BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DR 38

In the Matter of PACIFICORP, dba PACIFIC POWER & LIGHT COMPANY, and HCA MANAGEMENT COMPANY, LLC Joint Petition for Declaratory Ruling	STAFF'S OPENING BRIEF

I. INTRODUCTION

Petitioners, PacifiCorp, dba Pacific Power & Light Company ("Pacific Power") and HCA Management Company, LLC, operator of the Myra Lynne Mobile Home Park ("Myra Lynne"), have requested that the Commission resolve a potential conflict between ORS 90.532 and Pacific Power's General Service rate schedules and its Rule 2, Section O, on the one hand, and ORS 90.536. Staff of the Public Utility Commission of Oregon ("Staff") files its opening brief pursuant to the May 11, 2007, Prehearing Report.

II. DISCUSSION

Issue 1. Prior to the time HB 2247 became effective, was Myra Lynne Mobile Home Park, which was receiving service under Schedule 48[1] from Pacific Power, required as a condition of service to bill each of its sub-metered[2] tenants for electricity at the Pacific Power, Schedule 4[3] rate, in accordance with Pacific Power's Schedule 48 Special Conditions and Rule 2, Section O?

Pacific Power's General Service rate schedules, as approved by the Commission, constitute its filed rates for purposes of ORS 757.225, which provides:

> No public utility shall charge, demand, collect or receive a greater or less compensation for any service performed by it within the state, or for any service in connection therewith, than is specified in printed rate schedules as may at the time be in force or demand, collect, or receive any rate not specified in such schedule.

[1] Schedule 48 is Pacific Power's general schedule for nonresidential service.
[2] Sub-meters owned by Myra Lynne Mobile Home Park
[3] Schedule 4 is Pacific Power's schedule for residential service.

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> The rates named therein are the lawful rates until they are changed as provided in ORS 757.210 to 757.220.

Prior to January 2, 2006, the date that HB 2247 became effective, Myra Lynne received utility service under Pacific Power's Schedule 48, the general schedule for nonresidential service. Myra Lynne would then bill each of its sub-metered tenants for electricity under Pacific Power's Schedule 4, the schedule for residential service.

Each of Pacific Power's general service rate schedules, approved and on file with the Commission, contains the following provision:

> **Special Conditions**
>
> The Consumer shall not resell electric service received from the Company under provisions of this Schedule to any person, except by written permission of the Company and where the Consumer meters and bills any of his tenants at the Company's regular tariff rate for the type of service which such tenant may actually receive.

Section "O" of Pacific Power's Rule 2, which is approved and on file with the Commission, imposes the same requirement on the "Consumer":

> **Resale of Service**
>
> Resale of service shall be limited to Consumer's tenants using such service entirely within property described in the written agreement. Service resold to tenants shall be metered and billed to each tenant at Company's regular tariff rate schedule applicable to the type of service actually furnished the tenant. Consumer shall indemnify Company for any and all liabilities, actions or claims for an injury, loss or damage to persons or property arising from the results of service by Consumer.

These provisions require Myra Lynne, as reseller of service measured through a submeter, to bill its tenants at the Pacific Power Residential Rate, Schedule 4, as a condition of service under the General Service Rate. Pacific Power Rate Schedule 4 is the "Company's regular tariff rate schedule applicable to the type of service actually furnished the tenant."

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Issue 2. In enacting HB 2247, the legislature added ORS 90.532 and ORS 90.536 to the Manufactured Dwelling and Floating Home section, ORS 90.505 to 90.840, of the Residential Landlord Tenant Act. *See* ORS Chapter 90.

a. Under ORS 90.532 and ORS 90.536, may Myrna Lynne Mobile Home Park, as a Schedule 48 customer of Pacific Power, bill each of its sub-metered tenants for electricity at the Schedule 4 Residential Rate, as a condition of service under Schedule 48, and Rule 2, Section O; or

b. Under ORS 90.532 and ORS 90.536, must Myra Lynne Mobile Home Park, as a Schedule 48 customer of Pacific Power, also bill each of its sub-metered tenants at the same Schedule 48 rate it is billed by Pacific Power?

Our goal in interpreting a statute is to determine the intent of the legislature. ***PGE v. Bureau of Labor and Industries (PGE),*** 317 Or 606, 610, 859 P2d 1143 (1993); ORS 174.020. We start by examining a statute's text and context, with text being the better evidence of legislative intent. In interpreting text, we consider statutory and judicially developed rules of construction that "bear directly on how to read the text," such as "not to insert what has been omitted or to omit what has been inserted," and to give words of common usage their "plain, natural and ordinary meaning." ***PGE***, at 611; ORS 174.010. The context of a statute includes other provisions of the same statute, prior versions of the statute and other related statutes, as well as case law interpreting those statutes. ***PGE***, at 610***; SAIF Corporation v. Walker***, 330 Or 102, 108, 996 P2d 979 (2000). If a statute's text and context unambiguously disclose the legislature's intent, the inquiry ends there. ***PGE***, at 610-11. Only if the legislative intent is not clear from the text and context are we to take account of legislative history to attempt to discern the intent. ***PGE***, at 611-12. If after considering text, context and legislative history, the intent of the legislature remains unclear, we may resort to general maxims of statutory construction to resolve any remaining uncertainty as to the meaning of the statute. ***PGE***, at 612.

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ORS 90.532 enumerates the acceptable methods by which a landlord may provide or account for utility or service charges to tenants.[4] ORS 90.532(1)(c)(C) states in relevant part:

> (1) Subject to the policies of the utility or service provider, a landlord may provide for utilities or services to tenants by one or more of the following billing methods:
>
> * * * * *
>
> (c) A relationship between the landlord, tenant and utility or service provider in which:
>
> * * * * *
>
> (C) The landlord uses a submeter to measure the utility or service actually provided to the space and bills the tenant for a utility or service charge for the amount provided. [Emphasis supplied].

ORS 90.532(1) begins with the phrase "[s]ubject to the policies of the utility or service provider." The noun "subject" means "**1:** one that is placed under the authority, dominion, control, or influence of someone or something: **a:** one bound in allegiance or service to a feudal superior: VASSAL **b** (1): one subject to a monarch or ruler and governed by his law." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1993) at 2275. The phrase "subject to" means "governed or affected by." ***Northwest Forest Resources Council v. Glickam***, 82 F.3d 825, 833 (9th Cir. 1996); *see also* ***U.S. ex rel. Tottten v. Bombadier Corp.,*** 286 F.3d 542, 547 (D. C. Cir. 2002) ("[A]n entity is 'subject to' a particular legal regime when it is regulated by, or made answerable under, that regime."); ***Texaco Inc. v. Duhe,*** 274 F.3d 911, 918-19, (5th Cir. 2001)(holding that natural gas became "'subject to' an existing contract" within the meaning of the Natural Gas Policy Act when it was "governed by" terms of that contract); ***Michelin Tires (Canada) Ltd. v. First Nat'l Bank of Boston***, 666 F.2d 673, 677 (1st Cir. 1981) ("The words 'subject to,' used in the ordinary sense, mean 'subordinate to,' 'subservient to,' or 'limited by.'"); ***Burgess Const. Co. v. M. Morrin & Son Co.,*** 526 F.2d 108, 113 (10th Cir. 1975).

[4] "Utility or service" charges includes charges for electricity. *See* ORS 90.531(2); ORS 90.315.

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The phrase "subject to the policies of the utility or service provider" in ORS 90.532(1) means that a landlord's method of billing tenants for utility or service charges is governed by, and is subordinate to, the policies of the utility or service provider. Applied here, ORS 90.532(1)(c)(C) requires that, in submetering its tenants for their electrical usage, Myra Lynne must comply with Pacific Power's Large General Service Schedule 48 and its Rule 2, Section O, by billing those tenants at the Residential Schedule 4 rate with the Schedule 98 credits associated with the Residential Exchange Program (REP) of the Bonneville Power Administration (BPA).[5]

However, ORS 90.536, which was also enacted as part of HB 2247, may conflict with that interpretation of ORS 90.532(1)(c)(C). ORS 90.536 states:

> (1) If a written rental agreement so provides, a landlord using the billing method described in ORS 90.532 (1)(c) may require a tenant to pay to the landlord a utility or service charge that has been billed by a utility or service provider to the landlord for utility or service provided directly to the tenant's space as measured by a submeter.
>
> (2) A utility or service charge to be assessed to a tenant under this section may consist of:
>
> (a) The cost of the utility or service provided to the tenant's space and under the tenant's control, as measured by the submeter, at a rate no greater than the average rate billed to the landlord by the utility or service provider, not including any base or service charge;
>
> (b) ***; and
>
> (c) A pro rata portion of any base or service charge billed to the landlord by the utility or service provider, including but not limited to any tax passed through by the provider.
>
> (3) A utility or service charge to be assessed to a tenant under this section may not include:
>
> (a) Any additional charge, including any costs of the landlord, for the installation, maintenance or operation of the utility or service system or any profit for the landlord; or

[5] Pacific Power's Schedule 98 credit was suspended as of June 1, 2007 after BPA suspended the REP following a Ninth Circuit Court of Appeals ruling finding that BPA exceeded its authority by entering into settlement agreements related to the REP. *See* ***Golden Northwest Aluminum, Inc. v. Bonneville Power Administration***, 2007 WL 1289539 (9th Cir. 2007) and ***Portland General Electric Company v. Bonneville Power Administration***, 2007 WL 1288786 (9th Cir. 2007).

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(b) Any costs to provide a utility or service to common areas of the facility.

Pacific Power provides electric utility service to Myra Lynne. Myra Lynne provides electric utility service, measured by submeter, to its tenants per a written rental agreement and bills its tenants in accordance with ORS 90.532(1)(c). Thus, ORS 90.536 applies to Myra Lynne.

ORS 90.532(1)(c)(C) directs that Myra Lynne, in submetering its tenants for their electrical usage, must comply with Pacific Power's Large General Service Schedule 48 and its Rule 2, Section O, by billing those tenants at the Residential Schedule 4 rate with the Schedule 98 credits associated with the REP. But if ORS 90.536(2)(a) is followed, Myra Lynne would be required to bill its tenants based on the Schedule 48 general service rate at which it is billed by Pacific Power -- plus the pro rata adders permitted by ORS 90.536(2)(c), not the Schedule 4 residential rate. Use of the word "may" in ORS 90.536(2) suggests that the language is permissive rather than mandatory. If ORS 90.536(2)(a) is read as permissive it would not conflict with ORS 90.532(1)(c)(C). But if ORS 90.536(2) is read as mandatory it conflicts with ORS 90.532(1)(c)(C).

ORS 90.536(3)(a) states that a "utility or service charge to be assessed to a tenant under this section may not include * * * [a]ny additional charge, including any costs of the landlord for the installation, maintenance or operation of the utility or service system or any profit for the landlord…" Myra Lynne, in billing its tenants based on the Schedule 4 residential rate, is clearly not "including any additional charge * * * for the installation, maintenance or operation of the utility or service system…" But the statute's clause regarding "profit for the landlord" presents a closer question. It may be argued that Myra Lynne, in billing its tenants based on the Schedule 4 residential rate, as directed by Pacific Power's tariff under ORS 90.532(1)(c)(C), while it is receiving the power at the lower Schedule 48 rate, is getting a profit for the landlord. But Myra Lynne is merely billing the tenants at the Schedule 4 residential rate, as directed by Pacific

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Power's tariff under ORS 90.532(1)(c)(C), and has not "included any additional charge" for profit.

If Myra Lynne billing its tenants at the higher Schedule 4 residential rate is viewed as an "additional charge" under ORS 90.536(3)(a), then compliance with both ORS 90.532(1)(c)(C) and ORS 90.536(2) is impossible. We are able to give effect to a consistent legislative policy only if we read ORS 90.532(1)(c)(C) as mandatory and ORS 90.536(2)(a) as permissive. In enacting ORS 90.532(1)(c)(C), the legislature explicitly directed that billing methods followed by landlords are "[s]ubject to the policies of the utility or service provider." This language indicates that the legislature intended that landlords comply with the utility provider's policies. The legislature certainly knows how to make a statute mandatory. In contrast with the explicit directive of ORS 90.532(1), the legislature chose to use the word "may" in ORS 90.536(2)(a). This indicates that the legislature intended ORS 90.536(2) to be permissive. Under Staff's construction, ORS 90.532(1)(c)(C) is mandatory and controls. ORS 90.536(2)(a) would be treated as permissive and would apply where it does not conflict with ORS 90.532, such as when the utility provider policies do not govern the rate that tenants are charged by the landlords.

Legislative History of HB 2247

Staff believes that under first level analysis the better interpretation of ORS 90.532(1)(c)(C) and ORS 90.536(2) is that Myra Lynne should bill its tenants under the directive of ORS 90.532. However, because there is some ambiguity, we may look at the legislative history of HB 2247 to see if the legislature's intent can be clarified.

Exhibit D is a document entitled "COMMENTS ON HOUSE BILL 2247 WITH DASH 1 AMENDMENTS, Testimony Before the House Judiciary Subcommittee on Civil Law." John VanLandingham, attorney for the Lane County Law and Advocacy Center, prepared the testimony and delivered it on June 13, 2005. The testimony provides a section-by-section analysis of the bill that enacted ORS 90.532 and ORS 90.536. Mr. VanLandingham noted in his testimony that the bill was the result of negotiations among a broad array of trade associations

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and other groups interested in landlord-tenant law. *Id.* at 1-2. He also notes the involvement of the Commission in making recommendations regarding the language of relevant provisions of the bill. *Id.* at 6, 8, 9, and 10.

Regarding Section 6 of HB 2247, which became ORS 90.532, Mr. VanLandingham provided the following explanation:

> "One over-riding general principal (sic) is that the landlord must comply with the policies of the utility provider concerned with that utility service. For regulated utilities, that necessarily implicates state policies as well. Examples include utility rates and requirements for utility hookup procedures."

Exhibit D at 7.

In his testimony on the purpose of Section 8 of HB 2247, which became ORS 90.536, Mr. VanLandingham described that new statutory provision as follows:

> "With regard to the cost of the service, as a result of PUC recommendations this section refers to the average rate billed to the landlord by the provider, since there may be a range of rates charged, based on the amount of the service consumed. In addition, the "no greater than" phrase reflects that utility provider policies might require a landlord to charge the tenant a rate that is lower than the rate the provider uses to bill the landlord -- a residential rate instead of a commercial rate, for example.
>
> The sub meter utility charge may not include service to common areas (although the landlord could use the master meter method, if the rental agreement so provides). And it may not include any additional charge, for example profit, or the landlord's costs to install, maintain, or operate the system, for example, the cost of hiring a company to read the submeters. These costs should be treated as operating expenses, which, as with any operating expense, are normally recovered in the rent." [Emphasis supplied.]

Exhibit D at 7-8.

Thus, HB 2247's legislative history indicates that the legislature's "over-riding general princip[le]" was to require landlords to comply with the utility provider's policies, including its policies regarding rates. This indicates that Myra Lynne should follow Pacific Power's tariffs and schedules, i.e. that Myra Lynne should follow Schedule 48 requirements and Rule 2, Section O, which require Myra Lynne to bill its tenants under Residential Schedule 4 and apply the Schedule 98 credits that Myra Lynne is receiving.

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Mr. VanLandingham testified that, under what is now ORS 90.536, a landlord "may not include any additional charge, for example profit, or the landlord's costs to install, maintain, or operate the system…" But the landlord following the billing rate imposed by the service provider is not "including an additional charge …for profit." Myra Lynne billing the tenants at the Schedule 4 residential rate as directed by Pacific Power's tariff under ORS 90.532(1) (c) (C), even if the Schedule 4 rate is higher than the Schedule 48 general rate, is not an additional charge for profit.

The view that ORS 90.532 should control is also supported Mr. VanLandingham's testimony involving a hypothetical in which the utility bills the landlord at a commercial rate higher than its residential rate. In that circumstance, Mr. VanLandingham suggests "the no greater than" phrase reflects that utility provider policies might require a landlord to charge the tenant a rate that is lower than the rate the provider uses to bill the landlord – a residential rate instead of a commercial rate, for example." Thus, in Mr. VanLandingham's view, the utility provider policies in force under ORS 90.532 control and would require a landlord to bill the tenants at a rate that is ***lower*** than the rate that the provider uses to bill the landlord.

Legislative history supports the conclusion that the legislature, in enacting ORS 90.532(1)(c)(C) and ORS 90.536(2), intended that landlords comply with the utility provider's policies, including its policies regarding rates. Myra Lynne should bill its tenants under the directive of ORS 90.532(1)(c)(C).

General Maxims

If after considering text, context and legislative history, the intent of the legislature remains unclear, we may resort to general maxims of statutory construction to resolve any remaining uncertainty as to the meaning of the statute. ***PGE***, at 612.

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It has been said of "rules" or "maxims" of statutory construction that:

> "'Each of these common sense approaches fits some cases but not others, each has "exceptions" and opposite-and-equal counterparts, and each causes more harm than it is worth if it is not cheerfully ignored whenever it is an obstacle to understanding what the legislature enacted. "'References to "rules," "maxims" or "aids" to statutory construction might pass as merely a difference in the style of opinions, which is a personal matter, if it were not for the risk that they will be mistaken by courts and counsel as directives for how to argue and decide statutory questions.' * * * ***Davis v. Wasco IBD***, 286 Or 261, 274-75, 593 P2d 1152 (1979) (Linde, J. concurring)." ***Whipple v. Howser***, 291 Or 475, 482, 632 P2d 782 (1981).

Rather than choosing between competing maxims, we look to the touchstone of statutory analysis: legislative intent. As the Oregon Supreme Court has emphasized, "when construing any statutory provision the duty of this court [and this office] is to 'discern and declare the intent of the legislature.' ***Fifth Ave. Corp. v. Washington Co***., 282 Or 591, 596, 581 P2d 50 (1978); see also ORS 174.020." ***Whipple v. Howser***, supra, 291 Or at 479.

Legislative intent is gleaned primarily from the statutory language. ORS 174.010. As we have already discussed, in enacting ORS 90.532(1)(c)(C), the legislature explicitly directed that billing methods followed by landlords are "[s]ubject to the policies of the utility or service provider." Similarly, legislative history indicates that the legislature's central "over-riding general princip[le]" was to require landlords to comply with the utility provider's policies, including its policies regarding rates. In contrast with the explicit directive ORS 90.532(1), the legislature chose to use the word "may" in ORS 90.536(2)(a). One maxim that would apply here is that the legislature is presumed to know of existing law when enacting legislation. Accordingly, it knew that Pacific Power's General Services rate schedules, as approved by the Commission, constitute its filed rates. There is no indication that the legislature intended to disturb Pacific Power's filed rates and rules that require that Myra Lynne, as a condition of service, to bill its tenants under Pacific Power's Residential Rate Schedule 4, the "Company's regular tariff rate schedule applicable to the type of service actually furnished the tenant."

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Issue 3. If Myra Lynne Mobile Home Park is required to bill each of its sub-metered tenants at the Schedule 48 nonresidential rate rather than the Schedule 4 residential rate, are the Myra Lynne Mobile Home Park tenants still eligible for the residential credit generally available to residential consumers under Pacific Power's Schedule 98?

As described above, the legislature, in enacting ORS 90.532(1)(c)(C) and ORS 90.536(2), intended that landlords comply with the utility provider's policies, including its policies regarding rates. Myra Lynne should bill its tenants under the directive of ORS 90.532(1)(c)(C). However, if it is determined that Myra Lynne residents should be billed at the Schedule 48 nonresidential commercial rate, are the tenants still entitled to the REP rate credit?

Exhibit F is a copy of a June 2002 document prepared by the BPA entitled "Customer Load Eligibility Guidelines For the Investor Owned Utilities' Residential Exchange Program Settlement Agreements. ("BPA Guidelines")." BPA indicates the following in the introduction of this document:

> "The purpose of this document is to provide a set of guidelines that will assist utilities in determining whether or not a load meets the definition of residential and small farm use under the Northwest Power Act. Customer loads that meet the definition are eligible for REP Settlement Benefits provided the customer is served under a rate schedule listed on Exhibit A to the REP Settlement Agreement."

Thus, the BPA Guidelines suggest a two-part test: (1) the load must meet the definition of residential or small farm use under the Northwest Power Act; and (2) the customer must be served under a rate schedule listed on Exhibit A to the REP Settlement Agreement.

Section 3(18) of the Northwest Power Act defines "residential use" or "residential load" as "all usual residential, apartment, seasonal dwelling and farm electrical loads or uses, but only the first four hundred horsepower during any monthly billing period of farm irrigation and pumping from any farm." Moreover, the BPA Guidelines specifically list "Trailer Park/Mobile Home Park" as "[e]ligible – if residents stay longer than 30 days, otherwise ineligible." *Id.* at 11. The Myra Lynne residents fit within Northwest Power Act definition of customer loads eligible for REP Settlement Benefits.

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Under the REP Settlement Agreement between BPA and Pacific Power, "'Residential Load' means the load eligible to receive benefits under this Agreement, as such load is defined in Exhibit B," which provides that "Residential Load means the sum of the loads within the Pacific Northwest eligible for the Resident Exchange Program under the tariff schedules described below." Schedule 48 is not a tariff schedule that is listed in the Residential Load definition. Accordingly, if it is determined that Myra Lynne tenants should be billed at the Schedule 48 rate, those tenants do not appear to be eligible to receive the rate credit associated with the REP under the BPA Guidelines.

The Myra Lynne residents fit within the Northwest Power Act's definition of customer loads eligible for REP Settlement Benefits. But Schedule 48 is not a listed on Exhibit B of the REP Settlement Agreement. Pacific Power may request BPA to revise Exhibit B to include Schedule 48 within the "Residential Load" definition for the amount of electricity delivered under Schedule 48 that is consumed by end-users that meet the definition of residential customers under the REP.[6]

Although a strict reading of the BPA Guidelines would require that Exhibit B be revised to add Schedule 48 as an additional qualifying tariff schedule, BPA has not always required such a revision. In Docket No. UE 190, Advice No. 07-03 (April 30, 2007), the Commission approved Idaho Power Company's request to amend its Schedule 98 to allow certain long-term care facilities to be eligible to receive the Residential and Small Farm energy credit. Qualified long-term care facilities included those taking service under Schedule 7 and 9 who are not providing full medical care to residents and where the average patient stay is 30 days or longer. Idaho Power's request was supported by a BPA letter which indicated that nursing homes, assisted living facilities, and similar facilities qualify for the REP credit if they are not providing

[6] Exhibit B, Section 7 provides: "This Exhibit B shall be revised to incorporate additional qualifying tariff schedules, subject to BPA's determination that the loads served under these schedules are qualified under the Northwest Power Act."

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full medical care to residents and have an average patient stay of 30 days or longer. BPA approved Idaho Power extending REP benefits to long-term care facilities even though they receive power under Schedule 7 and Schedule 9, neither of which is listed on Schedule B of Idaho Power's REP Agreement with BPA. *See* Exhibit J.

III. CONCLUSION

Text and context, legislative history, and general maxims of statutory construction all support the conclusion that the legislature, in enacting ORS 90.532(1)(c)(C) and ORS 90.536(2), intended that landlords comply with the utility provider's policies, including its policies regarding rates. Myra Lynne should bill its tenants under the directive of ORS 90.532(1)(c)(C).

However, if it is determined that Myra Lynne residents should be billed at the Schedule 48 rate under ORS 90.536(2), a strict reading of the BPA Guidelines suggests that Myra Lynne residents would not be entitled to REP benefits because Schedule 48 is not listed on Exhibit B of the REP Settlement Agreement. But even where a class of residential customers is served under a tariff that this not listed on Schedule B of the utilities' REP Agreement, BPA has approved their receipt of REP benefits where they were clearly entitled to those benefits. Nevertheless, Pacific Power should seek a determination from BPA that the Myra Lynne residents are eligible. Pacific Power should also request that BPA revise Exhibit B to include Schedule 48 within the "Residential Load" definition to the extent that residential customers are served under Schedule 48.

DATED this 2nd day of July 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 2, 2007, I served the foregoing 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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