BEFORE THE PUBLIC UTILITY COMMISSION

OF THE STATE OF OREGON

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

The Oregon Department of Transportation (ODOT) respectfully submits this Opening Brief in the above-captioned declaratory ruling proceeding. As an intervenor, ODOT requested the Oregon Public Utility Commission's expedited rulings on two issues that are critical to ODOT's ability to finance a solar power generating system to serve its power needs at highway-related facilities.

ODOT intervened in the proceeding to address two core questions that will affect ODOT's ability to discharge its obligations under statutory directives and executive directives to increase the proportion of renewable electricity. The first of the core questions, to be resolved under the net metering statute, ORS 757.300, asks:

Whether a landowner who uses, on the landowner's real property, solar generation equipment that is owned by another party constitutes a customer-generator who qualifies for net metering under ORS 757.300.

For the reasons explained in Part I. of this Opening Brief, third-party ownership of the generating system that a customer uses to generate solar power is permissible under ORS 757.300, and the customer who uses that facility can constitute a customer-generator as defined by ORS 747.300(1)(d).

The second critical core question, to be resolved under the direct access statutes and related provisions, *see* ORS 757.600, asks:

> **Whether a solar generation system owner who, under Energy Services Agreements, sells the electric power generated by those systems to more than one customer constitutes an electricity service supplier as contemplated by ORS 757.600(16).**

As stated in Part II of this Opening Brief, ODOT accepts the analysis of ORS 757.600 that is contained in the Openi9ng Brief of the Staff of Public Utility Commission.

I. Net Metering.

A. Questions.

The Questions issued by Chief Administrative Law Judge Michael Grant on June 20, 2008, at page 3, frame the issues that concern the subject of net metering. ODOT presents and briefly answers those questions below, followed by a narrative explanation of ODOT's answers.

(1) Is a facility that Honeywell provides as described [in the Assumed Facts] a "net- metering facility" under ORS 757.300(1)(d)?

Response: Yes. That facility literally satisfies each of the five elements of the definition of "net metering facility" in ORS 7547.300(1)(d).

(2) Is Honeywell's customer as described [in the Assumed Facts] a "customer-generator" under ORS 757.300(1)(a)?

Response: The term "user" constitutes an inexact statutory term that the Public Utility Commission is authorized to interpret. ORS 757.300(1)(a) is silent concerning the question whether a customer must own a generating facility to constitute a customer-generator. Therefore, it lies within the Commission's authority to interpret the statute as not requiring a customer-generator to own the facility.

(3) Does ORS 757.300 require a customer to own a net-metering facility or a portion of the facility to be considered a "customer-generator"?

Response: ORS 757.300 contains no express requirement that a customer-generator must own a net metering facility. The statute requires only that the customer constitute a user of the facility and that the facility be located on the premises of the customer.

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

Response: For the reasons stated in the responses to Questions (2) and (3), above, No. The statute is silent concerning any legislative intent to restrict the ownership of a net metering facility to the person or entity that occupies the premises on which the facility is located.

(Similarly-Situated Businesses)

Would the Commission's answer to any of the questions above differ if:

(5) The customer leases the equipment from the third party rather than paying for the electricity it provides?

Response: No. Because ORS 757.300 is silent with respect to who must own a net metering facility, whether the equipment that generates the electricity is owned by a third party, is leased from a third party by the customer-generator, or is owned by customer-generator does not change the foregoing responses.

B. Discussion - Net Metering.

The definitions in the rules of the Public Utility Commission that govern net metering rely on the definitions contained in the net metering statute, ORS 757.300. Consequently the answer to the question whether a holder of real property who, through an Energy Services Agreement ("ESA"), purchases solar power from a third-party owner who has installed that system on the landholder's premises constitutes a "customer-generator" and qualifies for net metering treatment presents a question of statutory interpretation.

The object of this exercise of statutory interpretation is to determine and effectuate the intent of Legislative Assembly.[1] Attaining this objective requires the application of the three-step methodology prescribed by ***PGE v. Bureau of Labor and Industries***, 317 Or 606, 610-12, 859 P2d 1143 (1993).[2] In the first step of that interpretive methodology, an examination of the text and context of the statute in question, the words of the provision are the best evidence of the legislature's intent. 317 Or at 610-11. Words of general usage typically should be given their plain, ordinary and commonly accepted meanings. 317 Or at 611; ***Taylor v. Werner Enterprises, Inc.***, 329 Or 461, 467, 988 P2d 384 (1999).

ORS 757.300(2) requires an electric utility to permit the interconnection of net metering facilities to its distribution system, stating in pertinent part:

> (2) An electric utility that offers residential and commercial electric service:
>
> (a) Shall allow net metering facilities to be interconnected using a standard meter that is capable of registering the flow of electricity in two directions.
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> * * * * .

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[1] ORS 174.020(1)(a) declares:

> In the construction of a statute, a court shall pursue the intention of the legislature if possible.

See also, ***Edwards v. Riverdale School District***, 220 Or App ___, ___ P3d ___ (June 18, 2008), slip opinion at 3 ("[T]he goal of statutory construction is to ascertain, if possible, the meaning of the statute most likely intended by the legislature that enacted it by examining its text and context and, if necessary, legislative history and other aids to construction.").

[2] In ***PGE v. Bureau of Labor and Industries***, the court announced a three-step methodology for interpreting statutes. Under this methodology, the first analytical step entails an examination of the text of the provision in question, as that text is illuminated by the context in which it appears.

Under ***PGE***, if the examination of a provision's text and context does not make the legislature's intent clear, the court will then resort, as a second step, to the legislative history of the enactment. 317 Or at 611-12. If the legislative history does not satisfy the court as to the legislature's intent when it enacted the provision, the court will apply general maxims of statutory construction as a third step in determining the provision's meaning. 317 Or at 612.

1. "Net Metering Facility" - ORS 757.300(1)(d).

ORS 757.300 contains the definitions that determine what constitutes a net metering facility. ORS 757.300(1)(d) declares:

> (d) "Net metering facility" means a facility for the production of electrical energy that:
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> (A) Generates electricity using solar power * * * ;
>
> (B) Is located on the customer-generator's premises;
>
> (C) Can operate in parallel with an electric utility's existing transmission and distribution facilities; and
>
> (D) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.[3]

This five-part definition exhibits a remarkable simplicity that fully embraces, as a "net metering facility," the solar power generating equipment system owned by Honeywell and used by ODOT to provide power to ODOT's highway-related facilities. The subsection states the five elements almost invariably in statutory "'terms of precise meaning,' the meaning of which are easily discernable on their face and require only agency factfinding in their application."[4]

In this proceeding, of course, the facts have been determined by the Assumed Facts adopted by the Chief Administrative Law Judge.[5] Under the Assumed Facts, the posited generating system:

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[3] OAR 860-039-0005(3)(n) states that, "'Net metering facility' means a net metering facility as defined in ORS 757.300(1)(d)."

[4] ***J.R. Simplot Co. v. Depart. Of Agriculture***, 340 Or 188, 196-97, 131 P3d 162 (2006), *citing* ***Springfield Education Assn. v. School Dist.***, 290 Or 217, 223, 621 P2d 547 (1980).

[5] *See* Assumed Facts, issued by Chief Administrative Law Judge Michael Grant on June 20, 2008, at pages 1-2.

- Will generate electricity, so it constitutes "a facility for the generation of electrical power." ORS 757.300(1)(d).
- Will generate electricity using solar power. ORS 757.300(1)(d)(A).
- Will be located on the customer-generator's premises. ORS 757.300(1)(d)(B).
- Can operate in parallel with an electric utility's existing transmission and distribution facilities. ORS 757.300(1)(d)(C).
- Is intended to offset part of the customer-generator's requirements for electricity. ORS 757.300(1)(d)(D).

Thus, all five fingers fit the definitional glove literally and precisely. The facility that Honeywell provides constitutes a net metering facility as defined by ORS 757.300(1)(d).

2. "Customer-generator" - ORS 757.300(1)(a).

A customer that resorts to the generating facility that Honeywell provides to meet all or part of the customer's electric power needs also constitutes a "customer-generator," as defined by ORS 757.300(1)(a). That subsection states:

> "Customer-generator" means a user of a net metering facility.[6]

ODOT anticipates that the original petitioner and other intervenors will portray the core issue under the net metering statute as whether (or to what extent) a customer must have an ownership or property interest in a solar generation equipment system installed on the customer's premises for that system (and the proprietor of the premises) to satisfy the definitions in ORS 757.300(1). In this examination of the text and context of those definitions, however, ORS 174.010 commands the interpreter of a statute "not to insert what has been omitted or to omit what has been inserted."

For that reason, the Commission should not read into ORS 757.300 a condition the statute does not contain.[7] Nowhere does ORS 757.300(1) suggest that the owner or

occupier of the premises on 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 order to qualify for net metering.[8] Because ORS 757.300 is silent on the question of ownership, who owns the facility is not an issue that ORS 757.300 presents.

The sole additional concept introduced by the "customer-generator" definition is the requirement that the customer be a "user" of the facility. To discern the meaning of commonly used terms of a statute, the courts frequently - almost invariably - invoke dictionary definitions.[9] *Webster's* defines the word "user" simply as one who uses something.[10] That unsatisfactory definition, therefore, demands resort to those meanings of the root verb, "to use," that logically and reasonably may apply in the context of ORS 757.300(1)(a):

> * * * **2** to put into action or service **:** have recourse to or enjoyment of **:** EMPLOY * * * **3 :** to carry out a purpose or action by means of **:** make instrumental to an end or process **:** apply to advantage **:** turn to account **:** UTILIZE * * * **7 :** to benefit from the use of * * * *

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[6] Under OAR 860-039-0005(3)(d), "'Customer-generator" means a customer-generator as defined in ORS 757.300(1)(a)."

[7] In ***PGE v. Bureau of Labor and Industries***, the court stated that when interpreting a statute, it will consider rules of statutory construction that bear directly on how to read its text. Those rules of construction include statutory rules like ORS 174.010, *supra*. 317 Or at 611. *See also*, ***Oregonians for Health and Water v. Kitzhaber***, 329 Or 339, 344, 986 P2d 1167 (1999); ***Fairbanks v. Bureau of Labor and Industries***, 323 Or 88, 94, 913 P2d 703 (1996) (recognizing and applying the principle that the court may not, in the guise of statutory construction, add conditions a statute does not contain).

[8] To the extent fragile inferences in ORS 757.300(4)(c) and (5) might suggest an ownership requirement, ODOT dispels those claims in Part I.C. at pages 14-17, below.

[9] *See* ***State v. Murray***, 340 Or 599, 604, 136 P3d 10 (2006) (The court generally will resort to dictionary definitions when the statute suggests, as here, that "the legislature meant to use a word of common usage in its ordinary sense.").

[10] *Webster's Third New Int'l Dictionary* (3rd ed, unabridged 2002) at 2524 defines "user" as follows:

> one that uses; *specif* **:** a person who uses alcoholic beverages or narcotics

> **syn** EMPLOY, UTILIZE, APPLY, AVAIL: USE is general and indicates any putting to service of a thing, usu. for an intended or fit purpose or person * * * * [11]

As explained by Webster, the verb "use" is general. But clearly, 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."[12]

Moreover, in examining the text and context of a statutory provision, the context takes into account other parts of the same statute.[13] The part of that context that demands that a facility must be "intended primarily to offset part or all of the customer-generator's requirements for electricity," ORS 757.300(1)(d), illuminates the kind of use the legislature contemplated when it enacted ORS 757.300. That use is a customer's availing itself of the facility's electrical production to offset part or all of its own electrical power requirements. Honeywell's ESA customer satisfies the meaning of "user" and, therefore, the definition of a "customer-generator," when it employs the electricity generated by the facility that Honeywell provides to offset its electrical energy requirements.[14]

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[11] *Webster's* at 2523-24.

[12] Note that ORS 757.300(1)(d)(B) contains a second limitation that restricts those who can claim customer-generator status to those on whose premises the facility they use is located.

[13] As recognized in ***Hale v. Klemp***, 220 Or App ___, ___P3d ___ (May 14, 2008) (slip opinion at 4):

> When we examine the text of the statute, we always do so in context, which includes, among other things, other provisions of the statute of which the disputed provision is a part. *See, e.g.*, ***Vsetecka v. Safeway Stores, Inc.***, 337 Or 502, 508, 98 P3d 1116 (2004) ("Ordinarily, * * * text should not be read in isolation but must be considered in context." (Internal quotation marks omitted.)); ***Lane County v. LCDC***, 325 Or 569, 578, 942 P2d 278 (1997) ("[W]e do not look at one subsection of a statute in a vacuum; rather, we construe each part together with the other parts in an attempt to produce a harmonious whole.").

[14] This discussion of the "customer-generator" definition proceeds on the assumption that *Webster's* recognition that the term "use" is general in nature makes "user" an inexact statutory term. An inexact term

3. Net Metering - "Electricity Generated By a Customer-Generator" - ORS 757.300(1)(c).

ODOT anticipates a final, semantic attack based on the definitions in ORS 757.300(1). Subparagraph (c) of that subsection, a descriptive definition of the net metering process, contains an oblique suggestion that net metering might apply only to electricity that the customer-generator itself produces, without the assistance of any other entity, cooperator or collaborator.[15] ORS 757.300(1)(c), however, expresses no such constraint.

The phrase "electricity generated ***by*** a customer-generator" embraces so much elasticity as to suggest no significant limitation on the assistance a customer-generator may enlist to use a net metering facility to produce electric power. Webster's defines "by," in the sense in which it is used in ORS 757.300(1)(c), as:

> * * * * **4a :** through the means or instrumentality of * * * **b :** through the direct agency of * * * **c :** through the medium of (an indirect or subordinate agent) * * * **d :** through the work or operation of (as natural agencies) * * * **f :** in consequence of **:** as a result of **:** THROUGH * * * [16]

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is one by which the legislature intended to make a complete expression of policy, but did so with insufficient precision to eliminate all plausible contradictory interpretations of the term. The courts will uphold an agency's interpretation of an inexact term when the interpretation "effectuate[s] the legislative policy, as evidenced by the text and context of the statute." ***J.R. Simplot Co. v. Dept. of Agriculture***, 340 Or at 197.

[15] ORS 757.300(1)(c) states:

> "Net metering" means measuring the difference between the electricity supplied by an electric utility and the electricity ***generated by a customer-generator*** and fed back to the electric utility over the applicable billing period.

(Emphasis added).

[16] *Webster's Third New Int'l Dictionary* (3rd ed, unabridged 2002) at 307. Similarly, *Black's Law Dictionary* (Rev 4th ed 1968) at 251 defines the word "by" as follows:

> * * * Through the means, act, agency or instrumentality of, * * * .

To be sure, the Webster's definitions of "by" also include a connotation of doing something - like generating electricity - independently or without assistance.[17] However, even the example provided by Webster contains an explanatory emphasis ("<the boy finished the job *by himself*>") that the Oregon legislature omitted from ORS 757.300(1)(c).

Under the Assumed Facts and the inferences that may be drawn from them, one can only conclude that the description of net metering in ORS 757.300(1)(c) embraces the circumstances in which the electricity is "generated [through the means or instrumentality of] a customer-generator." The generating system cannot be operated on the customer's premises without the affirmative, volitional action of the customer permitting it to be installed there. The customer exercises significant control over the facility. Even where the customer does not actively recruit a facility provider, the implementation of the facility requires contracting activity to determine the parameters of the customer's and the provider's respective responsibilities concerning the duration of the facility's operation, when and by whom the facility must be installed, access to and security protection of the facility, and operation, maintenance and repair obligations. And, of course, the accepted definitions of the term "by" stated above embrace the idea that electricity can be generated by someone through that person's use of an agent, contractor, or other intermediary.

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[17] *Webster's* definition of "by," at 307, includes the following:

> * * * **2 :** through the agency of oneself **:** without help **:** INDEPENDENTLY <the boy finished the job *by himself* > * * *

(Emphasis in original).

Of the two plausible connotations of the phrase "generated ***by*** a customer-generator" - one open-ended as to the degree of involvement in the generation activity expected of the customer-generator, and one requiring the customer-generator solely and independently to engage in the act of generation - the former ("energy generated [through the means or instrumentality of] a customer-generator") must prevail in this case for two other reasons.

First, to apply a definitional provision as a regulation of behavior represents a dubious approach to statutory construction. The function of a definition section ordinarily is not to impose duties or requirements, but merely to specify the meaning of the defined term where ever it appears elsewhere in the statute.[18] The phrasing of the subparagraph itself demonstrates that Legislative Assembly intended the phrase "generated by a customer-generator" only as a descriptor to differentiate the power delivered to the customer by the electric utility from the power received by the electric utility from the customer. The legislature never contemplated that this off-handed description would serve as a major (and yet scarcely discernable) limitation on a customer's ability to undertake net metering.

Second, and more significantly, the Commission must make the choice whether to apply the more expansive or the highly restrictive connotation of the phrase "generated by a customer-generator" in light of the context and policy of the enactment in which the phrase appears. The context of a statutory provision, under ***PGE v. Bureau of Labor and Industries***, includes related statutes and the statutory framework within which the

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[18] ***Jackson County v. Bear Creek Authority***, 293 Or 121, 645 P2d 121 (1982), *citing* ***Chapman Bros v. Miles-Hiatt Investments***, 282 Or 643, 646, 580 P2d 540 (1978).

provision was enacted.[19] Resort to a related law as context is particularly appropriate when the related law was amended as part of the enactment that brought the provision in question, ORS 757.300(1)(c), into existence.

The Legislative Assembly enacted the 1999 net metering legislation as a self-contained measure, with only two substantive sections, intended to establish a net metering system and, thereby, to encourage the development of generating facilities that use renewable energy resources. *See* Oregon Laws 1999, chapter 944, §2 (House Bill 3219 (1999) (appended as ODOT Exhibit A). In addition to creating the net metering law, the 1999 measure, enacted with an emergency clause, amended ORS 757.262, an existing grant of rule-making authority to the Public Utility Commission, to encourage the development of small-scale, renewable fuel electric generating resources:

> **SECTION 3.** ORS 757.262 is amended to read:
>
> 757.262. (1) The Public Utility Commission, by rule, may adopt policies designed to encourage the acquisition of cost-effective conservation resources **and small-scale, renewable-fuel electric generating resources.**

Oregon Laws 1999, chapter 944, §3(1), *amending* ORS 757.262(1).[20]

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[19] ***Wetherell v. Douglas County***, 342 Or 666, 678, 160 P3d 614 (2007); ***Bridgeview Vineyards, Inc. v. State Land Board***, 211 Or App 251, 262, 154 P3d 734, *rev den* 343 Or 690 (2007).

[20] Oregon Laws 1999, chapter 944, also contained a preamble that declared the policy of the Legislative Assembly as follows:

> Whereas the Legislative Assembly 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,
>
> **Be It Enacted by the People of the State of Oregon:**
>
> * * * * .

This preamble did not constitute part of what was "Enacted by the People of the State of Oregon," so the preamble does not have the effect of statutory law. Nevertheless, a majority of both houses of the Legislative Assembly ratified these findings of a legislative purpose to encourage the utilization of renewable energy resources (and to encourage the private investment in those resources proposed by Honeywell). At the very least, therefore, these findings represent a species of "super" legislative history

In interpreting a statutory provision in light of the context provided by related provisions like ORS 757.262(1), the Commission must "construe each part together with the other parts in an attempt to produce a harmonious whole."[21] To harmonize ORS 757.300(1)(c) with the Legislative Assembly's resounding pronouncements of a policy to encourage the development of renewable energy resources,[22] the Commission should construe that subparagraph in a manner that does not frustrate that development by constricting customers' choices in the contractual arrangements they must make in order to implement net metering operations.[23]

C. Discussion - Ownership of the Facility.

ORS 757.300 contains no express requirement that a customer must own a net metering facility to be considered a customer-generator. To the contrary, the silence of the statute on the point of ownership suggests a legislative design not to regulate the ownership of the facility - the ownership of the generation equipment that produces the electricity that will be subject to net metering.

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that demonstrates an overarching state policy of encouraging the implementation of renewable energy projects.

[21] ***Wetherell v. Douglas County***, 342 Or at 678, *quoting* ***Lane County v. LCDC***, 325 Or 569, 578, 942 P2d 278 (1997).

[22] Subsequently, the legislature further expanded its commitment to the policy of promoting the harnessing of renewable energy resources by liberalizing the original restriction, in the definition of "net metering facility" (s*ee former* ORS 757.300(1)(d)(B)), that limited a net metering facility to one with a generating capacity of not more than 25 kilowatts. *See* Oregon Laws 2005, chapter 145, subsections 1(1)(d) and 1(8) (appended as ODOT Exhibit C).

[23] A contrary interpretation of ORS 757.300(1)(c) would mire the commission in a morass of regulatory distinctions and unnecessary subtleties. For example, would a residential customer or the sole proprietor of the premises on which a net metering facility is located lose the privilege of net metering if she either hired an employee, or engaged an independent contractor, to perform the operation of the generating equipment for her?

At the outset, if the text of a statute indeed "is the best evidence of the legislature's intent,"[24] then the legislature's choice of words when it defined "customer-generator" should be persuasive concerning the issue of ownership. In ORS 757.300(1)(a), the Legislative Assembly defined a customer-generator as a "user," not as an owner,[25] of a net metering facility: "'Customer-generator' means a user of a net metering facility."

A second indication of that intent lies in the legislature's decision to define a net metering facility not by reference to who has some form of property interest in the facility but, instead, solely by reference to the location on which the facility is situated. ORS 757.300(1)(d)(B), the only non-operational element of the definition of a net metering facility, states:

> "Net metering facility" means a facility for the production of electrical energy that:

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[24] ***PGE v. Bureau of Labor and Industries***, 317 Or at 610-11.

[25] The 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. *See* ORS 758.505(2)(b):

> "Cogeneration facility" means a facility that:
>
> * * * *
>
> (b) Is more than 50 percent owned by a person who is not an electric utility, an electric holding company, an affiliated interest or any combination thereof.

See also, ORS 30.870 (owner entitled to bring a civil action for shoplifting or taking agricultural produce "means any person who owns or operates a mercantile establishment or farm, or the agents or employees of that person."); ORS 98.302(11)(under the Uniform Disposition of Unclaimed Property Act, owner "means a depositor in case of a deposit, a beneficiary in case of a trust other than a deposit in trust, a creditor, claimant or payee in case of other intangible property, or a person, other than the person's legal representative, having a legal or equitable interest in the property."); ORS 308A.250(5)(owner for purpose of farm and forest homesite real property tax valuation); ORS 308A.350(1)(owner for purpose of riparian habitat exemption from real property taxation); ORS 358.480(4)(owner of historic property includes a purchaser under a recorded sales instrument); ORS 609.140(4)(a) (for purposes of a cause of action against the owner of a dog that has damaged livestock, owner "means the head of the family of the home where the dog is cared for at the time of the damage.").

(B) Is located on the customer-generator's premises;

* * * * .

No other provisions of the net metering statute express the notion that the legislature intended ORS 757.300 to restrict the parties who may own, or have a property interest of some character in, a generating system in order for that system to constitute a net metering facility. Those few parts of ORS 757.300 that express some relationship between the customer-generator and the facility instead, at most, suggest possession of the facility by the customer-generator only in the sense, incorporated in ORS 757.300(1)(d)(B), *supra*, that the facility must be on the customer-generator's premises.

ORS 757.300(4)(c) refers to "a customer-generator ***whose*** net metering facility" meets building code, control, and testing requirements.[26] That usage might plausibly be read as suggesting ownership to some degree, but both the term "whose" and the substance of the subparagraph fall far short of expressing a requirement that the customer-generator must have an ownership interest of some type in the capital equipment that generates the electricity. The adjective "whose" can be used to denote ownership in the correct context, but generally implies no more than the subject's (the customer-generator's) possession of or an association with an object (the facility).[27]

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[26] ORS 757.300(4)(c) provides in part:

> An electric utility may not require a customer-generator whose net metering facility meets the standards in paragraphs (a) and (b) of this subsection to comply with additional safety or performance standards, perform or pay for additional tests or purchase additional liability insurance. * * * * .

[27] The usages of the word "whose" that reasonably could apply in ORS 757.300(4)(c) include:

> **1 :** of what person or persons: **a :** of or belonging to what person or persons as possessor or possessors * * * **:** associated or connected with what person or persons * * * **2 a :** of whom: (1) **:** of or belonging to whom as possessor or possessors **:** due to whom **:** inherent in whom **:** associated or connected with whom * * * used as a possessive adjective corresponding in

The sole remaining source of any slight impression that ORS 757.300 was intended to regulate the ownership of a net metering facility is a mere apostrophe. ORS 757.300(5) refers "to the customer-generator's net metering facility."[28] The use of the possessive case can denote ownership,[29] but it's called the possessive case for a reason - it mandates no more than possession. Under the Assumed Facts, the facility is located on the customer's premises, and the customer has the right and responsibility to provide for the security of the facility. The customer controls access to the facility. Those facts constitute the customer's physical dominion and control over the facility that satisfies any sense of possession.[30]

The slenderness of these textual reeds precludes leaning on them for any implication that the Legislative Assembly thought it was restricting eligibility for net metering to those facilities that are owned to any degree by a customer-generator. The net metering statute contains no expression of that requirement.[31] ORS 174.010, *supra*,

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> meaning to the relative pronoun *who* * * * (1) **:** of or belonging to which as a possessor or possessors **:** inherent in which **:** associated or connected with which *** * ***

Webster's Third New Int'l Dictionary (3rd ed, unabridged 2002) at 2612.

[28] ORS 757.300(5) states:

> (5) Nothing in this section is intended to prevent an electric utility from offering, or a customer-generator from accepting, products or services related ***to the customer-generator's net metering facility*** that are different from the net metering services described in this section.

(Emphasis added).

[29] According to *Webster's Third New Int'l Dictionary* (3rd ed, unabridged 2002) at 48a:

> **14.0** An apostrophe and *s* are usually added to a noun to indicate ownership or a relation analogous to ownership. * * * * .

[30] Even under the criminal law, the Assumed Facts establish possession of the facility by the customer. *See* ***State v. Fries***, 344 Or ___, ___ P3d ___ (May 30, 2008) slip opinion at 3-8) (applying ***PGE*** analysis to the prohibition against the possession of a controlled substance, ORS 161.015(9), and concluding that "'to have physical possession' means what it says: to have physical control.").

commands the interpreter of a statute "not to insert what has been omitted." To infer an ownership requirement from the text and context of ORS 757.300 would inject into the statute a condition the legislature did not enact.

Moreover, the rejection of the notion that the net metering statute contains an ownership requirement that would inhibit the formation of contractual arrangements[32] to implement renewable energy projects comports with the legislative policies, described above, to encourage the growth of renewable energy resource usage. The Legislative Assembly finished its work when it required a net metering facility to be located on the premises of the customer-generator and that the facility be intended primarily to offset the electricity requirements of the customer-generator. ORS 757.300(1)(d)(B) and (D).

By abjuring any requirement that a customer must own all or part of a net metering facility, the legislature accomplished its stated purpose of facilitating the development of renewable energy resources. The Legislative Assembly left open to prospective customer-generators, in what can still be described as a period of nascent development in the financing of renewable energy resources, the choice of the contractual arrangements, whether purchase, lease, easement or other means,[33] by which to enlist

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[31] The commission's net metering rules, OAR 860-039-0005 to 860-039-0080, perhaps recognizing the legislature's refusal or failure to require a customer-generator to demonstrate any indicia of ownership of net metering facility equipment, impose no ownership requirement. *But cf.* OAR 860-039-0050(5) (granting a public utility the right to inspect "a customer-generator's facility.").

[32] Depending on market conditions and the individual circumstances of potential customer-generators, they may prefer to outright purchase solar generating systems, to make installment purchases, to lease them, to enter into ESA's, or to establish any number of other contractual structures to secure their use.

[33] ORS 757.005(2) appears to support the flexibility advocated by ODOT. There, the legislature was careful to provide, with respect to the statutory subsection that exempts entities that provide power from solar resources to any number of customers from regulation as a public utility, that:

> Nothing in this subsection (1)(b)(C) of this section shall prohibit third-party financing of acquisition or development by a utility customer of energy resources to meet the heat, light or power requirements of that customer.

renewable energy resources. The Commission should not foreclose those alternatives without a good regulatory basis for doing so.

ORS 757.300, as stressed above, is silent with respect to the issue of the ownership of a net metering facility. The statutory term "user" in the definition of "customer-generator," ORS 757.300(1)(a) does not, in so many words, require or imply ownership. Instead, "user" constitutes an inexact statutory term. The Commission has authority to interpret inexact terms in the statutes it administers.[34] The Commission has authority, therefore, to determine that third-party ownership of a net metering facility is permitted under ORS 757.300(1)(a), and should construe ORS 757.300 as directly imposing no ownership requirement on a customer.

II. Direct Access and "Electricity Services Supplier."

A. Questions.

(1) Does Honeywell offer "electricity services available pursuant to direct access to more than one retail electricity consumer" under ORS 757.600(16)?

Response: ODOT accepts the response to this question contained the Opening Brief of the Staff of the Public Utility Commission.

(2) If Honeywell sells electricity directly to the customer, but does not offer any ancillary services for purchase, does Honeywell's service constitute "direct access" under ORS 757.600?

Response: ODOT accepts the response to this question contained the Opening Brief of the Staff of the Public Utility Commission.

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[34] *See* ***Springfield Education Assn. v. School Dist.***, 290 Or at 226-27. Judicial review of the interpretation of an inexact statutory term addresses whether the interpretation "effectuated that policy." ***J.R. Simplot Co. v. Dept. of Agriculture***, 340 Or at 198. The commission's interpretation will be accorded an "appropriate degree of assumptive validity" due to involvement in the legislative process or where, as here, it has regulatory experience in the filed the statute addresses. *See* ***Springfield***, 290 Or at 227-28.

(3) Is Honeywell a public utility as defined in ORS 757.005(1)?

Response: ODOT accepts the response to this question contained the Opening Brief of the Staff of the Public Utility Commission.

B. Discussion.

As indicated in Part II. A. of this brief, ODOT accepts the responses to the questions that pertain to direct access and ORS 757.600 by the Staff of the Commission. On policy grounds, however, ODOT advocates that the Commission generously exercise its waiver authority under OAR 860-038-0001(4) to minimize the burden of any ESS-type regulation on solar energy providers.

An 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). If a party who sells electricity to a customer-generator under an ESA must be considered an ESS, the history of the legislature's regard for the development of renewable electricity presents a policy challenge that arises from the tension between the legislative expressions of an intent to promote the development of renewable energy resources and the call for regulation of direct access arrangements. In 1985, the legislature relieved the generators of solar power from the vast majority of the regulation that otherwise would apply to distributors of electric power. Oregon Laws 1985, chapter 779, §1(2)(d)(C) (attached as ODOT Exhibit B) amended ORS 757.005 to exempt, from the definition of "public utility":

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

The purpose of that exemption was to free from regulation, and thereby to promote, the development of solar and wind energy.[35]

The direct access legislation, Oregon Laws 1999, chapter 865 (Senate Bill 114), if construed expansively, arguably could unduly dilute the policy of the 1985 amendment. The 1999 legislation, a response to the advent of utility deregulation, was intended to address (at least in the context of electrical energy) the importation, and direct consumer use, of power that originated from outside the distribution system on which the consumer originally depended.[36]

The 1999 Legislative Assembly presumably was aware of the exempt treatment it had afforded solar energy providers, for it amended the statute that granted that exemption to

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[35] In 1985, the solar and wind generator exemption generated little discussion. In explaining the amendments to House Bill 2202 (1985), Representative Anderson stated, "It exempts some of the processes they thought needed a lift, in regards to solar and wind." Minutes, Senate Committee on Energy and Natural Resources, June 6, 1985 at 2.

[36] The preamble to Oregon Laws 1999, chapter 865, suggests, in terms that are less than explicit, that permitting and regulating power importation was the primary object of the enactment, stating in part:

> Whereas, the continued competitiveness of the state's economy requires that the Legislative Assembly consider national trends toward electric deregulation; and
>
> Whereas the functional separation of electrical power generation from the distribution functions is the most effective means of stimulating competition, providing depth and liquidity to the wholesale market and facilitation the transition to a fully competitive market by alleviating horizontal and vertical monopoly market power and providing a more accurate estimation and mitigation of stranded costs; and
>
> Whereas price and service unbundling is the best way to identify the costs associated with generation, transmission and distribution of electricity services and is essential to the development of a competitive market: and
>
> Whereas restructuring of the electricity industry must be crafted in a way that retains the benefits of low-cost resources for consumers; and
>
> Whereas all Oregon retail electricity consumers should be provided fair, non-discriminatory access to competitive electricity options;
>
> * * * * .

add a new definition - "electricity service supplier."[37] ODOT agrees with the Commission Staff assessment that the legislative history of the 1999 enactment discloses no instruction on whether the legislature consciously addressed whether its adoption of the then-new ESS definition should silently subject solar or wind resource developers to the special regime of regulation then being instituted for ESSs.

The Commission has interpreted ORS 757.600(2)[38] as permitting a case-by-case determination of the nature and degree of the ancillary services that are necessary to satisfy that element of "direct access." OAR 860-038-0340(3) states:

> The Commission may decide which ancillary services a direct access consumer may purchase directly from electricity service providers.

Thus, the reigns of this question are in hands of the commission. The extent and character of the ancillary services that are necessary to a consumer's participation in direct access depends on the commission's assessment of its need to regulate the relationships among the consumer, the electricity provider, and the affected distributor in a particular case.

ODOT submits that, to the extent a "direct access" relationship may be found to exist under the Assumed Facts, no more regulation is required than that already imposed by the net metering statute and rules. The Commission has reserved to itself the authority to waive, for good cause shown, the application of those direct access rules that are not

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[37] Section 21(1)(H) of Oregon Laws 1999, chapter 865, added to the exemptions in ORS 757.500:

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

[38] ORS 757.600(2) provides:

> "Ancillary services" means services necessary or incidental to the transmission and delivery of electricity from generating facilities to retail electricity customers, including but not limited to scheduling, load shaping, reactive power, voltage control and energy balancing services.

mandated by statute. OAR 860-038-0001(4).[39]

In determining good cause that warrants the waiver of direct access rules, the commission, however, should take into account several significant circumstances. The most significant such circumstance lies in the expressions of legislative policy, recounted in ODOT's Petition to Intervene and in Part I of this brief, to promote the development of Oregon's renewable energy resources. To facilitate the financing and development of solar generation facilities like the facility described in the Assumed Facts, the Commission should endeavor to maintain a system of regulation that does not impose unnecessarily arduous requirements or inflict significant costs on solar power generators.

Second, ODOT is not limited to the household resources of the ordinary retail, residential power consumer. Although it admits that it has limited technical expertise in solar power generation,[40] ODOT has the administrative and legal tools to solicit the best solar power offers, and to form contractual arrangements that adequately protect its interests in solar projects. That circumstance also warrants the Commission's favorable consideration of any application for the waiver of rule requirements.

CONCLUSION

ODOT thanks the Public Utility Commission for its expedited approach to this declaratory ruling proceeding. Because all briefs will be filed simultaneously in this proceeding, ODOT respectfully requests the Commission to grant it leave to amend, in its

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[39] OAR 860-038-0001(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 these rules and for good cause shown, the Commission may relieve it of any obligations under these rules.

[40] *See* ODOT's Petition to Intervene at 5.

Reply Brief, its answers and contentions in response to the Opening Briefs of the other parties and intervenors.

DATED this 30th day of June 2008.

Respectfully submitted,

Hardy Meyers
Attorney General

s/William F. Nessly, Jr._____
William F. Nessly, Jr.
Senior Assistant Attorney General
Of Attorneys for the Oregon Department of Transportation,

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tary obligations imposed by the court on an installment basis or on other conditions to be fixed by the court.

SECTION 9. Notwithstanding any other law limiting expenditures by the Department of Human Resources for the State Office for Services to Children and Families for the payment of expenses from fees, moneys or other revenues, including Miscellaneous Receipts, but excluding lottery funds and federal funds, collected or received by the Department of Human Resources for the State Office for Services to Children and Families for the biennium beginning July 1, 1999, the limitation on expenditures established by section 2 (1)(b), chapter [Vetoed], Oregon Laws 1999 (Enrolled House Bill 5029), is increased by the following amounts for the following purposes:

(1)	**Grants and assistance from the Sexual Assault Victims Fund**	**$ 530,000**
(2)	**Administrative costs of the State Office for Services to Children and Families incurred under sections 3 to 7 of this 1999 Act**	**$ 30,000**

Approved by the Governor August 16, 1999
Filed in the office of Secretary of State August 16, 1999
Effective date October 23, 1999

CHAPTER 944

AN ACT HB 3219

Relating to net metering; creating new provisions; amending ORS 757.262; and declaring an emergency.

Whereas the Legislative Assembly 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,

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

SECTION 1. Section 2 of this 1999 Act is added to and made a part of ORS chapter 757.

SECTION 2. (1) As used in this section:

(a) "Customer-generator" means a user of a net metering facility.

(b) "Electric utility" means a public utility, a people's utility district operating under ORS chapter 261, a municipal utility operating under ORS chapter 225 or an electric cooperative organized under ORS chapter 62.

(c) "Net metering" means measuring the difference between the electricity supplied by an electric utility and the electricity generated by a customer-generator and fed back to the electric utility over the applicable billing period.

(d) "Net metering facility" means a facility for the production of electrical energy that:

(A) Uses solar, wind, fuel cell or hydroelectric power to generate electricity;

(B) Has a generating capacity of not more than 25 kilowatts;

(C) Is located on the customer-generator's premises;

(D) Can operate in parallel with an electric utility's existing transmission and distribution facilities; and

(E) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

(2) An electric utility that offers residential and commercial electric service:

(a) Shall allow net metering facilities to be interconnected using a standard meter that is capable of registering the flow of electricity in two directions.

(b) May at its own expense install one or more additional meters to monitor the flow of electricity in each direction.

(c) May 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. However, the Public Utility Commission, for a public utility, or the governing body, for a municipal electric utility, electric cooperative or people's utility district, may authorize an electric utility to assess a greater fee or charge, of any type, if the electric utility's direct costs of interconnection and administration of the net metering outweigh the distribution system, environmental and public policy benefits of allocating such costs among the electric utility's entire customer base. The commission may authorize a public utility to assess a greater fee or charge under this paragraph only following notice and opportunity for public comment. The governing body of a municipal electric utility, electric cooperative or people's utility district may assess a greater fee or charge under this paragraph only following notice and opportunity for comment from the customers of the utility, cooperative or district.

(3)(a) For a customer-generator, an electric utility shall measure the net electricity produced or consumed during the billing period in accordance with normal metering practices.

(b) If an electric utility supplies a customer-generator more electricity than the customer-generator feeds back to the electric utility during a billing period, the electric utility shall charge the customer-generator for the net electricity that the electric utility supplied.

(c) Except as provided in paragraph (d) of this subsection, if a customer-generator feeds back to an electric utility more electricity than

Exhibit A
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the electric utility supplies the customer-generator during a billing period, the electric utility may charge the minimum monthly charge described in subsection (2) of this section but must credit the customer-generator for the excess kilowatt-hours generated during the billing period. An electric utility may value the excess kilowatt-hours at the avoided cost of the utility, as determined by the commission or the appropriate governing body. An electric utility that values the excess kilowatt-hours at the avoided cost shall bear the cost of measuring the excess kilowatt-hours, issuing payments and billing for the excess hours. The electric utility also shall bear the cost of providing and installing additional metering to measure the reverse flow of electricity.

(d) For the billing cycle ending in March of each year, or on such other date as agreed to by the electric utility and the customer-generator, any remaining unused kilowatt-hour credit accumulated during the previous year shall be granted to the electric utility for distribution to customers enrolled in the electric utility's low-income assistance programs, credited to the customer-generator or dedicated for other use as determined by the commission, for a public utility, or the governing body, for a municipal electric utility, electric cooperative or people's utility district, following notice and opportunity for public comment.

(4)(a) A net metering facility shall meet all applicable safety and performance standards established in the state building code. The standards shall be consistent with the applicable standards established by the National Electrical Code, the Institute of Electrical and Electronics Engineers and Underwriters Laboratories or other similarly accredited laboratory.

(b) Following notice and opportunity for public comment, the commission, for a public utility, or the governing body, for a municipal electric utility, electric cooperative or people's utility district, may adopt additional control and testing requirements for customer-generators to protect public safety or system reliability.

(c) An electric utility may not require a customer-generator whose net metering facility meets the standards in paragraphs (a) and (b) of this subsection to comply with additional safety or performance standards, perform or pay for additional tests or purchase additional liability insurance. However, an electric utility shall not be liable directly or indirectly for permitting or continuing to allow an attachment of a net metering facility, or for the acts or omissions of the customer-generator that cause loss or injury, including death, to any third party.

(5) Nothing in this section is intended to prevent an electric utility from offering, or a customer-generator from accepting, products or services related to the customer-generator's net metering facility that are different from the net metering services described in this section.

(6) The commission, for a public utility, or the governing body, for a municipal electric utility, electric cooperative or people's utility district, may not limit the cumulative generating capacity of solar, wind, fuel cell and microhydroelectric net metering systems to less than one-half of one percent of a utility's, cooperative's or district's historic single-hour peak load. After a cumulative limit of one-half of one percent has been reached, the obligation of a public utility, municipal electric utility, electric cooperative or people's utility district to offer net metering to a new customer-generator may be limited by the commission or governing body in order to balance the interests of retail customers. When limiting net metering obligations under this subsection, the commission or the governing body shall consider the environmental and other public policy benefits of net metering systems. The commission may limit net metering obligations under this subsection only following notice and opportunity for public comment. The governing body of a municipal electric utility, electric cooperative or people's utility district may limit net metering obligations under this subsection only following notice and opportunity for comment from the customers of the utility, cooperative or district.

(7) The commission or the governing body may adopt rules or ordinances to ensure that the obligations and costs associated with net metering apply to all power suppliers within the service territory of a public utility, municipal electric utility, electric cooperative or people's utility district.

(8) Notwithstanding subsections (2) to (7) of this section, an electric utility serving fewer than 25,000 customers in Oregon that has its headquarters located in another state and offers net metering services or a substantial equivalent offset against retail sales in that state shall be deemed to be in compliance with this section if the electric utility offers net metering services to its customers in Oregon in accordance with tariffs, schedules and other regulations promulgated by the appropriate authority in the state where the electric utility's headquarters are located.

SECTION 3. ORS 757.262 is amended to read:

757.262. (1) The Public Utility Commission, by rule, may adopt policies designed to encourage the acquisition of cost-effective conservation resources **and small-scale, renewable-fuel electric generating resources**.

(2) In furtherance of the policies adopted pursuant to subsection (1) of this section, and in such manner as the commission considers proper, the commission may authorize periodic rate adjustments for the purpose of providing some protection to a utility from reduction of short-term earnings

Exhibit A
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[*which*] **that** may result from implementation of such policies. The adjustments may include, but are not limited to, adjustments based in whole or in part upon the extent to which actual sales deviate from a base level of sales the commission considers appropriate.

SECTION 4. This 1999 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 1999 Act takes effect September 1, 1999.

Approved by the Governor August 16, 1999
Filed in the office of Secretary of State August 16, 1999
Effective date September 1, 1999

CHAPTER 945

AN ACT HB 3395

Relating to evidence; creating new provisions; and amending ORS 40.460.

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

SECTION 1. ORS 40.460 is amended to read:

40.460. The following are not excluded by ORS 40.455, even though the declarant is available as a witness:

(1) (Reserved.)

(2) A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) A statement of the declarant's then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain or bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.

(4) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause of external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the memory of the witness and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regular ducted business activity, and if it was the r practice of that business activity to make the orandum, report, record, or data compilation, shown by the testimony of the custodian or qualified witness, unless the source of infor or the method of circumstances of preparatio cate lack of trustworthiness. The term "busine used in this subsection includes business, insti association, profession, occupation, and call every kind, whether or not conducted for profi

(7) Evidence that a matter is not included memoranda, reports, records, or data compil and in any form, kept in accordance with th visions of subsection (6) of this section, to pro nonoccurrence or nonexistence of the matter, matter was of a kind of which a memorandu port, record, or data compilation was regularly and preserved, unless the sources of informati other circumstances indicate lack of trustw ness.

(8) Records, reports, statements, or data c lations, in any form, of public offices or age setting forth:

(a) The activities of the office or agency;

(b) Matters observed pursuant to duty im by law as to which matters there was a duty port, excluding however, in criminal cases m observed by police officers and other law en ment personnel; or

(c) In civil actions and proceedings and ag the government in criminal cases, factual finc resulting from an investigation made pursua authority granted by law, unless the sources formation or other circumstances indicate la trustworthiness.

(9) Records or data compilations, in any for births, fetal deaths, deaths or marriages, if th port thereof was made to a public office pursua requirements of law.

(10) To prove the absence of a record, re statement, or data compilation, in any form, o nonoccurrence or nonexistence of a matter of w a record, report, statement, or data compilatio any form, was regularly made and preserved public office or agency, evidence in the form certification in accordance with ORS 40.510, or timony, that diligent search failed to disclose record, report, statement, or data compilatio entry.

(11) Statements of births, marriages, divo deaths, legitimacy, ancestry, relationship by bloc marriage, or other similar facts of personal or fa history, contained in a regularly kept record religious organization.

(12) A statement of fact contained in a ce icate that the maker performed a marriage or o ceremony or administered a sacrament, made l clergyman, public official, or other person author by the rules or practices of a religious organiza or by law to perform the act certified, and purp ing to have been issued at the time of the ac within a reasonable time thereafter.

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

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

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

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

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

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

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

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

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

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

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

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

CHAPTER 779

AN ACT HB 2202

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

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

SECTION 1. ORS 757.005 is amended to read:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Exhibit B
Page 1

SECTION 2. ORS 758.450 is amended to read:

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

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

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

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

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

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

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

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

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

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

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

CHAPTER 780

AN ACT SB 394

Relating to interstate cooperation.

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

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

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

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

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

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

(5) Power transmission intertie access.

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

CHAPTER 781

AN ACT SB 793

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

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

SECTION 1. ORS 390.825 is amended to read:

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

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

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

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

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

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

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

Exhibit B
Page 2

CHAPTER 144

AN ACT SB 83

Relating to structural engineering; creating new provisions; and amending ORS 672.129.

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

SECTION 1. ORS 672.129 is amended to read:

672.129. (1) For purposes of this section:

(a) "Significant structure" means:

(A) Hazardous facilities and special occupancy structures, as defined in ORS 455.447;

(B) Essential facilities, as defined in ORS 455.447, that have a ground area of more than 4,000 square feet [*and*] **or** are more than 20 feet in height;

(C) Structures that the Director of the Department of Consumer and Business Services determines to have irregular features; and

(D) Buildings that are customarily occupied by human beings and are more than four stories or 45 feet above average ground level.

(b) "Significant structure" does not [*include*] **mean**:

(A) One-family and two-family dwellings and accompanying accessory structures;

(B) Agricultural buildings or equine facilities, both as defined in ORS 455.315; **or**

(C) Buildings located on lands exempt from Department of Consumer and Business Services enforcement of building code regulations.[*; or*]

[*(D) Essential facilities, as defined in ORS 455.447, that have a ground area of not more than 4,000 square feet and are not more than 20 feet in height.*]

(2) Consistent with ORS 672.255, the State Board of Examiners for Engineering and Land Surveying shall adopt rules establishing standards of competence in structural engineering analysis and design relating to seismic influence.

(3) An engineer [*must be registered with the board as*] **may not provide engineering services for significant structures unless the engineer possesses** a **valid** professional structural engineer [*under subsection (2) of this section to provide structural engineering services for significant structures*] **certificate of registration issued by the board.**

[*(4) The board may certify an engineer as a structural engineer without examination if:*]

[*(a) On October 23, 1999, the engineer is registered with the board as a professional engineer; and*]

[*(b) Within one year of October 23, 1999, the engineer demonstrates to the satisfaction of the board that the engineer has sufficient experience in the duties typically provided by a professional structural engineer regarding significant structures.*]

SECTION 2. (1) The amendments to ORS 672.129 (1) and (3) by section 1 of this 2005 Act apply to engineering services performed on or after the effective date of this 2005 Act.

(2) The deletion of ORS 672.129 (4) by section 1 of this 2005 Act does not affect the validity of or the ability to renew any certificate of registration as a structural engineer issued under ORS 672.129 (4) prior to the effective date of this 2005 Act.

Approved by the Governor June 7, 2005
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CHAPTER 145

AN ACT SB 84

Relating to net metering facilities; amending ORS 757.300.

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

SECTION 1. ORS 757.300 is amended to read:

757.300. (1) As used in this section:

(a) "Customer-generator" means a user of a net metering facility.

(b) "Electric utility" means a public utility, a people's utility district operating under ORS chapter 261, a municipal utility operating under ORS chapter 225 or an electric cooperative organized under ORS chapter 62.

(c) "Net metering" means measuring the difference between the electricity supplied by an electric utility and the electricity generated by a customer-generator and fed back to the electric utility over the applicable billing period.

(d) "Net metering facility" means a facility for the production of electrical energy that:

(A) [*Uses solar, wind, fuel cell or hydroelectric power to generate electricity*] **Generates electricity using solar power, wind power, fuel cells, hydroelectric power, landfill gas, digester gas, waste, dedicated energy crops available on a renewable basis or low-emission, nontoxic biomass based on solid organic fuels from wood, forest or field residues;**

[*(B) Has a generating capacity of not more than 25 kilowatts;*]

[*(C)*] **(B)** Is located on the customer-generator's premises;

[*(D)*] **(C)** Can operate in parallel with an electric utility's existing transmission and distribution facilities; and

[*(E)*] **(D)** Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

(2) An electric utility that offers residential and commercial electric service:

(a) Shall allow net metering facilities to be interconnected using a standard meter that is capable of registering the flow of electricity in two directions.

(b) May at its own expense install one or more additional meters to monitor the flow of electricity in each direction.

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(c) May 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. However, the Public Utility Commission, for a public utility, or the governing body, for a municipal electric utility, electric cooperative or people's utility district, may authorize an electric utility to assess a greater fee or charge, of any type, if the electric utility's direct costs of interconnection and administration of the net metering outweigh the distribution system, environmental and public policy benefits of allocating such costs among the electric utility's entire customer base. The commission may authorize a public utility to assess a greater fee or charge under this paragraph only following notice and opportunity for public comment. The governing body of a municipal electric utility, electric cooperative or people's utility district may assess a greater fee or charge under this paragraph only following notice and opportunity for comment from the customers of the utility, cooperative or district.

(3)(a) For a customer-generator, an electric utility shall measure the net electricity produced or consumed during the billing period in accordance with normal metering practices.

(b) If an electric utility supplies a customer-generator more electricity than the customer-generator feeds back to the electric utility during a billing period, the electric utility shall charge the customer-generator for the net electricity that the electric utility supplied.

(c) Except as provided in paragraph (d) of this subsection, if a customer-generator feeds back to an electric utility more electricity than the electric utility supplies the customer-generator during a billing period, the electric utility may charge the minimum monthly charge described in subsection (2) of this section but must credit the customer-generator for the excess kilowatt-hours generated during the billing period. An electric utility may value the excess kilowatt-hours at the avoided cost of the utility, as determined by the commission or the appropriate governing body. An electric utility that values the excess kilowatt-hours at the avoided cost shall bear the cost of measuring the excess kilowatt-hours, issuing payments and billing for the excess hours. The electric utility also shall bear the cost of providing and installing additional metering to measure the reverse flow of electricity.

(d) For the billing cycle ending in March of each year, or on such other date as agreed to by the electric utility and the customer-generator, any remaining unused kilowatt-hour credit accumulated during the previous year shall be granted to the electric utility for distribution to customers enrolled in the electric utility's low-income assistance programs, credited to the customer-generator or dedicated for other use as determined by the commission, for a public utility, or the governing body, for a municipal electric utility, electric cooperative or people's utility district, following notic and opportunity for public comment.

(4)(a) A net metering facility shall meet all a plicable safety and performance standards esta lished in the state building code. The standards sha be consistent with the applicable standards esta lished by the National Electrical Code, the Institu of Electrical and Electronics Engineers and Unde writers Laboratories or other similarly accredite laboratory.

(b) Following notice and opportunity for publ comment, the commission, for a public utility, or t governing body, for a municipal electric utilit electric cooperative or people's utility district, m adopt additional control and testing requirements f customer-generators to protect public safety or sy tem reliability.

(c) An electric utility may not require customer-generator whose net metering facili meets the standards in paragraphs (a) and (b) of th subsection to comply with additional safety or pe formance standards, perform or pay for addition tests or purchase additional liability insuran However, an electric utility shall not be liable rectly or indirectly for permitting or continuing allow an attachment of a net metering facility, or the acts or omissions of the customer-generator th cause loss or injury, including death, to any thi party.

(5) Nothing in this section is intended to preve an electric utility from offering, or a custom generator from accepting, products or services lated to the customer-generator's net meteri facility that are different from the net metering s vices described in this section.

(6) The commission, for a public utility, or t governing body, for a municipal electric utili electric cooperative or people's utility district, m not limit the cumulative generating capacity of lar, wind, fuel cell and microhydroelectric net m tering systems to less than one-half of one perc of a utility's, cooperative's or district's histo single-hour peak load. After a cumulative limit one-half of one percent has been reached, the ob gation of a public utility, municipal electric utili electric cooperative or people's utility district to fer net metering to a new customer-generator m be limited by the commission or governing body order to balance the interests of retail custome When limiting net metering obligations under t subsection, the commission or the governing bo shall consider the environmental and other pul policy benefits of net metering systems. The co mission may limit net metering obligations un this subsection only following notice and opportun for public comment. The governing body of a mu ipal electric utility, electric cooperative or peop utility district may limit net metering obligati under this subsection only following notice and portunity for comment from the customers of utility, cooperative or district.

(7) The commission or the governing body m adopt rules or ordinances to ensure that the c

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gations and costs associated with net metering apply to all power suppliers within the service territory of a public utility, municipal electric utility, electric cooperative or people's utility district.

(8) This section applies only to net metering facilities that have a generating capacity of 25 kilowatts or less, except that the commission by rule may provide for a higher limit for customers of a public utility.

[*(8)*] **(9)** Notwithstanding subsections (2) to [*(7)*] **(8)** of this section, an electric utility serving fewer than 25,000 customers in Oregon that has its headquarters located in another state and offers net metering services or a substantial equivalent offset against retail sales in that state shall be deemed to be in compliance with this section if the electric utility offers net metering services to its customers in Oregon in accordance with tariffs, schedules and other regulations promulgated by the appropriate authority in the state where the electric utility's headquarters are located.

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CHAPTER 146

AN ACT SB 92

Relating to the South Slough National Estuarine Research Reserve; amending ORS 273.554.

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

SECTION 1. ORS 273.554 is amended to read:

273.554. (1) For the purpose of providing for the administration of the South Slough National Estuarine Research Reserve in a manner consistent with the provisions of ORS 273.553, there is created the South Slough National Estuarine Research Reserve Management Commission. The commission shall have the authority, in accordance with the policies formulated by the State Land Board, to:

(a) Conduct the day-to-day operation and management of the South Slough National Estuarine Research Reserve with the administrative support of the Department of State Lands;

(b) Appoint a manager and other staff necessary to carry out this section; and

(c) Apply for, receive and expend moneys from the federal government and from this state or any agency thereof for the purpose of carrying out this section.

(2) The commission shall consist of [*eight*] **nine** members appointed by the Governor as follows:

(a) A representative of common schools in the area of the reserve;

(b) One authorized representative of the Coos County Board of Commissioners;

(c) One authorized representative of the governing body of the Port of Coos Bay;

(d) The Director of the Department of State Lands or a designee thereof;

(e) One authorized representative of the federal Office of Ocean and Coastal Resource Management;

(f) Two representatives with an interest in marine science, one from the University of Oregon Institute of Marine Biology at Charleston and one from Oregon State University; [*and*]

(g) One member selected from the general public at large**; and**

(h) One representative of Oregon Indian tribes appointed after consultation with the Commission on Indian Services.

(3) The members appointed by the Governor under subsection (2)(a), (f) [*and*]**,** (g) **and (h)** of this section shall serve for terms of four years and members appointed under subsection (2)(b) and (c) of this section shall serve for terms of two years. The Director of the Department of State Lands or the designee of the director, if appointed in place of the director, shall serve as the permanent chairperson of the commission. The commission shall select one of its members as vice chairperson. The chairperson and vice chairperson shall have duties and powers necessary for the performance of the functions of such offices as the commission determines. The vice chairperson shall act as the chairperson of the commission in the absence of the chairperson. The vice chairperson shall serve for a term of one year, subject to reelection by the commission.

(4) Each member of the commission shall have one vote, except that the member who is the authorized representative of the federal Office of Ocean and Coastal Resource Management shall be a nonvoting member. A majority of the commission constitutes a quorum for the transaction of business.

(5) Members of the commission are not entitled to compensation, but in the discretion of the State Land Board may be reimbursed for actual and necessary travel and other expenses incurred by them in the performance of their official duties, subject to laws regulating travel and other expenses of state officers and employees.

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CHAPTER 147

AN ACT SB 96

Relating to number of hearings required to amend statewide land use planning goals; creating new provisions; and amending ORS 197.235.

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

SECTION 1. ORS 197.235 is amended to read:

197.235. (1) In preparing the goals and guidelines, the Department of Land Conservation and Development shall:

CERTIFICATE OF SERVICE

I certify that on June 30, 2008, I served the foregoing upon all parties of record in this proceeding by delivering a copy by electronic mail and by mailing a copy by postage prepaid first class mail or by hand delivery/shuttle mail to the parties accepting paper service.

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