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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF DESCHUTES

**AVION WATER COMPANY, INC., an  
Oregon corporation,**

Plaintiff,

vs.

**SOURCE WEEKLY, an assumed  
business name of LAY IT OUT, INC.,  
an Oregon corporation,**

Defendant.

Case No. 22CV18513

**PLAINTIFF’S MOTION FOR  
SUMMARY JUDGMENT**

**UTCRC 5.050**

Plaintiff Avion Water Company (“Avion”) requests oral argument, estimates that 60 minutes will be required for said argument, and requests official court reporting services.

**MOTIONS**

**MOTION NO. 1:** Avion moves the Court for summary judgment in its favor on Avion’s First Claim for Relief (Declaratory Judgment), declaring that Avion is neither a public body nor the functional equivalent of a public body under Oregon’s Public Records Law, ORS Chapter 192.

**MOTION NO. 2:** Avion moves the Court for summary judgment in its favor on Avion’s Second Claim for Relief (Injunctive Relief), enjoining Defendant Source Weekly from enforcing the Deschutes County District Attorney’s order requiring Avion to produce records to defendant.



1 records. Such a sweeping argument would encompass not only every public utility  
2 operating within the State of Oregon, but also all other private entities that fit those broad  
3 characteristics. Without direction from the legislature that that is what it intended when it  
4 enacted Oregon’s Public Records Law, this court cannot reach the result advocated by  
5 defendant.

6 **II. LEGAL STANDARD**

7 A party is entitled to summary judgment if it can show that there is no genuine  
8 issue as to any material fact and that the party is entitled to judgment as a matter of law.  
9 ORCP 47 C. “No genuine issue of material fact exists if, based on the record before the  
10 court viewed in a manner most favorable to the adverse party, no objectively reasonable  
11 juror could return a verdict for the adverse party on the matter that is the subject of the  
12 motion on summary judgment.” *Id.*

13 On review from a district attorney’s order compelling an entity to produce records  
14 under Oregon’s Public Records Law, this Court “shall determine the matter *de novo*.”  
15 ORS 192.431(1).

16 **III. FACTUAL BACKGROUND**

17 **A. Avion is a private water utility.**

18 Avion is a private water utility operating in Deschutes County. It was first  
19 incorporated as a private corporation under the Oregon Business Corporation Act in  
20 1975. Wick Decl., Ex. 1. Before its incorporation, Avion was operated by a sole  
21 proprietor, Paul Ramsey, under the business name “Avion Water Company.” Wick Decl.  
22 at ¶3. Ramsey incorporated Avion and transferred all its assets to the corporation,  
23 including its water system, to “maintain continuity of ownership and operation in the  
24 event of the death or incapacity of its present owner.” *Id.*, Ex. 2 at 2.

25 In 1987, Jan Wick purchased Avion from Ramsey. *Id.* at ¶4. Jan Wick has since  
26 gifted Avion stock to his children and grandchildren, and recognized Avion’s stock as

1 part of his estate planning. *Id.* Avion is owned by eight (8) members of the Wick family  
2 and NW Natural Water of Oregon, LLC, a domestic limited liability company. *Id.* at ¶6.  
3 Under its current articles of incorporation, Avion may issue 1,000,000 shares of common  
4 stock. *Id.* at ¶5, Ex. 3. NW Natural Water of Oregon, LLC, owns 40.3 percent of  
5 Avion’s common stock; members of the Wick family own the remaining 59.7 percent of  
6 Avion’s common stock. *Id.* at Ex. 4.

7 Avion’s Board of Directors are appointed by its shareholders. *Id.* at ¶7. No  
8 governmental entity has a say in who Avion appoints to its board of directors or employs  
9 as its employees. *Id.* Avion’s day-to-day operations are managed by Avion’s personnel.  
10 *Id.* at ¶8. No governmental entity oversees Avion’s day-to-day operations. *Id.*

11 **B. Avion’s operations and territory**

12 Avion is considered a public utility subject to oversight and regulation by the  
13 Oregon Public Utility Commission (“PUC”). Wick Decl. at ¶11. For example, the PUC  
14 is responsible for approving the rates that Avion may charge its customers. *Id.* Even so,  
15 Avion does not make any decisions that are binding on government, including the PUC.  
16 *Id.* at ¶10.

17 Avion’s service territory is approximately 88 square miles. *Id.* at ¶14.  
18 Approximately 7.86 square miles (or 8.94% of Avion’s service territory) are within the  
19 Bend city limits. *Id.* To operate within the City of Bend, Avion and the City of Bend  
20 have executed a franchise agreement. *Id.* at ¶15, Ex. 6. Approximately 80.14 square  
21 miles (or 91.05%) of Avion’s service territory is outside the Bend city limits. *Id.* at ¶14.  
22 Avion does not have a comparable franchise agreement for the 91.05% of its service  
23 territory located outside the City of Bend. *Id.* at ¶16.

24 Avion obtains its water rights through permits or water rights certificates. *Id.* at  
25 ¶12, Ex. 5. Avion does not receive financial support from the government beyond that  
26

1 which would be available to other private businesses. *Id.* at ¶13. It constructs, maintains,  
2 and operates its water utility at its own expense. *Id.*

3 **C. Defendant requests certain records from Avion purportedly under the**  
4 **Oregon Public Records Law.**

5 In May 2022, a journalist working for defendant purported to submit a public  
6 records request to Avion. Wick Decl., Ex. 7.<sup>1</sup> The request sought “Avion’s top 15 urban  
7 water users from the calendar year 2021, along with the number of gallons they used and  
8 the amount they spent.” *Id.* Avion, through counsel, informed defendant that it was a  
9 private corporation and was not subject to Oregon Public Records Law. *Id.*, Ex. 8.

10 Defendant subsequently petitioned the Deschutes County District Attorney to  
11 review whether Avion is subject to Oregon Public Records Law. *Id.*, Ex. 9. Defendant  
12 argued that Avion is the functional equivalent of a public body because it “provides a  
13 service often provided by a public body” and “is regulated” by the PUC. *Id.*

14 **D. The District Attorney concludes that Avion is the functional**  
15 **equivalent of a public body and subject to Oregon Public Records**  
16 **Law.**

17 On May 26, 2022, the Deschutes County District Attorney issued his ruling on  
18 defendant’s petition for review. Wick Decl., Ex. 11. The District Attorney  
19 acknowledged that Avion was not a “public body” within the definition of Oregon Public  
20 Records Law, but concluded that it was the “functional equivalent” of a public body  
21 under the test articulated in *Marks*, 319 Or 451. The District Attorney found:

- 22 1. Avion is a private company and was not created by government;
- 23 2. Oregon state government has a “long history” of regulating the use of water  
24 consumed by Oregonians and the nature of Avion’s services are those  
traditionally associated with government because “government water utilities  
provide water to over 80 percent of US residents”;

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25 <sup>1</sup> Defendant stipulated that its journalist submitted the public records request on  
26 defendant’s behalf. As a result, the parties agreed that this case should proceed only  
against defendant, not the individual journalist, as the named defendant. *See*  
Stipulated Notice of Dismissal of Defendant Hanna Merzbach, July 8, 2022.

- 1 3. Avion has authority to set its own rates, and the PUC merely performs a “post  
hoc regulatory review”;
- 2 4. Avion’s franchise agreement with the City of Bend constitutes nonmonetary  
3 governmental support;
- 4 5. The PUC exercises governmental control over Avion;
- 5 6. There is no evidence that Avion’s officers or employees are government  
officials or government employees.

6 *Id.* For those reasons, the District Attorney concluded that Avion was the “functional  
7 equivalent of a public body” and therefore “subject to Oregon’s public records law.” *Id.*  
8 at 7. The District Attorney ordered Avion to produce the requested records to defendant  
9 or seek review of his decision with this Court.

10 **E. Avion’s claims against defendant and defendant’s claim against Avion**

11 Avion timely appealed from the District Attorney’s order by filing this action with  
12 this court. In its First Claim for Relief, Avion seeks the following judicial declarations  
13 under the Declaratory Judgment Act:

- 14 1. [Avion] is not a public body under Oregon Public Records Law, ORS  
15 192.311 to 192.478; and
- 16 2. [Avion] is not the functional equivalent of a public body under the factors set  
17 out in *Marks*; or
- 18 3. In the alternative, even if [Avion] were a public body or the functional  
19 equivalent of a public body, the records sought by Defendant[] are exempt  
20 from disclosure under ORS 192.355(28).

21 Avion’s Complaint at ¶17. In its Second Claim for Relief, Avion seeks an injunction,  
22 enjoining defendant from enforcing the District Attorney’s order requiring it to produce  
23 records to defendant. *Id.* at ¶20.

24 Defendant has asserted one counterclaim against Avion. In its counterclaim,  
25 defendant seeks an injunction, enjoining Avion from withholding the requested records  
26 and ordering Avion to disclose the records to defendant. Defendant’s Answer,  
Affirmative Defenses, and Counterclaim at ¶37. Defendant also requests that the Court  
award it its attorneys’ fees and costs. *Id.*

1 **IV. ARGUMENT**

2 **A. Avion is not a public body, nor the functional equivalent thereof,**  
3 **under Oregon Public Records Law.**

4 Oregon Public Records Law affords every person the “right to inspect any public  
5 record of a public body in this state,” subject to statutory exemptions. ORS 192.314. A  
6 “public record” “includes any writing that contains information relating to the conduct of  
7 the public’s business \* \* \*[that is] prepared, owned, used or retained by a public body  
8 regardless of physical form or characteristics.” ORS 192.311(5)(a). A “public record”  
9 does not include “any writing that does not relate to the conduct of the public’s business  
10 and that is contained on a privately owned computer.” ORS 192.311(5)(b). Thus,  
11 records are only “public records” subject to disclosure under Oregon Public Records Law  
12 if the entity whose records are sought is a “public body.”

13 **1. Avion is not a “public body” subject to Oregon Public Records**  
14 **Law.**

15 Avion is not subject to Oregon Public Records Law because it is not a “public  
16 body,” and, as a result, its records are not “public records.” A “public body” is a defined  
17 term under Oregon Public Records Law:

18 “every state officer, agency, department, division, bureau,  
19 board and commission; every county and city governing  
20 body, school district, special district, municipal  
21 corporation, and any board, department, commission,  
22 council, or agency thereof; and any other public agency of  
23 this state.”

24 ORS 192.311(4).

25 There is no reasonable argument that Avion is a “public body” within the plain  
26 language of ORS 192.311(4). Indeed, the Deschutes County District Attorney recognized  
that Avion “does not meet the definition of a public body, and [defendant] does not  
dispute this. Avion is a private company that provides water to customers who pay  
Avion for the water they use; they are not a government utility.” Wick Decl., Ex. 11 at 2.

1 Accordingly, Avion respectfully requests that this court enter a declaration declaring that  
2 Avion is not a “public body” under ORS 192.311(4).

3                   **2. Avion is not the “functional equivalent” of a public body under**  
4                   ***Marks*.**

5                   In addition to the statutory definition, the Oregon Supreme Court has held that an  
6 entity may be a “public body” within the meaning of ORS 192.311(4) depending on “the  
7 character of that entity and the nature and attributes of that entity’s relationship with  
8 government and government decision-making.” *Marks*, 319 Or at 463. In *Marks*, the  
9 court provided the following six nonexclusive factors that were relevant to determining  
10 whether a particular entity is the “functional equivalent” of a public body:

11                   (1) The entity's origin (*e.g.*, whether the entity was created  
12 by government or had some origin independent of  
government).

13                   (2) The nature of the function assigned to and performed by  
14 the entity (*e.g.*, whether that function is one traditionally  
15 associated with government or is one commonly performed  
by private entities).

16                   (3) The scope of the authority granted to and exercised by  
17 the entity (*e.g.*, does the entity have the authority to make  
binding governmental decisions, or is it limited to making  
nonbinding recommendations).

18                   (4) The nature and level of government financial  
19 involvement with the entity. (Financial support may include  
20 payment of the entity's members or fees as well as  
provision of facilities, supplies, and other nonmonetary  
support.)

21                   (5) The nature and scope of government control over the  
22 entity's operation.

23                   (6) The status of the entity's officers and employees (*e.g.*,  
24 whether the officers and employees are government  
officials or government employees).

25 *Id.*

26 *///*



1 Applying those factors to the facts before it, the Oregon Supreme Court in *Marks*  
2 held that a “fact-finding” team of individuals charged by a public school district board  
3 with investigating, reporting on, and making recommendations concerning the operations  
4 of a local high school was not a “public body” within the meaning of Oregon Public  
5 Records Law. 319 Or at 466. In reaching its conclusion, the court emphasized the policy  
6 underlying Oregon’s Public Records Law: “the public should have access to information  
7 on which government decisions are based.” *Id.*

8 Courts rarely conclude that an entity is the functional equivalent under Oregon’s  
9 Public Records Law. Indeed, in the 29 years that have elapsed since the Oregon Supreme  
10 Court pronounced the functional equivalent test in *Marks*, only one Oregon appellate  
11 court decision has held that the entity at issue was the functional equivalent of a public  
12 body under Oregon’s Public Records Law. *See Laine v. City of Rockaway Beach*, 134 Or  
13 App 655, 666, 896 P2d 1219 (1995) (concluding that a fire department that was created,  
14 funded, and controlled by the city was a “functional agency or department of the city  
15 government” and therefore subject to Oregon Public Records Law). Moreover, each time  
16 the issue has been presented to the Oregon Attorney General, he or she has declined to  
17 conclude that the entity was the functional equivalent of a public body. *See* Tatoian  
18 Decl., Ex. 4 (Oregon School Activities Section), Ex. 5 (Oregon Public Broadcasting), Ex.  
19 6 (Citizens’ Utility Board), Ex. 7 (Oregon Historical Society), Ex. 8 (Oregon Bridge  
20 Delivery Partnership), Ex. 9 (Mid-Willamette Valley Community Action Agency), Ex. 10  
21 (Cascade Health Alliance), Ex. 11 (Oregon Law Foundation).

22 For the reasons below, Avion is not the functional equivalent of a public body  
23 under *Marks* and is thus not subject to Oregon’s Public Records Law.

24 **a. Avion was not created by government.**

25 There can be no reasonable dispute about the first *Marks* factor: Avion was not  
26 created by government. Rather, it has operated as a private corporation for nearly 50

1 years. Before its incorporation, Avion was operated by a sole proprietor. And since its  
2 incorporation, Avion has been owned by private persons and entities. Even today, eight  
3 members of the Wick family own the majority of shares in Avion, and the remaining  
4 shares are owned by a limited liability company. Consequently, the fact that Avion was  
5 not created by government weighs against a finding that it is the functional equivalent of  
6 a public body.

7 **b. Avion has not been assigned a function traditionally**  
8 **associated with government.**

9 The second *Marks* factor concerns whether the nature and function of activities  
10 “assigned to and performed by” Avion are those traditionally associated with government  
11 or commonly performed by private entities. It should be noted at the outset that this  
12 factor presumes an act of a governmental body to assign particular functions to the entity,  
13 which did not occur with respect to Avion. This factor further weighs against a finding  
14 that Avion is the functional equivalent of a public body because operating a water utility  
15 is not an activity that is exclusive to government; rather, water utilities traditionally have  
16 been operated both by governmental and private entities.

17 In Oregon, a water utility may be private or public. As the Oregon Supreme  
18 Court recognized long ago,

19 “[t]he supply of gaslight is no more a duty of sovereignty  
20 than the supply of water. Both these objects may be  
21 accomplished through the agency of individuals or private  
22 corporations, and in very many instances they are  
23 accomplished by those means. If this power is granted to a  
borough or a city, it is a special private franchise, made as  
well for the private emolument and advantage of the city as  
for the public good.”

24 *Twohy Bros. Co. v. Ochoco Irr. Dist., Crook County*, 108 Or 1, 40, 216 P 189 (1923)  
25 (quoting *Western Saving Fund Society v. City of Philadelphia*, 31 Pa 183 (1858)). For  
26 example, the Eugene Water and Electric Board (“EWEB”) is a municipal water and

1 electric utility organized under the City of Eugene’s charter.<sup>2</sup> Yet 61% of water systems  
2 in Oregon are privately owned. *Tatoian Decl.*, Ex. 1 at 3 (explaining that 538 of  
3 Oregon’s 884 community water systems are privately owned).

4 Avion is a “public utility” under Oregon law.<sup>3</sup> Since the legislature’s enactment  
5 of the Public Utilities Law in 1911, public utilities have been regulated by the PUC. *See*  
6 *Tatoian Decl.*, Ex. 2.<sup>4</sup> Public utilities are regulated by the PUC because they are natural  
7 monopolies that control vital commodities. *Gearhart v. PUC*, 356 Or 216, 219, 339 P3d  
8 904 (2014). The purpose of regulating a public utility – and regulating its rates – is to  
9 balance investor and consumer interests. *FPC v. Hope Natural Gas Co.*, 320 US 591,  
10 603, 64 S Ct 281 (1944). That is, public utilities are regulated by the PUC *because* they  
11 are private enterprises:

12 “[T]he investor interest has a legitimate concern with the  
13 financial integrity of the company whose rates are being  
14 regulated. From the investor or company point of view it is  
15 important that there be enough revenue not only for  
16 operating expenses but also for the capital costs of the  
17 business. These include service on the debt and dividends  
18 on the stock. By that standard the return to the equity  
owner should be commensurate with returns on  
investments in other enterprises having corresponding  
risks. That return, moreover, should be sufficient to assure  
confidence in the financial integrity of the enterprise, so as  
to maintain its credit and to attract capital.”

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19 <sup>2</sup> *See* EWEB History, available at [https://www.eweb.org/your-public-utility/eweb-](https://www.eweb.org/your-public-utility/eweb-history)  
20 [history](https://www.eweb.org/your-public-utility/eweb-history).

21 <sup>3</sup> A “public utility” is defined as “[a]ny corporation, company, individual, association  
22 of individuals, or its lessees, trustees or receivers, that owns, operates, manages or  
23 controls all or a part of any plant or equipment in this state for the production,  
24 transmission, delivery or furnishing of heat, light, water or power, directly or  
indirectly to or for the public, whether or not such plant or equipment or part thereof  
is wholly within any town or city.” ORS 757.005(1)(a)(A).

25 <sup>4</sup> Public utilities and the laws regulating them pre-existed Oregon’s Public Records  
26 Law by over 60 years. Yet, when enacting Oregon’s Public Records Law, the  
legislature did not include public utilities as those whose records are subject to public  
inspection and disclosure.

1 *Id.* (citation omitted). In other words, public utilities, by definition and design, are  
2 private entities.

3 Public utilities are not municipal utilities. ORS 757.005(1)(b)(A). Municipal  
4 utilities generally consist of electors from the city who are elected by the citizens of the  
5 city.<sup>5</sup> Municipal utilities may set their own rates, condemn property, and issue bonds for  
6 constructing and operating waterworks. ORS 225.020, ORS 225.050, ORS 225.080.  
7 Notably, municipal utilities are not subject to regulation by the PUC. ORS  
8 757.005(1)(b)(A) (excluding municipal utilities from definition of “public utility”).  
9 Municipal utilities are public bodies subject to Oregon’s Public Records Law. *See Brown*  
10 *v. Guard Publishing Co.*, 267 Or App 552, 341 P3d 145 (2014) (concerning public  
11 records request made to EWEB).

12 Public utilities also are distinguishable from a “People’s Utility District”  
13 (“PUD”). *See* ORS 757.006 (excluding PUDs from definition of “public utility”). A  
14 PUD, like a governmental entity, may levy taxes, fix its own rates for water services, and  
15 is not subject to PUC regulation. ORS 261.305(9), (13). PUDs are formed by petitions  
16 initiated by citizens of a district, approved by a county’s governing body, and voted on by  
17 the electors. The board of directors of a PUD are elected by citizens of the district. ORS  
18 261.415. All meetings of the board of directors are open to the public and all ordinances  
19 adopted by a PUD are subject to referendum. ORS 261.430, ORS 261.460. Like  
20 municipal utilities, PUDs are subject to Oregon Public Records Law.

21 Thus, although operating a water utility is a function that *can be* performed by  
22 public bodies such as municipal utilities and PUDs, it is also a function performed by  
23 private entities. That is, operating a water utility is not an activity that is exclusive to  
24 government. *Compare with Laine*, 134 Or App at 664 (concluding that “firefighting is a  
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26 <sup>5</sup> *See, e.g.*, EWEB’s Bylaws, available at <https://www.eweb.org/your-public-utility/board-of-commissioners/eweb-bylaws> (EWEB Board “is composed of five electors of the city who shall serve without pay”).

1 service that is uniquely governmental” and recognizing that city code endowed members  
2 of the fire department with “policing and general welfare functions [that also are]  
3 traditionally associated with city government”).

4 The second *Marks* factor therefore weighs against a finding that Avion is the  
5 functional equivalent of a public body. *Accord* *Tatoian Decl.*, Ex. 9 at 2 (Attorney  
6 General opinion recognizing that “[w]hile assisting the homeless is a function performed  
7 by public bodies, it is also a function performed by private nonprofit organizations”), Ex.  
8 10 at 6 (Attorney General opinion concluding that, even though “[a]dministering the  
9 Medicaid program has been a job of nearly all state governments since the federal  
10 Medicaid was enacted in 1963[,]” the fact that a private coordinated care organization  
11 “delivers Medicaid health benefits to its members is a logical consequence of the state’s  
12 choice on how to deliver these benefits. It does not mean that [the entity] is engaged in  
13 the traditional governmental function of administering the state’s Medicaid program”);  
14 Ex. 6 at 3 (Attorney General opinion concluding that entity’s advocating for consumers  
15 before legislative, administrative, and judicial bodies “are in no way exclusive to  
16 government and may be performed by privately-created advocacy organizations”).

17 **c. Avion has no authority to make binding decisions for**  
18 **government.**

19 The third factor under the *Marks* analysis is “the scope of the authority granted to  
20 and exercised by the entity (*e.g.*, does the entity have the authority to make binding  
21 governmental decisions, or is it limited to making nonbinding recommendations).” 319  
22 Or at 463. Avion has no authority to make binding governmental decisions.

23 The Deschutes County District Attorney erroneously concluded that this factor  
24 was met because “Avion has authority to establish water utility rates for its customers.”  
25 *Wick Decl.*, Ex. at 11 at 3. The district attorney’s conclusion was erroneous for at least  
26 two reasons.

1 First, in concluding that Avion has the authority to make “binding decisions for  
2 government” because “Avion has authority to establish water utility rates for its  
3 customers,” the Deschutes County District Attorney begged the question. That is, the  
4 district attorney assumed that Avion was governmental and then concluded that its price-  
5 setting decision is a binding governmental decision. An entity does not make a  
6 governmental decision when it sets the price for its product. For example, no one could  
7 reasonably argue that McDonald’s is the functional equivalent of a public body because it  
8 has the authority to establish the price of a Big Mac. Similarly, Avion sets its rates for  
9 the customers who buy its water; Avion cannot force anyone to buy its water and its rate-  
10 setting authority requires no one to do so. There is nothing governmental about setting  
11 the price for a product.

12 Second, the district attorney’s conclusion is factually and legally incorrect. No  
13 Oregon statute grants a public utility unfettered discretion to establish its own rates.  
14 Although a public utility may propose rates to the PUC, only the PUC has the authority to  
15 approve a public utility’s rates. *See* ORS 757.210(1)(A) (“The commission may not  
16 authorize a rate or schedule of rates that is not fair, just and reasonable.”); *Gearhart*, 356  
17 Or at 220 (describing the “three key components in ratemaking” as directed by Oregon  
18 statutes). The public utility, then, may only charge and collect the rates as approved by  
19 the PUC. ORS 757.225; ORS 757.325. Indeed, if a public utility could merely set its  
20 own rates, there would be no need for the PUC. Moreover, even though a public utility  
21 like Avion may *propose* rates to the PUC, that is distinguishable from having the  
22 authority to make “binding governmental decisions.” *Compare with Laine*, 134 Or App  
23 at 664 (recognizing that the fire department personnel had power to arrest, declare a state  
24 of emergency, and enter into indemnity agreements that were binding on the city). *See*  
25 *also Jackson v. Metropolitan Edison Co.*, 419 US 345, 352-53, 95 S Ct 449 (1974)  
26 (holding that the action of a public utility in terminating service to a customer was not a

1 state action despite its regulation by the state and its performance of an essential service  
2 because courts “have rejected the contention that the furnishing of utility services is  
3 either a state function or a municipal duty”).

4 In sum, there is no evidence that Avion has authority to make “binding  
5 governmental decisions.” As a result, the third *Marks* factor weighs against a finding that  
6 Avion is the functional equivalent of a public body. *Accord* Tatoian Decl., Ex. 7 at 3  
7 (Attorney General opinion recognizing that, even though the Oregon Historical Society  
8 has statutorily-prescribed activities, none of those activities “show OHS as having the  
9 authority to make binding governmental decisions.”); Ex. 10 at 6 (Attorney General  
10 opinion concluding that, even though the coordinated care organization “does more [than]  
11 just make non-binding recommendations[,]” it may only “make decisions for its members  
12 only within the specific authority the Legislature and [the Oregon Health Authority] have  
13 granted it by statute and rule”).

14 **d. Avion does not receive financial support from**  
15 **government.**

16 The fourth *Marks* factor asks the court to evaluate the “nature and level of  
17 government financial involvement with the entity.” 319 Or at 463-64. As the court in  
18 *Marks* explained, financial support “may include payment of the entity’s members or fees  
19 as well as provision of facilities, supplies, and other nonmonetary support.” *Id.* There is  
20 no evidence to conclude that Avion receives financial support from government. Avion  
21 constructs, maintains, and operates its water utility at its own expense. Wick Decl. at  
22 ¶13. *Compare with Laine*, 134 Or App at 665 (finding that the city was “the primary  
23 provider of financial support” because it purchased the fire department’s hall and fire-  
24 fighting equipment, paid for the department’s utilities, equipment maintenance,  
25 recordkeeping, personnel training, collision insurance, and compensation to department  
26 staff).

1           The Deschutes County District Attorney erroneously concluded that Avion  
2 received “significant” governmental support because Avion and the City of Bend have  
3 negotiated a franchise agreement. Wick Decl., Ex. 11 at 4. There are several errors in  
4 that reasoning.

5           First, a franchise agreement is merely a type of license. It is a “negotiated  
6 agreement[] between a government entity and another entity, for their mutual advantage.  
7 Such a negotiated agreement may take the form of a contract or an ordinance granting a  
8 franchise that, when accepted by the utility, essentially functions as a contract.” *NW Nat.*  
9 *Gas Co. v. City of Gresham*, 359 Or 309, 334, 374 P3d 829 (2016). Under Oregon law,  
10 cities have the unique authority to require public utilities to have franchises to operate  
11 within their rights-of-way. ORS 221.415; ORS 221.420; ORS 758.010(1).

12           Thus, the franchise agreement between Avion and the City of Bend is a contract  
13 that allows Avion to operate in the city’s right-of-way. The franchise agreement  
14 concerns less than nine percent of Avion’s geographic territory. That is, more than 91%  
15 of Avion’s service territory is not affected by the franchise agreement with the City of  
16 Bend. By its terms, the agreement is “nonexclusive in that the City reserves the right to  
17 operate a water system within the public ways and to grant a similar use of streets, alleys  
18 and public ways to another person.” Wick Decl., Ex. 6 at 2. Avion’s nonexclusive right  
19 to operate within the City of Bend also comes at a price: Avion must indemnify the city  
20 for any loss arising from Avion’s operations and Avion must pay the City six percent of  
21 the gross revenues that Avion earns within the city limits. *Id.* at 2, 6; Bend City Code  
22 3.20.020(A)(1).

23           Second, the franchise agreement does not grant Avion a property interest in the  
24 city’s rights-of-way. *NW Nat. Gas v. City of Portland*, 300 Or 291, 312, 711 P2d 119  
25 (1985) (concluding that the city’s order to relocate the utilities without compensation was  
26 not a taking under Oregon and federal constitutions). Indeed, public utilities – including



1 Avion under the franchise agreement – bear the expense of relocating their facilities if  
2 doing so is required by the city. *Id.* at 306. They also bear the expense of removing their  
3 property from a city’s right-of-way when the franchise expires. ORS 221.470.

4 Finally, all of the City of Bend’s franchise agreements are with private entities.  
5 *See* *Tatoian Decl.*, Ex. 3. Under defendant’s theory, Pacific Power and Cascade Natural  
6 Gas, among others, receive “significant nonmonetary governmental support” merely  
7 because they have contractual agreements to operate within the city’s limits. Indeed, any  
8 entity who contracts with a governmental body could fall within such a broad scope.

9 In sum, no evidence supports a finding that Avion receives financial support from  
10 the government. Nor is there evidence that the government provides facilities, supplies,  
11 or other nonmonetary support to Avion. Thus, the fourth *Marks* factor weighs against a  
12 finding that Avion is the functional equivalent of a public body.

13 **e. Although Avion is regulated by the PUC, it is not**  
14 **controlled by government.**

15 The fifth *Marks* factor concerns “the nature and scope of government control over  
16 the entity’s operation.” 319 Or at 464. This factor weighs against a finding that Avion is  
17 the functional equivalent of a public body.

18 Avion does not dispute that it is subject to regulation by the PUC. But  
19 government regulation cannot by itself establish that an entity is “controlled by  
20 government.” Rather, the pertinent question is whether the government exercises day-to-  
21 day oversight over the particular entity. *See* Ex. 4 at 3 (Attorney General opinion  
22 concluding factor had not been met even though the State Board of Education had  
23 “oversight responsibilities” over Oregon School Activities Association because it  
24 “exercise[d] no supervision or control over the day-to-day operations of OSAA”); Ex. 10  
25 at 7 (Attorney General opinion concluding that, even though the organization’s  
26 operations “are subject to considerable governmental oversight[,]” factor had not been

1 met because there “are no indications that [government] exercises any control of  
2 [entity’s] day-to-day operations or that it has the ability to appoint or remove officers or  
3 employees”); Ex. 9 at 2 (Attorney General opinion concluding factor had not been met  
4 because the entity was “not subject to day-to-day oversight by the state”). *C.f.*, *Jackson*,  
5 419 US at 354 (“Doctors, optometrists, lawyers, Metropolitan, and Nebbia's upstate New  
6 York grocery selling a quart of milk are all in regulated businesses, providing arguably  
7 essential goods and services, ‘affected with a public interest.’ We do not believe that such  
8 a status converts their every action, absent more, into that of the State.”).

9 Here, Avion’s day-to-day operations are managed by Avion’s personnel. Wick  
10 Decl. at ¶8. Avion’s Board of Directors are appointed by its shareholders. *Id.* at ¶7. No  
11 governmental entity oversees Avion’s day-to-day operations and no governmental entity  
12 has a say in who Avion appoints to its board of directors or employs as its employees. *Id.*  
13 at ¶¶7-8. *Compare with Laine*, 134 Or App at 665 (finding that the city exercised  
14 “significant control” over fire department because, among other things, the city  
15 controlled the departments operating budget, had authority to approve the election of the  
16 fire chief and remove him with or without cause, and because the city agreed that the  
17 department would provide services to certain geographic areas).

18 In sum, no evidence supports a finding that Avion is controlled by government.  
19 Accordingly, the fifth *Marks* factor weighs against a finding that Avion is the functional  
20 equivalent of a public body.

21 **f. Avion’s officers and employees are not government**  
22 **officials.**

23 The sixth and final *Marks* factor concerns the “status of the entity’s officers and  
24 employees (*e.g.*, whether the officers and employees are government officials or

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1 government employees).” 319 Or at 464. Avion’s officers and employees are employed  
2 and paid by Avion. Wick Decl. at ¶9. They are not employed by government, nor paid  
3 by government. *Id.* There is no evidence to conclude otherwise. As a result, the sixth  
4 *Marks* factors weighs against a finding that Avion is the functional equivalent of a public  
5 body.

6 **3. Because Avion is neither a “public body,” nor the functional**  
7 **equivalent of a public body, it is not subject to Oregon’s Public**  
8 **Records Law.**

9 Each of the *Marks* factors as applied to Avion weigh against a finding that Avion  
10 is a public body or the functional equivalent of a public body under Oregon’s Public  
11 Records Law. Avion is a private corporation. Avion’s operations are entirely  
12 independent of government. It has no authority to make decisions for government. As a  
13 result, access to Avion’s records is “not necessary to serve the policy goals behind”  
14 Oregon’s Public Records Law: “the premise that the public should have access to  
15 information on which *government decisions* are based.” *Marks*, 319 Or at 466 (emphasis  
16 added). Nor would access to Avion’s records fulfill the “core principle animating public  
17 records disclosure law[:] the interest of the citizen in knowing what the *servants of*  
18 *government* are doing.” *Bialostosky v. Cummings*, 319 Or App 352, 367, 511 P3d 31  
19 (2022) (emphasis added; internal quotation marks omitted).

20 As noted above, public utilities and the laws regulating public utilities have  
21 existed long before the enactment of Oregon’s Public Records Law. Courts “presume  
22 that, when a legislature enacts a statute, it does so with full knowledge of the existing  
23 condition of the law and with reference to it.” *Int’l Ass’n of Fire Fighters, Local 3564 v.*  
24 *City of Grants Pass*, 262 Or App 657, 662, 326 P3d 1214 (2014) (internal quotation  
25 marks omitted). Thus, if the legislature intended public utilities and their records to fall  
26 within the scope of Oregon’s Public Records Law, it would have said so.

1           Moreover, the legislature has addressed the public’s interest in public utilities in  
2 the laws regulating public utilities, some of which include transparency provisions that  
3 are distinct from Oregon’s Public Records Law. *See, e.g.*, ORS 757.205(1) (requiring  
4 every public utility to file with the PUC “schedules which shall be open to public  
5 inspection”); ORS 757.240(1) (requiring copies of a public utility’s schedules “*as the*  
6 *Public Utility Commission deems necessary for the use of the public* shall be printed in  
7 plain type and kept on file in every business office of such public utility, open to the  
8 public, and in such form and place as to be readily accessible to the public for convenient  
9 inspection” (emphasis added)). These transparency provisions have existed since the  
10 public utility laws were first enacted in 1911, *see* Tatoiian Decl., Ex. 2 at 9-10 (sections  
11 27, 28, and 30), and “provide strong contextual support for [the] conclusion that the  
12 Legislature did not intend to encompass [public utilities] within the definition of a ‘public  
13 body.’” *Id.*, Ex. 10 at 6 (Attorney General opinion concluding same about coordinated  
14 care organizations). Even the PUC’s own regulations recognize that not all information  
15 submitted by public utilities to the PUC are subject to disclosure by the PUC under  
16 Oregon’s Public Records Law. *See* OAR 860-001-0070 (confidential information  
17 submitted by a public utility to the PUC “is exempt from public disclosure”).

18 **V. CONCLUSION**

19           For all these reasons, Avion respectfully requests that the court enter summary  
20 judgment in Avion’s favor on Avion’s First Claim for Relief (Declaratory Judgment), and  
21 declare that Avion is neither a public body nor the functional equivalent of a public body  
22 under Oregon’s Public Records Law, ORS Chapter 192. Avion further requests that the  
23 court dismiss defendant’s First Claim for Relief and enjoin defendant from enforcing the

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1 Deschutes County District Attorney's order requiring Avion to produce records to  
2 defendant.

3 DATED this 5th day of July, 2023.

4 HARRANG LONG P.C.

5  
6 By: s/ Erica Tatoian  
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**CERTIFICATE OF SERVICE**

I certify that on July 5, 2023, I served or caused to be served a true and complete copy of the foregoing **PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT** on the party or parties listed below as follows:

- Via the Court’s E-filing System
- Via First-Class Mail, Postage Prepaid
- Via Email

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