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July 16, 2007

VIA EMAIL and US MAIL

Public Utility Commission of Oregon
Attn: Filing Center
550 Capitol St. NE #215
Salem, OR 97308-2148

Re: DR-38

Dear Sir or Madam:

For filing in the above referenced docket, please find **REPLY BRIEF OF HCA MANAGEMENT COMPANY, LLC**. The original plus five will be sent via U.S. Mail to the Commission.

Comment [TIP:1]: To modify the name, select the name and hit Ctrl+Shift+F9. This will convert the field result to text and you can modify it as you wish. Then, if you have a 2nd page, you must go to the second page header, select it and hit Ctrl+Shift+F9 again. Modify the 2nd page header as you wish it to appear.

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Very truly yours,

Davis Wright Tremaine LLP

John A. Cameron

JAC:smp
Attachments

cc: Jason Eisdorfer (w/attach. via email)
Michelle Mishoe (w/attach. via email)
David Hatton (w/attach. via email)
Deborah Garcia (w/attach. via email)
Matthew Sutton (w/attach. via U.S. Mail)

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DR - 38

In the Matter of PACIFICORP, dba PACIFIC POWER & LIGHT COMPANY, and HCA MANAGEMENT COMPANY, LLC	**REPLY BRIEF OF HCA MANAGEMENT COMPANY, LLC**

I. RECAP OF OPENING BRIEFS

In their respective opening briefs, the Commission Staff and Pacific Power each establish that the Special Provisions of Schedule 48 and Section "O" of Pacific Power's Rule 2 unambiguously required Myra Lynne to bill its tenants at the Schedule 4 residential rate prior to the effective date of HB 2247. They also agree that Myra Lynne's tenants were eligible for the Schedule 98 residential credit during that time. Neither party contests the evidence of record demonstrating that Myra Lynne actually billed its tenants at the Schedule 4 rate, minus the Schedule 98 credit, prior to HB 2247. Thus, Myra Lynne reiterates its request that the Commission adopt each of the findings and conclusions stated at pp. 23-24 of its opening brief.

This reply brief focuses on the second and third issues stipulated by the parties for declaratory resolution by the Commission. All parties agree to the following propositions:

- The Special Provisions of Schedule 48 and by Section "O" of Pacific Power's Rule 2 have the force and effect of law and require compliance by Myra Lynne, as a customer of Pacific Power, both before and after enactment of HB 2247. [1]
- In enacting HB 2247, a conflict was created between ORS 90.532(1)(c), which makes the calculation of tenant utility bills "subject to the policies of [Pacific Power]," and ORS 90.536(3), which -- if it applies -- could require Myra Lynne to calculate tenant bills contrary to the policies of Pacific Power.

[1] The regulatory principles underlying Schedule 48 and Rule 2 are not at issue here.

Regarding the second stipulated issue, the parties differ regarding the most appropriate way in which to reconcile the conflict between ORS 90.532(1)(c) and ORS 90.536(3), so that Myra Lynne can conform to the Special Conditions of Schedule 48 and Rule 2. The Commission Staff and Pacific Power argue that ORS 90.536(3) is not mandatory and that Myra Lynne should still bill its tenants at the Schedule 4 rate. In contrast, Myra Lynne offered two alternative ways of reconciling the statutory conflict, if ORS 90.536(3) *is* mandatory. Myra Lynne's alternatives are each consistent with its current practice of billing tenants for electricity based on its own Schedule 48 bills from Pacific Power. Exhibit M shows the difference in billed amounts, depending on whether ORS 90.536(3) is mandatory or optional. [2]

Regarding the third stipulated issue, all parties agree that Myra Lynne's tenants remain eligible for the Schedule 98 residential credit after enactment of HB 2247, if those tenants are billed at the Schedule 4 residential rate. Myra Lynne believes that tenant eligibility is unaffected even if they are billed according to Myra Lynne's own Schedule 48 bills from Pacific Power (which include the Schedule 98 credit). However, Staff is unsure. Pacific Power believes this issue should be deferred until BPA resumes payments to it under 16 U.S.C. §839c(c).

II. ARGUMENT

A. The Commission Should Not Declare That Myra Lynne Must Bill Its Tenants At The Schedule 4 Residential Rate Unless It Is Clear That ORS 90.536(3) Is Elective Or Optional On The Part Of Myra Lynne, And Not Mandatory.

Myra Lynne now bills its tenants shares of the Schedule 48 bills it receives from Pacific Power. It passes on to tenants the Schedule 98 credit that Pacific Power has been including on Myra Lynne's bills since 2005. *See* Exhibit I. This billing practice was adopted by Myra Lynne long before the tenants filed their "elder abuse" lawsuit. Myra Lynne is not seeking to change these current practices; however, Commission Staff and Pacific Power each seem to believe that Myra Lynne's tenants are receiving a financial windfall in relation to other residential users in

[2] Myra Lynne provided all pleadings and Stipulation of Facts to the tenants' counsel, noting the significance of Exhibit M to understanding the dollar effect of this case on tenant electric bills.

Medford and throughout Pacific Power's service territory. [3] In advocating the application of the Schedule 4 residential rate, neither Pacific Power nor Staff give sufficient attention to ORS 90.536(3). Uncertainty about ORS 90.536(3) is what caused Myra Lynne to comply with that provision after HB 2247 went into effect.

Pacific Power is correct that ORS 90.532(1)(c), the Special Provisions of Schedule 48 and Section "O" of Pacific Power's Rule 2 all impose mandatory requirements on Myra Lynne, as a landlord and as a Pacific Power customer. Pacific Power opening brief, pp. 6-8. However, in arguing that ORS 90.536 is optional or elective on the part of Myra Lynne, Pacific Power focuses exclusively on the verb "may" found in ORS 90.536(1). It does not address the verb "may not" found in ORS 90.536(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; … ." [4]

Pacific Power's opening brief never mentions ORS 90.536(3). Perhaps this is because Pacific Power believes that the entire section is elective or optional with Myra Lynne and ORS 90.536(3) is limited in application to charges "assessed to a tenant under this section." Such reasoning should not be left unexpressed. In resolving the second stipulated issue in this case, Myra Lynne asks the Commission to explicitly address all of ORS 90.536, especially the language of ORS 90.536(3).

Commission Staff's opening brief does address ORS 90.536(3). Staff's argument is quite logical. However, Staff's opening brief may understate the vagueness of that provision.

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[3] Ironically, the tenants' lawsuit against Myra Lynne may lead to an end to the windfall they allegedly now receive.

[4] Under the rules of statutory construction codified as ORS 174.100(4), "'May not' and 'shall not' are equivalent expressions of an absolute prohibition."

If "profit," as used in ORS 90.536(3), is supposed to mean return on investment, as it does in the regulated utility context, then clearly there is no profit for a landlord merely by billing tenants in compliance with ORS 90.532 "[s]ubject to the policies of the utility or service provider … ." A landlord's compliance with ORS 90.532 would bear absolutely no relationship to that landlord's invested capital.

However, the Legislature did us no favor by including the word "profit" in this provision with no accompanying statutory definition. Neither does the legislative history of this provision explain the intent of the drafters. For all we know, "profit" might simply mean any net amount recovered by a reseller of electricity when its revenues, relating to billing tenants at Schedule 4, exceed its costs of electricity as billed by its utility. This uncertainty led Myra Lynne to conclude that it would be prudent to comply with ORS 90.536(3) on the chance it did apply. [5]

To summarize, co-petitioners Pacific Power and Myra Lynne seek certainty concerning the application of ORS 90.536 to the facts of record in this proceeding. Myra Lynne believes that certainty necessitates Commission treatment of ORS 90.536(3). Does it apply and, if so, would Myra Lynne realize a "profit" by billing its tenants at the Schedule 4 rate?

B. <u>The Commission Should Resolve The Third Stipulated Issue Now</u>.

The third stipulated issue in this case concerns tenant eligibility for the Schedule 98 credit, but not the amount of that credit. The period covered by this issue relates back to the time when Myra Lynne first complied with ORS 90.536 by billing tenants according to the Schedule 48 rate at which it is billed by Pacific Power. This issue is independent of BPA's recent decision to suspend residential-exchange payments to Pacific Power. It would be unfair to Myra Lynne if

[5] As explained at pp. 9-11 of its opening brief, there was no uncertainty about a predecessor statute, ORS 90.510(8) (2003 ed.). This statute, which was repealed by HB 2247, made no mention of "profit." Myra Lynne's billing practices complied with ORS 90.510(8) (2003 ed.), regardless of whether it applied. *Id.*

the Commission were to adopt Pacific Power's request that resolution of this issue be deferred while Pacific Power, this Commission and others try to convince BPA to resume payments.

The essential point is that Pacific Power and its eligible customers remain statutorily entitled to residential exchange payments under 16 U.S.C. §839c(c). There should be no delay in deciding whether Myra Lynne's tenants are part of the group eligible for the credit whenever BPA resumes fulfilling its obligations under federal law.

Deciding this stipulated issue now would not prejudice Pacific Power. The Schedule 98 credit is currently zeroed-out. Even when this issue is decided, Pacific Power would not be obligated to pay any actual credit until Schedule 98 is revised when BPA resumes payments to Pacific Power. Moreover, if the Commission agrees with Staff that the question of tenant eligibility should be referred to BPA for answer, it would appear that Pacific Power would not be obligated to extend any Schedule 98 credit for the benefit of Myra Lynne's tenants until their eligibility had been confirmed by BPA.

C. <u>If The Commission Concludes that The Question Of Tenant Eligibility For Schedule 98 Credits Should Be Referred To BPA For Answer, Then The Question Should Be Posed To BPA By The Tenants Themselves</u>.

If the Commission were to conclude that ORS 90.536 is *not* optional and that Myra Lynne is thereby required to bill its tenants at a rate other than the Schedule 4 residential rate, Staff recommends that the question about tenant eligibility for the residential-exchange credit be referred to BPA for resolution. Staff opening brief, p. 12. Staff further recommends that the Commission direct Pacific Power to handle any referral to BPA. This second Staff recommendation could expose Pacific Power to litigation. Instead, Myra Lynne believes that the tenants themselves should take the lead in confirming with BPA their own eligibility for the residential exchange credit.

The Schedule 98 credit is simply a pass-through. Whatever BPA pays Pacific Power under the federal residential-exchange program, Pacific Power passes on to customers including Myra Lynne, which in turn passes any credit received from Pacific Power on to tenants. The tenants are the beneficiaries of this credit, not Myra Lynne and not Pacific Power. The tenants are not even customers of Pacific Power.

Myra Lynne's tenants have developed an unfortunate tendency to file litigation regarding utility rate and billing issues they may not understand. It would be unfair if a future "elder-abuse" lawsuit befell Pacific Power if Myra Lynne's tenants disagreed with, or simply did not understand, some aspect of Pacific Power's efforts with BPA to ascertain tenant eligibility for the credit. Might the tenants sue Pacific Power if BPA concludes they are not eligible for the credit? Might the tenants also attempt to amend their complaint against Myra Lynne? Better to avoid this unknowable risk. Pacific Power should simply be directed by the Commission to cooperate with the tenants, who should take the lead in confirming their eligibility for the BPA credit from which they alone benefit. The tenants are certainly capable of approaching BPA about their own eligibility, knowing that Pacific Power and Myra Lynne will pass on to them any credit to which BPA determines them entitled under 16 U.S.C. §839c(c).

Respectfully submitted,

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Attorneys for HCA Management Co., LLC

DATED this 16th day of July, 2007.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **HCA MANAGEMENT COMPANY, LLC'S REPLY BRIEF** on:

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☒ by sending a .pdf copy thereof to each person listed above via email.

Dated this 16th day of July, 2007.

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