BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DR 40

In the Matter of HONEYWELL INTERNATIONAL, INC. and HONEYWELL GLOBAL FINANCE LLC and PacifiCorp, dba PACIFIC POWER	**OPENING BRIEF OF RENEWABLE NORTHWEST PROJECT, BACGEN SOLAR GROUP, THE CITIZENS' UTILITY BOARD OF OREGON, ENVIRONMENT OREGON, NATURAL RESOURCES DEFENSE COUNCIL, GERDING EDLEN SUSTAINABLE SOLUTIONS, OREGON SOLAR ENERGY INDUSTRIES ASSOCIATION, COMMERCIAL SOLAR VENTURES AND SUNENERGY POWER CORPORATION**

This Opening Brief is filed on behalf of the Renewable Northwest Project, Bacgen Solar Group, the Citizens' Utility Board of Oregon, Environment Oregon, the Natural Resources Defense Council ("NRDC"), Gerding Edlen Sustainable Solutions, the Oregon Solar Energy Industries Association ("OSEIA"), Commercial Solar Ventures and SunEnergy Power Corporation.

The questions raised in this docket have cast a cloud of uncertainty over a common financing method that allows businesses, governmental entities and non-profits to purchase solar electricity at affordable rates. Due to significant state and federal tax credits and support by the Energy Trust of Oregon ("ETO"), Oregon is experiencing rapid solar energy development. For the first time, the state can measure its solar electric resources in MWs, rather than kWs. The vast majority of these projects use third-party financing, where an investor offers to pay the up-front cost and then sells the solar-generated electricity to a building owner or occupant. These third-party arrangements provide public entities and other non-profits a means of benefiting from tax incentives that would otherwise be useless to them, reducing significantly the cost of solar power. These projects rely on the availability

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of net metering for the utility customer.

The uncertainty created by the issues in this docket has caused many solar projects in this state to come to a standstill. Without an affirmative answer that resolves these issues very soon, the window of opportunity will close on these projects as the federal investment tax credit for solar is currently set to drop from 30 percent to 10 percent by year end.

The timing in which these issues were raised concerns us for another reason. Third-party ownership or financing of net metering facilities is not new. In 2007, when the Commission engaged in rulemaking to implement net metering (AR 515), the parties were aware of third-party ownership as a viable means of promoting net metering. Indeed, a question was raised in that docket as to whether to adopt rules governing such arrangements. No one at that time even hinted that such third-party ownership or financing might render a customer ineligible for net metering. *See* AR 515, Order No. 07-319 at 3 (July 24, 2007). Indeed, PacifiCorp interpreted the net metering rules to "permit the owner of a net metering facility and the customer-generator or user to be different entities." *Id.* The Commission should reaffirm the understanding that the net metering law permits third-party ownership and financing.

We appreciate the Commission giving the parties this opportunity to submit briefs on the important issues raised in this docket. We are also grateful for the Commission's willingness to address these issues on an expedited basis. We respectfully request that the Commission act definitively in resolving the central questions in this docket.

I. APPLICABLE STANDARD

The applicable rules of statutory construction are well established. The Commission should review first the text and context of the statute; second, if the text and context are not clear, the legislative history; and third, if neither the text and context nor

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legislative history are clear, then the Commission may resort to general maxims of statutory construction to resolve any remaining uncertainty. *PGE v. Bureau of Labor & Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). In examining the text of the statute, the Commission should assume that the Legislature intended that terms be given their plain, ordinary meanings. *Haynes v. Tri-County Metro*, 337 Or 659, 663, 103 P3d 101 (2004). Ordinary meaning can be determined by reference to a dictionary or common usage. *State v. Murray*, 340 Or 599, 604, 136 P3d 10 (2006). The questions in this docket may be resolved based on these basic principles of statutory construction.

II. QUESTIONS PRESENTED

We have organized our responses in a manner consistent with the questions presented in ALJ Grant's June 20, 2008 Memorandum.

Net metering

(1) Is a facility that Honeywell provides as described above a "net metering facility" under ORS 757.300(1)(d)?

Response: Yes. Under the Assumed Facts, the Honeywell facility is a "net metering facility" under ORS 757.300(1)(d). The facility meets each of the four requirements to qualify as a net metering facility. First, it generates electricity using solar power. ORS 757.300(d)(A). Second, it is located on the customer-generator's premises. ORS 757.300(1)(d)(B). Third, it can operate in parallel with the electric utility's transmission and distribution facilities. ORS 757.300(1)(d)(C). Finally, the facility is intended primarily to offset part or all of the customer-generator's requirements. As such, the facility qualifies as a "net metering facility" based on the plain terms of the statute.

(2) Is Honeywell's customer as described above a "customer-generator" under ORS 757.300(1)(a)?

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Response: Yes. Honeywell's customer is a "customer-generator" under ORS 757.300(1)(a). Under the net metering law (ORS 757.300), a "customer-generator" is defined as "a user of a net metering facility." The central term here is "user," which is defined as one who uses or, as it is currently defined "to put into action or service: to have recourse to or enjoyment of: employ." Webster's Third New International Dictionary, (Unabridged 1971 at 2524). The Honeywell customer is a user of the net metering facility in at least two important respects. First, the Honeywell customer consumes energy produced by the solar facility to reduce "the energy provided to the customer by the utility." *See* Assumed Facts. Second, energy in excess of the Honeywell customer's concurrent load at the site is supplied to the utility and used as an offset against energy consumed by the customer on the site when loads are more than that produced by the solar facility. *See* Assumed Facts. Accordingly, there is no question that the Honeywell customer is a "customer-generator" under the plain terms of the net metering law.

(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: No. The net metering law does not require a customer to own a net metering facility, nor does the law require the customer to own part of the facility to be a customer-generator. The net metering law defines "net metering facility" in terms of four requirements: (a) generation using eligible fuel, (b) location of the facility, (c) parallel operation with utility, and (d) primary use to offset part or all of customer's load. The law contains no limitation or requirement with respect to ownership of the net metering facility. Similarly, "customer-generated" is defined exclusively in terms of the "user" of the net metering facility. Any customer that uses the facility qualifies, whether the customer owns the net metering facility or not.

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

Response: No. See Response to (3) above.

(5) Who is responsible for the costs of installing the metering arrangement for a facility provided by Honeywell?

Response: There are two meters involved in the Assumed Facts. A production meter between the net metering facility and the customer-generator that measures the output from the net metering facility (the production meter) and the meter between the Honeywell customer and the electric distribution utility (the net meter). The responsibility for the cost of the production meter is a matter to be determined and allocated between the Honeywell customer and Honeywell under the Assumed Facts, or generally the owner of the net metering facility and the customer. Responsibility for the cost of the net meter falls on the electric utility. ORS 757.300(2)(b) ("an electric utility that offers residential and commercial electric service: * * * may at its own expense install one or more additional meters to monitor the flow of electricity in each direction").

Transaction Between Honeywell and Customer

(1) If the customer does not qualify for net metering under ORS 757.300, is the transaction between Honeywell and the customer considered a retail sale?

Response: This question is inapplicable given that under the Assumed Facts the Honeywell customer qualifies for net metering.

(2) If the customer does qualify for net metering under ORS 757.300, does a portion of the transaction between the customer and Honeywell become a sale for resale (*i.e.*, the energy that the customer buys from Honeywell that is delivered to the utility)?

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Response: This issue should be beyond the scope of this proceeding. It is an attempt to interject federal-state jurisdictional issues into this proceeding.

If the Commission elects to answer this question, we believe the answer is "No." No portion of the transaction between the customer and Honeywell is a "sale for resale" because the customer does not sell the energy. As noted above, either (a) the customer consumes the energy produced by the solar facility, thereby reducing the energy provided to the customer by the electric utility or (b) energy in excess of the customer's concurrent load at the site is supplied to the electric utility and offset against energy consumed by the site when the customer's loads are more than that produced by the solar energy facility. In the latter case, any annual surplus is not paid for by the utility. If the net metering facility puts more energy onto the grid than the customer consumes from the electric utility during the year, the remaining offsets are credited to the utility's low income assistance program. *See* Assumed Facts. In neither alternative (reduction in its consumption or financial offsets against consumption from the electric utility) is the Honeywell customer engaged in the sale of electricity to the electric utility. *In re Mid-America Energy Company*, 94 FERC ¶ 61,340 (2001) ("In the case before us we find, likewise, that no sale occurs when an individual owner or farmer (or similar entity such as a business) installs generation and accounts for its dealings with the utility through the practice of netting.").

Instead, net metering is a method of measuring the amount of power that passes to and from the customer to the utility. The net metering law permits this measurement of the net flow of energy as a basis for calculating the customer's electricity bill, which in no circumstances can go negative (*i.e.*, the utility paying the customer for the net flow of electricity). Under the Assumed Facts, the Honeywell customer is eligible for net metering and the measurement of electrons flowing in both directions to set its electric bill. Electrons flowing on to the utility grid are not sold, but rather used as an intermediate step in

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calculating the customer's electricity bill.

(3) If some portion of the transaction between Honeywell and the customer is a sale for resale, what authority do the state and the Commission have over that sale for resale?

Response: This question is inapplicable given that no portion of the transaction between Honeywell and its customer is a "sale for resale."

(4) If some portion of the transaction between Honeywell and the customer is not a sale for resale, what is the source of the energy being delivered to the grid to qualify for net metering?

Response: The source of energy being delivered to the grid is the solar net metering facility. *See* Assumed Facts.

Electric Service Suppliers/Utilities

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

Response: No. Honeywell does not offer "electricity services available pursuant to direct access to more than one retail electricity consumer" because Honeywell does not offer direct access. The phrase used in ORS 757.600(16) "pursuant to direct access" is restrictive in nature and provides an essential component of the definition. It is not any person or entity that sells electricity but only entities or persons that offer to sell electricity pursuant to direct access that meet the statutory definition. Honeywell and others similarly situated do not qualify because they do not offer to sell electricity pursuant to direct access, which is defined as "the ability of a retail electricity consumer to purchase electricity and certain ancillary services, as determined by the commission for an electric company or the governing body of a consumer-owned utility, directly from an entity other than the distribution utility" (emphasis added). ORS 757.600(6). The word "and" should be afforded

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its normal meaning of the conjunction of two or more elements or requiring both elements. Webster's Third New International Dictionary at 80 ("compound proposition true only if both compounds are true"). To offer direct access, a company, other than the distribution utility, must offer both electricity and ancillary services.

Here, under the Assumed Facts, Honeywell provides no ancillary services. The statute defines "ancillary services" in a manner completely inconsistent with the Assumed Facts. Ancillary services are those services "necessary or incidental to the transmission and delivery of electricity from generating facilities to retail electricity consumers, including, but not limited to, scheduling, load shaping, reactive power, voltage control and energy balancing services." ORS 757.600(2). As an on-site generator of electricity, Honeywell provides none of these services that relate to the transmission and delivery of power using the utility's distribution grid. Accordingly, under the plain terms of the statute, Honeywell does not offer direct access and because it does not offer direct access, it does not satisfy the definition of "electricity service supplier."

Besides the plain terms of the statute, the context of the statute also points to the same conclusion. *PGE*, 317 Or at 610-612 ("at the first level of analysis, the court considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes") (emphasis added). The 1999 Oregon Legislature created two independent constructs for customers to have access to alternative suppliers of energy. Senate Bill 1149 (ORS 757.600 et. seq.) authorized direct access, which permits alternative providers to supply a customer's entire load using the electric utility's distribution facilities. ORS 757.300 ushered in net metering, which permits energy to be generated at the customer's location and enter the grid as an offset to part or all of the customer's load requirements. The two frameworks are independent and non-overlapping. The first involves use of the distribution network to displace the electric utility as the source of power. The

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second looks to onsite generating sources to complement and offset part of the customers' load. By definition, net metering permits putting electricity out from the customer location onto the grid for general use. That is completely at odds with direct access under which the electrons flow in exactly the opposite direction.

The Commission's rules recognize these two distinct and independent frameworks. Each ESS must be either a scheduling or non-scheduling ESS. OAR 860-038-0410. A scheduling ESS is responsible for all point-to-point services, settling imbalances, and scheduling with control area operators. A non-scheduling ESS must contract with a scheduling ESS for all scheduling services. This all makes absolute sense for direct access and absolute nonsense for net metering. In enacting net metering, the Legislature permitted customer-sited generation to be produced to (a) reduce the customer's direct consumption from the utility and (b) offset part or all of the customer's electric utility bill. The electric utility provides all ancillary services and remains responsible for serving the customer's entire load requirements. Direct access leaves the ESS with responsibility for providing the power to serve the customer's entire load.

(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: No. See Response to (1) above.

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

Response: No. As a solar provider, Honeywell is expressly excluded from the definition of "public utility" under ORS 757.005(1)(b)(C)(iii).

(4) Is Honeywell required to serve 100 percent of the customer's load?

Response: No. Honeywell is not required to serve 100 percent of the customer's load. The net metering law applies to facilities that are intended to offset "part or

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all" of the customer's requirements for electricity. ORS 757.300(1)(d)(D). The law expressly provides that the electric utility shall charge the customer for "net electricity that the electric utility" supplied. ORS 757.300(3)(b). Accordingly, there is no requirement that the net metering facility serve 100 percent of the customer's load.

(5) Is the utility required to sell electricity to the customer for any portion of load not served by Honeywell? If so, what rates apply to the portion of the customer's load not served by Honeywell?

Response: The net metering law does not affect or limit the electric utility's general obligation to serve its customers' loads. ORS 757.020. The net metering law permits a customer to use on-site generation to reduce its load requirements to the electric utility and use as an offset excess electricity produced by the net metering facility. The law in no way limits the utility's obligation to sell electricity to the customer for any, and all, of the load not served by the net metering facility.

The rates that apply to the portion of the customer's load not served by Honeywell depend on electric utilities' general rate schedules, the rate schedules for which the customer is eligible, and the customer's selection of a rate schedule for which it is eligible. A customer's election to enter into a net metering agreement with the electric utility should not affect the rate schedule under which it may receive service from the electric utility.

(6) Is the utility required to sell electricity to the customer for the customer's total load when the Honeywell facility is not generating electricity? If so, should the customer be placed on a partial requirements rate schedule?

Response: As discussed above, the electric utility continues to have an obligation to meet its customers' load for customers that have elected to enter into a net metering agreement. Accordingly, the electric utility is required to serve a customer's total

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load when the net metering facility is not in operation. A customer's election to enter into a net metering arrangement with the electric utility should not limit the customer's choices with respect to the applicable rate schedule. Accordingly, a net metering customer should not be limited to a partial requirements rate schedule.

(7) In its IRP, is the utility required to plan to serve the portion of the customer's load not served by Honeywell?

Response: Yes. The utility should be required to plan to serve the customer's load not served by Honeywell. However, the Commission does not need to determine how the utility accounts for Honeywell facilities or similarly situated solar facilities in its IRP as part of this proceeding. We recommend the Commission consider this issue as part of its analysis of the utility's next IRP.

(8) Does the utility have an obligation to determine who owns generation facilities installed on the customer's side of the meter?

Response: The net metering statute and implementing regulations set forth the applicable safety testing and performance requirements for a "customer-generator" to protect public safety or system reliability. ORS 757.300(4)(b). Moreover, the net metering law prohibits an electric utility from requiring a customer-generator to meet standards in excess of those set forth under the net metering law and the applicable Commission implementing regulations. ORS 757.300(4)(c). Accordingly, an electric utility is obligated to take reasonable steps to ensure that net metering facilities comply with the net metering law and the applicable implementing regulations in order to protect the electric utility grid and ensure system reliability for its customers. There is no independent obligation or intent for the utility to determine ownership of the net metering facility.

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Credits

(1) Does OAR 860, Division 39, apply when a facility is receiving three other subsidy mechanisms for the same facility (federal tax credit, state tax credit and ETO funding)?

Response: The eligibility requirements for net metering are set forth in the net metering law and in the implementing regulations (Division 39). If a net metering facility qualifies under the law and implementing regulations, no further test or qualification applies. We are unaware of any provision of the net metering rules that prohibits a net metering facility from receiving federal tax credits, state tax credits ETO funding, accelerated depreciation or other financial incentives.

(2) Who is entitled to any renewable energy credits associated with the output of the facility if the customer qualifies for net metering?

Response: The owner of the net metering facility is entitled to any renewable energy credits associated with the output of the facility. OAR 860-022-0075(2)(a). The owner may freely assign or sell its renewable energy credits to third parties, including, but not limited to, the Energy Trust of Oregon, in connection with the receipt of ETO funds or ETO subsidy programs. As a matter of policy, the ETO contractually requires recipients of its incentives for renewable energy projects to transfer to the ETO ownership of renewable energy credits in proportion to the ETO's contribution to the project's above-market cost. We understand that ETO holds these credits in trust for ratepayers of the utility in whose service territory the project is located.

Similarly-Situated Businesses

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

(1) The customer and third-party provider of a facility create a separate entity for each project, under which the third-party provider and customer

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share ownership of the facility?

Response: As discussed above, ownership of the net metering facility is irrelevant to the customer's eligibility to participate in net metering. A customer's ownership or non-ownership of the solar facility does not affect whether or not the facility is a net metering facility or whether the customer qualifies as a customer-generator. Accordingly, the answers above would be the same if the customer and third-party provider created a separate entity that owned the facility.

(2) The third-party provider uses outside sources, such as a bank or finance company, to finance the project?

Response: The answers to the questions above would not be affected if the third-party uses outside sources to finance the project. The net metering law and implementing regulations provide no limitation, much less a prohibition against, outside funding for a facility.

(3) The facility uses a net metering eligible fuel other than solar?

Response: The answers to the questions above would not differ if the facility uses a net metering eligible fuel, except that further information may be needed to determine whether or not the owner of such a facility would qualify as a public utility.

(4) The facility uses a non net metering eligible fuel?

Response: This question poses an alternative scenario that is so at odds with the Assumed Facts that is not reasonably possible to fashion a response based on the information provided.

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

Response: As discussed above, ownership of the generating facility is irrelevant to the customer's eligibility to participate in net metering. A facility owned by a

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third party may qualify as a net metering facility and a customer qualifies as a customer-generator if it uses that facility. Similarly, the fact that the customer may lease the equipment from a third party does not affect the availability of net metering to the customer.

(6) The third-party provider is a registered electricity service supplier under ORS 757.600(16)?

Response: This question departs so substantially from the Assumed Facts that it is difficult to provide a reasonable response at this time. We reserve the right to supplement this response in our Reply Brief based upon other parties' briefs on this question.

DATED this 30th day of June, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **OPENING BRIEF OF RENEWABLE NORTHWEST PROJECT, BACGEN SOLAR GROUP, THE CITIZENS' UTILITY BOARD OF OREGON, ENVIRONMENT OREGON, NATURAL RESOURCES DEFENSE COUNCIL, GERDING EDLEN SUSTAINABLE SOLUTIONS, OREGON SOLAR ENERGY INDUSTRIES ASSOCIATION, COMMERCIAL SOLAR VENTURES AND SUNENERGY POWER CORPORATION** by e-mail and/or mailing a copy thereof, to each party that has not waived paper service, in a sealed, first-class postage prepaid envelope, addressed to each party listed below and depositing in the US mail at Portland, Oregon.

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DATED this 30th day of June, 2008.

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