BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1262

CITY OF PORTLAND, Complainant, vs. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation, Defendant.	**CITY OF PORTLAND'S RESPONSE TO PORTLAND GENERAL ELECTRIC CO.'s MOTION TO DISMISS**

1. Background

On May 3, 2006, the City of Portland filed a complaint with the Oregon Public Utility Commission. Among other claims, the City asked that the Commission examine the practices of PGE in filing consolidated income taxes with the State of Oregon, and in making tax payments to Enron from 1997 to 2002 without having a tax allocation agreement in place or without seeking the Commission's review of the terms and conditions of the tax allocation agreement with an affiliated entity.

Portland General Electric Company (PGE) is a corporation organized and existing under and by virtue of the laws of the state of Oregon, with its principal executive offices located in Portland, Oregon. It is an operating electric public utility as defined by ORS 757.005, generating, purchasing, and distributing electric energy in the state of Oregon. There is no debate that PGE is itself subject to the jurisdiction of the commissioner.

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(503) 823-4047

On May 30, 2006, PGE moved to dismiss Claims 1 and 2 of the City's complaint. PGE asserts that the Commission lacks subject-matter jurisdiction to consider the City's claims. Despite PGE's contentions to the contrary, the Commission has jurisdiction over these claims, and should allow the City's claims to proceed.

2. Summary

The Commission has broad legislative authority in rate setting and utility regulation. The Commission has authority over utility accounting practices. The Commission is charged with protecting ratepayers from unjust and unreasonable practices and exactions. The Commission has authority to determine if management has made reasonable and prudent decisions in operating the utility. In making such determinations, the Commission has authority to investigate utility management. The Commission approves the recovery of utility tax liabilities from ratepayers through utility rates.

Correspondingly, the Commission has a duty to determine if the utility is properly accounting for those taxes, and if management is making reasonable and prudent decisions in how the corporation is handling its tax obligations. The Commission has authority over utility contracts and payments to affiliated entities. The Commission has a duty to determine if the utility is entering into reasonable tax allocation agreements that do not unreasonably favor the parent corporation. The Commission has a statutory obligation to review contracts to determine if the terms and conditions are fair and reasonable and in the public interest. The ratepayers are entitled to protection from potential abuses that may arise from less than arm's length transactions. The Commission must determine if the agreement was a reasonably prudent decision by management, and whether it provided a reasonable and balanced sharing of tax

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benefits and burdens. The Commission must also determine if the utility's practices are unjust or unreasonable.

In its complaint, the City has asked that the Commission investigate and determine if the utility complied with state tax laws in filing on a unitary basis with Enron from 1997 through 2005. The Commission has jurisdiction to undertake such an investigation to determine if the utility was being properly managed during this time, and to determine if the utility was properly accounting for liabilities. The City also asks that the Commission undertake an investigation to determine if the utility had failed to properly enter into tax allocation agreements with its corporate parent – agreements which would have provided for standard means of establishing tax burdens and benefits between the affiliated corporate entities. Furthermore, the City has asked the Commission for a determination if the tax allocation agreement, entered into in 2004, was subject to review as a contract between affiliated entities. The answers to these questions are important today both to prevent future problems from arising and to determine if the utility acted properly.

Despite PGE's characterizations, the City is not attempting to live in the past. Rather, the City is unwilling to treat the past as if it should be forgotten. "Those who cannot remember the past are condemned to repeat it."[1] In filing its complaint, the City is asking what lessons can be drawn from recent experience, and if there were mistakes, how might these be avoided in the future? On the other hand, if everything that has transpired is merely a one-time accident of

[1] George Santayana, *Life of Reason, Reason in Common Sense*, p. 284 (Scribner's 1905).

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history and incapable of repetition, then we can proceed merrily into the future, content in the collective knowledge that all is for the best in this best of all possible worlds.[2]

3. Standard for Review of a Motion to Dismiss.

The Commission follows the Oregon Rules of Civil Procedure "in all cases except as modified by these rules, by order of the Commission, or by ruling of the ALJ." OAR 860-011-0000.

In reviewing a motion to dismiss, the Commission "assume[s] the truth of all allegations, as well as any inferences that may be drawn, and view[s] them in the light most favorable to the nonmoving party." AT&T Communications of the Pacific Northwest, Inc. et al v. Qwest Corporation, UM 1232, Order No. 06-230, 2006 Ore. PUC LEXIS 208, *6 (May 11, 2006).

> [O]n a motion to dismiss for lack of subject matter jurisdiction under ORCP 21A(1), if
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> > "the facts constituting such [a] defense[ ] do not appear on the face of the pleading and matters outside the pleading, including affidavits, declarations and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present affidavits, declarations and other evidence, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits."
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> Consequently, a court may consider evidence beyond the allegations in the pleadings to determine whether it has subject matter jurisdiction of a case. In many cases, subject matter jurisdiction may not turn on factual determinations. But in some cases the question turns on extant facts, such as the determination as to whether a case is ripe for adjudication. Thus, if the statutory justiciability question presented by this case is jurisdictional, then we may consider the evidence and affidavits that were submitted to the court by the parties. If not, then our review is limited to the complaint.

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[2] As was embodied in the philosophy espoused by Voltaire's character of Dr. Pangloss in the novel *Candide*.

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Beck v. City of Portland, 202 Or.App. 360, 365, 122 P.3d 131 (2005).

"[Subject matter jurisdiction] exists when the constitution, the legislature or the law has told a specific court to do something about the specific kind of dispute in issue." Black v. Arizala, 182 Or App 16, 25 (2002), aff'd, 337 Or 250 (2004). Central Lincoln People's Utility District v. Verizon Northwest Inc., UM 1087, Order No. 05-042, 2005 Ore. PUC LEXIS 36 (January 19, 2005) (denying district's motion to dismiss utility's counter-complaint on the grounds that Commission had authority to regulate rates, terms and conditions of pole attachments). See, also, School Dist. No. 1, Mult. Co. v. Nilsen, 262 Or 559, 566-68, 499 P2d 1309 (1972) (reversing lower court determination that Labor Commissioner did not have jurisdiction over claim of general discrimination).

4. The Commission's jurisdictional authority encompasses the City's claims.

The Legislature has charged the Commission with the responsibility of representing and protecting ratepayers:

> "in all controversies respecting rates . . . and all matters of which the commission has jurisdiction. In respect thereof the commission shall make use of the jurisdiction and powers of the office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices".

ORS 756.040(1). This general grant of authority to the Public Utility Commission has been construed by the Oregon courts as containing a broad delegation from the Legislature. First National Bank v. Pacific Telephone & Telegraph Company, 81 Or 307, 159 P 561 (1916) (holding that Commission's authority "to do all things necessary and convenient in the exercise of such [statutory] power and jurisdiction" granted agency exclusive jurisdiction over dispute between telephone company and customer regarding termination of service).

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The Legislature has directed that the Commission's authorizing statutes "shall be liberally construed . . . to promote the public welfare . . . and substantial justice between customers and [PGE]." ORS 756.062(2). "Whenever the Public Utility Commission believes that . . . an investigation of any matter relating to any public utility or telecommunications utility or other person should be made . . . the commission may . . . investigate any such matter." ORS 756.515(1). "Public Utility Commission may inquire into management of the business of [PGE] and shall keep informed as to the manner and method in which they are conducted . . . " ORS 756.070.

The Commission "has the right and power of regulation, restriction and control over the budgets of expenditures of public utilities, as to all items covering . . . [a]ny payment or contemplated payment to any . . . affiliated interest". ORS 757.105(1)(f). The Commission may "at any time [make and file] orders rejecting imprudent and unwise expenditures or payments". ORS 757.110(2). The Commission has authority over all utility accounts concerning "all business transacted". ORS 757.120(1).

Elsewhere, the Commission has asserted authority over the accounting for utility taxes, in how those taxes are treated in utility ratemaking and how those taxes are recovered from ratepayers. See, e.g., Multnomah County v. Davis, 35 Or App 521, 581 P2d 968 (1978), rev denied, 285 Or 73 (1979) (upholding administrative rule on county taxes as within agency's broad regulatory authority under ORS 756.040 and ORS 756.060); Pacific Northwest Bell v. Davis, 43 Or App. 999, 608 P2d 547 (1979) (affirming administrative rule regarding utility advertising expenses as within agency's broad regulatory authority under ORS 756.040 and ORS 756.060). Indeed, utilities have otherwise asserted that the Commission **must** provide for

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recovery of the utility taxes from ratepayers. See, e.g., Pac. Tel. & Tel. Co. v. Hill, 229 Or 437, 365 P2d 1021, 41 PUR 3d 113 (1961) (rates set by Commission must allow for recovery of taxes incurred in conducting of intrastate business).

The Commission has promulgated administrative rules that address accounting for income taxes, in the context of cost allocation for transfers between and among utility affiliates. OAR 860-027-0048. Furthermore, "[n]o officer, agent or employee of any public utility . . . [shall fail] to properly use and keep a system of accounting or any part thereof, as prescribed by the commission." ORS 756.115(5). "No officer, agent or employee of any public utility [shall refuse] to do any act or thing in connection with such system of accounting when so directed by the commission or authorized representative." ORS 756.115(6). The Attorney General has previously advised the Commission that it may require utilities to provide tax information related to questions being examined by the agency, citing ORS 756.070, ORS 756.080, ORS 757.115, ORS 757.180 and ORS 757.990(3). 28 Op. Atty Gen. Ore. 91, 1957 Ore. AG LEXIS 25 (1957).

ORS 757.495 requires public utilities to seek approval of contracts with affiliated interests within 90 days after execution of the contract. In reviewing these contracts, the Commission is directed to determine if the contract terms are fair and reasonable, and not contrary to the public interest. ORS 757.495. As the Commission has repeatedly said, the intent of this statute is to "protect ratepayers from the abuses which may arise from less than arm's

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length transactions." See, e.g., CP National Corporation, UF 3842, Order No. 82-593 at 2; Portland General Electric Company, UF 3739, Order No. 81-737 at 6.[3]

> "ORS 757.495 and 757.105 extended the commissioner's regulatory authority over public utilities by empowering review and approval, or disapproval, of dealings between utilities and affiliated interests prior to execution of the contracts between the parties . . . [A] public utility's failure to timely submit an affiliated interest contract to the commissioner for approval pursuant to ORS 757.495 does not preclude the commissioner's subsequent examination of the contract . . ."

Letter of Advice to Rick Elliott, Office of Public Utility Commissioner from Chief Counsel Larry D. Thomson, 1986 Ore. AG LEXIS 80, *5-*6 (April 30, 1986).

It is well-settled that administrative agencies have such implied powers as are necessary to enable the agency to carry out the powers expressly granted to it. Pacific Northwest Bell Tel. Co. v. Katz, 116 Or App. 302, 309-310, 841 P2d 652 (1992) (citing SAIF Corp. v. Wright, 312 Or 132, 137, 817 P2d 1317 (1991) (determining that Workers' Compensation Board had authority to approve disbursement to SAIF from claimant's third-party settlement); Ochoco Const. v. DLCD, 295 Or 422, 426, 667 P2d 499 (1983) (holding that after agency acknowledged local government's comprehensive plan, it did not have standing to seek to enforce compliance of local land use decisions with the plan.); Warren v. Marion County, 222 Or 307, 320, 353 P2d 257 (1960) (approving rules and procedures for enforcement of building code ordinance as being

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[3] Other states have exercised jurisdictional authority to review the reasonableness of tax allocation agreements between utilities and affiliates. See, e.g., In re Northern Utilities, Inc., Docket No. 2002-323, 2002 WL 32003115, *1 (August 6, 2002) (Approving utility participation in a tax allocation agreement with its affiliates, and other members of parent corporate family.); In re Berkshire Gas Co., 1998 WL 996028, *12 (November 6, 1998) (approving tax sharing agreement containing "a reasonable method of allocating liabilities and benefits" between utility and its affiliates, protecting the interests of the utility's ratepayers).

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reasonably within agency's implied powers.)[4] Thus in the case of State v. Corvallis & E. R. Co., 59 Or 450, 117 P 980 (1911), the court determined that the Commission's authority over railroad rate and services contained sufficient ancillary authority to require the construction, operation and staffing of railroad stations at locations convenient to the public:

> The erection and maintenance of reasonably adequate buildings at regular stations on the line of railway necessarily facilitates the dispatch of business, and it is a duty which the enactment imposes on every railroad company for the convenience of passengers and the accommodation of freight. We conclude, therefore, that the Railroad Commission of Oregon possessed plenary power to order the erection of the building described.
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> The construction of a suitable depot at a station would be of little value to passengers and shippers, unless the carrier kept at such place, for a reasonable time before and after the arrival and departure of trains, an agent with whom the public could transact business relating to railroad traffic. The duty to maintain a representative at the place and times indicated is a service which a railroad company owes, and the performance of which may be compelled.

Corvallis & E. R. Co., 59 Or at 467-468.

The Commission has "been granted the broadest authority - commensurate with that of the legislature itself - for the exercise of [its] regulatory function." Pacific N.W. Bell v. Sabin, 21 Or App 200, 214, 534 P2d 984 (1975). The Commission's investigatory authority is proportionate to its ability to regulate utilities. It is well settled that "the power of inquiry . . . is an essential and appropriate auxiliary to the legislative function. It was so regarded and

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[4] See also, State ex rel. State Railroad Com. v. Great N. R. Co., 68 Wash. 257, 261-62, 123 P. 8 (1912) ("The admitted power of the commission to determine the duty and enforce performance under penalty carries with it the power and duty to determine manner of performance and time when the penalty for the failure to perform will attach. This is essential to the very genius of the law."); In re Metro One Telecommunications, Inc., IC 1, Order No. 00-709, 2000 Ore. PUC LEXIS 209, *15 (November 1, 2000) (determining that Commission's authority to arbitrate and approve interconnection agreements necessarily implied authority to interpret and enforce agreements).

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employed in American Legislatures before the Constitution was framed and ratified." McGrain v. Daugherty, 273 US 135, 174, 47 S Ct 319, 328 (1927). This is so because:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it.

McGrain. 273 US at 175.

As the United States Supreme Court has explained, the inherent legislative power to conduct investigations ". . . is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes the surveys of defects in our social, economic or political system for the purpose of enabling the [legislative body] to remedy them. . . ." Watkins v. United States, 354 US 178, 187, 77 S Ct 1173, 1179 (1957).[5] Although broad, the power to investigate is not unlimited:

> Its boundaries are defined by its source. Watkins v. United States, 354 US 178, 197 (1957). Thus, "[t]he scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." Barenblatt v. United States, 360 US 109, 111 (1959); Sinclair v. United States, 279 US 263, 291-92 (1929). We have made it clear, however, that Congress is not invested with a "'general' power to inquire into private affairs." McGrain v. Daugherty, 273 US 135, 173 (1927). The subject of any inquiry always must be one "on which legislation could be had." Id. at 177.

Eastland v. US Servicemen's Fund, 421 US 491, 504 n. 15, 95 S Ct 1813, 1822 (1975) (punctuation and ellipses added by the Eastland court).

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[5] The Oregon Supreme Court has recognized that the need for a legislative body to inform itself "is an essential part of the legislative process." Adamson v. Bonesteele, 295 Or 815, 821, 671 P 2d 693, 696 (1983) (citation omitted.)

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5. The Commission has jurisdiction over the claims presented by the City.

Did PGE properly account for its state income taxes? Did management act reasonably and prudently in determining that the utility should file on a consolidated basis with its corporate parent? The Commission bears a "responsibility to the public" to make certain that management decisions are reasonable and prudent. See, e.g., In re Portland General Electric Co., UF 3091, Order No. 74-998, 8 P.U.R.4th 393 (December 23, 1974) (disallowing utility's proposed recovery of advertising expenses as unreasonable, and adopting staff's recommended advertising expense). The Commission's authority must be read broadly, to protect "[PGE's ratepayers] and the public generally, from unjust and unreasonable exactions and practices." ORS 756.040(1). The Commission has authority to determine if the utility's decisions, and the outcomes of those decisions, resulted in "substantial justice between customers and [PGE]" as required under ORS 756.062(2).

The City's complaint noted that the utility otherwise publicly claimed to be separate from Enron, and was not a unitary entity. PGE's statements are at odds from the standards under Oregon law for filing on a unitary basis. Was the choice to file on a consolidated basis imposed upon the utility, or did it come from within? Was it reasonable and prudent to file on a consolidated basis? The City's complaint also noted that in approving Enron's acquisition of PGE, the Commission imposed standards that otherwise seemed to require that PGE be operated as a separate entity. The Commission has authority to determine if its orders were duly followed.

The authority to allow recovery of tax expenses necessarily includes the ability to determine the appropriate level of recovery for tax liabilities, and to examine whether that appropriate level has occurred. "It is the Commissioner's duty to see that all . . . liabilities [such

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as taxes] are properly accounted for in the utility's books." Or. Tel. Corp. v. Pub. Util. Comm'r, 5 Or App 231, 483 P.2d 822 (1971). It is the proper exercise of this duty that the City is now seeking.

If the Commission has the authority to approve recovery of certain expenses, it logically follows that the agency possesses authority to determine if the utility is properly accounting for those expenses and liabilities, or is otherwise complying with legal requirements as to how those expenses are incurred.[6] Logically, the Commission cannot possess authority to approve the recovery of taxes by PGE, without also having authority to determine if those taxes had been properly accounted for, or were actually a liability for the company. Put in a different way, the Commission must have the ability to examine whether the benefits and burdens were properly distributed between the ratepayers and the shareholder in this instance. It is unclear where, if at all, this balancing of interests occurred. The question of whether these practices were unreasonable and unjust toward the ratepayers has not been answered.

A parent corporation dealing with a subsidiary on how tax benefits and burdens will be carved up among affiliated entities epitomizes a situation where "less than [an] arm's length transaction" might occur. This situation squarely implicates the Commission's responsibilities under ORS 757.495.

Did PGE act properly in not presenting its tax allocation agreement to the Commission for review and ratification in 2002? In making payments to Enron for income taxes prior to

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[6] In reviewing the decisions and actions of the utility, the Commission must determine if the utility acted "[b]eyond the bounds of reason or moderation; immoderate, exorbitant." In re Public Utilities Comm'r, 201 Or 1, 26, 268 P.2d 605(1954) (discussing the meaning of "reasonableness").

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entering into this tax allocation agreement, was the distribution of tax benefits and burdens reasonable? Were ratepayer interests adequately protected during the time period in which payments were made without any apparent written guidelines for determining how tax benefits and burdens were allocated between the subsidiary, its affiliates and its corporate parent? From 1997 to 2001, what standards determined the allocation of tax benefits and burdens, when there was no apparent tax allocation agreement? Did any of these arrangements expose ratepayers to unreasonable or unjust practices, or to unreasonable or unjust exactions?

In 2004, when PGE entered into a tax allocation agreement with Enron as a requirement of complying with the SEC's PUHCA determination, did PGE act properly in not presenting this agreement to the Commission for review and approval?[7] If PGE inappropriately accounted for taxes on a unitary basis, would it be reasonable and proper to carry these as liabilities on its books? Would it be reasonable to recover these liabilities as "properly incurred expense" from ratepayers? Construing the Commission's authority broadly will serve to protect "[PGE's

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[7] PGE's interaction with Enron is not so far in the past as the motion to dismiss suggests. As recently as May 12th, Peggy Fowler and Jim Piro participated in a conference call with analysts. Portland General Electric Company First Quarter 2006 Conference Call, < http://investors.portlandgeneral.com/events.cfm > (May 12, 2006 10:00 AM ET). Approximately twenty-five minutes into the web cast conference call, Ms. Fowler responded to a question on the potential impact of SB 408 in the context of derivative contracts and "mark to market" accounting. Mr. Piro then added that PGE had just sent a check to Enron, that this would be disclosed in PGE's next quarterly filing, and that the payment was the result of deferred tax accounting.
"In April 2006, PGE paid $18 million to Enron for net current taxes payable for the first quarter of 2006 when PGE was included in Enron's consolidated group for filing consolidated federal and state income tax returns." *Portland General Electric Co., Securities and Exchange Commission Form 10-Q Quarter ending March 31, 2006* p. 22 (May 12, 2006), < http://www.shareholder.com/common/edgar/784977/784977-06-32/06-00.pdf > (Site visited June 12, 2006).

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ratepayers] and the public generally, from unjust and unreasonable exactions and practices." ORS 756.040(1). Shouldn't the Commission investigate these arrangements to determine if they served to provide "substantial justice between customers and [PGE]" as mandated by ORS 756.062(2)?

Senate Bill 408 addressed only the prospective treatment of taxes. It didn't address whether or how PGE may have properly or improperly handled taxes before passage of the legislation. Despite PGE's characterizations, the City is not asking that the Commission undertake to directly enforce the tax statutes or the former requirements of the Public Utility Holding Company Act. Rather, the City asks that the Commission review management's oversight of the utility's operations and determine whether management reasonably and prudently ran the company in regard to very particular issues.

PGE's motion to dismiss relies heavily upon the Commission's dismissal of the complaint brought by the Utility Reform Project, seeking enforcement of the Uniform Trade Practices Act. PGE fails to acknowledge that ultimately the Commission's dismissal of all of the URP complaint was reversed and remanded by Marion County Circuit Court. Marion County Circuit Court Case No. 03C21227, Letter Ruling of Circuit Court Judge Don A. Dickey, June 4, 2004, as noted in Utility Reform Project, et al. v. Portland General Electric Co., UCB 13, Order No. 05-198, p. 1 (April 26, 2005).

In the present proceeding, the City has made allegations of potential violations of statutes specifically within the Commission's authority. Thus, the City's claims are not the same as those addressed in staff's recommendations in Lewis, where the statutes were specifically outside of

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the Commission's purview. Utility Reform Project, et al., v. Portland General Electric Co., UCB 13, Order No. 03-401 p. 1 (July 9, 2003).

The claims brought by the City are not like those presented in Lewis. The City is not asking that the Commission enforce statutes outside of ORS Chapters 756 and 757. Granted, the Commission's determination may require consideration of the state tax statutes. But that is no different from the Commission being required to understand the tax code in approving the recovery of taxes by a utility in the first instance. In neither instance is the Commission enforcing the tax statutes. Rather, the Commission is exercising its authority over the utility in reviewing rates and the utility's accounting. Furthermore, the City is asking for the Commission to determine if the utility's transfer of funds to its parent corporation was subject to the Commission's oversight. This squarely implicates the Commission's authority under ORS 757.495, which is not subject to any other agency's oversight or enforcement.

The City does not ask whether Enron did or did not properly pay income taxes, but whether PGE, as a regulated utility, properly managed its business and whether the PUC properly oversaw the management of PGE. "Only expenditures necessary for furnishing utility service should be reflected in rates." In re Portland General Electric Co, UF 3218, Order No. 76-601 at 13, 1976 WL 24588 (September 1, 1976); In re Cascade Natural Gas, UF 3246, Order No. 77-125 at 10, 19 P.U.R.4th 170 (February 22, 1977).

Nor are the Commission's implied powers of investigation and oversight in this area limited in the same way as considered in Pacific Northwest Bell Tel. Co. v. Davis, 43 Or App 999, 1006-1007; 608 P2d 547 (1979), rev den, 289 Or 107 (1980) (finding that "tagline" administrative rules requiring the identification of utilities' political advertising was not within

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specifically delegated legislative authority). Unlike in Davis, the questions present by the City do not involve the power of legislation which the court felt was constitutionally constrained as a non-delegable power.

6. The relief sought by the City is fully within the Commission's statutory authority.

The proposition that "[u]tility management [has] full responsibility for making decisions and for accepting the consequences of the decisions" provides little protection for ratepayers if there are no consequences flowing from management's decisions. In re Pacificorp, LC 39, Order No. 06-0292006 WL 302102, *53 (January 23, 2006). If ratepayers will be saddled with responsibility for management's decisions, no matter how potentially imprudent, unreasonable or perhaps even outside the boundaries of the law, than there is no mechanism for providing balance in the system.

The City has asked for determinations on whether PGE was qualified to file unitary tax returns with the State of Oregon together with Enron and its other subsidiary corporations during the time period that PGE was owned by Enron. This pertains to whether the utility was properly accounting for tax liabilities, and whether it was acting reasonably and prudently in making these determinations.

The City has asked for a determination as to whether PGE failed to file the required separate Oregon income tax returns with the State of Oregon during the time PGE was owned by Enron. Again, this is relevant to the Commission's jurisdiction over the utility's accounting practices for tax liabilities, and over reasonableness and prudency of management's determinations.

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The City asks for a determination on whether the conditions under which the Commission approved Enron's acquisition of PGE prevented PGE from filing a unitary tax return with the State of Oregon. The Commission has unquestionable authority to interpret and enforce its own orders.

As to the ruling sought by the City on whether PGE and Enron distributed amounts collected from Oregon ratepayers for federal and state taxes without a tax allocation agreement being in place, this implicates the Commission's responsibility under ORS 757.495 to oversee transactions between utilities and affiliated entities.[8] The question of whether such arrangements were fair and reasonable and in the public interest is also unanswered, as this question has not been taken up by the Commission.

To the extent that the Commission determines that any of these matters may fall outside of its realm of established administrative expertise, ORS 757.160(3) allows the Commission to request the assistance of the Attorney General.

ORS 756.990 allows the Commission to impose penalties for violations of statutes administered by the Commission, and for failures to perform duties enjoined upon the utility.

Unlike in Ochoco Const., the Commission does have an express grant of statutory authority over utility accounting and rates. The Commission does have express statutory authority to oversee utility management, and to protect ratepayers. The Commission does have specific statutory responsibilities for reviewing contracts and transactions between utilities and

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[8] PGE may offer up the tax allocation agreement eventually submitted to the SEC in 2004. However, this begs the question of why the tax allocation agreement was not submitted prior to that point in time, going as far back as 1997.

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their affiliated interests, to protect the public interest. Additionally, the Commission has explicit statutory responsibilities for investigating utility management, and keeping informed about how the utility is being managed. Compare, Ochoco Const., 295 Or at 433-34. These statutes establishing the Commission are to be construed liberally "to promote the public welfare . . . and substantial justice between customers and [PGE]." ORS 756.062(2).

The City's claims address an actual controversy. This is not an academic exercise, potentially resulting in a declaration upon abstract propositions. The Commission's investigation and determinations upon PGE's accounting for its income taxes, and entering into tax allocation arrangements without seeking Commission approval, would guide future utility management decisions. Correspondingly, declining to investigate will mean that such arrangements will be outside the purview of the Commission's review. Depending on whether the Commission determines that there were statutory violations, penalties could be imposed. There might also be implications for other proceedings if the Commission determines that management's decisions were not reasonable and prudent, or that the ratepayers were subjected to unjust practices.

7. Conclusion

The Commission should deny PGE's request to dismiss the City's claims. PGE essentially argues that the OPUC has no present need to investigate these issues. PGE characterizes the City's questions as water under the bridge.[9] The City has not asked that the Commission engage in extra jurisdictional enforcement of statutes outside of its authority.

[9] PGE's response could be alternately characterized as being that it is too late now to hold PGE responsible for what may have transpired under Enron's ownership. This brings to mind the Latin proverb of "*Quis custodiet ipsos custodes?*" which has been translated as "Who will guard the guardians themselves?"

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Rather, the City has asked that the Commission engage in an investigation to determine if the utility complied with applicable statutes and administrative regulations governing utility accounting and contracts with affiliated entities. The Commission clearly has authority in these areas, and should undertake to determine if the utility acted reasonably and prudently when it took the actions that it did. Dismissing the City's claims would not serve to "promote the public welfare [or] substantial justice".

Dated this 14th day of June, 2006.

Respectfully submitted,

Benjamin Walters

Benjamin Walters, OSB #85354
Senior Deputy City Attorney
bwalters@ci.portland.or.us
Attorneys for Plaintiff City of Portland

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PORTLAND CITY ATTORNEY'S OFFICE
1221 SW 4TH AVENUE, RM. 430
PORTLAND, OREGON 97204
(503) 823-4047

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **CITY OF PORTLAND'S RESPONSE TO PORTLAND GENERAL ELECTRIC CO.'s MOTION TO DISMISS** on:

JEANNE M. CHAMBERLAIN DAVID F. WHITE ROBYN E. RIDLER TONKON TORP LLP 888 SW FIFTH AVE STE 1600 PORTLAND OR 97204 jeanne@tonkon.com davidw@tonkon.com robyn@tonkon.com	MELINDA J. DAVISON MATTHEW PERKINS DAVISON VAN CLEVE PC 333 SW TAYLOR STE 400 PORTLAND OR 97204 mail@dvclaw.com
J. JEFFERY DUDLEY PORTLAND GENERAL ELECTRIC CO. 1WTC1301 121 SW SALMON PORTLAND OR 97204 jay.dudley@pgn.com	JAMES T SELECKY BRUBAKER & ASSOCIATES INC 1215 FERN RIDGE PKWAY STE 208 ST LOUIS MO 63141 jtselecky@consultbai.com

on June 14, 2006, by causing a full, true and correct copy thereof, addressed to the last-known address of said persons, to be sent by the following method(s):

☑ by mail in a sealed envelope, with postage paid, and deposited with the U.S. Postal Service in Portland, Oregon.

☐ by hand delivery.

☐ by email.

☐ by facsimile transmission.

Benjamin Walters

BENJAMIN WALTERS, OSB #85354
Telephone: (503) 823-4047
Of Attorneys for City of Portland