BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DR 38

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

Staff of the Public Utility Commission of Oregon responds to Opening Briefs of Pacific Power and HCA Management Company, LLC (Myra Lynne), as follows:[1]

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

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

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

Staff agrees with Pacific Power that the mandatory language in ORS 90.532 requires that Myra Lynne bill its tenants according to Pacific Power's policies. In contrast, the permissive language in ORS 90.536 merely provides Myra Lynne with an option for billing tenants. For the reasons stated in the opening briefs of Pacific Power and Staff, Myra Lynne must bill its tenants using Schedule 4.

Myra Lynne acknowledges that reading ORS 90.532 as mandatory and ORS 90.536 as elective gives effect to both statutes and avoids a statutory conflict. Opening Brief of Myra

[1] Staff's Reply Brief uses the issue numbers listed by the parties in the May 16, 2007 stipulation regarding issues and as employed by all the parties in their opening briefs. Because there does not appear to be any dispute between the parties regarding Issue 1, Staff will only address Issues 2 and 3 in its reply.

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Lynne at 14. Myra Lynne, however, is unwilling to accept Pacific Power's construction because of a difference in wording between ORS 90.510(8) (2003 ed.) and ORS 90.536. ***Id.*** Myra Lynne admits that ORS 90.510(8) never applied to Myra Lynn[2] and that statute's "only relevant limitation * * * is that Myra Lynne 'may not increase the utility or service charge to the tenant by adding any costs of the landlord…'" ***Id.*** at 10. In contrast, Myra Lynne notes:

> "ORS 90.536(3)(a) states: 'A utility or service charge to be assessed to a tenant under this section may not include: … any additional charge, including any costs of the landlord, for the installation, maintenance operation of the utility or service system or any profit for the landlord.' If ORS 90.536 apples to Myra Lynne, the words 'additional charge' and 'profit for the landlord' raise questions about the continued use of Schedule 4 in tenant bills. Neither term is defined in the statute. However, the mere fact that the Schedule 4 rate is higher than the Schedule 48 rate at which Myra Lynne itself is billed suggests that billing tenants at the Schedule 4 rate might be construed as adding an 'additional charge' or 'profit for the landlord.'
>
> So Myra Lynne decided to follow ORS 90.536. The result is that Myra Lynne is no longer billing tenants at the Schedule 4 residential rate and is not in compliance with Pacific Power's interpretation [of] ORS 90.532."

Opening Brief at Myra Lynne at 14-15 (emphasis in original).

Myra Lynne's argument is unpersuasive. Staff agrees there is contrasting language in ORS 90.510(8) (2003 ed.) and ORS 90.536. But Staff questions what relevance the contrasting language in a repealed statute (ORS 90.510(8)) that never applied to Myra Lynne has to whether ORS 90.532 is mandatory and ORS 90.536 is permissive.

Myra Lynne does not address Pacific Power's argument that the mandatory language in ORS 90.532 requires that Myra Lynne bill its tenants according to Pacific Power's policies and the permissive language in ORS 90.536 merely provides Myra Lynne with an option for billing tenants. Nor does Myra Lynne parse the language in the statutes to support an alternative interpretation of the statutes to support its position. Instead, Myra Lynne notes that language in ORS 90.536 regarding an "additional charge" or "profit for the landlord" "raise questions" about

[2] Myra Lynne indicates "[i]nstead, it [ORS 90.510(8)] applied only in situations in which the landlord did not install tenant submeters and based tenant billings on allocated portions of amounts billed by the utility to the landlord at a 'mastermeter,' i.e., utility revenue meter." Opening Brief of Myra Lynne at 10.

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the application of ORS 90.532 and ORS 90.536. But Myra Lynne offers no analysis regarding the "raise[d] questions."

Myra Lynne also argues that the Commission should avoid rulings that might result in significant rate increases to tenants and expose Myra Lynne to liability in the tenants' lawsuit. Myra Lynne asks that the Commission do so in two ways: (1) the Commission should construe ORS 90.536(2) and ORS 90.536(3) to create a new subclass of residential service based on ORS 90.532(1)(c); and (2) if the Commission does not create a subclass, it should waive the application of Special Conditions 48 and Section "O", Rule 2 on Myra Lynne.

A. A new Subclass of Residential Service

Myra Lynne baldly asserts that the legislature, in enacting ORS 90.532 and ORS 90.536, created a new subclass of residential service to tenants whose electrical bills are determined by submeter in accordance with ORS 90.532(1)(c). Myra Lynne, however, offers no textual analysis to support its argument that the legislature did so here.

In enacting ORS 90.532(1)(c)(C), the legislature explicitly directed that billing methods followed by landlords are "[s]ubject to the policies of the utility or service provider." This language indicates that the legislature intended that landlords comply with the utility provider's policies. The legislature certainly knows how to make a statute mandatory. In contrast with the explicit directive of ORS 90.532(1), the legislature chose to use the word "may" in ORS 90.536(2)(a). It seems highly implausible to suggest that the legislature intended to create a new residential rate when it explicitly makes tenant electrical service "subject to the policies of the utility or service provider" under ORS 90.532(1). It seems even more implausible that the legislature, while engaging in the heretofore unheard act of enacting a new residential rate, would have used the word "may" in ORS 90.536 if it intended that statute to codify a new residential rate.

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Although the Commission should not even reach second level analysis and consider legislature history with respect to Myra Lynne's argument here,[3] legislative history does not support Myra Lynne's position. Regarding Section 6 of HB 2247, which became ORS 90.532, Mr. VanLandingham provided the following explanation:

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

Exhibit D at 7.

If the legislature's "over-riding general princip[le]" was that landlords must comply with the utility provider's policies, including its policies regarding rates, it is highly implausible that the legislature intended to codify a new residential rate through an amendment to the Manufactured Dwelling and Floating Home section of the Residential Landlord Tenant Act. Myra Lynne ignores this legislative history.

Myra Lynne contends that "the legislative history of Section 8 of HB 2247, codified as ORS 90.536, indicates that the Commission assisted in the legislative process that created this new residential class and subclass," citing the following language:

> "With regard to the cost of the service, <u>as a result of PUC recommendations</u> this section refers to the average rate billed to the landlord by the provider, since there may be a range of rates charged, based on the amount of the service consumed**.**

Myra Lynne at 14-15 (emphasis in original).

The legislative history does show that the Commission made recommendations regarding Section 8 of HB 2247. But the language cited by Myra Lynne does not show that "there was a legislative process that created this new residential rate and subclass." Rather, as Myra Lynne acknowledged in the Joint Petition for Declaratory Relief,

> "[u]se of the phrase 'average rate billed to the landlord' in ORS 90.536(2)(a) recognizes that a landlord may be billed under a two-part demand/energy rate, whereas its tenants often are metered and billed on the basis of energy consumption alone. Use of the landlord's 'average rate' would allow that landlord to allocate a portion of its demand charges among it tenants."

[3] If a statute's text and context unambiguously disclose the legislature's intent, the inquiry ends there. *See* ***PGE***, at 610-11.

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Id. at 6 fn. 3. The Commission's recommendation regarding "average rate billed to the landlord" has nothing to do with Myra Lynne's claims regarding a new residential rate

Moreover, a review of Mr. VanLandingham's testimony, which is set out below, further undercuts Myra Lynne's argument that ORS 90.536 creates a new residential rate.

> "With regard to the cost of the service, as a result of PUC recommendations this section refers to the average rate billed to the landlord by the provider, since there may be a range of rates charged, based on the amount of the service consumed. In addition, the "no greater than" phrase reflects that utility provider policies might require a landlord to charge the tenant a rate that is lower than the rate the provider uses to bill the landlord -- a residential rate instead of a commercial rate, for example.

Exhibit D at 7 (emphasis supplied). Mr. VanLandingham's testimony involved a hypothetical in which the utility bills the landlord at a commercial rate higher than its residential rate. In that circumstance, Mr. VanLandingham suggests "the no greater than" phrase reflects that utility provider policies might require a landlord to charge the tenant a rate that is lower than the rate the provider uses to bill the landlord – a residential rate instead of a commercial rate, for example." Thus, in Mr. VanLandingham's view, the utility provider policies in force under ORS 90.532, control and would require a landlord to bill the tenants at a rate that is ***lower*** than the rate that the provider uses to bill the landlord. Mr. VanLandingham's testimony does not support Myra Lynne's contention that ORS 90.536 creates a new residential rate.

B. Waiver

Alternatively, Myra Lynne requests that the Commission waive the application of Schedule 48 and Schedule "O," Rule 2 to Myra Lynne. This waiver would result in Myra Lynne tenants paying the lower Schedule 48 rate rather than the Schedule 4 residential rate. Myra Lynne bases the waiver on the "unfairness and demonstrated hardship" to the Myra Lynne residents. Myra Lynne has demonstrated neither unfairness nor hardship.

Myra Lynne contends that because the Schedule 4 residential rate is higher than the Schedule 48 rate Myra Lynne tenants would be exposed "to significantly higher rates." But as Myra Lynne residents argue elsewhere, Myra Lynne tenants are residential customers. In

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arguing that its tenants are entitled the Schedule 98 Residential Credit, Myrna Lynne contends that "Myra Lynne's tenants have been, and continue to be, users of electricity for domestic residential purposes within the park," and their "usage fits the definition of 'residential service' under Section 'P' of Pacific Power's Rule 2." Myra Lynne Opening Brief at 21. Myra Lynne tenants are residential customers; it is neither unfair nor a hardship to require Myra Lynne tenants to pay the same residential rate that every other Pacific Power residential customer pays.

Myra Lynne also contends that its tenants could be exposed to a recoupment of past discounts by Myra Lynne because it billed tenants at the lower Schedule 48 rate rather than the Schedule 4 residential rate. It is not clear what Pacific Power will do here. But even if Pacific Power did take some action with respect to Myra Lynne billing at the Schedule 48 rate, Staff questions whether it would be a "harsh result" as Myra Lynne suggests. *See* Opening Brief of Myra Lynne at 17. Seventy-nine Myra Lynne residents sued Myra Lynne alleging Financial Abuse of Elderly under ORS 124.110 and for Unjust Enrichment, alleging that Myra Lynne charged them an excessive rate for the use of electricity and for charging them for use of electricity not authorized by ORS 90.536. *See* Ex. K at 1; 3. Thus, those Myra Lynne residents received the lower Schedule 48 rates, at least in part, because of a position that they took in litigation. Having demanded that they receive a lower rate, Staff questions whether recoupment would be a "harsh result" if it turns out they were not entitled to those lower rates.

Myra Lynne also argues that Pacific Power's construction of HB 2247 would leave it exposed to allegations that it is extracting "profit" contrary to ORS 90.536(c)(3), exposing it to claims in the pending lawsuit. Contrary to Myra Lynne's claim, Pacific Power's construction of HB 2247 does not leave Myra Lynne exposed. The mandatory language in ORS 90.532 requires that Myra Lynne bill its tenants according to Pacific Power's policies, while the permissive language in ORS 90.536 merely provides Myra Lynne with an option for billing tenants. If Myra Lynne is entitled to bill its residents under Pacific Power policies under ORS 90.532 it is extremely doubtful that those actions would support claims of elder abuse or unjust enrichment.

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

Staff does not believe that the Commission should have to reach this issue because tenants should be billed under Schedule 4 under the directive of ORS 90.532(1)(c)(C). If the Commission determines that Myra Lynne residents should be billed at the Schedule 48 nonresidential commercial rate, Staff does not believe that the Commission should resolve this issue for two reasons.

First, Staff agrees with Pacific Power that because the Residential Exchange Program (REP) has been suspended and the difficultly in predicting what the terms of the program will be, if and when it is reinstated, the issue is not ripe for determination by the Commission.

Second, Staff believes the Bonneville Power Administration (BPA), which administers the REP, and not the Commission, should resolve this matter. The BPA, in its introduction to the Customer Load Eligibility Guidelines (BPA Guidelines), noted that "[w]hile these guidelines may be helpful in preliminary eligibility determinations, final determinations of eligibility will be made by BPA based on the provisions of the Northwest Power Act and the facts of each case." Ex. G at 3.

In Docket No. UE 190, Advice No. 07-03 (April 30, 2007), the Commission approved Idaho Power Company's request to amend its Schedule 98 to allow certain long-term care facilities to be eligible to receive the Residential and Small Farm energy credit that was supported by a BPA letter which approved Idaho Power extending REP benefits to long-term care facilities. BPA did so, even though the long-term care facilities received power under Schedule 7 and Schedule 9, neither of which was listed on Schedule B of Idaho Power's REP Agreement with BPA.

The Commission approved Idaho Power's request to amend its Schedule 98 in UE 190 after BPA indicated that the REP benefits should be extended to long-term care facilities. In

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contrast, Myra Lynne is requesting a Commission declaratory ruling regarding whether Myra Lynne residents are eligible for REP Settlement Benefits from BPA. Staff respectfully suggests that the decision rests with BPA.

DATED this 16th day of July 2007.

Respectfully submitted,

HARDY MYERS
Attorney General

s/David B. Hatton
David B. Hatton, #75151
Assistant Attorney General
Of Attorneys for Staff of the Public Utility Commission of Oregon

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-6322 / Fax: (503) 378-5300

CERTIFICATE OF SERVICE

I certify that on July 16, 2007, I served the foregoing upon all parties of record in this proceeding by delivering a copy by electronic mail and by mailing a copy by postage prepaid first class mail or by hand delivery/shuttle mail to the parties accepting paper service.

W
CITIZENS' UTILITY BOARD OF OREGON
LOWREY R BROWN
UTILITY ANALYST
610 SW BROADWAY - STE 308
PORTLAND OR 97205
lowrey@oregoncub.org

JASON EISDORFER
ENERGY PROGRAM DIRECTOR
610 SW BROADWAY STE 308
PORTLAND OR 97205
jason@oregoncub.org

ROBERT JENKS
610 SW BROADWAY STE 308
PORTLAND OR 97205
bob@oregoncub.org

DAVIS WRIGHT TREMAINE LLP
JOHN A CAMERON
1300 SW FIFTH AVENUE STE 2300
PORTLAND OR 97201
johncameron@dwt.com

PACIFIC POWER & LIGHT
MICHELLE R MISHOE
LEGAL COUNSEL
825 NE MULTNOMAH STE 1800
PORTLAND OR 97232
michelle.mishoe@pacificorp.com

PACIFICORP
OREGON DOCKETS
825 NE MULTNOMAH ST
STE 2000
PORTLAND OR 97232
oregondockets@pacificorp.com

PUBLIC UTILITY COMMISSION OF OREGON
DEBORAH GARCIA
PO BOX 2148
SALEM OR 97308-2148
deborah.garcia@state.or.us

Neoma Lane

Neoma Lane
Legal Secretary
Department of Justice
Regulated Utility & Business Section

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-6322