BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

DR 40

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

On Sunday, July 6, 2008, the New York Times published an article, Schwartz, *American Energy Policy, Asleep at the Spigot*,[1] describing how over the last 25 years, opportunities to reduce our country's dependence on imported oil have been missed, and in some cases, even blocked by policy makers. In 1999, the Oregon Legislative Assembly attempted to create opportunities, not only to reduce our dependence on imported oil and to reduce greenhouse gas emissions, but also, to "stimulate[] in-state economic growth, enhance[] the continued diversification of this state's energy resources and reduce[] utility interconnection and administrative costs." 1999 Or Laws Ch 944, ODOT Br, Exhibit A, at 1. It would be unfortunate if this legislative effort, and the opportunities it has created, were effectively blocked by the unnecessary misapplication of the direct access statutes to net metering facilities and customer-generators—something the legislature never intended.

Everyone agrees that when it enacted the net metering facilities statute, the Legislative Assembly intended to encourage the development of renewable energy resource facilities.

[1] http://www.nytimes.com/2008/07/06/business/06oil.html?em&ex=1215662400&en=62bca82f2b83a92a&ei=5087%0A

Everyone also agrees that the direct access statutes, which were enacted at the same time that the net metering facilities statute was enacted, were never contemplated or consciously intended to apply to on-premises solar generation facilities. On the contrary, the direct access statutes were contemplated and consciously intended to apply to off-premises generators of electricity who "deliver electricity to retail electricity consumers through a [distribution utility's] distribution system." ORS 757.600(8). Indeed, Pacific Power's direct access tariff requires an ESS that serves customers in Pacific Power's distribution territory to provide 100 percent of that ESS's customers' loads.

It was with the understanding that the electricity sold to retail electricity consumers by ESSs would be delivered from the utility-side of the meter, and that the net metering facility used by a customer-generator would be located on the customer-side of the meter, that the Legislative Assembly enacted the direct access statutes and the net metering facilities statute. Each statute makes sense when it is applied to the facilities it was intended to govern, and each statute does not make sense when it is applied to facilities it was not intended to govern. The net metering facilities statute does not make sense if it is construed to govern a facility that generates electricity on the utility-side of the meter because there is no need for a two-way meter in that situation. Similarly, the direct access statutes do not make sense if they are construed to govern a facility that generates electricity on the customer-side of the meter. For example, it does not make sense to require a net metering facility that consists of an on-premises generator of electricity using solar resources to be, or contract with, a scheduling ESS, as required by the direct access regulations, specifically, OAR 860-038-0410(3). For another example, it does not make sense to require solar net metering facilities to pay a public purpose charge if doing so will make solar net metering facilities less financially attractive when the purpose of the public

purpose charge is to facilitate the development of solar net metering facilities by making them more financially attractive.

I. EVERY PARTY AGREES FACILITIES OWNED BY HONEYWELL ARE NET METERING FACILITIES; AND ALMOST ALL PARTIES AGREE CUSTOMERS ARE CUSTOMER GENERATORS

In this proceeding, every party agrees that the facilities provided and owned by Honeywell and similarly-situated parties are "net metering facilities" as that term is used in ORS 757.300. Putting the concept another way, every party agrees that third party ownership of "net metering facilities" is permitted under ORS 757.300, or putting the concept in statutory construction terms, that in enacting ORS 757.300, the legislature intended to permit third parties to own "net metering facilities" as that term is used in ORS 757.300. *E.g.* PP&L Br. 7-8. ODOT Br. 2, 5-6. Every party, with the possible exception of PacifiCorp, agrees that the customers of Honeywell and similarly-situated parties are "customer-generators" as that term is used in ORS 757.300. ODOT Br. 6-8; *but see* PacifiCorp Br. 8-9.

ODOT has attached as Exhibit A, a copy of 1999 Or Laws Ch 944, the original net metering facilities act, now codified as ORS 757.300. The preamble to the Act certainly contemplates or suggests flexibility about third-party financing and ownership relationships, the legislature specifically desiring to "encourage[] private investment in renewable energy resources"—exactly what occurs when a third party provider invests in net metering facilities that are used by State and local governments. The preamble states:

> Whereas the Legislative Assemble finds that a net energy metering program for customers with small-scale, renewable-fuel electric generating facilities *encourages private investment in renewable energy resources*, stimulates in-state economic growth, enhances the continued diversification of this state's energy resources and reduces utility interconnection and administrative costs; now therefore, …."

ODOT Br, Exhibit A, at 1.

PacifiCorp suggests that perhaps the term "customer-generator" should be construed by parsing the combined term "customer-generator" into its two constituent parts, construing each part separately, and then combining the two constructions back together again. PacifiCorp Br. 8-9. There is no reason for the Commission to consider this suggestion because the Legislative Assembly expressly defined the term "customer-generator" in ORS 757.300(1)(a) as simply "a user of a net metering facility." The legislature did not parse the term and the Commission should not either. The legislature gave the term a simple and clear definition. The Commission should as well.

PacifiCorp also argues that the Commission will "need to consider" the Supplemental Comments in AR 515, in which PUC Staff said that a "customer-generator" must "actually 'generate' electricity with the net metering facility," and that "[a]s such, a casual tenant in an apartment building, or a home located on a winery, cannot be considered a 'customer-generator'" because "in the typical case the tenant will not itself be 'generating electricity' with the net metering facility." PacifiCorp Br. 9 (quoting Staff Supplemental Comments, Docket No. AR 515, May 9,2008, p. 2.).

The Commission does not need to consider the PUC Staff's Supplemental Comments from AR 515 for at least two reasons. First, in this proceeding, PUC Staff agrees that a facility owned and operated by Honeywell is a "net metering facility" and that Honeywell's customer who uses the net metering facility is a "customer-generator." OPUC Staff Br. 1, 3. Second, Honeywell believes that the better argument why a tenant *might* not be considered to be a customer-generator would be that depending on the circumstances of the tenancy, the facility

might not be "located on the customer-generator's premises," and therefore the facility the tenant-customer was using would not be a "net metering facility." ORS 757.300(1)(d)(B).

II. NET METERING FACILITIES STATUTE, WHICH PERMITS THIRD PARTY OWNERSHIP, PROVIDES CONTEXT FOR CONSTRUING DIRECT ACCESS STATUTES

The goal in the construction of a statute, as ODOT notes in its brief, "is to determine and effectuate the intent of the Legislative Assembly," and the first step to determine that intent is to examine the text and the context of the statute. ODOT Br. 4; ORS 174.020(1)(a); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993).

"Context," includes "other provisions of the *same* statute, the *session laws*, and related statutes." *Stevens v. Czerniak*, 336 Or 392, 84 P3d 140 (2004). Here, therefore, the net metering facilities statute, adopted by the very same 1999 Session of the legislature, provides the context for construing the direct access statutes. Where one statute provides a context for another statute, it is appropriate to construe the statutes consistently. *See PGE v. BOLI*, 317 Or at 611; *see Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 49, 911 P2d 350 (1996)("courts 'are required to harmonize apparent conflicts within a statute if it is possible to do so.'").

This is noteworthy because, as ODOT also recognizes, "[a]n examination of the direct access laws in the context of related statutes demonstrates that the Legislative Assembly probably did not consciously consider whether solar powered net metering facilities under ORS 757.300 also would constitute electricity service providers as defined by ORS 757.600(16)." ODOT Br. 19. In its brief, PUC Staff notes that "staff did perform an extensive review of the legislative history concerning the direct access statutes and did not find anything illuminating regarding the present questions." Staff Br. 6 n 2.

Honeywell believes that where, as ODOT says and Staff implicitly recognizes, the Legislative Assembly did not "consciously" consider that third party owners of net metering facilities would be ESSs, and where there is no legislative history indicating that the legislature did, it is appropriate to go one step further, and recognize that (1) the Legislative Assembly did not "intend" a customer generator's use of a net metering facility owned by a third party to be a form of "direct access," and (2) the third party owner is not an ESS.

ODOT points out that "the legislature's choice of words when it defined "customer-generator" should be persuasive concerning the non-issue of ownership. In ORS 757.300(1)(a), the Legislative Assembly defined a customer-generator as a "user," not as an owner, of a net metering facility: "'Customer-generator' means a user of a net metering facility.'" ODOT notes "[t]he dozens of Oregon statutes that deal with the concept of ownership demonstrate that when the legislature wants to specify or regulate ownership, it knows how to do so," and that many of these dozens of statutes specifically relate to public utility regulation, *e.g.* ORS 758.505(2)(b). ODOT Br. 14 n 24.

The net metering facilities act also contains an emergency clause providing that it goes into effect on September 1, 1999. 1999 Or Laws Ch 944, § 4, ODOT Br, Exhibit A, at 3. Given the fact that the net metering facilities act, as everyone agrees, permits customer generators to use net metering facilities owned by third parties like Honeywell, and given the fact that 1999 Or Laws Ch 865 § 2(1) (SB1149, ORS 757.601(1)) adopted by the legislature in the very same 1999 session provides that "[r]etail electricity consumers shall not be allowed direct access before" March 1, 2002, it makes no sense to suppose that the legislature, after providing in one Act that customer-generators could use net metering facilities owned by third parties beginning September 1, 1999 in one Act then, *sub silentio,* intended in another Act to take that right away

for two and one-half years. It makes much more sense to construe ORS 757.600(6) as it is written, that a customer-generator's use of a net metering facility owned by a third party like Honeywell does not constitute "direct access," and that Honeywell is not an ESS.

II. IT MAKES NO SENSE TO SUPPOSE THAT THE LEGISLATURE INTENDED THAT A CUSTOMER-GENERATOR'S USE OF A NET METERING FACILITY IS A FORM OF DIRECT ACCESS

Honeywell believes that, for a variety of reasons, it does not work to suppose that a customer generator's use of a net metering facility owned by a third party is a form of "direct access."

A. IF A CUSTOMER-GENERATOR'S USE OF A NET METERING FACILITY WERE A FORM OF DIRECT ACCESS, CUSTOMER-GENERATORS COULD PAY HIGHER MINIMUM MONTHLY CHARGES, WHICH IS GENERALLY PROHIBITED BY ORS 757.300(2)(c)

ORS 757.300(2)(c) provides a default rule that an electric utility cannot increase the minimum monthly charge paid by "customer-generators" over and above the charge paid by other customers in the same rate class: The electric utility "[m]ay not charge a customer-generator a fee or charge that would increase the customer-generator's minimum monthly charge to an amount greater than that of other customers in the same rate class as the customer-generator."

ORS 757.300(2)(c) means that as a general proposition an electric utility must provide the same service at the same rate that it provides other customers in the same rate class as the customer-generator despite that the fact that the customer-generator is using a net metering facility owned by a third party.

The direct access statutes are different . While retail electricity consumers are required to be provided by electric companies with a "cost-of-service option" (ORS 757.603(1)(a)),[2] retail electricity consumers who have been served by direct access may be prohibited or limited by the Commission from using a cost-of-service rate. ORS 757.603(3)(b). Instead, the retail electricity consumer receiving electricity services from its distribution utility may be limited to default service, either emergency default service or "standard offer" default service. ORS 757.622; OAR 860-038-0280, -0250.

These "limitations" are spelled out in the Commission's direct access rules. Under those rules, "direct access" is something that nonresidential consumers "choose." OAR 860-038-0260(1). Once the nonresidential consumer chooses direct access, "standardized" "direct access rates" apply to that consumer. OAR 860-038-0260(2), (6). On November 15 of each year, an electric company must "announce the prices to be charged for electricity services in the next calendar year" (OAR 860-038-0275(1)), and within 5 days thereafter, "must allow retail electricity customers that are eligible for direct access at least five business days after the Announcement Date to choose service under a cost-of-service rate option or to purchase electricity from either an electricity service supplier through direct access or an electric company through a standard rate offer." OAR 860-038-0275(2). In other words, a retail electricity consumer must make a choice each year to choose either (1) cost-of-service rate option; or (2) to purchase electricity from an electricity service supplier through direct access; or (3) to purchase electricity from an electric company through a standard offer rate.

[2] The Commission can waive the requirement for non-residential, non-small commercial consumers (757.603(1)), but it has not. OAR 860-038-0005(11), -0240(1).

After a consumer has made its choice for that year, it is possible for the consumer to obtain emergency default service (OAR 860-038-280(3)), and thereafter, standard offer service (OAR 860-038-280(6)), but only if, the rule provides, "when an electric company is informed by the ESS or nonresidential consumer, or becomes aware, that an ESS is no longer providing service." OAR 860-038-280(3)(a). The consumer (or the ESS) must give the electric utility notice that the consumer is going to take standard offer service. OAR 860-038-0250(6), -0280(4). "An electric company may require a deposit from a consumer applying to receive emergency default service or standard offer service." OAR 860-038-280(5).

OAR 860-038-0275(2) contemplates an "either, or, or" world where a consumer must each year choose either the cost-of-service rate option, or the direct access rate option, or the standard offer rate option. The rates for the cost-of-service option, the direct access option, and the standard offer option are not the same. The rules specify different methods by which the rates for each service is to be made. OAR 860-038-240(3) (cost-of-service ratemaking); OAR 860-038-260(2), (direct access ratemaking); OAR 860-038-250(2) (standard offer ratemaking); *see* OAR 860-038-0200 (unbundling of costs).

If a customer-generator's use of a net metering facility owned by a third party is "direct access," it follows that the customer-generator will have chosen "direct access" service and the "direct access rates" will apply even though those rates, including the minimum monthly charge, are greater than that of other customers in the same rate class as the customer-generator—something generally not permitted by ORS 757.300(2).

Finally, by requiring customers to choose between the direct access option, on the one hand, and the cost-of-service option and the standard offer option, on the other hand, OAR 860-038-0275(2) contemplates that the consumer will not be receiving electricity from a distribution

utility except in the case of an emergency. The direct access world where the customer does not receive electricity from the distribution utility is different from the net metering facility world where, ordinarily, the customer receives or may receive at any moment electricity from the electric utility without notice.

B. RELIEF FOR HONEYWELL FROM THE ESS REGULATIONS WOULD BE AN INADEQUATE REMEDY

In its opening brief, PUC Staff suggests that the adverse consequences of a determination that Honeywell is an ESS can be managed or eliminated by the expedited processing of a petition to waive certain regulations pertaining to ESS requirements pursuant to OAR 860-038-0001(4). OAR 806-038-0001(4) provides: "These rules shall not in any way relieve any entity from its duties under Oregon law. Upon application by an entity subject to the these rules and for good cause shown, the Commission may relieve it of any obligations under these rules."

Honeywell respectfully disagrees for at least two reasons. First, Honeywell understands that, in general, the Commission cannot waive statutory obligations. Honeywell believes that imposing statutory obligations of an ESS on the owner of a net metering facility leads to unintended results.

Second, Honeywell believes that virtually all of the Division 38 regulations make sense only when applied to off-premises generators of electricity who "deliver electricity to retail electricity consumers through a [distribution utility's] distribution system." ORS 757.600(8). Requiring Honeywell to petition for relief from all of the regulations that only make sense when applied to off-premises generators of electricity who deliver electricity to retail electricity consumers through a distribution system is cumbersome, takes time, is expensive, and should not be necessary.

1. Statutory Obligations

Honeywell understands that the Commission cannot waive the following statutory obligations that apply to ESSs.

a. ORS 757.609(2) requires all ESSs (and electric companies) to announce estimated prices that will be charged for electricity by the suppliers and companies in the subsequent calendar year or contract period at least five days before the date set by the commission under ORS 757.609 (1).

As noted in the Assumed Facts, the price for electricity that Honeywell charges is set in the year that the facility is installed, and escalates thereafter at a fixed percentage rate. Although ORS 757.609(2) readily makes sense and fits the intended situation where competitors of distribution utilities are competing to provide off-premises generated electricity delivered through a distribution system, it does not make sense or fit the situation where the electricity is generated by a net metering facility located on the customer side of the meter and not delivered through a distribution system.

b. ORS 757.612 (2) is not crystal clear, but it appears to require each ESS to collect a public purpose charge equal to three percent of the total revenues collected by the ESS from its retail electricity consumers for electricity services, distribution, ancillary services, metering and billing, transition charges and other types of costs included in electric rates on July 23, 1999.

Although Honeywell does sell electricity, Honeywell does not provide electricity services, distribution, or ancillary services. Honeywell, in theory, could collect an extra three percent of its revenues from future customers, but the contracts that Honeywell has entered with its current customers do not include an extra three percent. Taking three percent of Honeywell's gross revenues from its profit will make its current projects less

attractive, and may well be significant enough for Honeywell to exercise its right to stop work. Because Oregon has relatively low rates, profit margins for the proposed projects by Honeywell and the other providers are extremely tight. Indeed, Honeywell has had to cancel two proposed projects in Umatilla County that became uneconomic when it was discovered that foundation costs would have to be larger than originally planned. The increase in cost was relatively insignificant, but it was enough to kill the projects.

If the law is construed to require Honeywell to incur the cost of paying or collecting the public purpose charge and complying with the other administrative duties imposed by ORS 757.600 *et seq.*, Honeywell has serious doubts about the economic viability of solar projects in Oregon because profit margins are so tight. At least one other provider has said it will shut down its projects if it is determined to be an ESS.

Furthermore, increasing the cost of electricity provided by on-premises solar generators by the public purpose charge will make on-premises solar generation projects less financially attractive to potential customers. An increase in price, assuming everything else remains equal, will result in fewer solar projects. It does not make sense to require solar net metering facilities to pay a public purpose charge if doing so will result in fewer solar net metering facilities when a purpose of the public purpose charge is to facilitate the development of solar net metering facilities.

c. ORS 757.622 requires the Commission to establish terms and conditions for default electricity service to nonresidential consumers in an emergency and in circumstances when the consumer is receiving electricity services through direct access and elects instead to receive such services through the default service. ORS 757.622 requires the rules to provide for viable competition among electricity service suppliers.

The establishment of rules for default electricity service do not make sense when applied to Honeywell and similar on-premises generators of electricity using solar resources because the distribution utility will always be providing default electricity service. Most, if not all, of the time, Honeywell and similar on-premises generators of electricity using solar resources provide only a portion of the electricity needs of the customer. Most, if not all, of the time, the consequence of locating a solar net metering facility on the customer's side of the meter will have the effect of only lessening the amount of electricity that the distribution utility will be providing each minute. *See supra* p. 9-10.

d. ORS 757.649 requires each ESS to be certified by the PUC, and requires the PUC to establish standards for certification.

The establishment of standards that apply to an ESS that provides electricity services to the customer from the utility side of the meter do not make sense when they are applied to Honeywell and similar on-premises solar net metering facilities. Certification is an unnecessary burden, especially in light of the presence of competitive market mechanisms and the legislature's intention to minimize, if not eliminate, administrative agency regulation of solar and wind facilities. ORS 757.005(1)(b)(C) and ORS 758.450(4)(c).

e. ORS 757.649 states requirements for each bill that each ESS sends to its customers:

> (4) Every bill to a direct access retail electricity consumer from an electricity service supplier shall contain at least:

(a) The rate and amount due for each service or product that the retail electricity consumer is purchasing and other price information necessary to facilitate direct access, as determined by the commission;

(b) The rates and amounts of state and local taxes or fees, if any, imposed on the retail electricity consumer;

(c) The amount of any public purpose charge or credit;

(d) The amount of any transition charge or transition credit; and

(e) Power source and environmental impact information necessary to ensure that all consumers have useful, reliable and necessary information to exercise informed choice, as determined by the commission.

(5)(a) A retail electricity consumer of an electric company shall receive, upon request, a separate bill from every individual electricity service supplier that provides products or services to the retail electricity consumer. If a retail electricity consumer of an electric company does not request separate bills, or a consolidated bill from an electricity service supplier as provided in paragraph (c) of this subsection, the electric company shall consolidate the bills for all electricity services into a single statement, and electricity service suppliers shall provide to the electric company the information necessary to prepare a consolidated statement.

These requirements for bills make sense when applied to off-premises electricity generators who want to compete directly with the distribution utility, but they make little sense when applied to on-premises solar net metering facilities. The customer-generator knows that the power source is the sun, and the provisions regarding consolidation of bills impose an unnecessary administrative cost on tight profit margins.

f. ORS 757.649(5)(c) provides: "Upon the request of a retail electricity consumer of an electric company, an electricity service supplier shall consolidate the bills for all electricity services into a single statement, and electric utilities and other electricity service suppliers shall provide to the billing electricity service supplier any information necessary to prepare a consolidated statement."

This statutory requirement on its face makes no sense if it is applied to solar net metering facilities owned by third parties.

2. Regulatory Obligations.

Attached to this Reply Brief is an Appendix that identifies in italics the regulatory obligations that Honeywell believes do not apply to an on-premises solar net metering facility.

Honeywell believes that imposition of the italicized regulatory obligations for ESSs that are set forth in the Appendix makes little if any sense when applied to Honeywell and similar on-premises generators of electricity using solar resources. Honeywell believes that the inapplicability of the italicized regulatory obligations for ESSs in the Appendix, which are admittedly most of them, shows that Honeywell and similar on-premises generators of electricity using solar resources are not ESSs.

Honeywell also believes that construing the direct access statutes to require Honeywell and similar on-premises generators of electricity using solar resources to petition for waiver or comply with the italicized regulatory obligations for ESSs in the Appendix discourages the development of solar projects by needlessly increasing administrative costs, reducing tight profit margins, and decreasing the attractiveness of the projects to customers and providers alike.

3. Conclusion.

Honeywell and similar on-premises generators of electricity using solar resources were never intended by the Legislative Assembly to be ESSs. Requiring Honeywell and similar on-premises generators of electricity using solar resources to comply with statutory and regulatory obligations enacted and adopted to apply to off-premises off-premises generators of electricity who deliver electricity to retail electricity consumers through a distribution utility's distribution system would make all proposed solar projects significantly less economic, and would kill at

least some of them. Requiring Honeywell to petition for relief from some or all of the regulatory obligations of ESSs is unnecessarily cumbersome and costly when profit margins are tight, takes unnecessary time when time is tight. Recognizing that compliance with regulations for solar and wind facilities is costly, burdensome, and unnecessary, the Legislative Assembly excepted companies providing power from solar resources from complying with regulations applicable to public utilities [ORS 757.005(1)(b)(C)] and persons and entities providing utility services in the territorial allocation statutes [ORS 758.450(4)(c)].

Furthermore, Honeywell does not believe that the Commission can relieve an ESS of statutory obligations. Requiring Honeywell and similar on-premises generators of electricity using solar resources to incur the administrative cost of complying with statutory obligations that apply to ESSs will discourage the development of net metering facilities using solar resources, which is exactly the opposite of what the Legislative Assembly intended when it enacted the net metering statute in the same session.

III. TEXT OF ORS 757.600(6)(DEFINING "DIRECT ACCESS") DOES NOT DICTATE THAT THIRD PARTY OWNERS OF NET METERING FACILITIES ARE ESSs

This is not a case where the text of the statutes "dictates" the construction proposed by Staff. ORS 757.600(6) defines "direct access" as "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." Ordinarily, in Oregon, the word "and" is understood to be used in its conjunctive sense. *McCabe v. State of Oregon,* 314 Or 605, 610- 11, 841 P2d 635 (1992)("As this court has stated: 'Generally, the words "and" and "or," as used in statutes, are not interchangeable, being strictly of a conjunctive or disjunctive nature * * *.' *Lommasson v.*

School Dist. No. 1, 201 Or 71, 79, 261 P2d 860, *adhered to in part on rehearing*, 201 Or at 90, 91, 267 P2d 1105 (1954).”). While there can be cases where “and” is construed as a disjunctive sense, Oregon courts only do so where it is necessary to do so to effectuate the legislature’s intent. *Pendleton School Dist. v. State of Oregon*, 220 Or App 56, 70-71, 185 P3d 471 (2008).

In the case of ORS 757.600(6), the general rule applies. It makes the most sense and renders the most harmonious construction of the statutes to read “and” in the conjunctive sense. Construing “and” in the conjunctive sense eliminates what would be a conflict between ORS 757.300 and the direct access statues.

ORS 174.020(2) provides that “[w]hen a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.” To the extent that the net metering facilities statute, ORS 757.300 is inconsistent with the direct access statutes, this is a case where the particular intent permitting third party ownership of net metering facilities should control a general intent that would undermine that particular intent.

IV. FACILITIES USED TO CONDUCT ELECTRICITY FROM NET METERING FACILITY TO CUSTOMER WIRING IS NOT “ANCILLARY SERVICES”

PUC Staff may have misunderstood Honeywell’s arguments about “direct access,” “ancillary services,” and why Honeywell is not an ESS. In this proceeding, the issue is not whether the Commission has the authority to “determine which ancillary services are necessary to ensure delivery of the purchased electricity to the consumer and to ensure the consumer has the ability to purchase such necessary ancillary services.” PUC Staff Br. 8. Rather the issue is whether, under the Assumed Facts, Honeywell “offers to sell electricity services available *pursuant to direct access* to more than one retail electricity consumer,” (ORS 757.600(16)), the

critical subsidiary issue being whether, under the Assumed Facts, Honeywell's customers have "the ability…to purchase electricity ***and*** certain ancillary services, as determined by the commission for an electric company…, directly from an entity other than the distribution utility." ORS 757.600(6).

Likewise, Honeywell is not arguing that "it is not an ESS simply because it does not also offer ancillary services that its customers do not need or want under [its] business model." PUC Staff Br. 8. Rather, Honeywell is arguing that under the Assumed Facts, its customers do not purchase and have no use for "ancillary services" directly from any entity other than the distribution utility. Furthermore, that Honeywell's customers do not purchase and have no use for "ancillary services" directly from any entity other than the distribution utility is not a product or function of "Honeywell's business model." Rather it is a product or function of the physical set up of a "net metering facility"—the requirements that a net metering facility is located on the customer-generator's premises; operates *in parallel* with an electric utility's existing transmission and distribution facilities; is intended primarily to offset part or all of the customer-generator's requirements for electricity; and interconnected using a standard meter that is capable of registering the flow of electricity in two directions. ORS 757.300(1)(d)(B)-(D), (2)(a). Because the electricity generated by a net metering facility does not use an electric utility's "transmission and generation facilities" in order to be delivered to the customer-generator, the customer-generator does not purchase and has no use for ancillary services, as that term is properly understood, directly from any entity other than the distribution utility.

PUC Staff appears to accept the proposition that direct access requires that the retail electricity consumer have the ability to purchase both electricity *and* certain ancillary services directly from an entity other than the distribution utility. ORS 757.600(6). PUC Staff appears to

reach its answer that Honeywell is an ESS because Staff believes that either (1) Honeywell is providing the *facilities* necessary to deliver the electricity from its generating facility to its customers—the "facilities" constituting "ancillary services"; or (2) Honeywell's customers have provided the necessary "delivery facilities" themselves—these delivery facilities constituting ancillary services. PUC Staff Br. 8-9.

Honeywell respectfully believes that PUC Staff's definition of "ancillary services" is incorrect—that "ancillary services" are "services," not "facilities," for the transmission or delivery of electricity. ORS 757.600(2) defines "ancillary services" as "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." PUC Staff's argument that facilities are "ancillary services" is different from the specific examples the legislature gave in its statutory definition in ORS 757.600(2): "scheduling, load shaping, reactive power, voltage control and energy balancing services."

The examples listed in the statute are much more like FERC's definition(s) of ancillary services found in Order No. 888. Honeywell's Opening Br 20-21. FERC Order No. 888 contains an extensive discussion of ancillary services. Most importantly here, FERC rejected a proposal by NERC that "ancillary services" include the facilities used for the actual transmission (conduction) of electricity. FERC said:

> In addition, NERC designates "facilities use service" as an interconnected operations service. We note that the facilities use service described by NERC is simply basic transmission service, which must be provided under an open access tariff. We do not consider facilities use service to be an ancillary service.

FERC Order No. 888, at 215 n 363.

It is also worth noting that the term "ancillary services" is a term that FERC chose. Several commenters, including NERC (North American Electric Reliability Council/ Corporation), thought FERC should use "Interconnected Operations Services," but FERC rejected this suggestion. *Id.* at 202-03, 205). The Oregon legislature's choice to use the very same term and a very similar definition in ORS 757.600(2) is evidence that the legislature intended the term in the Oregon statutes to have a similar or the same meaning as the term was used by FERC.

It appears the Commission has understood the interconnectedness of Oregon direct access and FERC open access that way. The Commission's OAR 860-038-0260(7) requires electric companies to file direct access tariffs that:

> are practical and workable in combination with tariffs required by the Federal Energy Regulatory Commission (FERC). The electric company must:
>
> (a) Ensure the minimization of differences in service definitions between retail direct-access and wholesale open-access use service definitions that minimize the differences with the service definitions required by FERC; ...and
>
> (c) State rates, terms, and conditions in its Oregon tariffs that properly work in conjunction with the electric company's FERC tariffs and, if not identical to, can at least be easily compared with those required by the FERC.

"Ancillary services" are defined and covered by the Pro Forma Tariff that was a part of Order No. 888:

> Those services that are necessary to support the transmission of capacity and energy from resources to loads while maintaining reliable operation of the Transmission Provider's Transmission System in accordance with Good Utility Practice.

OAR 860-038-0260(7) indicates that where possible, Oregon's definition of ancillary services should be very similar to FERC's definition.

If the Commission were to adopt a definition of "ancillary services" that included, as a general matter, facilities for the transmission or distribution of electricity, it would make Oregon law out-of-step with the rest of the nation—and for no good local policy purpose.

Consistent with this recognition that ancillary services do not include the facilities themselves that are used to transmit or distribute electricity, in OAR 860-038-0200(2), OAR 860-038-0480(2), and OAR 860-038-0590(2) the Commission distinguished "ancillary services" from "transmission services" and "distribution services."

Finally, Oregon's statutes recognize a conceptual distinction between "ancillary services" and facilities that are used to transmit or distribute electricity. For example, while ORS 757.600(2) defines "ancillary services" as "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," subsection (8) defines "distribution" as "the delivery of electricity to retail electricity consumers through a distribution system consisting of local area power poles, transformers, conductors, meters, substations and other equipment," subsection (30) defines "site" as "a single contiguous area of land containing buildings or other structures that are separated by not more than 1,000 feet, or buildings and related structures that are interconnected by facilities owned by a single retail electricity consumer and that are served through a single electric meter," and subsection (33) defines "transmission facility" as "the plant and equipment used to transmit electricity in interstate commerce."

…

…

…

V. CONCLUSION

For the foregoing reasons, the Commission should make the declaratory rulings in accordance with the positions set forth by Honeywell and Honeywell Global Finance in their Opening Brief.

DATED this 11th day of July, 2008.

ESLER, STEPHENS & BUCKLEY

By: /s/ John W. Stephens
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Of Attorneys for Honeywell International, Inc. and Honeywell Global Finance, LLC

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APPENDIX

Honeywell believes that the following italicized regulatory obligations for ESSs in this Appendix should not be applied to Honeywell and similar on-site generators of electricity using solar resources in light of the Legislative Assembly's desire to encourage the development of facilities that produce electricity from solar and wind resources. Moreover, application of some of the ESS regulations to customer-generators would lead to the distribution utility's charging customer-generators different rates, including, potentially, a greater minimum monthly charge, from those charged other customers in the same rate class as the customer-generators, contrary to the requirements of the net metering statute, ORS 757.300(2)(c). The words "electricity service supplier" and "ESS" are set out in bold font for ease of reference.

OREGON ADMINISTRATIVE RULES
PUBLIC UTILITY COMMISSION
DIVISION 38
DIRECT ACCESS REGULATION

860-038-0001

Scope and Applicability of Rules

(1) The rules contained in this division apply to electric companies and **electricity service suppliers**, except that these rules do not apply to an electric company serving fewer than 25,000 consumers in this state unless the electric company:

(25) "**Electricity service supplier**" or "**ESS**" 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. An **ESS** can also be an aggregator.

(26) "Emergency default service" means a service option provided by an electric company to a nonresidential consumer that requires less than five business days' notice by the consumer or its **electricity service supplier**.

860-038-0275

Direct Access Annual Announcement and Election Period

(1) On November 15 of each year (or the next business day if November 15 falls on a Saturday, Sunday, or legal holiday as defined by ORS 187.010), each electric company must announce the prices to be charged for electricity services in the next calendar year. The date on which the electric companies are required to announce such prices is "the Announcement Date."

(2) Electric companies must allow retail electricity customers that are eligible for direct access at least five business days after the Announcement Date to choose service under a cost-of-service rate option or to purchase electricity from either an ***electricity service supplier*** *through direct access or an electric company through a standard rate offer.*

860-038-0280

Default Supply

(1) Default supply is an alternative available to nonresidential consumers served by direct access.

(2) The two types of default supply are emergency as defined in OAR 860-038-0005 and standard offer as defined in OAR 860-038-0250.

(3) Each electric company must provide the emergency option as follows:

(a) Emergency default service commences when an electric company is informed by the ***ESS*** *or nonresidential consumer, or becomes aware, that an* ***ESS*** *is no longer providing service; and*

(b) Each electric company must file tariffs with the Commission that include the emergency service option. An electric company must design emergency service rates to recover its costs of providing such service.

(4) A nonresidential consumer must give the electric company notice of intent to purchase or terminate purchase of standard offer service consistent with the applicable tariff provision.

(5) An electric company may require a deposit from a consumer applying to receive emergency default service or standard offer service. The electric company may disconnect a consumer receiving default service or standard offer service subject to OAR 860-021-0305 and 860-021-0505.

(6) Unless otherwise directed by a nonresidential consumer, an electric company must move an emergency service consumer from emergency default service to standard offer service within five

business days of the nonresidential consumer's initial purchase of emergency default service. This provision does not limit a consumer's right to return from emergency default service or standard offer service to direct access.

860-038-0300

Electric Company and **Electricity Service Supplier**s Labeling Requirements

*(1) The purpose of this rule is to establish requirements for electric companies and **electricity service supplier**s to provide price, power source, and environmental impact information necessary for consumers to exercise informed choice.*

(2) For each service or product it offers, an electric company must provide price, power source, and environmental impact information to all residential consumers at least quarterly. The information must be based on the available service options. The information must be supplied using a format prescribed by the Commission. An electric company must also include on every bill a URL address, if available, for a world-wide web site where this information is displayed. The electric company must report price information for each service or product for residential consumers as the average monthly bill and price per kilowatt-hour for monthly usage levels of 250, 500, 1,000 and 2,000 kilowatt-hours, for the available service options.

*(3) An electric company and an **electricity service supplier** must provide price, power source and environmental impact information on or with bills to nonresidential consumers using a format prescribed by the Commission. The electric company or **electricity service supplier** must provide a URL address, if available, for a world-wide web site that displays the power source and environmental impact information for the products sold to consumers. An electric company and an **electricity service supplier** must report price information for nonresidential consumers on each bill as follows:*

(a) The price and amount due for each service or product that a nonresidential consumer is purchasing;

(b) The rates and amount of state and local taxes or fees, if any, imposed on the nonresidential consumer;

(c) The amount of any public purpose charge; and

(d) The amount of any transition charge or credit.

(4) For power supplied through its own generating resources, the electric company must report power source and environmental impact information based on the company's own generating resources, not the net system power mix. An electric company's own resources include company-owned resources and wholesale purchases from specific generating units, less wholesale sales from specific generating units. An electric company's own resources do not

include the non-energy attributes associated with purchases under the provisions of a net metering tariff or other power production tariff unless the electric company has separately contracted for the purchase of the Tradable Renewable Certificates. For net market purchases, the electric company must report power source and environmental impact information based on the net system power mix. The electric company must report power source and environmental impact information for standard offer sales based on the net system power mix.

*(5) For purposes of power source and environmental impact reporting, an **ESS** should use the net system power mix for the current calendar year unless the **ESS** is able to demonstrate a different power source and environmental impact. An **ESS** demonstration of a different mix must be based on projections of the mix to be supplied during the current calendar year. Power source must be reported as the percentages of the total product supply including the following:*

(a) Coal;

(b) Hydroelectricity;

(c) Natural gas;

(d) Nuclear; and

(e) Other fuels including but not limited to new renewable resources, if over 1.5 percent of the total fuel mix.

(6) Environmental impact must be reported for all retail electric consumers using the annual emission factors for the most recent available calendar year applied to the expected production level for each source of supply included in the electricity product. Environment impacts reported must include at least:

(a) Carbon dioxide, measured in lbs./kWh of CO2 emissions;

(b) Sulfur dioxide, measured in lbs./kWh of SO2 emissions;

(c) Nitrogen oxides, measured in lbs./kWh of NOx emissions; and

(d) Spent nuclear fuel measured in mg/kWh of spent fuel.

(7) Every bill to a direct access consumer must contain the ESS's and the electric company's toll-free number for inquiries and instructions as to those services and safety issues for which the consumer should directly contact the electric company.

*(8) The **ESS** must provide price, power source, and environmental impact in all contracts and marketing information.*

(9) The electric company must provide price, power source, and environmental impact in all standard offer marketing information.

*(10) Beginning April 1, 2003, and on April 1st thereafter for the prior calendar year, each electric company, and each **ESS** making any claim other than net system power mix, must file a reconciliation report on forms prescribed by the Commission. The report must provide a comparison of the fuel mix and emissions of all of the seller's certificates, purchase or generation with the claimed fuel mix and emissions of all of the seller's products and sales.*

*(11) Each **ESS** and electric company owning or operating generation facilities shall keep and report such operating data about its generation of electricity as may be specified by order of the Commission.*

860-038-0340

Electric Company Ancillary Services

(1) This rule applies to those ancillary services that are not within the exclusive jurisdiction of the Federal Energy Regulatory Commission.

(2) The Commission may require an electric company to provide ancillary services to facilitate direct access to consumers.

*(3) The Commission may decide which ancillary services a direct access consumer may purchase directly from **electricity service supplier**s.*

(4) An electric company must provide ancillary services to facilitate direct access that are comparable to the services it provides for its own retail electricity consumers.

860-038-0360

Electric Company Customer Metering Requirements

(1) The electric company must own/lease, install, test, read, remove, and maintain a customer meter for each retail electricity consumer receiving metered distribution services.

*(2) The electric company's meter reading must be the basis for the electric company charges billed to the retail electricity consumer. The electric company must provide the results of the meter reading to the consumer's **ESS** in a timely manner, comparable to the provision of such information to its own non-distribution divisions, affiliates, and related parties for direct access customers served by those divisions, affiliates, and related parties. The electric company must not disclose meter data to any entity or person other than the retail electricity consumer, the*

consumer's ESS, or the Commission unless written authorization is obtained from the retail electricity consumer.

(3) The electric company must make available a standard meter and metering services to each retail electricity consumer that are adequate for the billing and other requirements of the electric company.

*(4) The electric company must offer meters and metering services, other than the standard meters and metering services, that are necessary for an **ESS** to provide service to a retail electricity consumer. If an **ESS** requests that the electric company offer a specific meter capability or function or metering service, the electric company must consider and approve or deny the request within 10 business days. If the request is approved, the electric company must file rates with the Commission for such meter or metering service within 30 days. If the request is denied, the **ESS** may appeal the decision to the Commission. The electric company must establish charges for different meter capabilities or functions and metering services subject to approval by the Commission.*

860-038-0380

Aggregation

(1) For purposes of ensuring compliance with Commission standards for consumer protection, an aggregator must be registered by the Commission to combine retail electricity consumers in the service territory of an electric company into a buying group for the purchase of electricity and related services.

(2) The initial registration fee is $50.

(3) The annual renewal fee is $25.

(4) At a minimum, the aggregator must supply the following information:

(a) Name of aggregator;

(b) Name, address, and phone number of the aggregator's regulatory contact; and

(c) A signed statement from an authorized representative of the aggregator declaring that all information provided is true and correct.

(5) At a minimum, the aggregator must attest that it will:

(a) Furnish to consumers a toll-free number or local number that is staffed during normal business hours to enable a consumer to resolve complaints or billing disputes and a statement of the aggregator's terms and conditions that detail the consumer's rights and responsibilities;

(b) Comply with all applicable state and federal laws, rules, and Commission orders applicable to aggregators; and

(c) Adequately respond to Commission information requests applicable to aggregators and related to the provisions of this rule within 10 business days.

(6) An aggregator must take all reasonable steps, including corrective actions, to ensure that persons or agents hired by the aggregator, including but not limited to officers, directors, agents, employees, representatives, successors, and assigns adhere at all times to the terms of all state and federal laws, rules, and Commission orders applicable to aggregators.

(7) Annually, 30 days prior to expiration, a registered aggregator must notify the Commission that it will not be renewing its registration or it must renew its registration by submitting an application for renewal that includes an update of information specified in section (4) of this rule. The aggregator must state that it continues to attest that it will meet the requirements of section (5) of this rule. The authorized representative of the aggregator must state that all information provided is true and correct and sign the renewal application. The renewal is granted for a period of one year from the expiration date of the prior registration.

(8) No aggregator may make material misrepresentations in consumer solicitations, agreements, or in the administration of consumer contracts. Aggregators may not engage in dishonesty, fraud, or deceit that benefits the aggregator or disadvantages consumers.

(9) An aggregator must promptly report to the Commission any circumstances or events that materially alter information provided to the Commission in the registration process.

(10) The electric company must allow aggregation of electricity loads, pursuant to ORS 757, which may include aggregation of demand for other services available under direct access.

860-038-0400

Electricity Service Supplier Certification Requirements

(1) An **electricity service supplier** (ESS) must be certified by the Commission to sell electricity services to consumers.

(2) An **ESS** must be certified as either scheduling or nonscheduling as prescribed in OAR 860-038-0410.

(3) The initial certification fee is $400.

(4) The annual renewal fee is $200.

(5) An **ESS** applicant must file an application that contains the following information:

(a) Name of applicant, *including owners, directors, partners, and officers, with a description of the work experience of key personnel in the sale, procurement, and billing of energy services or similar products*;

(b) Name, address, and phone number of the **ESS** applicant's regulatory contact;

(c) Proof of authorization to do business in the state of Oregon;

(d) Dun and Bradstreet number, if available;

(e) Confirmation that the applicant (including owners, directors, partners, and officers) has not violated consumer protection laws or rules in the past three years;

*(f) Audited financial statements of the **ESS** applicant (and its guarantor, if applicable) and credit reports consisting of:*

(A) A balance sheet, income statement, and statement of cash flow for each of the three years preceding the filing and for the interim quarters between the end of the last audited year and the filing date; or

(B) For an applicant that has been in operation for less than three years, the audited balance sheets, income statements, and statements of cash flow for each of the years the company was in operation and for the interim quarters between the end of the last audited year and the filing date; or

(C) For an applicant that has been in operation for less than 12 months on the date the application is filed, such financial statements as are kept in the regular course of the applicant's business operations and pro-forma financial statements for a period of not less than 36 months.

(D) If audited financial statements are unavailable, the applicant may submit unaudited financial statements for each of the three years preceding the filing and for the interim quarters between the end of the last unaudited year and the filing date. The applicant must also submit a statement explaining why audited statements are not available.

(g) A showing of creditworthiness through documentation of tangible assets in excess of liabilities (i.e., tangible net worth) of at least $1,000,000 on its most recent balance sheet and demonstration of either its own investment grade credit rating pursuant to (A) or fulfillment of bond/guaranty requirements pursuant to (B):

(A) Investment grade rating means a suitable rating on the long term, senior unsecured debt, or if this rating is unavailable, the corporate rating, of a major credit rating agency.

(B) An applicant may use any of the financial instruments listed below, in an amount commensurate with the services and products it intends to offer, to satisfy the credit requirements established by this rule.

(i) Cash or cash equivalent (i.e., cashier's check);

(ii) A letter of credit issued by a bank or other financial institution, irrevocable for a period of at least 18 months;

(iii) A bond in a form acceptable to the Commission, irrevocable for a period of at least 18 months; or

(iv) A guaranty in a form acceptable to the Commission issued by a principal of the applicant or a corporation holding controlling interest in the applicant, which is irrevocable for at least 18 months. To the extent the applicant relies on a guaranty, the applicant must provide financial evidence sufficient to demonstrate that the lender or guarantor possesses the cash or cash equivalent needed to fund the guaranty.

(h) A showing of technical competence in energy procurement and delivery, information systems, billing & collection, and if subject to the requirements of section 16 of this rule, safety & engineering;

(i) A showing that its financial and technical competence is consistent with the services and products it intends to offer, and the targeted customer class(es) and geographical areas; and

*(j) A statement as to whether the **ESS** is applying for certification as a scheduling or nonscheduling **ESS** and information documenting an ability to comply to the requirements of OAR 860-038-0410; and*

(k) The authorized representative of the applicant must state that all information provided is true and correct and sign the application.

(6) At a minimum, an applicant must attest that it will:

(a) Furnish to consumers a toll-free number or local number that is staffed during normal business hours to enable a consumer to resolve complaints or billing disputes and a statement of the ESS's terms and conditions that detail the customer's rights and responsibilities;

(b) Comply with all applicable laws, rules, Commission orders, and electric company tariffs;

(c) Maintain insurance coverage, security bond, or other financial assurance commensurate with the types and numbers of consumers and loads being served, meet any other credit requirements contained in the electric company's tariffs, and cover creditors for a minimum of 90 days from the date of cancellation; and

(d) Adequately respond to Commission information requests within 10 business days.

*(7) As conditions for certification, an **ESS** must agree to:*

(a) Enter into an agreement or agreements with each respective electric company to assign to the electric companies any federal system benefits available from the Bonneville Power Administration to the residential and small-farm customers who receive distribution from an electric company and are served by the ESS; and

(b) Not enter into a Residential Sale and Purchase Agreement with the Bonneville Power Administration pursuant to Section 5(c) of the Pacific Northwest Power Act concerning federal system benefits available to residential and small farm customers receiving distribution from an electric company.

(8) Staff will notify interested persons of the application, allow 14 days from the date of notification for the filing of protests to the application (through submission of an email or letter to the staff), review the application, and make a recommendation to the Commission whether the application should be approved or denied.

(9) An applicant or a protesting party may request a hearing within seven calendar days of the date of the staff recommendation. Upon determining the appropriateness of the request, the Commission will conduct a hearing as provided for in division 014 of the Commission's rules.

(10) The Commission may issue an Order granting the applicant's request for certification upon a finding that:

(a) The applicant paid the initial certification PUC fee, as required by OAR 860-038-0400(3);

(b) The applicant filed an application containing accurate, complete and satisfactory information that demonstrates it meets the requirements to be certified as an ESS.

(11) If the Commission grants the application, the Commission may include any conditions it deems reasonable and necessary. Further, upon granting the application, the Commission will certify the **ESS** for a period of one year from the date of the order.

(12) An **ESS** must take all reasonable steps, including corrective actions, to ensure that persons or agents hired by the **ESS** adhere at all times to the terms of all laws, rules, Commission orders, and electric company tariffs applicable to the ESS.

(13) An **ESS** must notify the Commission that it will not be renewing its certification or it must renew its certification each year as follows:

(a) An **ESS** must submit its application for renewal 30 days prior to the expiration date of its current certificate;

(b) In its application for renewal the **ESS** must include the renewal fee, update the information specified in subsections (5)(a), (b), *(i), and (j)* of this rule, and state whether it violated or is currently being investigated for violation of any attestation made under the current certificate. The **ESS** must state that it continues to attest that it will meet the requirements of sections (6) *and (7)* of this rule. The authorized representative of the **ESS** must state that all information provided is true and correct and sign the renewal application;

(c) If the Commission takes no action on the renewal application, the renewal is granted for a period of one year from the expiration date of the prior certificate;

(d) If a written complaint is filed, or if on the Commission's own motion, the Commission has reason to believe the renewal should not be granted, the Commission will conduct a revocation proceeding per section (14) of this rule. The renewal applicant will be considered temporarily certified during the pending revocation proceeding.

(14) Upon review of a written complaint or on its own motion the Commission may, after reasonable notice and opportunity for hearing, revoke the certification of an **ESS** for reasons including, but not limited to, the following:

(a) Material misrepresentations in its application for certification or in any report of material changes in the facts upon which the certification was based;

(b) Material misrepresentations in customer solicitations, agreements, or in the administration of customer contracts;

(c) Dishonesty, fraud, or deceit that benefits the **ESS** or disadvantages customers;

(d) Demonstrated lack of financial, or operational capability; or

(e) Violation of agreements stated in sections (6) *and (7)* of this rule.

(15) An **ESS** must promptly report to the Commission any circumstances or events that materially alter information provided to the Commission in the certification or renewal process or otherwise materially impacts their ability to reasonably serve electricity consumers in Oregon.

*(16) Each **ESS** that owns, operates, or controls electrical supply lines and facilities subject to ORS 757.035 must have and maintain its entire plant and system in such condition that it will furnish safe, adequate, and reasonably continuous service. Each such **ESS** must inspect its lines and facilities in such a manner and with such frequency as may be needed to ensure a reasonably complete knowledge about their condition and adequacy at all times. Such record must be kept of the conditions found as the **ESS** considers necessary to properly maintain its system, unless in special cases the Commission specifies a more complete record. The **ESS** must have written plans describing its inspection, operation, and maintenance programs necessary to ensure the safety and reliability of the facilities. The written plans and records required herein*

*must be made available to the Commission upon request. The **ESS** must report serious injuries to persons or property in accordance with ORS 860-024-0050.*

860-038-0410

Scheduling

*(1) Each **ESS** shall be certified as either scheduling or nonscheduling.*

*(2) Each scheduling **ESS** shall schedule the resources to serve the direct access loads for which it has scheduling responsibility with the appropriate control area operators. Scheduling shall be in accordance with all generally accepted regional and Western Electricity Coordinating Council rules and guidelines.*

*(a) Only a single scheduling **ESS** may schedule all the resources and other services for any single direct access consumer. Multiple ESSs may provide services to any individual direct access consumer, but only through a single scheduling ESS;*

*(b) Each scheduling **ESS** shall be responsible for ensuring that all necessary point-to-point transmission services have been acquired across the facilities of third parties, above and beyond the network integration transmission service provided on the facilities of the electric company to serve the direct access loads for which it has scheduling responsibility;*

*(c) Each scheduling **ESS** shall be responsible for forecasting the requirements for serving the direct access loads for which it has scheduling responsibility and arranging for resources;*

*(d) Each scheduling **ESS** shall be responsible for settling imbalances with electric companies for the total resources and direct access loads for which it has scheduling responsibility.*

*(3) A nonscheduling **ESS** must contract with a scheduling **ESS** or control area operator for all scheduling services.*

860-038-0420

Electricity Service Supplier Consumer Protection

(1) All advertising and marketing activities by **electricity service supplier**s must be truthful, not misleading, and in compliance with Oregon's Unfair Trade Practices Act (ORS 646.605 through 646.656).

(2) No person or entity may offer to sell electricity services available pursuant to direct access unless it has been certified by the Commission as an ESS.

(3) Sections (3) through (6) of this rule do not apply when a consumer is changing suppliers. Sections (3) through (6) apply when an **ESS** is discontinuing service to a consumer. An **ESS** must give its customers at least 10 business days written notice, as prescribed in section (5) of this rule, before the **ESS** may discontinue service.

(4) The written notice of intent to discontinue service to the **ESS** customer must be printed in boldface type and must state in easy to understand language:

(a) The name and contact information of the **ESS** and the service location intended to be discontinued;

(b) The reasons for the proposed discontinuance;

(c) The earliest date for discontinuance; and

(d) The amount necessary to be paid to avoid discontinuance of services, if applicable.

(5) The **ESS** must serve the notice of discontinuance in person or send it by first class mail to the last known address of the **ESS** customer. Service is complete on the date of personal delivery or, if service is by U. S. mail, on the day after the U. S. Postal Service postmark or the day after the date of postage metering.

*(6) Not less than 10 business days prior to discontinuance of service to an **ESS** customer, the **ESS** must notify the serving electric company, by mutually acceptable means, that the **ESS** will no longer be supplying energy to that **ESS** customer. If an **ESS** and a consumer waive the 10-day notice, pursuant to section (8) of this rule, the **ESS** must still notify the electric company of its intent to discontinue a consumer's service as soon as it notifies the consumer that service is to be discontinued. The written notice must contain the following:*

*(a) Name and contact information of the **ESS** that is discontinuing service, the consumer's name, account number, service location and, if applicable, the electric company's unique location identifier;*

(b) Earliest date for discontinuance; and

(c) Necessary information applicable to the transfer of the consumer's service.

(7) This section of this rule applies to any alleged violation of the rules in Division 038 applicable to **electricity service supplier**s.

(a) When a dispute occurs between an **ESS** and its consumer about any bill, charge, or service, the **electricity service supplier** must acknowledge the dispute with a response to the consumer within five calendar days. The **ESS** must thoroughly investigate the matter and report the results of its investigation to the **ESS** consumer within 15 calendar days. If the **ESS** is unable to resolve the matter with its consumer within 15 calendar days, the **ESS** must advise the consumer of the

option to request internal supervisory review of unregulated disputes and to request the Commission's assistance in resolving a dispute within the Commission's jurisdiction;

(b) An **ESS** customer may request the Commission's assistance in resolving a dispute within the Commission's jurisdiction by contacting the Commission's Consumer Services Division. The Commission must notify the **electricity service supplier** upon receipt of such a request;

(c) The Commission's Consumer Services Division will assist the complainant and the **electricity service supplier** in an effort to reach an informal resolution of the dispute. The **ESS** must provide the Commission with the necessary information to assist in resolving the dispute. The **electricity service supplier** must answer the registered **ESS** dispute within 15 calendar days of service of the complaint;

(d) If a registered **ESS** dispute cannot be resolved informally, the Commission's Consumer Services Division will advise the complainant of the right to file a formal written complaint with the Commission. The complaint must state the facts of the dispute and the relief requested. The **electricity service supplier** must answer the complaint within 15 calendar days of service of the complaint. The matter will then be set for expedited hearing. A hearing may be held on less than 10 calendar days' notice when good cause is shown.

*(8) Within the terms of a written contract, a consumer and an **ESS** may agree to arrangements other than those specified in sections (3), (4), (5), and (6) of this rule, if the following requirements are met:*

(a) The contract must include an exact copy of the paragraphs in subsection (8)(b) of this rule. The paragraphs must be in bold type of at least 12-font size. Immediately following the paragraphs, there must be a line for the consumer's signature and the date.

(b) The agreement must contain the following notice:

*IF YOU SIGN THIS AGREEMENT, YOU MAY GIVE UP CERTAIN RIGHTS YOU HAVE UNDER OAR 860-038-0420(3) through (6). These rules state: The **ESS** must insert the complete text of OAR 860-038-0420(3) through (6). THIS MAY AFFECT YOUR ABILITY TO ARRANGE FOR OTHER ENERGY SERVICE.*

860-038-0445

Coordination of Supplier Changes and Billing

*(1) This rule applies to **electricity service supplier**s and to electric companies providing service options to nonresidential consumers. For purposes of this rule, "supplier" means an **electricity service supplier** or electric company.*

*(2) An **ESS** may not provide service to a consumer without a written contract or electronic authorization between the customer and the **ESS** and the submission by the **ESS** of a Direct Access Service Request (DASR) to the electric company to switch such customer from its then-current supplier to the ESS. The DASR must contain all information required by the electric company's direct access tariff to effect the switching of such customer's supplier.*

*(3) An **ESS** or electric company shall not submit a DASR unless it possesses written or electronic authorization from the consumer.*

*(4) The **ESS** must maintain records sufficient to demonstrate compliance with this rule including a copy of the contract authorizing the change in supplier for a period of one year from the date the customer authorized a change in electric service to such supplier. Upon request, the supplier must make such records available to the electric company or the Commission.*

(5) An acceptable DASR must conform to industry electronic data interchange protocols.

(6) The written contract or electronic authorization must contain, at a minimum, the following information:

(a) The consumer's name, current account number, and an electric company's unique location identifier, if available;

(b) The service address and the consumer's mailing address;

(c) The type of service being purchased;

(d) The name of the new supplier that will be supplying the service;

(e) The effective date and time of change of supplier;

*(f) The consumer's billing preference (electric company only, **electricity service supplier** only, or both);*

(g) Identification and explanation of any nonrecurring charges associated with the change of supplier;

(h) A statement to the effect that the consumer is authorized to make the change and authorizes the change to the new supplier; and

(i) The consumer's signature or electronic authorization and title.

(7) Any change of supplier without an acceptable DASR conforming to the requirements of section (5) of this rule and a written contract or electronic authorization conforming to the requirements of section (6) of this rule shall constitute a violation of this rule.

*(8) An **ESS** must obtain acceptance of its DASR at least 10 business days prior to the effective date of the change.*

(9) An electric company must accept or reject a DASR and provide notification to the ESS, within three business days of submission. Upon acceptance of a DASR, the electric company must notify the current supplier of the change within three business days.

(10) If the change date of suppliers does not coincide with the serving electric company's established meter reading schedule, the new supplier will pay the applicable tariffed charges to the electric company necessary to accommodate an off-cycle meter reading.

(11) Each supplier must supply, upon request from a consumer, a copy of the service description and rates applicable to the type or types of service furnished to the consumer.

(12) A consumer will receive a consolidated bill from the electric company unless the consumer chooses one of the following:

(a) A separate bill from every individual supplier that provides products or services to the consumer; or

(b) A consolidated bill from an ESS.

*(13) An electric company and the **ESS** must cooperate to ensure the exchange of information in a timely manner necessary for billing purposes. The electric company or the **ESS** may request the Commission's assistance in resolving a dispute within the Commission's jurisdiction by contacting the Commission's Consumer Services Division. The Commission will notify the appropriate company upon receipt of such a request. The appropriate company must answer the registered dispute within 15 calendar days of service of the complaint.*

*(14) If the consumer receives a consolidated billing from an electric company, the **ESS** must provide the information to the electric company required in OAR 860-038-0300, and the electric company must provide that information on the bill.*

*(15) If the consumer chooses a consolidated billing by the ESS, the electric company must provide the information to the **ESS** required in OAR 860-038-0300 and the **ESS** must provide that information on the bill.*

*(16) An electric company and **ESS** must cooperate to resolve any consumer complaint.*

*(17) An electric company and the **ESS** must exchange all necessary information to facilitate the billing of consumers and the exchange of funds using industry electronic data interchange protocols. If there is a dispute regarding the information exchange, the **ESS** or the electric company may appeal to the Commission for assistance in resolving the dispute.*

*(18) The party contracting with the electric company for the delivery of services shall be obligated to pay the electric company's transmission and distribution charges in accordance with the electric company's applicable tariffs. When the **ESS** is the contracting party, the direct access customer's failure to pay the **ESS** the full amount of **ESS** charges shall not relieve the **ESS** of its obligation to the electric company for delivery services in accordance with the electric company's direct access tariff. The electric company shall have access to the security posted by the **ESS** in accordance with the terms of the electric company's direct access tariff in the event the **ESS** defaults in the payment of electric company charges to the ESS.*

*(19) Absent a contract with the electric company described in section (18) of this rule, when payment, including amounts for regulated charges, is made directly to an **electricity service supplier** or electric company, the payment must be allocated as follows:*

(a) As directed by the nonresidential consumer; or

(b) Absent specific direction from the nonresidential consumer, in the following sequence:

(A) Past due regulated;

(B) Current regulated;

(C) Past due unregulated charges in proportion to the outstanding balance; and

(D) Current unregulated charges in proportion to the outstanding balance; and

*(c) If a contractual agreement between an **ESS** customer and an **electricity service supplier** dictates payment allocations other than those identified in section (b) of this rule, the **electricity service supplier** will provide notification with the bill that failure to pay the regulated charges can result in disconnection of service.*

(20) Services subject to the jurisdiction of the Commission may not be discontinued, disconnected, or placed in jeopardy because of nonpayment of unregulated charges.

860-038-0450

Location of Underground Facilities

An **ESS** and its customers shall comply with requirements of chapter 952 regarding the prevention of damage to underground facilities.

860-038-0460

*Construction, Safety, and Reporting Standards for **Electricity Service Supplier**s*

*An **ESS** shall comply with the construction, safety, and reporting standards set forth in OAR chapter 860, division 024.*

860-038-0480

Public Purposes

*(1) Each electric company that offers direct access to its retail electricity consumers and each **electricity service supplier** that provides electricity services to direct access consumers in the electric company's service territory will collect a public purpose charge from its retail electricity consumers until January 1, 2026.*

*(2) Except as provided in section (6) of this rule, electric companies and **electricity service supplier**s will bill and collect from each of their retail electricity consumers a public purpose charge equal to 3 percent of the total revenues billed to those consumers for electricity services, distribution, ancillary services, metering and billing, transition charges, and other types of costs that were included in electric rates on July 23, 1999.*

*(3) The **electricity service supplier**s will remit monthly to each electric company the public purpose charges they collect from the customers of each electric company.*

*(4) The **electricity service supplier**s will remit monthly the public purpose charges collected from direct service industrial consumers they serve to the electric company in whose service territory the direct service industrial site is located.*

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **REPLY BRIEF OF PETITIONERS HONEYWELL INTERNATIONAL AND HONEYWELL GLOBAL FINANCE** on the following persons on July 11, 2008, by hand-delivering, faxing, e-mailing, or mailing (as indicated below) to each a copy thereof, and if mailed, contained in a sealed envelope, with postage paid, addressed to said attorneys at the last known address of each shown below and deposited in the post office on said day at Portland, Oregon:

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