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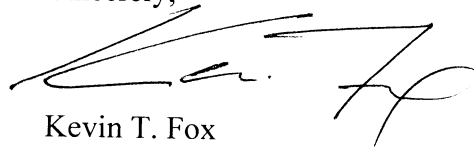
**Re: DR 40 – In the Matter of HONEYWELL INTERNATIONAL, INC.,
HONEYWELL GLOBAL FINANCE, LLC and PACIFICORP, dba PACIFIC
POWER Application for Declaratory Ruling.**

Attention Filing Center:

Enclosed for filing in the above-captioned docket are an original and five copies of the Reply Brief of the Interstate Renewable Energy Council.

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kevin T. Fox', with a stylized flourish at the end.

Kevin T. Fox

Enclosures

Cc: Service List-DR 40

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
DR 40**

In the Matter of)	
)	
HONEYWELL INTERNATIONAL, INC.,)	
HONEYWELL GLOBAL FINANCE, LLC)	REPLY BRIEF OF THE INTERSTATE RENEWABLE ENERGY COUNCIL
and)	
)	
PACIFICORP, dba PACIFIC POWER)	
)	
Application for Declaratory Ruling.)	

REPLY BRIEF

In accord with the June 20, 2008 Memorandum issued in DR 40 by Chief Administrative Law Judge Michael Grant (“Memorandum”), the Interstate Renewable Energy Council (“IREC”) replies to the opening briefs addressing the regulation of Honeywell’s business model in the above referenced proceeding.

I. INTRODUCTION

In this proceeding, the Oregon Public Utility Commission (“Commission”), among other things, is considering (1) whether Honeywell’s customer is eligible for net metering under ORS 757.300 despite it not owning a “net metering facility”; (2) whether the transaction between Honeywell and its customer represents a sale for resale; and (3) whether Honeywell is an electricity service supplier subject to the Commission’s direct access regulations. Through its Opening Comments, IREC responded to these inquiries, demonstrating that (1) Honeywell’s customer is eligible for net metering; (2) Honeywell’s sale to its customer is not a sale for resale; and (3) Honeywell is not an electricity service supplier.

Honeywell’s Energy Services Agreements (“ESAs”) offer a creative means for its customers to finance renewable self-generation in a way that avoids significant up front expenditure. ESAs also enable entities that lack federal taxable-income, such as Oregon’s schools and government agencies, to capture the value of federal tax incentives. This is significant given that all of the contemplated customers identified in the Assumed Facts are either Oregon colleges or municipalities. Without this type of financial arrangement, customers such as these may be unable to install on-site renewable generation which would be to the detriment of the great state of Oregon.

Despite the obvious benefits that Honeywell’s ESAs offer to Honeywell’s customers and to Oregon, PacifiCorp and Commission Staff have focused on ways in which they believe Honeywell’s service should be regulated. In the remainder of this Reply Brief, IREC focuses on rebutting these arguments.

II. Honeywell’s Customer is Eligible for Net Metering.

A distinguishing feature of Honeywell’s model is that Honeywell’s customer does not own its net metering facility but instead buys power from Honeywell under an ESA. *See* Assumed Facts. Judge Grant posed a series of questions to parties to determine whether Honeywell’s customer is eligible for net metering despite the customer not owning its net metering facility. All parties agreed that ORS 757.300 does not contain language limiting third-party ownership of a net-metering facility or requiring a customer to own a net-metering facility or a portion of a facility to be considered a customer-generator.¹ Parties also agreed that

¹ *See, e.g., Opening Brief of Oregon Department of Transportation (“ODOT”)* p. 6-7 (“Nowhere does ORS 757.300(1) suggest that the owner or occupier of the premises which a solar generation facility has been installed must have ownership of, or a property interest in, the generating equipment that comprises the facility in to qualify for net metering.”)

Honeywell’s facility is a “net-metering facility” as defined in ORS 757.300(1)(d). The only dispute in opening briefs was with regard to whether Honeywell’s customer is a “customer-generator” under ORS 757.300(1)(a).

ORS 757.300(1)(a) defines “customer-generator” as “a user of a net metering facility.”

All parties except PacifiCorp reached the conclusion that the plain meaning of ORS 757.300(1)(a) embraces Honeywell’s customer as “a user of a net metering facility” and therefore a “customer-generator.”² PacifiCorp, however, looks beyond the plain meaning of the term “user,”³ and focuses on the Legislature’s decision to hyphenate the words “customer” and

² See, e.g., ODOT p. 8 (“[C]learly, the sense that a customer who consumes the electrical output of a solar facility ‘puts [that facility] into service,’ and therefore is a user of it, comports with the plain and evident meaning of the forthright definition of ‘customer-generator.’”); *Staff of the Public Utility Commission of Oregon’s Opening Brief* (“Staff”) p. 1 (concurring with ODOT); *Opening Brief of Portland General Electric Company* (“PGE”) p. 4. (“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. The plain meaning of the statutory text supports this interpretation and should be accorded deference.”); *Opening Brief of Intervener League of Oregon Cities* (“LOC”) p. 3 (“As it is not disputed in the assumed facts that electricity generated by Honeywell is being used by Honeywell’s customer, the LOC argues that Honeywell’s customer would clearly be considered a ‘customer-generator’ under the statute.”); *Opening Brief of the Renewable Northwest Project, et. al.* (“RNP”) p. 4 (“[T]here is no question that the Honeywell customer is a ‘customer-generator’ under the plain terms of the net metering law.”); *Opening Brief of Petitioners Honeywell International and Honeywell Global Finance* (“Honeywell”) p. 5. (“Each customer uses the net metering facility because it uses the electricity generated by the facility that is located on the customer’s premises that operates in parallel with an electric utility’s existing transmission and distribution facilities, and is intended primarily to offset part or all of the customer-generator’s requirements for electricity.”); *Opening Brief and Waiver of Paper Service of Energy Trust of Oregon, Inc.* (“Energy Trust”) p. 5 (“[T]he host entity, which uses the energy generated from the solar facility described in the Assumed Facts, is the user of the facility.”); *Opening Brief of Oregon People’s Utility District Association* (“OPUDA”) p. 2-3.

³ “Customers buying electricity from Honeywell are certainly users of the net metering facility, but that does not resolve the uncertainty created by the Legislature’s choice of the term ‘customer-generator.’” *Opening Brief of Pacific Power* (“PPL”) p. 8.

“generator.” PacifiCorp suggests this may be a possible indication of an ownership requirement in ORS 757.300(1)(a).⁴

IREC has several problems with PacifiCorp’s approach. First, PacifiCorp impermissibly looks beyond the plain language of ORS 757.300(1)(a). According to *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), the text and context of a statute provide the best evidence of the Legislature’s intent. Only if the text and context do not make the Legislature’s intent clear, do we look beyond the plain meaning of a statute. *Id.* Here, all parties except PacifiCorp agree that the plain language of ORS 757.300(1)(a) requires only that a “customer-generator” be a “a user” of a net metering facility. Moreover, all parties agree that the context of ORS 757.300 clearly indicates no requirement that a “customer-generator” must have an ownership interest in a net metering facility. Thus, the plain meaning of the statute should prevail leaving no need to look beyond the plain language of ORS 757.300(1)(a). Second, PacifiCorp attempts to insert into a statute what has been omitted in contravention of ORS 174.010. Lastly, IREC thinks PacifiCorp reads too much into a hyphen. California, Colorado, Hawaii, Nevada, Washington and Wyoming all use the term “customer-generator” in their net metering statutes. IREC also uses this term in its Model Net-Metering Rules.⁵ In Nevada, Washington and Wyoming, a “customer-generator” is “a user of a net metering system,” the same as in Oregon.⁶ With a few more words, California also defines an “eligible

⁴ “Here, the Legislature created a new hyphenated term rather than select the term ‘customer’ which is used in common parlance.” PPL p. 8.

⁵ See http://www.irecusa.org/fileadmin/user_upload/ConnectDocs/NM_Model.pdf

⁶ See Nevada Revised Statutes 704.768; Revised Code of Washington 80.60.010(2); and Wyoming Statutes 7-16-101(a)(ii).

customer-generator” as one “who uses” a net metering facility.⁷ In Colorado, by comparison, a “customer-generator” is “the owner or operator of a net metering system,” C.R.S. § 40-9.5-301(1), while in Hawaii, an “eligible customer-generator ... owns and operates” an eligible net metering system. H.R.S. §269-101. The considerable variation in definitions between these states despite the fact that they are defining the same term suggests that the meaning of the term “customer-generator” should be found in the definition provided in a statute not in the term itself or some hidden meaning that might be lurking behind the hyphenation.

II. Honeywell’s Sale to its Customer is Not a Sale for Resale.

As IREC stated in its opening comments, if there is no sale from Honeywell’s customer to the utility, then Honeywell’s sale cannot be considered a sale for resale. All parties except PacifiCorp appear to agree on this point.

PacifiCorp bases its suggestion that Honeywell’s sale to its customer constitutes a sale for resale on the faulty premise that the flow of energy to a utility under net metering is a sale. See PPL p. 12. (“When the customer delivers a portion of the electricity that it purchased from Honeywell to the utility for net metering, * * * that portion of the electricity and the associated transaction arguably become a sale from Honeywell to the customer *for resale by the customer to the utility.*”) (italics added). As IREC demonstrated in its opening comments, this is a settled issue. PacifiCorp’s sister company litigated this issue before the Federal Energy Regulatory

⁷ “‘Eligible customer-generator’ means a residential, small commercial customer as defined in subdivision (h) of Section 331, commercial, industrial, or agricultural customer of an electric service provider, *who uses* a solar or a wind turbine electrical generating facility, or a hybrid system of both, with a capacity of not more than one megawatt that is located on the customer's owned, leased, or rented premises, is interconnected and operates in parallel with the electric grid, and is intended primarily to offset part or all of the customer's own electrical requirements.” (italics added) Cal. Pub. Util. Code § 2827(b)(2)

Commission (“FERC”) and its argument was rejected. *See MidAmerican Energy Company*, 94 FERC ¶ 61,340 at 62,263 (2001) (“*MidAmerican*”) (“no sale occurs when an individual homeowner or farmer (or similar entity such as a business) installs generation and accounts for its dealings with the utility through the practice of netting.”) *See also PJM Interconnection, L.L.C.*, 94 FERC ¶ 61,251 (2001) (“*PJM Interconnection*”) (finding in a similar matter that there is no sale – for end use or otherwise – when one party is using its own generating resources for the purpose of self-supply of station power, and accounting for such usage through the practice of netting).

Although PacifiCorp acknowledges that *MidAmerican* determined that “the net metering transaction between the utility and its retail customer is not a sale for resale that the FERC needs to regulate,” PacifiCorp attempts to distinguish *MidAmerican* as a case dealing with a situation where the customer owns its generation.⁸ PacifiCorp’s argument is unpersuasive for at least two reasons. First, PacifiCorp offers no explanation as to why first-party versus third-party ownership of a generating system might give rise to FERC classifying a net metered transaction as a sale for resale. If PacifiCorp believes that FERC might reach a different outcome under a third-party ownership scenario, then PacifiCorp should explain its reasoning to the Commission and other parties. Second, although IREC agrees with PacifiCorp that FERC has stated “there may be circumstances where the FERC will choose to exercise its jurisdiction” (PPL p. 13), in Order No. 2003-A, FERC clarified that such situations would be ones in which an on-site generating facility produces more energy than it needs and makes a net sale of energy to a utility. Order No. 2003-A, *Standardization of Generator Interconnection Agreements and Procedures* at ¶ 744-747, 106 FERC ¶ 61,220 (2004). As IREC explained in its opening

⁸ “FERC has not addressed the issue of sales for resale when an entity other than the customer owns the generation.” PPL p. 12-13.

comments, Oregon's net metering rules are not structured so as to allow for sales of net energy production. Thus, PacifiCorp offers nothing more than unexplained and unsupported assertions when it suggests that "there is a question as to whether the sale from Honeywell to the customer is subject to review and approval by the FERC as a sale for resale." PPL p. 13.

III. Honeywell is Not an Electricity Service Supplier.

IREC finds particularly curious the argument advanced by PacifiCorp and Staff that Honeywell is an electricity service supplier despite it not offering services that require the provision of ancillary services. In making this argument, PacifiCorp and Staff ignore the plain language of ORS 757.600(6), which defines "direct access" as "the ability of a retail electricity consumer to purchase electricity and certain ancillary services ... directly from an entity other than the distribution utility." PacifiCorp and Staff reason that because there is no express requirement that an electricity service supplier provide ancillary services, any entity that provides electricity services is an electricity service provider engaging in a direct access sale. IREC disagrees with this conclusion for two reasons. First, PacifiCorp and Staff commit a basic logic error in assuming that if an electric service supplier need only provide electricity service, then any entity that provides electricity service must be an electricity service supplier. Second, PacifiCorp and Staff lose sight of the definition of an electricity service supplier, which focuses on whether an entity "offers to sell electricity services available pursuant to direct access."

IREC agrees with the comments of Portland General Electric and Renewable Northwest Project, *et al.* that Honeywell does not offer to sell electricity service available pursuant to direct access and therefore it is not an electricity service supplier ("ESS").

An ESS is entity that provides service available pursuant to direct access, which is defined as the ability of a retail electricity consumer to purchase electricity and certain ancillary services, as determined by the commission directly from an entity other than the distribution utility. ORS 757.600(6) and (16). PacifiCorp and Staff focus on whether an ESS must provide both electricity and ancillary services to be considered an ESS. After concluding that there is no requirement that an ESS offer both electricity and ancillary services, PacifiCorp and Staff conclude that any entity that sells electricity is an ESS. *See* PPL p. 14. (“Honeywell acknowledges selling electricity to more than one Oregon consumer * * * Honeywell appears to offer electricity as contemplated by the definition of direct access.”); Staff p. 7 ll. 19-21. (“Honeywell’s customers are engaging in ‘direct access’ because they have the ability to purchase electricity directly from Honeywell, which is an entity other than a distribution utility.”).

IREC agrees with PacifiCorp and Staff that the direct access statutes do not appear to place any requirements on the types of services an ESS must offer to customers to qualify as an ESS. However, IREC does not agree with the conclusion that any entity that sells electricity is an energy service provider that is subject to direct access regulation. Instead, IREC agrees with Renewable Northwest Project, *et al*, that ORS 757.600(16) has a limited reach: “It is not any person or entity that sells electricity but only entities that offer to sell electricity service pursuant to direct access that meet the statutory definition.” RNP p. 7. The plain language of ORS 757.600(16) supports this conclusion. It defines an ESS as “a person or entity that offers to sell electricity services available pursuant to direct access.” The operative question, then, is whether Honeywell offers to sell electricity services available pursuant to direct access.

Direct Access is the “the ability of a retail electricity consumer to purchase electricity and certain ancillary services, as determined by the commission * * * directly from an entity other than the distribution utility.” ORS 757.600(6). 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.” ORS 757.600(2).

IREC agrees with PGE that “[d]irect access, through its use of other statutorily defined terms, assumes use of the utility’s distribution network.” PGE p. 8. In other words, direct access service is associated with the transmission and delivery of electricity. Even the definition of definition of ancillary service incorporates the need for wheeling power: “ancillary services” means “services necessary or incidental to the transmission and delivery of electricity from generating facilities to retail electricity consumers...” ORS 757.600(2). PacifiCorp and Staff also note that direct access aims to facilitate the wheeling of power. *See* Staff p. 8 (“In other words, the Commission is authorized to ensure that a retail electricity consumer has the ability to purchase the ancillary services it ‘needs’ to have the electricity it has purchased from a seller (who is not a distribution utility) transmitted or delivered to it.”); PPL p. 15 (“In order to level the playing field for direct access, the Commission included a requirement in the direct access rules that requires electric utilities to make ancillary services available for purchase by customers/ESSs.”). Thus, there is broad agreement that Oregon’s direct access statutes and regulations deal with the kind of retail electricity purchases that must be wheeled from the point of generation to the point of consumption.

Honeywell does not provide electricity services that require the use of ancillary services such as scheduling, load shaping, reactive power, voltage control and energy balancing services

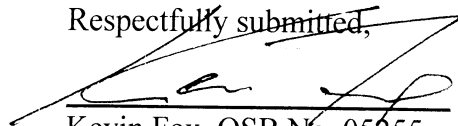
because Honeywell's electricity service is delivered on site. As such, Honeywell does not provide electricity services available pursuant to direct access and therefore is not an ESS. Staff and PacifiCorp erroneously conclude that Honeywell is an ESS because it does not need to provide ancillary services to be considered an ESS. However, the operative question is not whether an ESS must provide ancillary services. The operative question is whether Honeywell, or any other entity, provides electricity services of the type made available through direct access. The answer to that question is no. Direct access involves the wheeling of power from source to sink. Honeywell's service does not require any wheeling or ancillary services. As such, Honeywell does not provide service of the type "available pursuant to direct access" and therefore is not an ESS.

CONCLUSION

IREC appreciates the opportunity to file the above Reply Brief.

Dated this 11th day of July, 2008.

Respectfully submitted,



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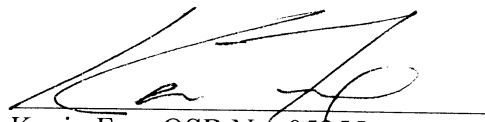
I certify that on the 11th day of July, 2008, I served the foregoing Reply Brief of the Interstate Renewable Energy Council upon the persons named on the attached service list by electronic mail and/or by mailing a full, true and correct copy thereof with first class postage prepaid.

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