ORDER NO. 06-636

ENTERED 11/17/06

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1262

CITY OF PORTLAND Complainant, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant.	)	ORDER

DISPOSITION: MOTION FOR SUMMARY JUDGMENT GRANTED; COMPLAINT DISMISSED

On May 3, 2006, the City of Portland (City) filed a complaint against Portland General Electric Company (PGE). In its complaint, the City made three claims. On May 30, 2006, PGE filed a motion to dismiss the City's first and second claims, but PGE did not seek dismissal of the City's third claim. On June 14, 2006, the City responded, and a ruling was issued on July 31, 2006, granting the motion to dismiss the first two claims.

That left the third claim, that PGE violated ORS 757.495 when it failed to file its Tax Allocation Agreement (Agreement) between PGE and Enron. On August 16, 2006, PGE filed a motion for summary judgment, arguing that the claim fails as a matter of law. A prehearing conference was held on August 18, 2006, and pursuant to the schedule set at the conference, the City filed a response to the motion on September 15, 2006, and PGE filed a reply on September 29, 2006. This order grants PGE's motion for summary judgment, and dismisses the remainder of the City's complaint.

Legal Standard for Motion for Summary Judgment

OAR 860-011-0000(3) states that the "Oregon Rules of Civil Procedure shall govern in all cases except as modified by these rules, by order of the Commission, or by ruling of the ALJ." Motions for summary judgment are governed by ORCP 47. The legal standard regarding the motion is set out in ORCP 47 C:

> The court shall enter judgment for the moving party if the pleadings, depositions, affidavits, declarations and

> admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment.

While, on its face, the rule applies to courts, the Commission has also applied this standard in reviewing motions for summary judgment. *See, e.g., Metro One Telecommunications, Inc*., docket IC 1, Order No. 02-126, 2 (Feb 28, 2002).

Parties' Arguments

The City's complaint asks the Commission for "a ruling as to whether PGE and Enron violated ORS 757.495 by not submitting tax allocation agreements to the Commission for a determination as to whether such agreements were fair and reasonable and in the public interest." Complaint, 7. Further, the City's complaint asserts that "PGE and Enron entered into a tax allocation agreement under which PGE made payments to Enron equivalent to the income taxes that PGE might have otherwise made if it were a stand-alone entity." *Id.* at 2. The City claims that the Agreement was effective from approximately December 31, 2002 to April 3, 2006. *See id.* at 2-3. The Complaint asserts that Enron and PGE should have submitted their Agreement to the Commission for a determination as to whether it was fair and reasonable and in the public interest. *Id.* at 6.

In its motion for summary judgment, PGE argues that the Agreement did not need to be filed with the Commission for its approval under ORS 757.495.[1] PGE distinguishes the Agreement, which was intended to delineate who was responsible for filing tax returns and how tax liabilities were to be allocated and tracked, from the Master Services Agreement,[2] which addressed Enron's provision of tax services to PGE. *See* Motion for Summary Judgment (PGE Motion), 2. PGE argues that the Agreement concerned neither services nor advice provided for by the affiliate, nor the sale or purchase of property which would be recognized as an expense in a future rate proceeding, and consequently did not fall under ORS 757.495. *See id.* at 3-4. PGE also notes that the Commission's order under ORS 757.495, regarding whether particular expenses are fair and reasonable, is to be considered in the next rate proceeding; in this

[1] PGE claims that it filed the Agreement with the Commission, asserting that it did not need review under ORS 757.495, but asking that the Commission contact it if the Commission disagreed. *See* PGE Motion, 2. PGE further states that the Commission never responded. *See id.* While the City does not refute these statements, they are not part of the City's assertion of facts. Because we view the motion in the light most favorable to the City, we do not consider these statements.

[2] The Master Services Agreement is "a service agreement between PGE and its wholly owned subsidiaries," for the provision of services, and it was properly filed with the Commission. *See In re Portland General Electric Company*, UI 248, Order No. 06-250.

case, PGE asserts that the taxes paid to Enron will have no impact on that next rate proceeding, which is currently under Commission consideration. *See id.* at 5-6. The allocation of taxes reflected in the Agreement had been set by the previous rate proceeding, UE 115, decided in 2001, and were decided at that time to be calculated for PGE on a stand-alone basis. *See id.* at 6. PGE also contends that the City's arguments misinterpret ORS 757.495 as reflected by the Commission's implementation of the statute in OAR 860-027-0040. *See id.* at 6-7.

The City responds that, through the Agreement, PGE "bought" property from Enron – specifically its net operating losses – to offset its tax liability. *See* City Response, 3. In focusing on the second section of ORS 757.495, the City asserts that the "Commission cannot tell if the Agreement should have been recognized as an expense or an expenditure until it reviews the contract." *See id.* at 7. The City further contends that it is "irrelevant" whether PGE's rates would have been affected by the Agreement; instead, the Commission must determine whether the contract is the "basis" for an expense in "any other hearing or proceeding." *See id.* at 8. The City argues that ORS 757.495 "was designed to protect ratepayers from abuses which may arise from less than arm's length transactions," and that "ratepayers and citizens were abused by these arrangements [in the Agreement]." *Id.* at 9 (citations omitted).

PGE replied by returning to the question presented by the Complaint: Should PGE have filed a copy of the Agreement with the Commission pursuant to ORS 757.495(2)? *See* PGE Reply, 1. PGE argues that it should not have filed it, because that section only covers contracts that will be recognized as an expense in a rate proceeding, and not other contracts between a utility and its affiliates. *See id.* at 2-3. The company further addresses *Pacific NW Bell v. Sabin*, 21 Or App 200 (1975), which distinguished between affiliate contracts that are subject to filing with the Commission and those that are not: Contracts that are not subject to filing place the burden of possible affiliate overcharges on shareholders, not ratepayers. *See id.* at 4-5. PGE concludes that the Commission should limit its consideration to the claims set forth in the complaint. *See id.* at 6-9.

Analysis

The parties offer two varying interpretations of ORS 757.495: PGE argues that ORS 757.495 only applies to contracts for property that will be considered in a future rate proceeding. However, the City argues that the statute is ambiguous, and that it applies to any expense that could be the "basis" for "any other hearing or proceeding." The Commission has routinely applied the statute in a manner that is consistent with PGE's interpretation. *See, e.g., Pacific NW Bell v. Sabin*, 21 Or App 200 (1975); *In re PacifiCorp*, UE 134, UM 1047, Order No. 02-820, 6 ("If the contract is not fair and reasonable, or is contrary to the public interest, then the expenses cannot be recognized in rates."). ORS 757.495 concerns contracts between a utility and an affiliate, in which the affiliate agrees to perform a service for the utility, and the utility wishes to include in rates what it pays the affiliate. The statute exists to protect customers by preventing a utility from entering into a contract with an affiliate under which the utility pays an

excessive amount to the affiliate. When the Commission receives a contract under which a utility is to pay an affiliate for services, it reviews the contract to see whether it is "fair and reasonable" and "not contrary to the public interest." *See* ORS 757.495(3). Specifically, because the contract between the utility and its affiliate is not an arm's length transaction, the Commission looks to see whether the utility can perform the service itself at a rate lower than what it will pay its affiliate, or if the utility needs outside help, whether the amount it is paying its affiliate is at or lower than what the utility would pay for a similar service on the open market. *See* OAR 860-027-0040. If the Commission approves the contract, then the utility, when it files a rate case, may ask for recovery of the money to be paid the affiliate under the contract, and the Commission may allow the payment in rates to the extent it finds it is prudent. The issue here is whether a so-called Tax Allocation Agreement is an affiliated interest contract that PGE was required to file under ORS 757.495. We conclude that it is not such a contract.

To determine the meaning of ORS 757.495, we apply the Oregon Supreme Court's methodology set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993), first examining the text and context of the statute. ORS 757.495 provides as follows:

> (2) 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.
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> (3) When any such contract has been submitted to the commission, the commission promptly shall examine and investigate the contract. If, after such investigation, the commission determines that the contract is fair and reasonable and not contrary to the public interest, the commission shall enter findings and an order to this effect and serve a copy thereof upon the public utility, whereupon any expenses and capital expenditures incurred by the public utility under the contract may be recognized in any rate valuation or other hearing or proceeding. If, after such investigation, the commission determines that the contract is not fair and reasonable in all its terms and is contrary to the public interest, the commission shall enter findings and

> an order accordingly and serve a copy thereof upon the public utility, and, except as provided in subsection (4) of this section, it shall be unlawful to recognize the contract for the purposes specified in this section.
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> (4) When any such contract has been filed with the commission within 90 days of execution and the commission has not entered an order disapproving the contract under subsection (3) of this section, the commission may not base its refusal to recognize any expenses or capital expenditures incurred under the contract in any rate valuation or other hearing or proceeding solely on the basis that such contract has not been approved under subsection (3) of this section.

As explained in subsection (2), a contract relating to the use of property need only be submitted to the Commission if it is to "be recognized as the basis of an operating expense or capital expenditure in any rate valuation or any other hearing or proceeding." The City argues for a broad definition of "basis" of an expense that could be used in any kind of proceeding. In context, the basis of the property is considered when it is part of an operating expense or capital expenditure, which goes into calculating rates. *See American Can Co v. Lobdell*, 55 Or App 451, 454, *rev den* 293 Or 190 (1982) (to determine rates, the Commissioner compares "actual costs derived from the expenses, capital costs and fair return on equity of a selected 'test year' with actual test-year revenues" and makes adjustments). The Agreement between PGE and Enron is not to be the foundation for any rate proceeding: in docket UE 115, Order No. 01-777, the Commission had already set the charges for taxes for rates from March 1, 2002, through the outcome of the next rate case, anticipated to be in mid-January 2007, in pending docket UE 180. Any amount charged for taxes will be subject to a true-up under ORS 757.268 beginning with those charged on January 1, 2006.

Viewing subsection (2) in context with subsection (3) lends further support to the construction that Commission review is conducted as a preliminary step in a future rate proceeding. As PGE notes, if a contract is found to be "not fair and reasonable in all its terms and is contrary to the public interest," the remedy is that it will "be unlawful to recognize the contract for the purposes specified in this section." ORS 757.495(3). The specified purposes included recognizing the "expenses and capital expenditures incurred by the public utility under the contract * * * in any rate valuation or other hearing or proceeding." *See id.*

Even if the wording of the statute were ambiguous, the legislative history persuades us that the only affiliated contracts required to be filed under the statute are those related to costs that will be considered in a future rate proceeding. In the 1989 Legislative Assembly, the affiliated contract statute was amended at the request of a telecommunications utility. *See* Minutes, House Subcommittee on Telecommunications,

HB 2517, April 18, 1989.[3] ORS 757.495(4) was added to make it clear that affiliated contracts are to be considered in ratemaking proceedings, even if they were not yet the subject of an order by the Commission. *See id.*

Past court cases have also considered the Commission's role in review of affiliated contracts. The Oregon Supreme Court observed that the Commission's role is not to manage the utility, but to consider the utility's management and its effect on rates:

> * * * The determination of what is reasonable in conducting the business of the utility is the primary responsibility of management. If the commission is empowered to prescribe the terms of contracts and the practices of utilities and thus substitute its judgment as to what is reasonable for that of management, it is empowered to undertake the management of all utilities subject to its jurisdiction. It has been repeatedly held, however, that the commission does not have such power.
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> 'In the absence of express statutory authority it has generally been held that a commission's control over contracts between affiliated corporations is limited to disallowance of excessive payments for the purpose of fixing rates (citing numerous authorities).'

Pacific Tel. & Tel. Co. v. Flagg, 189 Or 370, 395-96 (1950) (internal citations omitted). In *Pacific NW Bell v. Sabin*, the Court of Appeals discussed the "extension" of the Commission's authority in overturning a lower court's decision to limit it. The court discussed a two-step process by which the Commission first reviews an affiliated interest contract to affirm a "course of conduct which – at the time – lacked the appearance of impropriety or unreasonableness." 21 Or App at 228. The second step involves "scrutiny of that course of conduct for the purposes of calculating a rate which is just and reasonable to both the utility and its patrons," and that scrutiny should not be limited by the earlier affirmation of the affiliated interest contracts." *See id.* But again, the disallowance of expenses incurred as a result of the affiliated interest contract was considered in the context of a rate proceeding. *See id.* at 204-05.

The Commission has considered the application of this two-step analysis. In a recent Commission order, the steps for reviewing an affiliated interest contract were set out: First, the Commission "concluded that the affiliated transaction between the affiliates was fair, reasonable and not contrary to the public interest," but for ratemaking

[3] Originally, HB 2517 only applied to telecommunications utilities, but was amended to apply to all public utilities. HB 2517 was included in SB 78 by amendment, and amended SB 78 was included in SB 559. SB 559 was enacted in Oregon Laws 1989, chapter 956. Amended HB 2517 is section 7 of that law.

purposes, the Commission "reserved the right to review for reasonableness all financial aspects of the transaction." *In re PacifiCorp*, UE 134, UM 1047, Order No. 02-820, 6, 7. The second step, conducted during the rate proceeding, is to determine "whether the payments set forth in the contract are reasonable. * * * The question is whether the costs of the lease are reasonable, i.e., is the cost of the lease a necessary and ordinary recurring expense. If it is, the costs are included in rates. If not, the costs are not included in rates." *Id.*

The text, context, legislative history, and past practice in implementation of ORS 757.495 are quite clear in establishing that affiliated interest contracts need only be submitted when providing the basis of a contract for a subsequent rate proceeding.

In addition, the City made other assertions in its response. PGE objects to the new assertions, and argues that the City should not be allowed to amend its complaint through its response by raising new claims. We agree, but even if we did address those claims, we find them to be without merit.

First, the City suggests that the Agreement was drafted to evade regulatory review or the conditions limiting dividends which were imposed when Enron acquired PGE in 1997, and requests that the Commission investigate the intent behind the Agreement and allow further discovery to that end.[4] *See* Response, 10-12. It is well settled that a court will not look to the intent behind a contract unless the contract terms are ambiguous on their face. *See Yogman v. Parrott*, 325 Or 358, 361 (1997). We find that the terms of the Agreement are not ambiguous, at least not as they relate to our analysis of the construction of the statute. The City also implies that the Commission should have initiated a rate case after Enron filed for bankruptcy and any consolidated tax liability would have been "effectively eliminated." *See* Response, 13. The Commission does not engage in single issue ratemaking. *See In re Qwest*, UT 125, Order No. 06-515, 10 n 19. Even if the City had petitioned the Commission for a rate case at the time, the result, after evaluating all of the utility's expenses, would not necessarily have resulted in a rate decrease. *See American Can Co*, 55 Or App at 454-55 (all adjustments are balanced against each other; if "actual costs will exceed actual revenues under the existing rate structure, the utility is entitled to increase its revenues, by increasing rates, to recover that excess"). The City also implies that the Commission had a responsibility to true-up PGE's taxes, especially after Enron entered bankruptcy. *See* Response, 14-16. The Commission does not engage in retroactive ratemaking. *See In re US West Communications*, docket UT 135, Order No. 97-180, 3-5 (retroactive ratemaking is barred in the absence of an express statutory exception). In UE 115, the Commission acted according to long-standing practice in setting rates to account for PGE's taxes calculated on a stand-alone basis, and with the passage of SB 408, the Commission will adjust rates as set forth in ORS 757.268 based on taxes collected beginning January 1,

[4] An attorney for the City submitted a letter on August 24, 2006, stating that "as a matter of judicial economy and ease of process, I request that a determination be made on the summary judgment motion first and then to allow Ms. Halle [attorney for PGE] and I to confer regarding discovery (if necessary)." Due to the disposition of PGE's motion for summary judgment, no further action on PGE's motion for an order limiting discovery, or the City's data requests, will be taken.

2006. Even if these arguments had been properly presented in the Complaint, which they were not, they would not withstand the motion for summary judgment.

Conclusions

Viewing the facts in the light most favorable to the City, ORS 757.495(2) required neither PGE nor Enron to file the Tax Allocation Agreement with the Commission for review. The Agreement did not affect rates, which had been set previously in docket UE 115, Order No. 01-777. Nor will the Agreement or the costs set out in the Agreement be considered as the basis for expenses in the current rate case, docket UE 180. The motion for summary judgment should be granted, and the complaint should be dismissed.

ORDER

IT IS ORDERED that:

1. The motion for summary judgment is granted, and

2. The complaint is dismissed.

Made, entered, and effective NOV 17 2006.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.