MEMORANDUM OF CHIEF PETITIONERS
on
MULTNOMAH COUNTY COMMISSION HEARING
ON P.U.D. BOUNDARIES

June 4, 2003

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1. THE COMMISSION HAS SPECIFIC, LIMITED AUTHORITY TO ALTER THE BOUNDARIES OF A PUD, SET FORTH IN AN ELECTORS' PETITION.

The Commission's authority with respect to the boundaries of a People's Utility District (PUD) presented in an electors' petition is set forth in ORS 261.161(3) and ORS 261.161(4):

> (3) No lands shall be included in the boundaries fixed by the governing body lying outside the boundaries described in the electors' petition unless the owners of that land request inclusion in writing before the hearing under subsection (1) of this section is completed.
>
> (4) An electors' petition shall not be denied by a county governing body because of any deficiency in the description of the boundaries of the proposed district, but the county governing body shall correct those deficiencies.

Some commentors to you have suggested that you exercise discretion to exclude from the prospective PUD's boundaries various parts of the area specified in the electors' petition, such as the area served by Pacific Power & Light Company (PP&L). These commentors have referred to ORS 261.161(2), which states that the Commission "shall determine the boundaries of the proposed or established district," stressing the phrase "determine the boundaries." But that sentence does not apply to the boundaries of a PUD set forth in an electors' petition (accompanied by the required number of valid signatures). Instead, it applies to the boundaries of a PUD, when the formation or enlargement of the PUD is proposed by the Commission itself (by resolution).

It is necessary to read ORS 261.161(1) to place the phrase "determine the boundaries" in context.

> (1) After certification of a petition, **or passage of the resolution when the formation, annexation or consolidation proposal is by resolution of the county governing body**, the county governing body shall, within 10 days, fix a date for a hearing on the boundaries described in the electors' petition **or resolution of the county governing body for inclusion in the proposed or established district**. . . . The hearing shall be held by the county governing body not less than 60 days nor more than 90 days after certification of the petition or passage of the resolution. Notice of the hearing, stating the time and place of the meeting, together with the electors' petition, when applicable, without the signatures attached, shall be published at least two times prior to the date of the meeting. The first publication shall not be more than 25 days nor less than 15 days preceding the hearing and the last publication shall not be more than 14 days nor less than eight days preceding the hearing. Notice of the hearing, and all other publications required by this chapter, shall be published in at least one newspaper of general circulation in the proposed or established district. The hearing may be adjourned from time to time, but shall not exceed four weeks in total length. Public testimony shall be taken at the hearing. (emphasis added)

This indicates that the Commission is conducting a hearing either on (1) the boundaries described "in the electors' petition" or on (2) the boundaries described in the "resolution of the county governing body for inclusion in the proposed or established district."

ORS 261.161(2) then states that, "the county governing body within 10 days of the last date of hearing shall **determine the boundaries of the proposed or established district**." This refers to the boundaries of the "proposed district" (if the county governing body is proposing to create one) or of the "established district" (if the county governing body is proposing to add territory to an existing PUD). In both cases, the phrase "determine the boundaries" refers to the creation of enlargement of a PUD which has is being pursued by the county governing body by its own resolution. The exact phrase "for inclusion in the proposed or established district" is used in ORS 261.161(1) to refer to the entity that is being proposed by resolution of the county governing body. That phrase is, however, never used to describe an electors' petition for formation of a PUD.

The remainder of ORS 261.161 makes it even more clear that "shall determine the boundaries of the proposed or established district" in ORS 261.161(2) does not refer to altering the boundaries of a PUD proposed by electors' petition. ORS 261.161(3) and (4) set forth the specific changes that the county governing body can make in boundaries of a PUD set forth in an electors' petition and the specific conditions under which the county governing body can make those changes ("only if "the owners of that land request inclusion in writing" or if there are "deficiencies" in the description of the boundaries in the electors' petition. If the Commission has plenary authority to "determine the boundaries," then ORS 261.161(3) and (4) would be surplusage. Further, ORS 261.161(3) and (4) are obviously more specific to the boundaries established by an electors' petition than is ORS 261.161(2), which does not even use the term "electors' petition" at all.

ORS 174.020(2) requires that statutes be construed to favor a specific provision over a more general one:

> When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.

In ***PGE v. BOLI***, 317 Or 606, 611, 859 P2d 1143 (1993), the Oregon Supreme Court stated:

> Just as with the court's consideration of the text of a statute, the court utilizes rules of construction that bear directly on the interpretation of the statutory provision in context. Some of those rules are mandated by statute, including, for example, the principles that "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all," ORS 174.010, and that "a particular intent shall control a general one that is inconsistent with it," ORS 174.020.

Here, the specific instruction to the Commission regarding the boundaries described in an electors' petition is to correct deficiencies in the boundaries, not to make other changes to them. Consequently, the function of the Multnomah County Commission in this proceeding is to correct deficiencies in the description of the boundaries of the proposed district but not to otherwise "determine the boundaries."

2. THE COMMISSION SHOULD NEED NOT EXCLUDE THE TERRITORY WITHIN MULTNOMAH COUNTY CURRENTLY RECEIVING ELECTRIC SERVICE FROM COLUMBIA RIVER PUD.

As the Commission heard during the hearing, the Columbia River PUD serves some customers who reside in Multnomah County, although these customers do not reside within the political boundaries of the Columbia River PUD.

The territory served by Columbia River PUD within Multnomah County need not be excluded from the boundaries of the proposed PUD. ORS 261.110(7) provides:

> (7) No territory which is part of another people's utility district shall be included in the formation of any district, except under the conditions provided in ORS 198.720 (2), nor shall the proposed district include any territory which at the time of the proposed district's formation is being served by an electric cooperative.

While the statute requires (1) exclusion of "territory which is part of another people's utility district and (2) exclusion of "territory which at the time of the proposed district's formation is being served by an electric cooperative," the statute does not call for exclusion of territory which is outside the boundaries of any existing PUD, even if it is being served by that PUD. Thus, the statute does not call for exclusion of the area served by Columbia River PUD within Multnomah County, because that area is not within the political boundaries of Columbia River PUD.

While the chief petitioners would not object to excluding that small area from the boundaries of the prospective Multnomah County People's Utility District, we do not believe that ORS Chapter 261 necessarily provides to this Commission the authority to make that exclusion. It may be possible to interpret the term "territory which is part of another people's utility district" as including territory which is served by the PUD but which is not within its political boundaries. Further, it is possible that CRPUD will call an annexation election and annex the part of Multnomah County which it serves, prior to the date of the election on formation of the Multnomah County People's Utility District (November 4, 2003). In that case, the Multnomah County Commission's proclamation of district formation under ORS 261.200, after a successful formation election, could exclude the new Multnomah part of CRPUD. Or the Multnomah territory annexed to CRPUD prior to November 4, 2003, could be removed from the Multnomah County People's Utility District by the Multnomah County Commission pursuant to ORS 261.200(5) as having been improperly included.

3. THE COMMISSION SHOULD CORRECT THE BOUNDARIES TO EXCLUDE 156 ADDRESSES WITHIN MULTNOMAH COUNTY THAT RECEIVE ELECTRIC SERVICE FROM THE CITY OF CASCADE LOCKS.

As we mentioned at the Multnomah County Commission hearing on May 15, 2003, we have learned that 156 addresses inside Multnomah County are provided electric service by the City of Cascade Locks, which is a municipality wholly within Hood River County. These addresses are in the extreme northeast corner of Multnomah County, along the Columbia River. We have attached a table of those customers.

The territory served by the City of Cascade Locks should be excluded from the boundaries of the PUD, as it is territory served by a "publicly owned utility." ORS 261.110(5) refers to municipal electric utilities (such as City of Cascade Locks) and provides that "the territory it **serves** within or without the boundaries of such municipality at the time of a proposed formation of a people's utility district" is not be be included within the boundaries of the new PUD.

4. THE COMMISSION SHOULD NOT ALTER THE BOUNDARIES TO EXCLUDE THE TERRITORY OF THE CITY OF PORTLAND.

In a letter dated May 29, 2003, an attorney for PacifiCorp (PP&L) demanded that the Commission exclude the entire City of Portland from the boundaries of the PUD, citing ORS 261.110(5).

A. PP&L'S READING OF ORS 261.110(5) IS WRONG, CONSIDERING THE TEXT AND CONTEXT OF THE STATUTES.

PP&L claims that, because the City of Portland owns pieces of equipment which generate electricity, that the entire city must be excluded from the boundaries of the PUD. PP&L comes to this erroneous conclusion by equating the term "Utility" in ORS 261.010(6) with this term in ORS 261.110(5): "a publicly owned utility for development or distribution, or both, of electric energy or the territory it serves within or without the boundaries of such municipality."

As noted previously, the first level of analysis of a statute includes only the text and context of the words. The context of a statute for the purposes of ***PGE v. BOLI*** includes other provisions of the same statute and related statutes, prior enactments and prior judicial interpretations of those and related statutes [***Owens v. Maass,*** 323 Or 430, 435, 918 P2d 808 (1996)], as well as the historical context of the relevant enactments. ***Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto,*** 322 Or 406, 415, 908 P2d 300 (1995), *on recons* 325 Or 46, 932 P2d 1141 (1997); ***Krieger v. Just***, 319 Or 328, 876 P2d 754 (1994); *see generally* Jack L. Landau, *Some Observations About Statutory Construction in Oregon,* 32 WILL L REV 1, 38-40 (1996).

Examining the text and context of ORS 261.110(5) indicates that cities which provide no electric service to customers (such as the City of Portland) are not excluded from PUD formation boundaries. First, the definitions in ORS 261.010 do not apply where inappropriate in the context of other portions of the statute. ORS 261.010 provides definitions, "As used in this chapter, **unless otherwise required by the context**."[1] The definition of "Utility" in ORS 261.010(6) refers to physical equipment or property. This definition is appropriate where the term "utility" appears by itself in other subsections of

1. This is a significant condition on the application of the definitions provided in ORS 261.010. When interpreting a statute with a similar condition regarding application of definitions, the Oregon Supreme Court in ***Chapman Bros. Stationery & Office Equipment Co. v. Miles-Hiatt Investments, Inc.***, 282 Or 643, 580 P2d 540 (1978), concluded that a tenant of a building was not the "owner" of certain furniture, even though a literal reading of the applicable statute would have required such a conclusion.

ORS Chapter 261.[2] But it is not appropriate (and does not make sense, as demonstrated below) if applied to ORS 261.110(5).

Second, the term "Utility" by itself is not used in ORS 261.110(5).[3] Instead, the term used is "publicly owned utility". In context, this refers not to pieces of equipment or property but to an entity which provides electric service. In the context of ORS 261.110(5), the term "publicly owned utility" clearly refers to an entity which provides electric service to customers, which the City of Portland does not. ORS 261.110(5) strongly implies that the "publicly owned utility" it refers to must (like the City of Cascade Locks) have some electric service territory at the time of the PUD formation election. The statute refers to "no municipality . . . or the territory it serves without or without the boundaries of such municipality at the time of a proposed formation of a people's utility district." This strongly implies that the municipality at issue must serve at least some territory, either within or outside of its own boundaries. The City of Portland serves no territory with electric service.

Third, Oregon statutes consistently use the term "publicly owned utility" to refer to entities which provide electric service to customers and are owned by units of government. These are the more appropriate indicators of the meaning of "publicly owned utility" in ORS 261.110(5). ***PGE v. BOLI***, *supra*, stated that the "context of the statutory provision at issue * * * includes other provisions of the same statute **and other related statutes**. 317 Or at 611. There are other Oregon statutes which pertain to

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2. For example, ORS 261.305(4) refers to "electric energy generated from any utility," clearly using the term "utility" to refer to equipment or property that generates electricity. The same is true of ORS 261.350, which states (emphasis added):

> **261.350 Agreements for use of excess district facilities.** Whenever any of the facilities, works or **utilities** of the district, or any part thereof, are not used or employed to its fullest capacity for the benefits or requirements of the district or its inhabitants, the district may enter into agreements, upon terms and conditions satisfactory to the board, for renting, leasing or otherwise using the available portion or parts of such facilities, works or **utilities**.

Similarly, ORS 261.355(3) states:

> Revenue bonds shall not be issued and sold for the purpose of acquiring an initial **utility** system or acquiring property or facilities owned by another entity that provides electric utility service without first obtaining the affirmative vote of the electors within the district.

Similarly, ORS 261.355(10) states:

> The district shall order an election for the authorization of revenue bonds to finance the acquisition or construction of an initial **utility** system, including the replacement value of the unreimbursed investment of an investor owned utility in energy efficiency measures and installations within the proposed district . . .

In these contexts, the definition of "Utility" as equipment or property for the "development, generation, storage, distribution or transmission of electric energy" makes sense.

3. The Oregon Supreme Court in ***Chapman Bros. Stationery***, *supra*, warned that the assumption that the definition of a particular word constitutes a "precise and careful use applies only to the term actually defined, not necessarily to all cognate and related forms of the same term." The term "Utility" used to refer to equipment or property is not the same term as "publicly owned utility" used to refer to a government entity providing electric service to customers.

"publicly owned utilities" and which provide a perfectly appropriate definition for that specific term. ORS 469.649(9) defines the term "publicly owned utility" as follows:

> (9) **"Publicly owned utility**" means a **utility** that:
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> > (a) Is owned or operated in whole or in part, by a municipality, cooperative association or people's utility district; and
> >
> > (b) Distributes electricity.

This definition does not include the City of Portland, because the City does not distribute electricity.[4]

If the City of Portland were indeed a "publicly owned utility," then it would be required to offer its "customers" a specified series of residential and commercial electricity use audit and conservation programs, under ORS 469.651, ORS 469.653, ORS 469.655, ORS 469.659, ORS 469.880, ORS 469.885, and ORS 469.895. The City of Portland does not comply with these statutes, because it is not a "publicly owned utility" for electricity purposes.

Fourth, adopting the PP&L approach would require that the Commission adopt an entirely new interpretation of ORS 261.110(5) than it has applied in the past. Applying the ***PGE v. BOLI*** historical context rules to the present situation, the PUD formation statutes have been on the books for over 60 and have undergone several legislative revisions (in 1953, 1955, 1957, 1959, 1961, 1963, 1967, 1969, 1971, 1973, 1975, 1979, 1981, 1983, 1985, 1987, 1989, 1991, 1993, 1995, and 1999, that we know of). In more recent times, PUD formation questions have been placed, by the Multnomah County Commission, before voters in November 1980 (county-wide PUD proposed), May 1988 (portions of the City of Portland proposed), and 1990 (Rockwood Water PUD). PP&L territory was directly affected by the 1980 PUD election. PP&L was active in campaigning against the 1988 PUDs. Neither it, nor any other commentator proffered the new, hypertechnical interpretation of a "publicly owned utility" now offered by PP&L.

PP&L's new interpretation of ORS 261.110(5) would have rendered unlawful all of the PUD elections within Multnomah County in 1980, 1988, and 1990, because (1) all of them included portions of the City of Portland and (2) the City of Portland has owned power generation facilities since it installed backup generators at its main sewage

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4. ORS Chapter 255 is entitled "Municipal Utilities." ORS 225.030 states:

> **Utility may provide services outside city limits**. Any city owning, controlling or operating a system of waterworks or electric light and power system for supplying water or electricity for its inhabitants and for general municipal purposes, and any person, persons, or corporation controlling or operating any water system or electric light and power system under contract, lease or private ownership, may sell, supply and dispose of water or electricity from such system to any person, persons, or corporation within or without the limits of the city in which the water or electric light and power system is operated, and may make contracts in reference to the sale and disposal of water or electricity from such system, for use within or without the corporate limits.

This further indicates that the term "Utility" means a "system of supplying * * * electricity for its inhabitants and for general municipal purposes." The City of Portland has no such system.

treatment plant in 1973. When a statute has been on the books for decades, has been applied uniformly by the officers charged with administering the terms, and the legislature has not intervened, the doctrine of contemporaneous interpretation requires that the long-established interpretation continue and prevail. See 2 SUTHERLAND, STATUTORY CONSTRUCTION, pp. 514-515, § 5104 (3d ed). The doctrine applies where a contemporaneous interpretation of a statute is made at or soon after the time of its enactment and where such contemporaneous and practical interpretation has continued for a considerable length of time. *Id*. at 520, 522. The application of the doctrine has particular force her, because the proponent of a novel interpretation (PP&L) has been involved for decades with the application of that statute and never before offered the new theory. This doctrine favoring the continuation of contemporary construction of statutes has long been the rule in Oregon. ***Union Pac. R. R. Co. v. Anderson***, 167 Or 687, 709, 120 P2d 578 (1941).

In ***Butler v. State Indus. Acc. Commission*****,** 212 Or 330, 340, 318 P2d 303, 308 (1957), the Oregon Supreme Court rejected a novel interpretation of workers compensation coverage, because the prevailing interpretation had been unchallenged for many years without legislative intervention:

> * * * This has been the interpretation for some 40 years, and that it has been put into effect in numerous school districts. At recurring sessions of the legislature the Workmen's Compensation Law has been amended and revised, but this practice has not been disturbed. On a question as close as this, upon the decision of which very grave public consequences may depend, we think that the contemporaneous, administrative interpretation over a long period of time should turn the scale. ***City of Portland v. Duntley***, 185 Or 365, 385, 203 P2d 640; ***Union Pac. R. R. Co. v. Anderson***, 167 Or 687, 709, 120 P2d 578; ***Kelly v. Multnomah County***, 18 Or 356, 359, 22 P 1110; 2 SUTHERLAND, STATUTORY CONSTRUCTION (3d ed) 525-526.

Accord, ***Standard Ins. Co. v. State Tax Commission***, 230 Or 461, 469, 370 P2d 608, 611-612 (1962) (tax code interpretation went "unchallenged and unquestioned for more than twenty years by defendant").

B. PP&L SEEKS TO APPLY HYPER-LITERALNESS, BUT ONLY TO A PARTIAL EXTENT THAT IS CONVENIENT TO ITS PURPOSE.

In essence, PP&L is seeking to apply a hyper-literal definition of "utility" to ORS 261.110(5) in order to achieve the exclusion of the City of Portland from the PUD. This strategy, however, encounters many problems. First, the PUD statutes are not to be interpreted with strict literalness. ORS 261.900(1) itself states:

> (1) The rule of strict construction shall have no application to ORS 261.007, 261.010, 261.030, 261.065 to 261.118, 261.131 to 261.171, 261.190, 261.200, 261.220, 261.225, 261.305 to 261.325, 261.345, 261.355, 261.371, 261.375, 261.605, 261.635 and this section; but the same shall be liberally construed, in order to carry out the purposes and objects for which ORS 261.007, 261.010, 261.030, 261.065 to 261.118, 261.131 to 261.171, 261.190, 261.200, 261.220, 261.225, 261.305 to 261.325, 261.345, 261.355, 261.371, 261.375, 261.605, 261.635 and this section are intended.

Note that this list includes ORS 261.110, the statutory section at issue.

Second, PP&L's interpretation of "utility" to ORS 261.110(5) would render the PUD formation statutes essentially useless. It would have foreclosed, for example, the creation of Rockwood Water PUD, because the boundaries of Rockwood Water PUD include substantial territory within the City of Portland.[5]

Third, if hyper-literalness is to be applied, then PP&L has failed to recognize that such a reading of ORS 261.010(6) and ORS 261.110(5) would produce the absurd result of precluding the formation or expansion of any PUD, where there exists any city whatsoever. It does not matter that the City of Portland owns any hydropower generation, because it also owns other power generating equipment. The City has an electricity generating fuel cell and other backup generators at its sewage treatment plant on the Columbia, its Tryon Creek sewage plant, and at other critical facilities. According to PP&L, the existence of such backup generation would itself require that all of the City of Portland be removed from the boundaries of the PUD, because such generation would constitute a "utility" as defined by ORS 261.010(6).

PP&L's interpretation of ORS Chapter 261 would also require the exclusion of Gresham, Troutdale, and Fairview. The City of Gresham owns backup electricity generating equipment for city-owned buildings. The City of Troutdale owns backup generators for its sewage treatment and water production facilities. The City of Fairview has backup generators for its water pumping operations.[6]

If the literal interpretation of a statute, as PP&L urges here, produces an absurd result (as it does here), Oregon courts reject the literal interpretation.

> Case law also supplies several rules of construction of statutes in context that are relevant here. In *Fox v. Galloway,* 174 Or 339, 347, 148 P2d 922 (1944), this court said:
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> > "If the language is plain and unambiguous, if it can be given but one meaning, and that meaning does not lead to an impossibility or an absurdity such as the legislature could not be supposed to have intended, the court must give effect to that meaning if constitutional, even though the result may be, in the court's opinion, harsh, unjust or mistaken in policy[.]
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> > "When, however, a literal application of the language produces an absurd or unreasonable result, it is the duty of the court to construe the act, if possible, so that it is a reasonable and

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5. Rockwood Water PUD was formed pursuant to ORS Chapter 261. Although it uses the term "water" in its title, there is only one type of legal entity in Oregon that is a people's utility district. Rockwood Water PUD is one of those.

6. We do not know whether Wood Village or Maywood Park own any stationary power generation facilities. But it may be safe to assume that each of those cities owns a car. Every internal combustion automobile uses the thermal energy of gasoline to generate electricity (which feeds the spark plugs and battery). A literal interpretation of ORS 261.010(6), which PP&L urges, would include an automobile as "property used for *** generation *** of electric energy produced from resources including but not limited to *** other thermal generation." Of course, such car-produced electricity is not used to serve electric utility customers, but then again the City of Portland does not use Bull Run-generated power to serve electric utility customers, either, because the City has no electric utility operations. Nothing in ORS 261.010(6) requires that the generation equipment be stationary.

> workable law and not inconsistent with the general policy of the legislature[.]" (Citations omitted, emphasis supplied.)
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> This court has relied repeatedly on that statement in ***Fox*** to reject proposed statutory constructions that, although supported by a literal reading of statutory text, produced unworkable results in actual application. *See Johnson v. Star Machinery Co.,* 270 Or. 694, 704-09, 530 P.2d 53 (1974) (court construed statute of repose governing "negligent injury" to apply as well to a strict product liability claim); *State v. Irving,* 268 Or. 204, 206-07, 520 P.2d 354 (1974) (court rejected a literal interpretation of a criminal procedural statute because it produced a "patently unreasonable result"); *Beck v. Aichele,* 258 Or. 245, 249, 482 P.2d 184 (1971) (court rejected a proposed statutory construction that would create a monopoly because, "[i]n light of our everyday knowledge and common sense, this interpretation is absurd").
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> Another relevant rule of construction of statutes in context appears in *Wright v. Blue Mt. Hospital Dist.,* 214 Or. 141, 147, 328 P.2d 314 (1958):
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> > "[It is a] well-established rule of statutory construction that when one construction will make a statute void for conflict with the constitution, and another will render it valid, the latter will be adopted though the former at first view is otherwise the more natural interpretation of the language."

Carlson v. Myers, 327 Or 213, 233, 959 P2d 31 (1998, Durham concurring). In ***State v. Galligan***, 312 Or 35, 39, 816 P2d 601 (1991), the Court stated:

> When construing a statute, "the intention of the legislature is to be pursued if possible." ORS 174.020; *State v. Carrillo,* 311 Or 61, 65, 804 P2d 1161 (1991). In keeping with that rule of construction, this court has stated that a statute should not be construed "so as to ascribe to the legislature the intent to produce an unreasonable or absurd result." *State v. Linthwaite,* 295 Or 162, 170, 665 P2d 863 (1983). * * * *See Johnson v. Star Machinery Co.,* 270 Or. 694, 704, 530 P.2d 53 (1974) ("if the literal import of the words is so at variance with the apparent policy of the legislation as a whole as to bring about an unreasonable result, the literal interpretation must give way and the court must look beyond the words of the act").

So, instead of adopting PP&L's hyper-literal reading--automatically applying ORS 261.010(6)'s definition of "Utility" to ORS 261.110(5)--the Commission should interpret the term "publicly owned utility" in ORS 261.110(5) in light of its text and context, in light of the contemporaneous and longstanding interpretation of those statutes (by Multnomah County Commission itself and others), and in light of the purposes of ORS Chapter 261. Doing so will also avoid the type of constitutional conflict noted by Justice Durham in ***Carlson v. Myers***, *supra*. The right of the people to form People's Utility Districts is set forth in Article XI, Section 12, of the Oregon Constitution. An interpretation of ORS 261.110(5) which renders it virtually impossible to form PUDs would conflict with Article XI, Section 12.

C. EVEN PP&L'S HYPER-LITERAL READING OF ORS 261.110(5) DOES NOT REQUIRE EXCLUDING THE CITY OF PORTLAND FROM THE PUD FORMATION ELECTION.

(1) ERRORS IN THE BOUNDARIES CAN BE CORRECTED, AFTER A SUCCESSFUL PUD FORMATION ELECTION.

Even if the Commission were to adopt PP&L's hyper-literal interpretation, there is no need to exclude the territory of the City of Portland at this stage. Instead, the matter can be addressed after the PUD has been formed. ORS 261.200(5) provides:

> (5) Following proclamation of formation of a district, any person whose property has been improperly included within a district, contrary to the provisions of ORS 261.110(5) or (7), may petition a county governing body to revise the district boundaries to exclude the property. After notice to the district, and a hearing on the petition, the county governing body shall revise the district boundaries to exclude such property as it finds should not have been included within the district under the standards set forth in ORS 261.110(5) or (7). Upon such findings and boundary revisions a district shall be permitted to refund related taxes paid which are based upon assessments made after January 1, 1978. Boundary revisions shall comply with ORS 308.225. The remedy provided in this subsection shall be available only to persons owning property in districts which were formed after January 1, 1978.

Thus, the City of Portland, if it were to agree with PP&L's absurd interpretation of ORS 261.110(5), could petition the Multnomah County Commission for the exclusion of its territory. This avoids the need to address PP&L's contention, unless and until the PUD formation election is successful.

(2) THE PUD FORMATION ELECTION CAN SUBSUME THE CITY OF PORTLAND INCLUSION ELECTION.

Again, even if the Commission were to adopt PP&L's hyper-literal interpretation, inclusion of areas within the City of Portland in the PUD boundaries is not prohibited. Such territory may be included in the PUD if "inclusion is agreed to at an election by the electors of such municipality." There is no requirement for a “municipal” election and no further description of the procedure for “an election by the electors” of the City of Portland. Nor is there a prohibition on the “inclusion” election being held simultaneously with the formation election throughout the PUD territory to the extent necessary. In fact, in most circumstances, the “inclusion” question put to municipal electors is a necessarily included question within the question of whether the PUD should be formed (including part of the city).

The PUD formation election is “an election,” and assuming that *all* the electors of the City of Portland had an opportunity to vote on the question of formation, and the majority voted against formation of a PUD consisting of the territory described in the electors' petition before the Commission, then none of the City of Portland territory would be included in the formed PUD, pursuant to the effect of ORS 261.110(4). On a smaller scale, all of the municipal electors in Fairview will vote on the formation question at the same time they vote on the inclusion question. If the majority of City of Fairview electors vote for a PUD with the described boundaries, then they necessarily

will have voted yes for the inclusion in the PUD of the described portions of the City of Fairview (in this case, all of it).

Thus, the intent of the statute that a municipality that owns or operates a "publicly owned utility" nay not be included within a PUD (unless its electors affirmatively agree) is usually satisfied by the PUD formation election itself and the effect of counting votes within each municipality separately under ORS 261.110(4). The only difference between Fairview and Portland is that there are a very small number of Portland electors who do not reside within Multnomah County and are thus not within the PUD boundaries. In this case, these non-Multnomah electors would not otherwise receive a ballot during the PUD formation election but for the PP&L-alleged requirement that *all* Portland electors must have an opportunity to vote on the inclusion of *most* of Portland within the PUD.

The only election authority involved in PUD formation is a county elections office. ORS 261.171. ORS 261.145 provides that where

> the procedure for the formation of a district * * * is not specifically provided for * * * any suitable method and proceeding, or either, may be adopted which appears conformable to the spirit of this chapter and the provisions of section 12, Article XI, Oregon Constitution.

The Oregon Constitution guarantees the right of the citizens to form People's Utility Districts. The enabling statutes must conform to the intention of the Constitution to facilitate, not unnecessarily hinder, the formation of PUDs. Under the present circumstances, the most suitable (and efficient) method for the Multnomah County Elections Office to provide for an election which includes all electors within the City of Portland is set out in ORS 254.108(2). Thus, when the Multnomah County Commissioners pass a resolution directing the Elections Office to take the necessary steps to place the PUD formation question on the ballot, the Multnomah County Elections Office can certify that question to the elections offices of Washington and Clackamas counties for preparation and distribution to the affected non-Multnomah Portland electors, in much the same manner as would occur if the PUD boundaries had included territory in those counties in its description.[7] A “yes” vote on the question of the formation of a PUD which includes most of the City of Portland in its description is clearly a “yes” on the question of the “inclusion” of that part of Portland in such a district.

Under this simple one-election procedure, the entire City of Portland vote would be counted first to determine whether or not the affected portions of the City of Portland should be included in the PUD. Depending on the outcome of that question, the vote to be counted on the formation question will then either include the votes from Portland electors within the proposed boundaries or not. If the overall vote is affirmative on the formation question, then the votes of the wholly included cities, such as Fairview, will be tallied to determine the final boundaries.

Dated: June 5, 2003 Respectfully Submitted,

7. Since the non-Multnomah Portland electors are not to be in the proposed district, they would not vote on the levy question, nor would they get candidate ballots.

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