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

DECLARATION OF ERICA TATOIAN IN SUPPORT OF PLAINTIFF AVION WATER COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT

I, Erica Tatoian, declare the following statements are true to the best of my knowledge and belief.

1. I am one of the attorneys representing Plaintiff Avion Water Company, Inc. ("Avion"). I make these statements based upon my personal knowledge.

2. Attached as Exhibit 1 is a true and correct excerpt of the University of North Carolina Environmental Finance Center's 2017 report *Navigating Legal Pathways to Rate-Funded Customer Assistance Programs: A Guide for Water and Wastewater Utilities*, which is available at https://efc.sog.unc.edu/wp-content/uploads/sites/1172/2021/06/Nagivating-Pathways-to-Rate-Funded-CAPs.pdf.

3. Attached as Exhibit 2 is a true and correct copy of the 1911 Public Utility Act, which is available at https://babel.hathitrust.org/cgi/pt?id=uc1.b4378185&view=1up&seq=5&skin=2021.

4. Attached as Exhibit 3 is a screenshot of the City of Bend's website listing its franchise agreements, including its franchise agreement with Avion Water Company,

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which is available at https://www.bendoregon.gov/government/departments/city-recorder/franchise-agreements.

5. Attached as Exhibit 4 is a true and correct copy of the Oregon Attorney General's Opinion concerning the Oregon School Activities Section, dated January 31, 2001, which is available on the State of Oregon Law Library's website at https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll2/id/1242/rec/8.

6. Attached as Exhibit 5 is a true and correct copy of the Oregon Attorney General's Opinion concerning Oregon Public Broadcasting, dated September 3, 2002, which is available on the State of Oregon Law Library's website at https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll2/id/1137/rec/3.

7. Attached as Exhibit 6 is a true and correct copy of the Oregon Attorney General's Opinion concerning the Citizens' Utility Board, dated November 19, 2002, which is available on the State of Oregon Law Library's website at https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll2/id/1127/rec/5.

8. Attached as Exhibit 7 is a true and correct copy of the Oregon Attorney General's Opinion concerning the Oregon Historical Society, dated March 29, 2004, which is available on the State of Oregon Law Library's website at https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll2/id/1040/rec/11.

9. Attached as Exhibit 8 is a true and correct copy of the Oregon Attorney General's Opinion concerning the Oregon Bridge Delivery Partnership, dated July 24, 2008, which is available on the State of Oregon Law Library's website at https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll2/id/1429/rec/2.

10. Attached as Exhibit 9 is a true and correct copy of the Oregon Attorney General's Opinion concerning the Mid-Willamette Valley Community Action Agency,

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dated October 24, 2017, which is available on the State of Oregon Law Library's website at https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll2/id/2121/rec/13.

11. Attached as Exhibit 10 is a true and correct copy of the Oregon Attorney General's Opinion concerning Cascade Health Alliance, dated July 24, 2019, which is available on the State of Oregon Law Library's website at https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll2/id/2204/rec/1.

12. Attached as Exhibit 11 is a true and correct copy of the Oregon Attorney General's Opinion concerning the Oregon Law Foundation, dated July 9, 2021, which is available on the State of Oregon Law Library's website at https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll2/id/2352/rec/7.

I HEREBY DECLARE THAT THE ABOVE STATEMENTS ARE TRUE TO THE BEST OF MY KNOWEDGE AND BELIEF, AND THAT I UNDERTAND THEY ARE MADE FOR USE AS EVIDENCE IN COURT AND SUBJECT TO PENALTY FOR PERJURY.

DATED this 5th day of July, 2023.

Erica Tatoian

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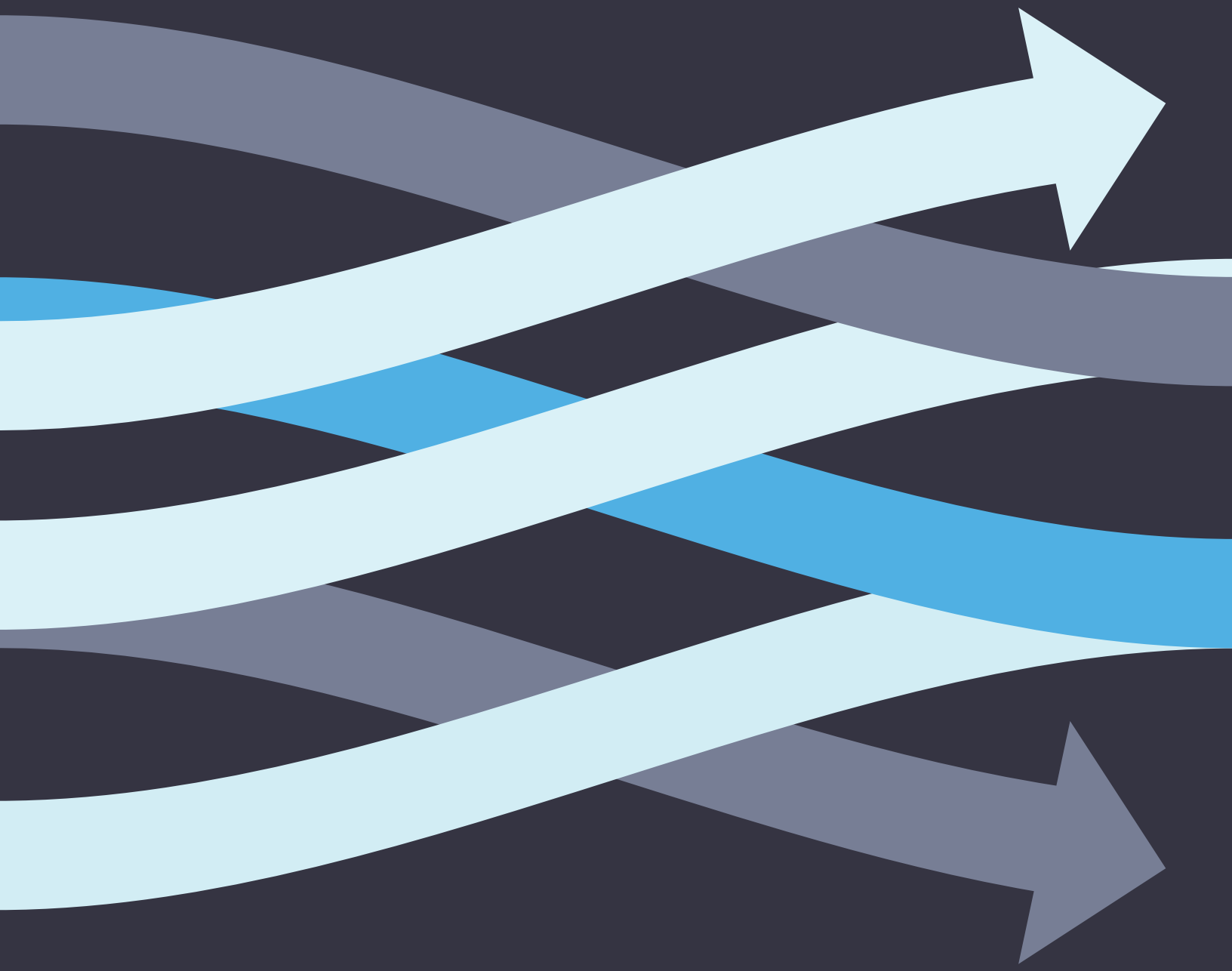
Navigating Legal Pathways to Rate-Funded Customer Assistance Programs:

A Guide for Water and Wastewater Utilities



2017

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Exhibit 1 Page 2 of 4

Oregon

Water and wastewater utilities in Oregon fall under several rate setting regulatory systems.

Commission-regulated utilities ⚠

Noncommission-regulated utilities ⚠

State Population (2016):	4,093,465
Median Annual Household Income (2015):	$51,243
Poverty Rate (2015):	16.5%
Typical Annual Household Water and Wastewater Expenditures (2015):	$991

Oregon has 884 community water systems (CWS), of which 538 are privately owned and 829 serve populations of 10,000 or fewer people.

Oregon has 182 publicly owned treatment works facilities (POTWs), of which 140 treat 1 MGD or less.

148,639 people are served by privately owned CWS; 3,261,298 are served by government-owned CWS; and 3,481,662 are served by POTWs.

Estimated Long-Term Water and Wastewater Infrastructure Needs:	$8.9 billion

Sources: U.S. Census Bureau, 2016 Population Estimate & 2011–2015 American Community Survey 5-Year Estimates; 2016 EFC Rates Survey; U.S. Environmental Protection Agency, 2016 Safe Drinking Water Information System, 2011 Drinking Water Infrastructure Needs Survey, and 2012 Clean Watersheds Needs Survey. See Appendix C for more details.

Commission-Regulated Utilities

The Oregon Public Utility Commission (PUC) regulates private water and wastewater companies. The Oregon PUC does not regulate government-owned water and wastewater utilities. With respect to commission-regulated utilities, Or. Rev. Stat. § 756.040 requires the Oregon PUC to protect customers "from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates." In addition, the statute states that the commission "shall balance the interests of the utility investor and the consumer in establishing fair and reasonable rates."[296] Rates are "fair and reasonable" according to this section if they provide adequate revenue for capital and operating costs, as well as an adequate return to the equity holder.[297]

While *Gearhart v. Public Utility Commission of Oregon*[298] established that the Oregon PUC has broad jurisdiction in determining what is "fair," "just," and "reasonable," Or. Rev. Stat. § 757.310 prohibits commission-regulated utilities from charging customers "a rate or an amount for a service that is different from the rate or amount the utility charges any other customer for a like and contemporaneous service under substantially similar circumstances." An exemption exists in Or. Rev. Stat. § 757.315(3), which explicitly allows natural gas utilities to use rate revenues for bill payment assistance, however, there is no similar exception for water utilities.

A 1993 opinion issued by the Office of the Oregon Attorney General confirmed that the Oregon PUC cannot approve income-based rate classifications, stating "[t]he commission is a creation of the legislature. As such, 'its power arises from and cannot go beyond that expressly conferred upon it' by the legislature . . . Nothing in ORS 757.230, or in any other statute, gives the commission authority to set rate classifications based on income."[299]

However, the opinion goes on to state that the Oregon PUC could approve the issuance of rebates to eligible low-income customers. The attorney general's office reasoned that with rebates, the commission would not be authorizing utilities to collect customer rates that differ by the income of those customers. Instead, all classes of customers, regardless of income level, would be charged the same utility rates. A utility could then issue rebates to low-income customers without being

296. Or. Rev. Stat. § 756.040.

297. Rate setting requirements for utilities regulated by Oregon PUC are further established in Or. Rev. Stat. § 757.020. This section requires that charges made by any commission-regulated utility "shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited." Id.

298. Gearhart v. Pub. Util. Comm'n of Oregon, 299 P.3d 533, 537 (Or. 2013). The court in Gearhart also established that the Oregon PUC "is not obligated to employ any single formula or combination of formulas to determine what are in each case just and reasonable rates." Id.

299. Or. Op. Atty. Gen. OP-6475 (Or. A.G.), 1993 WL 602059 (internal citations omitted).

in violation of Or. Rev. Stat. § 757.310.

Thus, commission-regulated utilities could face legal challenges based on the statutes that prohibit utilities from offering different rates for customers under substantially similar conditions or on the basis of the attorney general's opinion cited above. However, under the same attorney general's opinion, commission-regulated utilities may provide rebates to low-income customers (i.e., after rate charges have been collected).

Noncommission-Regulated Utilities

State statutes provide very few restrictions on the establishment of rates for government-owned utilities.[300] Additionally, many municipalities operate under home rule, which gives them broader rate setting authority.

However, some statutes and case law suggest that rates must be based on cost of service. Specifically, Or. Rev. Stat. § 264.310 states that water supply districts may fix and classify rates "according to the type of use and according to the amount of water used." Additionally, in *Kliks v. Dalles City*,[301] a case challenging differences in rates on the basis of nonservice characteristics, the court found that where a municipality makes differentiations in rate to be charged for water service or other service rendered by municipal utilities, but differences in conditions cannot be shown between customers entitled to different rates, "all customers are entitled to receive the same service on an equal basis and at uniform rate." The court further held that "a difference in rates must find justification in a difference in conditions of service."[302]

Thus, although government-owned utilities have broad rate setting authority, the aforementioned case law suggests that classifications and rates based on nonservice characteristics would be subject to legal challenges. Despite this, and as documented in the U.S. EPA's 2016 compendium, *Drinking Water and Wastewater Utility Customer Assistance Programs*, several government-owned water and wastewater utilities in Oregon offer low-income customer assistance programs.

300. In Oregon, utilities that are not regulated by Oregon PUC include municipal-owned water and wastewater utilities, domestic water supply districts, sanitary districts, water and sanitary authorities, and People's Utility Districts.
301. Kliks v. Dalles City, 335 P.2d 366, 374 (Or. 1959). In this case, the nonservice characteristics were the inclusion of rooming houses, boarding houses, motels, hotels, and trailer courts under a classification distinct from, and under a more favorable rate structure than, apartment houses. Id.
302. Id.

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STATE OF OREGON

CONSTITUTIONAL AMENDMENTS ADOPTED AND LAWS ENACTED BY THE PEOPLE UPON INITIATIVE PETITION AND REFERENDUM AT THE GENERAL ELECTION NOVEMBER 8, 1910

TOGETHER WITH THE

GENERAL LAWS

AND

Joint Resolutions and Memorials

ENACTED AND ADOPTED BY THE

TWENTY-SIXTH REGULAR SESSION

OF THE

LEGISLATIVE ASSEMBLY

1911

SALEM, OREGON:
STATE PRINTING DEPARTMENT
1913

PREFACE

This compilation is made under and by virtue of the authority of an act of the Legislative Assembly of this State, approved February 21, 1905, and embraces all of the laws enacted, and constitutional amendments adopted, by the people of the State of Oregon at the last general election upon initiative petition and referendum, and all laws enacted by the Twenty-sixth Legislative Assembly of the State of Oregon, begun and held from January 9, 1911, to February 18, 1911, inclusive. This compilation also contains such resolutions and memorials passed by said Legislative Assembly as are deemed of public importance.

The enrolled acts, as filed in the office of the Secretary of State, are full of bad spelling, improper punctuation, and apparent omissions of necessary words, and while the Secretary of State has no other alternative than to furnish true copy of the acts as filed, the State Printer, in order to make readable and presentable copy, corrects obvious errors in capitalization, punctuation, spelling, repeated words, and omitted words.

Section 28 of Article IV of the Constitution of this State provides that no act of the Legislative Assembly shall take effect until ninety days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency must be declared in the preamble or in the body of the law.

By the provisions of Section 1 of Article IV of the Constitution of this State, the people reserve to themselves the power to approve or reject at the polls any act of the Legislative Assembly. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the Legislative Assembly which passed the bill on which the referendum is demanded. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise.

immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist and this Act shall take effect and be in full force and effect from and after its approval by the Governor.

Section 20. That Sections 5508, 5509, 5510, 5511, 5512, 5513, 5514, 5515, 5516, 5517, 5518, 5519, 5520 and 5521 of Lord's Oregon Laws are hereby repealed.

Filed in the office of the Secretary of State, February 24, 1911.

CHAPTER 279.

AN ACT

[S. B. 73.]

To define public utilities, and to provide for their regulation in this State, and for that purpose to confer upon the Railroad Commission of Oregon power and jurisdiction to supervise and regulate such public utilities, and providing the manner in which the power and jurisdiction of such Commission shall be exercised, prescribing penalties for the violation of the provisions of this Act and the procedure and rules of evidence in relation thereto, making an appropriation to carry out the provisions hereof, amending Section 2 of Chapter 53 of the Laws of Oregon for the year 1907, the same being Section 6876 of Lord's Oregon Laws, and declaring an emergency.

Be it enacted by the People of the State of Oregon:

Be it enacted by the Legislative Assembly of the State of Oregon:

Section 1. *Term "Public Utility" Defined.*—The term "public utility," as used herein, shall mean and embrace all corporations, companies, individuals, associations of individuals, their lessees, trustees or receivers (appointed by any court whatsoever), that now or hereafter may own, operate, manage or control, any plant or equipment or part of a plant or equipment in this State for the conveyance of telegraph or telephone messages, with or without wires, or for the transportation of persons or property by street railroad as common carriers, or for the production, transmission, delivery or furnishing of heat, light, water or power, and any and all whether either directly or indirectly to or for the public, and whether said plant or equipment or part thereof is wholly within any town or city, or not.

No plant owned or operated by a municipality shall be deemed a public utility under or for the purposes of this Act.

Section 2. *Term "Council" Defined.*—The term "council," as used in this Act, shall mean and embrace the common

council, city council, commission, or any other governing body of any town, city or other municipal government wherein the property of the public utility or any part thereof is located.

Section 3. *Term "Municipality" Defined.*—The term "municipality," as used in this Act, shall mean any town, city or other municipal government wherein property of the public utility or any part thereof is located.

Section 4. *Term "Service" Defined.*—The term "service," is used in this Act in its broadest and most inclusive sense, and includes equipment and facilities.

Section 5. *Term "Commission" Defined.*—The term "Commission," as used in this Act, shall mean the Railroad Commission of Oregon.

Section 6. *Jurisdiction of Railroad Commission to Supervise and Regulate Public Utilities.*—The Railroad Commission of Oregon is vested with power and jurisdiction to supervise and regulate every public utility in this State, and to do all things necessary and convenient in the exercise of such power and jurisdiction.

Section 7. *Adequate Service and Reasonable Rates Required.*—Every public utility is required to furnish adequate and safe service, equipment and facilities, and the charges made by any public utility for any heat, light, water or power produced, transmitted, delivered or furnished or for any telegraph or telephone message conveyed, or for any transportation of persons or property by street railroad, or for any service rendered or to be rendered in connection therewith shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared to be unlawful.

Section 8. *Common User of Facilities, Compensation, Procedure and Appeal; Interchange of Business, Traffic or Product.*—Every public utility, and every person, association or corporation having conduits, subways, street railway tracks, poles or other equipment on, over or under any street or highway shall for a reasonable compensation permit the use of the same by any public utility whenever public convenience or necessity require such use and such use will not result in irreparable injury to the owner or other users of such equipment nor in any substantial detriment to the service to be rendered by such owners or other users.

In case of failure to agree upon such use or the conditions or compensation for such use, any public utility or any person, association or corporation interested may apply to the Commission, and if after investigation the Commission shall ascertain that public convenience or necessity require such use and that it would not result in irreparable injury to the owner or other users of such equipment, it shall by order direct

that such use be permitted and prescribe reasonable conditions and compensation for such joint use.

Such use so ordered shall be permitted and such conditions and compensation so prescribed shall be the lawful conditions and compensation to be observed, followed and paid, subject to recourse to the courts upon the complaint of any interested party as provided in Sections 54, 55, 56, 57 and 58 hereof, inclusive, and such sections so far as applicable shall apply to any suit arising on such complaint so made. Any such order of the Commission may be from time to time revised by the Commission upon application of any interested party or upon its own motion. All public utilities shall afford all reasonable facilities and make all necessary regulations for the interchange of business, or traffic carried or their product between them, when ordered by the Commission so to do.

Section 9. *Commission to Value Property of Utilities.*—The Commission shall value all the property of every public utility actually used and useful for the convenience of the public. In making such valuation the Commission may avail itself of any information in possession of the Board of State Tax Commissioners, or any other State officer or board.

Section 10. *Hearing and Determination of Value, Re-Valuation.*—Before final determination of such value the Commission shall, after notice to the public utility, hold a public hearing as to such valuation in the manner prescribed for hearing complaints as herein prescribed, and the provisions of this Act relative to hearings on complaints on the Commission's own motion so far as applicable shall apply to such hearing. The Commission shall within five days after such valuation is determined serve a statement thereof upon the public utility interested, and shall file a statement thereof upon the public utility interested, and shall file a like statement with the auditor, recorder or clerk of every municipality in which any part of the plant or equipment of such public utility is located. The Commission may at any time on its own initiative make a re-valuation of such property, and may make a re-valuation upon the application of any public utility filed not less than six months after the service of such statement.

Section 11. *Uniform Accounting by Utility.*—Every public utility shall keep and render to the Commission in the manner and form prescribed by the Commission uniform accounts of all business transacted. All forms of accounts which may be prescribed by the Commission shall conform as nearly as practicable to similar forms prescribed by Federal authority. Every public utility engaged directly or indirectly in any other business than that of the transportation of persons or property by street railroads or the production, transmission or furnishing of heat, light, water or power or the conveyance of telephone

messages shall, if required by the Commission, keep and render separately to the Commission in like manner and form the accounts of all such other business, in which case all the provisions of this Act shall apply with like force and effect to the books, accounts, papers and records of such other business.

Section 12. *Commission to Prescribe Forms for Accounts and Records; Other Books Shall Not Be Kept.*—The Commission shall prescribe the forms of all books, accounts, papers and records required to be kept, and every public utility is required to keep and render its books, accounts, papers and records accurately and faithfully in the manner and form prescribed by the Commission and to comply with all directions of the Commission relating to such books, accounts, papers and records. No public utility shall keep any other books, accounts, papers or records of its public utility business transacted than those prescribed or approved by the Commission, except such as may be required by the laws of the United States.

Section 13. *Commission to Furnish Suitable Blanks.*—The Commission shall cause to be prepared suitable blanks for reports for carrying out the purposes of this Act, and shall, when necessary, furnish such blanks for reports to each public utility.

Section 14. *Office and Records of Utility Maintained in State.*—Each public utility shall have an office in one of the towns or cities in this State in which its property or some part thereof is located, and shall keep in said office all such books, accounts, papers and records as shall be required by the Commission to be kept within the State. No books, accounts, papers or records required by the Commission to be kept within the State shall be at any time removed from the State, except upon such conditions as may be prescribed by the Commission.

Section 15. *Annual Balance Sheet, Filing.*—The accounts shall be closed annually on the thirtieth day of June and a balance sheet of that date promptly taken therefrom. On or before the first day of August following, such balance sheet, together with such other information as the Commission may prescribe, verified by an officer of the public utility, shall be filed with the Commission.

Section 16. *Audit of Accounts; Allocation of Items.*—The Commission shall provide for the examination and audit of all accounts, and all items shall be allocated to the accounts in the manner prescribed by the Commission.

The agents, accountants or examiners employed by the Commission shall have authority under the direction of the Commission to inspect and examine any and all books, accounts, papers, records and memoranda kept by such public utilities.

Section 17. *Depreciation Accounts; Application of Funds.*—Every public utility shall carry a proper and adequate depreciation account whenever the Commission after investigation shall determine that such depreciation account can be reasonably required. The Commission shall ascertain and determine what are the proper and adequate rates of depreciation of the several classes of property of each public utility. The rates shall be such as will provide the amounts required over and above the expenses of maintenance, to keep such property in a state of efficiency corresponding to the progress of the industry. Each public utility shall conform its depreciation accounts to such rates so ascertained and determined by the Commission. The Commission may make changes in such rates of depreciation from time to time as it may find to be necessary.

The Commission shall also prescribe rules, regulations and forms of accounts regarding such depreciation which the public utility is required to carry into effect.

The Commission shall provide for such depreciation in fixing the rates, tolls and charges to be paid by the public.

All moneys thus provided for shall be set aside out of the earnings and carried in a depreciation fund. The moneys in this fund may be expended in replacements, new construction, extensions or additions to the property of such public utility, or invested, and if invested the income from the investments shall also be carried in the depreciation fund. This fund and the proceeds thereof shall be used for no other purpose than as provided in this section and for depreciation.

Section 18. *New Constructions; Accounting.*—The Commission shall keep itself informed of all new construction, extensions and additions to the property of such public utilities and shall prescribe the necessary forms, regulations and instructions to the officers and employees of such public utilities for the keeping of construction accounts, which shall clearly distinguish all operating expenses and new construction.

Section 19. *Reports by Utilities; Details.*—Each public utility shall furnish to the Commission in such form and at such times as the Commission shall require, such accounts, reports and information as shall show in itemized detail: (1) The depreciation per unit, (2) the salaries and wages separately per unit, (3) legal expenses per unit, (4) taxes and rentals separately per unit, (5) the quantity and value of material used per unit, (6) the receipts from residuals, by-products, services or other sales separately per unit, (7) the total and net cost per unit, (8) the gross and net profit per unit, (9) the dividends and interest per unit, (10) the surplus or reserve per unit, (11) the prices per unit paid by consumers;

and in addition such other items, whether of a nature similar to those hereinbefore enumerated or otherwise, as the Commission may prescribe in order to show completely and in detail the entire operation of the public utility in furnishing the unit of its product or service to the public.

Section 20. *Annual Report of Commission.*—The annual report of the Commission to the Governor shall show its proceedings under this Act, and shall also show the details per unit as provided in Section 19 hereof for all the public utilities of each kind in this State, together with such other facts and suggestions relative thereto as the Commission shall deem advisable. The Commission shall also publish in its annual reports the value of all property actually used and useful for the convenience of the public, of every public utility as to whose rates, charges, service or regulations any hearing has been held by the Commission, or the value of whose property has been ascertained by it as provided in this Act.

Section 21. *Units of Product or Service.*—The Commission shall ascertain and prescribe for each kind of public utility suitable and convenient standard commercial units of product or service. These shall be lawful units for the purposes of this Act.

Section 22. *Standards for Measurement; Accurate Appliances.*—The Commission shall ascertain and fix adequate and serviceable standards for the measurement of quality, pressure, initial voltage or other conditions pertaining to the supply of the product or service rendered by any public utility and prescribe reasonable regulations for examination and testing of such product or service and for the measurement thereof. It shall establish reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for measurements, and every public utility is required to carry into effect all orders issued by the Commission relative thereto.

Section 23. *Testing of Measuring Appliances; Fees.*—The Commission shall provide for the examination and testing of any and all appliances used for the measuring of any product or service of a public utility, and may provide by rule that no such appliance shall be installed and used for the measuring of any product or service of any public utility until the same has been examined and tested by the Commission and found to be accurate. The Commission shall declare and establish a reasonable fee governing the cost of such examination and test, which shall be paid to the Commission by the public utility.

The Commission shall declare and establish reasonable fees for the testing of such appliances on the application of the

consumer or user, the fee to be paid by the consumer or user at the time of his request, but to be repaid to the consumer or user by the Commission and to be paid by the public utility if the appliance be found defective or incorrect to the disadvantage of the consumer or user beyond such reasonable limit as may be prescribed by the Commission. All fees collected under the provisions of this section shall be paid by the Commission into the State Treasury.

The Commission may purchase such materials, apparatus and standard measuring instruments for such examination and tests as it may deem necessary.

Section 24. *Entry Upon Premises for Inspection or Test.*—The Commission, its agents, experts, examiners or inspectors shall have power to enter upon any premises occupied by any public utility for the purpose of making any inspection, examination or test provided in this Act and to set up and use on such premises any apparatus and appliances and occupy reasonable space therefor.

Section 25. *Rate Schedules to Be Filed; Maximum Charges.*—Every public utility shall file with the Commission, within a time to be fixed by the Commission, schedules which shall be open to public inspection, showing all rates, tolls and charges which it has established and which are in force at the time for any service performed by it within the State, or for any service in connection therewith or performed by any public utility controlled or operated by it. The rates, tolls and charges shown on such schedules shall not exceed the rates, tolls and charges in force January 1, 1911.

Section 26. *Rules and Regulations and Interstate Schedules to Be Filed.*—Every public utility shall file with and as part of every such schedule all rules and regulations that in any manner affect the rates charged or to be charged for any service. Every public utility shall also file with the Commission copies of interstate rate schedules and rules and regulations issued by it or to which it is a party.

Section 27. *Schedules Accessible to Public.*—A copy of so much of said schedules as the Commission shall deem necessary for the use of the public shall be printed in plain type, and kept on file in every station or office of such public utility where payments are made by the consumers or users, open to the public, in such form and place as to be readily acessible to the public and as can be conveniently inspected.

Section 28. *Joint Rates. Filing and Publishing Schedules.*—Where a schedule of joint rates or charges is or may be in force between two or more public utilities, such schedules shall in like manner be printed and filed with the Commission and so much thereof as the Commission shall deem necessary for

the use of the public shall be filed in every such station or office as provided in Section 27.

Section 29. *Changes in Schedules; Ten Days' Notice.*—No change shall thereafter be made in any schedule, including schedules of joint rates, except upon ten days' notice to the Commission, and all such changes shall be plainly indicated upon existing schedules, or by filing new schedules in lieu thereof ten days prior to the time the same are to take effect; *provided,* that the Commission, upon application of any public utility, may prescribe a less time within which a reduction may be made.

Section 30. *Revised Schedules to Be Open to Public.*—Copies of all new schedules shall be filed as hereinbefore provided in every station and office of such public utility where payments are made by consumers or users ten days prior to the time the same are to take effect, unless the Commission shall prescribe a less time.

Section 31. *Charges Other Than as Specified in Printed Schedules Unlawful.*—It shall be unlawful for any public utility to charge, demand, collect or receive a greater or less compensation for any service performed by it within the State or for any service in connection therewith than is specified in such printed schedules, including schedules of joint rates, as may at the time be in force, or to demand, collect or receive any rate, toll or charge not specified in such schedule. The rates, tolls and charges named therein shall be the lawful rates, tolls and charges until the same are changed as provided in this Act.

Section 32. *Commission May Prescribe Changes in Form of Schedules.*—The Commission may prescribe such changes in the form in which the schedules are issued by any public utility as may be found to be expedient.

Section 33. *Classification of Utility Service.*—The Commission shall provide for a comprehensive classification of service for each public utility, and such classification may take into account the quantity used, the time when used, the purpose for which used, and any other reasonable consideration. Each public utility is required to conform its schedules of rates, tolls and charges to such classification.

Section 34. *Commission May Prescribe Rules of Procedure.*—The Commission shall have power to adopt and amend reasonable and proper rules and regulations relative to all inspections, tests, audits and investigations and to adopt and publish reasonable and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it, and any person may appear before the Commission, and be

heard, or may appear by attorney. All hearings shall be open to the public.

Section 35. *Inquiry Into Business Management of Utilities; Conference With Other Commissions.*—The Commission shall have authority to inquire into the management of the business of all public utilities and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from any public utility all necessary information to enable the Commission to perform its duties. The Commission may confer by correspondence, or by attending conventions, or otherwise with public utility commissioners of other States or the United States on any matter relating to the public utilities.

Section 36. *Inspection of Books and Papers.*—The Commission or any Commissioner or any person or persons employed by the Commission for that purpose, shall, upon demand, have the right to inspect the books, accounts, papers, records and memoranda of any public utility and to examine, under oath, any officer, agent or employee of such public utility in relation to its business and affairs. Any person other than one of said Commissioners, who shall make such demand, shall produce a certificate under the seal of the Commission showing his authority to make such inspection.

Section 37. *Production of Books and Papers; Judicial Process.*—The Commission may require, by order or subpœna to be served on any public utility in the same manner that a summons is served in a civil action in the circuit court, the production within this State at such time and place as it may designate, of any books, accounts, papers or records kept by said public utility in any office or place without the State of Oregon, or verified copies in lieu thereof, if the Commission shall so order, in order that an examination thereof may be made by the Commission or under its direction. Any public utility failing or refusing to comply with any such order or subpœna shall, for each day it shall so fail or refuse, forfeit and pay into the State Treasury a sum of not less than fifty dollars nor more than five hundred dollars.

Section 38. *Employees of Commission.*—The Commission is authorized to employ such engineers, examiners, experts, clerks, accountants, inspectors and other assistants as it may deem necessary, at such rates of compensation as it may determine upon.

Section 39. *Appointment of Examiners, Hearings Before Single Commissioner or Examiner.*—For the purpose of making any investigation which may be required or permitted by any law the Commission shall have power to appoint, by an order in writing, an examiner, or agent, whose duties shall

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be prescribed in such order. In the discharge of his duties such examiner or agent shall have every power whatsoever of an inquisitorial nature granted by this or any other Act to the Commission and the Commissioners thereof and the same powers as a notary public with regard to the taking of depositions. Any investigation, inquiry or hearing which the Commission has power to undertake or hold may be undertaken or held by or before any commissioner, examiner or agent of the Commission. The decision of the Commission shall be based upon its examination of all of the testimony and records in the matter investigated or heard.

Section 40. *Utilities to Furnish Commission with Information Required.*—Every public utility shall furnish to the Commission all information required by it to carry into effect the provisions of this Act, and shall make specific answers to all questions submitted by the Commission.

Any public utility receiving from the Commission any blanks with directions to fill the same, shall cause the same to be properly filled out so as to answer fully and correctly each question therein propounded, and in case it is unable to answer any question, it shall give a good and sufficient reason for such failure; and said answer shall be verified under oath by the president, secretary, superintendent or general manager of such public utility and returned to the Commission at its office within the period fixed by the Commission.

Whenever required by the Commission, every public utility shall deliver to the Commission any or all maps, profiles, contracts, reports of engineers and all documents, books, accounts, papers and records or copies of any or all of the same, with a complete inventory of all its property, in such form as the Commission may direct.

Section 41. *Complaint Against Utility by Patrons, Etc.*—Upon a complaint made against any public utility by any mercantile, agricultural or manufacturing society or by any body politic or municipal organization or by any three persons, firms, corporations or associations, that any or all of the rates, tolls, charges or schedules or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act whatsoever affecting or relating to the production, transmission, delivery or furnishing of heat, light or water or power or the conveyance of any telegraph or telephone message, or the transportation of persons or property by street railroad, or any service in connection therewith is in any respect unreasonable, insufficient or unjustly discriminatory, or that any service rendered by any public utility is inadequate or is not afforded, the Commission shall proceed, with or without notice, to make

such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, measurements, practice or act complained of shall be entered by the Commission without a formal hearing.

Section 42. *Notice of Complaint to Utility; Notice of Hearing.*—The Commission shall, prior to such formal hearing, notify the public utility complained of that complaint has been made, and to answer the same and at the same time or afterward, may proceed to set a time and place for a hearing and an investigation as hereinafter provided.

The Commission shall give the public utility and the complainant, if any, ten days' notice of the time and place when and where such hearing and investigation will be held and such matters considered and determined. Both the public utility and complainant shall be entitled to be heard and shall have process to enforce the attendance of witnesses.

Section 43. *Commission to Prescribe Reasonable Rates and Regulations.*—If, upon such investigation, any rates, tolls, charges, schedules, or joint rates shall be found to be unjust, unreasonable, insufficient or unjustly discriminatory or to be preferential or otherwise in violation of any of the provisions of this Act, the Commission shall have power to fix and order substituted therefor such rate or rates, tolls, charges or schedules as shall be just and reasonable. If, upon such investigation, it shall be found that any regulation, measurement, practice, act, or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise in violation of any of the provisions of this Act, or if it be found that any service is unsafe or inadequate or that any reasonable service cannot be obtained or is not afforded, the Commission shall have power to substitute therefor such other regulations, measurements, practices, service or acts and to make such order respecting, and such changes in such regulations, measurements, practices, service or acts as shall be just and reasonable.

Section 44. *Separate Hearings on Complaint; Direct Damage to Complainant Not Essential.*—The Commission may, in its discretion, when a complaint is made of more than one rate or charge, order separate hearings thereon, and may consider and determine the several matters complained of separately and at such times as it may prescribe. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Section 45. *Investigation on Commission's Own Motion.*—Whenever the Commission shall believe that any rate or charge or schedule of rates or charges may be unreasonable or unjustly discriminatory, or that any service is unsafe or inade-

quate or is not afforded, or that an investigation of any matter relating to any public utility should for any reason be made, it may on its own motion summarily investigate the same, with or without notice. If, after making such investigation, the Commission becomes satisfied that sufficient grounds exist to warrant a hearing being ordered to determine whether any rate or charge or schedule of rates or charges so investigated is unreasonable or unjustly discriminatory, or whether the service investigated is unsafe or inadequate or is not afforded, or that an investigation of any other matter relating to such public utilities should be made, it shall furnish such public utility interested a statement, notifying the public utility of the matters under investigation, which said statement shall be accompanied by a notice fixing a time and place for hearing upon such matters. Notice may likewise be given to other parties interested. Such notice of hearing shall be given at least ten days in advance of any hearing. Thereafter proceedings shall be had and conducted in reference to the matter investigated in like manner as though complaint had been filed with the Commission relative to the matter investigated, and the same order or orders may be made in reference thereto as if such investigation had been made on complaint.

Section 46. *Utilities May Complain.*—Any public utility may make complaint as to any matter affecting its own product or service with like effect as though made by any mercantile, agricultural or manufacturing society, body politic or municipal organization, or by any ten persons, firms, corporations or associations.

Section 47. *Powers of Commissioners and Examiners as to Production of Testimony and Papers; Contempt Proceedings.*—Each of the Commissioners, and every examiner or agent appointed, as herein provided, shall for the purposes mentioned in this Act and for the purposes mentioned in Chapter 53 of the Laws of Oregon for the year 1907, and Sections 6928 and 6929 of Lord's Oregon Laws, as compiled and annotated by Hon. William Paine Lord and Richard Ward Montague, have the power to administer oaths, certify to official acts, issue notices in the name of the Commission, issue subpœnas under his hand, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony, and to take and receive testimony, conduct hearings and investigations, whether upon complaint or upon the Commission's own motion.

In case of disobedience on the part of any person or persons to comply with any order of the Commission or any Commissioner, examiner or agent or any subpœna, or, on the refusal of any witness to testify to any matter regarding which he may be lawfully interrogated before the Commission, any Commis-

sioner, examiner or agent authorized as provided in Section 39 hereof, it shall be the duty of the circuit court of any county or the judge thereof, upon application of the Commission, or any Commissioner to compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpœna issued from such court or a refusal to testify therein. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, waybills, contracts, accounts, and documents, if in his power to do so, in obedience to the subpœna or lawful requirement of the Commission, shall be guilty of a misdemeanor and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

Section 48. *Witness Fees and Mileage.*—Each witness who shall appear before the Commission, or its agent by its order, shall receive for his attendance the fees and mileage now provided for witnesses in civil cases in courts of record, which shall be audited and paid by the State in the same manner as other expenses are audited and paid, upon the presentation of proper vouchers sworn to by such witnesses and approved by the Commission; *provided,* no witness shall be entitled to receive double mileage fees.

No witness subpœnaed at the instance of parties other than the Commission shall be entitled to compensation from the State for attendance or travel unless the Commission shall certify that his testimony was material to the matter investigated.

Section 49. *Depositions.*—The Commission or any party may, in any investigation, cause the depositions of witnesses residing within or without the State to be taken in the manner prescribed by law for like depositions in civil suits in the circuit court.

Section 50. *Record of Proceedings and Testimony; Transcript Received in Evidence.*—A full and complete record shall be kept of all proceedings had before the Commission or any Commissioner, examiner or agent on any investigation, and all testimony shall be taken down by the stenographer appointed by the Commission. Whenever any complaint is served upon the Commission under the provisions of Section 54 of this Act, the Commission shall, before said suit is reached for trial, cause a certified transcript of all proceedings had and testimony taken upon such investigation to be filed with the county clerk of the county where the action is pending. A transcribed copy of the evidence and proceedings, or any

specific part thereof on any investigation, taken by the stenographer appointed by the Commission, being certified by such stenographer to be a true and correct transcript in long hand of all the testimony on the investigation, or of a particular witness, or of other specific parts thereof, carefully compared by him with his original notes, and to be a correct statement of the evidence and proceedings had on such investigation so purporting to be taken and transcribed, shall be received in evidence with the same effect as if said evidence had been given and said proceedings had upon the trial in which said transcript or any part thereof is offered.

Section 51. *Commission to Order Substitution of Reasonable Rates and Service; Taking Effect of Order.*—Whenever, upon an investigation made under the provisions of this Act, the Commission shall find any existing rate or rates, or any schedule of rates, tolls, charges, joint rate or joint rates to be unjust, unreasonable, insufficient, or unjustly discriminatory or to be preferential or otherwise in violation of any of the provisions of this Act, the Commission shall determine and by order fix reasonable rate or rates, schedule of rates, tolls, charges or joint rates to be imposed, observed and followed in the future in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential or otherwise in violation of any of the provisions of this Act.

Whenever, upon an investigation made under the provisions of this Act, the Commission shall find any regulations, measurements, practices, acts or service to be unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise in violation of any of the provisions of this Act; or shall find that any service is unsafe or inadequate or that any service which can be reasonably demanded is not afforded, the Commission shall determine and declare and by order fix reasonable measurements, regulations, acts, practices or service to be furnished, imposed, observed and followed in the future in lieu of those found to be unjust, unreasonable, insufficient, preferential, unjustly discriminatory, unsafe, inadequate, or otherwise in violation of this Act, as the case may be, and shall make such other order respecting such measurement, regulation, act, practice or service as shall be just and reasonable. The Commission shall cause a certified copy of all such orders to be delivered to an officer or agent of the public utility affected thereby, and all such orders shall of their own force take effect and become operative twenty days after service thereof, unless a different time be provided by said order. The Commission may provide by rule that any public utility affected by any order shall within a time to be fixed by the Commission, notify the Commission whether the terms of the order are accepted and will be obeyed.

Section 52. *Revision and Amendment of Orders.*—The Commission may at any time, upon notice to the public utility and after opportunity to be heard as provided in Section 42 hereof, rescind, alter or amend any order fixing any rate or rates, schedule of rates, tolls, charges, or any other order made by the Commission, and certified copies of the same shall be served and take effect as herein provided for original orders.

Section 53. *Orders Enforced Until Set Aside; Prima Facie Lawful and Reasonable.*—All rates, tolls, charges, schedules and joint rates fixed by the Commission shall be in force and shall be *prima facie* lawful, and all regulations, practices and services prescribed by the Commission shall be in force and shall be *prima facie* lawful and reasonable until found otherwise in a suit brought for the purpose pursuant to the provisions of Sections 54, 55, 56, and 57 of this Act.

Section 54. *Suits to Set Aside Orders, Procedure, Precedence in Hearing, Burden of Proof.*—Any public utility or other person, persons or corporation interested in or affected by any order of the Commission fixing any rate or rates, tolls, charges, schedules, classifications, joint rate or rates, or any order fixing any regulations, practices, act or service, being dissatisfied therewith, may commence a suit in the circuit court of the county in which the hearing was held, against the Commission as defendant to vacate and set aside any such order or specified portion thereof on the ground that the order or portion thereof is unlawful, in which suit a copy of the complaint shall be served with the summons as in a suit in equity. The Commission shall serve and file its answer to said complaint within ten days after the service thereof, whereupon said suit shall be at issue and stand ready for trial upon ten days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in said court, and the circuit court shall always be deemed open for the trial thereof, and the same shall be tried and determined as a suit in equity. Every such suit to set aside, vacate or amend any determination or order of the Commission or to enjoin the enforcement thereof or to prevent in any way such order or determination from becoming effective, shall be commenced, and every appeal to the courts or right or recourse to the courts, shall be taken or exercised within ninety days after the entry or rendition of such order or determination, and the right to commence any such action, proceeding or suit shall terminate absolutely at the end of such ninety days after such entry or rendition thereof.

Section 55. *Suspension or Stay of Order Pending Suit to Set Aside Order, Terms and Bond.*—After the commencement

of such suit the circuit court may for cause shown, upon application to the circuit court or presiding judge thereof, and upon notice to the Commission and hearing, suspend or stay the operation of the order of the Commission complained of until the final disposition of such suit, upon the giving of such bond or other security, and upon such conditions as the court may require; and if such order of injunction suspends the order or requirement of the Commission fixing rates, then the court shall require a bond with good and sufficient surety, conditioned that the public utility or public utilities applying for such injunction shall answer for all damages caused by the delay in the enforcement of the order of the Commission and all compensation for whatever sums any person or corporation shall be compelled to pay in excess of the sums such person or corporation would have been compelled to pay if the order of the Commission had not been suspended; and such bond shall cover the periods transpiring from time of the issuance of any such injunction until the final determination of the question litigated. The said bond shall be executed in favor of the Railroad Commission of Oregon for the benefit of whom it may concern, and shall be enforceable by said Commission or any person interested, in an appropriate proceeding. Any person paying charges found to be excessive shall have a claim for the excess, whether paid under protest or not, and unless refunded within thirty days after written demand made after final judgment, may recover the same by action against such public utility, or such public utility and the sureties on such bond. Claims of persons for money collected in excess of the amount payable under the rate or rates established by the Commission shall be assignable in the same manner as any chose in action. No appeal to the Supreme Court shall stay the operation of any order of the Commission unless the circuit or Supreme Court shall so direct, and unless the public utility so appealing shall give a bond with like conditions and terms as that given on granting injunctions suspending an order of the Commission fixing rates.

Section 56. *Reconsideration by Commission When New Evidence Introduced.*—If, upon the trial of such suit, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the Commission or additional thereto, the court, before proceeding to render judgment, unless the parties to such suit stipulate in writing to the contrary, shall transmit a copy of such evidence to the Commission and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same, and may alter, modify, amend

or rescind its order relating to such rate or rates, fares, charges, classification, joint rate or rates, regulation, practice, service or equipment complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence.

If the Commission shall rescind its order complained of, the suit shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment or decree shall be rendered thereon, as though made by the Commission in the first instance. If the original order shall not be rescinded or changed by the Commission, judgment or decree shall be rendered upon such original order.

Section 57. *Appeal to Supreme Court, Precedence Upon Calendar.*—Either party to said suit, within sixty days after the entry of the judgment or decree of the circuit court, may appeal to the Supreme Court. Where an appeal is taken the cause shall, on the return of the papers to the Supreme Court, be immediately placed on the calendar of the then pending term, and shall be assigned and brought to a hearing in the same manner as other causes on the calendar, but shall have precedence over civil causes of a different nature pending in said court.

Section 58. *Procedure as in Civil Actions; Burden of Proof of Unlawfulness or Unreasonableness.*—In all suits, actions and proceedings in court arising under this Act, all processes shall be served and the practice and rules of evidence shall be the same as in civil actions, except as otherwise in this Act provided.

In all trials, actions, suits and proceedings arising under the provisions of this Act or growing out of the exercise of the authority and powers granted herein to the Commission, the burden of proof shall be upon the party adverse to such Commission or seeking to set aside any determination, requirement, direction or order of said Commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order of the Commission complained of is unreasonable or unlawful, as the case may be.

Section 59. *Incriminating Evidence; Immunity Does Not Extend to Corporation.*—No person shall be excused from testifying or from producing books and papers in any proceedings based upon or growing out of any violation of the provisions of this Act on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person having so testified shall be prosecuted or subjected to any penalty or forfeiture for, or on account of, any

transaction, matter or thing concerning which he may have testified or produced any documentary evidence; *provided*, that no person so testifying shall be exempted from prosecution or punishment for perjury in so testifying; *and provided*, the immunity hereby conferred shall extend only to a natural person who, in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

Section 60. *Certified Copies of Orders Furnished.*—Upon application of any person the Commission shall furnish certified copies, under the seal of the Commission, of any order made by it, which shall be *prima facie* evidence of the facts stated therein.

Section 61. *Power of Municipality to Regulate Utilities; Appeal.*—Every municipality shall have power:

(1) To determine by contract, ordinance or otherwise the quality and character of each kind of product or service to be furnished or rendered by any public utility furnishing any product of service within said municipality and all other terms and conditions not inconsistent with this Act upon which such public utility may be permitted to occupy the streets, highways or other public property within such municipality and such contract, ordinance or other determination of such municipality shall be in force and *prima facie* reasonable. Upon complaint made by such public utility or by any qualified complainant as provided in Section 41, the Commission shall set a hearing as provided in Section 42 and if it shall find such contract, ordinance or other determination to be unreasonable, such contract, ordinance or other determination shall be void. *Provided, however*, that no ordinance or other municipal regulation shall be reviewed by the Commission under the provisions of this section which was prior to such review enacted by the initiative or which was prior to such review referred to and approved by the people of said municipality or while a referendum thereon is pending.

(2) To require of any public utility by ordinance or otherwise such modifications, addititons and extensions to its physical equipment, facilities or plant or service within said municipality as shall be reasonable and necessary in the interest of the public, and to designate the location and nature of all such additions and extensions, the time within which they must be completed and all conditions under which they must be constructed subject to review by the Commission as provided in this section.

(3) To provide for a penalty for non-compliance with the provisions of any ordinance or resolution adopted pursuant to the provisions hereof.

(4) The power and authority granted in this section shall exist and be vested in said municipalities, anything in this Act to the contrary notwithstanding.

Section 62. *Passes, Franks and Privileges Denied Political Committees and Candidates; Penalty.*—No public utility or any agent or officer thereof, or any agent or officer of any municipality constituting a public utility as defined in this Act shall offer or give for any purpose to any political committee or any member or employee thereof to any candidate for or incumbent of any office or position under the constitution or laws or under any ordinance of any municipality of this State, or to any person at the request, or for the advantage of all or any of them, any pass, reduced rate, frank or any privilege withheld from any person for any transportation, product or service produced, transmitted, delivered, furnished or rendered, or to be transported, produced, transmitted, delivered, furnished or rendered by any public utility, or the conveyance of any telephone message or communication or any free produce or service whatsoever.

No political committee and no member or employee thereof, no candidate for and no incumbent of any office or position under the constitution or laws or under any ordinance of any town or municipality of this State, shall ask for or accept from any public utility or any agent or officer thereof, or any agent or officer of any municipality constituting a public utility as defined in this Act, or use in any manner or for any purpose any pass, reduced rate, frank or privilege withheld from any person, for any transportation product or service produced, transmitted, delivered, furnished or rendered, or to be produced, transmitted, delivered, furnished or rendered by any public utility, or the conveyance of any telephone message or communication. Any violation of any of the provisions of this section shall be punished by imprisonment in the State Penitentiary not more than five years nor less than one year or by fine not exceeding one thousand dollars nor less than two hundred dollars, or by both such fine and imprisonment.

Section 63. *Unjust Discrimination, Prohibited; Definition; Penalty; Permissible Free or Reduced Rate Service.*—If any public utility or any agent or officer thereof shall, directly or indirectly, by any device whatsoever or otherwise, charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it in, or affecting it relating to, the transportation of persons or property by street railroad or to the production, transmission, delivery or furnishing of heat, light, water or power or the conveyance of telegraph or telephone messages or for any service in connection therewith than that

prescribed in the public schedules or tariffs than in force or established as provided therein, or than it charges, demands, collects or receives from any other person, firm or corporation for a like and contemporaneous service under substantially similar circumstances, such public utility shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful, and upon conviction thereof shall forfeit and pay into the State Treasury not less than one hundred dollars nor more than one thousand dollars for each offense; and such agent or officer so offending shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars for each offense. *Provided*, that this provision shall not be construed to prohibit the privilege of passes or franks or the exchange thereof with each other for the officers, agents, employees and their families of street railroads, telegraph, telephone and cable lines, and the officers, agents, employees and their families of other street railroads, telegraph, telephone and cable lines and with the officers, employees and their families of railroad, express and sleeping car lines, union depots and other common carriers. *Provided, however*, that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services. Nothing herein shall prevent the transportation of persons or property or the production, transmission, delivery or furnishing of heat, light, water or power, or the conveying of telegraph or telephone messages within this State free or at reduced rates for the United States, the State, or any municipality thereof, or for charitable purposes, or to employees of any such public utility for their own exclusive use and benefit, nor prevent any such public utility from giving free transportation or service, or reduced rates therefor, to its officers, agents, surgeons, physicians, employees and attorneys at law, or members of their families, or to former employees to such public utilities or members of their families where such former employees have become disabled in the service of such public utility or are unable from physical disqualification to continue in the service, or to members of families of deceased employees of such public utility; to ministers of religion, inmates of hospitals and charitable and eleemosynary institutions and persons exclusively engaged in charitable and eleemosynary work. The Commission may in its discretion require to be filed with it by any public utility a list, verified under oath of the president, manager, superintendent or secretary of any public utility, of all free or reduced rate privileges granted by such public utility under the provisions of this section.

Section 64. *Facilities in Exchange for Less Compensation Prohibited; Exceptions.*—It shall be unlawful for any public utility to demand, charge, collect or receive from any person, firm or corporation less compensation for any service rendered or to be rendered by said public utility in consideration of the furnishing by said person, firm or corporation of any part of the facilities incident thereto; *provided*, nothing herein shall be construed as prohibiting any public utility from renting any facilities incident to the transportation of persons or property by street railroad, or to the production, transmission, delivery or furnishing of heat, light, water or power or the conveyance of telephone messages and paying a reasonable rental therefor, or as requiring any public utility to furnish any part of such appliances which are situated in and upon the premises of any consumer or user, except telephone station equipment upon the subscriber's premises, and unless otherwise ordered by the Commission, meters and appliances for measurements of any product or service.

Section 65. *Undue Preferences Prohibited, Penalty; Existing Contracts Respected.*—If any public utility shall make or give any undue or unreasonable preference or advantage to any particular person, firm or corporation, or to any particular locality, or shall subject any particular person, firm, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such public utility shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful. Any person, firm or corporation convicted of violating any of the provisions of this section shall forfeit and pay into the State Treasury not less than one hundred dollars nor more than ten thousand dollars for each offense; and any agent or officer of any public utility, person, firm or corporation so offending shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars for each offense.

Section 66. *Rebates, Concessions and Discriminations Prohibited; Penalty.*—It shall be unlawful for any person, firm or corporation knowingly to solicit, accept or receive any rebate, concession or discrimination in respect to any service in or affecting or relating to the transportation of persons by street railroad, or to production, transmission, delivery or furnishing of heat, light, water or power or the conveying of telegraph or telephone messages within this State, or for any service in connection therewith whereby any such service shall, by any device whatsoever, or otherwise, be rendered free or at a less rate than that named in the published schedules and tariffs in force as provided herein, or whereby

any service or advantage is received other than is herein specified. Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than fifty dollars nor more than one thousand dollars for each offense.

Section 67. *Treble Damages for Violation of Act by Public Utility; Attorney's Fees; Statute Penalty Not Affected by Civil Damages.*—If any public utility shall do or cause to be done or permit to be done any matter, act or thing in this Act prohibited, or declared to be unlawful, or shall omit to do any Act, matter or thing required to be done by it, such public utility shall be liable to the person, firm or corporation injured thereby in treble the amount of damages sustained in consequence of such violation together with a reasonable counsel's or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case; *provided*, that any recovery as in this section provided shall in no manner affect recovery by the State of the penalty prescribed for such violation.

Section 68. *Information, Papers and Accounting Denied Commission; Penalty.*—Any officer, agent or employee of any public utility who shall fail or refuse to fill out and return any blanks as required by this Act, or shall fail or refuse to answer any question therein propounded, or shall knowingly or willfully give a false answer to any such question or shall evade the answer to any such question where the fact inquired of is within his knowledge or who shall, upon proper demand, fail or refuse to exhibit to the Commission or any Commissioner or any person authorized to examine the same, any book, paper, account, record, or memorandum of such public utility which is in his possession or under his control or who shall fail to properly use and keep his system of accounting or any part thereof as prescribed by the Commission, or who shall refuse to do any act or thing in connection with such system of accounting when so directed by the Commission or its authorized representative, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one thousand dollars for each offense. A penalty of not less than five hundred dollars nor more than one thousand dollars shall be recovered from the public utility for each such offense when such officer, agent or employee acted in obedience to the direction, instruction or request of such public utility or any general officer thereof.

Section 69. *Violations of Act in General, Penalties; Utility Held Responsible for Agents.*—If any public utility shall violate any provisions of this Act, or shall do any act herein

prohibited, or shall fail or refuse to perform any duty enjoined upon it, for which a penalty has not been provided, or shall fail, neglect or refuse to obey any lawful requirement, order made by the Commission or council, or any judgment or decree made by any court upon the application of the Commission, for every such violation, failure or refusal, such public utility shall forfeit and pay into the State Treasury a sum of not less than one hundred dollars, nor more than ten thousand dollars for such offense. In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any public utility acting within the scope of his employment, shall in every case be deemed to be the act, omission or failure of such public utility. All penalties, fines or forfeitures or other sums collected or paid under the provisions of this Act, shall be paid into the general fund of the State Treasury, except where it is provided the same shall be paid to the aggrieved party.

Section 70. *Interference With Commission's Equipment; Penalty.*—Any person who shall destroy, injure, or interfere with any apparatus or appliance owned or operated by or in charge of the Commission or its agent, or any apparatus or appliance sealed by it, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by fine not exceeding one hundred dollars or imprisonment for a period not exceeding thirty days, or both. Any public utility knowingly permitting the destruction, injury to, or interference with any such apparatus or appliance or with the seal affixed to any apparatus or appliance by direction of the Commission, shall forfeit a sum not exceeding one thousand dollars for each such offense.

Section 71. *Temporary Alteration or Suspension of Rates.*—The Commission shall have power, when deemed by it necessary to prevent injury to the business or interests of the people or any public utility of this State in case of any emergency to be judged of by the Commission, to temporarily alter, amend, or with the consent of the public utility concerned, suspend any existing rates, schedules and order relating to or affecting any public utility or part of any public utility in this State. Such rates so made by the Commission shall apply to one or more of the public utilities in this State or to any portion thereof as may be directed by the Commission, and shall take effect at such time and remain in force for such length of time as may be prescribed by the Commission.

Section 72. *Unreasonable Rates, Practices and Services not Specifically Designated May Be Regulated.*—Whenever, after hearing an investigation as provided in this Act, the Commission shall find that any rate, toll, charge, regulation or

practice for, in, or affecting or relating to the transportation of persons or property by street railroad, or to production, transmission, delivery or furnishing of heat, light, water or power or the conveying of any telephone or telegraph message or any service in connection therewith not hereinbefore specifically designated, is in any respect unsafe, inadequate, unreasonable or unjustly discriminatory, it shall have the power to regulate the same as provided in Sections 41 to 46 hereof, inclusive.

Section 73. *Investigation of Accidents.*—Every public utility shall, whenever an accident attended with loss of human life occurs within this State upon its premises or directly or indirectly arises from or connected with its maintenance or operation, give immediate notice thereof to the Commission. In the event of any such accident the Commission, if it deem the public interest require it, shall cause an investigation to be made forthwith, which investigation shall be held in the locality of the accident, unless for greater convenience of those concerned it shall order such investigation to be held at some other place; and said investigation may be adjourned from place to place as may be found necessary and convenient. The Commission shall seasonably notify the public utility of the time and place of the investigation.

Section 74. *Enforcement of Laws as to Public Utilities; Duties of Attorney General, Prosecuting Attorneys and Counsel.*—The Commission shall inquire into any neglect or violation of any law of this State or any law or ordinance of any municipality thereof by any public utility corporation doing business therein, or by the officers, agent or employees thereof, or by any person operating a public utility, and shall have the power, and it shall be its duty to enforce the provisions of this Act, as well as all other laws relating to public utilities and report all violations thereof to the Attorney General. Upon the request of the Commission it shall be the duty of the Attorney General or the prosecuting attorney of the proper county to aid in any investigation, hearing, or trial had under the provisions of this Act, and to institute and to prosecute all necessary suits, actions or proceedings for the enforcement of this Act or the recovery of penalties payable to the State or the enforcement of any law of this State or any law or ordinance of any municipality thereof relating to public utilities, and for the punishment of all violations thereof. Any forfeiture or penalty herein provided shall be recovered by an action brought thereon in the name of the State of Oregon in any court of appropriate jurisdiction. The Commission shall have authority to employ counsel and to fix their duties and compensation.

Section 75. *Substantial Compliance With Acts Sufficient; Technical Omissions Immaterial; Liberal Construction.*—A

substantial compliance with the requirements of this Act shall be sufficient to give effect to all the rules, orders, acts and regulations of the Commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereo. The provisions of this Act shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.

Section 76. *Other Rights of Action Not Released or Waived; Penalties Cumulative.*—This Act shall not have the effect to release or waive any right of action by the State or by any municipality thereof or by any person for any right, penalty or forfeiture which may have arisen or which may hereafter arise under any law of this State or under any law or ordinance of any municipality thereof; and all penalties and forfeiture accruing under this Act shall be cumulative and a suit for, and recovery of one, shall not be a bar to the recovery of any other penalty. The duties and liabilities of public utilities shall be the same as at common law and the remedies against them the same, except where otherwise provided by the Constitution or statutes of this State, and the provisions of this Act are cumulative thereto.

Section 77. *Rates of January 1, 1911, to Govern as Maximum Unless Otherwise Ordered; Proceedings to Change.*—Except as in this Act provided, and unless the Commission shall otherwise order, it shall be unlawful for any public utility within this State to demand, collect or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates for the same service on the first day of January, 1911. Every public utility in this State shall, within a time to be fixed by the Commission, file in the office of the Commission, copies of all schedules of rates and charges including joint rates, in force on the first day of January, 1911, and all rates in force at any time subsequent to said date. Any public utility desiring to advance or discontinue any such rate or rates may make application to the Commission in writing, stating the advance in or discontinuance of the rate or rates desired, giving the reasons for such advance or discontinuation. Upon receiving such application the Commission shall fix a time and place for hearing and give such notice to interested parties as it shall deem proper and reasonable. If, after such hearing and investigation, the Commission shall find that the change or discontinuation applied for is reasonable, fair and just, it shall grant the application either in whole or in part. Any public utility being dissatisfied with any order of the Commission made under the provisions of this Section may commence a suit against it in the circuit court in the manner provided in Section 54 of this Act, which suit shall be tried and

determined in the same manner as is provided for suits brought under said Section 54.

Section 78. *Expenses of Commission and Employees, Offices, Supplies.*—The agents, experts, engineers, accountants, inspectors, examiners or assistants provided for in this Act shall be appointed by the Commission and the Commission shall fix their compensation. The Commission shall be provided by the Secretary of State with necessary office furniture, supplies, stationery, books, periodicals, maps, and all necessary expenses therefor shall be audited and paid as other State expenses are audited and paid. The Commission may hold sessions and maintain offices at places other than the Capitol in its discretion for the more convenient and efficient performance of the duties imposed upon it by law, and shall upon its request be provided by the county court of any county in the State with suitable room or rooms for offices and hearings. The commissioners, secretary, clerk, stenographer and other employees, traveling upon the direction of the Commission, shall be entitled to receive from the State their actual necessary expenses while traveling on the business of the Commission. Such expenditures shall be sworn to by the person who incurred the expense and approved by the Commission.

Section 79. That Section 2 of Chapter 53 of the Laws of Oregon for the year 1907, the same being Section 6876 of Lord's Oregon Laws, as compiled and annotated by Honorable William Paine Lord and Richard Ward Montague, be and the same is amended so that the same shall read as follows:

Sec. 6876. The Governor, Secretary of State, and State Treasurer may at any time remove any Commissioner appointed by them, for inefficiency, neglect of duty, or malfeasance in office. Before such removal they shall give such Commissioner a copy of the charges against him, and shall fix a time when he can be heard in his own defense, which shall not be less than ten days thereafter, and such hearing shall be open to the public. If he shall be removed, the Governor, Secretary of State, and State Treasurer shall file in the office of the Secretary of State a complete statement of all charges made against such Commissioner, and their findings thereon with a record of the proceedings. Such power of removal shall be absolute, and there shall be no right of review of the same in any court whatsoever. No person so appointed or elected shall be pecuniarily interested in any railroad, common carrier or public utility in this State or elsewhere, and if any such Commissioner shall voluntarily become so interested, his office shall *ipso facto* become vacant; and if he shall become so interested otherwise than voluntarily he shall, within a reasonable time, divest himself of said interest; failing to do so, his office shall

become vacant. No Commissioner, nor the secretary, shall hold any other office or position of profit, or pursue any other business or vocation, or serve on or under any committee of any political party, but shall devote his entire time to the duties of his office. Before entering on the duties of his office, each of said Commissioners shall take and subscribe to an oath or affirmation to support the Constitution of the United States, and of this State, and to faithfully and honestly discharge the duties of such office of Commissioner; and that he is not pecuniarily interested in any railroad in this State or elsewhere, or in any common carrier, or in any corporation, company, or association of individuals owning, operating, managing or controlling any plant or equipment in this State or elsewhere for the conveyance of telegraph or telephone messages, or for the transportation of persons or property by street railroad, or for the production, transmission, delivery or furnishing of heat, light, water or power, nor in the stock, bonds, securities, earnings or contracts of any thereof, and that he holds no other office of profit, nor any position under any political committee or party; which oath or affirmation shall be filed in the office of the Secretary of State. Each of the said Commissioners shall also, before entering upon the duties of his office, execute a bond, payable to the State of Oregon, in the penal sum of ten thousand dollars ($10,000) with sureties to be approved by the Governor, Secretary of State, and State Treasurer, or a majority of them, for the faithful discharge of his duties and office, which said bond, when so executed and approved, shall be filed in the office of the Secretary of State. Each of said Commissioners shall receive an annual salary of four thousand dollars, payable in the same manner as salaries of other State officers are paid.

Section 80. The sum of thirty-five thousand dollars, or so much thereof as may be necessary to carry this Act into effect is hereby appropriated out of any money in the general fund of this State not otherwise appropriated. *Provided, however,* the sum hereby appropriated is not to be used in paying the salaries of the members of the Commission.

Filed in the office of the Secretary of State, February 24, 1911.

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- City Recorder
Franchise Agreements
Public Records Request
City Code
Elections

CONTACT
Christie, Robyn
City Recorder
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Franchise Agreements

A Franchise Agreement is a legally binding document between a Franchisee and a Franchisor. City of Bend Franchise Agreements are listed below.

FRANCHISE AGREEMENTS

- Blue Mountain Networks, LLC
- Central Electric Cooperative Non-Exclusive Franchise Agreement - 2022
- Lightspeed Networks Franchise Agreement
- Bend Code Chapter 11.16
- TDS Broadband Services, LLC Franchise Agreement
- Roats Water System Franchise Agreement
- Pacific Power Franchise Agreement
- Mobilitie, LLC, Franchise Agreement
- Crown Castle Fiber LLC Franchise Agreement
- Cascade Natural Gas Company Franchise Agreement
- Bend Garbage Franchise Agreement
- Avion Water Company Franchise Agreement

Bend Code Chapter 11.6 - Solid Waste Management

Free viewers are required for some of the attached documents.
They can be downloaded by clicking on the icons below.

If you need assistance with any document, form, etc.,
you may request assistance from the Accessibility Program.

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January 31, 2001

Charles Hinkle
Attorney at Law
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204

Re: Petition for Public Records Disclosure Order:
Oregon School Activities Association

Dear Mr. Hinkle:

This letter is the Attorney General's order in response to your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received January 17, 2001,[1] asked the Attorney General to direct the Oregon School Activities Association (OSAA) to disclose records showing the amount of fines for player ejections that were paid by public high schools in the Mt. Hood Conference and Northwest League. For the reasons discussed below, we respectfully deny your petition on the ground that OSAA is not a state agency as that term is defined by the Oregon Public Records Law.

OSAA is a voluntary organization composed of public and private secondary schools. Member schools contractually delegate to OSAA the authority to establish binding rules governing interscholastic athletic competitions. The State Board of Education is required to establish standards for voluntary organizations such as OSAA. ORS 326.051(1)(f). The State Board also has responsibility to review and approve the rules and bylaws of voluntary organizations for compliance for state law and board rules. ORS 339.430(1).

In your petition, you argue that OSAA is a public body subject to the Public Records Law under the analysis set forth by the Oregon Supreme Court in *Marks v. McKenzie High School Fact-finding Team*, 319 Or 451 (1994). In *Marks*, the Court held that a private body can be subject to the Public Records Law if it has been created and operates as the functional equivalent of a governmental entity. Citing the characteristics of a public body listed in *Marks*, you argue

[1] We appreciate your extending the time in which the law would otherwise have required us to issue the Public Records Order under ORS under ORS 192.450(1).

that: (1) OSAA was largely created by public school districts; (2) OSAA serves a governmental function in its supervision of high school athletics; (3) Public and private schools have granted OSAA independent authority to supervise many aspects of interscholastic athletics; (4) OSAA is predominantly supported by school district funds; (5) OSAA is under the indirect control of its members schools; and (6) OSAA's officers and employees are primarily composed of public school officials. In short, you argue that OSAA is an extension of its public school district members.

The Oregon Public Records Law applies to every public body. "Public body" includes:

> every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal cooperation, and any board, department, commission, council, or agency thereof; and any other public agency of this state.

ORS 192.410(3).

The Attorney General's authority to review petitions and to order disclosure of public records is expressly limited to those public records in the custody of state agencies. ORS 192.450(1). The Public Records Law defines "state agency" to mean:

> any state officer, department, board, commission or court created by the Constitution or statutes of this state but does not include the Legislative Assembly or its members, committees, officers or employees in so far as they are exempt under Section 9, Article IV of the Oregon Constitution.

ORS 192.410(5).

Under these definitions, school districts are public bodies, but they are not state agencies. Petitions for disclosure of records in the custody of a public body other than a state agency may be filed with the district attorney of the county in which the public body is located.[2] ORS 192.460.

Although the statutes do not address entities that are the function equivalent of a public body, we believe that the same allocation of responsibilities between the Attorney General and the district attorneys applies, i.e., the Attorney General has jurisdiction over petitions seeking the records of entities that are the functional equivalent of a state agency and the district attorneys have jurisdiction over records of entities that are the functional equivalent of a public body other than a state agency. Therefore, we consider whether OSAA is an entity that is the functional equivalent of a state agency. In making this determination, we examine the character of the entity and the nature and attributes of that entity's relationship with government and government decision-making. *See Marks v. McKenzie High School Fact-Finding Team*, 319 Or at 463-64.

[2] You have also filed a petition for disclosure of these same records with the District Attorney for Clackamas County where the OSAA's administrative offices are located.

We apply the following non-exclusive list of the factors outlined by the Supreme Court in *Marks*:

1. Was OSAA created by the state or a state agency? No. The OSAA is a voluntary consortium of public and private school districts.

2. Are OSAA's functions traditionally associated with state government? No. The regulation of high school competitions is not an activity traditionally performed by or associated with state government.

3. What is the scope of OSAA's authority, e.g., does OSAA have authority to make binding decisions for state government? OSAA may make binding decisions, but those decisions are not ones that would be made by a state agency because no state agency has responsibility to set rules and policies governing interscholastic competitions. In addition, OSAA has no authority to make decisions that are binding on the State Board or any other agency of state government.

4. Does OSAA receive financial support from state government? No. We are informed that OSAA is financed through dues of its private and public school members, sponsorship payments and gate receipts at competitions. It receives no financial support from state government.

5. What is the nature and scope of state control over OSAA's operation? The only state agency having legal authority over voluntary interscholastic organizations is the State Board of Education. The State Board may set standards for such organizations and is required to review and approve the organizations' bylaws and rules for compliance with state laws and rules of the board. The State Superintendent must rule on appeals by a school district or a voluntary organization that a student is ineligible to participate in interscholastic activities. But the Superintendent's scope of review is limited to whether the decision of ineligibility violates state or federal law or a rule of the State Board. OAR 581-0210035. Aside from these oversight responsibilities, the State Board exercises no supervision or control over the day-to-day operations of OSAA or other voluntary organizations.

6. Are OSAA's officers and employees state government officials? No.

Based on the above factors, we conclude that OSAA is not the functional equivalent of any agency of state government.

We express no opinion as to whether OSAA is an entity that is subject to the requirements of the Public Records Law. To extent it may be argued that OSAA functions as the equivalent of a public body, that body is composed of the OSAA's member school districts and private schools. Because neither school districts nor their functional equivalents are state

agencies, the Attorney General has no authority to consider your petition for disclosure of records in the custody of OSAA. Accordingly, we respectfully deny your petition for disclosure.

Sincerely,

Peter D. Shepherd

PETER D. SHEPHERD
Deputy Attorney General

AG06966
c: C. Gregory McMurdo, ODE
Wes Ediger, OSAA
Ron Nelson DA

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September 3, 2002

SENT VIA FAX (1-503-294-4039) & MAIL

James Long, Reporter
The Oregonian
1320 SW Broadway
Portland, OR 97201
Facsimile: (503) 294-4039

Re: *Petition for Public Records Disclosure Order*:
Oregon Public Broadcasting Records

Dear Mr. Long:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on August 20, 2002,[1] asks the Attorney General to order Oregon Public Broadcasting (OPB) to disclose "certain financial records." For the reasons that follow we deny your petition.

You asked OPB to disclose to you records that you have identified to Assistant Attorney General Kelly Carlson as its employment contracts with Maynard Orme and Jack Galmiche and contracts between OPB and Mr. Galmiche's business interest, "Big TV," prior to his employment with OPB. You attached to your petition a copy of the response provided by OPB Vice President for Marketing, Laurie Kelley. Ms. Kelley informed you that OPB does not have an employment contract with either Mr. Orme or Mr. Galmich. With respect to your request for other contracts with Mr. Galmiche, Ms. Kelley stated that "OPB is not obligated to disclose confidential private documents as Oregon's Public Records and Meetings Laws do not apply to Oregon Public Broadcasting."

OPB is a private, not-for-profit corporation. It was established as such in 1993 under state legislation abolishing the Oregon Commission on Public Broadcasting and transferring

[1] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

the commission's FCC licenses and other rights and obligations to OPB. *See* Or Laws 1993, ch 208, § 1 (1993 Act).

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. "Public body" includes:

> every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal cooperation, and any board, department, commission, council, or agency thereof; and any other public agency of this state.

ORS 192.410(3). Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from disclosure. ORS 192.450(1). The Public Records Law defines "state agency" to mean:

> any state officer, department, board, commission or court created by the Constitution or statutes of this state but does not include the Legislative Assembly or its members, committees, officers or employees in so far as they are exempt under Section 9, Article IV of the Oregon Constitution.

ORS 192.410(5).

Your petition asserts that OPB is a public body subject to the Public Records Law under the analysis set forth by the Oregon Supreme Court in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994). In *Marks*, the court held that a private body can be subject to the Public Records Law if it has been created and operates as the functional equivalent of a governmental entity. Citing the characteristics of a public body listed in *Marks*, you argue that OPB is a private body subject to the Public Records Law primarily for the following reasons: (1) OPB operates "under what amounts to a state charter and contract containing some very definite performance requirements"; (2) public broadcasting "traditionally has been a government function," demonstrated by OPB's educational programming and services; (3) OPB is self-governing within the terms of the 1993 legislation, with the Governor appointing a percentage of the corporation's board members and the legislature retaining the authority to "find OPB in default and reclaim the FCC licenses and other property" transferred in 1993; and (4) OPB receives government funding, with the FCC licenses conditionally transferred to OPB by the 1993 legislation having a commercial value of between 50 to 100 million dollars

Although the Public Records Law does not address entities that are the functional equivalent of a public body, we believe that the Attorney General has jurisdiction over petitions seeking the records of entities that are the functional equivalent of a state agency. Therefore, we consider whether OPB is an entity that is the functional equivalent of a state agency. In making this determination, we examine the character of the entity and the nature and attributes of that entity's relationship with government and government decision-making,

see Marks, 319 Or at 463-64, applying the non-exclusive list of factors outlined by the Supreme Court in *Marks*.

1. Was OPB created by the state? Yes. As you describe in your petition, OPB was created by the 1993 Act. While additional steps were necessary, *e.g.*, filing the necessary documents to entitle OPB to hold the status of a private, not-for-profit corporation, enactment of the legislation was fundamental to providing the new corporation with the means to operate as a broadcasting entity.

2. Are OPB's functions traditionally associated with state government? No. The primary work in which OPB engages is the creation and broadcast of television and radio programs. In general, nothing about such work is traditionally associated with government. State government typically is not engaged in the production of radio and television programming.

You point to public broadcasting being under government control in Oregon from 1922 until 1993 as evidence of it being a traditional government function. According to materials provided by OPB attorney Kristin Ingram, public broadcasting was operated first by the Oregon Agricultural College and then by the State System of Higher Education. The Oregon Commission on Public Broadcasting was responsible for operations from 1981 to 1993. However, the legislature chose to break with this tradition in 1993 by placing the authority and responsibility for public broadcasting within the state in the hands of a private not-for-profit entity. Considering this deliberate legislative decision to change the established way of doing things, it would be contrary to logic to look only at the history of public broadcasting within the state to determine whether it is governmental in nature.

According to statistics promulgated by the national Public Broadcasting Service, of the current 171 noncommercial educational licensees, 88 are community organizations, 56 are colleges and universities, 20 are state authorities and 7 are local educational or municipal authorities. Http://www.pbs.or/insidepbs/facts/faq1.html. With community organizations, i.e., not-for-profits, holding over half of the licenses, it does not appear as though operating public television is established as a function performed by government.

Another element that you believe makes OPB's work something traditionally performed by government is its educational focus. But education is a task that persons outside of government undertake, and historically have undertaken. Using television as an example, because OPB is licensed by the FCC as a noncommercial educational broadcaster, it may transmit "educational, cultural and entertainment programs, and programs designed for use by schools and school systems in connection with regular school courses[.]" 47 CFR § 73.621(c). This limitation applies equally to all noncommercial broadcasters, regardless of whether the licensee is a government agency or a not-for-profit foundation, corporation or association. While, consistent with its FCC licenses, OPB provides educational services to the citizens of Oregon, its work in this regard is not parallel to that of educators in the public realm, whose work is overseen and regulated by the state. For example, OPB's programming on television and radio extends far beyond traditional educational material for a classroom setting; according to the materials submitted by Ms. Ingram, the programs that OPB has

shared in responsibility for creating or producing include *Great Lodges*, *Children's Hospital* and *Satellite Sisters*.

On balance, we do not consider OPB's work to be traditionally associated with the work of state government.

3. What is the scope of OPB's authority, *e.g.*, does OPB have authority to make binding decisions for state government? OPB has authority to make binding decisions; however, it has no authority to make decisions on behalf of state government. OPB is a private, not-for-profit corporation. Its business and affairs are managed and controlled by its Board of Directors. OPB Amended Bylaws, Art. II, sec. 7. Its President and Chief Executive Officer is responsible for day-to-day operations. OPB Amended Bylaws, Art. IV, sec. 9. Decisions made by these persons bind OPB. But we have identified no way in which decisions made by OPB personnel bind the actions of state agencies.

4. What is the nature and scope of state control over OPB's operation? The state exercises very little control over OPB's operations. You characterize the 1993 Act as "a conditional grant to OPB of between $50 and $100 million in public assets," and you suggest that "the Legislature could find OPB in default and reclaim the FCC licenses and other property." The following language conditions the transfers of property, rights and obligations to OPB in the 1993 Act:

> To the extent consistent with federal law and regulations and with agreements established by the Oregon Commission on Public Broadcasting, the transfers accomplished by this section are made on the condition that the assets, licenses and right transferred to the private, not-for-profit corporation known as Oregon Public Broadcasting shall continue to be used by the corporation throughout their terms or useful lives, for the purpose of continuing and advancing public broadcasting in Oregon. If the corporation dissolves or discontinues public broadcasting operations in Oregon, the corporation shall *in good faith take all reasonable measures* to transfer or assign the assets, licenses and rights to a public or private entity that has the authority to continue and to advance public broadcasting in Oregon.

Or Laws 1993, ch. 208, §3 (emphasis added). This conditional language is consistent with FCC requirements for holding a noncommercial broadcasting license. In other words, if OPB sought to provide commercial television and radio programming, the FCC would not permit it to continue to hold its licenses. However, even if OPB were to fail to continue and advance public broadcasting in Oregon, no where in the 1993 Act is it stated that the transferred property reverts back to the state. Instead, it provides for OPB "in good faith [to] take all reasonable measures" to transfer the property to an entity that will continue public broadcasting in the state. Therefore, we do not find the conditional language of the 1993 Act to impose ongoing governmental oversight of OPB.

As you note, the 1993 Act does require, as a condition of the law becoming operative, that OPB's bylaws provide for the Governor's authority to appoint "at least 20 percent" of the

directors comprising OPB's board. Or Laws 1993, ch. 208, § 11. OPB's current bylaws contain such a provision. *See* OPB Amended Bylaws, Art. II, sec. 1. According to Ms. Ingram, out of the 24 current members of the board, the Governor appointed four. Once appointed, however, the Governor's appointees are subject to removal for cause or upon recommendation voted upon by a specified percentage of the sitting directors; the bylaws do not provide for their removal by the Governor. *See* OPB Amended Bylaws, Art. II, sec. 6. Because of the Governor's lack of ongoing control over his appointees, and the minority position that they hold on the board in relation to elected directors, we do not find the Governor's appointment authority to constitute a source of substantial state control over OPB's operations.

5. Does OPB receive financial support from state government? Yes. As noted by both you and Ms. Ingram, for the current biennium the Legislature appropriated over $3 million dollars to OPB. In addition, the state is providing OPB with $7 million in proceeds from Lottery Revenue Bonds to finance digital television transmission facilities that Ms. Ingram states are mandated by the federal government.[2]

You state in your petition that "more significant than all these cash grants and appropriations is the Legislature's continuing, conditional 'loan' of the FCC operating licenses to OPB." We see no basis, however, for construing the FCC licenses under which OPB operates as being loaned by the state, subject to recall by the legislature. Those licenses were transferred under the 1993 legislation which, as explained above, contains no provision for them to revert back to the state. Moreover, the licenses are granted and regulated by a federal agency; they are not the state's to control. We find these conclusions consistent with Ms. Ingram's statement that "OPB's licenses are OPB's property and under no law, regulation, lien, contract or 'understanding' does ownership of this property revert to the State." Therefore, without estimating the value of the property and rights transferred to OPB in 1993, we construe such property and rights to have been a one-time transfer instead of a source of ongoing state financial support.

6. Are OPB's officers and employees state government officials or employees? No. The officers and employees of OPB who transferred from the Oregon Commission on Public Broadcasting retained "all rights and privileges of state employees" only through June 30, 1993. Or Laws 1993, ch. 208, §5. Subsequent to the creation of OPB, the Legislature phased out participation by transferred OPB employees in the Oregon Public Employees Retirement System. *See* Or Laws 1995, ch 575, §§ 2, 3. Furthermore, OPB officers and employees do not act in a government capacity, *e.g.*, they do not report to government officials.

Under the factors specifically considered by the court in *Marks*, OPB possesses some characteristics of an entity that is the functional equivalent of a state agency. It was created by government and it receives financial support from the state. However, the lack of governmental control over OPB's operations, the fact that the nature of OPB's broadcasting

[2] While OPB also receives financial support from the federal government, this fact is not relevant to determining whether OPB is the functional equivalent of a *state* agency for purposes of the Public Records Law.

activities, as well as some of the content, fall outside the realm of functions traditionally performed by government, and the private status of its employees persuade us that OPB is not a functional equivalent of a state agency for purposes of the Public Records Law.

In addition to the factors listed in Marks, we find an, as yet undiscussed, aspect of the 1993 Act relevant to our consideration of OPB's status under the Public Records Law.[3] The 1993 Act provided for the records of the abolished Oregon Commission on Public Broadcasting to be transferred to OPB, to the extent that the records related to the functions being transferred. Or Laws 1993, ch 208, § 9. The provision regarding records ends by stating: "*However*, such records retain their identity as public records subject to ORS 192.410 to 192.505." *Id.* (emphasis added). We find this provision significant. It shows that the Legislature was cognizant of a possible question arising about the status of the transferred records. The only basis for questioning their status would have been OPB's status under the Public Records Law. Instead of making all of OPB's records subject to the Public Records Law, the legislature chose only to continue the public status of the transferred records. Moreover, it did so using language of exception. There would have been no reason for the legislature to have used the word "however" unless it considered making the transferred records subject to the Public Records Law inconsistent with the status of OPB. We find this aspect of the 1993 Act supportive of the conclusion that OPB is not subject to the Public Records Law.

Because we find that OPB is not subject to the Public Records Law, we respectfully deny your petition for disclosure.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS10936
c: Kristin Ingram, Contracts Attorney, OPB (Fax only: 1-503 293-1989)

[3] The factors listed by the court in *Marks* were "not intended to be exclusive." *Marks*, 319 Or at 464 n9. The court clarified that "[a]ny factor bearing on the character of the entity and the entity's relationship with government may be relevant[.]" *Id.*

HARDY MYERS
ATTORNEY GENERAL

PETER D. SHEPHERD
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
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Salem, Oregon 97301-4096
Telephone: (503) 378-4400
TTY: (503) 378-5938

November 19, 2002

By FAX and first class mail
Scott Forrester
2030 NW 7th Place
Gresham, OR 97030

Re: *Petition for Public Records Disclosure Order*:
Citizens' Utility Board Records

Dear Mr. Forrester:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on November 8, 2002,[1] asks the Attorney General to order the Citizens' Utility Board (CUB) to disclose the following records: (1) "a photocopy of the most current list of the elected Board of Directors for C.U.B. * * * * includ[ing] the name, address, telephone and fax numbers and email address(es)"[2]; (2) the most current and complete list of all C.U.B. members by each Congressional District * * * * includ[ing] all the information kept or stored on the database(s), to include but not limited to, name of member(s), member address(es), telephone and fax numbers for both home and office, email address(es) for home or office and all phone number(s)"; (3) "a copy of every agenda and the minutes or meeting notes for all meetings from January 1996 to present"; (4) "a photocopy of each 'Annual Audit' by an independent C.P.A., as required under O.R.S. 774.040(2), for the most recent 5 years"; and (5) "a photocopy of each 'Annual financial statement' of the Citizens Utility Board for the most recent 5 years." For the reasons that follow we respectfully deny your petition.

[1] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

[2] CUB is managed by "The Citizens' Utility Board of Governors." ORS 774.060. We assume that your request is for information about individuals serving on the Board of Governors.

You requested the identified records from Bob Jenks, CUB's Executive Director. In separate letters, Mr. Jenks and CUB's attorney, Jason Eisdorfer, responded to your requests. Mr. Jenks agreed to provide you with the records identified above in categories 3 through 5. Also, with respect to the information you requested in category 1, Mr. Eisdorfer provided you with the names and addresses of the elected members of the CUB Board of Governors as well as of other CUB officers. A request for records is "moot" if intervening events – in this case CUB's decision to provide you with certain of the records you requested – have satisfied the request. Therefore, with respect to these records we deny your petition as moot.

Mr. Eisdorfer denied your request for records about CUB members and did not provide you with telephone, fax or email numbers for CUB Governors. In other words, CUB has denied your request for all of the records in category 2 and partially denied your request for records in category 1.

Mr. Eisdorfer's letter to you states CUB's belief that it is not subject to the Public Records Law. We agree.

The Public Records Law, ORS 192.410 to 192.505, confers a right to inspect any public record of a *public* body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. The Public Records Law defines "public body" to include "every state officer, agency, department, division, bureau, board and commission * * * and any other public agency of this state." ORS 192.410(3). Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from disclosure.[3] ORS 192.450(1).

The Public Records Law does not specify what determines whether a body is public or private. However, in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994), the court analyzed whether a fact-finding team comprised of private citizens but established at the initiative of a school district was subject to the Public Records Law. A review of the text, context and legislative history of the Public Records Law did not disclose whether the legislature intended to apply the Public Records Law to an entity such as the fact-finding team. *Id.* at 456-457 *citing PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-612, 859 P.2d 1143 (1993). Therefore, the court considered "how the legislature would have intended the statute to be applied had it considered the issue." *Id.* at 457 *citing PGE*, 317 Or at 612.

Concluding that "the determination of whether a particular entity is a 'public body' within the meaning of ORS 192.410(3) will depend on the character of that entity and the nature and attributes of that entity's relationship with government and

[3] Under the Public Records Law, "state agency" is defined to mean "any state officer, department, board, commission or court created by the Constitution or statutes of this state* * *." ORS 192.410(5).

governmental decision-making," *id.* at 463, the court identified and applied a set of factors that bear on that question. *Id.* at 463-464. Therefore, we analyze CUB under the factors cited in *Marks*, which are:

1) The entity's origin (was it created by government or was it created independently?);
2) The nature of the function(s) assigned and performed by the entity (are these functions traditionally performed by government or are they commonly performed by a private entity?);
3) The scope of the authority granted to and exercised by the entity (does it have the authority to make binding decisions or only to make recommendations to a public body?);
4) The nature and level of any governmental financial and non-financial support;
5) The scope of governmental control over the entity; and
6) The status of the entity's officers and employees (are they public employees?).[4]

1. Was CUB created by government? Yes. CUB is an "independent nonprofit public corporation" that was established by the people's adoption of a ballot measure in the November 6, 1984 election. ORS 774.030.

2. Are CUB's functions traditionally associated with state government? No. CUB advocates for utility consumers. Its powers, as listed in ORS 774.030, include conducting research, funding demonstration projects and representing consumers' interests before the legislature, the courts and the executive branch of state government.[5] ORS 774.020 confirms that CUB is limited to being an advocate for utility consumers "before legislative, administrative and judicial bodies." These activities are in no way exclusive to government and may be performed by privately-created advocacy organizations.

3. What is the scope of CUB's authority, *e.g.*, does CUB have authority to make binding decisions for state government? CUB does not have authority to make binding decisions for state government. Nothing in CUB's enumerated responsibilities allows it to resolve or decide any issue of public policy or even to make any finding of fact with binding consequence for the determination of an issue of public policy. CUB does not exercise authority that controls any aspect of state government. An entity formed and operated by private parties without a statutory mandate could do what CUB is authorized to do.

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[4] Factors are taken from the ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2001), 3-4.

[5] ORS chapter 774 requires utility companies to include materials provided by CUB in their billings to utility consumers. ORS 774.120 – 774.160. However, shortly after CUB was created the U.S. Supreme Court held requirements unconstitutional due to their infringement upon the First Amendment rights of utility companies. *Pacific Gas and Electric Company v. Public Utilities Commission of California*, 475 US 1, 106 SCt 903 (1986).

4. Does CUB receive support from state government? Some. According to Mr. Jenks, CUB does not receive public funds but is wholly funded by private means. However, CUB does enjoy some benefits that private advocacy organizations do not. It has a statutory right to intervene in a state agency or judicial proceeding, and, by statute, it has standing to obtain judicial or administrative review of an agency's action. *See* ORS 774.180. These capabilities may not be most aptly described as "government support," but they constitute special treatment given to CUB by statute.

5. What is the nature and scope of state control over CUB's operation? The state exercises very little control over CUB's operations. Management of CUB rests with a Board of Governors, the members of which are elected by utility consumers who join CUB. Provisions of ORS chapter 774 specify that statutes traditionally governing the operation of state agencies, such as those relating to public funds, do not apply to CUB. CUB is exempt from statutes governing activities specific to state agencies, including, public contracting and purchasing, public printing, state financial administration and the administration and auditing of public funds.[6] ORS 774.190(1). Also, the Administrative Procedures Act, ORS 183.310 to 183.550, does not apply to CUB's determinations and actions. ORS 774.190(2).

6. Are CUB's officers and employees state government officials or employees? No. ORS 774.190 specifies that CUB is exempt from the State Personnel Relations Law and that CUB's employees are not "employees" for purposes of the public employees retirement laws. Moreover, because CUB does not engage in the activities of government, there is little basis to conclude that those employed by CUB are government officials.

Under the factors specifically considered by the court in *Marks*, CUB possesses only two characteristics of an entity that is the functional equivalent of a state agency. It was created by government and has some rights in relation to administrative and judicial proceedings not shared by private organizations. However, on balance and given the complete absence of the remaining characteristics, we conclude that CUB is not a public body or the functional equivalent of a public body for purposes of the Public Records Law.

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[6] Your petition argues that CUB is subject to the Public Records Law, citing the fact that a statute identifying the laws from which CUB is exempt, ORS 774.190(1), does not list the Public Records Law. But an equally strong contrary inference can be drawn from the fact that audits of CUB's financial affairs are "public record(s) subject to inspection in the manner provided" in the Public Records Law. ORS 774.040(2). If CUB were a public body under ORS 192.410(3), it would be redundant for its statutes to specify that its financial audits are public records.

Conclusion

The limited powers, duties, and purposes of the Citizens' Utility Board are telling. Simply put, like the fact-finding team commissioned to assist a local school board in *Marks,* CUB performs only advocacy or advisory functions. It performs no governmental decision-making function. Like the entity at issue in *Marks,* CUB is not an entity subject to the Public Records Law. Because we find that CUB is not subject to the Public Records Law, we respectfully deny your petition for disclosure.

Sincerely,

Peter D. Shepherd

PETER D. SHEPHERD
Deputy Attorney General

AGS11291
c: Bob Jenks, Executive Director, CUB

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March 29, 2004

Jim Redden
Portland Tribune
Senior Staff Writer
620 SW 5th Ave, Ste 400
Portland, OR 97204

Re: *Petition for Public Records Disclosure Order*:
Records of Former Governor Neil Goldschmidt

Dear Mr. Redden:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on March 22, 2004, asks the Attorney General to order the Oregon Historical Society (OHS) to disclose "certain files compiled during the term of former Oregon Gov. Neil Goldschmidt's administration," which are identified by box number and heading in a postscript to your petition. For the reasons that follow we respectfully deny your petition.

According to your petition, you requested the identified records from OHS Librarian Mary Ann Campbell, who responded to the request by telling you to submit your request to Governor Goldschmidt. Subsequent to Ms. Campbell's response, you requested the State Archivist, Roy Turnbaugh, to order OHS to disclose the records. According to your petition, Mr. Turnbaugh suggested that you seek review of OHS' denial by the Attorney General.

The Public Records Law, ORS 192.410 to 192.505, confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. The Public Records Law defines "public body" to include "every state officer, agency, department, division, bureau, board and commission * * * and any other public agency of this state." ORS 192.410(3). Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney

General to review the public record to determine if it may be withheld from disclosure.[1] ORS 192.450(1).

The Public Records Law does not specify what determines whether a body is public or private. However, in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994), the court analyzed whether a fact-finding team comprised of private citizens but established at the initiative of a school district was subject to the Public Records Law. A review of the text, context and legislative history of the Public Records Law did not disclose whether the legislature intended to apply the Public Records Law to an entity such as the fact-finding team. *Id.* at 456-457 *citing PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-612, 859 P.2d 1143 (1993). Therefore, the court considered "how the legislature would have intended the statute to be applied had it considered the issue." *Id.* at 457 *citing PGE*, 317 Or at 612.

Concluding that "the determination of whether a particular entity is a 'public body' within the meaning of ORS 192.410(3) will depend on the character of that entity and the nature and attributes of that entity's relationship with government and governmental decision-making," *id.* at 463, the court identified and applied a set of factors that bear on that question. *Id.* at 463-464. Therefore, we analyze OHS under the factors cited in *Marks*, which are:

1) The entity's origin (was it created by government or was it created independently?);
2) The nature of the function(s) assigned and performed by the entity (are these functions traditionally performed by government or are they commonly performed by a private entity?);
3) The scope of the authority granted to and exercised by the entity (does it have the authority to make binding decisions or only to make recommendations to a public body?);
4) The nature and level of any governmental financial and non-financial support;
5) The scope of governmental control over the entity; and
6) The status of the entity's officers and employees (are they public employees?).[2]

1. Was OHS created by government? No. According to the *Oregon Historical Quarterly*, OHS was founded in 1873. *OHQ* VOL. 104, NO. 4 at 596. The website for the Office of the Secretary of State, Corporations Division, shows that OHS initially registered as a corporation on December 20, 1898. The legislature did not convene the year prior to incorporation and did not enact any statutes related to OHS during the 1898 special session. An 1899 statute appropriating funds to OHS and providing for a limited

[1] Under the Public Records Law, "state agency" is defined to mean "any state officer, department, board, commission or court created by the Constitution or statutes of this state* * *." ORS 192.410(5).
[2] Factors are taken from the ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2001), 3-4.

amount of work to be done for it by the state printer at the state's expense contains the following description in its preamble:

> Whereas, the Oregon Historical Society has been incorporated and organized under the laws of this state for the purpose of collecting and preserving a library of historical literature relative to the settlement and acquisition of the Oregon territory, and relative to the history of this state, and for the accomplishment of other cognate objects of public interest and,
>
> Whereas, said society has agreed to do all of its work and to hold all of its collections of material for the use and benefit of all the people of this state, and the state is interested in the prosecution and success of its objects, and should contribute aid to the same * * *.

Laws of Oregon 1899 at 224 (SB 17). Based on this information, we conclude that OHS was not created by government.

2. Are OHS' functions traditionally associated with state government? No. According to its website, from the time of its creation OHS has developed and operated a regional research library and a collection of historical artifacts. It publishes the *Oregon Historical Quarterly* as wells as books, field guides and exhibit catalogs, including over 150 books on Oregon history, politics and culture. In addition, OHS also creates and operates education programs focused on Oregon history and other subjects. These activities are not necessarily those traditionally undertaken by state government. While a state may choose to operate historical museums or centers, such as the State Archives, those activities also may be performed by privately-operated entities, such as those run by private colleges and universities. We do not believe that the functions of OHS would be perceived as those traditionally performed by government actors.

3. What is the scope of OHS' authority, *e.g.*, does OHS have authority to make binding decisions for state government? No, OHS does not have authority to make binding decisions for state government. The legislature has directed agencies to consult with and receive the recommendations of OHS in relation to programs touching on matters within OHS' historical expertise. *See, e.g.*, ORS 329.492 (Department of Education to consult with OHS in developing academic content standards in Oregon Studies) and ORS 358.770 (OHS to advise Department of Transportation on acquisition, development and operation of historic places). OHS is also statutorily responsible for preparing, administering and periodically revising a comprehensive program for development of the Oregon Trail as a state historical attraction. ORS 358.045. None of these statutorily-prescribed activities show OHS as having the authority to make binding governmental decisions.

4. Does OHS receive support from state government? Very little. ORS 358.015 provides that the state "recognizes a continuing obligation to contribute to the support of [OHS]," and, in previous biennia, the legislature has appropriated funds to OHS. The Legislative Fiscal Office's analysis of the 2003-2005 budget characterizes the

appropriation as a "supplemental grant," with OHS being financed "largely by membership fees, contributions, and publication sales." LFO Analysis of 2003-05 Legislatively Adopted Budget – Economic and Community Development at 213. However, the legislature appropriated no funds to OHS for the 2003-2005 biennium, a decision that the LFO attributes to budgetary constraints. LFO Analysis at 213.

OHS remains eligible as one of five "core partner agencies" to receive moneys from the Trust for Cultural Development Account. ORS 359.400(2) and 359.426(3)(c). The "core partner agencies" include both entities established by state law, *e.g.*, the Oregon Heritage Commission, and non-state entities, such as the Oregon Council for the Humanities.

5. What is the nature and scope of state control over OHS' operation? The state exercises very little, if any, control over OHS' operations. As already noted, through legislation, the state has directed OHS to prepare, administer and periodically revise a comprehensive program for development of the Oregon Trail as a state historical attraction. ORS 358.045. However, there is no provision for government oversight of how OHS fulfills this task or a mechanism by which government officials may disapprove of OHS' completed work. Except for ex-officio positions, the officers and directors of OHS are not state government officers or employees. Statutes do not control appointments to the OHS Board of Directors nor do statutes provide for those appointments to be made by the Governor or another state government official. Also, in light of the discontinuance of direct appropriations to support OHS, the state does not appear to exert significant influence through the provision of funds.

6. Are OHS' officers and employees state government officials or employees? No. We have not found any evidence that the officers or employees of OHS are state government officials or employees.

Conclusion

Based on the above information, we conclude that OHS does not possess sufficient characteristics to be considered the functional equivalent of a state agency. For this reason, we conclude that OHS is not a public body or the functional equivalent of a public body for purposes of the Public Records Law, and, therefore, we deny your petition.

To the extent that the records deposited with OHS by former Governor Neil Goldschmidt are public records as defined by ORS 192.410(4), their custodian is the State Archivist, the state official who has authority to requisition transfer of the records in the event that they are "stored under conditions where they are no longer available for

use." ORS 357.835(1). A future request for access to former Governor Goldschmidt's records should be submitted to Mr. Turnbaugh.[3]

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS13769

c: Paddy McGuire, Deputy Secretary of State
Roy Turnbaugh, State Archivist
Neil Goldschmidt
Vicki Ballou, Tonkin Torp, Counsel for OHS

[3] You made your request for records of OHS and, in a letter dated March 11, 2004, asked the State Archivist, Roy Turnbaugh, to "require OHS to comply with the law regarding public documents." Because Mr. Turnbaugh was away from the office when we received your petition, we spoke with Paddy McGuire, the Deputy Secretary of State, who is familiar with the actions that Mr. Turnbaugh took in response to your letter. According to Mr. McGuire, the State Archivist understood your March 11 letter to be a request for intervention with OHS, not a public records request directed to him. Mr. McGuire told us that he and Mr. Turnbaugh have contacted OHS about availability of the requested records and are addressing the issue with both OHS and former Governor Goldschmidt.

HARDY MYERS
ATTORNEY GENERAL

PETER D. SHEPHERD
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DEPARTMENT OF JUSTICE

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July 24, 2008

Tom Rios
Business Representative
Ironworker Local 29
P.O. Box 7295
Klamath Falls, OR 97603

Re: Petition for Public Records Disclosure Order
Oregon Bridge Delivery Partners' Records

Dear Mr. Rios:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on June 26, 2008,[1] asks the Attorney General to direct the Oregon Bridge Delivery Partnership (OBDP) to produce copies of the Certified Payroll Records for Harris Rebar and Holm II, subcontractors of OBDP.[2] Your request for records was made to Larry Lewter, employed by OBDP as a project manager on the Eastern Oregon project, I-84 Corridor, Boardman to Ontario. Mr. Lewter forwarded the request to Laurie Sletten, CRM, CA for OBDP. She referred you to the Oregon Department of Transportation (ODOT), with the explanation that OBDP is a private company, and is not able to release the payroll records you requested. ODOT, as a public body, routinely releases the type of information requested. Your petition to the Attorney General argues that OBDP should be treated as functionally equivalent to a public body. For the reasons that follow, we deny your petition.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. Custodians of public records are required to make those records available for inspection or copying unless the records are exempted from disclosure by statute. ORS 192.430(1). A custodian is "a public body mandated,

[1] We appreciate your agreement to extend the time for us to respond to your petition.

[2] We note that although your petition refers to Harris Rebar and Holm II, the copy of the letter to Larry Lewter, included with your petition, requests payroll records for Idaho Harris Rebar (ABCO Inc.) and asks if any Holm II employees assisted Harris employees. However, this discrepancy does not affect our analysis.

directly or indirectly, to create, maintain, care for or control a public record." ORS 192.410(1). A "public body" includes every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council or agency thereof; and any other public agency of this state. ORS 192.410(3). "State Agency" is defined to mean any state officer, department, board, commission or court created by the Constitution or statutes of this state. ORS 192.410(5). Thus, OBDP is required to provide an opportunity to inspect the specified payroll records only if OBDP is a "public body". Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the record to determine if it may be withheld from public inspection. ORS 192.450(1).

The Public Records Law does not specify what determines whether a body is public or private. However, in ***Marks v. McKenzie High School Fact-Finding Team***, 319 Or 451, 878 P2d 417 (1994), the Oregon Supreme Court analyzed whether a fact-finding team comprised of private citizens but established at the initiative of a school district, was subject to the Public Records Law. A review of the text, context and legislative history of the Public Records Law did not disclose whether the legislature intended to apply the Public Records Law to an entity such as the fact-finding team. *Id.* at 456-457, *citing* ***PGE v. Bureau of Labor and Industries***, 317 Or 606, 610-612, 859 P.2d 1143 (1993). Therefore, the court considered how the legislature would have intended the statute to be applied had it considered the issue. ***Marks*** at 457, *citing* ***PGE***, 317 Or at 612. The court concluded that the legislature would have intended for the resolution of this issue to depend on the character of that entity and the nature and attributes of that entity's relationship with government and governmental decision-making, *id.* at 463. The court proceeded to identify and apply a set of factors that bear on that question:

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

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

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

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

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

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

Id. at 463-464. The overall purpose of this test is "functional" The court noted that "no single factor is either indispensable or determinative" and indicated that its list was not intended to be exclusive. *Id.* at 463-464.

In weighing the significance of the various factors it identified, the court was guided by the need to protect the policies underlying the Public Records Law. *Id.* at 468. The court's goal was to glean "what the legislature would have intended" had it considered the issue of what makes an entity "public" for purposes of the Public Records Law. *Id.* at 457. The ultimate resolution turned largely on the failure to show that the entity in question

> was given any decision-making authority, other than the authority that [the entity] exercised over the conduct of the investigation. Without any greater decisionmaking authority, [the entity]'s investigation could have affected matters of public concern *only* through the vehicle of [the entity]'s report, which would have been accessible as a public record of the school board when submitted to the board.

Id. at 466 (emphasis in original). In sum, the court concluded that "because [the entity]'s operations were independent of government, and because [the entity] did not have any authority to make decisions for the school board, access to [the entity]'s records was not necessary to serve the policy goals behind the Inspection of Public Records Law." *Id.*

In previous Public Records Orders, we have determined that the Attorney General may review a petition claiming that an ostensibly private entity is the functional equivalent of a public body that is a state agency under the test articulated in ***Marks***. *See* ATTORNEY GENERAL'S PUBLIC RECORDS MANUAL (2008) ("MANUAL") at 3-4; see also Public Records Order, January 31, 2001, Hinkle; Public Records Order, September 3, 2002, Long; Public Records Order, November 19, 2002, Forrester; Public Records Order, March 29, 2004, Redden. In considering the factors identified by the Supreme Court, we bear in mind the purposes underlying the Supreme Court's "functional" test. Specifically, we think it significant that in weighing the significance of the various relevant factors, the court focused on whether "access to [the entity's] records [is] necessary to serve the policy goals behind the Inspection of Public Records Law." ***Marks***, 319 Or at 468.

Neither our office nor Oregon's appellate courts have had occasion to decide what consequences properly flow from a conclusion under the functional ***Marks*** analysis that an independent entity performs government functions.[3] We begin by exploring the proper consequences. We do so because our answer to that question obviates the need to examine in detail each of the numerous functions performed by OBDP under its contracts with ODOT, an undertaking that would be difficult if not impossible to thoroughly accomplish in the space of this Public Records Order.

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[3] We recognize that in *Laine v. City of Rockaway*, 134 Or App 655, 896 P2d 1219 (1995) the Court of Appeals found that a fire department had been a "functional agency or department of the city government" such that the *city* could be compelled to turn over fire department documents. However, the conclusion that a public entity includes one or more subparts is different from a conclusion that an independent entity is "functionally" a public entity. A city subject to the public records law obviously must disclose the records of its agencies and departments, as the court of appeals ruled in *Laine*. It does not follow that an independent entity that functions as a public body for some purposes must disclose records that are unrelated to any governmental function performed by the entity.

In addressing this issue, we note the possibility that a single entity could perform some functions that are governmental under the functional approach of ***Marks***, while performing other functions that would not meet that standard. That is, we can easily imagine a scenario in which an entity's relationship to government has numerous aspects, some of which might implicate the "policy goals behind the Inspection of Public Records Law" and others of which might not. In such a case, we do not believe that the correct approach would be to throw open all of the entity's records to public inspection simply because it may perform some governmental functions. It seems to us that the policies underlying the Public Records Law would be adequately protected in that kind of case by a rule subjecting an entity's records to disclosure under the Public Records Law only to the extent that the records are possessed pursuant to governmental functions being performed by the entity.

Like the court in ***Marks***, we are guided by our view of what the legislature would likely have determined had it considered this issue. Specifically, we believe that if the legislature had considered the ramifications of finding that an entity is the functional equivalent of a public entity, the legislature probably would have adopted the limited application of the public records law that we describe. That is, the legislature would have applied the public records law to the entity only to the extent that the entity's records were obtained or retained pursuant to governmental functions being exercised by the agency.

As a result, we do not broadly examine each of the functions performed by OBDP to determine whether any of them would justify a determination that OBDP is functionally equivalent to a state agency. Instead, we first examine the nature of the records you requested, and consider whether OBDP's possession of them is related to any function that should be considered "governmental" under the approach articulated in ***Marks***.

Once again, the records that you have requested are "certified payroll records." The contracts between ODOT and OBDP give OBDP a very limited role with respect to certified payroll records. Work Order Contract #10 to Agreement to Agree # 23856 requires OBDP to "Input certified payroll data for OTIA III and Pilot Area projects" and "Provide data input to MEAUR, Certified Payrolls, and Paid Summary reports."

We do not see anything remotely governmental about this data input function. Applying the ***Marks*** factors, in order, to those activities, yields the following:

(1) OBDP is a private entity formed by two private entities. This factor weighs in favor of finding that OBDP is not the functional equivalent of a public body.

(2) Reporting certified payroll information is "commonly performed by private entities." This factor weighs in favor of finding that OBDP is not the functional equivalent of a public body when it performs this data input for purposes of reporting.

(3) OBDP's certified payroll data input and reporting are subject to typical review by state government. That is, ODOT, DAS or BOLI may audit the data reported by OBDP just as the same agencies may audit equivalent data reported by any

contractor. This factor weighs in favor of finding that OBDP is not the functional equivalent of a public body when it provides ODOT with certified payroll data.

(4) OBDP earns the amounts it receives from its contract with OBDP. This factor weighs in favor of finding that OBDP is not the functional equivalent of a public body.

(5) ODOT exercises no control over OBDP's operation relevant to OBDP's reporting of certified payroll data. This factor weighs in favor of finding that OBDP is not acting as the functional equivalent of a public body when it provides ODOT with certified payroll data.

(6) OBDP's officers and employees are not government officials or government employees. This factor weighs in favor of finding that OBDP is not the functional equivalent of a public body.

As a result, we conclude that this record is not possessed by OBDP pursuant to any function that could be characterized as governmental.

We therefore do not address your broader assertion that some of OBDP's contractual tasks may make OBDP functionally equivalent to a state agency. Even if you were correct, we simply do not believe that the proper consequence would be to render OBDP wholly subject to the Public Records Law.

In sum, it is clear to us that the records you have requested – certified payroll records of entities other than OBDP – are records that OBDP does not possess in any capacity that is functionally governmental. OBDP simply reports the data to ODOT; OBDP does not have governmental powers with respect to the information contained in those records any more than would any other contractor reporting the same information. Because OBDP does not possess the requested exercise any governmental function with respect to those records, we find it unnecessary to address whether OBDP is the "functional equivalent" of a state agency when it performs other tasks under contract with ODOT. Requiring OBDP to disclose these records to you is not necessary to protect the policies underlying the Public Records Law.

We must respectfully deny your petition seeking an order that OBDP issue the records in question.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

DM627351

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October 24, 2017

SENT VIA EMAIL ONLY: michaellivingston1@msn.com and hlowens2@msn.com

Michael Livingston & Sarah Owens
585 Winter Street NE Apt 715
Salem, OR 97301

Re: Petition for Public Records Disclosure Order
Mid-Willamette Valley Community Action Agency
DOJ File No. 914200-GA0135-17

Dear Mr. Livingston and Ms. Owens:

This letter responds to your petition of October 9, 2017, asking the Attorney General to order the Mid-Willamette Valley Community Action Agency to disclose its bylaws under the Oregon Public Records Law, ORS 192.410 to 192.505.[1] We respectfully deny your petition as we conclude that this agency is not the functional equivalent of a state agency and that therefore we do not have the authority to consider your petition.

Your petition shows that the agency denied your public records request for a copy of its bylaws, stating that its bylaws are not public records subject to disclosure. You concede in your petition that the agency is a nonprofit corporation and that it is not a state agency, but assert that it is the functional equivalent of a public body due to the substantial amount of money it receives from the State of Oregon to carry out state programs. You note that you seek the agency's bylaws as part of an attempt to obtain information about the agency's use of nearly half a million dollars in state funds to purchase an office building.

Generally, Oregon's Public Records Law applies only to public bodies. *See* ORS 192.420(1) (providing a right to inspect any public record of *a public body* in Oregon). However, the Oregon Supreme Court has adopted a six-factor test to determine whether an entity is the functional equivalent of a public body, and therefore subject to Public Records Law:

[1] Thank you for granting an extension on the deadline to issue an order.

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

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

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

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

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

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

Marks v. McKenzie High-School Fact-Finding Team, 319 Or 451, 463–64 (1994). Because the Attorney General only has the authority to consider petitions when a state agency has denied a records request or request for fee waiver, ORS 192.450(1), our inquiry focuses on the agency's relationship to Oregon state agencies.

The Oregon Housing & Community Services Department (OHCS) administers antipoverty funds to community action agencies such as the Mid-Willamette Valley Community Action Agency. *See* ORS 458.505(1)–(2). We spoke with Ben Fetherston, Jr., an attorney for the agency. He explained that the agency's position is that it is not the functional equivalent of a public body for purposes of Public Records Law. He told us that the agency was incorporated as a nonprofit in 1969 by private citizens; that 38% of its funding comes from state grants; that while the agency is subject to the terms of grant agreements, those agreements do not provide for management or operational control by the state; that the agency's board of directors is not selected by the state; and that the agency has no authority to make any decision that is binding on the state.

We also spoke with Marilyn Miller at OHCS, who provided similar information; that is, OHCS distributes funds to the agency through a master grant agreement, the agency is not subject to management or day-to-day control by OHCS; and the agency has no ability to make decisions that bind OHCS. Every three years, OHCS reviews a grantee's files to ensure the grantee is complying with the terms of the master agreement.

Based on this information, we conclude that the agency is not the functional equivalent of a state agency. It was created as a nonprofit organization, not as a public body; there is no indication that its employees are considered to be public employees; the agency has no authority to make binding decisions for the state; and the agency is not subject to day-to-day oversight by the state, although it must comply with the terms of the master grant agreement. While assisting the homeless is a function performed by public bodies, it is also a function performed by private nonprofit organizations. And while the agency does receive a significant portion of its funds

from the state, this is the sole factor that weighs in favor of the agency being the functional equivalent of a state agency, and is outweighed by the other factors supporting a contrary finding.

Because the Mid-Willamette Valley Community Action Agency is not the functional equivalent of a state agency, the Attorney General cannot resolve your petition under ORS 192.450(1). Therefore, we respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

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July 24, 2019

Kelsey Heilman
Oregon Law Center
522 SW Fifth Ave., Suite 812
Portland, OR 97204

Re: Petition for Public Records Disclosure Order
Cascade Health Alliance Records
DOJ File No.: 443001-GA0054-19

Dear Ms. Heilman:

This letter is the Attorney General's response to your petition for the disclosure of records under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, which we received on June 18, 2019,[1] asks the Attorney General to direct the Cascade Health Alliance (CHA) to produce its policies and procedures for authorizing the use of Direct Acting Antiviral (DAA) medications in the treatment of Hepatitis C. Your petition explains that CHA denied your request because it is a private entity and not a "public body" under the Oregon Public Records Law.. Your petition asks us to find that CHA is the functional equivalent of a public body for purposes of the Public Records Law. For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to inspect or receive copies of any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.314. A "public body" includes "every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council or agency thereof; and any other public agency of this state." ORS 192.311(4). "State Agency" is defined to mean "any state officer, department, board, commission or court created by the Constitution or statutes of this state." ORS 192.311(6). Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the record to determine if it may be withheld from public inspection. ORS 192.411(1).

[1] We appreciate your agreement to extend the time for us to respond to your petition.

Your petition asks us to find that CHA is the functional equivalent of a "public body" as defined in ORS 192.311(4), based upon the factors adopted by the Oregon Supreme Court in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451 (1994). We have previously determined that the Attorney General may review a petition claiming that an ostensibly private entity is the functional equivalent of a public body that is a state agency under the *Marks* test. *See Attorney General's Public Records Manual* (2019) ("*Manual*") at 3-4.[2]

We begin by summarizing the court's analysis in *Marks*. The issue before the court was whether an ad hoc fact-finding team comprised of private citizens selected by a private association of school administrators was a "public body" under the Public Records Law. The court concluded that the team, which was tasked with investigating, reporting on, and making recommendations to a public school district, was not a public body or the functional equivalent of a public body. The court's analysis involved three levels of statutory interpretation, beginning with a review of the text and context of ORS 192.410(3)[3] to determine whether the Legislature intended to encompass an entity such as the fact-finding team within the term "public body." *Marks* at 456-57. The court found nothing in the text or context of the statutory definition of "public body" to help it determine whether the Legislature meant for the term to encompass the fact-finding team. *Id.* The court then proceeded to the next level of statutory interpretation by examining the statute's legislative history for guidance. *Id.* The court found that the relevant legislative history provided little help.

After concluding that the text, context and legislative history of the Public Records Law did not make Legislature's intent clear, the court resorted to general maxims of statutory construction to resolve the uncertainty. *Id.* at 457. Specifically, the court sought to determine how the Legislature "*would have intended* the statute to be applied had it considered the issue." *Id.* (emphasis added). The court concluded that the Legislature would have intended for the resolution of this issue to "depend on the character of that entity and the nature and attributes of that entity's relationship with government and governmental decision-making." *Id.* at 463. The court proceeded to identify and apply the following factors that bear on that inquiry:

> (1) The entity's origin (*e.g.*, whether the entity was created by government or had some origin independent of government).
>
> (2) The nature of the function assigned to and performed by the entity (*e.g.*, whether that function is one traditionally associated with government or is one commonly performed by private entities).

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[2] *See also* Public Records Order (PRO), Jan 31, 2001, Hinkle (Oregon School Activities Association not a public body); PRO, Sep 3, 2002, Long (Oregon Public Broadcasting not a public body); PRO, Nov 19, 2002, Forrester (Citizens Utility Board not a public body); PRO, Mar 29, 2004, Redden (Oregon Historical Society not a public body); and PRO, Jul 24, 2008, Rios (Oregon Bridge Delivery Partnership, under contract with the Department of Transportation, not a public body).

[3] ORS 192.410(3) was the predecessor to ORS 192.311(4). The statutory definition of "public body" did not change when the statute was renumbered.

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

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

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

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

Id. at 463-64. The overall purpose of this test is "functional." The court noted that "no single factor is either indispensable or determinative" and that this list was not intended to be exclusive. *Id.* In weighing the significance of the various factors, the court was guided by the need to protect the policies underlying the Public Records Law; i.e., ensuring public access to information on which governmental decisions are based. *Id.* at 466.

Your petition argues that CHA is the functional equivalent of a public body under the *Marks* factors. Your position is based upon CHA's status as a Coordinated Care Organization (CCO). As a CCO, CHA has contracted with the Oregon Health Authority (OHA) to coordinate regional medical assistance to qualified individuals under the state's Medicaid plan. Applying the *Marks* factors, you argue that (1) because CCOs were created by statute, the state is responsible for CHA's origin; (2) the functions CHA performs relating to the coordination of medical assistance under the state's Medicaid program – such as coverage determinations – are traditional functions of government; (3) CHA exercises broad authority with regard to these traditional government functions, such as approving or denying coverage; (4) CHA's revenue comes almost exclusively from a combination of state and federal funds; and (5) CCOs are highly regulated such that the state exercises a high degree of control over their operations. Finally, you contend that a finding that CCOs are not public bodies would be inconsistent with the goals of the Public Records Law because it would mean the state "can avoid transparency and accountability in key government programs merely by contracting with private entities, regardless of the type of services those entities provide."

In light of your petition, we contacted CHA's legal counsel, Kelly Knivila of Stoel Rives, LLC. She explained CHA's position that the text, context and legislative history of the relevant statutes in this case make it clear that the Legislature did not intend to encompass private entities such as CHA, or CCOs generally, within the Public Records Law definition of a public body. Because the Legislature's intent is clear, she argues, it is neither proper nor necessary for us to apply the *Marks* factors to determine whether CHA is the functional equivalent of a public body. She explains that CHA is a private Limited Liability Company (LLC) and that the definition of a "public body" in ORS 192.311(4) does not encompass private entities such as LLCs or corporations. She also expresses CHA's view that the Legislature has specifically addressed the need for public oversight by expressing its strong desire for transparency over the operations of CCOs. She notes that consistent with this desire, the Legislature and OHA have enacted a number of transparency-promoting statutes and rules,

such as provisions relating to CCO record keeping, routine reporting to OHA, financial reporting, application disclosures, agency access to CCO records, public participation and membership in community advisory committees, and public access to certain meetings of CCO governing bodies. And, she notes, much of this information is available to the public through OHA's website or through its public records. These provisions, she argues, demonstrate that CCO transparency has already been addressed through legislative and rule making processes. More importantly, she contends, none of these provisions explicitly subject CCOs to the Public Records Law.

Ms. Knivila also points to recent legislation that, CHA believes, supports the conclusion that the Legislature does not regard CCOs as public bodies. This includes House Bill 4018 (2018) (HB 4018), which originally included a provision requiring certain meetings of CCO governing bodies to comply with the Public Meetings Law – a body of law that contains a definition of "public body" similar to the definition found in the Public Records Law. HB 4018, Section 2 (introduced). According to Ms. Knivila, such a provision would not have been necessary if the Legislature already considered CCOs public bodies under the Public Meetings Law. She also notes that the original provision was rejected and replaced with a provision affirmatively stating that such meetings are *not* subject to the Public Meetings Law. HB 4018, Section 18(2) (enacted). Ms. Knivila argues that if CCOs are not public bodies for purposes of the Public Meetings Law, then by extension they are not public bodies under the Public Records Law. She also cites Senate Bill 1041 (2019) (enacted) (SB 1041), which provides that any self-evaluative audit document submitted by CCOs to OHA, and in the possession of OHA, "remains the property" of the CCO and is not subject to disclosure by OHA under the Public Records Law. She argues that this provision demonstrates the Legislature's intent that a CCO's records are private property and are not public records subject to disclosure under the Public Records Law.

Finally, Ms. Knivila argues that if the Legislature's intent remains unclear to us, OLC has nevertheless failed to demonstrate that CHA is the functional equivalent of a public body under the *Marks* factors. Regarding the first factor, she notes that CHA is a wholly private LLC, created by Cascade Comprehensive Care, Inc. (CCC), a private corporation. And notwithstanding the fact that CCC created CHA to bid for a CCO contract, CHA is a private contractor and was not created by the state. Regarding the second *Marks* factor, she argues that CHA is performing functions commonly performed by private entities, such as risk based managed care, that are not traditionally associated with government functions. Third, she asserts that CCOs exercise only limited authority and that OHA retains both primary and ultimate authority over the state's Medicaid program. She explains that the scope of CHA's discretionary authority is limited primarily to utilization management, care coordination, and provider network management. And even these functions, she asserts, are heavily regulated by OHA. Ms. Knivila also argues that CCOs have no authority to bind OHA because their decisions may be appealed to OHA, which can issue final orders that are binding on CCOs. As to the fourth factor, she contends that the nature of CHA's funding weighs against a finding that it is a public body because that funding is governed by the terms of its contract. She indicates that CHA does not receive direct appropriations or ad hoc reimbursements from the state, and the state does not share in CHA's financial risk. Finally, she argues that the extensive regulation of CCOs does not equate to state control over their activities. For example, she explains that OHA has no authority over CHA's day-to-day operations and it does not have the power to appoint or remove CHA's officers. She also

contends that the degree of regulation is not unlike other highly regulated commercial managed care and insurance entities that are not subject to the Public Records Law.

We begin by examining the relevant text, context and legislative history to see if we can discern whether the Legislature intended to encompass CCOs within the Public Records Law definition of a "public body." *See Marks,* 319 Or at 456-57. If the Legislature's intent is clear, then the more general test adopted by the court in *Marks* does not apply.

After reviewing the relevant text, context and legislative history, we conclude that the Legislature did not intend for CCOs, including CHA, to fall within the definition of a "public body." First, we have previously observed that on its face, the Public Records Law does not apply to private entities such as nonprofit corporations and cooperatives. *Manual* at 3. And in contrast to each of the ostensibly private entities previously examined by the courts and by us,[4] CCOs are subject to a substantial body of interrelated statutes, rules and contract provisions that provide considerable context for our analysis.[5] *See Marks*, 319 at 456-57 (the relevant context includes "other provisions of the same statute and other related statutes") (*quoting PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993) (internal quotations omitted)).

Several statutes and rules specifically address CCO transparency, including extensive CCO reporting requirements to OHA.[6] Much of the information reported to OHA is available to the public

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[4] *See,.e.g., Marks*, 319 Or 451 (ad hoc fact-finding body not a public body); *Laine v. City of Rockaway Beach*, 134 Or App 655, 663 (1995) (volunteer fire department found determined to be a public body); and note 2 above.

[5] *See, e.g.,* ORS 414.620 to 414.686; and OAR Chapter 410.

[6] *See, e.g.*, ORS 414.018(3)(g) (Legislature's finding that the goals of the state's Medicaid program require "an integrated and coordinated health care system in which … [i]nteractions between the Oregon Health authority and coordinated care organizations are done in a transparent and public manner."); ORS 414.625 (requires OHA to adopt by rule CCO qualification criteria and requirements, including reporting requirements, to be integrated into CCO contracts; states that CCOs may be a single corporate structure or a network of provided organized through contract; requires CCOs to establish standards for publicizing CCO activities to keep the community informed); ORS 414.627 (requires CCOs to have community advisory councils that includes community members, establishes council public meeting and reporting requirements; states that council meetings are not subject to the Public Meetings Law); ORS 414.651 (OHA shall establish CCO financial reporting requirements and submission reqnirements for outcome and quality data); ORS 414.655 (CCOs shall report to OHA on uniform quality measures for primary care home and behavioral health homes); ORS 414.661 (OHA shall conduct annual quality reviews of each CCO, OHA shall collect a standard list of documents as part of its review) HB 4018 (2018) and OAR 410-141-3025 (requires CCO governing bodies to provide public notice of meetings where substantive decisions are made, permits members of the public to attend and provide testimony at the meetings, requires recording or minutes of the meetings and making them available to the public, states that meetings of governing bodies are not subject to the Public Meetings Law); OAR 410-141-3010(6) (CCO applications may be disclosed to the public upon award of a contract); OAR 410-141-3015 (entities applying for certification as a CCO must certify how it will assure transparency in governance and agree to provide access to certain financial, outcomes, quality and efficiency metrics that will be transparent and publicly reported); OAR 410-141-3390 (interactions between OHA or the Department of Consumer and Business Services and CCOs shall be done in a transparent and public manner; OHA exercises sole discretion in determining whether records in its custody that were provided by a CCO are confidential under the Public Records Law); OAR 410-141-3180 (CCO record keeping requirements); OAR 410-141-3230 to 410-141-3247 (required notices to members regarding grievances and appeals to OHA); OAR 410-141-3255 (grievance and appeals record keeping and required reports to OHA); OAR 410-141-3270 (CCO marketing guidelines to be developed with OHA through a "transparent public process, including stakeholder input."); and OAR 410-141-3370 (required disclosures of CCO financial solvency reports to OHA).

as part of OHA's public records and as part of OHA's reporting requirements. *See* SB 1041, Section 54(3) (itemizing CCO reports that OHA "shall make readily available to the public on an easily accessible website, and shall annually report to the Legislative Assembly"). We find that these transparency provisions are distinct from the Public Records Law and many would appear to be unnecessary if CCOs are subject to the Public Records Law.[7] These provisions provide strong contextual support for our conclusion that the Legislature did not intend to encompass CCOs within the definition of a "public body." And considering OHA's broad regulatory and oversight responsibilities over CCOs, we are also satisfied that these transparency provisions adequately protect the general policies underlying the Public Records Law.

As we are able to discern the Legislature's intent in this instance, we do not need to apply the *Marks* factors to determine how the Legislature "would have intended" the Public Records Law to apply to CCOs "had it considered the issue." *Marks,* 319 Or at 457 (citations omitted). But even under the *Marks* factors we would conclude that CHA is not the functional equivalent of a public body. For example:

> (1) CHA is a private company and was not created by the state. Although the Legislature created the concept of a CCO, the term CCO is certification or designation given to an existing entity that qualifies under OHA's rules to contract with OHA. This factor weighs in favor of finding that CHA is not the functional equivalent of a public body.
>
> (2) Administering the Medicaid program has been a job of nearly all state governments since the federal Medicaid law was enacted in 1963. But the state, like the federal government in administering Medicare, may choose to deliver benefits either directly (through fee for service) or indirectly (through risk-bearing contractors). When the Oregon Health Plan was created in 1994, the state chose to shift the provision of health care for the indigent *away* from the traditional fee-for-service model (where the state and federal governments pay directly for services and are at risk) toward a managed care model (where a third party pays and is at risk for the cost and quality of services provided). That a private CCO like CHA delivers Medicaid health benefits to its members is a logical consequence of the state's choice on how to deliver these benefits. It does not mean CHA is engaged in the traditional governmental function of administering the state's Medicaid program. This factor weighs in favor of finding that CHA is not the functional equivalent of a public body.
>
> (3) CHA can and does make important decisions affecting the delivery of health care services to its members, even if certain of these decisions can be appealed to OHA. Thus, it does more just make non-binding recommendations. But CHA may make decisions for its members only within the specific authority the Legislature and OHA have granted CHA by statute and rule, as incorporated into CHA's contract. OHA has not, and could not consistent with the Oregon Constitution, delegated its governmental responsibility for administering the state's Medicaid program to CHA. This factor weighs in favor of finding that CHA is not the functional equivalent of a public body.

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[7] *See, e.g.*, ORS 414.625(2)(p) (each CCO shall establish standards for publicizing CCO activities to keep the community informed); and OAR 410-141-3010 (OHA, and not CCOs, determines whether CCO application information labeled confidential meets public records exemptions requirements).

(4) Most of CHA's funding comes through capitated payments it receives for Medicaid health services. The capitated payments to CHA and the other CCOs are not itemized in OHA's budget. Rather, OHA receives state general funds, which it combines with federal financial participation (FFP), to issue monthly capitation payments to CCOs including CHA. The FFP is subject to exacting scrutiny by the federal Centers for Medicare and Medicaid Services (CMS) to assure compliance with federal law. Once CMS approves CCO capitation rates, the FFP is paid to OHA, not to the CCOs. CHA's contract with OHA requires it to pay for the medical expenses of its members, as well as for its own administrative expenses, from its capitation payments. Although OHA receives detailed financial reports on how CHA spends its money, neither OHA nor the federal government exercises budgetary control over CHA or directly shares in its overall financial risk. This factor weighs in favor of finding that CHA is not the functional equivalent of a public body.

(5) As noted above, CHA's operations are subject to considerable governmental oversight. But we cannot conclude that the amount of regulation in this instance equates to government control of CHA's operations. There are no indications that OHA exercises any control of CHA's day-to-day operations or that it has the ability to appoint or remove officers or employees. *See Marks*, 319 Or at 465. *See also Laine v. City of Rockaway Beach*, 134 Or App 655, 663 (1995) (volunteer fire department found to be a public body, in part, because city approved election of fire chief, could remove chief for cause, and because city controlled department's operating budget). And, for purposes of establishing government control, we do not see any major distinctions between CCOs and other highly regulated private entities – such as managed care organizations and private insurance companies – that we do not regard as public bodies under the Public Records Law. This factor weighs in favor of finding that CHA is not the functional equivalent of a public body.

(6) According to Ms. Knivila, none of CHA's officers or employees are government officials or employees. This factor weighs in favor of finding that CHA is not the functional equivalent of a public body.

For the foregoing reasons, we conclude that CHA is not a public body under the Public Records Law. We therefore lack jurisdiction to resolve your appeal and must respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM9727150
c via email only: Kelly Knivila, Stoel Rives LLP

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July 9, 2021

VIA E-MAIL ONLY: sllvolin@gmail.com

Stephanie Volin
29 South Valley Road
West Orange, NJ 07052

Re: Petition for Public Records Disclosure Order
Oregon Law Foundation
DOJ File No.: 173048-GA0001-21

Dear Ms. Volin:

This letter is the Attorney General's response to your petition for the disclosure of records under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, which we received on June 15, 2021,[1] asks the Attorney General to direct the Oregon Law Foundation ("Foundation") to disclose records pertaining to Interest on Lawyer Trust Accounts (IOLTA) maintained by a particular Oregon attorney. The Foundation denied your request asserting that it is a private non-profit corporation and therefore not a "public body" subject to the Oregon Public Records Law. Your petition asks us to find that the Foundation is the functional equivalent of a public body for purposes of the Public Records Law. For the reasons that follow, we cannot reach such a finding with respect to the specific records you seek. We must therefore respectfully dismiss your petition due to a lack of jurisdiction.

a. Oregon Public Records Law

The Public Records Law confers a right to inspect or receive copies of any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.314. A "public body" includes "every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council or agency thereof; and any other public agency of this state." ORS 192.311(4). "State Agency" means "any state officer, department, board, commission or court

[1] We appreciate your agreement to extend the time for us to respond to your petition.

created by the Constitution or statutes of this state." ORS 192.311(6). Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the record to determine if it may be withheld from public inspection. ORS 192.411(1).

b. The Oregon Law Foundation, Lawyer Trust Accounts, and IOLTA

The Foundation is a non-profit public benefit corporation, incorporated in 1981 with an independent board of directors and tax-exempt status as a charitable entity. *See* Oregon Law Foundation, Articles of Incorporation, *available at* https://sos.oregon.gov/business/pages/find.aspx (accessed Jul 1, 2021) ("Foundation's Articles of Incorporation"). According to the Foundation, it serves as a vehicle through which the legal profession – separate from the regulatory functions served by the Oregon State Bar (the "Bar") – can raise private funds to advance its stated purposes of providing legal aid to the poor, improving the administration of justice, and promoting the study of law.

In 1983, the Foundation implemented a voluntary IOLTA program that allowed Oregon lawyers to direct the interest paid on certain lawyer trust accounts to the Foundation. An IOLTA account is one in which a lawyer deposits client funds that will not produce net income for a client, in which case the client suffers no loss from IOLTA interest being paid to the Foundation. *See* Oregon Law Foundation, *For Lawyers*, https://olf.osbar.org/lawyers/ (accessed Jun 23, 2021). In 1988, Oregon lawyers approved a proposal to make the IOLTA program mandatory. Consistent with that vote, the Oregon Supreme Court approved rule changes making the program mandatory in 1989. *See* Oregon Law Foundation, *About Us*, https://olf.osbar.org/about/ (accessed Jun 23, 2021).

The current rules governing lawyer trust accounts and IOLTA are found in Oregon Rule of Professional Conduct (ORPC) 1.15-1, *Safekeeping Property*,[2] and ORPC 1.15-2, *IOLTA Accounts and Trust Account Overdraft Notification*.[3] ORPC 1.15-2(h)(3) envisions that financial institutions will enter agreements with the Foundation to remit interest earned on IOLTA accounts to the Foundation

[2] ORPC 1.15-1, which governs lawyer trust accounts, states in relevant part:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the jurisdiction where the lawyer's office is situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained. * * *

[3] ORPC 1.15-2, which governs IOLTA accounts, states in relevant part:

> (a) A lawyer trust account for client funds that cannot earn interest in excess of the costs of generating such interest ("net interest") shall be referred to as an IOLTA (Interest on Lawyer Trust Accounts) account. IOLTA accounts shall be operated in accordance with this rule and with operating regulations and procedures as may be established by the Oregon State Bar with the approval of the Oregon Supreme Court.
>
> (b) All client funds shall be deposited in the lawyer's or law firm's IOLTA account unless a particular client's funds can earn net interest. All interest earned by funds held in the IOLTA account shall be paid to the Oregon Law Foundation as provided in this rule.

and to report to the Foundation certain limited account information.[4] Although it is not clear from the text of the rule why financial institutions must report limited account information to the Foundation, the Foundation informs us that such reports facilitate its efforts to encourage financial institutions to increase the rates they pay on IOLTA accounts.

In this instance, the particular IOLTA records you requested contain only the following account information: name and firm number of the attorney who established the IOLTA account; name of the financial institution; account number; and the account balance, rate of return and interest accrued each month. The records do not contain any client information or detail any account transactions.

c. Private Entities and the Public Records Law

We have previously observed that on its face, the Public Records Law does not apply to private entities such as non-profit corporations and cooperatives. *See Attorney General's Public Records Manual* at 3 (2019) ("*Manual*"). However, in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451 (1994), the Oregon Supreme Court concluded that if an ostensibly private entity is the "functional equivalent" of a public body, the Public Records Law applies to it. The court identified the following factors as relevant in making this determination:

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

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

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

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

[4] ORPC 1.15-2 states in relevant part:

> (h) A lawyer or law firm may maintain a lawyer trust account only at a financial institution that:
>
> (3) has entered into an agreement with the Oregon Law Foundation: (i) to remit to the Oregon Law Foundation, at least quarterly, interest earned by the IOLTA account, computed in accordance with the institution's standard accounting practices, less reasonable service charges, if any; and (ii) to deliver to the Oregon Law Foundation a report with each remittance showing the name of the lawyer or law firm for whom the remittance is sent, the number of the IOLTA account as assigned by the financial institution, the average daily collected account balance or the balance on which the interest remitted was otherwise computed for each month for which the remittance is made, the rate of interest applied, the period for which the remittance is made, and the amount and description of any service charges deducted during the remittance period * * * .

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

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

Id. at 463-64. The overall purpose of this test is "functional." The court noted that "no single factor is either indispensable or determinative" and that this list was not intended to be exclusive. *Id*. In weighing the significance of the various factors, the court was guided by the need to protect the policies underlying the Public Records Law; i.e., ensuring public access to information on which governmental decisions are based. *Id.* at 466. Consistent with the court's guidance, we have determined that the Attorney General may review a petition claiming that an ostensibly private entity is the functional equivalent of a public body that is a state agency under the *Marks* factors. *See Manual* at 3-4.[5] We have also concluded that some private entities "might be the functional equivalent of a public body only with respect to functions that are governmental in nature," in which case only the records related to those governmental functions are subject to inspection. *Id.* at 5 (citation omitted). That is, even if a private entity might be functionally equivalent to a public body for some purposes, it does not follow that all of the information in that entity's possession will relate to functions that are governmental in nature.

d. Discussion

Although your petition acknowledges that the Foundation is a private non-profit corporation, you characterize it as being "under the umbrella" of the Bar. You therefore ask us to find that the Foundation is the functional equivalent of a state agency. In this instance, our evaluation of the *Marks* factors leads us to conclude that the Foundation is not the functional equivalent of a state agency with respect to the specific IOLTA records you seek because they do not relate to functions that are traditionally governmental in nature.

1. Was the Foundation created by the state or a state agency? Yes. In its response to your petition, the Foundation acknowledges that it was created by the Bar, which is as a state agency. *See State ex rel Frohnmayer v. Oregon State Bar*, 207 Or 304 (1989) (the Bar is a state agency subject to the Public Records Law). However, the Foundation notes that it was incorporated in 1981 as a separate non-profit charitable corporation, with an independent board of directors and with a mission distinct from that of the Bar or any other governmental entity.

2. Are the Foundation's functions traditionally associated with state government? No. The Foundation asserts that it only performs charitable, not governmental, functions. Specifically, as a private non-profit corporation, the Foundation distributes grants for charitable purposes, does so

[5] *See also* Public Records Order (PRO), Jan 31, 2001, Hinkle (Oregon School Activities Association not the functional equivalent of a state agency); PRO, Sep 3, 2002, Long (same for Oregon Public Broadcasting); PRO, Nov 19, 2002, Forrester (same for Citizens Utility Board); PRO, Mar 29, 2004, Redden (same for Oregon Historical Society); PRO, Jul 24, 2008, Rios (same for Oregon Bridge Delivery Partnership, under contract with the Department of Transportation); PRO, Oct 23, 2017, Livingston & Owens (same for Mid-Willamette Valley Community Action Agency); and PRO, Jul 24, 2019, Heilman (same for Coordinated Care Organizations under contract with Oregon Health Authority).

independently from the Bar or any other public body, and operates free from other restrictions that would apply to governmental entities.

We observe that the voluntary IOLTA program adopted by the Foundation in 1983 did not assume responsibility for or replicate any functions traditionally performed by state government. Rather, the program enabled access to otherwise unavailable interest earned on private lawyer trust accounts and the Foundation became the beneficiary of that interest. We are not aware of any analogous programs operated by state government. Consistent with its status as a private non-profit corporation, the Foundation then used those private funds for charitable purposes. Such charitable activities are commonly performed by private entities, not governments.

The IOLTA program became a state program when the Supreme Court assumed responsibility for its management and made participation mandatory in 1989. But we do not believe that change affected the Foundation's basic relationship with the program, which is to be the beneficiary of interest earned on IOLTA accounts. More importantly, we understand the Foundation receives the IOLTA account information you requested to facilitate its charitable operations; i.e., to support its efforts to encourage financial institutions to pay higher interest in IOLTA accounts. The Foundation asserts that it does not receive or maintain this information to conduct any functions that are traditionally governmental. And in this instance, we are not able to discern any traditionally governmental purpose for which the Foundation receives or maintains the specific IOLTA account information you seek. *See* Public Records Order, Jul 24, 2008, Rios (policies underlying the Public Records Law are adequately protected by subjecting a private entity's records to disclosure only to the extent they are possessed to conduct governmental functions being performed by the entity).

3. What is the scope of the Foundation's authority; e.g., does the Foundation have authority to make binding decisions for state government? Your petition notes that you "cannot think of any other private entity that could require that an entire group of people – who are required by statute to be members of that group (a state agency) – must give the private entity the interest from their bank accounts." In response, the Foundation asserts that it does not have authority to make any decisions that are binding upon the state government because it does not exercise any governmental powers in the context of the IOLTA program. The Foundation emphasizes the fact that it did not promulgate the rules governing Oregon's IOLTA program, nor does it have any authority to regulate lawyers or to enforce compliance with the program.

After reviewing the relevant authorities – including the Bar Act (ORS Chapter 9), the Bar's Bylaws, the ORPCs, and the Foundation's articles of incorporation – we have found no basis for concluding that the Foundation has been granted or is exercising any governmental authority with respect to the IOLTA program generally, or with respect to the specific account information you seek. The Foundation's only roles in relation to the IOLTA program are to receive interest and to negotiate certain agreements with financial institutions. The interest it receives is used only to support the Foundation's charitable activities and those activities are not governed by the IOLTA program or by any other state agency. And such charitable activities are not traditionally associated with the functions of state government. We also note that the Bar and Supreme Court are responsible for enforcing compliance with the IOLTA program, not the Foundation. *See* ORPC 1.15-2(a) ("IOLTA accounts shall be operated in accordance with this rule and with operating regulations and procedures

as may be established by the Oregon State Bar with the approval of the Oregon Supreme Court."), and ORS 9.675 (requiring active members of the bar to certify annually to the Bar whether they maintain lawyer trust accounts in Oregon).

4. What is the nature and level of government financial involvement with the Foundation? The Foundation is the sole beneficiary of interest earned on IOLTA accounts by virtue of the state-enacted, state-enforced mandatory IOLTA program. In 2019, the Foundation reported $2,671,330 in IOLTA receipts, which represented more than 92% of the Foundation's total revenue that year. *See* Oregon Law Foundation, *2019 Form 990 Tax Return* (Nov 4, 2020), *available at* https://olf.osbar.org/files/2021/05/2019-OLF-Tax-Return-Public.pdf (accessed Jun 30, 2021). Clearly the Foundation's finances are heavily dependent upon this state program. But the Foundation reports that it does not receive any direct financial support from the Bar or any other state entity, nor does any governmental entity direct how the Foundation manages or distributes the interest it receives. And if the Foundation were to dissolve, its assets would be distributed to another charity rather than revert to the state.

5. What is the nature and scope of state control over the Foundation's operations? The Oregon Rules of Professional Conduct direct that any interest earned on IOLTA accounts shall be paid to the Foundation, but the Bar and the Supreme Court are responsible for ensuring that Oregon lawyers comply with that requirement. *See* ORPC 1.15-2(a) and (b), ORS 9.675, and ORS 9.490. We also note that among the Foundation's thirteen directors, three are appointed by the Bar's Board of Governors and one is appointed by the Chief Justice of the Supreme Court. *See* Foundation's Articles of Incorporation. Because the appointed directors may be removed by the official entitled to appoint them, the Board of Governors and the Chief Justice could ostensibly exert some ongoing influence over the work of their appointees on the Foundation's board. *Id*. However, those positions constitute a minority of the board.

Beyond the state connections described above, we have not been able to locate any authority purporting to give the Bar, the Supreme Court, or any other state agency continuing management or official control over the Foundation's charitable operations. Similarly, we have no basis for concluding that the Foundation is directly accountable to any governmental entities generally, or with particular regard to the IOLTA records you have requested.

6. Are the Foundation's officers and employees state government officials? The Foundation explained its position that it does not have any employees. Rather, the Foundation has contracted with the Bar to use Bar employees as the Foundation's Executive Director and administrative staff, and the Foundation reimburses the Bar for their salaries and expenses. *See* Oregon Law Foundation, *Policies and Procedures* at 38 (Mar 1, 2021), *available at* https://olf.osbar.org/files/2021/03/2021-03-policies-and-procedures.pdf (accessed Jun 25, 2021). The Foundation is otherwise comprised of a voluntary thirteen-member board of directors, including one state employee who serves in an elected position. *See* Oregon Law Foundation, *Policies and Procedures* at 2.

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e. Conclusion

On balance, our evaluation of the *Marks* factors leads us to conclude that the Foundation does not possess the particular IOLTA records you have requested as part of any governmental function. The Foundation was incorporated to fulfill charitable purposes and these records are used to advance those functions. Although it is the sole beneficiary of funds generated by a state-enacted program, the Foundation is not subject to state budgetary control and its assets would not revert to the state if it were to dissolve. The Foundation operates without any direct management or official control by a state agency, it does not exercise any authority to make decisions binding upon any state instrumentality, and it is not accountable to any state agency. Most importantly, with regard to the specific IOLTA records you seek, the Foundation does not appear to possess that information in any capacity that is functionally governmental. It follows that disclosing those records to you will not advance the goal, articulated by the court in *Marks*, of ensuring public access to information on which governmental decisions are based. Because we conclude that the Foundation is not the functional equivalent of a state agency with respect to the specific IOLTA account records you seek, we lack jurisdiction to resolve your appeal and must respectfully dismiss your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn
c via email only: Bill Penn (OLF)

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 **DECLARATION OF ERICA TATOIAN IN SUPPORT OF PLAINTIFF AVION WATER COMPANY, INC.'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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