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July 16, 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 an original letter and five (5) copies of its Reply Brief for Oregon Public Utility Commission Docket No. DR 38.

Very truly yours,

  
Michelle R. Mishoe  
Legal Counsel

Enclosures

cc: DR 38 Service List

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**DR-38**

In the Matter of

PACIFIC POWER, dba PACIFIC POWER  
& LIGHT COMPANY, and

HCA MANAGEMENT COMPANY, LLC

REPLY 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 Reply Brief in the above-captioned matter. In the Joint Issues List, the parties agreed to brief the Oregon Public Utility Commission (“Commission”) on three issues. In this Reply Brief, Pacific Power responds to several points raised by other parties to this docket.

**II. ARGUMENT**

**A. Further Comparing Pacific Power’s Tariff Requirements With the Billing Parameters Set Forth in ORS 90.536(3) Produces the Same Conclusion—Pacific Power’s Tariffs Control.**

Oregon Public Utility Commission Staff’s (“Staff”) Opening Brief pp 6-7 contains a discussion of the effects of ORS 90.536(3)(a), which states:

- (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; . . .

This provision precludes a landlord from tacking extra charges onto tenants' utility bills for extra utility related-costs not contained on the landlord's bill or for the landlord's own profit. ORS 90.532(1) subjects landlords billing tenants for utilities to the policies of the utility provider. Pacific Power's Oregon Rule 2, Section O requires resellers of electricity to charge the rate applicable to the type of service the end-user receives. In this particular instance, the residential rate applicable to Myra Lynne Mobile Home Park's ("Myra Lynne") tenants leads to higher rates than the rate applicable to Myra Lynne's service. The price difference is not a "profit" to Myra Lynne; it is merely happenstance that residential rates are higher than commercial rates at this point in time. This interpretation is consistent with the application of Pacific Power's tariffs and Myra Lynne would be following Pacific Power's policies, not adding additional costs or collecting profits.

**B. Myra Lynne's Proposed Alternative Resolutions do not Fall Within the Commission's Jurisdiction to Grant.**

In its Opening Brief, Myra Lynne proposes two alternative resolutions for the Commission to consider. Alternative Resolution one suggests that the Commission should read ORS 90.536 as creating a new residential electric rate. Alternative Resolution two suggests that if the Commission does not agree with Alternative Resolution one, then the Commission should grant a waiver of Pacific Power's Schedule 48 and Oregon Rule 2, Section O requirements. As demonstrated below, neither option is within the Commission's jurisdiction.

**i. ORS 90.536 Does Not Create a New Residential Tariff Rate.**

Myra Lynne suggests that the Oregon Legislature, when enacting ORS 90.536(2) & (3), created a new residential rate for tenants who receive electric service measured

through a submeter. (Myra Lynne Opening Brief, pp. 18-19). This is incorrect. The Oregon Legislature delegated exclusive ratemaking authority to the Commission. ORS 756.040(1). With this delegation, the Commission is charged with administering Chapters 756, 757, 758, 759, 772 and 774 of the Oregon Revised Statutes. The Commission is a creature of statute and possesses only those powers granted by the legislature. The Commission's powers are limited by powers expressly conferred by statute. (*Coquille School District 8 v. Castillo*, 212 P.3d 338, 345 (Or.App. 2007); *Beaver Creek Cooperative Telephone Company v. Public Utility Commission*, 986 P.2d 592, 594 (Or.App. 1999); *Lee v. Oregon Racing Commission*, 920 P.2d 554, 556 (Or.App. 1996)). Since ORS 90.536(2) & (3) govern the relationship between landlords and tenants, these sections do not confer any authority on the Commission, much less with respect to the creation and administration of a new residential rate. The Commission only has the powers expressly granted in the statutes mentioned above, which do not extend to regulating the relationship between landlords and tenants.

While Pacific Power continues to believe that in following the statutory interpretation framework set forth in *Portland General Electric Company v. Bureau of Labor and Industries*,<sup>1</sup> the Commission can construct a reasonable interpretation of the interplay between ORS 90.532, ORS 90.536 and Pacific Power's tariffs without using extrinsic aids, it may be helpful to consider the legislative history and statutory construction maxims.

Chapter 90 of the Oregon Revised Statutes governs the relationship between landlords and tenants. Nowhere in Chapter 90 can one find indicia of intent, express or

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<sup>1</sup> Pacific Power provides a discussion of *Portland General Electric Company v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (Or. 1993), in footnote 1 on page 9 of its Opening Brief.

implied, to bestow further administrative duties on the Commission. A review of the legislative history for Amendments to the Manufactured Dwelling and Floating Home section of the Residential Landlord Tenant Statute (“HB 2247”) emphasizes this point. HB 2247 is intended to ensure landlords present a truthful accounting of utility service costs to tenants based on utility policies, not to regulate public utility rates. (*See generally*, Comments on House Bill 2247 With the Dash 1 Amendments, John VanLandingham, June 13, 2005 (“HB 2247 Comments”).<sup>2</sup> Pages 5-10 of the HB 2247 Comments discuss the purpose of the amendments governing the landlords’ permissible methods of calculating utility charges to tenants. These comments demonstrate that the intent behind the amendments is to govern how a landlord accounts for utilities to tenants in situations where the landlord acts as the utility provider, i.e., master metering situations. Legislative intent clearly demonstrates that the legislature did not intend to create a new residential rate with the enactment of ORS 90.536(2) & (3).

Even though the legislative history clearly indicates that HB 2247 does not create a new residential rate, if the Commission chooses to apply principles of statutory construction, one that should be employed is the “absurd results” principle. If a statutory provision lends itself to more than one interpretation, a court or agency should not choose an interpretation that would lead to absurd results. (*Young v. State*, 983 P.2d 1044, 1048 (Or.App. 1999)). HB 2247 amended the portion of the Oregon Residential Landlord Tenant Statute dealing specifically with Manufactured Dwellings and Floating Homes. Construing ORS 90.536(2) & (3) to create a new residential utility rate solely for a small subset of residential rental properties, leads to an absurd result. Additionally, “residential

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<sup>2</sup> These comments indicate that the Commission provided input on the amendments, but only to the extent of suggesting that landlords expressly be declared to not be public utilities. (Comments on House Bill 2247 With the Dash 1 Amendments, John VanLandingham, June 13, 2005, p. 6).

rates” is a term used to characterize something used by a utility as a price indicator for service provided to residential customers, rates that the Commission regulates. Calling ORS 90.536(2) & (3) a “residential rate” would necessarily imply Commission regulatory oversight of the landlord-tenant utility billing practices, something HB 2247 clearly does not intend and would lead to another absurd result.

**ii. Provisions of Pacific Power’s Tariffs Can Not be Waived.**

Myra Lynne requests that the Commission grant a waiver of the application of the Special Condition on Resellers in Pacific Power’s Schedule 48 and Rule 2, Section O. A waiver of Pacific Power’s tariffs is not appropriate in this situation. (Myra Lynne Opening Brief, pp 19-21).

**a. A Waiver of Pacific Power’s Tariff Requirements would Violate ORS 757. 225.**

ORS 757.225 provides, “...The rates named [in the printed rate schedules] are the lawful rates until they are changed as provided in ORS 757.210 to 757.220.” As the Oregon Supreme Court set forth in *Dreyer*, “ORS 757.225 is most reasonably read as a direction to utilities to charge all their ratepayers the PUC-approved rate and, if a utility is dissatisfied with a rate, to obtain a new PUC-approved rate through the process set out at ORS 757.210 to 757.220.” (*Dreyer v. Portland General Electric Co.*, 341 Or 262, 278-79, 142 P3d 1010 (2006)). ORS 757.225 serves to prevent utilities providing services pursuant to regulated rates from discriminating against and between ratepayers by requiring that the approved tariff rates be charged. Granting a waiver would alter the application of a tariff without using one of the statutorily recognized methods of changing tariff requirements. Granting a waiver for Myra Lynne from Pacific Power’s

tariffs would also provide a basis for discrimination among similarly situated ratepayers, which tariffs are specifically designed to protect against.

**b. The Commission's Enabling Statutes do not Confer the Power to Grant Such a Waiver.**

Nothing in the Commission-administered statutes gives the Commission the authority to grant a waiver of Pacific Power's tariffs to a limited subset of customers. As noted above, the Commission's authority is limited by its enabling statutes. (*Coquille School District 8 v. Castillo*, 212 P.3d 338, 345 (Or.App. 2007)). Oregon Revised Statutes Chapter 757, entitled "Utility Regulation Generally", contains provisions related to filing rate schedules, and rules and regulations for service. Absent from this chapter are provisions of authority to grant a waiver of any of the chapter's provisions, much less authority to grant a waiver of tariff filing requirements and applicability. Oregon Revised Statutes Chapter 756, entitled "Public Utility Commission", generally sets forth the Commission's authority and purpose. Like Chapter 757, Chapter 756 does not contain any provisions indicating the Commission may grant a waiver of any of the statutory provisions applicable to utility regulation.

Utility regulation statutes prohibit Pacific Power from charging different rates or applying different terms and conditions of service for similarly situated customers. ORS 757.310. Additionally, Pacific Power must not show undue or unreasonable preferential treatment or disadvantage to any person or locality. ORS 757.325. Granting the waiver as suggested by Myra Lynne would cause one particular customer to receive different terms and conditions than other Schedule 48 customers and other Resellers, creating discriminatory treatment. The Commission cannot grant a waiver that could create

discriminatory treatment within customer classes, especially when that treatment would apply to only one customer.

Oregon law prohibits inserting words or phrases into statutes that have been omitted. ORS 174.010. The Oregon Legislature did not include any provisions allowing the Commission to waive any of the statutory requirements. Therefore, the request for a waiver of Pacific Power's tariff requirements is not within the Commission's authority to grant. Additionally, granting waivers of statutory provisions without express authority could lead to selective enforcement and would render the statute meaningless.

**C. Myra Lynne's Policy Concerns Regarding the Effects of Pacific Power's Statutory Interpretation on Myra Lynne's Tenants and Myra Lynne's Liability in a Lawsuit do Not Provide Sufficient Basis for Myra Lynne's Proposed Alternatives.**

Myra Lynne notes that Pacific Power's rate Schedule 4 is higher than rate Schedule 48, and that construing HB 2247 in the manner suggested by Pacific Power would cause tenants to pay significantly higher electric rates. (Myra Lynne Opening Brief, pp 17-18). Pacific Power acknowledges that the current rates would lead to Myra Lynne's tenants paying higher electric utility bills. This was not always the case and may not be the case in the future. Additionally, if Myra Lynne's tenants took service directly from Pacific Power, they would be subject to the higher rate Schedule 4. Finally, Myra Lynne's tenants paid higher rates until January 2006 when Myra Lynne began charging the tenants Schedule 48 rates versus Schedule 4 rates, Pacific Power empathizes with Myra Lynne's concern. However, in this particular case, construing the language of the statutes, rules and tariffs solely in an attempt to avoid exposure to higher rates is not an appropriate basis for making a decision.



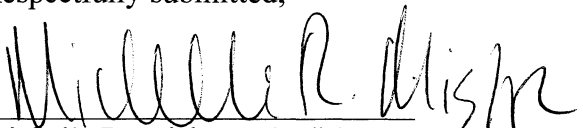
Myra Lynne also states that by adopting Pacific Power's interpretation of HB 2247, Myra Lynne may face an allegation of including a "profit" in electric bills to tenants, which ORS 90.536(c)(3) does not allow. (Myra Lynne Opening Brief, pp 17-18). As Pacific Power stated above, Pacific Power's tariffs do not require Myra Lynne to include an amount for "profit" in its tenants' utility bills. By following Pacific Power's tariff requirements, Myra Lynne is not earning a profit. Myra Lynne is merely following Pacific Power's policies. Additionally, there is no guarantee that Schedule 4 rates will always be higher than Schedule 48 rates, which means "profit" may not always be an issue. Construing the language of the statutes, rules and tariffs in an attempt to avoid potential exposure to liability in lawsuit in another jurisdiction is not an appropriate basis for making a decision in this case.

**D. The Commission should not adopt Myra Lynne's Proposed Findings and Conclusions.**

Myra Lynne, in its Opening Brief, requests that the Commission enter specific findings and conclusions. Pacific Power respectfully disagrees with many of the requested findings and conclusions and asks that the Commission not adopt them. Pacific Power requests that the Commission reach findings and conclusions consistent with Staff's and Pacific Power's interpretation of Pacific Power's tariffs, ORS 90.532 and 90.536.

DATED: July 16, 2007.

Respectfully submitted,

  
Michelle R. Mishoe OSB# 07242  
Legal Counsel  
Pacific Power & Light Company

**CERTIFICATE OF SERVICE**

I certify that I have caused to be served the foregoing **REPLY BRIEF** in Oregon Public Utility Commission Docket No. DR 38 by electronic mail and first class mail to the parties on the attached service list.

DATED this 16th day of July, 2007.

  
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Peggy Ryan

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