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July 2, 2007

***VIA ELECTRONIC FILING
AND OVERNIGHT MAIL***

Oregon Public Utility Commission
550 Capitol Street NE, Suite 215
Salem, OR 97310-2551

Attn: Vikie Bailey-Goggins
Administrator, Regulatory Operations

RE: DR 38- In the Matter of PACIFICORP and HCA MANAGEMENT COMPANY
Joint Petition for Declaratory Ruling

PacifiCorp (d.b.a. Pacific Power & Light Company) hereby submits for filing its Opening
Brief for Oregon Public Utility Commission Docket No. DR 38.

Very truly yours,

A handwritten signature in black ink that reads "Michelle R. Mishoe".

Michelle R. Mishoe
Legal Counsel

Enclosures

cc: DR 38 Service List

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

DR-38

In the Matter of

PACIFICORP, and HCA
MANAGEMENT COMPANY Joint
Petition for Declaratory Ruling

OPENING BRIEF OF
PACIFIC POWER

I. INTRODUCTION

Pursuant to OAR 860-014-0090 and the May 11, 2007 Preconference Order, PacifiCorp, dba Pacific Power & Light Company (“Pacific Power”) hereby submits its opening brief in the above-captioned matter. Pacific Power respectfully requests that the Oregon Public Utility Commission (“Commission”) issue a declaratory ruling in this docket.

II. BACKGROUND

In 2006, Myra Lynne Mobile Home Park (“Myra Lynne”) first approached Pacific Power with questions regarding Myra Lynne’s billing practices to its tenants. The Oregon Residential Landlord Tenant Statute governs the relationship between Myra Lynne and its tenants. Amendments to the Manufactured Dwelling and Floating Home section of the Residential Landlord Tenant Statute (“HB 2247”) changed the way landlords of manufactured home parks could assess charges to tenants for utility service, causing an apparent conflict between Pacific Power’s tariffed resale of service requirements and the new legislated utility billing parameters. Prior to the newly legislated parameters, Myra Lynne had been following Pacific Power’s tariff requirements to resell service to its

tenants at the rate applicable to the type of end-use service. As a result of the new legislation, Myra Lynne changed its billing practices to comply with HB 2247.

The new statutory utility service billing parameters appeared to conflict with Pacific Power's resale billing requirements because they provide a method for calculating tenants' electric bills that is different from the method contained in Pacific Power's tariffs. Myra Lynne inquired of Pacific Power as to how to resolve the potential conflict. Pacific Power advised Myra Lynne to follow the tariff requirements. At that time, Myra Lynne and Pacific Power agreed to present the potential conflict to the Commission for resolution.

Myra Lynne and Pacific Power petitioned the Commission for a declaratory ruling pursuant to ORS 756.450. A declaratory ruling is binding on the Commission and the petitioners on the facts alleged in the petition. *Id.*

III. RELEVANT AUTHORITY

Pacific Power provides service to Myra Lynne under Large General Service Schedule 48, which contains the following provision:

Special Conditions

The Consumer shall not resell electric service received from the Company under provisions of this Schedule to any person, except by written permission of the Company and where the Consumer meters and bills any of his tenants at the Company's regular tariff rate for the type of service which such tenant may actually receive.

(Pacific Power & Light Company, Oregon Schedule 48, Large General Service- 1000 KW and Over Delivery Service, p. 2).

Pacific Power's General Rules and Regulations contain a similar provision:

Resale of Service

Resale of service shall be limited to Consumer's tenants using such service entirely within property described in the written agreement.

Service resold to tenants shall be metered and billed to each tenant at Company's regular tariff rate schedule applicable to the type of service actually furnished the tenant...

(Pacific Power & Light Company, Oregon Rule 2, General Rules and Regulations/Types of Service, para. O).

Myra Lynne is also subject to the billing provisions contained in HB 2247. (See generally ORS Chapter 90). One provision of this statute outlines permissible methods for landlords to bill tenants for utility service (in relevant part):

Billing methods for utility or service charges; system maintenance; restriction on charging for water. (1) Subject to the policies of the utility or service provider, a landlord may provide for utilities or service to tenants by one or more of the following billing methods:

- (c) A relationship between the landlord, tenant and utility or service provider in which:
 - (A) The provider provides the utility or service to the landlord;
 - (B) The landlord provides the utility or service directly to the tenant's space; and
 - (C) The landlord uses a submeter to measure the utility or service actually provided to the space and bills the tenant for a utility or service charge for the amount provided.

(ORS 90.532(1)(c)(A)-(C)).

The following provision of HB 2247 describes charges for utility services measured by a submeter:

Charges for utilities or services measured by submeter. (1) If a written rental agreement so provides, a landlord using the billing method described in 90.532(1)(c) may require a tenant to pay to the landlord a utility or service charge that has been billed by a utility or service provider to the landlord for utility or service provided directly to the tenant's space as measured by a submeter.

- (2) A utility or service charge to be assessed to a tenant under this section may consist of:
 - (a) The cost of the utility or service provided to the tenant's space and under the tenant's control, as measured by the submeter, at a rate no greater than the average rate billed to the landlord by the utility or service provider, not including any base or service charge;
 - (b) ...; and
 - (c) A pro rata portion of any base or service charge billed to the landlord by the utility or service provider, including but not limited to any tax passed through by the provider.

- (3) A utility or service charge to be assessed to a tenant under this section may not include:
 - (a) Any additional charge, including any costs of the landlord, for the installation, maintenance or operation of the utility or service system or any profit for the landlord; or
 - (b) Any costs to provide a utility or service to common areas of the facility.

(ORS 90.536).

IV. ARGUMENT

- A. **Prior to the time HB 2247 became effective, was Myra Lynne, which was receiving service under Schedule 48 from Pacific Power, required as a condition of service to bill each of its sub-metered tenants for electricity at the Pacific Power, Schedule 4 rate, in accordance with Pacific Power's Schedule 48 Special Conditions and Rule 2, Section O?**

Pacific Power must file schedules showing rates, tolls and charges applicable to any of its services with the Commission for approval. (ORS 757.205(1)). Pacific Power must also file, as part of the schedules, all rules and regulations applicable to services offered. (ORS 757.205(2)). Once approved by the Commission, Pacific Power's rates,

rules and regulations have the full force and effect of law. ORS 757.565. Accordingly, Myra Lynne must follow the provisions of the tariffs.

Myra Lynne takes service under Rate Schedule 48 for the entire mobile home park, measured through a master meter, from Pacific Power and then submeters tenants to measure each tenant's electric usage. Under Rate Schedule 48, Myra Lynne may resell service to its tenants under an agreement with Pacific Power as long as Myra Lynne bills the tenants at the regular rate for the service the tenant receives. (Oregon Schedule 48, p. 2, Special Conditions). Oregon Rule 2, Paragraph O contains a similar provision, requiring resellers to meter service to tenants and then bill tenants at the Pacific Power rate applicable to the type of service actually furnished to the tenant. (Oregon Rule 2, Paragraph O). Pursuant to these rate schedules, Pacific Power advised Myra Lynne that it should use Oregon Schedule 4- Residential Delivery Service, to calculate rates to tenants.

Given that tariffs have the force and effect of law, prior to the enactment of HB 2247, Myra Lynne was required to comply with the Special Conditions in Oregon Schedule 48 and Paragraph O of Oregon Rule 2 by using Oregon Schedule 4 to calculate tenants' bills.

- B. 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. Under ORS 90.532 and ORS 90.536, may Myra Lynne, as a Schedule 48 customer of Pacific Power, bill each of its submetered tenants for electricity at the Schedule 4 Residential Rate, as a condition of service under Schedule 48, and Rule 2, Section O; or, under ORS 90.532 and ORS 90.536, must Myra Lynne, as a Schedule 48 customer of Pacific Power, also bill each of its submetered tenants at the same Schedule 48 rate it is billed by Pacific Power?**
- 1. Applying principles of statutory construction to the above inquiry requires that Myra Lynne follow Pacific Power's tariff requirements and bill Myra Lynne's tenants at the Schedule 4 rate.**

This question presents the Commission with a choice of possible ways to interpret the interplay between the new provisions of HB 2247 and Pacific Power's tariffs, which also have the force and effect of law. Answering the question requires applying rules and principles of statutory construction. *Portland General Electric Company v. Bureau of Labor and Industries* provides guidance and a detailed analysis for statutory construction and operation. (*Portland General Electric Company v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (Or. 1993)).

Under the first level of analysis, the Commission should examine the text and context of a statute, giving words their plain, natural and ordinary meaning. (*PGE v. BOLI*, 859 P.2d 1143, 1146). If this examination reveals the legislature's clear intent, then no further inquiry is necessary. *Id.*

The Manufactured Dwelling and Floating Home Section of the Residential Landlord Tenant statute allows a landlord to provide utility services to tenants measured through submeters, *subject to the policies of the utility*. (ORS 90.532 (1)(c)(C)). (Emphasis added). Accordingly, Myra Lynne may provide electricity to its tenants and in doing so must follow Pacific Power's policies.

Pacific Power's tariffs contain policies concerning the resale of electricity. Pacific Power's Schedule 48, the tariff applicable to Myra Lynne's service, contains the following condition:

The Consumer shall not resell electric service received from the Company under provisions of this Schedule to any person, except by written permission of the Company and where the Consumer meters and bills any of his tenants at the Company's regular tariff rate for the type of service which such tenant may actually receive.

This provision contains the phrase “shall not.” “Shall” denotes mandatory action or a command. (*Preble v. Department of Revenue*, 331 Or. 320, 324, 14 P.3d 613, 615 (Or. 2000)). Pacific Power’s tariffs have the full force and effect of law. (ORS 757.565). In this particular instance, by the use of “shall,” the tariff language contains mandatory terms which must be followed.

Under Schedule 48, Myra Lynne can only resell electric service to its tenants with Pacific Power’s permission if it meters and bills the tenants at Pacific Power’s regular rate for the type of service actually used by the tenants. Pacific Power defines residential consumers as those residing in dwellings primarily used for domestic purposes but not typically including occupancy of less than 30 days. (*See Pacific Power Oregon Rule 1*, p. 4). Since Myra Lynne manages a mobile home park where tenants reside for more than 30 days at a time, Myra Lynne furnishes its tenants with residential electric service. Pacific Power’s Schedule 4 applies to residential electric service. Therefore, under the terms of Schedule 48, Myra Lynne must bill its tenants at the Schedule 4 rate.

Pacific Power also places the following condition on the reselling of electricity in Rule 2, paragraph O: “Resale of service shall be limited to Consumer’s tenants using such service entirely within property described in the written agreement. Service resold to tenants shall be metered and billed to each tenant at Company’s regular tariff rate schedule applicable to the type of service actually furnished the tenant...” As with Schedule 48, this provision uses the word “shall,” a command. This provision strictly limits Myra Lynne’s ability to resell electric service to its tenants. This provision also mandates that Myra Lynne meter and bill the tenants according to the tariff applicable to the electric service provided to the tenant. As demonstrated above, Myra Lynne provides

its tenants with residential electric service, meaning Myra Lynne must use Schedule 4 to bill its tenants for electric service.

Given that the provision of HB 2247 subjects Myra Lynne to Pacific Power's policies for providing electric service to Myra Lynne's tenants and Pacific Power's tariffs contain mandatory provisions, it would seem clear that Myra Lynne must bill its tenants using Schedule 4. However, the analysis does not end here because another provision of HB 2247 suggests a potentially conflicting result.

ORS 90.536 states that if a landlord provides utility service to tenants through submeters, the landlord *may* require a tenant to pay a utility charge that the utility has billed the landlord. (ORS 90.536(1)). (Emphasis added). This section further describes what a utility charge from the landlord to the tenant *may* consist of—the cost of the utility service at a rate no greater than the average rate billed to the landlord and a pro rata portion of any base or service charge, all based on the bill from the utility to the landlord. (ORS 90.536(2)(a)&(c)). (Emphasis added). “May” is considered a permissive term. (*Associated Oregon Veterans v. Department of Veterans' Affairs*, 70 Or.App. 70, 74, 688 P.2d 431, 433 (Or. 1984)).

The use of “may” leaves room for discretion on the landlord's part when billing tenants for utility services. ORS 90.536 permits a landlord to charge tenants for utility service, but does not require a landlord to charge tenants for utility service. If a landlord opts to charge tenants for utility service, the statute indicates the types of charges that *may* be included, but does not *require* the charges to be included. This statutory provision affords Myra Lynne leeway when calculating tenants' electricity bills.

2. The mandatory provisions of ORS 90.532 and Pacific Power's tariffs take precedence over the permissive provisions of ORS 90.536.

When comparing and analyzing ORS 90.532, Pacific Power's tariffs, and ORS 90.536, a potential conflict exists. When such a conflict presents itself, the Commission should give effect, if possible, to each provision. (ORS 174.010). Here, the Commission can give effect to each provision. The permissive language in ORS 90.536 merely provides Myra Lynne with an option for billing tenants. The mandatory language in ORS 90.532 and Pacific Power's tariffs impose definite requirements on Myra Lynne's billing practices to its tenants. Given the mandatory requirements, Myra Lynne must bill its tenants according to Pacific Power's policies. Therefore, Myra Lynne must bill its tenants using Schedule 4.¹

¹ Since the text of the statute provisions and Pacific Power's tariffs is clear, the legislative history need not be considered. *PGE v. BOLI*, 859 P.2d 1143, 1146. However, if the Commission chooses to examine the legislative history, the same conclusion applies. John VanLandingham, of the Lane County Law and Advocacy Center, led the negotiations for HB 2247 with the Manufactured Housing Landlord/Tenant Coalition. In Mr. VanLandingham's testimony before the House Committee on Judiciary Subcommittee on Civil Law, he indicated that one of the overarching principles behind what is now known as ORS 90.532 is that a landlord must comply with utility providers' policies regarding that utility service. This would include, among other things, utility rates and utility hookup procedures. (Comments on House Bill 2247 With the Dash 1 Amendments, John VanLandingham, June 13, 2005, p. 6). This demonstrates that the main purpose of HB 2247 is to ensure that landlords who provide utility service for tenants comply with utility policies instead of providing utility service under landlord-developed policies.

Mr. VanLandingham also provided testimony regarding the intent behind what is now known as ORS 90.536. He indicated that since often there may be a range of rates set for utility service, this section refers to the "average rate billed to the landlord by the provider." Additionally, this section includes the phrase "no greater than" for situations where a utility might require a landlord to charge tenants a rate that is lower than the rate billed to the landlord. (Comments on House Bill 2247, p. 8). This reinforces the idea that landlords must base utility charges to tenants on utility rates. In Myra Lynne's situation, the rate Pacific Power requires Myra Lynne to use to calculate tenants' bills happens to be greater than the rate under which Pacific Power bills Myra Lynne. It seems that this possibility was not contemplated during the HB 2247 negotiations. However, as demonstrated above, the permissive language in ORS. 90.536 provides flexibility to accommodate this possibility.

C. If Myra Lynne is required to bill each of its submetered 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?

Pacific Power developed Schedule 98 in response to the Pacific Northwest Electric Power Planning and Conservation Act ("Northwest Power Act"). (See 16 U.S.C.A. §839). The Northwest Power Act created a program for Northwest utilities to exchange some of their high-cost power with the Bonneville Power Administration's ("BPA") lower-cost power as a way to offset the disparity between the wholesale costs of investor-owned utilities and public utilities. (16 U.S.C.A §839c(c)). To implement this, Pacific Power developed a credit to be applied to eligible customers' bills. This credit became Schedule 98 and is often referred to as the Residential Exchange Credit ("REC").

On May 3, 2007, the United States Court of Appeals for the Ninth Circuit issued decisions in two cases that greatly affected the REC program. (See *Golden Northwest Aluminum v. Bonneville Power Administration* 2007 WL 1289539 (9th Cir. 2007) and *Portland General Electric Company v. Bonneville Power Administration* 2007 WL 1288786 (9th Cir. 2007)). In response to the Ninth Circuit's rulings, BPA suspended the REC program. Subsequently, Pacific Power amended Schedule 98 to reduce the credit to zero, effective June 1, 2007. At this time, the REC program has been suspended and the future of the program is uncertain. If the program is reinstated, it is difficult to predict what the terms will be and whether Schedule 98 will be retained in the future. Given this significant uncertainty, this issue is not ripe for determination by the Commission at this time.

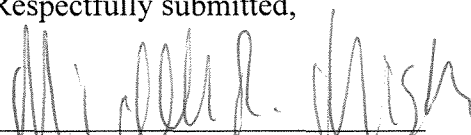
Additionally, as demonstrated above, Myra Lynne must use Schedule 4, a residential rate, to calculate its tenants' electric bills. Since Myra Lynne would be applying a residential rate to customers taking the equivalent of residential electric service, the REC program would apply to Myra Lynne's tenants if the program is reinstated.

V. CONCLUSION

There is no question that prior to the passage of HB 2247, Myra Lynne, a Pacific Power Schedule 48 customer, was required to bill its tenants according to the conditions of Pacific Power's Oregon Rule 2, paragraph O by using Schedule 4 to calculate tenants' bills. An analysis of the construction of ORS 90.532, Pacific Power's tariffs and ORS 90.536 reveals that Myra Lynne must continue to bill its tenants according to the conditions contained in Pacific Power's tariffs. Myra Lynne must continue to use Schedule 4 to calculate its tenants' bills. Finally, given the uncertainty surrounding the REC program, the Commission should not make a determination on the third issue at this time.

DATED: July 2, 2007.

Respectfully submitted,



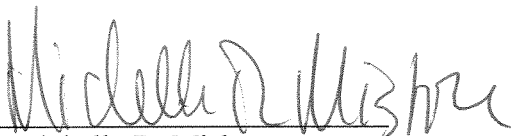
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Legal Counsel
Pacific Power

CERTIFICATE OF SERVICE

I certify that I have caused to be served the foregoing **OPENING BRIEF** in
OPUC Docket No. DR 38 by electronic mail or overnight mail to the parties on the
attached service list.

DATED this 2nd day of July, 2007.


Michelle R. Mishoe

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