ORDER NO. 08-388

ENTERED 07/31/08

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DR 40

In the Matter of	)	
	)	
HONEYWELL INTERNATIONAL, INC., and	)	
HONEYWELL GLOBAL FINANCE, LLC,	)	ORDER
	)	
and	)	
	)	
PACIFICORP, dba PACIFIC POWER,	)	
	)	
Application for Declaratory Ruling.	)	

DISPOSITION: DECLARATORY RULING GRANTED

On June 6, 2008, Honeywell International, Inc., and Honeywell Global Finance, LLC (Honeywell), and PacifiCorp, dba Pacific Power (Pacific Power), filed a Petition for Declaratory Ruling pursuant to ORS 756.450. Petitioners ask the Public Utility Commission of Oregon (Commission) to address questions relating to the applicability of various Oregon statutes and Commission rules to Honeywell's model of building and operating solar facilities on premises belonging to utility customers. Petitioners requested expedited treatment of the petition.

I. PROCEDURAL BACKGROUND

A prehearing conference in this proceeding was convened on June 18, 2008. At that conference, Chief Administrative Law Judge (ALJ) Michael Grant provided the parties with a streamlined list of assumed facts and questions derived from the petition for declaratory relief. Participants commented on the list on June 19, 2008, and a final list of assumed facts (Assumed Facts) and questions was issued on June 20, 2008.[1]

The following parties filed petitions to intervene: BacGen Solar Group; Central Lincoln People's Utility District (Central Lincoln); City of Medford; Commercial Solar Ventures and Real Energy Solutions; Energy Trust of Oregon, Inc. (Energy Trust); Environment Oregon; Gerding Edlen Sustainable Solutions; Interstate Renewable Energy Council; League of Oregon Cities (the League); Natural Resources Defense Council (NRDC); Oregon Department of Energy (ODOE); Oregon Department of Transportation (ODOT); Oregon People's Utility District Association (OPUD); Oregon Solar Energy

[1] A minor correction to the assumed facts was made on June 30, 2008.

Industries Association (OSEIA); Portland General Electric Company (PGE); Renewable Northwest Project (RNP); and SunEnergy Power Corporation (SunEnergy). No objections were filed to the petitions to intervene, and all were granted. The Citizens' Utility Board of Oregon (CUB) also filed a notice of intervention pursuant to ORS 774.180(1).

The parties submitted opening briefs on June 30, 2008,[2] and reply briefs on July 11, 2008.[3]

II. BACKGROUND

In their petition for declaratory relief, Honeywell and Pacific Power have asked the Commission to address questions relating to the applicability of various Oregon statutes and Commission rules to Honeywell's model of building and operating solar facilities on premises belonging to utility customers. Questions about the proper interpretation of these statutes and rules have created uncertainty about a common financing method that encourages the development of solar power. Significant state and federal tax credits and incentives from the Energy Trust are currently available to subsidize the development of renewable generation resources. Parties have been able to take advantage of these incentives in large part by using a third-party financing structure that allows third-party investors to take advantage of the subsidies.

Under this structure, described in more detail in the Assumed Facts, an investor pays the up-front cost of solar generating facilities, retains ownership of the facilities, and benefits from multiple subsidies available under state and federal law. The investor sells electricity generated from the facilities to its customer, who is the owner or occupant of the premises on which the facilities are located. The customer, in turn, enters into a net-metering agreement with an electric utility, using the electricity from the solar facilities to offset some of the load it would otherwise purchase from the electric utility. This arrangement makes the development of solar power affordable for both the investor and the customer. The structure also makes solar power more affordable for certain entities that cannot themselves take advantage of tax credits, such as governmental and non-profit entities.

While we have issued a fairly long list of questions to address in this proceeding, we believe the petition before us involves two key issues: (1) whether the customer under the Assumed Facts is able to take advantage of Oregon's net-metering laws, and (2) whether the third-party investor's sale of electricity to the customer subjects the investor to regulation by the Commission.

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[2] Opening briefs were filed by the Commission Staff (Staff), ODOT, PGE, Energy Trust, OPUD, Pacific Power, Interstate Renewable Energy Council, Honeywell, The League, and a joint opening brief was filed by RNP, BacGen Solar Group, CUB, Environment Oregon, NRDC, Gerding Edlen Sustainable Solutions, OSEIA, Commercial Solar Ventures, and SunEnergy Power Corporation (the "Joint Renewables").

[3] Reply briefs were filed by Staff, ODOT, PGE, Energy Trust, OPUD, Pacific Power, Interstate Renewable Energy Council, Honeywell, The League, ODOE, and the Joint Renewables.

III. ASSUMED FACTS

We base our declaratory ruling on the following Assumed Facts:

1. Honeywell offers solar Energy Services Agreements (ESAs) to customers in Oregon. Honeywell has executed ESAs with the City of Hillsboro (100 kW); Lewis & Clark College (100 kW); City of Pendleton I (100 kW); City of Pendleton II (200 kW); and Mt. Hood Community College (100 kW). These customers currently receive most or all of their electricity service from either Pacific Power or PGE.

2. Under an ESA, Honeywell finances, builds, and operates a solar photovoltaic facility that generates electricity using solar power and is located on a customer's premises, such as a roof or vacant land. The facility can operate in parallel with an electric utility's existing transmission and distribution facilities and is intended primarily to offset part or all of the customer's requirements for electricity. Depending on the particular project with the above-identified customers, these solar facilities generate between 0.5 percent and 18 percent of the annual electricity used by the customer at the project served by the solar facility.

3. At all times during the term of the ESA, the facility is fully owned by Honeywell. Honeywell is responsible for operating, maintaining, and monitoring the facility and bills the customer monthly for all the actual kilowatt-hours of electricity generated. Honeywell does not provide any ancillary services to the customer.

4. The customer provides its premises for the facility and is responsible for providing physical security. The customer, in addition to Honeywell, monitors the operation of the facility, including its power output.

5. The customer purchases all of the electricity generated by the facility at agreed-upon rates with Honeywell, which may be comparable to the electric utility's retail tail block rate. The customer pays only for the power produced by the facility.

6. Coincident with the ESA, the customer enters into a net-metering agreement with its electric utility. All of the electricity purchased by the customer from Honeywell is provided on the customer side of the meter. Energy produced by the solar facility that is consumed onsite reduces the energy provided to the customer by the utility. Energy in excess of concurrent loads at the site is supplied to the utility distribution system and is credited against energy consumed by the site when loads are more than that produced by the solar energy facility (e.g., at night). The customer is not paid for any annual surplus energy. Any annual surplus is credited to the utility's low income assistance program as per administrative rules governing net metering.

7. Under the terms of the ESA, Honeywell is entitled to all incentives associated with the facility, including the Federal Income Tax Credits and accelerated

depreciation, the Oregon Business Energy Tax Credit (either directly or using the pass-through), and any other available incentives, such as those provided by the Energy Trust.

8. Pacific Power is a public utility that is subject to state and federal regulation. Pacific Power must offer net metering service to qualifying Oregon retail customers pursuant ORS 757.300. Pacific Power must also make direct access available to non-residential customers. Pacific Power offers other rates, such as standby and partial requirements rates, that may be applicable to customers. Further, Pacific Power must maintain resource plans, which identify the projected amounts of capacity and energy required to service the projected needs of Oregon customers that Pacific Power is obligated to serve.

9. All Pacific Power customers pay a public purpose charge for cost-effective conservation, new market transformation, and for constructing and operating certain new renewable energy resources. All of the renewable energy funds, not subject to self-direction, are administered by the Energy Trust. Customers owning and installing net-metering facilities frequently seek grants from the Energy Trust.

IV. ISSUES PRESENTED

The parties have identified a number of issues for Commission declaration. We organize our discussion based on the ALJ's grouping of those issues into five categories.

Issue 1: Net Metering.

The general issue presented with respect to net metering is whether a utility customer who signs an ESA with Honeywell under the Assumed Facts is entitled to take advantage of net metering under Oregon law. We find that such a customer is entitled to utilize net metering, a conclusion that not only comports with the text of ORS 757.300, Oregon's net-metering statute, but also serves to effectuate the Legislature's stated policy of encouraging the development of renewable energy projects. We address each of the questions raised in turn.

(1) Is a facility that Honeywell provides as described above a "net-metering facility" under ORS 757.300(1)(d)?

ORS 757.300(1)(d) states as follows:

> 'Net metering facility' means a facility for the production of electrical energy that:

> (A) Generates electricity using solar power, wind power, fuel cells, hydroelectric power, landfill gas, digester gas, waste, dedicated energy crops available on a renewable basis or low-emission, nontoxic biomass based on solid organic fuels from wood, forest or field residues;
> (B) Is located on the customer-generator's premises;
> (C) Can operate in parallel with an electric utility's existing transmission and distribution facilities; and
> (D) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

Positions of the Parties. All parties agree that a facility that Honeywell provides under the Assumed Facts is a "net-metering facility" under ORS 757.300(1)(d).

Resolution. We agree with the parties that a facility provided by Honeywell under the Assumed Facts is a "net-metering facility" under ORS 757.300(1)(d).

Where there is no ambiguity with respect to a statutory definition, the plain language of the statute controls. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611-12 (1993). In this case, the statutory definition of a "net-metering facility" is straightforward, and the Honeywell facility described in the Assumed Facts meets each of the criteria required by statute. The Honeywell facility: (1) generates electricity using solar power; (2) is located on the customer-generator's premises; (3) can operate in parallel with an electric utility's existing transmission and distribution facilities; and (4) is intended primarily to offset part or all of the customer-generator's requirements for electricity. The facility thus meets the definition of a "net-metering" facility under ORS 757.300(1)(d).

(2) Is Honeywell's customer as described above a "customer-generator" under ORS 757.300(1)(a)?

ORS 757.300(1)(a) states as follows:

> (1) As used in this section:
> (a) 'Customer-generator' means a user of a net metering facility.

Positions of the Parties. All parties except Pacific Power agree that Honeywell's customer, as described in the Assumed Facts, is a "customer-generator" under ORS 757.300(1)(a). These parties reason that a "customer-generator," under the statutory definition of that term, need only be a "user" of a net-metering facility. They contend that a customer under the Assumed Facts "uses" a net-metering facility by purchasing all of the electricity generated by the facility to offset the customer's electricity requirements.

Pacific Power argues, however, that the Legislature's choice of the term "customer-generator" creates some uncertainty about whether a customer under the Assumed Facts is a "customer-generator" for purposes of ORS 757.300(1)(a). The company argues that the second-half of the hyphenated term, the word "generator," cannot be separated from the word "customer" and must be given independent meaning. According to Pacific Power, a "generator" "takes no retail electric service from a regulated utility—only end-use customers take retail electric service."[4] Thus, Pacific Power argues, the Commission must determine the significance of the word "generator" in the term "customer-generator." Pacific Power suggests that, under this analysis, a customer might not qualify for net metering unless that customer *is* a generator or has an ownership or leasehold interest in a generation facility.

Resolution. We disagree with Pacific Power that we must read into the definition of "customer-generator" a requirement that a customer-generator be a generator or have an ownership or leasehold interest in generation facilities. We conclude that, under the Assumed Facts, a Honeywell customer is a "customer-generator" as that term is defined in ORS 757.300(1)(a).

While it is generally true, as Pacific Power asserts, that each word in a statute must be given meaning, we begin any statutory analysis by giving the terms in a statute the definitions that are expressly supplied by the Legislature. *See State v. Couch*, 341 Or 610, 619 (2006). As the Oregon Supreme Court has explained, a term in a statute "means whatever the legislature says that it means," and we are thus obliged to apply the Legislature's definitions. *Id*. at 619 (*citing Enertrol Pwr. Monitoring Corp. v. State*, 314 Or 78, 84 (1992)).

In this case, the Legislature has explicitly defined the hyphenated term "customer-generator" to mean "a user of a net-metering facility." Given this explicit statutory definition, Pacific Power's assertion that we must define the term "customer-generator" by reference to the word "generator" is misplaced. The term has been clearly defined, and under Oregon law we may not insert terms into a statute that the Legislature has not. *See* ORS 174.010. The Legislature's definition is straightforward, and our analysis thus focuses on the issue of whether a customer under the Assumed Facts is a "user" of a net-metering facility.

Having concluded that the generating facility at issue is a "net-metering facility," we have no trouble concluding that a customer under the Assumed Facts is a "user" of that facility. Under the Assumed Facts, a Honeywell customer uses the electricity generated by Honeywell's solar facility to offset part, or all, of its requirements for electricity. The customer also uses any excess power generated by the facility as credit against electricity purchased from the utility when the customer's electricity needs exceed the output of the solar facility. These facts support a finding that the customer is a "user" of the generating facility.

[4] Pacific Power Opening Brief, at 8.

(3) Does ORS 757.300 require a customer to own a net-metering facility or a portion of the facility to be considered a "customer-generator"?

(4) Does ORS 757.300 place any limitations on third-party ownership of net-metering facilities?

We address these questions together.

Positions of the Parties. The parties agree that ORS 757.300 imposes no express ownership limitations or restrictions on net-metering facilities. Most parties argue that, given the Legislature's omission of ownership restrictions, it would be inappropriate to impose such limitations here. Staff points out that third-party ownership is necessary to the viability of many renewables projects and urges the Commission to allow third-party ownership to effectuate State policy in favor of encouraging the development of renewable energy projects. According to Staff, the Commission should not be concerned that allowing third-party ownership would result in "too much" net metering, because the Commission retains authority to oversee the proliferation of net metering after a statutory threshold for net metering has been met.[5] The Energy Trust notes that although the Commission presumably has authority to impose ownership requirements, none currently exist.

Pacific Power acknowledges that neither ORS 757.300 nor Commission rules contain language restricting ownership of a net-metering facility, but suggests that the law on the issue is nevertheless unclear. Pacific Power states that it previously asked the Commission to adopt rules addressing the situation where the owner and user of a net-metering facility are two different entities,[6] but the Commission declined to do so.[7] The company notes that it is willing to request waivers of the net-metering rules when necessary to accommodate net-metering facilities with separate owners and users, and suggests that it would be most efficient for the Commission to clarify its rules or grant a blanket waiver in this proceeding.

Resolution. We conclude that a customer is not required to own a net-metering facility or a portion of the facility to be considered a "customer-generator"

[5] ORS 757.300(6) provides that:

> The commission . . . may not limit the cumulative generating capacity of solar, wind, fuel cell and microhydroelectric net metering systems to less than one-half of one percent of a utility's . . . historic single-hour peak load. After a cumulative limit of one-half of one percent has been reached, the obligation of a public utility . . . to offer net metering to a new customer-generator may be limited by the commission . . . in order to balance the interests of retail customers.

[6] Citing to Pacific Power Comments, docket AR 515, May 9, 2008, at 5.

[7] *See* Order No. 07-319 at 5-7.

under ORS 757.300. We also conclude neither the statute itself nor existing Commission rules place any limitations on third-party ownership of net-metering facilities. As a result, we find it unnecessary to grant the blanket waiver suggested by Pacific Power.

The text of a statute is the best evidence of the Legislature's intent. *PGE*, 317 Or at 610. In interpreting a statute, we may neither insert what the Legislature omitted, nor omit what the Legislature inserted. *Id.* at 611; ORS 174.010. In this case, ORS 757.300 contains no express requirement that a customer must own a net-metering facility to be considered a customer-generator. Nor does it contain any express ownership limitations or restrictions with respect to ownership of net-metering facilities. The Legislature's silence on the point of ownership suggests that the Legislature chose not to regulate the ownership of the facility. As ODOT points out, the many Oregon statutes that deal with the concept of ownership demonstrate that when the Legislature wants to specify or regulate ownership, it knows how to do so.[8]

Moreover, the Legislature's choice of words when it defined "customer-generator" should be persuasive concerning the issue of ownership. In ORS 757.300(1)(a), the Legislature defined a customer-generator as a "user," of a net-metering facility, rather than an "owner." The statutory provision defining a net-metering facility describes the facility with reference to its location, rather than by reference to who may have some form of property interest in the facility. ORS 757.300(1)(d)(B) states:

> (d) 'Net metering facility' means a facility for the production of electrical energy that:
>
> (B) Is located on the customer generator's premises.

Like the applicable statutes, the Commission's rules addressing net metering, OAR 860, Division 39, are silent with respect to the issue of ownership of net-metering facilities. We reserve the question, not presented here, of whether the Commission has authority to impose ownership requirements on net-metering facilities in the future. But at this time, we find that neither the relevant statutes nor rules limit ownership of net-metering facilities.

(5) Who is responsible for the costs of installing the metering arrangement for a facility provided by Honeywell?

Positions of the Parties. The answer to this question depends on whether a Honeywell customer is entitled to take advantage of net metering. If a Honeywell customer is entitled to take advantage of net metering, the parties agree that the net-metering rules answer this question. If not, the question presents some uncertainty.

[8] *See, e.g.*, ORS 758.505(2)(b) ("'Cogeneration facility' means a facility that: . . . [i]s more than 50 percent owned by a person who is not an electric utility, and electric holding company, an affiliated interest or any combination thereof.").

Resolution. Because we have determined that the Honeywell customer described in the Assumed Facts is entitled to take advantage of net metering, we agree with the parties that the net-metering rules address the issue of cost responsibility for metering. ORS 757.300(2)(a) states that an electric utility "[s]hall allow net metering facilities to be interconnected using a standard meter that is capable of registering the flow of electricity in two directions." OAR 860-039-0020(5) states that the utility is responsible for the cost of installing this standard meter. Consequently, under the Assumed Facts and existing law, Pacific Power is responsible for the costs of installing the standard meter required by a Honeywell customer for net-metering purposes.

We note, however, that this conclusion applies only to the interconnection between the customer-generator and the utility. Any additional meter required to interconnect Honeywell's solar facility to the customer's premises should be borne by Honeywell and the customer, in whatever manner Honeywell and the customer determine.

Issue 2: Transaction Between Honeywell and Customer.

Pacific Power has expressed concern that certain portions of the transactions described in the Assumed Facts may be within the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC). The Federal Power Act (FPA) gives FERC exclusive jurisdiction over sales of electric energy for resale in interstate commerce. *See* 16 U.S.C. §§ 824(b), (d). Pacific Power's questions, which focus generally on whether a transaction under the Assumed Facts is a sale of electric energy for resale, are as follows:

(1) If the customer does not qualify for net metering under ORS 757.300, is the transaction between Honeywell and the customer considered a retail sale?

(2) If the customer does qualify for net metering under ORS 757.300, does a portion of the transaction between the customer and Honeywell become a sale for resale (i.e., the energy that the customer buys from Honeywell that is delivered to the utility)?

(3) If some portion of the transaction between Honeywell and the customer is a sale for resale, what authority do the state and the Commission have over that sale for resale?

(4) If some portion of the transaction between Honeywell and the customer is not a sale for resale, what is the source of the energy being delivered to the grid to qualify for net metering?

The Commission's authority to issue declaratory rulings is found in ORS 756.450. That statute states as follows:

> On petition of any interested person, the Public Utility Commission may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute *enforceable by the commission.* (Emphasis added.)

During the prehearing conference in this matter, the ALJ struck certain questions contained in the joint petition addressing the applicability of the FPA to the transactions at issue because the FPA is not a statute "enforceable by the commission." Although the ALJ included the above-cited questions in his streamlined version of the issues to be addressed, we conclude that these also relate to the applicability of federal law and decline to address them.

We note, however, that the most recent FERC pronouncement on the issue suggests that FERC would be unlikely to assert jurisdiction over the transactions described in the Assumed Facts. *In re Mid-America Company*, 94 FERC ¶ 61,340, 62,263 (2001), FERC held that no "sale" occurs under the FPA when an entity installs generation and "accounts for its dealings with the utility through the practice of netting." If a state net-metering transaction is not itself a "sale" under federal law, then a sale of electricity from Honeywell to a customer would appear unlikely to be a "sale for resale."

Issue 3: Electric Service Suppliers/Utilities.

(1) Does Honeywell offer "electricity services available pursuant to direct access to more than one retail electricity consumer" under ORS 757.600(16)?

(2) If Honeywell sells electricity directly to the customer, but does not offer any ancillary services for purchase, does Honeywell's service constitute "direct access" under ORS 757.600?

These questions focus on whether Honeywell, under the Assumed Facts, is an "electricity service supplier" (ESS) subject to regulation by the Commission. If so, Honeywell must comply with various requirements found in Oregon's direct-access legislation and Commission rules.[9]

ORS 757.600(16) defines "Electricity service supplier" as:

> . . . a person or entity that offers to sell electricity services available pursuant to direct access to more than one retail electricity consumer.

[9] ORS 757.600 through 757.689 (direct-access legislation); OAR 860, Division 038 (Commission rules addressing direct access).

ORS 757.600(6) defines "Direct access" as:

> . . . the ability of a retail electricity consumer to purchase electricity and certain ancillary services, as determined by the commission . . . directly from an entity other than the distribution utility.

Because our analysis focuses on the term "direct access," as that term is used in ORS 757.600(16), we answer these two questions together.

Positions of the Parties. With the exception of Pacific Power, the parties agree that under the Assumed Facts and relevant statutory provisions, Honeywell should not be considered an ESS.

Honeywell argues that it cannot be an ESS because it does not offer electricity services available pursuant to "direct access" under ORS 757.600(16). "Direct access," it argues, means the ability of a retail electricity consumer to purchase electricity *and* ancillary services from the seller. Because it does not offer ancillary services, Honeywell argues, it cannot be an ESS. Honeywell contends that this interpretation of the term "direct access," comports not only with the text of ORS 757.600(16) and 757.600(6), but also with the background and purpose of direct-access regulation. RNP makes similar arguments.

Staff and ODOT initially declined to give the word "and" such weight in their statutory interpretation, concluding that Honeywell was an ESS because it offered electricity services directly to its customers. In their reply briefs, however, Staff and ODOT change this conclusion. In the end, they agree with Honeywell that it is inappropriate to disregard the word "and" in the statutory definition of "direct access," and that this is particularly true in light of the context and background of Oregon's direct-access legislation. In short, Staff and ODOT ultimately conclude that because Honeywell does not offer any "ancillary services," it cannot be an ESS.

PGE makes a somewhat different point, contending that a critical feature of direct-access legislation is that it allows alternative electricity suppliers access to a utility's distribution system. Because Honeywell's facilities are entirely on the customer's side of the meter and do not utilize the utility's distribution system to deliver electricity to the customer, PGE reasons, Honeywell should not be considered an ESS. PGE notes, however, that on this point ORS 757.600 is not as clear as it could be.

In contrast to the other parties, Pacific Power contends that Honeywell may, in fact, be an ESS. Pacific Power disputes that an electricity seller must offer both electricity *and* ancillary services in order to be an ESS, and thus argues that Honeywell's failure to offer ancillary services to its customers is not a dispositive fact in analyzing Honeywell's status.

Resolution. We conclude that Honeywell is not an ESS because it does not offer "electricity services available pursuant to direct access to more than one retail electricity consumer," under ORS 757.600(16).

As explained above, our goal in construing a statute is to give effect to the Legislature's intent. ORS 174.020; *PGE*, 317 Or at 610. The starting point for this analysis is the text of the statutory provision itself. *Id.* In construing a statute, effect should be given to every word, if possible. *See, e.g., Sanders v. Oregon Pacific States Ins. Co.*, 314 Or 521, 527 (1992).

Applying these rules, we conclude that Honeywell is not an ESS. Under ORS 757.600(16), a party is not an ESS unless it "offers to sell electricity services available *pursuant to direct access* to more than one retail electricity consumer." ORS 757.600(16). (Emphasis added.) "Direct access," is defined as "the ability of a retail electricity consumer to purchase electricity *and* certain ancillary services . . . directly from an entity other than the distribution utility." ORS 757.600(6). (Emphasis added.) Because Honeywell offers no ancillary services, and because, as we will explain, it has no need for ancillary services, it is not an ESS.

We may not simply ignore the Legislature's use of the word "and" in ORS 757.600(6). Nor may we construe the words "electricity" and "ancillary services" to be merely alternative possibilities. As the Oregon Supreme Court has noted, "the words 'and' and 'or,' as used in statutes, are not interchangeable, being strictly of a conjunctive or disjunctive nature, and their ordinary meaning will be followed if it does not render the sense of the statute dubious or circumvent the legislative intent." *Lommasson v. School Dist. No. 1*, 201 Or 71, 79 (1953), *adhered to in part on reh'g*, 201 Or 70, 91 (1954). *See also McCabe v. State*, 314 Or 605, 610-611 (1992) (court should not reverse the meaning of words "and" and "or").

Construing ORS 757.600(16) to require an ESS to offer both electricity and ancillary services not only gives effect to the words of the statute, but it also makes sense within the context of direct-access legislation and the policy and purposes underlying that legislation. *See PGE*, 317 Or at 611 (in interpreting statute, court must consider context of statutory provision at issue, including other provisions of same statute and other related statutes).

Oregon's direct-access legislation, passed in 1999, was intended to allow new electricity sellers, called ESSs, to compete with electric utilities for retail electricity customers. In order to compete with electric utilities, however, the new electricity sellers needed a way to deliver electricity to those customers. Consequently, ORS 757.632 requires utilities to provide ESSs with non-discriminatory access to the utilities' existing distribution systems.[10] ORS 757.632 states, in relevant part, as follows:

[10] "Distribution" means "the delivery of electricity to retail electricity consumers through a distribution system consisting of local area power poles, transformers, conductors, meters, substations and other

> Every electricity service supplier is *authorized to use the distribution facilities of an electric company* on a nondiscriminatory basis after the retail electricity consumers of the electricity service supplier are afforded direct access pursuant to ORS 757.601. (Emphasis added.)

ORS 757.637(1), (2) states that, to the extent permissible under federal law, the Commission is required to ensure that an electric company that offers direct access:

> [p]rovides electricity service suppliers and retail electricity consumers *access to its transmission facilities and distribution system* comparable to that provided for its own use; and . . . timely access to *information about its transmission facilities and distribution system*, metering and loads comparable to that provided to its own nondistribution divisions, affiliates and related parties. (Emphasis added.)

This feature of direct access, the ESS's use of a utility's distribution system for the delivery of power to retail customers, is a critical component of direct access.

Additional provisions throughout the direct-access legislation reflect the understanding that an ESS will utilize a utility's distribution system to deliver electricity to its retail customers. For example, ORS 757.649 contains both certification requirements for ESSs and a requirement that an electric utility "maintain the integrity of its transmission facilities and distribution system and provide safe, reliable service to all retail electricity consumers." ORS 757.649(1), (2). The implication is that an ESS will deliver electricity over that system. ORS 757.649(5) requires the distribution utility to provide a consolidated bill for electricity services provided by various ESSs to the customer, unless the customer requests otherwise. This default rule indicates that the ESS delivers electricity over the utility's system.

Because direct-access legislation presumes that an ESS will use the utility's distribution system, it is not surprising that the Legislature would require an ESS to provide the ancillary services necessary to support its use of that system. Ancillary services are critical to the operation of the electric grid. ORS 757.600(2) defines "ancillary services" as:

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equipment." ORS 757.600(8). "Distribution utility" means "an electric utility that owns and operates a distribution system connecting the transmission grid to the retail electricity consumer." ORS 757.600(9).

> . . . services necessary or incidental to the transmission and delivery of electricity from generating facilities to retail electricity consumers, including but not limited to scheduling, load shaping, reactive power, voltage control and energy balancing services.

Each of the services listed in the statute is directly related to the management of electric power delivered through the transmission and distribution grid.

Like the direct-access statutes, the Commission's direct-access rules reflect the understanding that an ESS must provide not only electricity, but also the ancillary services to support the delivery of that electricity. For example, OAR 860-038-0410 requires every certified ESS to schedule the transmission and distribution resources needed to handle the delivery of loads for which it is responsible. The ESS can meet this obligation either by designating itself a "scheduling ESS," in which case it handles the scheduling itself; or by designating itself as a "nonscheduling ESS," in which case it must contract with a third party to provide scheduling services. As ORS 757.600(2) states, "scheduling" is a type of ancillary service, and the Commission requires that every ESS provide it.

In summary, both the text and context of direct-access legislation support the conclusion that an electricity seller must provide both electricity and ancillary services in order to provide "direct access" under ORS 757.600(16). Under the Assumed Facts, Honeywell does not provide ancillary services. Honeywell facilities are connected on the customer's side of the meter; Honeywell does not use the utility's distribution system, and Honeywell has no need for ancillary services.[11] We conclude that Honeywell is not an ESS.

(3) Is Honeywell a "public utility" as defined in ORS 757.005(1)?

ORS 757.005(1) states, in relevant part, as follows:

> (1)(a) As used in this chapter, except as provided in paragraph (b) of this subsection, "public utility" means:
>
> (A) Any corporation, company, individual, association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the production, transmission, delivery or furnishing of heat, light, water or power, directly or indirectly to or for the public, whether or not such plant or equipment or part thereof is wholly within any town or city.

[11] We note as well that the net-metering statutes in ORS 757.300 make no reference to ancillary services.

> [. . .]
>
> (b) As used in this chapter, *"public utility" does not include*:
>
> [. . .]
>
> (C) Any corporation, company, individual or association of individuals providing heat, light or power:
>
> [. . .]
>
> (iii) *From solar or wind resources* to any number of customers.
> (Emphasis added.)

Positions of the Parties. The parties agree that Honeywell is not a "public utility" under ORS 757.005(1).

Resolution. Under the Assumed Facts, Honeywell owns and operates a solar photovoltaic facility that generates electricity using solar power. Because ORS 757.005(1)(b)(C)(iii) explicitly exempts from the definition of "public utility" any company providing "power . . . [f]rom solar or wind resources," Honeywell is not a "public utility" under Oregon law.

(4) Is Honeywell required to serve 100 percent of the customer's load?

Positions of the Parties. With the exception of Pacific Power, the parties agree that Honeywell has no obligation to serve 100 percent of the customer's load.[12]

Pacific Power agrees that Honeywell is not a public utility and thus has no statutory obligation to serve customers. It argues, however, that if Honeywell is an ESS, it has an obligation under Pacific Power's existing tariffs to serve 100 percent of a customer's load.[13]

[12] The parties note that if Honeywell were a "public utility," it would have the legal duty to serve its customers. *See* ORS 757.020 (public utility has a statutory obligation to furnish adequate and safe service); ORS 757.603 (public utility must provide all retail electricity consumers connected to its distribution system with a regulated, cost-of-service rate option for service).

[13] Pacific Power explains that its direct-access tariff does not allow a customer to split load between Pacific Power and a chosen ESS. Pacific Power Opening Brief at 16 (citing to Pacific Power & Light Company Oregon Rule 21, Section I.C). Staff initially agreed with Pacific Power than Honeywell was an ESS, and recommended that Pacific Power's direct-access tariff be modified to allow Honeywell to provide a customer with only part of the customer's electricity needs. Because we have concluded that Honeywell is not an ESS, however, we find it unnecessary to address this issue.

Resolution. We conclude that, under the Assumed Facts, Honeywell is not required to serve 100 percent of a customer's load. Because Honeywell is not a public utility, it has no statutory service obligations under ORS 757.020. Because we have concluded that Honeywell is not an ESS, utility tariffs that may prohibit the splitting of load between the utility and an ESS are inapplicable.

Moreover, ORS 757.300(1)(d)(D) makes clear that net-metering facilities are intended to offset "part or all" of the customer's electricity requirements. Because net-metering facilities can be permissibly used to offset "part" of a customer's requirements for electricity, the facilities need not offset 100 percent of those requirements.

(5) Is the utility required to sell electricity to the customer for any portion of load not served by Honeywell? If so, what rates apply to the portion of the customer's load not served by Honeywell?

(6) Is the utility required to sell electricity to the customer for the customer's total load when the Honeywell facility is not generating electricity? If so, should the customer be placed on a partial requirements rate schedule?

We address these questions together.

Positions of the Parties. With the exception of Pacific Power, the parties who briefed this issue agree that Honeywell is neither a public utility nor an ESS, so it has no obligation under Oregon law or utility tariffs to supply a customer with any particular percentage of its electricity needs. They argue that Pacific Power has a statutory duty to serve its customers, including net-metering customers, and thus is required to serve any portion of the customer's load that is not met by the net-metering facilities on the customer's premises.

These parties further agree that a customer under the Assumed Facts should take electricity on the same utility rate schedule that would apply to the customer in the absence of a net-metering agreement. Putting the customer on a partial requirements rate schedule, they argue, would be inappropriate.

Pacific Power, by contrast, focuses on various scenarios that would result if Honeywell were deemed to be an ESS.

Resolution. Because we have concluded that Honeywell is not an ESS and that the Honeywell facilities are properly considered "net-metering facilities," the resolution of these issues is straightforward.[14] A public utility has an obligation to serve its customers. *See* ORS 757.020; 757.603. No statute or rule exempts a utility from serving its net-metering customers. Thus, under the Assumed Facts, the utility is required to sell electricity to the customer for any portion of load not served by Honeywell.

The appropriate rate schedule is the rate schedule for which the customer would be eligible absent a net-metering agreement. A customer's decision to enter into a net-metering agreement should not affect the rate schedule under which the customer would otherwise receive service from the electric utility.

(7) In its Integrated Resource Plan (IRP), is the utility required to plan to serve the portion of the customer's load not served by Honeywell?

Positions of the Parties. As with other questions, there is little dissent on this issue once certain threshold issues have been addressed. Staff, Honeywell, RNP, PGE, and the Energy Trust agree that, if the customer is entitled to take advantage of net metering, the utility must plan to serve that customer in the same manner that it plans to serve other retail customers. Thus, they contend that the utility must plan in its IRP to serve any portion of the customer's load not served by Honeywell. Pacific Power states that it needs clarification on the issue of whether Honeywell is an ESS before it can answer this question.

Resolution. Because we have concluded that Honeywell is not an ESS, and that the Honeywell facilities are properly considered "net-metering facilities," we conclude that the utility is required in its IRP to treat a customer under the Assumed Facts the same way it would any other net-metering customer. Under existing Commission policy, the utility is required in its IRP to plan to serve its customer load. *See* Orders No. 89-507 (establishing Least Cost Planning in Oregon) and No. 07-002 (providing guidelines for Integrated Resource Plans) (corrected by Order No. 07-047).

(8) Does the utility have an obligation to determine who owns generation facilities installed on the customer's side of the meter?

Positions of the Parties. The parties who briefed this question agree that no statute or rule addresses this issue. Honeywell and PGE contend that ownership of the generation facilities is irrelevant because the utility's relationship is with its customer,

[14] The questions in this section would appear to present more difficult issues if Honeywell were deemed to be an ESS. For example, if Honeywell were an ESS, it would presumably be required under Pacific Power's tariffs to provide the customer with 100 percent of its electricity needs. Under the Assumed Facts, however, Honeywell's facilities provide only enough electricity to meet a small fraction of the customer's load. If Honeywell were an ESS, then, the Commission would need to determine whether this arrangement were appropriate and, if so, how the remainder of the customer's electricity needs should be met. We find it unnecessary to address these issues here.

rather than with a third party like Honeywell. They point out that net-metering facilities must meet certain system and safety requirements, but that the utility can address these issues through contracts and tariffs applicable to the customer. Pacific Power contends that everything on the customer's side of the meter should be the responsibility of the customer and Honeywell.

Resolution. The parties have pointed to no authority under Oregon law, and we have found none, that suggests a utility has an obligation to determine who owns generation facilities installed on the customer's side of the meter.

We agree with Pacific Power that, as a general matter, a utility is not responsible for generating facilities installed on the customer's side of the meter. The utility must, however, ensure that the utility complies with all applicable statutes and Commission rules governing net metering.[15]

Issue 4: Credits.

(1) Does OAR 860, Division 39, apply when a facility is receiving three other subsidy mechanisms for the same facility (federal tax credit, state tax credit, and Energy Trust funding)?

Positions of the Parties. All parties who briefed this issue agree that OAR 860, Division 39, the Commission's net-metering rules, apply even when a net-metering facility is receiving multiple credits or subsidies. The Energy Trust adds that the availability of all of these credits is important to the emerging market for renewable energy.

Resolution. We agree that under the Assumed Facts, OAR 860, Division 39, apply even when a net-metering facility is receiving multiple state and federal credits or subsidies. Nothing in the net-metering statutes or rules suggests that a facility taking advantage of multiple subsidies is excluded from the ordinary application of the net-metering rules.

(2) Who is entitled to any renewable energy credits (RECs) associated with the output of the facility if the customer qualifies for net metering?

Positions of the Parties. With the exception of Pacific Power, the parties agree that the owner of a net-metering facility (here, Honeywell) is entitled to any RECs associated with the output of the facility, citing Order No. 05-1229. PGE and the Energy Trust add that, although the owner of a net-metering facility is the default owner of RECs, the owner may agree to transfer ownership of the RECs via contract. PGE, RNP, and the Energy Trust explain that the Energy Trust generally requires parties who receive

[15] For example, certain safety, reliability, and other requirements apply to net-metering facilities. *See, e.g.*, ORS 757.300(4)(a) (establishing safety testing and performance requirements for net-metering facilities).

Energy Trust incentives to transfer to the Energy Trust certain credits associated with the output of the facility.

Pacific Power agrees that the owner of the facility is generally entitled to any RECs associated with the output of the facility. It argues, however, that where the utility is paying more than Public Utility Regulatory Policies Act (PURPA) avoided cost for power, the excess payment arguably represents the value of the RECs. In that case, Pacific Power argues, the RECs should go to the utility's customers.

Resolution. We conclude that, under the Assumed Facts, the owner of a net-metering facility (here, Honeywell) is entitled to any RECs associated with the output of the facility. As we stated in Order No. 05-1229, "absent a clause providing otherwise, contracts to purchase renewable electricity do not transfer the green tags [RECs] associated with the purchased electricity." Order No. 05-1229 at 8.

This general policy, that the owner of a renewable generating facility is entitled to retain the RECs associated with the output of the facility, is reflected in OAR 860-022-0075(2)(a), which states, in relevant part, as follows:

> (2) Unless otherwise agreed to by separate contract, the owner of the renewable energy facility retains ownership of the non-energy attributes associated with electricity the facility generates and sells to an electric company pursuant to:
> (a) The provisions of a net metering tariff . . . .

While this rule does not apply precisely to the situation in the Assumed Facts, as it assumes that the owner of a renewable energy facility sells electricity directly "to an electric company," rather than to the utility customer, it reflects the default rule that the owner of a renewable energy facility retains ownership of any associated RECs unless it chooses to transfer those RECs via contract. *See* Order No. 05-1229 at 8.

We decline to address Pacific Power's assertion that a utility should be entitled to the RECs if it pays more than PURPA avoided cost for renewable energy, as we find this issue to be outside the scope of this proceeding.[16]

[16] Pacific Power raised this same argument in docket AR 495, the rulemaking proceeding in which OAR 860-022-0075 was adopted. *See* Order No. 05-1229 at 4-5. In that proceeding, the Commission rejected Pacific Power's argument requesting utility ownership of RECs under certain circumstances, and we find it inappropriate to revisit that issue here.

Issue 5: Similarly Situated Businesses.

Would the Commission's answer to any of the questions above differ if:

(1) The customer and third-party provider of a facility create a separate entity for each project, under which the third-party provider and customer share ownership of the facility?

Positions of the Parties. Honeywell states that this type of arrangement might, in theory, eliminate one element of ORS 757.600(16), which states that an ESS is a person or entity that "offers to sell electricity services available pursuant to direct access *to more than one retail electricity consumer*." (Emphasis added.) By creating a separate entity for each project, Honeywell notes, it could ensure that each separate legal entity would offer electricity services to only a single retail customer, thereby ensuring that it did not fall within the statutory definition of an ESS. The other parties who briefed this issue do not appear to disagree with this assertion, although some, like RNP, state that this new factual scenario would simply make no difference to the Commission's answers because Honeywell is not an ESS under the Assumed Facts.

Resolution. We agree that, under this scenario, the separate legal entity created for each project would not be offering electricity to "more than one retail electricity consumer," and thus would not be an ESS under ORS 757.600(16). Because we have already concluded that Honeywell is not an ESS, however, this scenario would not change the Commission's answer to any of the prior questions.

(2) The third-party provider uses outside sources, such as a bank or finance company, to finance the project?

Positions of the Parties. The parties appear to agree that the source of financing for a project is irrelevant to the issues presented in the petition.

Resolution. We conclude that the use of a third-party provider, such as a bank or finance company, to finance the project would have no impact on the issues addressed in this proceeding. The parties have pointed to no authority, nor are we aware of any, that places any significance on a solar net-metering project's source of financing.

(3) The facility uses a net-metering eligible fuel other than solar?

Positions of the Parties. There is little dispute on this issue. The parties who addressed this question agree that the Commission's conclusions under the Assumed Facts have the potential to change if the generating facility uses a net-metering eligible fuel other than solar. Staff, Pacific Power, and PGE point out that ORS 757.300 allows a net-metering facility to generate electricity using a wide range of fuels, but that ORS 757.005(1)(b)(C)(iii) excludes a company providing electricity from the definition

of "public utility" only if it generates electric power from solar or wind resources.[17] Consequently, they contend, if a facility under the Assumed Facts uses a net-metering eligible fuel other than wind or solar, Honeywell would presumably become a "public utility" subject to regulation by the Commission.

Resolution. We agree with the parties that if Honeywell sells electricity from a facility that uses a net-metering eligible fuel other than solar or wind, it would presumably be a "public utility" subject to the Commission's regulation. ORS 757.005(1)(b)(C)(iii) explicitly exempts from the definition of "public utility" any company providing "power . . . [f]rom solar or wind resources," but provides this exemption for no other fuel sources.

Despite the narrow exemption found in ORS 757.005(1)(b)(C)(iii), the Legislature allows a net-metering facility to generate electricity using a wide range of fuels, including "solar power, wind power, fuel cells, hydroelectric power, landfill gas, digester gas, waste, dedicated energy crops available on a renewable basis or low-emission, nontoxic biomass based on solid organic fuels from wood, forest or field residues." ORS 757.300(d)(A).

Without a change in the existing legislation, it would appear that a net-metering facility that generates electricity from a resource other than solar or wind would not be able to take advantage of the business model described in the Assumed Facts without subjecting its owner to regulation by the Commission as a public utility.

(4) The facility uses a non net-metering eligible fuel?

Positions of the Parties. The parties who briefed this issue agree that the resolution of the issues presented in this proceeding would change if the generating facility under the Assumed Facts used a non net-metering eligible fuel. They agree that the customer under the Assumed Facts would cease to be a "customer-generator," and the generating facility would not be a "net-metering facility" under ORS 757.300.

Resolution. If the facility in the Assumed Facts were to use a non net-metering eligible fuel, the customer under the Assumed Facts would cease to be a "customer-generator," and the generating facility would not be a "net-metering facility" under ORS 757.300. Because this would so drastically change the business model types of contracts described in the Assumed Facts, we decline to speculate about the contracts, tariffs, or other agreements that might validly govern the parties' relationships under this alternative factual scenario.

[17] Staff also notes that generation facilities are exempted from the territorial allocation statutes if they generate electricity from a wind or solar resource. *See* ORS 758.450(4)(c).

(5) The customer leases the equipment from the third party rather than paying for the electricity it provides?

Positions of the Parties. The parties' position on this issue varies, it seems, depending on whether they assume that Honeywell is an ESS. If Honeywell is deemed to be an ESS under the Assumed Facts, Staff and Pacific Power suggest that the customer leasing the equipment from the third party, rather than paying for the electricity it provides, might alter our conclusion about Honeywell's ESS status. Honeywell, who argues that it is not an ESS, states that this new fact would be irrelevant to the analysis.

Resolution. The potential impact of this alternative factual scenario would seem to arise only if Honeywell were deemed to be an ESS under the Assumed Facts. Because we have found that Honeywell is not an ESS, this new scenario would not alter our resolution of the issues in the petition.

(6) The third-party provider is a registered ESS under ORS 757.600(16)?

Positions of the Parties. The parties who addressed this question are divided on whether this addition to the Assumed Facts would change the Commission's resolution of the issues in this proceeding. Pacific Power asserts that if the third-party provider is an ESS, the direct-access rules would apply to the third party. Honeywell disagrees, arguing that there is simply no direct-access transaction in the Assumed Facts, even if the third-party provider is a registered ESS. RNP contends that this assumption would depart so substantially from the Assumed Facts that it is difficult to formulate a response.

Resolution. We have determined that, based on the nature of the transactions in the Assumed Facts, Honeywell is not an ESS. Given this conclusion, it is not clear why Honeywell would choose to register as an ESS. So long as the key Assumed Facts remain the same—Honeywell connects net-metering facilities on the customer's side of the meter and offers the customer no ancillary services—Honeywell's registration as an ESS would appear to be unnecessary.

Other Issues.

Finally, OPUD asks us to clarify that this declaratory ruling is intended to bind only public utilities regulated by the Commission. Under ORS 756.450, this declaratory ruling "is binding between the commission and the petitioner on the state of facts alleged[.]"

ORDER

The Commission hereby grants Honeywell International, Inc., and Honeywell Global Finance, LLC, and PacifiCorp dba Pacific Power's petition for declaratory order, as discussed in the body of this order.

Made, entered, and effective JUL 31 2008.

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.