a utility distribution system. For that reason, no ancillary services are involved in any way in Honeywell's provision of electrical power to an ESA customer. Hence, a necessary element of direct access - one or more ancillary services - is missing from the equation.

ORS 757.600(6), *supra*, also recognizes that the ancillary services that are essential to the delivery of power "pursuant to direct access" shall be those ancillary services "as determined by the commission." In promulgating OAR 839-038-0005(5), the Public Utility Commission determined, in a manner that is consistent with the principle of *ejusdem generis*, the basic characteristics of the ancillary services that a customer must be able to acquire in order for a provider to constitute an ESS:

> "Ancillary services" means those services necessary or incidental to the transmission and delivery of electricity from resources to retail electricity customers, including but not limited to scheduling, frequency regulation, load shaping, load following, spinning reserves, supplemental reserves, reactive power, voltage control and energy balancing services.

Although the rule expands the list of ancillary services in ORS 757.600(2) by adding frequency regulation, load following, spinning reserves, and supplemental reserves, each of those activities likewise partakes of the character of the ancillary services listed in the statutory definition. Under the rule, ancillary services remain restricted to those services that share the core characteristic of being directly related to the management of electric power that is delivered through the transmission grid or utility distribution system. If the sale of the solar power generated by the Honeywell equipment to a customer-generator neither requires nor involves the provision of services of that character, then a necessary element of "direct access" is missing and Honeywell does not satisfy the definition of an ESS.

Moreover, under both ORS 757.600(2) and OAR 839-038-0005(5), the ancillary services, of which at least some must be provided to constitute direct access, are those

services that are necessary or incidental both[12] to the "transmission" and to the "delivery" of electricity. Stated differently, direct access must involve the consumer's ability and need to acquire services that are either necessary or incidental to the transportation of electrical current - "transmission."[13]

In the Honeywell situation, no transmission occurs or is required. In the context of a direct access regulatory system that was intended to govern the importation, to customers, of electrical power that originated elsewhere than the customer's premises, it becomes apparent that the provider and owner of a generating system that creates power on the site of the power consumer provides no services that are necessary or incidental to any transmission of the power.

The word "transmission" has the following meanings that make sense in reading ORS 757.600(2) and OAR 839-038-0005(5):[14]

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[12] "And" expresses the conjunctive; "or" denotes the disjunctive. When used in a statute, "and" requires the coexistence of both of the subjects it connects, not merely either of them:

> Generally, the words "and" and "or", as used in statutes, are not interchangeable, being strictly of a conjunctive or disjunctive nature, respectively: and their ordinary meaning will be followed if it does not render the sense of the statute dubious or circumvent the legislative intent, or unless the act itself furnishes cogent proof of the legislative error.

Lommasson v. School Dist. No. 1, 201 Or 71, 79, 261 P2d 860, 267 P2d 1105 (1954). *See also* ***Recovery House VI v. City of Eugene***, 156 Or App 509, 512-15, 965 P2d 488 (1998) (recognizing and applying this principle).

[13] ODOT will not maintain that services relating, in the terms of ORS 757.600(6), to the "delivery" of electricity to the customer are not involved in the Honeywell solar generating system structure. The point is that a literal application of ORS 757.600(6) requires services that relate to both "transmission" and "delivery," and that transmission is lacking here.

ODOT observes, however, that in the use of a generation system that must, under ORS 757.300(1)(d)(B), be located on the customer's premises, the concept of "delivery" of electric power to the place at which it originates is not easy to grasp.

[14] ORS 757.600(2) and OAR 839-038-0005(5) are sufficiently similar in structure and content that they require no separate interpretational treatment. To the extent the rule may be regarded as different, however, the interpretation of administrative rules involves essentially the same interpretive framework that applies, under ***PGE v. Bureau of Labor and Industries***, *supra*, to the construction of statutes. The examination begins with the text of the rule itself, taken in connection with the rule's context, which includes the statute pursuant to which the rule was adopted. ***Tye v. McFetridge***, 342 Or 61, 69, 149 P3d 1111 (2006).

> **1 :** an act, process, or instance of transmitting: * * * * [15]

The root verb, to transmit, connotes that "transmission" involves moving something from place to place:

> **1 a :** to cause to go or be conveyed to another person or place **:** SEND *** * * b** (1) **:** to pass on or spread about **:** DISSEMINATE, COMMUNICATE * * * **2 a** (1) **:** to cause (as light or force) to pass or to be conveyed through space or a medium * * * * [16]

In other words, unless the provision of electric power by the owner of a net metering facility involves the provision of service that relates to the transportation of electric from place to place, no one provides any ancillary services that are necessary or incidental to the transmission of electricity. Consequently, the owner of the net metering facility does not provide electricity services that are available pursuant to direct access. The owner is not an ESS as that term is defined by ORS 757.600(16).

CONCLUSION

ODOT thanks the Public Utility Commission for its expedited consideration of this declaratory ruling proceeding. ODOT respectfully requests the Commission to issue an order that determines that the Honeywell solar generating installation qualifies as a net

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[15] *Webster's Third New Int'l Dictionary* (3rd ed, unabridged 2002) at 2429.

[16] *Id.*

metering facility under ORS 757.300(1)(c) and that Honeywell does not constitute an electricity service supplier under ORS 757.600(16).

DATED this 11th day of July 2008.

Respectfully submitted,
Hardy Meyers
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William F. Nessly, Jr.
Senior Assistant Attorney General
Theodore C. Falk
Senior Assistant Attorney General
Of Attorneys for the Oregon Department of Transportation

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The electrical power received by the host customer from the solar generating system under an ESA does not come to the customer over the transmission grid or a utility distribution system. For that reason, no ancillary services are involved in any way in Honeywell's provision of electrical power to an ESA customer. Hence, a necessary element of direct access - one or more ancillary services - is missing from the equation.

ORS 757.600(6), *supra*, also recognizes that the ancillary services that are essential to the delivery of power "pursuant to direct access" shall be those ancillary services "as determined by the commission." In promulgating OAR 839-038-0005(5), the Public Utility Commission determined, in a manner that is consistent with the principle of *ejusdem generis*, the basic characteristics of the ancillary services that a customer must be able to acquire in order for a provider to constitute an ESS:

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Although the rule expands the list of ancillary services in ORS 757.600(2) by adding frequency regulation, load following, spinning reserves, and supplemental reserves, each of those activities likewise partakes of the character of the ancillary services listed in the statutory definition. Under the rule, ancillary services remain restricted to those services that share the core characteristic of being directly related to the management of electric power that is delivered through the transmission grid or utility distribution system. If the sale of the solar power generated by the Honeywell equipment to a customer-generator neither requires nor involves the provision of services of that character, then a necessary element of "direct access" is missing and Honeywell does not satisfy the definition of an ESS.

Moreover, under both ORS 757.600(2) and OAR 839-038-0005(5), the ancillary services, of which at least some must be provided to constitute direct access, are those

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ODOT observes, however, that in the use of a generation system that must, under ORS 757.300(1)(d)(B), be located on the customer's premises, the concept of "delivery" of electric power to the place at which it originates is not easy to grasp.

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In other words, unless the provision of electric power by the owner of a net metering facility involves the provision of service that relates to the transportation of electric from place to place, no one provides any ancillary services that are necessary or incidental to the transmission of electricity. Consequently, the owner of the net metering facility does not provide electricity services that are available pursuant to direct access. The owner is not an ESS as that term is defined by ORS 757.600(16).

CONCLUSION

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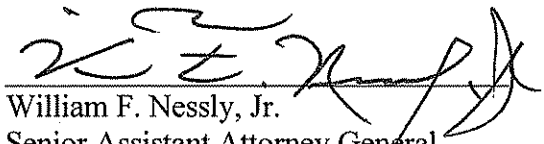
DATED this 11th day of July 2008.

Respectfully submitted,
Hardy Meyers
Attorney General



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(7) Authority for the board to hire a staff and make contracts.

(8) A provision precluding the board from expending more than five percent of the current asset value of the fund and its investments for staff services in any one year.

(9) A provision directing the board to give priority to Oregon's depressed areas, and its traditional farming, forestry and fisheries industries in its allocation of funds for feasibility studies and investments.

(10) A provision directing the board to give special preference to financing community and worker owned enterprises interested in purchasing closed down manufacturing facilities.

(11) The authority for the board to use any form of financing it deems appropriate and reasonable, including loans, equity, stock purchases and royalty agreements.

(12) A directive to the board to exercise whatever degree of management supervision and control it feels is required to assure the long-term success of the enterprises it finances.

(13) A provision prohibiting financing more than 50 percent of any buy-out of an industrial facility.

(14) A directive to seek returns for the fund that are commensurate with the risks that it undertakes in the investment.

SECTION 3. Notwithstanding any other law, the amount of $2 million is established for the biennium beginning July 1, 1985, as the maximum limit for payment of expenses from the Economic Stabilization and Conversion Fund for purposes of this Act.

SECTION 4. In accordance with any applicable provisions of ORS 183.310 to 183.550, the Economic Development Commission may adopt such rules as it considers necessary to carry out the duties, functions and powers under this Act.

SECTION 5. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect July 1, 1985.

Approved by the Governor July 14, 1985
Filed in the office of Secretary of State July 15, 1985

CHAPTER 779

AN ACT HB 2202

Relating to public utilities; amending ORS 757.005 and 758.450; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 757.005 is amended to read:

757.005. (1) As used in this chapter, except as provided in subsection (2) of this section, the term "public utility" means:

(a) Any corporation, company, individual, association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the conveyance of telephone messages, with or without wires, for the transportation of persons or property by street railroads or other street transportation as common carriers, or for the production, transmission, delivery or furnishing of heat, light, water or power, directly or indirectly to or for the public, whether or not such plant or equipment or part thereof is wholly within any town or city.

(b) Any corporation, company, individual or association of individuals, which is party to an oral or written agreement for the payment by a public utility, for service, managerial construction, engineering or financing fees, and having an affiliated interest with said public utility.

(2) As used in this chapter, the term "public utility" does not include:

(a) Any plant owned or operated by a municipality.

(b) Any railroad, as defined in ORS 760.005, or any industrial concern by reason of the fact that it furnishes, without profit to itself, heat, light, water or power to the inhabitants of any locality where there is no municipal or public utility plant to furnish the same.

(c) Any telephone corporation not providing intrastate telephone service to the public in this state, whether or not such corporation has an office in this state or has an affiliated interest with a public utility as defined in this chapter.

(d) Any corporation, company, individual or association of individuals providing heat, light or power: [*to less than 20 customers.*]

(A) From any energy resource to fewer than 20 customers, if it began providing service to a customer prior to the effective date of this 1985 Act;

(B) From any energy resource to fewer than 20 residential customers so long as the corporation, company, individual or association of individuals serves only residential customers;

(C) From solar or wind resources to any number of customers; or

(D) From biogas, waste heat or geothermal resources for nonelectric generation purposes to any number of customers.

(e) A qualifying facility on account of sales made under the provisions of ORS 758.505 to 758.555.

(f) Any water utility serving less than 300 customers at an average annual residential rate of $15 per month or less, which provides adequate and nondiscriminatory service.

(3) Nothing in paragraph (d) of subsection (2) of this section shall prohibit third party financing of acquisition or development by a utility customer of energy resources to meet the heat, light or power requirements of that customer.

[*(3)*] (4) This section does not apply to street transportation in cities of less than 50,000 population.

Exhibit A
Page 1 of 2

SECTION 2. ORS 758.450 is amended to read:

758.450. (1) Territory served by more than one person providing similar utility service may only become an allocated territory by a contract approved by the commissioner.

(2) Except as provided in subsection (4) of this section, no other person shall offer, construct or extend utility service in or into an allocated territory.

(3) Except as provided in subsection (4) of this section, during the pendency of an application for an allocation of exclusively served territory, no person other than applicant shall offer, construct or extend utility service in or into the territory applied for; nor shall any person, without the express consent of the commissioner, offer, construct or extend utility service in or into any unserved territory which is the subject of a filing pending before the commissioner under ORS 758.420 or 758.435.

(4) The provisions of ORS 758.400 to 758.475 do not apply to any corporation, company, individual or association of individuals providing heat, light or power: [*to less than 20 customers.*]

(a) From any energy resource to fewer than 20 customers, if it began providing service to a customer prior to the effective date of this 1985 Act;

(b) From any energy resource to fewer than 20 residential customers so long as the corporation, company, individual or association of individuals serves only residential customers;

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

(d) From biogas, waste heat or geothermal resources for nonelectric generation purposes to any number of customers.

(5) Nothing in subsection (4) of this section shall prohibit third party financing of acquisition or development by a utility customer of energy resources to meet the heat, light or power requirements of that customer.

SECTION 3. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

Approved by the Governor July 14, 1985
Filed in the office of Secretary of State July 15, 1985

CHAPTER 780

AN ACT SB 394

Relating to interstate cooperation.

Be It Enacted by the People of the State of Oregon:

SECTION 1. The State of Oregon shall pursue and may enter into an interstate cooperative agreement with the states of Washington, Idaho and Montana for the purpose of making collective efforts to control Bonneville Power Administration wholesale power costs and rates by studying and developing a region-wide response to:

(1) Federal attempts to increase arbitrarily the interest rates on federal funds previously used to build public facilities in the Pacific Northwest.

(2) Federal initiatives to sell the Bonneville Power Administration.

(3) Bonneville Power Administration rate increase and budget expenditure proposals in excess of their actual needs.

(4) Regional uses of surplus firm power, including uses by existing or newly attracted Pacific Northwest industries, to provide long-term use of the surplus for job development.

(5) Power transmission intertie access.

Approved by the Governor July 14, 1985
Filed in the office of Secretary of State July 15, 1985

CHAPTER 781

AN ACT SB 793

Relating to scenic waterways; creating new provisions; and amending ORS 390.825.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 390.825 is amended to read:

390.825. The following lakes or rivers, or segments of rivers, and related adjacent land, are designated as scenic waterways:

(1) The segment of the Rogue River extending from the confluence with the Applegate River downstream a distance of approximately 88 miles to Lobster Creek Bridge.

(2) The segment of the Illinois River from the confluence with Deer Creek downstream a distance of approximately 46 miles to its confluence with the Rogue River.

(3) The segment of the Deschutes River from immediately below the existing Pelton reregulating dam downstream approximately 100 miles to its confluence with the Columbia River, excluding the City of Maupin as its boundaries are constituted on October 4, 1977.

(4) The entire Minam River from Minam Lake downstream a distance of approximately 45 miles to its confluence with the Wallowa River.

(5) The segment of the South Fork Owyhee River in Malheur County from the Oregon-Idaho border downstream approximately 25 miles to Three Forks where the main stem of the Owyhee River is formed, and the segment of the main stem Owyhee River from Crooked Creek (six miles below Rome) downstream a distance of approximately 45 miles to the mouth of Birch Creek.

(6) The segment of the main stem of the John Day River from Service Creek Bridge (at river mile 157)

Exhibit A
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CERTIFICATE OF SERVICE

I certify that on July 11, 2008, I served the foregoing OREGON DEPARTMENT OF TRANSPORTATION'S REPLY BRIEF upon all parties of record in this proceeding by delivering a copy by electronic mail and by mailing a copy by postage prepaid first class mail or by hand delivery/shuttle mail to the parties accepting paper service.

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