ENTERED 10/22/07

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DR 38

In the Matter of	)	
	)	ORDER
PACIFICORP, dba PACIFIC POWER & LIGHT COMPANY and HCA MANAGEMENT COMPANY, LLC	)	
	)	
Joint Petition for Declaratory Ruling.	)	

DISPOSITION: DECLARATORY RULING ISSUED

On March 20, 2007, PacifiCorp dba Pacific Power (Pacific Power) and HCA Management Company, LLC (Myra Lynne) filed a Petition for Declaratory Ruling pursuant to ORS 756.450. Petitioners request the Public Utility Commission of Oregon (Commission) address questions relating to Myra Lynne's billing practices to its mobile home park tenants for electric service provided by Pacific Power.

At a public meeting on April 24, 2007, the Commission opened this docket to entertain Petitioners' request. As a matter of courtesy, an Administrative Law Judge invited the tenants of the Myra Lynne Mobile Home Park to participate in this proceeding in correspondence dated May 11, 2007. The tenants declined the offer per a correspondence dated May 25, 2007.

On May 17, 2007, Commission Staff, Pacific Power, and Myra Lynne submitted a Joint Issues List. In addition, on July 2, 2007, the three parties submitted a Joint Stipulation of Facts (Stipulation); the sole intervenor in this proceeding, Citizen's Utility Board of Oregon (CUB), stated that it did not oppose the Stipulation.

Staff, Pacific Power and Myra Lynne each submitted opening briefs on July 2, 2007, and reply briefs on July 16, 2007. CUB filed no briefs.

FACTS

We base our declaratory ruling on the following assumed facts:

1. Pacific Power is an investor-owned utility provider of electricity at retail, regulated by the Commission pursuant to ORS Chapters 756 and 757. Pacific Power provides retail electric service in Medford, Oregon, under a franchise agreement with the City of Medford.

2. Myra Lynne owns and operates the Myra Lynne Mobile Home Park in Medford, Oregon. Myra Lynne's tenants occupy detached, residential dwellings within the park for periods in excess of 30 days. No tenant runs any commercial business in the park.

3. Myra Lynne purchases electricity for the entire mobile home park from Pacific Power under Schedule 48, applicable to commercial customers with demands of 1,000 KW and above. Myra Lynne's electricity usage is measured through a master meter. Myra Lynne's monthly bills from Pacific Power include a charge for energy use, as well as miscellaneous charges and fees.

4. Myra Lynne resells the electricity to tenants for residential usage through landlord-owned submeters, pursuant to each tenant's written rental agreement.

5. Schedule 48 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.

6. Section O of Pacific Power's Rule 2 imposes the same requirement on the "Consumer":

> **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. Consumer shall indemnify Company for any and all liabilities, actions or claims for an injury, loss or damage to persons or property arising from the results of service by Consumer.

7. Historically, Myra Lynne met the Special Conditions of Schedule 48 and the "Resale of Service" provision of Section O, Rule 2 by billing tenants according to Pacific Power's Schedule 4, applicable to residential customers. Myra Lynne did not add any other charges, costs or adders to its tenant electric bills, and its use of Schedule 4 was consistent with specific instructions Myra Lynne received from Pacific Power.

8. Section "P" of Pacific Power's Rule 2 defines "residential service" as follows:

> Service furnished to Consumers for domestic purposes in single-family dwellings, including rooming houses where not more than four rooms are used as sleeping or living quarters by persons not members of Consumer's family, apartments and flats where each dwelling unit is separately metered and billed, but excluding dwellings where tenancy is typically less than 30 days in length such as hotels, motels, camps, lodges and clubs.

9. During its 2005 legislative session, the Oregon Legislature enacted HB 2247, which added several new provisions to Oregon's landlord/tenant law. As enacted, the bill added provisions to Chapter 90, including ORS 90.532 and ORS 90.536. The new law became effective as of January 2, 2006.

10. ORS 90.532 enumerates the acceptable methods by which a landlord may provide or account for utility or service charges to tenants. ORS 90.532(1)(c)(C) states in relevant part:

> (1) Subject to the policies of the utility or service provider, a landlord may provide for utilities or services 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:
>
> * * * * *
>
> (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.

As applicable here, ORS 90.536 adds:

> (1) If a written rental agreement so provides, a landlord using the billing method described in ORS 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;

* * * * *; 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.

11. When Myra Lynne became aware of the enactment of HB 2247, it began to bill its tenants in accordance with its understanding of ORS 90.536. Rather than bill tenants according to Schedule 4, each tenant's bill now consists of a pro rata share, according to tenant usage, of Myra Lynne's actual monthly electricity bills based on Pacific Power's Schedule 48 rate. Each month, Myra Lynne bills its tenants for a share of charges for energy use, as well as miscellaneous charges and fees.

12. After HB 2247 became effective, Pacific Power continued to advise Myra Lynne that it was required to apply Schedule 4 in billing tenants for their submetered electric service.

13. Myra Lynne has applied the Schedule 98 credit from the Residential Exchange Program (REP), administered by the Bonneville Power Administration, both before and after HB 2247 became effective, even during an extended period in which Pacific Power had failed to include that credit in its bills to Myra Lynne.

ISSUES

The Petitioners and Staff have identified three issues for Commission declaration. We address each separately.

Issue 1: **Prior to the time HB 2247 became effective, was Myra Lynne Mobile Home Park, which was receiving service under Schedule 48 from Pacific Power, required as a condition of service to bill each of its submetered 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?**

Position of Parties

All parties contend that, prior to the enactment of HB 2247, Myra Lynne was required, as a condition of service, to bill each of its submetered tenants for electricity at Pacific Power's Schedule 4 rate for residential service. The parties contend such method of billing was required to comply with Pacific Power's Schedule 48 Special Conditions and Rule 2, Section O.

Resolution

In addressing this issue, we assume that Myra Lynne was properly classified as a Schedule 48 customer under PacifiCorp's tariffs. We also assume that Myra Lynne had Pacific Power's written permission to submeter and bill its tenants.

With those assumptions, we agree that, prior to the time HB 2247 became effective, Myra Lynne was required to bill its tenants for electricity at Pacific Power's Schedule 4 rate. Pacific Power's tariffs place two conditions limiting the resale of service provided under the circumstances presented here. As a condition to resell service provided under Schedule 48, Myra Lynne was obligated to bill its tenants for the type of service the tenant "may actually receive." Similarly, as a general condition to resell service to tenants, Myra Lynne was obligated to bill each tenant at Pacific Power's "regular tariff rate schedule applicable to the type of service actually furnished the tenant." Rule 2, Section O. Because Myra Lynne's tenants received "residential service" within the definition set forth in PacifiCorp's Rule P, Myra Lynne was required to bill its tenants under Pacific Power's Schedule 4 rate for residential service.

Issue 2: **Under amended ORS 90.532 and ORS 90.536, may Myra Lynne 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 at the same Schedule 48 rate it is billed by Pacific Power?**

Position of Parties

Pacific Power and Staff contend that Myra Lynne must continue to bill its tenants at the Schedule 4 rate for residential service. Staff and Pacific Power contend that the opening phrase of ORS 90.532, "Subject to the policies of the utility or service provider,"

requires that a landlord's method of billing tenants for utility service be governed by, and subordinate to, the policies of the utility. According to the parties, ORS 90.532(1)(c)(C), as applied here, requires that Myra Lynne must comply with Pacific Power's policies when submetering its tenants for electrical usage. Because those policies require Myra Lynne to bill its tenants for the end-use service the tenant "may actually receive" or "actually receives," PacifiCorp and Staff maintain that the tenants must be billed under Pacific Power's Schedule 4.

Myra Lynne acknowledges that Pacific Power's and Staff's interpretation of ORS 90.532 is plausible. Myra Lynne, however, is reluctant to accept that construction because of language in ORS 90.536(3)(a). That language provides that a utility charge assessed by a landlord to a tenant may not include "[*a]ny 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*[.]" (Emphasis added). Because the Schedule 4 rate is currently higher than the allocated Schedule 48 rate at which Myra Lynne itself is billed, Myra Lynne is concerned that billing tenants at the Schedule 4 rate might be construed as adding an "additional charge" or "profit for the landlord." Consequently, Myra Lynne is currently billing its tenants based on its Schedule 48 rate.

Resolution

This question requires the interpretation of ORS 90.532 and ORS 90.536. When construing any statutory provision, our duty is to discern the intent of the legislature. ORS 174.040. To accomplish this, we use the analysis set forth in *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 610-12 (1993). We begin with the text and context of the statutes, giving words their plain, natural and ordinary meaning. If the intent of the legislature is not clear from that inquiry, we then examine legislative history. If that too fails, we then turn to general maxims of statutory construction. *See id.*

We begin with ORS 90.532, which enumerates the acceptable methods by which a landlord may bill tenants for utility service. The opening phrase of the statute makes clear that any permissible method is "[s]ubject to the policies of the utility or service provider." ORS 90.532(1). As Staff notes, the noun "subject" means: "one that is placed under the authority, dominion, control, or influence of someone or something." Webster's Third New International Dictionary (unabridged 1993) at 2275. Accordingly, the legislature's use of "subject to the policies of the utility" in ORS 90.532(1) means that it intended that any landlord billing tenants for utility service must comply with the utility provider's policies.

We now turn to ORS 90.536. That statute has three sections. First, ORS 90.536(1) states that, if a landlord provides utility service to tenants under a billing method described in ORS 90.532(1)(c), the landlord:

> *[M]ay* 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.

(Emphasis added.) Next, if a landlord decides to charge its tenants for electricity, ORS 90.532(2) identifies what a utility charge may include the cost of the service at a rate no greater than the average rate billed to the landlord. ORS 90.532(3) then identifies what the charge may not include, among other things, an additional fee or profit for the landlord. ORS 90.536(2) and (3).

Because the Schedule 4 residential rate is currently higher than the Schedule 48 commercial rate, all three parties believe that the clause in ORS 90.536 prohibiting a "profit for the landlord" raises a potential conflict with ORS 90.532. They question whether Myra Lynne, in billing its tenants at a higher rate to meet Pacific Power's policies as required by ORS 90.532, is obtaining a "profit" that is prohibited under ORS 90.536.

Pacific Power and Staff contend that the statutes may be interpreted to avoid any conflict by focusing on the word "may" in ORS 90.536(1). According to both parties, the use of "may" suggested the language is permissive, not mandatory, and conclude that, if ORS 90.536(1) is read as permissive, it would not conflict with the mandatory requirements of ORS 90.532. Thus, Pacific Power and Staff conclude ORS 90.536 affords landlords discretion when calculating tenants' electricity bills. Myra Lynne accepts this interpretation, but remains concerned about the discrepancy between the two tenant rates.

We agree that ORS 90.536(1) is permissive, but not to the extent advocated by Pacific Power and Staff. True, the statute permits, but does not require, a landlord to charge tenants for utility service. Thus, Myra Lynne could decide not to charge its tenants for electricity. Once it opts to charge tenants for utility service, however, it is required to adhere to the statutory provisions and, subject to the provisions of ORS 90.532, may only charge those items permitted in ORS 90.536(2) and (3).

Despite this clarification, we do not find a conflict between the two statutory provisions. By its own terms, ORS 90.536(1) establishes the charges a landlord may require a tenant to pay under "the billing method described in ORS 90.532(1)." When one statute refers to another in this manner, the reference extends to and incorporates the provisions of the statute referenced. ORS 174.060. Thus, the provisions of ORS 90.532(1) necessarily apply to and govern those contained in ORS 90.536(1).

As discussed above, the opening phrase in ORS 90.532(1) requires any billing by landlords to tenants for utility service be "subject to the policies of the utility." This requirement controls not only the remainder of that statute, but also ORS 90.536(1) by operation of the express reference.

Thus, in adding ORS 90.532 and ORS 90.536 to Oregon's landlord-tenant law, the legislature identified approved billing methods for utility service and permissible utility charges, but made both provisions "[s]ubject to the policies of the utility." Any potential conflict between these statutory provisions and utility policy must be resolved in favor of the utility policy. Here, that requires Myra Lynne to bill its tenants as residential customers under Pacific Power's Schedule 4 rate.

We do not share Myra Lynne's concern that its charging of tenants the Schedule 4 rate could be interpreted as "an additional charge" or "profit for the landlord,"

prohibited under ORS 90.536(3). As we have determined, Myra Lynne's billing of its tenants for utility service must comply with Pacific Power's policies. So long as Myra Lynne does not add an additional charge beyond those obligated by the Schedule 4 tariff, it will not violate the proscription against imposing an additional charge or profit for the resale of utility service under ORS 90.536(3)(a).

Because the legislative intent is clear from the plain language of the statute, a resort to legislative history is not necessary. Nonetheless, the legislative history confirms this interpretation. John VanLandingham, an attorney for the Lane County Law and Advocacy Center, led the negotiations for HB 2247 with the Manufactured Housing Landlord/Tenant Coalition. In testimony before the House Judiciary Subcommittee on Civil Law, Mr. VanLandingham noted that the bill was the result of negotiations among a broad array of groups interested in landlord-tenant law. He also noted the involvement of the Commission in making recommendations regarding the language of relevant provisions of the bill.

Mr. Van Landingham provided a section-by-section analysis of the bill. Regarding Section 6, which was later codified as ORS 90.532, Mr. VanLandingham testified:

> *One of the 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 hook-up procedures.

Testimony, House Judiciary Subcommittee on Civil Law, HB 2247, June 13, 2005, Ex B, page 7 (statement of John VanLandingham) (emphasis added).

As to the purpose of Section 8, which became ORS 90.536, Mr. VanLandingham explained:

> With regard to the cost of 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 the 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.*

Id. at 8. (emphasis added).

This history clarifies two conclusions. First, that the legislature intended to defer, if necessary, to the policies of the utility provider. Second, that such deference includes the requirement that the landlord charge its tenants a different rate if required by the utility's policies. While the legislature may not have contemplated the situation presented here, where the utility policy requires the landlord to charge a higher rate, this testimony confirms that the landlord must bill its tenants at rates consistent with the utility's policies.

Accordingly, we conclude that, under ORS 90.532 and ORS 90.536, Myra Lynne is obligated to follow Pacific Power's policies in charging its tenants for electric usage. Those policies require Myra Lynne to bill each of its submetered tenants for electricity at the Schedule 4 Residential Rate.

We emphasize, however, that this decision does not preclude Myra Lynne or its tenants from challenging Pacific Power's policies in a Commission proceeding. The utility's policies are contained in tariffs approved by and on file with the Commission. Either Myra Lynne or its tenants may ask the Commission to use its authority under ORS 756.515 to investigate the reasonableness of Pacific Power's policies in light of the unusual circumstances presented here.

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

Position of Parties

Both Staff and Pacific Power believe that the Commission should not resolve this issue, as they contend that Myra Lynne is required to bill its clients under Schedule 4, not Schedule 48. In addition, they note that Pacific Power's Schedule 98 credit was suspended as of June 1, 2007, after BPA suspended the residential exchange program (REP) following adverse decisions from the Ninth Circuit Court of Appeals. *See Golden Northwest Aluminum, Inc. 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).

Myra Lynne acknowledges the uncertainty regarding the availability of the residential exchange credit, but asks the Commission to address the eligibility of its tenants to receive the credit.

Resolution

We have determined that Myra Lynne must treat its tenants as residential customers, and bill each of its submetered tenants for electricity, at PacifiCorp's Schedule 4 Rate. Accordingly, that decision has essentially rendered this question moot. Moreover, as the parties note, the REP has been suspended and it is difficult to determine whether and under what terms the Schedule 98 credit will be reestablished in the future. Accordingly, we decline to issue a ruling on this matter. We anticipate, however, that any decision regarding the REP will treat all of Pacific Power's residential customers equally, including the tenants of Myra Lynne.

ORDER

IT IS ORDERED that the Public Utility Commission of Oregon make the following declaratory rulings:

1. Prior to the time HB 2247 became effective, Myra Lynne Mobile Home Park, which was receiving service under Schedule 48 from Pacific Power, was required, as a condition of service, to bill each of its submetered tenants for electricity at the Pacific Power Schedule 4 rate.

2. Under ORS 90.532 and ORS 90.536, Myra Lynne Mobile Home Park must 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.

Made, entered, and effective OCT 2 2 2007.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.