

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**
3 **UM 1121**

5 In the Matter of
6 OREGON ELECTRIC UTILITY COMPANY, LLC,
7 et al.,
8 Application for Authorization to Acquire Portland
9 General Electric Company

**APPLICANTS' RESPONSE TO
MOTION TO SUSPEND
PROCEEDINGS OR, IN THE
ALTERNATIVE, TO CONDITION
APPROVAL**

10 Oregon Electric Utility Company, LLC, *et al.* ("Applicants") respectfully submit this
11 response to the "Motion to Suspend Proceedings or, in the Alternative, to Condition Approval"
12 (the "Motion"), filed by Portland Building Owners and Managers Association ("BOMA") on
13 October 22, 2004.

14 **INTRODUCTION**

15 BOMA moves to suspend proceedings in this docket or, in the alternative, to obtain an
16 Order from the Commission that imposes certain conditions on the approval of Applicants'
17 proposed acquisition of Portland General Electric ("PGE"). BOMA asserts that the
18 Commission's deliberations potentially could be impacted by: (1) an alleged Oregon
19 Department of Justice ("ODOJ") investigation of the Texas Pacific Group ("TPG"); or (2) the
20 Securities Exchange Commission's (SEC's) review of this transaction under the Public Utility
21 Holding Company Act ("PUHCA"). BOMA's Motion should be rejected.

22 To be clear, *there is no pending ODOJ investigation of TPG*, but rather an investigation
23 to determine the facts surrounding Diana Goldschmidt's vote on an Oregon Investment Council
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1 (“OIC”) action taken October 29, 2003.¹ Indeed, the ODOJ has not suggested that TPG is
2 suspected of any wrongdoing, and TPG is confident that it did not act improperly. In short,
3 BOMA’s Motion is wholly inappropriate and will prejudice the Applicants if certified to the
4 Commission for its consideration.

5 The Administrative Law Judge (“ALJ”) has authority and reason to deny BOMA’s
6 Motion on the following specific grounds:

7 • The Motion is untimely. The Commission’s rules required that BOMA introduce
8 all evidence before the hearing record closed on October 21, 2004. If BOMA was concerned that
9 it have an opportunity to introduce the results of an alleged pending ODOJ investigation, it
10 should have requested that the hearing record be kept open. It did not. Accordingly, the ALJ
11 should reject BOMA’s motion as an untimely backdoor attempt to delay these proceedings and
12 influence the Commission with matters outside the record.

13 • The Motion lacks any basis in fact. BOMA seeks to suspend this entire
14 proceeding by asserting that TPG is the subject of “one or more investigations,” including, in
15 particular, an ODOJ investigation. That assertion is false. Neither TPG nor any Applicant has
16 been the focus of an ODOJ investigation. As explained below, BOMA’s Motion is grounded
17 entirely in speculation about what a broader investigation of Diana Goldschmidt and the OIC
18 might reveal.

19 • PUHCA Review Is Not Cause for Delay. The Commission never has suspended
20 proceedings in a Section 511 docket to await completion of an SEC review under PUHCA. Any
21 SEC ruling will have no impact on the Commission’s determination of whether it should approve
22 this transaction. Moreover, the SEC routinely refrains from completing a review of transactions
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25 ¹ TPG is cooperating with the ODOJ in this investigation. Mrs. Goldschmidt’s vote related to a TPG-
26 managed fund. See *Letter from Shepard to Edwards of 9/29/04, attached as Exhibit 1 to Declaration of James M. Barrett.*

1 until *after* an applicant obtains other regulatory approvals. There is no reason for this
2 Commission to attempt to force the SEC to act first.

3 BACKGROUND FACTS

4 BOMA's Motion is motivated primarily by concerns that an ODOJ review of facts
5 surrounding Diana Goldschmidt's vote on an OIC action taken October 29, 2003 could
6 potentially impact the Commission's deliberations in this proceeding. On September 29, 2004,
7 the ODOJ completed an initial review of Mrs. Goldschmidt's vote, and wrote a letter to the State
8 Treasurer incorporating its legal opinion and recommendations. *See Letter from Shepard to*
9 *Edwards of 9/29/04, at 2 (hereafter "AG Letter"), attached as Exhibit 1 to Declaration of James*
10 *M. Barrett (hereafter "Barrett Decl.>"). On October 1, 2004, State Senator Vicki L. Walker*
11 *wrote a letter to the Commission Staff ("Staff"), requesting that all ODOJ findings relating to*
12 *any investigation of Diana Goldschmidt be added to the record in UM 1121. See Letter from*
13 *Walker to Conway of 10/1/04, attached as Exhibit 2 to Barrett Decl. Staff forwarded this request*
14 *to the ALJs assigned to UM 1121, who consulted with the Chief ALJ, Michael Grant. See Letter*
15 *from Grant to UM 1121 Service List of 10/5/04, attached as Exhibit 3 to Barrett Decl. Judge*
16 *Grant advised the Director of the Utility Program at the Commission that Staff should respond to*
17 *Senator Walker's letter. Id. Judge Grant also treated Senator Walker's request as an ex parte*
18 *communication and served a copy on all parties. Id. On October 5, 2004, Staff responded to*
19 *Senator Walker that, "[i]f the [ODOJ] findings are available before the close of the record in*
20 *[UM 1121], [Staff] commits to review the findings, and unless inappropriate, ask that they be*
21 *made a part of the record." See Letter from Conway to Walker of 10/5/04, attached as Exhibit 4*
22 *to Barrett Decl.*

23 An evidentiary hearing in UM 1121 was held on October 20-21, 2004. *Barrett Decl.* ¶ 6.
24 Counsel for both Staff and BOMA attended. *Id.* No party requested that ODOJ's opinion
25 relating to Diana Goldschmidt or any other investigative record be admitted into evidence. *Id.*
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1 The ALJ closed the hearing record on October 21, 2004, with the exception of two items not
2 relevant here. *See Posthearing Report*, UM 1121 (Oct. 26, 2004).

3 **ARGUMENT**

4 As an initial matter, BOMA requests that the ALJ certify its Motion for consideration “by
5 the full Commission.” *Motion at 1*. The ALJ should deny this request. BOMA’s Motion is an
6 improper attempt to influence the Commission with matters outside the record, and, as
7 demonstrated below, the ALJ has the authority to deny it. *See OAR 860-012-0035(g)* (ALJ has
8 authority to decide procedural matters).

9 **I. BOMA’S MOTION IS UNTIMELY**

10 BOMA’s Motion makes two alternative requests, *viz.*, to suspend proceedings or to
11 impose certain conditions on approval. The ALJ should reject both requests, because they are
12 based on assertions and evidence that clearly are directed at the merits of Applicants’ proposed
13 acquisition of PGE. Accordingly, they should have been raised during the evidentiary phase of
14 the contested case process.

15 BOMA argues that proceedings should be suspended because, “[c]urrently there are one
16 or more investigations into activities of TPG that directly relate to the reasonableness of the
17 proposed acquisition and the possible benefits to Oregonians of the acquisition.” *Motion at 3*. If
18 BOMA wanted the Commission to consider this allegation, it should have articulated its position
19 and introduced any supporting evidence before the record closed on October 21, 2004. *See ORS*
20 *183.450(2)* (“The burden of presenting evidence to support a fact or position in a contested case
21 rests on the proponent of the fact or position.”). BOMA had no reasonable excuse for failing to
22 do so, either during the two-day hearing on October 20-21, or at the October 15, 2004 status
23 conference.² At a minimum, if BOMA believed that it needed more time to present its evidence,
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25 ² In the weeks prior to the evidentiary hearing, BOMA could not reasonably have claimed ignorance of
26 ODOJ’s review of Diana Goldschmidt’s October 29, 2003 vote on the OIC, or of the SEC’s PUHCA review. BOMA knew about the ODOJ’s review at least as early as October 5, 2004, when Chief ALJ Grant served BOMA with a copy of Senator Walker’s letter asking that the results of any investigation be made part of the record. The

1 it could have moved for a continuance. See OAR 860-014-0010 (permitting ALJ to continue a
2 hearing “to receive additional evidence or argument”). Instead, BOMA remained silent. The
3 ALJ should not permit BOMA to engage in improper post-hearing motion practice designed to
4 circumvent the rules and influence the Commission with new, un rebutted argument and
5 evidence.

6 Failure to shield the Commission from BOMA’s improper Motion will prejudice
7 Applicants. See *Smith v. Veterinary Medical Examining Board*, 175 Or. App. 319, 327 (2001)
8 (an agency’s “observance of procedural and evidentiary standards plays an important role in
9 ensuring a fair consideration of contested fact issues”). The Court of Appeals repeatedly has
10 instructed agencies not to contaminate the record after it has closed:

11 Exclusiveness of the record is at the core of the right to a fair hearing. Without
12 that principle the hearing itself can be a sham. . . . Only if the agency is limited to
13 the record of the hearing can the private party have assurance that he not only has
14 a full opportunity to present his case but, more important, opportunity to confront
15 and rebut the entire case against him. Without the exclusiveness principle the
16 right to be heard is a right only to present one side of the case. The hearing itself
17 becomes only an administrative town meeting rather than the adversary
18 proceeding required by due process. *Rolfe v. Psychiatric Security Review Board*,
19 53 Or. App. 941, 951 (1981) (quoting B. Schwartz, *Administrative Law* 358
20 (1976)); see also *Smith*, 175 Or. App. at 327 (quoting same).

21 Moreover, April 18, 2005 is the “Outside Date” by which the transaction must close, after
22 which either party would have the right to terminate the Proposed Transaction.³ See *Oregon*
23 *Electric/Exhibit 6, Stock Purchase Agreement Between Oregon Electric Utility Company, LLC,*
24 *and Enron Corp.* ¶3.2 (Nov. 18, 2003). If the Commission grants BOMA’s motion, it will

25 ODOJ’s review also was reported widely in the local press as early as August 2004. See *Affidavit of Ann L. Fisher*
26 *in Support of Motion to Suspend Proceedings or, in the Alternative, to Condition Approval* ¶ 2. Applicants notified
all parties about the SEC’s PUHCA review in its initial application on March 8, 2004. See *Oregon Electric/5,*
Schifter/3.

³ The “Outside Date” is defined on page 84 of the Stock Purchase Agreement as the “one year anniversary of
the date of execution of [the] Agreement” plus a six-month extension, “if the Closing shall not have occurred
because of any delay in obtaining, or due to the failure to obtain, any approval of one or more Governmental
Authorities that is necessary to satisfy the conditions [of the Agreement].”

1 suspend proceedings until the ODOJ completes any further investigations of Diana Goldschmidt
2 and issues conclusions. After that, the current schedule would resume, and the Commission
3 would be unable to issue a decision until briefs are filed and oral argument is heard. By that
4 time, the Applicants' window of opportunity may have closed.

5 It is clear that BOMA seeks to use its Motion as a vehicle for presenting matters to the
6 Commission outside the hearing record and to make new arguments that various, unspecified
7 "investigations . . . of TPG" present unacceptable risks to the public interest. This is a
8 manipulation of the administrative process. If BOMA wanted the Commission to consider these
9 matters, it should have offered testimony and evidence before the record closed and allowed
10 Applicants an opportunity to confront and rebut its position. BOMA ignored procedure, and its
11 Motion must be denied. ORS 183.450(2); *Rolfe*, 53 Or. App. at 951; *Smith*, 175 Or. App. at 327.

12 II. BOMA'S MOTION LACKS ANY BASIS IN FACT

13 BOMA asserts that there are "one or more" "investigations . . . of TPG" that should
14 provide the grounds for a suspension of proceedings. *Motion at 3*. This is false. Applicants
15 were able to access two of the four news articles that BOMA's counsel cited in her affidavit in
16 support of BOMA's Motion.⁴ Both concerned Diana Goldschmidt. Neither was "related to
17 investigations of TPG," as averred by BOMA's counsel. *See Affidavit of Ann L. Fisher In*
18 *Support of Motion to Suspend Proceedings or in the Alternative to Condition Approval ¶ 2*.

19 In fact, BOMA's Motion is grounded almost entirely on speculation about what a future
20 investigation of Diana Goldschmidt – the scope and duration of which is unknown – might
21 reveal. BOMA claims that "[t]he Commission may take Official Notice of . . . *pending*
22 *accusations and investigations*" because they are "of the nature of matters of which the courts of
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24

25 ⁴ BOMA's counsel did not attach copies of the articles she uses to support her allegations; she provided
26 hyperlinks to the articles on the Internet. The "ventureeconomics.com" article and the "finance.lycos" article were
not accessible via the hyperlinks that BOMA provided.

1 the State of Oregon take Judicial Notice.” *Motion at 2* (citing ORS 40.060 *et seq.*; emphasis
2 added).

3 BOMA is wrong. First, a request for official notice further demonstrates that BOMA’s
4 Motion is nothing more than a backdoor attempt to supplement the hearing record, because
5 official notice must “be given on the record during the hearing or in findings of fact in a
6 proposed or final order.” OAR 860-014-0050(2). Second, official notice of facts is appropriate
7 only if those facts are not subject to “reasonable dispute” and are “capable of accurate and ready
8 determination by resort to sources whose accuracy cannot reasonably be questioned.” ORS
9 40.065. That is clearly not the case here. By definition, an agency’s “*pending* accusations and
10 investigations,” are not “capable of accurate and ready determination.” “[S]elf-restraint must be
11 exercised in order to avoid the taking of evidence from a source not subject to confrontation and
12 cross-examination.” *Groshong v. Montgomery Ward Co.*, 73 Or. App. 403, 408 (1985).

13 BOMA alternatively argues that, even if the Commission cannot officially notice
14 “pending accusations and investigations,” the *fact* of an investigation of Diana Goldschmidt was
15 admitted by Dr. Peter Kohler on cross-examination, and “the Commission cannot realistically
16 claim to be unaware of [it].” *Motion at 2*. It is not clear what this argument is intended to show.
17 There is a well-established distinction between noticing the *existence* of document, such as an
18 investigative record, and noticing the *truth* of its contents. *See Kirkpatrick, Oregon Evidence 51*
19 (2d ed. 1989). “[A]lthough it may be appropriate to judicially notice the former, it is
20 inappropriate to notice the latter.” *Thompson v. Telephone & Data Systems, Inc.*, 132 Or. App.
21 103, 107 (1994). Accordingly, the Commission properly cannot consider a pending
22 investigation, even if it is “aware” of it.

23 Outside of pure speculation and mischaracterization of facts, BOMA provides no basis
24 for suspending or conditioning these proceedings. Its Motion should be denied.

25 //

1 their decisions” so that it “had the benefit of the agencies’ determinations and supporting
2 materials before it”).

3 In light of the foregoing, BOMA’s request to suspend proceedings to allow the SEC to
4 complete its review of the transaction under PUHCA is nonsensical, and BOMA’s Motion
5 should be denied.

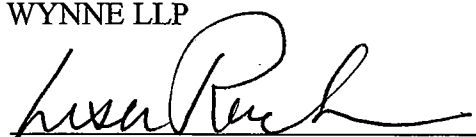
6 **CONCLUSION**

7 For the foregoing reasons, Applicants respectfully request that the ALJ deny BOMA’s
8 Motion without certifying it to the Commission for consideration.

9 Respectfully submitted this 1st day of November, 2004.

10 ATER WYNNE LLP

11
12 By:



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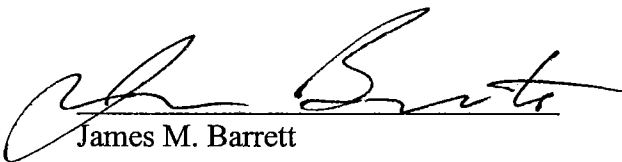
1 communication and served a copy on all parties. A true and correct copy of Chief ALJ Grant's
2 letter to the parties about Senator Walker's request is attached hereto as Exhibit 3.

3 5. On October 5, 2004, Staff wrote Senator Walker that, "[i]f the [DOJ] findings are
4 available before the close of the record in [UM 1121], [Staff] commits to review the findings,
5 and unless inappropriate, ask that they be made a part of the record." A true and correct copy of
6 Staff's October 5, 2004 letter to Senator Walker is attached hereto as Exhibit 4.

7 6. An evidentiary hearing in UM 1121 was held on October 20-21, 2004. Counsel
8 for both Staff and BOMA attended. No party requested that ODOJ's opinion relating to Diana
9 Goldschmidt or any other investigative record be admitted into evidence.

10
11 **I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO**
12 **THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I**
13 **UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND**
14 **IS SUBJECT TO PENALTY FOR PERJURY.**

15 DATED this 1st day of November, 2004.

16 
James M. Barrett



DEPARTMENT OF JUSTICE

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September 29, 2004

The Honorable Randall Edwards
Treasurer
Oregon State Treasury
159 State Capitol
Salem, OR 97310-0840

Re: Review of Vote on October 29, 2003, By Oregon Investment Council Member Diana Goldschmidt to Modify Policy on Alternative Equity Investments Sub-Committee to Allow Subcommittee Consideration of \$300 Million Investment in TPG Partners IV, LP

DOJ File: 171-001-GG0818-04

Dear Mr. Treasurer:

We have been asked to review the circumstances surrounding a vote cast by Oregon Investment Council (OIC) member Diana Goldschmidt on October 29, 2003. On that date, the OIC authorized its Alternative Equity Investments Sub-Committee (Sub-Committee) to increase by \$100 million the amount the Sub-Committee could consider investing in TPG Partners IV, LP (Fund IV) at the Sub-Committee's November 10, 2003, meeting.

This is a legal opinion based upon stated facts provided by the Oregon State Treasury. Part A of this opinion necessarily relies on the accuracy of the stated facts. If the actual facts differed from the stated facts, then, of course, the opinion could reach different conclusions. We understand that the stated facts have been compiled from a variety of sources, including documents, records of actions, and recollections of representations made to Treasury staff. Part B of this opinion briefly identifies some of the facts that, if changed, could result in different legal outcomes. We conclude with the recommendation that you request the Attorney General to conduct an investigation to determine the facts.

STATED FACTS

Investments of the Oregon Public Employee Retirement Fund (OPERF) are overseen by the Oregon Investment Council (OIC). OPERF investments include those in which the state is a limited partner in certain partnerships. In these partnerships, the general partner controls specific investments within the limits established by the terms of the partnership. Since 1994, the OIC has committed as a limited partner a total of \$950 million in a series of investments in which Texas Pacific Group (TPG) was the general partner. The successive investments were designated First Fund, Fund II, Fund III, and Fund IV. OIC's most recent investment with TPG occurred in November, 2003 and is the subject of the vote in question.

Treasury staff learned in the spring of 2003 that TPG planned to return to the equity market with Fund IV later in 2003. In early summer, 2003, TPG informed Treasury Senior Equities Investment Officer Jay Fewel (Fewel) that TPG was in discussions to acquire Portland General Electric (PGE) from its bankrupt parent Enron. During September and early October 2003, negotiations about the terms of the partnership in Fund IV were conducted between TPG and prospective limited partners. No discussion of specific investments took place at that time.

OIC Policy 4.06.01, which has been in effect since before January 1, 2000, delegates to the Alternative Equity Investments Sub-Committee (Sub-Committee) the authority to approve alternative equity investments of \$200 million or less in alternative equity investments such as the various TPG funds. OIC's staff originally understood that Fund IV would not close until the first quarter of 2004. But in mid-October, 2003, TPG informed Treasury staff that the first closing date for Fund IV was to be moved up from first quarter of 2004 to October or November, 2003.

On Thursday, October 23, 2003, Fewel gave OIC members a report from Pacific Corporate Group, a Private Placement Memorandum for Fund IV, and a joint staff and consultant recommendation that the OIC authorize the Sub-Committee to invest up to \$300 million in Fund IV. None of the materials identifies any specific company or investment being considered for purchase by TPG with monies from Fund IV. Nor do they mention Neil Goldschmidt or his consulting firm. The materials distributed to the OIC indicate that the Sub-Committee would consider itself authorized to make the recommended investment unless an OIC member objected.

On Tuesday, October 28, while preparing for the November 10 Sub-Committee meeting, Deputy State Treasurer Linda Haglund (Haglund) became aware of the approval mechanism for the proposed \$100 million increase in the Sub-Committee's authority. She advised Fewel and Treasury's Investment Division Director Ron Schmitz (Schmitz) that the OIC should be asked affirmatively in a public meeting to approve the change in

policy 4.06.01 rather than allowing the absence of objection to be registered as authorization to the Sub-Committee as staff originally had contemplated.

The OIC had scheduled its Wednesday, October 29, 2003 meeting for the purpose of conducting an educational workshop. No action item for the OIC was identified in the agenda. The agenda was distributed and posted publicly a week before the meeting.

On October 29, 2003, the OIC members present were: Jerry Bidwell (Bidwell), Drummond, Randall Edwards (Edwards), Diana Goldschmidt, Mark Gardiner, and James Voytko. Assistant Attorney General Dee Carlson (Carlson) was present as legal counsel for OIC. OIC staff present included Schmitz and Fewel.

AAG Carlson advised the OIC in public session that it had authority to authorize the Sub-Committee to make an investment exceeding the \$200 million limit established in Policy 4.06.01. AAG Carlson advised that Oregon's Public Meetings Law permits an agency to take action in emergencies notwithstanding the absence of a specific item from the previously-published notice or agenda. Bidwell moved to grant the Sub-Committee authority to make the investment and Edwards seconded the motion. OIC members passed the motion unanimously and granted the Sub-Committee authorization to consider a \$300 million investment in Fund IV at the Sub-Committee's November 10, 2003, meeting.

Representations made to Treasury staff reveal that on Thursday, October 30, 2003, the day after the OIC authorized the Sub-Committee to consider an investment of up to \$300 million in Fund IV, a TPG partner met with Neil Goldschmidt to offer Mr. Goldschmidt a position on the board of the company being formed by TPG to purchase PGE. Mrs. Goldschmidt first became aware of her husband's involvement with TPG after he returned from his meeting with TPG. Between that time and the OIC's next meeting on November 19, 2003, at which she announced that she would not be involved in any of the OIC's subsequent discussions or actions involving TPG, Mrs. Goldschmidt did not have any contact with TPG or any Sub-Committee members about TPG or the investment in Fund IV.

On November 10, 2003, the Sub-Committee convened as previously planned. No member of the OIC then served on the Sub-Committee. All members of the Sub-Committee attended the November 10 meeting. The members discussed and approved a \$300 million investment in Fund IV subject to satisfactory negotiation of the requisite legal documents. Schmitz moved to approve the investment and Haglund seconded the motion. The motion passed unanimously.

ANALYSIS – PART A

1. Ethics Standards.

Diana Goldschmidt, as an OIC member, is a “public official” under ORS 244.020(15).¹ Mrs. Goldschmidt is thus required to adhere to the code of ethics for public officials set forth in ORS 244.040.² ORS 244.040 generally prohibits use of public office for personal financial gain.³ Mrs. Goldschmidt is also required to follow certain procedures under ORS 244.120 when presented with an “actual” or “potential” conflict of interest while acting as a public official. The OIC’s own Ethics Standards include Policy 4.00.03. That policy mirrors the requirements in ORS 244.120 with regard to action that must be taken when a member has an actual or potential conflict of interest. See Policy 4.00.03 §§ 3.B. and 3.C. Thus our analysis of Chapter 244 applies as well to that policy.

An “actual” conflict of interest exists when any action, decision, or recommendation by a public official *would* have a financial benefit or detriment to the person or the person’s relative, or any business associated therewith.⁴ A “potential” conflict of interest exists when any action, decision, or recommendation *could* have a financial benefit or detriment to the person or the person’s relative, or any business associated therewith, with certain limited exceptions.⁵ A public official’s spouse is considered a relative of the public official for conflict of interest purposes.⁶

¹ ORS 244.020(15) defines “public official” to mean “any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services.”

² ORS 244.010(1) provides that “The Legislative Assembly hereby declares that a public office is a public trust, and that as a safeguard for that trust, the people require all public officials to adhere to the code of ethics set forth in ORS 244.040.”

³ ORS 244.040(1)(a) provides “No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official’s holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this section, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official’s relative, or for any business with which the public official or a relative of the public official is associated.” ORS 244.040(1)(b) & (c) describe limits on honoraria. ORS 244.040(2) describes limitations on the value of gifts that can be accepted. ORS 244.040(3) to (6) describe other limitations upon the use of a public official’s position for financial gain.

⁴ ORS 244.020(1) provides “[a]ctual conflict of interest’ means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person’s relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (14) of this section.”

⁵ ORS 244.020(14) provides “[p]otential conflict of interest’ means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person’s relative, or a business with which the person or the person’s relative is associated, unless the pecuniary benefit or detriment arises out of the

If an actual conflict of interest exists for an appointed public official serving on a board or commission, that person must announce publicly the nature of the actual conflict and refrain from participating as a public official from any discussion, debate, or vote on the issue except where the public official's vote is necessary to meet the minimum number of votes to take public action and, in that situation, the person must not be involved in any discussion or debate. If a potential conflict of interest exists for an appointed public official serving on a board or commission, that person must announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official.⁷

Based on the stated facts, Mrs. Goldschmidt did not have an actual or potential conflict of interest on October 29, 2003, when she voted to permit the Sub-Committee to consider a \$300 million investment in Fund IV. Based on the representations made to Treasury staff as set out in the stated facts, Neil Goldschmidt's involvement with TPG relative to the PGE acquisition did not begin until October 30, 2003, the day after the OIC acted. In addition, under the stated facts, Mrs. Goldschmidt did not have any communication or involvement with the Sub-Committee about TPG or PGE between the October 29, 2003, OIC meeting and the Sub-Committee's decision to make the investment on November 10, 2003. Therefore, her vote on October 29, 2003, did not violate the ethics standards for public officials in ORS 244.040 and 244.120.

following:

(a) An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position.

(b) Any action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person's relative or business with which the person or the person's relative is associated, is a member or is engaged. The commission may by rule limit the minimum size of or otherwise establish criteria for or identify the smaller classes that qualify under this exception.

(c) Membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.

⁶ORS 244.020(16) provides "'[r]elative' means the spouse of the public official, any children of the public official or of the public official's spouse, and brothers, sisters or parents of the public official or of the public official's spouse."

⁷ORS 244.120(2) provides that "[a]n elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:

(a) When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or

(b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:

(A) Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.

(B) If any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises."

In providing this advice, we caution that the advisory opinion process of the Oregon Government Standards and Practices Commission (GSPC), under ORS 244.280, provides the exclusive statutory procedure by which a person in doubt about the interpretation of ORS Chapter 244, and its application to a particular transaction or situation, can obtain an advisory opinion which is binding on the GSPC. *See Davidson v. Oregon Government Ethics Commission*, 300 Or 415, 712 P.2d 87 (1985). Our legal advice about the application of Chapter 244 to past events does not operate as a bar to subsequent GSPC investigation or enforcement action. Any person seeking to bind the GSPC must request an advisory opinion from the GSPC.

2. Public Investment Standards.

The OIC had authority to permit the Sub-Committee to invest \$300 million in Fund IV. It also had authority to delegate authority to its Sub-Committee. The OIC has delegated to the Sub-Committee the authority to make alternative equity investments within the guidelines of OIC policies, including OIC Policy 4.06.01. The Sub-Committee's decision to invest \$300 million in Fund IV did not exceed its delegated authority. Based on the stated facts, it appears that the OIC and Sub-Committee acted within the limits of their respective authority.

The OIC's policies provide one source of potential limitation on the behavior of its members and on its investment decisions. Statutes also prohibit certain criminal conduct involving public officials.⁸ We briefly describe some of those laws.⁹

A person commits the crime of public investment fraud under ORS 162.117(1) if the person knowingly makes any false statement or report for the purpose of influencing in any way action of the State Treasury.¹⁰ "Action of the State Treasury" is defined to "include" any purchase by the State Treasury.¹¹ This statute has not been construed by any appellate court and we are not aware of any prosecutions under it.

⁸ Some of these statutes provide civil as well as criminal remedies. *See, e.g.*, ORS 166.715 *et seq* [Authorizing the state to pursue civil remedies].

⁹ We have not attempted in this advice to catalog all of the offenses that could arise from criminal misconduct by public servants responsible for the management of public funds. For example, the Oregon Racketeer Influenced and Corrupt Organizations Act (ORICO), ORS 166.715 *et seq*, could apply to such misconduct. *See, e.g.*, ORS 166.715(6)(a)(D)[Offenses relating to abuse of public office can form part of the elements of an ORICO violation]. ORS 162.425, mislabeled "Misuse of confidential information," may be violated by certain public servants who acquire "a pecuniary interest in any property, transaction or enterprise which may be affected by" certain official actions by the agency with which the servant is associated.

¹⁰ ORS 162.117(1) provides "[a] person commits the crime of public investment fraud if, for the purpose of influencing in any way the action of the State Treasury, the person knowingly makes any false statement or report."

¹¹ ORS 162.117(4) provides "[a]s used in this section, 'action of the State Treasury' includes any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment or loan, or any change or extension of any of them, by renewal, deferment of action or otherwise, or the acceptance, release or substitution of security therefore."

The use of the open-ended term “includes” rather the closed term “means” in the definition of the phrase “action of the State Treasury” suggests that both the Sub-Committee’s decision to invest in Fund IV and the OIC’s grant of authority for that decision could be “action[s] of the State Treasury” for purposes of ORS 162.117(1).¹² Based on the stated facts, however, and assuming *arguendo* that the failure to disclose information is sufficient to meet the requirement that the person “makes any false statement or report,” we conclude on the stated facts that Mrs. Goldschmidt could not have violated ORS 162.117. On the stated facts, she did not make any false statement or report to the OIC during its meeting on October 29, 2003 because she did not know until later that her husband had been approached by TPG. On the stated facts, Mrs. Goldschmidt had no communication with Sub-Committee members between the OIC meeting on October 29, 2003 and the Sub-Committee meeting on November 10, 2003. The stated facts contain no information from which we can conclude that Mrs. Goldschmidt made any “statement or report” to anyone during that period. For that reason, on the stated facts, Mrs. Goldschmidt could not have committed the crime of public investment fraud.

ORS 162.405 and ORS 162.415 describe the crimes of official misconduct in the second and first degrees. “Public servants” are subject to both statutes. Because the OIC is an instrument of the state of Oregon, its members are “public servants.” ORS 162.005(2)(a).

Official misconduct in the second degree requires proof that a public servant knowingly violates a statute relating to the public servant’s office. ORS 162.405. The stated facts provide no basis upon which to conclude that any statute relating service on the OIC has been violated. On the stated facts, Mrs. Goldschmidt could not have violated ORS 162.405.

In contrast to the crime of official misconduct in the second degree, the crime of official misconduct in the first degree does not depend on violation of a statutory duty. For example, the offense may be committed by a public servant who knowingly fails to perform a duty “clearly inherent in the nature of office” or by one who “knowingly performs an act constituting an unauthorized exercise in official duties.” ORS 162.415(1)(a) and (b). But all variations on the elements of official misconduct in the first degree require proof that the public servant acted “with intent to obtain a benefit” ORS 162.415(1). The stated facts provide no basis upon which to conclude that Mrs. Goldschmidt acted with that intention.

ANALYSIS – PART B

The conclusions in Part A could vary with changes in the stated facts. For example, if Mr. Goldschmidt’s involvement with TPG relative to PGE or Fund IV began

¹² ORS 162.121 states “The provisions of ORS 30.862 and 162.117 to 162.121 shall be liberally construed to effectuate its remedial purposes.”


Randall Edwards
September 29, 2004
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on or before the OIC vote that occurred on October 29, 2003, and if his spouse knew about that involvement when she voted on that date to permit the Sub-Committee to make up to a \$300 million investment in Fund IV, then it is possible that violations of law or policy occurred. Variations in other stated facts also could change the resulting legal analysis.

RECOMMENDATION

As noted, our legal conclusions are dependent upon the accuracy of the stated facts. We have not conducted any investigation to validate these facts or to ascertain the existence of other relevant facts. We recommend that you ask the Attorney General to conduct an investigation to determine the facts and to ascertain whether anyone engaged in any prohibited conduct.

Sincerely,



PETER D. SHEPHERD
Deputy Attorney General

AGS14511.DOC



VICKI L. WALKER
STATE SENATOR
DISTRICT 7
LANE COUNTY

October 1, 2004

BY FACSIMILE TRANSMISSION
503-378-5505

Bryan Conway
Public Utility Commission
550 Capitol Street NE, Ste 215
Salem, OR 97301-2551

Re: PGE/TPG

Dear Mr. Conway:

Please consider this a written request that the Oregon Justice Department findings in the matter of the investigation of Diana Goldschmidt be added to the record of the Oregon Electric Utility Company/Texas Pacific Group application for the purchase of Portland General Electric. This request would ask that all findings pertinent to that investigation, regardless of whom they involve, be added to the record.

Sincerely,

Vicki L. Walker
State Senator





Oregon

Theodore R. Kulongoski, Governor

Public Utility Commission
550 Capitol Street NE, Suite 215
Mailing Address: PO Box 2148
Salem, OR 97308-2148
Consumer Services
1-800-522-2404
Local: 503-378-6600
Administrative Services
503-373-7394

RECEIVED

October 5, 2004

OCT 6 2004

UM 1121 Service List

ATER WYNNE LLP

RE: Letter from State Senator Vicki Walker

On Friday, October 1, 2004, Administrative Law Judges (ALJs) Kathryn Logan and Christina Smith received an electronic mail message from Bryan Conway of the Commission Staff. His e-mail referenced the attached letter from Senator Vicki Walker. Mr. Conway contacted the ALJs under the belief that they would be the appropriate individuals to respond to Senator Walker's request.

After consultation with the ALJs, I advised Lee Sparling, Director of the Utility Program, that Staff should respond to Senator Walker's letter. Staff will respond to Senator Walker later this week. Any inquiries regarding this matter should be directed to Mr. Conway.

I have been meeting with stakeholders regarding the Commission's rule on ex parte communications. Although Senator Walker's letter is not technically an "ex parte" communication, it is the type of contact that stakeholders believe should be disclosed. Because of those conversations, I have decided to provide notice of Senator Walker's letter to all parties in this proceeding.

Michael Grant
Chief Administrative Law Judge
Public Utility Commission of Oregon

Attachment
Ex parte/UM 1121/Walker





Oregon

Theodore R. Kulongoski, Governor

Public Utility Commission

550 Capitol Street NE, Suite 215

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Administrative Services

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October 5, 2004

HONORABLE VICKI L. WALKER
STATE SENATOR
900 COURT STREET NE
SALEM, OREGON 97301

RE: Correspondence dated October 1, 2004

Thank you for your letter regarding the Oregon Justice Department investigation of Diana Goldschmidt and the application of Oregon Electric Utility Company to purchase Portland General Electric. If the Justice Department findings are available before the close of the record in the PUC docket for the Oregon Electric application (UM 1121), the Public Utility Commission Staff commits to review the findings, and unless inappropriate, ask that they be made a part of the record.

Please let me know if you have any questions about this matter.

A handwritten signature in cursive script, appearing to read "Bryan Conway".

Bryan Conway
Program Manager, Economic and Policy Analysis
503 378-6200
bryan.conway@state.or.us