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September 29, 2006

VIA E-FILING & FIRST CLASS MAIL

Oregon Public Utility Commission
Attn: Filing Center
550 Capitol St. NE, Suite 215
P. O. Box 2148
Salem, OR 97308-2148

Re: *UM 1262*

Attention Filing Center:

Enclosed for filing in the above-referenced docket are the original and five copies of Portland General Electric Company's Reply in Support of Motion for Summary Judgment. This document is being filed electronically per the Commission's eFiling policy to the electronic address PUC.FilingCenter@state.or.us, with copies being served on all parties on the service list via U.S. Mail. A photocopy of the PUC tracking information will be forwarded with the hard copy filing.

Very truly yours,

Leslie Hurd, Legal Assistant to
David F. White

/ldh
Enclosures
cc (w/enc.): Service List
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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1262

CITY OF PORTLAND, Complainant, vs. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation, Defendant.	**PORTLAND GENERAL ELECTRIC COMPANY'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

The Third Count of the Complaint presents a straightforward question of law: should Portland General Electric Company ("PGE") have filed a copy of the Tax Allocation Agreement ("Agreement") with the Commission pursuant to ORS 757.495(2)? This question is ideally suited to summary judgment since it depends entirely on the proper interpretation of ORS 757.495. Subsequent events involving Enron Corp. have no bearing on the answer. There is no discovery or investigation that would aid the Commission in interpreting the statute. Rather, the answer lies in the language of the statute and the nature of the Agreement, which together make clear that PGE is entitled to summary judgment as a matter of law.[1]

[1] For purposes of this motion, PGE has assumed the truth of the factual assertions in the Complaint, but reserves the right to dispute those assertions and also the factual assertions in the City's Response.

I. The Tax Allocation Agreement Does Not Come Within the Scope of ORS 757.495(2)

The City of Portland ("City") implicitly concedes that PGE was not required to file the Tax Allocation Agreement pursuant to ORS 757.495(1).[2] The City argues only that PGE was required to file the Agreement under ORS 757.495(2). (City Response at 4.)

The City's interpretation of ORS 757.495(2) is incorrect as a matter of law. ORS 757.495(2) states:

> When any public utility doing business in this state enters into any contract, oral or written, with any person or corporation having an affiliated interest relating to the construction, operation, maintenance, leasing or use of the property of such public utility in Oregon, or the purchase of property, materials or supplies, which shall be recognized as the basis of an operating expense or capital expenditure in any rate valuation or any other hearing or proceeding, the contract shall be filed with the commission within 90 days of execution of the contract. The contract shall be deemed to be executed on the date the parties sign a written contract or on the date the parties begin to transact business under the contract, whichever date is earlier.

(Emphasis added.)

The City's principal argument is that the Tax Allocation Agreement is subject to filing under ORS 757.495(2) because it relates to PGE's "purchase of property" from Enron Corp., specifically "net operating losses." Even assuming *arguendo* that the Tax Allocation Agreement could be viewed as relating to "property" within the meaning of ORS 757.495(2), the Agreement still does not come within the scope of the statute. In order to be subject to filing, the contract must pertain to a purchase of property "which shall be recognized as the basis of an operating expense or capital expenditure in any rate valuation or any other hearing or proceeding." ORS 757.495(2). The City impermissibly disregards this statutory predicate to

[2] The Tax Allocation Agreement is not subject to filing under ORS 757.495(1) for the reasons stated in the Motion, including that it does not relate to tax services.

filing.[3] *See* ORS 174.010 (stating general rule of statutory construction that one must not "omit what has been inserted"). Since PGE's rates were based on its forecasted stand-alone tax liability, the Tax Allocation Agreement was not going to be "the basis of an operating expense or capital expenditure in any rate valuation or any other hearing or proceeding," and PGE therefore correctly concluded that filing was not necessary under ORS 757.495.[4]

The "remedy" provision of ORS 757.495(3) inherently reflects the fact that the only affiliate contracts subject to filing under subsections (1) and (2) are those affiliate contracts which will be recognized as "an operating expense or capital expenditure in any rate valuation or any other hearing or proceeding." ORS 757.495 does not prohibit a utility from entering without PUC approval a contract for purchase of property from an affiliate (for example); indeed, by its terms, the contract has already been executed by the time the PUC reviews it. *See* ORS 757.495(3) (allowing 90 days after execution to file). Rather, the statute simply provides that, if the PUC reviews the contract and determines it fair and reasonable and not contrary to the public interest, then "any expenses and capital expenditures incurred by the public utility under

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[3] The City argues that the Agreement falls under ORS 757.495 because it "should have been recognized as an expense or expenditure in rates" (City Response at 7), which entirely ignores the language and purpose of the statute. Alternately, the City argues that the statute applies to all affiliate contracts regardless of their content, citing *GTE Northwest, Inc.*, UI 93(6), Order No. 95-1264 (Or. PUC 1995), and *Malheur Home Tel. Co. & U.S. West Comm'n*, UI 146, Order No. 95-1060 (Or. PUC 1995). That argument is again plainly inconsistent with ORS 757.495. It is also inconsistent with ORS 759.390, the analogous telecom statute under which *GTE* and *Malheur* were decided, which, like ORS 757.495, applies only to contracts that will be recognized as "an operating expense or capital expenditure in any rate valuation or any other hearing or proceeding." ORS 759.390(2) and (3). The Commission cannot disregard the statutory requirement, and there is no reason to believe it did so in *GTE* or *Malheur*.

[4] Inexplicably, the City asserts that "PGE has admitted that it did not previously comply with the statute," citing the Lesh Declaration ¶ 3. (City Response at 13) Neither Ms. Lesh nor PGE has ever stated anything of the kind. To the contrary, Ms. Lesh declared that she did not believe that the Agreement needed to be filed under ORS 757.495 (Lesh Decl. ¶ 3), and PGE has filed for summary judgment precisely because it believes it has complied with ORS 757.495.

the contract may be recognized in any rate valuation or other hearing or proceeding." ORS 757.495(3). Conversely, if the PUC "disapproves" the contract, then "it shall be unlawful to recognize the contract for the purposes specified in this section," *i.e.*, it shall be unlawful to recognize the contract as the basis of an operating expense or capital expenditure in any rate valuation or other hearing or proceeding.[5] *Id.* Since PGE's rates were based on its forecasted stand-alone tax liability, the Tax Allocation Agreement was never recognized as the basis of an operating expense or capital expenditure in any rate valuation or other hearing or proceeding, and therefore no unlawful act occurred under ORS 757.495(3).

In *Pacific Northwest Bell Tel. Co. v. Sabin*, 21 Or. App. 200, 225-26, 534 P.2d 984 (1975), the Court of Appeals held that the Commissioner's approval of a contract under ORS 757.495 does not estop him from excluding expenses related to the contract in a subsequent rate proceeding. The City cites *Sabin* for the proposition that the legislature enacted ORS 757.495 to "extend" the PUC's authority over affiliate contracts beyond the rate-making process. It is true, as *Sabin* recognizes, that ORS 757.495 created a mechanism for the PUC to review relevant affiliate contracts in advance of the actual rate proceedings in which the utility will seek to have the costs of those contracts reflected in rates. *See Sabin*, 21 Or. App. at 226. However, that fact does not expand the scope of ORS 757.495 beyond the language of the statute.

To the contrary, the *Sabin* court specifically recognized the inherent difference between affiliate contracts that affect rates and are subject to filing with the Commission, and

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[5] The reference to "this section" in subsection (3) refers to ORS 757.495. *See* ORS 757.495(4) (referring to "subsection (3) of this section"). "Purposes specified in this section" necessarily refers to the recognition of expenses and capital expenditures under the contract in a rate valuation or other hearing or proceeding, because those are the only purposes identified in ORS 757.495.

affiliate contracts (like the Tax Allocation Agreement) that only affect the utility's own profits and are not subject to filing:

> So far as rate making is concerned, it is of no consequence that the Legislature has declined to go further and provide for regulation by the commission of the very terms and conditions of all contracts between affiliates. The primary purpose of such regulation is to protect the corporation's treasury and to preserve its financial integrity. The function of the rate making power, however, is to protect the utility's rate payers. In the proper exercise of that power, the commission does not require the authority to invalidate contracts. All that is required—and, indeed, all that is given—is the authority to disregard unwarranted payments to affiliates when calculating the 'just and reasonable' rates which the telephone company will be permitted to charge to its subscribers. The treatment thereby accorded to the affiliates' overcharges is no different than in any other case where the commission and management disagree on the reasonableness of an expenditure, and the management concludes that it is good business judgment to make such payments from its profits despite the fact that it cannot recoup them from its rate payers.

Sabin, 21 Or. App. at 226-27 (quoting *Matter of General Tel. Co. v. Lundy*, 218 N.E.2d 274, 278 (N.Y. 1966)).

The Tax Allocation Agreement had no effect on rates. PGE's rates were set based on its own forecasted stand-alone tax liability during the entire period it was owned by Enron. *See Utility Reform Project v. PGE*, UCB 13, Order No. 03-401, at 6-7 (Or. PUC 2003). While the City clearly disagrees with the stand-alone approach, at least now with the benefit of hindsight, this proceeding is neither an effective nor appropriate forum to debate it. If the City disagreed at the time, it could have raised the issue in a PGE rate case or brought the larger policy question to the attention of the Oregon Legislature.[6] For purposes of the City's claim in this proceeding, the fact remains that PGE's rates were based on its forecasted stand-alone tax

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liability and the Agreement was not recognized as "the basis of an operating expense or capital expenditure in any rate valuation or any other hearing or proceeding" and never will be. ORS 757.495(2). The Agreement was therefore not subject to filing under the statute.

Finally, the City simply ignores OAR 800-027-0040, the regulation implementing ORS 757.495. As discussed in the Motion, the regulation reflects an understanding of the statute consistent with PGE's, *i.e.*, that an agreement such as the Tax Allocation Agreement is not subject to filing under ORS 757.495. The City does not even acknowledge the existence of the regulation, let alone offer any means of reconciling the City's overbroad interpretation of ORS 757.495 with the requirements of OAR 800-027-0040.

II. Unfounded Speculation Has No Relevance to the Question of Law Now Before the Commission

In an effort to expand the scope of ORS 757.495, the City engages in various speculations that have no relevance to the legal issue before the Commission.

For example, the City speculates that, if PGE had filed the Tax Allocation Agreement with the PUC, it might have spurred some public policy debate about the merits of calculating PGE's rates based on its stand-alone tax liability. This rampant speculation has no relevance to whether the Agreement was subject to filing under ORS 757.495 in the first place. As a practical matter, it is also a highly suspect speculation. The Commission affirmatively decided to set PGE's rates based on its forecasted stand-alone revenues and costs, including tax liability, in order to protect customers, which is consistent with long-standing PUC policy. *See Utility Reform Project v. PGE*, UCB 13, Order No. 03-401, at 6-7 (describing rationale for stand-alone policy in proceeding involving PGE); *In re Oregon Exchange Carrier Ass'n*, Order No. 93-328 (Or. PUC 1993) (recognizing general Commission policy). Moreover, it was already public

knowledge that PGE was sending its tax payments to Enron, who was in turn filing tax returns on a consolidated basis. *See* PGE, 10-K for fiscal year 2001 (filed 4/16/02) ("As a member of Enron's consolidated income tax return, PGE made income tax payments to Enron for PGE's income tax liabilities.").[7] In any event, the speculation is irrelevant to the proper interpretation of ORS 757.495(2).

The City also speculates about the "intent" or "motivation" of Enron Corp. and/or PGE in entering into the Tax Allocation Agreement and suggests that this is a crucial factual issue that must be investigated through discovery. Again, this speculation entirely ignores the actual requirements of ORS 757.495(2). Whether a contract is subject to filing under the statute is based on the nature of the contract, not the subjective "intent" or "motivation" of unidentified corporate officials at PGE or its former affiliate.[8] *See* ORS 757.495(2).

Finally, the City ignores the statute, and seems to forget that its complaint is against PGE, not the PUC, when it asserts that, once Enron elected to file on a consolidated basis, the Commission had a "duty and obligation" to review that "transaction." (City Response at 13) The Commission had the authority to set PGE's rates on a stand-alone basis as it did, but that is beside the point. The only question presented by the City's Complaint is whether PGE

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[7] *See also* PGE, 10-K for fiscal year 2000 (filed 3/5/01) ("PGE's federal income taxes are a part of its parent company's consolidated federal income tax return. PGE pays for its tax liabilities when it generates taxable income and is reimbursed for its tax benefits by the parent company on a stand-alone basis. Deferred income taxes are provided for temporary differences between financial and income tax reporting.").

[8] The City freely speculates that Enron and/or PGE might have intentionally drafted the Agreement so as to avoid filing under ORS 757.495. Even if intent were legally relevant (which it clearly is not), Enron is not a party to this proceeding, whatever its internal motivations were, and PGE voluntarily sent a copy of the Agreement to PUC Staff at the time, which severely undercuts any suggestion that PGE was trying to keep it secret. (Lesh Decl. ¶ 3). The City is merely trying to manufacture a factual dispute to avoid summary judgment.

was required to file the Tax Allocation Agreement under ORS 757.495(2), and the answer to that question is no. The City appears more concerned with the alleged unfairness of consolidated tax filings under the federal tax code and the Commission's approach to taxes in rate-making than it is with PGE's filing requirements under ORS 757.495.

The City's true purpose in bringing this complaint is well reflected in its statement, "With all due deference to PGE and the Commission, and pending discovery and further factual investigation, it seems fair to say that there is at least some indication here that ratepayers were abused and citizens were abused by these arrangements." (City Response at 9) In other words, the City is suspicious of PGE and/or Enron, and it wants to dig until it finds some violation of some law, even if it is not ORS 757.495. Therefore, the City simply glosses over the fact that PGE's rates were based on its stand-alone tax liability, the fact that the PUC adopted that policy in order to protect customers, the fact that the Tax Allocation Agreement had no impact on PGE's rates, and the fact that PGE's rates would have been the same in the absence of the Agreement.

The Commission must consider those facts, however, because they are directly relevant to the question before it. This is not a generalized investigation into PGE and Enron Corp.'s tax relationship, which has already been addressed by the Commission on several occasions.[9] The only pending claim in this proceeding is the City's allegation that PGE should have filed the Tax Allocation Agreement with the PUC pursuant to ORS 757.495(2). There are

[9] The Utility Reform Project's complaint in UCB 13 and related proceeding UM 1074 pertained entirely to PGE's tax arrangements. More recently, the PUC Staff issued a report on March 2, 2006, addressing various issues raised by the City Attorney in a December 2005 memorandum, including tax issues. For example, the City alleged that PGE had paid Enron Corp. $88 million less in taxes than it had collected from customers. Upon investigation, the Staff determined that PGE had in fact paid Enron Corp. $56 million more for taxes than it had collected from customers. The Commission has never found any misconduct by PGE with respect to its taxes.

no disputed facts material to resolving that issue. The Agreement was not subject to filing under the statute as a matter of law, and PGE is therefore entitled to summary judgment.[10]

III. Conclusion

For the foregoing reasons, defendant Portland General Electric Company respectfully asks the Commission to grant summary judgment in its favor on Count 3 of the Complaint.

DATED this 29th day of September, 2006.

PORTLAND GENERAL ELECTRIC COMPANY

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Of Attorneys for Defendant

[10] The City's request to amend its pleading to conform to the evidence is unavailing. The subject of the City's request—PGE's cash payments to Enron and Enron-PGE merger conditions—is irrelevant to the legal issue at hand.

CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** by mailing a copy thereof in a sealed envelope, first-class postage prepaid, addressed to each party listed below, deposited in the U.S. Mail at Portland, Oregon.

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DATED this 29th day of September, 2006.

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BEFORE THE PUBLIC UTILITY COMMISSION

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[4] Inexplicably, the City asserts that "PGE has admitted that it did not previously comply with the statute," citing the Lesh Declaration ¶ 3. (City Response at 13) Neither Ms. Lesh nor PGE has ever stated anything of the kind. To the contrary, Ms. Lesh declared that she did <u>not</u> believe that the Agreement needed to be filed under ORS 757.495 (Lesh Decl. ¶ 3), and PGE has filed for summary judgment precisely because it believes it <u>has</u> complied with ORS 757.495.

the contract may be recognized in any rate valuation or other hearing or proceeding." ORS 757.495(3). Conversely, if the PUC "disapproves" the contract, then "it shall be unlawful to recognize the contract for the purposes specified in this section," *i.e.*, it shall be unlawful to recognize the contract as the basis of an operating expense or capital expenditure in any rate valuation or other hearing or proceeding.[5] *Id.* Since PGE's rates were based on its forecasted stand-alone tax liability, the Tax Allocation Agreement was never recognized as the basis of an operating expense or capital expenditure in any rate valuation or other hearing or proceeding, and therefore no unlawful act occurred under ORS 757.495(3).

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For example, the City speculates that, if PGE had filed the Tax Allocation Agreement with the PUC, it might have spurred some public policy debate about the merits of calculating PGE's rates based on its stand-alone tax liability. This rampant speculation has no relevance to whether the Agreement was subject to filing under ORS 757.495 in the first place. As a practical matter, it is also a highly suspect speculation. The Commission affirmatively decided to set PGE's rates based on its forecasted stand-alone revenues and costs, including tax liability, in order to protect customers, which is consistent with long-standing PUC policy. *See Utility Reform Project v. PGE*, UCB 13, Order No. 03-401, at 6-7 (describing rationale for stand-alone policy in proceeding involving PGE); *In re Oregon Exchange Carrier Ass'n*, Order No. 93-328 (Or. PUC 1993) (recognizing general Commission policy). Moreover, it was already public

knowledge that PGE was sending its tax payments to Enron, who was in turn filing tax returns on a consolidated basis. *See* PGE, 10-K for fiscal year 2001 (filed 4/16/02) ("As a member of Enron's consolidated income tax return, PGE made income tax payments to Enron for PGE's income tax liabilities.").[7] In any event, the speculation is irrelevant to the proper interpretation of ORS 757.495(2).

The City also speculates about the "intent" or "motivation" of Enron Corp. and/or PGE in entering into the Tax Allocation Agreement and suggests that this is a crucial factual issue that must be investigated through discovery. Again, this speculation entirely ignores the actual requirements of ORS 757.495(2). Whether a contract is subject to filing under the statute is based on the nature of the contract, not the subjective "intent" or "motivation" of unidentified corporate officials at PGE or its former affiliate.[8] *See* ORS 757.495(2).

Finally, the City ignores the statute, and seems to forget that its complaint is against PGE, not the PUC, when it asserts that, once Enron elected to file on a consolidated basis, the Commission had a "duty and obligation" to review that "transaction." (City Response at 13) The Commission had the authority to set PGE's rates on a stand-alone basis as it did, but that is beside the point. The only question presented by the City's Complaint is whether PGE

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[7] *See also* PGE, 10-K for fiscal year 2000 (filed 3/5/01) ("PGE's federal income taxes are a part of its parent company's consolidated federal income tax return. PGE pays for its tax liabilities when it generates taxable income and is reimbursed for its tax benefits by the parent company on a stand-alone basis. Deferred income taxes are provided for temporary differences between financial and income tax reporting.").

[8] The City freely speculates that Enron and/or PGE might have intentionally drafted the Agreement so as to avoid filing under ORS 757.495. Even if intent were legally relevant (which it clearly is not), Enron is not a party to this proceeding, whatever its internal motivations were, and PGE voluntarily sent a copy of the Agreement to PUC Staff at the time, which severely undercuts any suggestion that PGE was trying to keep it secret. (Lesh Decl. ¶ 3). The City is merely trying to manufacture a factual dispute to avoid summary judgment.

was required to file the Tax Allocation Agreement under ORS 757.495(2), and the answer to that question is no. The City appears more concerned with the alleged unfairness of consolidated tax filings under the federal tax code and the Commission's approach to taxes in rate-making than it is with PGE's filing requirements under ORS 757.495.

The City's true purpose in bringing this complaint is well reflected in its statement, "With all due deference to PGE and the Commission, and pending discovery and further factual investigation, it seems fair to say that there is at least some indication here that ratepayers were abused and citizens were abused by these arrangements." (City Response at 9) In other words, the City is suspicious of PGE and/or Enron, and it wants to dig until it finds some violation of some law, even if it is not ORS 757.495. Therefore, the City simply glosses over the fact that PGE's rates were based on its stand-alone tax liability, the fact that the PUC adopted that policy in order to protect customers, the fact that the Tax Allocation Agreement had no impact on PGE's rates, and the fact that PGE's rates would have been the same in the absence of the Agreement.

The Commission must consider those facts, however, because they are directly relevant to the question before it. This is not a generalized investigation into PGE and Enron Corp.'s tax relationship, which has already been addressed by the Commission on several occasions.[9] The only pending claim in this proceeding is the City's allegation that PGE should have filed the Tax Allocation Agreement with the PUC pursuant to ORS 757.495(2). There are

[9] The Utility Reform Project's complaint in UCB 13 and related proceeding UM 1074 pertained entirely to PGE's tax arrangements. More recently, the PUC Staff issued a report on March 2, 2006, addressing various issues raised by the City Attorney in a December 2005 memorandum, including tax issues. For example, the City alleged that PGE had paid Enron Corp. $88 million less in taxes than it had collected from customers. Upon investigation, the Staff determined that PGE had in fact paid Enron Corp. $56 million more for taxes than it had collected from customers. The Commission has never found any misconduct by PGE with respect to its taxes.

no disputed facts material to resolving that issue. The Agreement was not subject to filing under the statute as a matter of law, and PGE is therefore entitled to summary judgment.[10]

III. Conclusion

For the foregoing reasons, defendant Portland General Electric Company respectfully asks the Commission to grant summary judgment in its favor on Count 3 of the Complaint.

DATED this 29th day of September, 2006.

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[10] The City's request to amend its pleading to conform to the evidence is unavailing. The subject of the City's request—PGE's cash payments to Enron and Enron-PGE merger conditions—is irrelevant to the legal issue at hand.

CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** by mailing a copy thereof in a sealed envelope, first-class postage prepaid, addressed to each party listed below, deposited in the U.S. Mail at Portland, Oregon.

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