

BEFORE THE OREGON PUBLIC UTILITIES COMMISSION

DR 32

**In the Matters of:
PORTLAND GENERAL ELECTRIC
COMPANY Petition for a Declaratory
Ruling Regarding the Application of
OAR 860-022-0045**

**RESPONSE TO STAFF'S MOTION
TO STRIKE;**

**REPLY ON LEWIS, URP MOTION
TO DISMISS**

I. RESPONSE TO MOTION TO STRIKE.

Staff moves to strike portions of the Lewis, URP Opening Brief which refer to discovery originally propounded and answered in UCB 13, as "facts outside PGE's Petition for Declaratory Ruling." Staff Opening Brief (p. 1). Yes, the facts about PGE's collection of millions of dollars "on behalf" of Multnomah County, and Staff's indifference to the implementation of the language of OAR 860-022-0045, are outside the discussion of the *substantive merits* of the questions propounded by PGE in its petition for a declaratory ruling, but they are offered in support of Lewis/URP's Motion to Dismiss for lack of jurisdiction, not offered on the discussion of the merits of the requested ruling. The merits discussion begins on p. 12 of the Opening Brief. There is utterly no bar to noting the underlying facts in a motion to dismiss for lack of jurisdiction.

Lewis and URP argued in their Motion to Dismiss that the Commission lacked jurisdiction because, inter alia, "[t]he Commission does not in fact enforce the rule, and Commission Staff disavow any role in its enforcement or administration." The Commission may disagree with the argument, but the Staff's historical practice of

ignoring how utilities implement OAR 860-022-0045 is relevant to the Motion to Strike as a course of conduct which indicates that the questions presented are not justiciable and have never been the subject of staff inquiry.

Staff miscomprehends Lewis/URP's primary argument in their Motion to Dismiss. In order for a Commission declaratory ruling to be appealable, it must be "binding" on the parties to the declaratory ruling proceeding. ORS 756.450. We seem agreed that, in order for the Commission to issue a "binding" ruling, the rule or matter before it must involve some sort of "enforcement," again a kind of legal effect which "binds" a party to a course of approved conduct. The referenced discovery responses illustrate that OPUC does not "enforce" OAR 860-022-0045, in the sense of tracking actual conduct of PGE to see whether it comports with the rule. Moreover, Staff's legal argument is that OAR 860-022-0045 is *not* enforceable as written. Consequently, the Commission cannot lawfully issue a declaratory ruling in this context.

II. REPLY TO MOTION TO STRIKE.

A. THE AGENCY'S AUTHORITY TO PERFORM QUASI-JUDICIAL FUNCTIONS ARISES FROM ONLY ONE SOURCE.

It is a fundamental premise of modern administrative law that the Commission is a creature of statute that has both quasi-judicial and quasi-legislative delegations of power. When it sets rates and acts in the public interest (or proposes rules of general application), it is acting in a legislative role. When it decides individual controversies, or imposes penalties, exercises judicial powers (administering oaths, issuing subpoenas, issuing binding decisions) it is acting in a quasi-judicial role.

Oregon-Washington R. & Nav. Co. v. McColloch, 153 Or 32, 52-53, 55 P2d 1133 (1936).

The Oregon courts have often distinguished judicial or quasi-judicial functions from legislative (rule-making) functions.

A judicial or quasi-judicial function is one that involves or requires an adjudicatory process. A typical adjudicatory process results in a decision, applies pre-existing criteria to concrete facts and is directed at a closely circumscribed factual situation or a relatively small number of persons. ***Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.***, 287 Or 591, 602-03, 601 P2d 769 (1979).

Koch v. City of Portland, 306 Or 444, 448, 760 P.2d 252, 254 (1988). It is evident that the petition for declaratory ruling applies some criteria to the presented facts and is both a closely circumscribed factual situation and involves a relatively small number of persons (only the participants are "bound" by the ruling). Thus, the Commission's authority arises from a delegation of judicial power. There is only one source of judicial power in this state: Oregon Constitution, Article VII, § 1.

B. THE COMMISSION'S RESOLUTION, AT MOST, WILL BE MERELY ADVISORY.

This declaratory ruling proceeding will result in an advisory opinion, not countenanced by the Oregon Constitution. If the agency performs any judicial function, it must comport with the motherlode of such power. It "must be more than a request for an advisory opinion. "***La Grande/Astoria v. PERB***, 281 Or 137, 139 n 1, 576 P2d 1204 (1978); ***Oregon State Shooting Society v. Multnomah County***, 122 OrApp 540, 543, 858 P2d 1315, 1318 (1993).

Apparently the parties are in agreement that the decision of the Commission is merely to "assist" the court. Staff Reply Brief (p. 3, ll. 22-25). Staff points to the DR 28 proceeding as precedent for advisory opinions. However, in DR 28 for example, upon Reconsideration, the Commission concluded that the actual dispute would have to be resolved by a court and that the declaratory ruling itself, Order No. 02-121, February 25, 2002, based on hypothetical facts, was of no particular import or aide to the court. On reconsideration the Commission stated:

We did assume that a garden-variety utility-customer relationship existed between PGE and Blue Heron. In our order, we acknowledged that there is much more to this case than we described in the statement of assumed facts. As both parties have informed us, the Court will sort out the competing claims and the impact of the agreements on the transaction.

The reason we limited the statement of assumed facts is because our jurisdiction is limited to garden-variety utility-customer relationships. PGE's rate schedules are designed to deal with such relationships, as is our jurisdiction to set those rates.

* * *

One of the main reasons for issuing the declaratory ruling was to provide the Court our view of how PGE's rate schedules and the statutes we implement would apply when used for their intended purpose. The Court may find our reasoning useful when evaluating Blue Heron's claim in the Circuit Court that the treble damages statute, ORS 757.185, applies in this case.

Order No. 02-317, May 7, 2002. Thus, the Commission has itself acknowledged that its opinion might be at most "useful" in evaluating statutory treble damages in court, under the same statute at issue now in Multnomah County Circuit Court.

As Lewis/URP pointed out in their Opening Brief, the matter of PGE's wilfulness (treble damages) or intent to deceive (common law fraud) is not a factfinding matter

for the Commission and is not a matter of law presented by the petition for a declaratory ruling. Staff is capable of presenting testimony, under oath, in the court proceeding to offer facts and describe circumstances which might have evidentiary value in determining PGE's "good faith" in charging for MCBIT which was never imposed by the county. Such testimony will be subject to impeachment, of course, based on Staff's prior answers to discovery in UCB 13.

PGE has taken the position that the decision will be "the equivalent of an opinion of the attorney general." PGE reply Brief (Ex. A at p.2, colloquy between attorney David Markowitz and the Hon. John Wittmayer). Such an opinion is not binding on the court and has no more elevated status than the arguments of the attorneys actually before the court.

The Attorney General's opinions are not reviewed by this court. The Attorney General, as do other lawyers, gives opinions on questions which sometimes are later answered by decisions of this court.

Thornton v. Johnson, 253 Or 342, 360, 453 P2d 178, 187 (1969). "Attorney General opinions are not precedential," ***Rogers v. Lane County***, 91 OrApp 579, 582, 756 P2d 665, 66 (1988), quoted with approval, ***Rogers v. Lane County***, 307 Or 534, 539, 771 P2d 254, 256 (1989).

III. CONCLUSION.

For the foregoing reasons, and the authority in the Opening Brief, the Staff Motion to Strike should be denied, and the Lewis/URP Motion to Dismiss for lack of jurisdiction to issue advisory opinions should be granted.

Dated: August 24, 2005

Respectfully Submitted,

LINDA K. WILLIAMS
OSB No. 78425
10266 S.W. Lancaster Road
Portland, OR 97219
503-293-0399 voice
503-245-2772 fax
linda@lindawilliams.net

DANIEL W. MEEK
OSB No. 79124
10949 S.W. 4th Avenue
Portland, OR 97219
503-293-9021 voice
503-293-9099 fax
dan@meek.net

Attorneys for Intervenors

CERTIFICATE OF SERVICE

I hereby certify I filed the foregoing RESPONSE TO STAFF'S MOTION TO STRIKE; REPLY ON LEWIS, URP MOTION TO DISMISS by e-filing upon the OOPUC, followed by mail of the original and 5 copies this date to the Oregon Public Utility Commission, and further I certify that I served copies by e-mail to the service list maintained this day on the OPUC web site for this docket, pursuant to the statement in the ALJ Order of August 24, 2005, that "All parties agreed to electronic service among themselves."

stephanie.andrus@state.or.us
lowrey@oregoncub.org
jason@oregoncub.org
tlannom@ci.portland.or.us
kl04@mailstation.com
dan@mEEK.net
mwp@dvclaw.com
doug.tingey@pgn.com
mail@dvclaw.com
bwalters@ci.portland.or.us
linda@lindawilliams.net
jffell@stoel.com

Dated: August 24, 2005

Daniel W. Meek