IN THE SUPREME COURT OF THE STATE OF OREGON

POWEREX CORP. Plaintiff-Respondent, v. DEPARTMENT OF REVENUE, State of Oregon, Defendant-Appellant.	Tax Court No. 4800 Supreme Court No. S060859

RESPONDENT'S ANSWERING BRIEF

Appeal from the Judgment of the Oregon Tax Court
The Honorable Henry C. Breithaupt Judge

Eric J. Coffill
Jenny Choi
Morrison & Foerster LLP
400 Capitol Mall, Suite 2600
Sacramento, CA 95814
Telephone: (916) 325-1324
Facsimile: (916) 448-3222

Carol Vogt Lavine, #914571
P.O. Box 697
Gladstone, OR 97027
Telephone: (503) 650-5361
Facsimile: (503) 650-6511

Of Attorneys for Plaintiff-Respondent Powerex Corp.

Ellen F. Rosenblum, #753239
Attorney General
Marilyn J. Harbur, #802517
Senior Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, OR 97301
Telephone: (503) 947-4342
Facsimile: (503) 378-3784

Of Attorneys for Defendant-Appellant Department of Revenue

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

STATEMENT OF THE CASE

Respondent Powerex Corp. ("Powerex") accepts Appellant Department of Revenue's ("Department") Statement of the Case, except as indicated.

I. Nature of the Action or Proceeding

This is an appeal by the Department from the judgment of the Tax Court in a Corporation Excise Tax refund case brought by Powerex for tax years ending ("TYE") March 31, 2002, March 31, 2003 and March 31, 2004 (collectively, the "years in issue").[1]

Trial was held on September 12-13, 2011, and extensive post-trial briefing and oral argument[2] followed. In its opinion filed on September 17, 2012 ("Opinion"), the Tax Court ruled in favor of Powerex on all issues. Specifically, and as more fully explained below, the Tax Court held the sales of electricity were sales of other than tangible personal property under ORS 314.665 and ruled the greater proportion of income producing activity related to

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[1] The transcript of the trial held on September 12-13, 2011, is cited as "Tr. __"; the exhibits introduced by Powerex at the trial are cited as "PE __"; the exhibits introduced by Department at the trial are cited as "DE __"; the parties' Joint Stipulation of Facts and Documents is cited as "JS ¶ __"; and the parties' Stipulated Exhibits are cited as "SE __." The transcript of the oral argument held on February 29, 2012, is cited as "2/29/12 Tr. __." The transcript of the hearing on Powerex's Second Motion for Partial Summary Judgment held on August 12, 2011, is cited as "8/12/11 Tr. __."

[2] Specifically, nearly four hours of post-trial oral argument were held before Judge Breithaupt on February 29, 2012, commencing at 9:32 a.m. and ending at 1:27 p.m. 2/29/12 Tr. 115-344.

those sales occurred outside of Oregon (i.e., in Canada). The Tax Court also held that sales of natural gas (which the parties stipulated were sales of tangible personal property) must be sourced under ORS 314.665 to their ultimate destination and not to the contractual point of delivery.

The Department on appeal challenges these rulings of the Tax Court. Accordingly, on appeal, the disputes between the parties are:[3]

- Whether the Tax Court correctly ruled that Powerex's sales of electricity during the years in issue were sales of other than tangible personal property under ORS 314.665;

- Assuming the Tax Court correctly ruled that such sales of electricity are sales of other than tangible personal property, whether there were any income producing activities in Oregon under ORS 314.665;

- Assuming the Tax Court correctly ruled that such sales of electricity are sales of other than tangible personal property, and assuming there were income producing activities in Oregon, whether the Tax Court correctly ruled the greater proportion of the costs of performance associated with those income producing activities were outside Oregon under ORS 314.665; and

- If, *arguendo*, the Tax Court erred in ruling that such sales of electricity are sales of other than tangible personal property, and regarding sales of natural gas (which the parties stipulated are sales of tangible personal property), whether they must be sourced under ORS 314.665 to the contractual point of delivery as opposed to the ultimate destination.

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[3] Powerex takes issue with the brevity of the Department's Statement of the Case regarding the Nature of the Action or Proceeding. As discussed herein and as discussed in the Tax Court opinion, the sales factor issue at trial was more complex than simply whether the sales in this case of electricity and natural gas "were delivered to purchasers in Oregon." Department's Opening Brief ("OB"), p. 1.

Well before trial, the Tax Court heard two motions for partial summary judgment concerning OAR 150-314.665(2)-(A)(1) (defining tangible personal property to include electricity) and OAR 150-314.665(2)-(C) (sourcing sales of tangible personal property to the contractual point of delivery). The Department first adopted these rules in 2007, but then repealed them.[4] The Department then re-adopted these rules in 2011. By order dated December 17, 2010, the Tax Court granted partial summary judgment in favor of Powerex and found the 2007 rules invalid because the rules' adoption process failed to comply with the governing procedural law. Ord. Granting Powerex's First Mot. For Partial Sum. Judg., 12/17/10 ("12/17/10 Order"). By order dated August 24, 2011, the Tax Court granted partial summary judgment in favor of Powerex and found the 2011 rules inapplicable to the years in issue because they were not "open to examination." Ord. Granting Powerex's Second Mot. For Partial Sum. Judg., 8/24/11 ("8/24/11 Order").

II. Questions Presented on Appeal

The Department does not accurately present the first question on appeal. The issue is not whether the "wholesale sales of electricity sold by Powerex on the *Intertie power grid* constitute sales of tangible personal property under ORS

[4] The Department states in a footnote the rules were "repealed," and then "readopted," to cure a "defect" in the small business impact statement. OB, p. 5, fn. 5. As discussed below, that "defect" was the basis of Judge Breithaupt's

314.665." OB, p. 2, emph. added. It is whether electricity, in general, constitutes tangible personal property under ORS 314.665.[5]

While not identified as a question presented on appeal, the Department argues that if electricity is intangible property, "Powerex failed to introduce evidence of direct costs for each separate item of income as required by OAR 150-314.665(4)(4)." OB, pp. 42-43. Thus, a fourth question is presented:

- Did the Tax Court properly determine as a matter of fact that under ORS 314.665, the majority of the costs incurred by Powerex in carrying on the income producing activities occurred outside of Oregon (i.e., in Canada)?

III. Summary of Argument

The principal issue in this case is whether Powerex's sales of electricity constitute sales of tangible personal property under ORS 314.665. Powerex contends, and the Tax Court so held, that electricity is not tangible personal property under ORS 314.665 as supported by the history of the Uniform Division of Income for Tax Purposes Act ("UDITPA" or "Act"). Powerex's

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December 17, 2010 ruling granting partial summary judgment in favor of Powerex and invalidating the 2007 rules.

[5] The Department states in footnote 3 that it "advised the tax court in post-trial briefing" that exclusion of "bookout sales" would increase the tax assessment. OB, p. 3, fn. 2. Other than to simply cite OAR 150-314.665(2)-(C), which the Tax Court found did not apply to the years in issue, the Department does not explain on appeal why or how bookout sales should be included in the Oregon sales factor or how the exclusion of bookout sales would increase the tax assessment. In any event, Powerex disagrees, and has fully addressed this issue in its Tax Court briefing. Powerex Opening Brief, December 20, 2011 ("POB"), pp. 44-45; Powerex Post-Trial Reply Brief, February 1, 2012 ("PRB"), pp. 24-25.

position, and the Tax Court so held, is also supported by the Multistate Tax Commission ("MTC"), which treats electricity as intangible property for purposes of the UDITPA sales factor. Moreover, as the Tax Court so held, the treatment of electricity as intangible property promotes uniformity among the UDITPA states because *all* the UDITPA states which have addressed this precise issue have found electricity to be other than tangible personal property. As also found by the Tax Court, that electricity is not tangible personal property is further supported by the plain meaning of the term "tangible" and the testimony of Powerex's expert witness, Professor Peter Fisher of MIT, who opined that, scientifically speaking, electricity cannot be tangible personal property because in order to be tangible, it must be made of matter, and electricity is not composed of matter (it is composed of virtual photons, which are force particles, not matter particles).

Powerex contends, and the Tax Court so held, that because sales of electricity are sales of other than tangible personal property, none of Powerex's receipts from those sales can be sourced to Oregon. This is because, as the Tax Court held, the greater proportion of Powerex's income producing activities giving rise to those receipts were performed outside of Oregon.

With respect to the separate issue regarding the sourcing for the sales factor of sales of natural gas (which the parties stipulated to be tangible personal property), Powerex contends, and the Tax Court so held, that such

sales must be assigned to the ultimate destination state under ORS 314.665. As found by the Tax Court, sourcing such sales of tangible personal property to the ultimate destination is proper because the UDITPA sales factor is intended to reflect the market for a taxpayer's goods, i.e., where the purchasers are located. Powerex's position is also supported not only by the Department's own administrative rules, but as found by the Tax Court, it is also consistent with how the issue has been addressed and resolved by other states.

Powerex also contends the Department's amendments to OAR 150-314.665(2)-(A)(1) and adoption of OAR 150-314.665(2)-(C) in 2011 do not apply to the years in issue. This is because, and the Tax Court so held, Powerex's returns for the years issue were not open to examination as required OAR 150-305.100-(B). Alternatively, Powerex contends such retroactive application of the Department's rules is barred by ORS 305.125. (The Tax Court did not reach this alternative argument.)

Finally, the contentions of Portland General Electric ("PGE"), which submitted a lengthy *amicus curiae* brief in support of the Department, are not only without merit, but on many points are not cognizable in this appeal because PGE improperly raises issues not raised by the parties.

IV. Summary of Facts

A Joint Stipulation of Facts and Documents was filed with the Tax Court on August 31, 2011, which was accompanied by 19 Stipulated Exhibits. In

addition, over the course of the two-day trial in this matter, the parties each introduced a number of exhibits in addition to presenting witness testimony.

Powerex is an energy trading and marketing company located in Vancouver, British Columbia, Canada. Powerex is the wholly-owned power marketing subsidiary of the British Columbia Hydro and Power Authority, a Provincial Crown Corporation which operates the major hydropower-based generation and retail distribution system in British Columbia. JS ¶ 2.

During the years in issue, Powerex sold electricity and natural gas, some of which sales had contractual delivery points in Oregon. JS ¶ 9. Powerex timely filed returns with the Department for the years in issue, but did not include sales of electricity with contractual delivery points in Oregon in the numerator of the sales factor. JS ¶¶ 6, 8. Powerex made no sales of natural gas with contractual delivery points in Oregon in TYE 3/31/02 or TYE 3/31/03. JS ¶ 12. During TYE 3/31/04, Powerex made sales of natural gas with contractual delivery points in Oregon, reported and paid tax on these natural gas sales and filed a claim for refund. JS ¶¶ 12, 13. Upon audit, the Department found these sales of electricity and natural gas to be Oregon sales includable in the numerator, and concluded that such electricity (and natural gas) was tangible personal property and such sales should be sourced to the contractual delivery point. JS ¶ 22. Powerex timely appealed and paid the full deficiencies. JS ¶¶ 24-25. Following an appeals conference with the Department, the Conference

Officer upheld in part and cancelled in part the auditor's findings. JS ¶¶ 26-30. Powerex then filed a suit for Corporation Excise Tax in Tax Court.

Powerex presented three witnesses at trial.[6]

Testifying for Powerex at trial, expert witness Peter Fisher, a physicist and Professor at MIT and Head of its Division of Experimental Particle and Nuclear Physics,[7] opined how, scientifically speaking, the principles of physics demonstrate electricity cannot be considered "tangible" personal property because in order to be tangible, it must be made of matter and electricity is not composed of matter.[8] PE, 2, p. 2; P. Fisher Tr. 143:3-5; 152:14-24. This is because an electric field is composed of virtual photons and virtual photons are not matter particles because under the theory of Standard Model, a virtual photon is classified as a "force carrier" particle as opposed to a "matter" particle. P. Fisher, Tr. 163:11-166:5; PE 2, pp. 7-9, 12. Professor Fisher explained, "what is sold by Powerex Corp. is an electric field which is just a flow of virtual photons" and virtual photons are not matter particles. P. Fisher,

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[6] The testimony of two of those witnesses, Professor Fisher and Ms. Hopkins, is summarized here. The testimony of Powerex's third witness, the Department's employee Dennis Maurer, is discussed below.

[7] As of November 15, 2013, Professor Fisher will be Chair of the Department of Physics (72 faculty) at MIT.

[8] Professor Fisher's 85-page professional vita is available at PE 1 and describes his authorship on over 600 scientific publications, editing of two journals, fellowships and advisory panel roles, teaching experience since 1989, and teaching awards. Professor Fisher's expert witness report is available at PE 2.

Tr. 144:5-10, 163:11-164:4; PE 2, p. 6-9, 12. In the specific case of the transmission of power from a generating station to a load (or consumer), it is the movement of virtual photons that carries the power. Professor Fisher explained there is no net motion or transfer of electrons. P. Fisher, Tr. 161:13-162:15. A sale of electricity is not the transfer of electrons from the seller to the buyer and there are as many electrons in the relevant system after the point of transmission of energy to the purchaser as before. P. Fisher, Tr. 161-162. The Department's expert witness, Professor Joel Fajans, had no disagreement with the scientific substance of Professor Fisher's testimony on the nature of electricity.[9] Instead, Professor Fajans only disagreed as to the "appropriate level of description." Fajans, Tr. 261:14-16.

Also testifying for Powerex, Lisa Hopkins, a Transmission Position Manager on Powerex's Trading Floor during the years in issue, explained the process by which Powerex bought and sold electricity. Hopkins, Tr. 10:10-11. Each sale of electricity was made by one of Powerex's traders on the trading floor located in Powerex's Vancouver, B.C. headquarters. Hopkins, Tr. 14:13-22, 15:2-7, 21:12-14. While Powerex's traders occasionally used brokers to

[9] While the Department states "[e]lectricity is described as a flow of electrons," (OB, p. 7), as the Tax Court noted, the Department's expert Professor Fajans "agreed, that the sale of electricity is not the transfer of electrons from the seller to the buyer." Opinion, pp. 4-5.

facilitate sales of electricity, none of those brokers were located in Oregon during the years in issue. Hopkins, Tr. 61:2-16.

Powerex's sales of electricity in issue were made overwhelmingly to counterparties outside of Oregon. During TYE 3/31/02, Powerex made sales of electricity with Oregon delivery points to 43 counterparties, only five of which were located in Oregon. PE 16, p.1; Hopkins Tr. 71:25-72:13. During TYE 3/31/03, Powerex made sales of electricity with Oregon delivery points to 54 counterparties, only five of which were in Oregon. PE 16, p. 2; Hopkins, Tr. 72:19-73:14. During TYE 3/31/04, Powerex made sales of electricity with Oregon delivery points to 42 counterparties, only five of which were in Oregon. PE 16, p. 3; Hopkins, Tr. 74:1-21.

ASSIGNMENT OF ERROR

I. Response to Department's First Assignment of Error

The Tax Court correctly ruled Powerex's sales of electricity were sales of other than tangible personal property within the meaning of ORS 314.665. Opinion, p. 8. The Tax Court pointed out that ORS 314.665 is part of UDITPA, which has been adopted by Oregon. Opinion, pp. 3-4. As such, the Tax Court properly analyzed the issue under ORS 314.665 and the provisions and functions of UDITPA, including the views of the MTC and sister states that have adopted UDITPA. Opinion, p. 6. The Tax Court properly rejected cases

cited by the Department from other jurisdictions in which electricity is treated for tax purposes *other* than the UDITPA sales factor. Opinion, p. 8

II. Response to Department's Second Assignment of Error

The Tax Court correctly ruled the Department's 2011 re-promulgated OAR 150-314.665(2)-(A)(1) and OAR 150-314.665(2)-(C) could not be applied to the years in issue because the years were no longer open to examination. *See* 8/24/11 Order.

III. Response to Department's Third Assignment of Error

The Tax Court correctly ruled that sales of natural gas (stipulated by the parties to be sales of tangible personal property (*see* JS ¶ 15)) should be assigned under ORS 314.665 based upon an ultimate destination rule, instead of the contractual delivery point. Opinion, pp. 9-11.

IV. Response to Department's Fourth Assignment of Error

The Tax Court correctly found as a matter of fact the majority of the costs incurred by Powerex in carrying on the income producing activity of its wholesale electricity business are incurred in British Columbia. Opinion, p. 2.

V. Response to Department's Fifth Assignment of Error

The Tax Court correctly reversed the Department's denial of Powerex's claim for refund of Oregon Corporate Excise Taxes for the years in issue.

VI. Preservation of Error

Powerex agrees each of the errors cited above is preserved.

VII. Standard of Review

Powerex agrees this Court reviews a decision of the Tax Court for "errors or questions of law or lack of substantial evidence in the record to support the Tax Court's decision or order." ORS 305.445; OB, p. 11. However, Powerex disagrees with the Department's claim that its Fourth Assignment of Error is an *error of law.*[10] The Tax Court made this finding as a matter of *fact*, as evident not only from the Tax Court's opinion but also the excerpt found in the Department's brief. OB, p. 11.

ARGUMENT

I. The Tax Court Correctly Held Powerex's Sales of Electricity Were Sales of Other than Tangible Personal Property Under ORS 314.665

ORS 314.665 sets forth the treatment of sales of "tangible personal property" and sales of "other than sales of tangible personal property" for purposes of the sales factor of the Oregon apportionment formula. Powerex contends the Tax Court correctly held that Powerex's sales of electricity were *not* sales of tangible personal property, but were sales of "other than tangible personal property" for purposes of ORS 314.665.

The Department errs in claiming the issue is whether sales "which were delivered to purchasers at points on the Intertie power grid within Oregon, were sales of 'tangible personal property'... ." OB, pp. 12-13. There is nothing in

[10] The Department states in its Standard of Review its Fourth Assignment is an "error of law." OB, p. 12.

the record to support the Department's claim that electricity was delivered in Oregon in the physical sense, or even a claim that all the electricity in issue was "contractually delivered" in Oregon. At best, the Department can only claim, as stipulated by the parties, that "[d]uring the years at issue, [Powerex] sold electricity and natural gas, *some of which sales had contractual delivery points* in Oregon." JS ¶ 9, emph. added.

Further, the Department's claim that Powerex's sales of wholesale electricity "were delivered to purchasers at points on the Intertie power grid within Oregon" is deceptively confusing in that it is unclear whether that claim is (1) the deliveries were "within Oregon"; or (2) the purchasers were "within Oregon." As discussed by the Tax Court (Opinion, pp. 10-11), and as addressed below in Section III,[11] the distinction between the location of the delivery and the location of the purchaser is a legally significant one.

Finally, recall that Powerex has no retail customers in Oregon. Powerex is a marketer of wholesale energy products. JS ¶ 1; Opinion, p. 1. Powerex is not treated as or taxed by the State of Oregon as an Oregon public utility and Powerex was audited and taxed by the Department under the Oregon Corporation Excise Tax Law. JS ¶¶ 5, 6, 7, 21-32. As stated by the Tax Court, "[t]he tax at issue is the corporate income tax… ." Opinion, p. 1.

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[11] All internal Section references are to the "Argument" Section of the brief.

A. The History of UDITPA Demonstrates It Was Not Drafted to Apply to Marketers of Electricity

The Department's discussion of the rules of statutory construction ignores the fact that ORS 314.665 was a model statute taken verbatim from UDITPA.[12] It is important to place the issue at bench in its proper historical legal context because the language to be interpreted by the Court dates to 1957.

ORS 314.665 was adopted in 1965 by the Oregon Legislature as part of UDITPA as a means of allocating and apportioning the business income of multistate taxpayers to the State. *See* ORS 314.605 *et seq*. UDITPA was approved by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the House of Delegates of the American Bar Association in July 1959. William J. Pierce, *The Uniform Division of Income for State Income Tax Purposes*, 35 TAXES 747 (1957).

In construing a model act, it is necessary to examine the history and commentary to that model act. *See State v. Huntley*, 302 Or 418, 430-431, 730 P.2d 1234, 1241-42 (1986); *see also Jones v. Wallace*, 291 Or 11, 15-16, 628 P.2d 388, 390 (1981). It is also necessary to examine "this section of the uniform act in connection with the act as a whole." *Twentieth Century-Fox Film Corp. v. Dep't of Revenue*, 299 Or 220, 226, 700 P.2d 1035, 1038 (1985).

[12] The Tax Court specifically asked the parties to discuss the historical context of ORS 314.665. Tr. 346:4-348:15. Powerex provided this discussion to the

An examination of the Act shows its provisions were hardly intended to apply to sales of electricity.

UDITPA was intended for manufacturing businesses, not wholesale marketers of electricity. Specifically, the drafter of UDITPA, William J. Pierce, refers to the allocation and apportionment provisions of the Act as "a formula designed for manufacturing and merchandising businesses." Pierce, *supra*, at 749. Indeed, Professor Pierce points out the property and payroll factors were drafted to "emphasize the activity of the manufacturing state[s]," with the sales factor drafted to counterbalance the location of manufacturing activity by reflecting the contribution of the consumer states.[13] Pierce, *supra*, at 780. Other commentators have discussed the same purpose of the sales factor: "such sales are allocated to the states where the markets are obtained in order to balance the property and payroll factors, which are heavily concentrated in the states where manufacturing operations are located." Frank M. Keesling & John S. Warren, *California's Uniform Division of Income for Tax Purposes Act (Part II)*, 15 UCLA L.REV. 655, 675 (1968).[14]

Tax Court. POB, pp. 2-5; PRB, p. 2. The Department failed to provide any such discussion to the Tax Court, and provides no such discussion here.

[13] As discussed in the Summary of Facts, Powerex essentially has no "consumers" of electricity in Oregon.

[14] Both Pierce and Keesling & Warren have been cited by the Oregon Supreme Court in examining the history of the Act. *See Twentieth Century-Fox*, 299 Or at 227-229.

Consistent with its design for manufacturing and merchandising businesses, Section 2 of the Act was written to exclude three classes of taxpayers, one of which was public utilities. *See* UDITPA, § 2 (1957).[15] Professor Pierce explains these major classes of taxpayers were excluded from the Act for two reasons, one of which was "there appear to be better methods available for the allocation and apportionment of the income of these classes." Pierce, *supra,* at 748.[16] Under the Act, "Public utility" was defined to include "any business entity which owns or operates for public use any plant, equipment, property, franchise or license for the . . . production, storage, transmission, sales, delivery, or furnishing of electricity… ." UDITPA, § 1(f). When the Oregon Legislature adopted the Act, it retained this exemption for public utilities. ORS 314.615.[17]

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[15] Reprinted at http://www.uniformlaws.org/shared/docs/uditpa/uditpa66.pdf. Section 2 provides in full: "Any Taxpayer having income from business activity which is taxable both within and without this state, other than activity as a financial organization or public utility or the rendering of purely personal services by an individual, shall allocate and apportionment his net income as provided in this Act."

[16] The second reason is that "generally the treatment of the allocation and apportionment problem for these classes has been fairly adequately handled under existing legislation." Pierce, *supra*, at 748.

[17] ORS 314.615 provides: "When allocation and apportionment of net income from business activity required. Any taxpayer having income from business activity which is taxable both within and without this state, other than activity as a financial institution or public utility or the rendering of purely personal services by an individual, shall allocate and apportion the net income of the taxpayer as provided in ORS 314.605 to 314.675. Taxpayers engaged in

The relevance of this history is as follows: UDITPA was intended and drafted for manufacturing and merchandising businesses, neither category of which includes businesses – like Powerex's – that market wholesale electricity. In other words, its provisions were neither drafted nor intended to apply to sales of electricity. Had the drafters so intended, they most certainly would not have excluded activities such as the sales, delivery or furnishing of electricity (albeit in the strict context of "public" utilities) and would have drafted apportionment provisions to address them. They did not.

In a footnote, the Department *now* claims "Powerex was incorrectly assessed as a UDITPA company even though it is a 'public utility' as defined in ORS 314.610(6) ... ." OB, p. 14, fn. 10. The claim is neither properly raised on appeal nor properly preserved on appeal. As stated above, Powerex was neither audited nor assessed by the Department as a public utility. Indeed, the first line of the first page of the Department's brief states it "assessed excise tax… ." OB, p. 1. The Department's position is also surprising given the Department in its Opening Brief identifies its first question presented on appeal as whether wholesale sales of electricity by Power "constitute sales of tangible personal property under ORS 314.665" – *not* ORS 314.610(6). OB, p. 2. No question presented on appeal by the Department even references, much less addresses,

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activities as a financial institution or public utility shall report their income as provided in ORS 314.280 and 314.675."

ORS 314.610(6). In addition, because this claim is not raised as an Assignment of Error in the Department's Opening Brief, it cannot be raised on appeal. *See* OB, pp. 8-11; ORAP 5.45(1). Moreover, such a claim is directly contradictory to statements made by the Department to the Tax Court: "Now, we don't have a utility here ... they're not assessed as a utility. They are assessed as a seller of wholesale power." 2/29/12 Tr. 175:16-25. In the Tax Court proceeding, the Department framed this case as arising under UDITPA. Accordingly, the Department cannot now claim Powerex was "incorrectly assessed" as a UDITPA company in order to attempt to bolster its position on appeal. It is a classic example of "invited error" where the Department below in the Tax Court chose not to raise the claim. *See State ex rel. Juvenile Dep't of Multnomah County v. S.P.*, 346 Or 592, 606, 215 P. 3d 847, 855 (2009).[18]

B. The Multistate Tax Commission Treats Electricity as Intangible Property for Purposes of the UDITPA Sales Factor

The Department argues the Tax Court improperly determined the position of the MTC was that electricity was to be treated as intangible personal property for purposes of the sales factor of the UDITPA apportionment formula. OB, p. 31. Note, however, the Department never comes out and says

[18] *Amicus curiae* PGE concurs: "[t]he parties agree that Powerex was *not* assessed as a 'public utility' for purposes of UDITPA and is therefore directly subject to UDITPA. Brief on the Merits of *Amicus Curiae* ("ACB"), p. 5.

the MTC does *not* treat electricity as an intangible – it simply argues the MTC's position is not the Department's position. OB, p. 31.

The Tax Court correctly found that "[f]or the years in issue, the MTC Corporation Income Tax Audit Procedures Guideline Manual specified that electricity was to be treated as intangible personal property," and found that "[f]or the years at issue a major institution [the MTC] in the effort to achieve uniformity among the states following UDITPA principles has accepted that electricity is intangible in nature." Opinion, pp. 6-7.

Powerex, as did the Tax Court, believes it is *highly* significant that the MTC treats electricity as an *intangible* for purposes of the UDITPA sales factor.

The record is clear on this point. Stipulated Exhibit 6 consists of portions of the MTC's Corporation Income Tax Audit Procedures Guideline Manual. There, the MTC distinguishes between "Tangible vs. Intangible" property for purposes of the UDITPA sales factor. In that discussion, the MTC categorically states, "For example, water and gasoline are considered to be tangible property, while electricity and money are considered to be *intangible* property." SE 6, § 1721, emph. added. The MTC's position that electricity is treated as an intangible for UDITPA sales factor purposes should come as no surprise to the Department. The Department's own 2005 Corp Policy Issue paper – written at

the time the audit of Powerex was in progress[19] – discusses the Department's proposed treatment of electricity in the sales factor and states that one of the options under consideration by the Department is whether to "[t]reat the sale of electricity as intangible personal property like some other states *and the MTC*." *See* SE 10, p. 15, emph. added.

The opinion of the MTC that electricity is intangible for purposes of the sales factor is highly probative on this issue. Recall the MTC was created pursuant to Article VI of the Multistate Tax Compact ("Compact") and is composed of the tax administrators from all the Compact member states. *See United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 456 (1978). Among other things, the MTC was empowered under the Compact to develop and recommend proposals for increased uniformity to administer the Compact, to adopt uniform regulations and forms, and to maintain an audit program. Compact, Arts. VI-VIII.[20]

Article IV of the Compact contains UDITPA, which "allows multistate taxpayers to apportion and allocate their income under formulae and rules set

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[19] The audit in this case commenced on September 15, 2005 and Notices of Deficiency were issued dated July 21, 2006. JS ¶¶ 20-21. A copy of the Department's 2005 Corp Policy Issue paper was actually attached as Exhibit E to the Notices of Deficiency. *See* SE 10, pp. 12-16.

[20] Reprinted at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf.

forth in the Compact." *United States Steel Corp.*, 434 U.S. at 457, n. 6. As stated above, Oregon adopted UDITPA and is a member of the Compact.[21] *See* ORS 314.605; ORS 305.655.[22] Among the goals of the Compact are "promoting uniformity and compatibility in state tax systems" and "avoiding duplicative taxation." *United States Steel Corp.*, 434 U.S. at 456. Indeed, Oregon's apportionment provisions were adopted in accordance with UDITPA and the Compact in an effort to create a uniform taxing scheme among the states and avoid double taxation of multistate corporations. *See* ORS 314.605, ORS 305.655; *see also Twentieth Century-Fox Film Corp.*, 299 Or at 227.

As found by the Tax Court, it makes no sense for Oregon, a longstanding Compact member and UDITPA state, to interpret a UDITPA section, which was incorporated into the Compact, in a manner directly inconsistent with the view of the MTC on this very issue. The Department's attempted classification of electricity as "tangible personal property" for purposes of ORS 314.665, which flies in the face of its classification as intangible property by the MTC,

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[21] Elizabeth Harchenko, who became Director of the Department in 1997, joined the MTC Executive Committee in 2000; was elected Treasurer of the MTC in 2000; was appointed Chair of the MTC in 2001; and was honored twice by the MTC for her work. *See* MTC Resolution No. 03-B, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/Policy_S_and_R/2003_Resolutions/Honorary_Resolutions/Honorary%20Resolution%202003B.pdf; *see also* 2004 Wade Anderson Award, available at http://www.mtc.gov/Resources.aspx?id=2762.

[22] *See also* MTC website, available at http://www.mtc.gov/AboutStateMap.aspx.

hardly acts to create a uniform taxing scheme as contemplated in ORS 305.655 and *Twentieth Century-Fox Film Corp.* The fact the Department simply states its disagreement with the MTC's position does not detract from the value of the MTC's position in determining the issue before the Court.

C. Treatment of Electricity as Intangible for Sales Factor Purposes Promotes Uniformity Among UDITPA States

Powerex contends treating electricity as intangible property for purposes of the sales factor promotes the goal of uniformity among the UDITPA states which have considered and ruled upon this precise issue. The Tax Court held "considerations of uniformity and consistency in the application of UDITPA provisions" support the conclusion the sale of electricity is a sale of other than tangible personal property. Opinion, pp. 8-9. The Department's proposed treatment of electricity as tangible personal property under ORS 314.665 guarantees a *complete* lack of uniformity among the UDITPA states which have decided this issue, a result directly contrary to the goal of Oregon's uniform apportionment rules and the finding of the Tax Court.

Oregon's apportionment provisions were adopted in accordance with UDITPA and the Compact in an effort to create a uniform taxing scheme among the states and to avoid double taxation of multistate corporations. *See* ORS 314.605, ORS 305.655; *see also Twentieth Century-Fox Film Corp.*, 299 Or at 227. Oregon interprets UDITPA consistent with two goals: "(1) fair

apportionment of income among the taxing jurisdictions; and (2) uniformity of application of the statutes." *Twentieth Century-Fox Film Corp.*, 299 Or at 227. Furthermore, Oregon's statutory scheme expressly provides that its sales factor apportionment provisions are derived from UDITPA and "shall be so construed so as to effectuate its general purpose to make uniform the laws of those states which enact it." ORS 314.605(2).

Because "uniformity is a predicate for UDITPA's success," the statutes and rules of other UDITPA states must be considered. *Atlantic Richfield Co. v. Dep't of Revenue*, 300 Or 637, 650, 717 P.2d 613, 620 (1986).

For example, in *Atlantic Richfield*, this Court considered whether a determination by the Department should be set aside when it conflicted with rulings on the same matter in several other states. This Court determined that in order to be consistent with the fairness and uniformity goals of UDITPA, the Department's determination would be upheld only if "the application of the rule by the department 'effectuate[d] [the] general purpose to make uniform the law of those states which enact UDITPA.'" *Id.*, 300 Or at 644-45, citation omitted. In order to ensure uniformity, this Court looked to the rules and statutes of four other states (Alaska, Nebraska, Utah, and North Dakota), and determined that all four had provisions *opposite* to the Department's determination. After observing that if Oregon had been the first state to consider the issue it might have affirmed the Department's ruling, this Court concluded that "because

uniformity is a predicate for UDITPA's success," Oregon should follow suit and reach the same conclusion reached by the other states. *Id.*, 300 Or at 650.

Oregon courts have consistently attempted to achieve this goal of uniformity of law with other UDITPA states. *See Atlantic Richfield Co. v. Dep't of Revenue*, 301 Or 242, 246, 722 P.2d 727 (1986) (this Court affirmed its earlier decision, refusing to make an exception which "would undercut UDITPA's uniformity goal"); *Twentieth Century-Fox Film Corp.*, 299 Or 220 (this Court upheld the Department's rules regarding taxation of income of a motion picture company because it was the same rule used in California, another UDITPA state); *Pennzoil Co. v. Dep't of Revenue*, 15 OTR 101, 105 (2000) (Oregon Tax Court observed that when ascertaining the intent of the legislature in drafting ORS 314.605 to 314.675 (the Oregon UDITPA), the statute should be "construed … to make uniform the law of those states which enact it").

Accordingly, there is a *very* long history in the Oregon courts, including this Court, of interpreting Oregon UDITPA statutes so they are applied uniformly among UDITPA states. That goal of uniformity would be thwarted by a finding that for purposes of the *Oregon* sales apportionment factor taken from UDITPA, electricity is tangible personal property.

As observed by the Tax Court, the question of the nature of electricity for purposes of the sales factor of the apportionment formula has been discussed in

cases from two other UDITPA states. Opinion, p. 7. Those states are California and Massachusetts. Both states have found that electricity is to be treated as intangible property.

First, California treats electricity as intangible property for purposes of the UDITPA sales factor. The California State Board of Equalization ("SBE") decision in *Appeal of PacifiCorp*, Cal. St. Bd. of Equal., 2002 Cal. Tax LEXIS 469 (Sept. 12, 2002), directly addressed this issue. The SBE in *PacifiCorp*, in a lengthy and well-reasoned decision involving PacifiCorp, a Portland, Oregon-based power seller, rejected the position of the California Franchise Tax Board ("FTB") – the exact same position taken by the Department in this case – that electricity was tangible personal property for purposes of the sales apportionment factor.[23] *Pacificorp* noted the MTC Corporate Audit Guidance Manual considers electricity to be "intangible property;" that FTB treats electricity as "intangible" for purposes of Public Law 86-272; and that the Federation of Tax Administrators has stated electricity should not be considered tangible property. *Appeal of PacifiCorp*, *supra*. The SBE concluded in *PacifiCorp*, "We agree with appellant's primary contention that the sales of electricity here are 'other than sales of tangible personal property for purposes

[23] The Department's expert witness, Joel Fajans, prepared a report and testified on behalf of FTB, the losing party, in *PacifiCorp*. *Appeal of PacifiCorp, supra*. As Professor Fajans testified at trial, the report he prepared and which was

of section 25136.'"[24] *Id.* The SBE also stated, "we conclude that, for purposes of California tax law, electricity is intangible." *Id.*; *see also Searles Valley Minerals Operations, Inc. v. State Bd. of Equalization*, 160 Cal.App.4th 514, 521-22, 72 Cal.Rptr.3d 857, 862-63 (Cal. App. 2008) (finding that "for the purposes of applying California's *corporate income tax laws*…" the SBE in *PacifiCorp* "concluded that electricity was intangible…"), ital. orig.

PacifiCorp addresses the precise issue in this case – the characterization of electricity for purposes of the sales factor under UDITPA – and concludes electricity is intangible. *PacifiCorp* is a decision by a sister state which is also a member of the MTC and which has also adopted the Compact. *See* Cal. Rev. & Tax. Code §§ 38001, 38006. The sales factor under Oregon law and California law mirror each other, and both come from UDITPA and the Compact.[25] The position taken by California on this precise issue is *especially* relevant to the determination of the issue in Oregon. Indeed, the Department's own "corporation audit manual," in effect during the years in issue, relies heavily on California judicial and administrative decisions, citing to 12 such decisions in its Appendix B. *See* SE 15, pp. 8, 11, 15, 17, 22, 24, 26-29.

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admitted in this case as Department's Exhibit LL is nearly identical to the report he prepared and used in *PacifiCorp*. Fajans, Tr. 219:22-220:11.

[24] The relevant provisions of California Revenue and Taxation Code sections 25135 and 25136 mirror those in ORS 314.665(2), (4).

[25] *Id*.

The Tax Court agreed with Powerex regarding the significance of *PacifiCorp*, noting it considered this opinion "to be especially important" because of the need for "[c]onsistency in treatment of electricity" between California and Oregon because many of the sales of electricity in this case occurred in the north-south corridor that includes Oregon and California. Opinion, p. 7.

The Department continues to disagree with the *PacifiCorp* decision, stating simply it is "not precedential, nor should it be followed in Oregon." OB, pp. 25-27. The Department fails to offer any persuasive argument why a decision on this precise issue by a sister UDITPA state should not be followed. The "nonprecedential" issue apparently flows from the fact the Department, in its Tax Court briefing, provided the court with a copy of an un-official "Westlaw" copy of the decision.[26] In response, Powerex provided the Tax Court with a copy of the official *PacifiCorp* decision as found on the SBE website.[27] Powerex also provided the Tax Court with a copy of the "2002 Minutes of the State Board of Equalization" for Wednesday, April 17, 2002, stating the SBE drafted a formal opinion in *PacifiCorp*.[28] Section 5452(a) of Title 18 of the California Code of Regulations, where the SBE's Rules for Tax

[26] Department's Post Trial Brief and Response to POB, Att. 3.

[27] Available at http://www.boe.ca.gov/legal/pdf/02-sbe-005.pdf; PRB, Att. A.

Appeals are found, states a formal opinion (*PacifiCorp* is formal opinion 2002-SBE-0005) "is intended to set precedent." 18 Cal. Code of Regs. § 5452(a).

In responding to Powerex, the Department also cites to the California Court of Appeal decision in *Searles*. OB, p. 26, fn. 17. *Searles* addresses electricity under the California *sales* tax law – not under corporate income tax law, and certainly not under UDITPA. But, note *Searles* cites to the (official and precedential) *PacifiCorp* decision for the proposition that electricity "did not qualify as tangible personal property *for corporate income tax purposes.*" *Searles*, 160 Cal. App. 4th at 521-522, 72 Cal. Rptr. 3d at 862-863, emph. added.

The other UDITPA state which has addressed this precise issue is Massachusetts. Massachusetts also concluded that electricity is intangible in *Eua Ocean State Corporation et al., v. Commissioner of Revenue*, April, 24, 2006, Commonwealth of Massachusetts Appellate Tax Board, 2006 Mass. Tax LEXIS 35 (Mass. Tax 2006). The issue before the Massachusetts Appellate Tax Board was whether any of the taxpayers' sales of electricity should be treated as Massachusetts sales includible in the numerator of taxpayers' sales factors under Massachusetts' statutory apportionment provisions, which mirror in principal part ORS 314.665(2), (4). *Eua*, 2006 Mass. Tax LEXIS 35 at *35,

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[28] Available at http://www.boe.ca.gov/meetings/pubmins/041702.pdf; PRB, Att. B.

*36; *see also* 63 Mass. G.L. § 38(f). That decision was followed by Technical Information Release, TIR 06-9, dated June 12, 2006, by the Commonwealth of Massachusetts Department of Revenue regarding "The Effect of the Appellate Board's Decision in EUA Ocean State Corp. v. Commissioner of Revenue Corporation Excise." That Release states Massachusetts will follow *Eua* and states in part:

> The Board ruled in *EUA* that electricity is not 'tangible personal property' for purposes of G.L. c. 63, § 38(f). 'Electricity has no physical shape, form or geographic location. It has no height, weight, volume or other dimension by which tangible property is typically measured. Although electricity may be perceived by the senses, such as feeling a shock, it has no form or substance which can be touched. It is of a nature similar to heat, light and sound, all of which can be sensed and even measured but, given their lack of form or substance, would not be considered tangible,' the Board stated.

The Department does not address the merits of *Eua*,[29] just as it did not discuss the merits of *PacifiCorp*, and instead simply dismisses both decisions as being the work of "administrative tribunals." OB, p. 28.[30] Powerex responds

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[29] The Department attempts to undermine *Eua* by stating the decision relied on *Farrand Coal Co. v. Halpin*, 10 Ill.2d 507, 512, 140 N.E. 2d, 698, 701 (Ill. App. Ct. 1957), which was subsequently rejected in *Exelon Corp. v. Dep't of Revenue*, 234 Ill.2d 266, 280-284, 917 NE.2d 899 (Ill. 2009). OB, p. 28. As the Department itself notes, *Farrand Coal* was only one of many decisions the Massachusetts Appellate Tax Board considered and was not dispositive to the holding in *Eua*. OB, p. 27; *Eua*, 2006 Mass. Tax LEXIS 35 at *40.

[30] The Department also speculates, *without* citations to either decision, that both bodies were "reluctant" to find electricity sales to be sales of tangible personal

that decisions of tax "administrative tribunals" are routinely discussed and cited in Oregon judicial decisions addressing UDITPA, including *Atlantic Richfield Co. v. Dep't of Revenue*, 301 Or 242, in which this Court considered a decision by the SBE (*Appeal of Pauley Petroleum, Inc.*) cited by the Department. *Atlantic Richfield Co.*, 301 Or at 247, fn. 3; *see also Stonebridge Life Ins. Co. v. Dep't of Revenue*, 18 OTR 423, 437-438, n. 21 (2006) (wherein Department relied upon an SBE decision in the UDITPA apportionment formula context). Further, the Department's own corporation audit manual in effect during the years in issue relied heavily on California case law and SBE administrative decisions, citing to 12 such decisions in its Appendix B. *See* SE 15, pp. 8, 11, 15, 17, 22, 24, 26-29.

Like the decision by California in *PacifiCorp*, the decision by Massachusetts in *Eua* addresses the precise issue in this case – the characterization of electricity as either tangible or intangible property for purposes of the sales factor under UDITPA. Both states conclude that electricity is intangible.

Accordingly, all other UDITPA states which have looked at and decided this precise issue of whether electricity is tangible personal property for

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property because of issues relating to "ultimate destination theories." OB, p. 28. Arguments without authority are invalid. *Boatwright v. State Industrial Accident Comm'n*, 244 Or 140,144, 416 P.2d 328 (1966). Moreover, it is well-

purposes of the UDITPA sales factor have concluded it is intangible. As this Court stated in *Atlantic Richfield*, "uniformity is a predicate for UDITPA's success." 300 Or at 650, 717 P.2d at 620. Uniformity would be thwarted, and the success of UDITPA would not be served, by Oregon reaching a conclusion contrary to that of all the other UDITPA states (in addition to the MTC) on this precise issue.

D. The Department's Argument the "Majority of States Treat Electricity as Tangible Personal Property" Is Irrelevant and Proves Nothing

Because this case involves the interpretation of an apportionment provision of Oregon's UDITPA, Powerex argues above the treatment of electricity as an intangible for *sales factor purposes* promotes uniformity among the *UDITPA states*. Citing to *Atlantic Richfield*, the Department turns this concept of uniformity on its head and argues – far more broadly – "uniformity with other states should be considered." OB, p. 24. The Department then proceeds to cite to a plethora of non-UDITPA sources involving a variety of types of taxes.

The key to *Atlantic Richfield*, which the Department overlooks, is that in interpreting a provision of law derived from UDITPA, a court should look at other states' interpretations of the same UDITPA provision because "uniformity

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settled law that a party's argument is not evidence. *State v. Emery*, 318 Or 460, 474, fn. 22, 869 P.2d 859 (1994).

is a predicate for UDITPA's success… ." *Atlantic Richfield*, 300 Or at 650. As argued above, and as the Tax Court properly noted, the relevant inquiry regarding UDITPA states is whether a state "has the same UDITPA provisions on definitions of a sales factor as Oregon has." 2/29/12 Tr., 160:25-161:3. For the years in issue, California and Massachusetts adopted the same sales apportionment formula as Oregon. The *PacifiCorp* decision from California, and the *Eua* decision from Massachusetts, both holding electricity is intangible, are discussed above.

Instead, the Department points to the 1998 through 2007 Multistate Corporate Tax Guide CCH state surveys (the "CCH surveys") and claims the "trend in other states was to treat electricity sales as sales of tangible personal property for corporation excise tax purposes." OB, p. 25. Powerex responds the only relevant "trend" is that all UDITPA states which have decided the issue of the tangibility of electricity for apportionment purposes under UDITPA have concluded it was intangible.[31]

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31 The Department states the CCH surveys were "jointly submitted," inferring Powerex agrees with the surveys' content. OB, p. 25. SE 17 is an exhibit which the parties stipulated *only* as to authentication and admissibility. The Joint Stipulation of Facts and Documents quite clearly states "the parties do not waive objections as to the relevancy and materiality of any of the facts stipulated or the documents authenticated." JS ¶ 1. Here, as at trial, Powerex contends the CCH surveys are not relevant and not persuasive because their content is not reliable and is not focused upon the treatment of electricity in the UDITPA sales factor – the issue in this case.

Powerex in the Tax Court cited to many errors in the CCH surveys.[32] Judge Breithaupt stated he was giving "zero weight" to the CCH surveys because they constituted "summaries done by people that I don't know and that I can't question." 2/29/12 Tr., 170:4-11. The Tax Court noted the absence of "detailed analysis" in the CCH surveys which "would assist the court in determining the authoritative validity of [the CCH surveys]." Opinion, p. 8.

Instead of discussing (1) sales factor cases (2) from UDITPA states, the Department cites to two other cases. The first is *Exelon Corp. v. Dep't of Revenue*, 234 Ill.2d 266, 280-284, 917 N.E.2d 899 (Ill. 2009). OB, p. 29. *Exelon*, however, did not involve any provision of UDITPA, much less the sales factor of UDITPA. Instead, it examined the statutory definition of "retailing" for purposes of eligibility for a tax credit. *Exelon*, 234 Ill.2d at 269-270, 917 N.E. 2d at 902-903. The key difference between *Exelon* and the decisions from California and Massachusetts is that the latter two expressly found that electricity is not tangible personal property in the context of the very UDITPA statute presently before this Court.

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[32] For example, the CCH guide excerpts for 2004-2007 (i.e., after *PacifiCorp*) erroneously list California as treating electricity as tangible personal property for apportionment purposes. *See* SE 17, CCH Multistate Corporate Tax Guide, Sales Factor – Sale of Electricity and Natural Gas tables for 1998 through 2007, pp. 27, 31, 35, 39. Moreover, these charts contain no information regarding the statutory language of the states in question (e.g., does the state have an express definition of "tangible personal property" for apportionment purposes, has the state adopted the UDITPA sales factor language, etc.).

The second decision cited by the Department is *Utilicorp United Inc. v. Director of Revenue*, 75 S.W.3d 725 (Mo. 2001). OB 30. The issue there was whether, for purposes of the Missouri sales and use tax law, transformers, voltage regulators, and other equipment used between the electric generators and the place where the electricity is delivered to the customer are used directly in manufacturing within the sales/use tax exempt for purposes of equipment directly used in manufacturing. As with *Exelon, Utilicorp* did not involve any provision of UDITPA, much less the sales factor of UDITPA.

E. Contrary to *Amicus Curiae* PGE's Contentions, the Department's Construction of "Tangible Personal Property" Does Not Warrant Deference

Relying on *Atlantic Richfield*, *amicus curiae* PGE argues the Tax Court failed to give appropriate deference to the Department's construction of the term 'tangible personal property.'"[33] ACB, pp. 6-9. While unclear, it appears PGE is referring to the Department's so-called "long-standing policy" of treating electricity as tangible personal property. ACB, p. 1. The Department's "long-standing policy" is not only irrelevant to this case and not an issue in this case, it is factually suspect.

1. PGE improperly raises a new issue

PGE improperly attempts to raise a new issue in this appeal. The Department itself does not even raise any alleged "long-standing policy" in this appeal. Accordingly, this is a new issue which the *amicus curiae* may not raise on appeal.[34] *See e.g., Smith v. Multnomah County Bd. of Comm'rs*, 318 Or 302, 311, fn. 13, 865 P. 2d 356 (1994).

2. The Department's "long-standing policy" is without merit

Initially, the Tax Court found below any alleged "long-standing policy" by the Department regarding electricity was irrelevant to the case. Powerex called as a witness Dennis Maurer, a tax auditor/policy analyst for the Department. Maurer, Tr. 111:9-112:3. Mr. Maurer had prepared a "policy issue document" which purportedly set forth the Department's policy on the sale of electricity. Maurer, Tr. 114:25-115:4; 117:10-13. Mr. Maurer was questioned about that policy. Maurer, Tr. 137:14-139:2. In the midst of that questioning, the Tax Court intervened and stated it did not "really care about Mr. Maurer's testimony" because "it is a de novo proceeding" in the Tax Court.

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[33] PGE filed an Application to Appear as *Amicus Curiae* in support of the Department, accompanied by Brief on the Merits of *Amicus Curiae*. This Court accepted PGE's application by order dated July 11, 2013.

[34] To the extent PGE is arguing the 2007 rules or the 2011 rules is a reflection of the Department's alleged "long-standing policy," those rules are not applicable to this instant case for the reasons discussed above in Section I.H, *infra*.

Tr. 134:3-5. The Department's counsel also pointed out it was a de novo proceeding. Tr. 133:8-9.

Turning now to the substance of PGE's argument, PGE argues here the Department's construction of the term "tangible personal property" should be given deference because under *Atlantic Richfield*, the Department's construction of UDITPA provisions is given "some latitude" if it (1) results in reasonable approximation of the taxpayer's Oregon income and (2) effectuates the general purpose of making uniform the laws of those states enacting UDITPA. ACB, pp. 7-9. No such "latitude" is warranted under that decision.

PGE misreads *Atlantic Richfield*. The Court merely stated in *Atlantic Richfield* that if Oregon had been the "first state to address" the question at hand, it "likely would affirm the department ... for *the department has some latitude* in interpreting" the term at issue. 300 Or at 646, emph added. However, this Court rejected the Department's interpretation because other UDITPA jurisdictions previously had considered the same issue. *Id*. at 650. Likewise, in this case, Oregon is not the first state to address whether electricity constitutes tangible personal property under the UDITPA sales factor statute – California and Massachusetts already have found electricity to be intangible.

In any event, the Department's (and PGE's) proposed construction of the term "tangible personal property" does not promote uniformity – it promotes a

lack of uniformity.[35] PGE devotes 18 pages of its brief to discussing "relevant authority" comprised of four "income tax" cases, six "non-income tax" cases, and "at least 12" "non-tax" cases from UDITPA and MTC states. ACB, pp. 13-31. However, none of these 22 cases – aside from *PacifiCorp* and *Eua* – addresses the treatment of electricity in the context of the UDITPA sales factor. The two UDITPA states which have addressed this precise issue have held electricity is intangible.

Consider the citations offered by PGE. Putting aside *PacifiCorp* and *Eua,* PGE's "income tax" cases address the tangibility of electricity for purposes of eligibility for tax refunds (*Tucson Electric Power*, 170 Ariz. 145, 822 P.12d 498 (1991)) and tax credits (*Exelon*, 234 Ill.2d 266, 917 N.E.2d 899). ACB, pp. 15-21. As to the six "non-income tax" cases, even PGE concedes these cases, decided under sales and use tax law, are not as "persuasive" as the income tax cases. ACB, p. 26. (Oregon does not even impose a sales tax.) Regarding the "at least 12" "non-tax" cases involving strict product liability, even PGE concedes that "whether these non-tax cases indicate how the respective states might rule in a tax case is no doubt debatable." ACB, p, 31. PGE also notes there are "public policy reasons *not* to treat electricity as a

[35] PGE is wrong when it states there is a "split among UDITPA states in their treatment of electricity as tangible or intangible." ACB, p. 14. The two UDITPA states addressing the precise issue – California and Massachusetts – have uniformly found that electricity is intangible for purposes of UDITPA.

tangible product in the strict liability context." ACB, p. 26, emph. added. How electricity is treated in the context of a tort case certainly should have no weight on how it is treated in a tax case involving a UDITPA statute.

Regarding the only two cases on point, PGE argues the Tax Court was "too quick to defer to" *PacifiCorp and Eua* (although conceding *PacifiCorp* and *Eua* are the "only decisions on point" with this case) and suggests this Court should not rely on *PacifiCorp* and *Eua* as they are both "administrative proceedings." ACB, pp. 31-33. Powerex points out, again, that Oregon judicial decisions addressing UDITPA routinely discuss and cite administrative decisions. *See e.g., Atlantic Richfield,* 301 Or 242. In addition, Powerex points out, again, the Department's own corporation audit manual during the years in issue relied heavily on California SBE administrative decisions. *See* SE 15, pp. 8, 11, 15, 17, 22, 24, 26-29.

Finally, PGE argues treating electricity as tangible "makes more sense" because electricity sales can be "readily located." ACB, pp. 34-37.[36] PGE misses the point. Location of the "sale" is not the test for tangibility, nor does PGE cite any authority for this proposition. In any event, factual record in this case is clear the location of the "property" – electricity – cannot be "readily

[36] PGE's reliance on a single case, *Roth Drugs, Inc. v. Johnson*, 13 Cal. App. 2d 720, 724, 57 P.2d 1022, 1028 (Cal. Ct. App. 1936), is unpersuasive as it is a sales tax case and in any event, electricity cannot be readily located.

located" because electricity takes "the path of least resistance" and what "actually happens" is "all a guess." Hopkins, Tr. 95:17-18. 98:20-21.

3. The Department's "long-standing policy" is factually suspect

Assuming any such "long-standing policy" would be relevant, and also assuming PGE may raise the issue in this appeal, whether the Department even had a "long-standing policy" to treat electricity as tangible personal property is factually suspect.

First, other than stating that it has "long understood it to be the policies" of the Department, PGE provides no citations to support such a policy even existed. ACB, p. 1.

Second, in pre-trial motions regarding the validity of the Department's regulations, Powerex fully responded in the Tax Court to the Department's claims and argued that no such policy existed. *See* Powerex's Resp. to Def. First Mot. For Sum. Judg, 03/26/10, pp. 2-11; *see also* PRB, pp. 3-7.[37] Notably, the Tax Court stated: "It is not clear that there is such a long held policy and the attempts by the department to articulate that conclusion have met with difficulties ... ." Opinion, p. 9, fn. 5. The Tax Court continued: "Even if the

[37] The Department pointed to the Declaration of Dennis Maurer, select pages from the 1998-2007 Multistate Corporate Tax Guide, a 2005 Corp Policy Issue "Whitepaper," and the Department's corporation manual for this alleged policy. Department's First Mot. For Sum. Judg., 02/17/10, Decl. of Dennis Maurer ¶¶ 3-4.

department had properly articulated its position on this question, *that position could not trump the conclusion of this court based on the factors the court has considered*." *Id.*, emph. added.

4. Any "long-standing policy" of the Department is not entitled to deference under ordinary principles of Oregon administrative law

Contrary to PGE's assertions, the Department's construction of the term "tangible personal property" is not entitled to deference under ordinary principles of Oregon administrative law. ACB, p. 37.[38]

First, the Department's construction is not a "reasonable factual determination" as claimed by PGE. ACB pp. 37-38. PGE's discussion of federal tax treatment of electricity (and citations to private letter rulings and Technical Advice memoranda which PGE even concedes "do not have the same force as a precedential federal court ruling"), are inapposite. PGE does not explain how such construction is factually reasonable in light of all the evidence and testimony set forth by Powerex as to the nature of electricity. Moreover, similar to the myriad of "non-income taxes" and "non-tax cases" PGE discusses in its brief, federal treatment of electricity is irrelevant to the precise issue in

[38] Indeed, this Court is authorized to overrule an agency's interpretation if an agency has "erroneously interpreted a provision of law." *Don't Waste Oregon Com. v. Energy Facility Sitting*, 320 Or 132, 142, 881 P.2d 119 (1994), internal citations and quotations omitted (this Court declined to overrule an agency's interpretation of its own rule because such interpretation was not "shown either

this case – how electricity should be treated under a UDITPA statute enacted by the Oregon Legislature.

Second, PGE argues the Department's construction is "a reasonable construction of ORS 314.665(2)" because electricity can allegedly be "delivered or shipped." ACB pp. 40-43. PGE offers no citations for why "delivered" or "shipped" go to the definition of "tangible." In any event, there is no evidence in the record that electricity can be "shipped" and PGE has not provided any citations to support its claim. As to "delivery," the record is clear that electricity takes "the path of least resistance," and as such, there is no guarantee that electricity sold by Powerex will even pass through its contractual point of delivery. Hopkins, Tr. 95:17-18; 103:21-105:23. PGE also argues tangible property "*generally* includes" property "subject to conventional shipping arrangements." ACB, p. 43, emph. original. This was precisely the Tax Court's conclusion. The Tax Court rejected a conclusion that tangible property "must be capable of being shipped" from the locations contemplated in ORS 314.665(2), in favor of an opinion that tangible property "would be capable" of such shipment from such locations. Opinion, p. 6.

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to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law").

F. There Is No Specialized Legal Usage of the Term "Tangible"

Not giving any deference to the history of UDITPA, or the position of the MTC, or the decisions of other UDITPA states which have addressed this precise issue, the Department discusses a series of citations to rules of statutory interpretation. OB, p. 13-15. As discussed below in Section I.I, Powerex agrees with the citations which stand for the proposition that statutory terms are to be given their ordinary meaning and, to ascertain that meaning, courts typically look to dictionary definitions. OB, p. 14. However, two of the Department's citations here refer to a situation where the legislature employs a "term of art," in which case a court is to "give words that have well-defined legal meanings those meanings." OB, p. 14, citing to *State ex. rel. Dept. of Transportation v. Stallcup*, 341 Or 93, 99, 138 P.3d 9, 12 (2006); *State v. Hess*, 342 Or 647, 650, 159 P.3d 209 (2007). Neither "term of art" citation is relevant to this case. *Stallcup* addressed the legal term "appraisal" and *Doe* addressed the term "stipulation." Unlike "appraisal" or "stipulation," this case addresses the meaning of "tangible" in ORS 314.665, which is most certainly not a term that has a well-defined "legal" meaning.

Further, the Department continues to miss the point in speaking of the "term used by the legislature… ." OB, p. 15, fn. 11. The term "tangible" in

ORS 314.665 was used by the drafters of UDITPA, which the Oregon Legislature then adopted verbatim.[39]

G. The Context of ORS 314.665 Does Not Support the Department's Argument

The Department argues the "context" of ORS 314.665 supports its position. OB, pp. 17-18. The Department's argument makes no sense.

The Department errs when it says the "test for tangible personal property is whether it is 'delivered or shipped' to a purchaser within Oregon." OB, pp. 17-18. There is no such "test," and the whole purpose of the instant case is to decipher the meaning of the term "tangible" for purposes of ORS 314.665.[40]

The Department also does not present the full record. As stipulated by the parties, Powerex "sold electricity and natural gas, *some of which sales had contractual delivery points* in Oregon." JS ¶ 9, emph. added. Further, there is no guarantee that the electricity Powerex sells to a particular customer even

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[39] The Department states it is "far more likely that in 1965, when ORS 314.665 was enacted," the legislature intended "tangible personal property" to have a definition advanced by the Department – i.e., sensed and weighed, measured, and delivered at a particular location. OB, pp. 15-16, fn. 12. This completely ignores there is no separate "legislative history" behind ORS 314.665 other than the history and commentary to UDITPA, a model act. It also directly contradicts the Department's earlier statement that it has "located no legislative history relevant to the interpretation of 'tangible personal property' as used in ORS 314.665." OB, p. 12, fn. 7.

[40] The Department's statement "[o]nly sales to delivery points in Oregon are included in the numerator of the sales factor" is also a premature legal conclusion. OB, p. 18. How to source tangible personal property under ORS 314.665 is also an issue in this case.

travels through its contractual point of delivery because "electricity will take the path of least resistance." Hopkins, Tr. 95:17-18. Powerex's entire practice of scheduling electricity transmissions, identifying contractual points of delivery, and generating e-Tags represents "a very imperfect model" where what "actually happens" is "all a guess." Hopkins, Tr. 95:19-20, 98:19-99:1. In addition, some sales of electricity were ultimately scheduled for delivery at a point other than the contractual point of delivery as a result of the transmission scheduling process. Hopkins, Tr. 103:21-105:23.

H. OAR 150-314.665(2)-(A)(1) Does Not Apply to the Years in Issue

Turning to OAR 150-314.665(2)-(A)(1) defining "tangible personal property" for purposes of ORS 314.665, the Department argues the Tax Court erred when it "gave the rule no deference." OB, p. 18-20.

Powerex responds the reason the Tax Court properly did not give any deference to that rule is because the Tax Court properly ruled, on Powerex's two motions for partial summary judgment, that the (first) rule was invalid and the (second) rule did not apply to this case.

The Department's summary of the history of the rule does not present the full picture.[41] At the time Powerex filed its returns for the years in issue, OAR

[41] The Department's cursory assessment of the record warrants examination. Powerex's Complaint raised a host of legal challenges to the 2007 rules. *See* Powerex's Amend. Comp., ¶¶ 23, 27. When the Department filed a Motion for

150-314.665(2)-(A)(1) defining tangible personal property to include electricity did not exist. In 2007, while this matter was pending, the Department amended the rule. Powerex then filed its First Motion for Partial Summary Judgment, which asked the Tax Court to find the Department's 2007 amendments to OAR 150-314.665(2)-(A) (as well as a new rule OAR 150-314.665(2)-(C) addressing sales of electricity and natural gas)[42] invalid as a matter of law because they were invalidly promulgated under *Oregon Cable Telecommunications Ass'n v. Dep't of Revenue*, 237 Or App 628, 240 P. 3d 1122 (2010) (2007 amendments to OAR 150-314.665(2)-(A) and the new rule OAR 150-314.665(2)-(C) is collectively referred herein as the "2007 rules"). The Tax Court agreed with Powerex and invalidated the 2007 rules. 12/17/10 Order.

The Department then states the rules were "re-adopted" as temporary rules on December 1, 2010 (the same day of their repeal) and as permanent

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Summary Judgment in Tax Court requesting a ruling the rules were validly promulgated as a matter of law, Powerex described in greater detail some of the legal defects plaguing the Department's rules. *See* Powerex's Resp. to Def. First Mot. For Sum. Judg, 03/26/10. The Department then withdrew its motion before the Tax Court had the opportunity to rule on it. *See* 11/12/10 Ltr. from Department to Tax Court. Subsequently, and in light of the Oregon Court of Appeal's decision in *Oregon Cable Telecommunications Ass'n*, 237 Or App 628, 240 P. 3d 1122 (2010), Powerex filed its First Motion for Partial Summary Judgment requesting the Tax Court invalidate the 2007 rules. The Tax Court then granted Powerex's motion.

[42] As the Department notes, this rule had the same infirmity as OAR 150-314.665(2)-(A)(1) and was repealed and re-adopted at the same time as OAR 150-314.665(2)-(A)(1). OB, p. 19, fn. 13.

rules on March 12, 2011. OB, p. 19. Powerex then filed a Second Motion for Partial Summary Judgment ("Second Motion") with the Tax Court regarding the re-adopted rules ("2011 rules"). The Tax Court then granted Powerex's Second Motion, and held the 2011 rules did not apply retroactively to the years in issue in this case. *See* 8/24/11 Order. The Department now argues on appeal the Tax Court's ruling on Powerex's Second Motion regarding the 2011 rules was erroneous. OB, p. 20. Powerex disagrees.

1. The Tax Court properly held OAR 150-305.100-(B) precludes application of the 2011 rules to Powerex's returns for the years in issue

OAR 150-305.100-(B) provides: "Administrative rules adopted by the department, unless specified otherwise by statute or by rule, shall be applicable for all periods open to examination." The Tax Court properly ruled that as of the effective date of the 2011 rules, March 12, 2011, Powerex's returns for the years in issue were *not* open to examination.[43] *See* 8/24/11 Order.

[43] Pursuant to ORS 314.410, the statute of limitations for the Department to issue a Notice of Deficiency for TYE 3/31/02, TYE 3/31/03 and TYE 3/31/04 expired on January 13, 2006, January 13, 2007 and January 17, 2008, respectively. Powerex's Second Motion, 06/13/11, pp. 7-8. Further, as of March 1, 2011, there was no agreement in place between (1) Powerex and the Internal Revenue Service to extend the period in which an assessment of federal tax may be made for the years in issue to or beyond March 2011 and (2) Powerex and any state taxing authority to extend the period in which an assessment of state tax may be made for the years in issue to or beyond March 2011. *Id*., p. 2.

The Department argues the Tax Court erred because it ruled the phrase "periods open to examination in OAR 150-305.100-(B) could not refer to the period when a deficiency assessment is on appeal in Tax Court." OB, p. 20. The Department assumes the Tax Court erroneously equated "periods open to examination" with "periods open to adjustment" or "periods open to issuance of a notice of deficiency." OB, p. 20. The Department then argues "examination" is broader than "adjustment." OB, p. 20. The Department is wrong.

It has been the Department's stated position "open to examination" means open to review and audit by the *Department itself* and subject to the statute of limitations for issuing a deficiency notice. While testifying before the Oregon Senate Committee on Finance & Revenue in the legislative hearings on SB 498 – the bill discussed below which became ORS 305.125 – the Department Director stated in pertinent part:

> The Department has had the rule…that says that our administrative rules will apply to all periods – tax years – that are open to examination, or audit. … [F]or income tax purposes, *periods open to examination typically are three years after the return is due*, but we also have a statute that does reopen Oregon income tax returns … *for review and audit* if there's a federal adjustment … and … if there is [] even an adjustment in another state[.] … It is true that especially for very, very large taxpayers …, the statute of limitations *for audit* can be a very long one indeed.[44]

[44] Audio Recording, Senate Committee on Finance & Revenue, SB 498, March 9, 2009, at 13:46 (testimony of Elizabeth Harchenko),

The Department Director's written testimony submitted at the hearing repeats this position:

> For income tax purposes, periods are open to examination for three years after due date of a tax return or if the taxpayer's return was examined and adjusted by the IRS, for one year after the department receives notice of the adjustment.[45]

The Department states the Tax Court should have given "some deference" to the Department's interpretation and intent. OB, p. 21. The Tax Court did just that by interpreting "open to examination" consistent with the Department's previously stated position before the Legislature.

Moreover, the Tax Court was not confused nor did it "assume" that "period open to examination" was the same thing as "periods open to adjustment" or "periods open to issuance of a notice of deficiency." The Tax Court clearly stated:

> "Examination" referenced in OAR 150-305.100-(B) is a process undertaken by the department, not this court ... [and] [a]lthough under ORS 305.575 this court has jurisdiction to determine the correct amount of a deficiency and may do so on new grounds asserted by the department in some cases, *that statute does not alter the fact that the department has bound itself to apply changes to its rules only to periods open to examination by the department. Nor does ORS 305.575 make the process in this court an "examination" of a return.*

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https://olis.leg.state.or.us/liz/2009R1/2009-03-09 (last accessed 10/23/13), emph. added.

[45] Powerex's Second Motion, 06/13/11, Decl. of Eric Coffill, Ex. 10, p. 2.

8/24/11 Order, emph. added.

The Department also argues it continues to "examine" the tax years under appeal because of "availability of formal discovery in a Tax Court case." OB, p. 21. However, in the instant matter, the Department has not even alleged the discovery of any new information leading to additional adjustments to income. In any event, submitting "new or different evidence" is a far cry from applying an administrative rule promulgated and adopted in the midst of trial.

Finally, contrary to the Department's argument, whether or not the 2011 rules provide "consistent, standard treatment" or how the Department "historically interpreted" the term (OB, p. 23) is irrelevant to whether or not the years in issue were "open to examination" under OAR 150-305.100-(B).

2. ORS 305.125 also precludes application of the 2011 rules to Powerex's returns for the years in issue

The Department also argues ORS 305.125 does not preclude its application of the 2011 rules to Powerex's returns for the years in issue. OB, p. 21. Powerex disagrees.

Powerex's Second Motion raised two independent arguments why the 2011 rules did not apply to Powerex's returns for the years in issue. The Tax Court ruled in favor of Powerex on its second argument, discussed above, that OAR 150-305.100-(B) precludes application of the 2011 rules to Powerex's returns for the years in issue. Powerex's first argument, which the Tax Court

had no need to rule upon and did not rule upon,[46] contended the Department could not apply the 2011 rules under ORS 305.125. The Department now responds to that argument. OB, p. 21.

ORS 305.125 provides:

> The Department of Revenue may not apply an administrative rule in a manner that *requires a change in the treatment* of an item of income or expense, a deduction, exclusion, credit or other particular on a report or return filed by a taxpayer if:
>
> (1) The taxpayer filed the report or return by the date it was due; and
>
> (2) The treatment of the item on the report or return was *consistent with an administrative rule adopted and in effect at the time* that the report or return was filed.

Emph. added.

ORS 305.125 applies to the 2011 rules.[47] Powerex contends here, as it did in its Second Motion, that ORS 305.125 bars retroactive application of the 2011 rules to Powerex's tax returns for the years in issue because both prongs of that statute are met.

First, subsection (1) of ORS 305.125 requires that"[t]he taxpayer filed the . . . return by the date it was due…." Powerex timely filed its (three) Oregon

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[46] The Tax Court did not address this argument. 8/12/11 Tr. 107:17-21.

[47] ORS 305.125 was enacted pursuant to Senate Bill 498, 2009, chapter 494, section 2, and applies to administrative rules adopted or amended by the Department on or after September 28, 2009. Powerex's Second Motion,

Corporation Excise Tax returns for the years in issue within the applicable period set forth in ORS 314.385.[48]

Second, subsection (2) of ORS 305.125 requires that the "treatment of the item on the … return was consistent with an administrative rule adopted and in effect at the time that the ... return was filed." Powerex's Oregon Corporation Excise Tax Returns for the years in issue did not include any receipts from sales of electricity in the numerator of Powerex's Oregon sales factor.[49] Such treatment on its returns for the years in issue was "consistent" with OAR 150-314.665(4) as "in effect at the time" those returns were filed.[50]

The application of the 2011 rules to Powerex's Corporation Excise Tax returns for the years in issue would require "a change in the treatment" of electricity in the sales factor of Powerex's apportionment formula from the treatment shown on those returns. That is because *contrary* to the administrative rules "in effect at the time" Powerex filed its tax returns, the

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06/13/11, Decl. of Eric Coffill, Ex. 6. The 2011 rules have a certified effective date of March 21, 2011. *See id.*, Ex. 5, p. 1.

[48] *See* Powerex's Second Motion, 06/13/11, Decl. of Rose Low, ¶ 3; *see also id.*, Decl. of Eric Coffill, Ex. 1, pp. 2, 6, 10.

[49] *See* Powerex's Second Motion, 06/13/11, Decl. of Eric Coffill, Ex. 1, pp. 3, 7, 11; Ex. 2, p. 1.

[50] *See* Powerex's Second Motion, 06/13/11, Decl. of Eric Coffill, Ex. 4. Assuming, *arguendo*, electricity was tangible personal property for Oregon sales factor purposes, Powerex's treatment of its sales of electricity was also consistent with OAR 150-314-665(2)-(A) in effect during the years in issue. *See id*., Ex. 3.

2011 rules *require* taxpayers to treat sales of electricity as sales of tangible personal property, to source such sales for Oregon apportionment purposes based on the contractual point of delivery, and to treat bookout transactions[51] with contractual points of delivery in Oregon as Oregon sales for apportionment purposes. Because the 2011 rules would require a "change in the treatment" of electricity on Powerex's returns for the years in issue, and because Powerex's returns for those years were filed "consistent" with the Department's administrative rules in effect at the time, the 2011 rules cannot be applied to Powerex's returns for the years in issue.

The Department states Powerex fails the second prong of ORS 305.125 because it "adopted no other rule defining 'tangible personal property' prior to the 2007 rule" and as a result, "Powerex did not file its 2002 to 2004 returns consistent with any previous rule." OB, pp. 21-22.

Powerex's response is two-fold. First, the 2011 rules, not the 2007 rules are at issue. The record is clear the 2007 rules were repealed. OB, pp. 19-20; 8/12/11 Tr. 103:13-17.

Second, the Department defeats its own claim. The Department admits it had no rule defining "tangible personal property" during the years in issue. OB,

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[51] A "bookout" is an accounting adjustment made when two or more counterparties have offsetting transactions at the same time and location. In a bookout, wholesale electricity is "bought and sold and bought and sold till it

pp. 21-22. Accordingly, Powerex filed its returns consistently with the relevant existing administrative rule "in effect at the time" – OAR 150-314.665(4).

I. Electricity Is Not Tangible Personal Property Because It Is Not Composed of Matter

1. The Tax Court correctly ruled expert opinion of Professor Fisher, but not that of Professor Fajans, is persuasive on the issue of whether electricity is tangible personal property for purposes of ORS 314.665

Testifying for Powerex at trial, expert witness Professor Peter Fisher opined how, scientifically speaking, the principles of physics demonstrate electricity cannot be considered "tangible" personal property because electricity is not composed of matter. P. Fisher Tr. 152:14-24. The Tax Court's finding that electricity is not tangible personal property based on Professor Fisher's testimony is a finding of fact. Under ORS 305.445, a finding of fact is reviewed under the substantial evidence standard. Substantial evidence in the record exists "when the record, viewed as a whole, would permit a reasonable person to make that finding." *Save Our Rural Oregon v. Energy Facility Siting Council*, 339 Or 353, 373, 121 P.3d 1141, 1152 (2005), internal citations omitted.

Professor Fisher concluded in his report and in his testimony before the Tax Court that *electricity cannot be tangible personal property because in*

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ultimately forms a loop;" it is purely "financial" and no load is generated and no electricity is transmitted or delivered. L. Hopkins, 41:18-24; 42: 3-9.

order to be tangible, it must be made of matter, and electricity is not matter. PE 2, p. 2; P. Fisher, Tr. 152:14-24. In brief, Professor Fisher's opinion is based on the following:

The theory known as the Standard Model "is the cornerstone of the theory of subatomic interactions" and it "describes all the forces we know about except gravity." PE 2, p. 3, ital. orig. The particle content of the Standard Model, shown on Figure 1 of Professor's Fisher's Report (PE 2, p. 12), and its constituents, all fall into the two categories of (1) matter particles, and (2) force carriers. PE 2, p. 3. An electric field communicates force from one charged matter particle to another charged matter particle and, in this manner, an electrical field carries energy. P. Fisher, Tr. 155:12-156:10. The electric field carrying energy is composed of irreducible entities, referred to as quanta, which means that it is the smallest thing that can communicate the electromagnetic force from one place to another. P. Fisher, Tr. 156:8-10, 157:18-21. Another term for a quanta is a photon – a quanta of the electromagnetic field. P. Fisher, Tr. 158:6-8.

Thus, an electric field is composed of photons, and an electrical field is simply a very large number of photons. P. Fisher, Tr. 158:17, 160:25-161:2. More precisely, an electric field is composed of "virtual" photons because the photons have a very short existence between the point of emission to the point of absorption between electrons. P. Fisher, Tr. 160:6-14. In the specific case of

the transmission of power from a generating station to a load (or consumer), the movement of virtual photons carries the power. There is no net motion or transfer of electrons. P. Fisher, 161:13-162:15. Professor Fisher demonstrated this point with a simple illustration of the generation and flow of electrical power. PE 2, p. 15. There a power plant generates electrical power that propagates down the transmission lines to a power distribution point in the form of moving charges. However, if one drew a "dotted line" between the transmission lines and the power distribution point, the only movement across that line is by virtual photons. There is no net movement of electrons across that dotted line to the power distribution point. P. Fisher, Tr. 161:13-162:15. As explained by Professor Fisher, "what is sold by Powerex Corp. is an electric field which is just a flow of virtual photons." PE 2, p. 6.

Virtual photons are not *matter* particles. That is because under the Standard Model, a virtual photon is not made up of matter because a virtual photon is classified as a "force carrier" particle as opposed to a "matter" particle. P. Fisher, Tr. 163:11-166:5; PE 2, pp. 7-9, 12. The carrier of electricity, the virtual photon, is not considered matter (or a "matter" particle) because it does not display important properties that all matter particles have: (1) there are a fixed number of matter particles in the universe, but that is not true of force carriers (i.e., the "amount" of electricity in the universe is not fixed); (2) matter particles all have mass, but virtual photons which carry

electricity do not; and (3) matter particles, but not virtual photons, obey a special rule called the Pauli Exclusion Principle that restricts their ability to approach each other. P. Fisher, Tr. 166:20-169:13; PE 2, p. 8.

The concept of "wireless" electricity is also very relevant to the issue of whether electricity is "tangible."

Professor Fisher explained that electrical power can be transmitted wirelessly, with a simple example being a household electric toothbrush. P. Fisher, Tr. 169:20-174:4. On a larger scale, a series of experiments conducted by Professor Fisher and others at MIT beginning in 2007 transmitted electrical energy without wires over a distance of 100 inches, i.e., over 8 feet, lighting a 60 watt bulb. P. Fisher, Tr. 170:9-171:18; PE 2, p. 11. Such transmission can be through dry wood, concrete, brick and human tissue, and allows wireless power transfer to all manner of devices such as electric cards, cell phones, implanted pace makers, televisions, lamps and for charging electric cars. P. Fisher, Tr. 171:21-174:11; PE 2, p. 11. Photos of these "WiTricity" experiments are found in Powerex's evidence submitted in Tax Court. PE 2, pp. 16-17. Professor Fisher also explained his current work on a project sponsored by the Defense Advanced Research Projects Administration (DARPA)[52] to use wireless electricity technology to transfer electrical power

[52] DARPA, established in 1958, is the "primary innovation engine" of the United States Department of Defense. http://www.darpa.mil/Our_Work/.

between two spacecraft involving the International Space Station. P. Fisher, Tr. 174:12-24; PE 2, p. 11.

Professor Fisher's opinion goes to the interpretation of the language of the statute and the application of that language to electricity. In interpreting a statute, the function of the court is "not to insert which has been omitted, or to omit what has been inserted." ORS 174.010. To achieve these goals, Oregon courts consider the text and context of the statute, giving words of common usage their "plain, natural and ordinary meaning." *Portland Gen. Elec. Co. v. Bureau of Labor and Indus.*, 317 Or 606, 610-611, 859 P.2d 1143, 1146 (1993). Note that the statutory interpretation exercise in this case is not to define "electricity," because that term is not found in ORS 314.665. The statutory term to be defined is the term "tangible" personal property as used in ORS 314.665. The second part of the analysis is then to decide whether electricity falls within the definition of "tangible" as used in the statute.

Where a term is not defined by statute, the court turns to the dictionary. *See Zamani v. Dep't of Revenue*, 19 OTR 318, 320 (2007); *State v. Murray*, 340 Or 599, 604, 136 P.3d 10, 12-13 (2006). Two reputable, recognized, dictionary definitions are set forth below.

According to Webster's, "Tangible" means "a: capable of being perceived especially by the sense of *touch*: palpable" and "b: substantially real : *material*."[53]

According to the Oxford English Dictionary ("OED"), "tangible" means:[54]

> A. adj.
>
> 1. a. Capable of being *touched*; affecting the sense of *touch*; *touchable*
>
> b. (a) Hence, *Material*, externally real, objective.
>
> (b) tangible assets n. physical and *material* assets which can be precisely valued or measured.
>
> 2. That may be discerned or discriminated by the sense of *touch;* as a tangible property or form.
>
> 3. fig. That can be laid hold of or grasped by the mind, or dealt with as a fact; that can be realized or shown to have substance; palpable.
>
> 4. Capable of being *touched* or affected emotionally.
>
> B. n. A thing that may be *touched*; something *material* or objective.

Throughout all of the definitions of touch set forth above in both Webster's and the OED, there is a distinct requirement of contact between

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[53] Available at http://www.merriam-webster.com/dictionary/tangible, emph. added.

[54] Available at http://www.oed.com/view/Entry/197491?redirectedFrom=tangible#eidm, emph. added.

material objects in the verb "touch" that is explicit in tangibility. Indeed, not only does Webster's, but also the definition for "tangible" from the OED, explicitly state the touched object must be "material," which means composed of matter. Professor Fisher's testimony – *uncontroverted* by Professor Fajans as to its substance, as will be discussed below – establishes that applying dictionary definitions to the scientific nature of electricity, electricity is not and cannot be "tangible" personal property because electricity is not composed of any matter – it consists of energy (i.e., virtual photons). As Professor Fisher pointed out, if one were to conclude that virtual photons are material (thus making electricity, composed only of virtual photons, "tangible"), one would be forced to conclude that a "vacuum" itself would be tangible. That is because the quantum mechanical picture of a vacuum shows that it is actually filled with virtual particles, such as virtual photons. If virtual particles are material, a vacuum itself is "tangible." P. Fisher, Tr. 176:19-177:14.

Note how defining electricity as intangible is also entirely consistent with, and the only definition that makes sense, when it is undisputed that electricity can be transmitted wirelessly. It defies common sense to think of something as "tangible" when it can wirelessly travel significant distances (over 8 feet in Professor Fisher's experiments) through dry wood, concrete, brick and human tissue, to light a 60 watt bulb. P. Fisher, Tr. 170:9-171:18; PE 2, p. 11**.** Electricity will soon travel wirelessly in space to provide electricity to satellites

in connection with the International Space Station. Electricity can be transmitted wirelessly to charge electric cards, cell phones, implanted pace makers, televisions, lamps and for charging electric cars. Query, how can something (virtual photons) that can travel wirelessly through the air (or space, as in the case of the International Space Station) and travel though solid objects such as brick, concrete and people, be considered to be "tangible?" The words in a statute are not to be interpreted to "absurd results." *State v. Vasquez-Rubio,* 323 Or 275, 282-283, 917 P.2d 494, 497 (1996); *see also McKean-Coffman v. Employment Div.*, 312 Or 543, 549, 824 P.2d 410, 414 (1992). Powerex respectfully submits that it would indeed be an "absurd result" to conclude something that invisibly travels through the air (and space) and through solid objects, leaving them all undisturbed, is "tangible" in any sense of that term.

The Tax Court expressly adopted the testimony of Professor Fisher over that of Professor Fajans, who was the Department's expert witness:

> The testimony of taxpayer's expert witness [Professor Fisher] supports a finding that electricity does not involve the transfer of something that is tangible or a 'thing' that is delivered to a purchaser. Rather, according to that testimony, the transmission of electricity involves transmission of a force occurring by reason of the operation of 'virtual photons,' that have no mass. (Transcript at 161-163.) Importantly, the testimony of taxpayer's expert established, and the department's witness agreed, that the sale of electricity is not the transfer of electron from the seller to the buyer. There are as many electrons in the relevant

> system after the point of transmission of energy to the purchaser as before. (*Id.* at 161-62: 293.)

Opinion, at pp. 4-5.

As noted by the Tax Court, what is interesting about Professor Fajans' testimony is that "[t]he expert witness for the department did not contest any of the conclusion or positions of the expert witness for taxpayer." Opinion, p. 5. Indeed, Professor Fajans testified that:

- "everything that he [Professor Fisher] said about photons is true…" Fajans, Tr. 261:15-16;
- "it is true in this photon picture that the power flows outside the wires…" Fajans, Tr. 266: 15-18;
- "Electrical energy can certainly be transmitted wirelessly…" Fajans, Tr. 287:23-24, 288:4-6;
- [regarding Professor Fisher's testimony] "I think the physics, the exact description of terms, is not in dispute. The exact – physics terms as used in physics and the physics understanding of those terms is not in dispute in this case." Fajans, Tr. 289:6-9;
- "Do you agree that a photon is a force carrier? Yes." Fajans, Tr. 293:21-24;
- "Do you agree that a photon is not a matter particle? Yes." Fajans, Tr. 293:25-294:2.

However, Professor Fajans believes that Professor Fisher has "chosen the wrong level of description to talk about the facts at hand, the problem at hand," which Professor Fajans believes "is electrical power over transmission lines." Fajans, Tr. 259:23-260:1. So, "*it is true that everything that he [Professor*

Fisher] said about photons is true, it's not an appropriate level of description." Fajans, Tr. 261:14-16, emph. added.

Accordingly, since there is no argument by the Department and Professor Fajans that Professor Fisher's description of all electricity consisting of virtual photons is wrong, the issue before the Tax Court was partially a choice of whose so-called "level of description" – Fisher's or Fajans' – is the correct description of electricity in deciding whether it is tangible or intangible for purposes of ORS 314.665.

On this issue, the Tax Court squarely came down on the side of Powerex, choosing the testimony and position of Professor Fisher over Professor Fajans:

> [T]he witness for the department simply opinioned that taxpayer's witness had chosen the wrong level of description for the problem at hand. This expert merely concluded that the question was to be differently analyzed when considering sales of electricity on the power grid—his viewpoint—as opposed to the level of particular physics—the viewpoint of the expert for taxpayer.
>
> The problem with the approach of the witness for the department is that *there is no indication in the statute that the answer to the question of whether a sale is of tangible property changes depending on the level of analysis*. The court therefore can give no credit to the ultimate conclusion of the witness for the department.

Opinion, p. 5, emph. added.

Powerex submits the Tax Court correctly held that Professor Fisher's analysis (or level of description) is the right one. In defining the statutory term

"tangible" in ORS 314.665, a court should be looking for a complete definition. A definition should be "every and only." A definition must be applicable to everything to which the defined term applies, i.e., not leave anything out, and to nothing else, i.e., not include any things to which the defined term would not truly apply. Where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all. ORS 174.010.

As noted by the Tax Court, there is no limitation upon the word "tangible" in ORS 314.665, i.e., it applies to all tangible personal property. Opinion, p. 5. A court should not define a statutory term – here "tangible" – by looking to the context of the term in a particular case. Instead, a court first defines a statutory term, and then applies that definition in the context of a particular case.

Professor Fajans' proposed approach is that electricity is "tangible" personal property because he argues the electricity *in this particular case in this particular context* is "tangible." As found by the Tax Court, the problem with this approach is that it ignores what it means to define something and to define "tangible" in ORS 314.665. All (i.e., every) electricity falls within the definition of "tangible" when electricity is defined as consisting of virtual photons because a virtual photon is classified as a "force carrier" particle as opposed to a "matter" particle and, accordingly, is not "material" and not "tangible." Remember that Professor Fajans does not disagree with this

definition. What the Department offers via Professor Fajans is a contextual definition in the context of the specific facts of this specific case which involves, in Professor Fajans' words, only electricity in the "power grid." In other words, even though all electricity is composed of virtual photons, and even though only *some* electricity is found in Professor Fajans' "power grid," the Department asks this Court, as it did the Tax Court, to conclude *all* electricity is tangible. So defining electricity as "tangible" for purposes of falling within ORS 314.665 would improperly lead to "absurd results." *Vasquez-Rubio*, 323 Or at 282-283; *see also McKean-Coffman*, 312 Or at 549. Even though all electricity has the same composition, the Department's contextual approach leads to the result that some electricity would be classified as tangible property and some would be classified as intangible property under a single term "tangible" in ORS 314.665.

If the electricity in issue in this case is "tangible" because it is in the context of the "power grid," how can it be said that wireless electricity passing through solid walls, bricks, concrete, or passing through space at the International Space Station, is "intangible? It cannot, because there is only one definition of "tangible" under the statute. All electricity is the same – it all consists of virtual photons without matter. How can some electricity, consisting of virtual photons without matter, suddenly become "tangible" to Professor Fajans and the Department simply by virtue of being found in the context of the

"power grid"? An apple is always an apple. No matter how many of them there are, and no matter where it is located or its size, it is still an apple – that is what it means to define "apple," to identify what is common to things and not found in other things.[55]

What is common to all electricity is that it is composed of non-material virtual photons. It is not common to all electricity to find it in the "power grid."

Another problem with Professor Fajans' approach is that many things can be sensed, measured and stored, and just because something can be sensed, measured or stored does not mean it is "tangible." OB, pp. 31-32, 36. Many of

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[55] Powerex offered the following example in its briefing to the Tax Court: Assume a corporation in Portland went into the business of installing devices underground at traffic signals which were capable of charging electric vehicles as they waited, momentarily immobile at "red" traffic lights, and then provided, for a fee, those charging services to the owners of electric vehicles. Under the Department's claim that electricity must be classified as tangible or intangible for purposes ORS 314.665 in context, it would appear that even the Department would concede this "wireless" context, involving low volumes of electricity sales, would result in sales of "intangible" electricity, even while the Department would argue the electricity in this case before this court would result in "tangible" electricity. Both results would be correct under the same definition of "tangible" under the Department's theory that it is appropriate to look at differing levels of descriptions to define a term. Powerex contends the Department's approach would lead to a completely absurd result. It is as an absurd result as concluding – by applying differing levels of description – whether selling shoes is a sale of tangible property under ORS 314.665 depends upon whether one sells one pair of shoes or thousands of pairs of shoes. If shoes are tangible personal property for ORS 314.665, they are tangible personal property in all contexts. That result does not change when one is speaking of sales of electricity as opposed to shoes – all electricity is definitionally the same just as all shoes are definitionally the same. That's what it means to "define" shoes or to "define" electricity.

the characteristics Professor Fajans ascribes to electricity as indicative of tangibility are simply incorrect. For instance, measurement is not indicative of tangibility, e.g., IQ can be measured. *See* DE LL, p. 6. Being "subject to the laws of nature" is hardly indicative of tangibility, e.g., light and sound are equally subject to the laws of nature and no one would argue they are tangible. *See id.*, p. 7. Being able to "store" electricity is not indicative of tangibility, e.g., memories can be stored. *See id.* Being able to "feel" electricity is not indicative of tangibility, e.g., one can feel heat and cold, as well as emotions, and no one would argue they are tangible. *See id.*, p. 10. Despite the fact humans "do not normally see electricity directly," it is scant evidence of the "tangible" nature of electricity to point out that perhaps eels and some other sea creatures can "see" electricity through their "ampullae of Lorenzini," a fishy organ "similar to an eye." Fajans, Tr. 308:1-309:10; DE LL, p. 10. "Taste" is hardly indicative of tangibility; one can taste the "sweetish taste" of hydrogen sulfide. *See* DE LL, p. 12; *see also* Center for Disease Control, "Hydrogen Sulfide, Public Health Statement."[56] Finally, "hearing" electricity is hardly indicative of tangibility (aside from the fact Professor Fajans concluded that "under normal circumstances you cannot hear electricity directly") because one

[56] Available at http://www.atsdr.cdc.gov/toxprofiles/tp114-c1.pdf.

can hear sounds, and no one would argue sound is tangible.[57] *See* DE LL, p. 12, emph. added.

The Department's response to Professor Fisher's testimony is brief and difficult to follow, but appears to be based on the claim that because a website of a company that he and others had started does not mention "virtual photons," then Professor Fisher's testimony, and the Tax Court's findings regarding virtual photons, must be rejected. OB, pp. 35-36. The argument is specious, and the Tax Court's finding as to the nature of electricity involving virtual photons is correct.[58]

The Department also argues Powerex was "not selling merely the 'virtual photons'" and its wholesale customers "purchased the flowing electrons." [59]

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[57] As to "sensed," the Department cites in a footnote to death by electrocution. OB, p. 32, fn. 22. The example proves nothing. Radiation certainly can cause death. *See* U.S. Nuclear Regulatory Commission, "Frequently Asked Questions (FAQ) About Radiation Protection," available at http://www.nrc.gov/about-nrc/radiation/related-info/faq.html (last accessed 10/23/13). Also, common sense dictates that exposure to extremely high temperature causes death. Death by electrocution does not make electricity tangible, just as death by radiation poisoning or heat exposure does not make radiation or heat tangible.

[58] While the Department claims the Tax Court was "incorrect in saying that the department's witness agreed with Powerex's witness," as demonstrated by Professor Fajans' testimony identified above, "[t]he expert witness for the department did not contest any of the conclusion or positions of the expert witness for taxpayer." Opinion, p. 5.

[59] The Department states that "Powerex's sales income comes from selling a precisely measured and quantified product ...." OB, pp. 33, 34. That is a misstatement. The Department's witness, Stephen V. Fisher, testified that

OB, p. 34. As discussed above, and as found by the Tax Court, the Department focuses on the wrong level of defining "electricity." To define something means to find what is common to all instances of that thing. The only thing common to all electricity is virtual photons – electrons are irrelevant to the definitional exercise present before this Court. "[W]hat is sold by Powerex Corp. is an electric field which is just a flow of virtual photons." PE 2, p. 6. Moreover, as the Tax Court noted, Professor Fajans "agreed, that the sale of electricity is not the transfer of electrons from the seller to the buyer." Opinion, pp. 4-5. Professor Fajans testified it is both an "accurate perspective" and a "valid perspective" that electrical energy, including in the power grid, is transferred by virtual photons. Fajans, Tr. 300:24-301:4. Professor Fajans also testified that "[e]lectrical energy can be transmitted without using electrons." Fajans Tr. 288:20-22. Professor Fisher explained that in the case of the transmission of power from a generating station to a load (or consumer), it is the movement of virtual photons that carries the power; there is no net motion or transfer of electrons. P. Fisher, Tr. 161:13-162:15.

The Department also refers to electricity as a "product" in interpreting ORS 314.665.[60] OB, pp. 33-34. The reference is not proper and is not relevant.

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while "lines" such as the lines that terminate at Malin are metered, there is no metering of individual transactions going through line. S. Fisher, Tr. 394:1-10.

[60] One such reference is coupled with the phrase, "just as is natural gas," which the Department then goes on to state, in a footnote, and without citation to the

First, the term "product" is not found in ORS 314.665, the statute being interpreted. Second, Powerex does not concede electricity is a "product," nor has the Department cited to any evidence in the record that electricity is a "product," whatever that term means to the Department. Finally, the Tax Court made no ruling regarding electricity as a "product."

II. Assuming the Tax Court Properly Held Sales of Electricity as Sales of Other than Tangible Personal Property, the Tax Court Correctly Found the Greater Proportion of the Costs of Performance Were Outside Oregon

Powerex argued to the Tax Court that under ORS 314.665(4) and OAR 150-314.665(4)(2), no "income producing activity" was performed in Oregon. POB, pp. 23-27; PRB, pp. 17-18. In the alternative, Powerex argued that a greater proportion of its income producing activities are outside Oregon under ORS 314.665(4), based on costs of performance. POB, pp. 27-32. The Tax Court ruled in favor of Powerex:

> The court finds *as a matter of fact,* based on the testimony and other record made in this case, that the majority of the costs incurred by taxpayer in carrying on the income producing activity of its wholesale electricity sales business are incurred in British Columbia. That record includes evidence from taxpayer as to direct costs incurred in British Columbia in connection with the sales in question and an absence of evidence from Defendant Department of Revenue

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record, "cannot be seen, tasted, touched or heard." OB, p. 34, fn. 23. There is absolutely nothing in the record to support such speculations about the nature or characteristics of natural gas, and the Department may not unilaterally add facts to the record in hopes of bolstering its case.

> (the department) that direct costs of performance of the transactions giving rise to the transactions in question occurred at any other location.

Opinion, p. 2, emph. added.

In response, the Department's two-page argument claims that "as the department has argued in *AT&T Corp. v. Department of Revenue,* S060150 (under advisement)" the key is to look at "direct costs," and that "Powerex failed to present evidence of direct costs." OB, pp. 42-43. Powerex expresses no view here regarding the Department's position in another case (i.e., *AT&T Corp.*), but contends it certainly *did* present evidence of "direct costs."

Powerex's sales of electricity are properly characterized as sales "other than sales of tangible personal property," and applying the standard under ORS 314.665(4) and OAR 150-314.665(4)(2), the Tax Court properly found that Powerex incurred the costs outside of Oregon. As the Tax Court noted, this is a finding of "fact." Opinion, p. 2. A finding of fact is reviewed under the substantial evidence standard. ORS 305.445. Substantial evidence in the record exists "when the record, viewed as a whole, would permit a reasonable person to make that finding." *Save Our Rural Oregon*, 339 Or at 373.

Under ORS 314.665(4) and OAR 150-314.665(4), receipts from Powerex's sales of electricity are Oregon sales for apportionment purposes only in two circumstances: if (1) the income producing activity which gave rise to the receipts is performed *wholly within Oregon*; or (2) the income producing

activity which gave rise to the receipts is performed both *in and outside Oregon* and a greater proportion of the income producing activity is performed *in Oregon* than in any other state, based on costs of performance. The Department's rule defines "income-producing activity" as the "transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gains or profit." OAR 150-314.665(4)(2). Under OAR 150-314.665(4)(4), "costs of performance" means "direct costs."

Powerex contends there were three, and only three, direct costs of performance associated with its income producing activity giving rise to the receipts in issue in this case: (1) direct labor costs; (2) direct property costs; and (3) direct brokerage fee costs. Each was presented to the Tax Court, which found as a matter of fact all such costs were outside of Oregon.

- **Direct Labor Costs – None in Oregon.** *None* of the labor costs related to Powerex's sales in issue were in Oregon because Powerex does not have any employees in Oregon.[61] All of Powerex's employees who sold electricity were located in Vancouver, British Columbia, during the years in issue. Hopkins, Tr. 14:13-18.

- **Direct Property Costs – None in Oregon.** *None* of the property costs associated with Powerex's wholesale power marketing business during the years in issue was in Oregon because Powerex had no property whatsoever

[61] Powerex filed its Oregon Corporation Excise Tax Returns showing zero Oregon payroll factors for the years in dispute. SE 1, p. 3; SE 2, p. 3; SE 3, p. 3. The Department's auditor accepted those numbers and shows a zero Oregon payroll factor for all such years. *See* SE 10, p. 6.

in Oregon.[62] Recall that all of Powerex's energy trades are made on Powerex's Trading Floor, which was located in Vancouver, British Columbia, during the years in issue.[63] Hopkins, Tr. 14-15.

- **Direct Brokerage Fee Costs – None in Oregon.** *None* of the brokerage fees paid by Powerex in connection with the sales in issue are Oregon costs of performance. Powerex's traders occasionally worked with third-party brokers in making electricity sales. Hopkins, Tr. 61:2-61:11, 81:8-12. The brokerage fees were paid by Powerex in connection with transactions entered into by Powerex traders on its Trading Floor in Vancouver. None of the brokers used by Powerex during the years in issue were located in Oregon. PE 9.

The Department claims Powerex "failed to meet its burden of proving that the costs of performance were not greatest in Oregon" because it "presented only indirect and lump sum costs." OB, p. 43. The Department states the "desk and computers on the trading floor, as well as the headquarters building" and the salary of the "traders" are "all indirect, sunk costs." *Id*.

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[62] Powerex filed its Oregon Corporation Excise Tax Returns showing zero Oregon property factors for the years in issue. SE 1, p. 3; SE 2, p. 3; SE 3, p. 3. The Department's auditor accepted those numbers and shows a zero Oregon property factor for all such years. *See* SE 10, p. 6.

[63] The property element of that business, including the property associated with the Trading Floor in Vancouver, is included in Powerex's total property factor. For each of the years in issue, a portion of these numbers represents costs attributable to use of the Vancouver office facilities (i.e., the Trading Floor itself) and the desks, computers, and other equipment used by Powerex's traders engaged in electricity sales on the Trading Floor. *See* PE 11, PE 3; *see also* Hopkins, Tr. 16:13-17:23. The point to be made here is that *whatever* portion of those total property factor figures are attributable to the activity of the Vancouver trading operations giving rise to the sales in issue, it is proportionately greater than the portion appropriately allocated to Oregon (i.e., zero), so *none* of that property cost is attributable to Oregon. That is because none of Powerex's property is "Oregon" property.

"Direct costs" appears only in OAR 150-314.665(4)(4), not in any statute. Administrative rules are to be read reasonably. *See Cook v. Oregon*, 197 Or App 125, 133, 104 P.3d 1153, 1157-1158 (2005); *see also Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P.2d 119 (1994). The Department's approach is not reasonable.

For example, consider the employees on the Trading Floor located in Vancouver involved in trading operations and trading functions for the Western United States. The language of OAR 150-314.665(4)(4) does not require that for any payroll to be a "direct cost," it must be incurred prior to and cease immediately after completing a sale. Is the Department suggesting under its reading of "direct costs" that in order for a trader's salary to constitute a direct cost, Powerex *would have to hire that trader, have him make the single transaction, and then terminate him*? Similarly, is the Department suggesting that in order for the property costs of the desks and computers on Powerex's Vancouver Trading Floor to constitute direct costs, Powerex *would have to buy all that equipment before each sale and then sell all that equipment after each sale?* It is simply not reasonable to interpret "direct costs" in OAR 150-314.665(4)(4) in such a granular "but for" fashion.[64]

[64] Determining "direct costs" this way is not "consistent with generally accepted accounting principles" and not "in accordance with accepted conditions or practices in the trade or business of" Powerex, or any taxpayer for that matter. Common sense dictates businesses could not operate in this fashion.

It is also patently unreasonable that no portion of the rent for the building in which Traders make a particular sale, no portion of the internet service and power used by the Traders to research prices for a particular sale, and no portion of the telephone service required and used by a Trader to make a particular sale are "direct costs" of that particular sale. As to the labor costs, the record is uncontroverted that of all of Powerex's energy traders, a certain group bore primary responsibility for the sales in issue. Hopkins, Tr. 78:19-23. Again, it is patently unreasonable that no portion of these individuals' salary is rightly considered a direct cost, remembering that 100% of that cost is incurred outside Oregon (in Vancouver) in any event.

Regarding brokerage fees, the Department argues Powerex improperly presented this information on direct costs in "aggregate form." OB, p. 43. On the contrary, there is ample evidence in the record showing that Powerex paid a brokerage fee for a given sale – thus satisfying even the most granular, most unreasonable reading of "direct costs" by the Department under OAR 150-314.665(4)(4). Numerous Confirmation Agreements record the involvement of a particular broker (and consequently a particular broker cost) in a particular sale. *See, e.g.*, Confidential DE H, pp. 1-2, 4-11; Confidential DE I, pp. 17-18, 22-23, 25-33, 38, 40-42, 47, 50, 55-57,59. It is undisputed each of these brokers was located outside of Oregon. PE 9. It is also undisputed that each of these brokers was paid a fee for his or her services in a particular transaction.

Hopkins, Tr. 61:2-6. Thus, these were "direct costs" even under the narrowest, most unreasonable reading of the regulation, *and still all such costs were outside Oregon.*

In short, as the Tax Court found "as a matter of fact," (Opinion, p. 2), Powerex's evidence shows that a "greater proportion of the income producing activity" was performed outside of Oregon. This is because while Powerex has identified three direct costs of performance outside of Oregon, *the Department has not identified a single direct cost in Oregon.* Thus, simple logic dictates that any cost greater than zero (in Oregon) is a "greater proportion" (outside Oregon). Just as in the Tax Court, the Department makes no affirmative showing and presents no evidence regarding costs of performance. It simply "raises the bar" of the burden of proof to argue that whatever evidence Powerex presented to the Tax Court, Powerex nevertheless "failed to meet its burden of proving that the costs of performance were not greatest in Oregon." OB, p. 43.

III. If, *Arguendo,* the Tax Court Erred in Holding Sales of Electricity Are Sales of Other than Tangible Personal Property, and Regarding Sales of Natural Gas, Such Sales Must Be Sourced to the Ultimate Destination Under ORS 314.665

A. The Text of ORS 314.665 and OAR 150.314.665(2)-(A)(4) Does Not Require Sourcing Sales of Tangible Personal Property to the Contractual Delivery Point

Regarding the sourcing of sales of natural gas (which parties *stipulated* to be tangible personal property), the Tax Court rejected the Department's position

regarding contractual point of delivery and held an ultimate destination rule should be followed as to these sales of natural gas. Opinion, pp. 9-11.[65]

The Department argues the Tax Court's determination of an ultimate destination rule was "legal error." OB, p. 38. The Department claims neither ORS 314.665 nor OAR 150.314.665(2)-(A)(4) supports an ultimate destination theory.[66] OB, p. 39. Powerex disagrees and contends the Tax Court properly held that sales of natural gas should be assigned based on the ultimate destination of the tangible property. Opinion, pp. 9-11.

1. The UDITPA sales factor is intended to reflect the market for a taxpayer's goods

As stated by the Tax Court:

> The purpose of the sales factor in apportionment is to recognize the contribution of the market state to the income producing process. Hellerstein, 1 *State Taxation* at ¶ 8.06[2]. On the facts of this case that purpose is clearly best served by looking beyond the point of contractual delivery where the purchaser is located in another state.

Opinion, pp. 10-11.

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[65] If this Court overrules the Tax Court and determines that electricity is tangible personal property, then sales of "tangible" electricity also must be assigned to the "destination state" under ORS 314.665 and OAR 150-314.665(2)-(A). As is clear from the record, the ultimate destination of practically all the sales of electricity in this case is not Oregon (but California). PE 16, pp. 1-3; Hopkins Tr. 71:25-72:13, 72:19-73:14, 74:1-21; POB pp. 41-43.

[66] If the Department is arguing Powerex is attempting to source its sales based on "the subsequent sale from Powerex's purchaser to its buyer" (OB, p. 38,) the Department is wrong. Powerex has not advanced such a position.

With few exceptions, the record is uncontroverted that the market for Powerex's sales of natural gas is not in Oregon.[67] None of these sales of natural gas were made to Oregon utilities. JS ¶ 16. All purchasers of Powerex's natural gas at issue in this case were located outside of Oregon. SE 8. In reaching its holding, the Tax Court properly found the purpose of the sales factor in the apportionment formula, which is to recognize the contribution of the market state, is "clearly best served by looking beyond the point of contractual delivery where the purchaser is located in another state." Opinion, pp. 10-11.

Where the issue is the assignment of receipts for purposes of the UDITPA sales factor, it is important to begin by inquiring whether including those receipts accomplishes the sales factor's basic function, namely, reflecting the market for the taxpayer's goods. "The primary reason for including the sales factor [was] to give weight to the obtaining of markets" and therefore "balanc[e] to some extent the property and payroll factors which are apt to be heavily concentrated in the state or country where the production or manufacturing operations are located." Keesling & Warren, *supra*, at 670; *see*

[67] Powerex made no sales of natural gas with contractual delivery points in Oregon in either TYE 3/31/02 or TYE 3/31/03. JS ¶ 12. During TYE 3/31/04, Powerex made sales of natural gas with contractual delivery points in Oregon. On its 2003 Oregon Corporation Excise Tax Return, Powerex reported and paid tax on these natural gas sales. JS ¶ 12. Powerex subsequently filed a claim for

also Arthur D. Lynn, Jr., *The Uniform Division of Income for Tax Purposes Act Re-Examined*, 46 Virginia L.REV. 1257, 1262 (1960); *Appeals of Pacific Telephone and Telegraph Co.*, Cal. St. Bd. of Equal., 1978 Cal. Tax LEXIS 91 (May 4, 1978); *Appeal of The Babcock and Wilcox Co.*, Cal. St. Bd. of Equal., 1978 Cal. Tax LEXIS 118 (Jan. 11, 1978).[68]

UDITPA "provides that sales of tangible personal property should be apportioned to the state or country of *destination*." Keesling & Warren, *supra*, at 671, emph. added. Indeed, the rationale behind the "destination" concept for the sales factor is that it was believed by the drafters of UDITPA "that the contribution of the consumer states toward the production of the income should be recognized by attributing the sales to those states." Pierce, *supra*, at 780.

It would turn upside down the concept of the sales factor, a factor which is intended to represent the market element of a taxpayer's activities, to interpret the sales factor by looking to "delivery" instead of the ultimate destination. However, "delivery" is not even the principle proposed by the Department here. Rather, the Department proposes looking to "contractual points of delivery" as the test for sourcing such sales. OB, p. 37. Consider the

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refund to remove its natural gas receipts from its 2003 returns. JS ¶ 13. The Department disallowed Powerex's claim for refund. JS ¶ 14.

[68] We note the Department includes a number of SBE decisions in its corporation audit manual, including decisions which interpret comparable Oregon apportionment factors. *See, e.g.*, SE 15, p. 28 (SBE decision in *Universal C.I.T. Credit Corporation*).

policy implications of this proposal; taxpayers easily could craft contracts to escape taxation of sales merely by agreeing between themselves to a more tax-favorable and fictional "contractual" delivery point.

2. Powerex's sales of natural gas must be sourced outside of Oregon using the ultimate destination rule

Under ORS 314.665(2), sales of tangible personal property are deemed to take place within Oregon if:

> (a) The property is delivered or shipped to a purchaser, other than the United States Government, within this state regardless of the f.o.b. point or other conditions of the sale; or
>
> (b) The property is shipped from an office, store, warehouse, factory, or other place of storage in this state and (A) the purchaser is the United States Government or (B) the taxpayer is not taxable in the state of the purchaser.

Similarly, OAR 150-314.665(2)-(A) (2004) in effect during the years in issue provided in pertinent part:

> (1) Gross receipts from the sales of tangible personal property (except sales to the United States Government; see OAR 150-314.665(2)-(B)) are in this state:
>
> (a) If the property is delivered or shipped to a purchaser within this state regardless of the f.o.b. point or other conditions of sale; or
>
> (b) If the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and the taxpayer is not taxable in the state of the purchaser.
>
> (2) Property shall be deemed to be delivered or shipped

> to a purchaser within this state if the recipient is located in this state, even though the property is ordered from outside this state.
>
> Example 1: The taxpayer, with inventory in State A, sold $ 100,000 of its products to a purchaser having branch stores in several states including Oregon. The order for the purchase was placed by the purchaser's central purchasing department located in State B. $25,000 of the purchase order was shipped directly to purchaser's branch store in Oregon. The branch store in this state is the "purchaser within this state" with respect to $ 25,000 of the taxpayer's sales.
>
> (3) Property is delivered or shipped to a purchaser within this state if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state.
>
> Example 2: The taxpayer makes a sale to a purchaser who maintains a central warehouse in Oregon at which all merchandise purchases are received. The purchaser reships the goods to its branch stores in other states for sale. All of taxpayer's products shipped to the purchaser's warehouse in Oregon is property "delivered or shipped to a purchaser within this state."

As explained above, Oregon is a UDITPA state. The "delivered or shipped to a purchaser within this State" language in ORS 314.665(2) is the standard language found in the UDITPA sales factor provisions. The question under Oregon law then is whether "within this state" modifies "delivered" or "purchaser," i.e., must the item be delivered in Oregon, or must the purchaser be in Oregon?

The Department itself already has answered this question. In its Conference Decision Letters, the Department has stated that it was the

"department's policy to assign [sales of tangible personal property] to the … *destination state*." SE 13, p. 13; SE 14, p. 5, emph. added. If the Department treats natural gas as tangible personal property, then it must also assign such sales to the "destination state" under ORS 314.665 and OAR 150-314.665(2)-(A), as it admittedly does with sales of other tangible personal property (e.g., raw materials and automobiles). *See* SE 13, p. 9; SE 14, p. 1.

The Department's administrative rule also confirms the position espoused in these Conference Decision Letters. Both OAR 150-314.665(2)-(A)(2) and (3) tie the statutory language "delivered or shipped to a purchaser within this state" to a purchaser *physically located in Oregon*. OAR 150-314.665(2)-(A)(2) applies when "the recipient is located in [Oregon]" and Example 1 discusses property "shipped directly to purchaser's branch store in Oregon." Likewise, OAR 150-314.665(2)-(A)(3) applies where the "shipment terminates in [Oregon]." Again, Example 2 leaves no doubt this provision requires a purchaser physically located in Oregon (e.g., "a purchaser who maintains a central warehouse in Oregon" and "shipped to the purchaser's warehouse in Oregon"). OAR 150-314.665(2)-(A)(3) and Example 2 confirm the "destination state" approach; a subsequent shipment of the property by the Oregon purchaser out of the state (i.e., an entirely separate transaction) does not change the fact the "destination" of the initial sale was Oregon. Neither

provision concerns the "contractual point of delivery," rather the physical delivery of tangible personal property to a purchaser located in Oregon.

Additionally, an issue of interpretation arises under the UDITPA sales factor definition where an out-of-state purchaser picks up the tangible personal property at the taxpayer's "dock." This so-called "dock sale" issue illustrates the difference between a delivery rule and a destination rule for sales of tangible personal property.

Consider, for example, a situation where goods are delivered in a state, but with an ultimate destination in another state. Two simple illustrations are (1) a taxpayer delivers tangible personal property to the purchaser in San Francisco, who then transports it to its ultimate destination in Portland; and (2) a taxpayer delivers tangible personal property to the purchaser in Portland, who then transports it to its ultimate destination in San Francisco. The issue is whether under either illustration there is an Oregon sale for purposes of the sales factor.

The Tax Court found that applying an ultimate destination rule "will put Oregon in the position of the majority of states that have had to address the question under UDIPTA." Opinion, p. 11. As discussed above, Oregon's apportionment provisions were adopted in accordance with UDITPA and the Compact in an effort to create a uniform taxing scheme among the states and to avoid double taxation of multistate corporations. *See* ORS 314.605, ORS

305.655; *see also Twentieth Century-Fox Film Corp.*, 299 Or at 227. As also discussed above, UDITPA "provides that sales of tangible personal property should be apportioned to the state or country of *destination*." Keesling & Warren, *supra*, at 671, emph. added. Again, Oregon law expressly provides that its sales factor apportionment provisions are derived from UDITPA and "shall be so construed so as to effectuate its general purpose to make uniform the laws of those states which enact it." ORS 314.605(2).

In view of this goal of uniformity, it is critical to consider how this assignment of sales issue has been addressed and resolved by other states. The vast majority of courts that have considered this issue have adopted an ultimate-destination rule, rather than a place-of-delivery rule.[69] For example:

- California (UDITPA state and MTC member): In *McDonnell Douglas Corp. v. Franchise Tax Bd.*, 26 Cal.App.4th 1789, 33 Cal.Rptr.2d 129 (Cal. Ct. App. 1994), sales of aircraft picked up by purchasers at the taxpayer's California facility which were subsequently transported by the purchaser out of state were not sales within California for apportionment purposes.

- Florida (MTC member): In *Dep't of Revenue v. Parker Banana Co.*, 391 So.2d 762 (Fla. Dist. Ct. App. 1980) sales of bananas transferred from the ship's hold directly into refrigerated trucks sent by or on behalf of purchasers from out-of-state for transportation and sale out-of-state were not sales within Florida for apportionment purposes.

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[69] *See also*, Professor Hellerstein, who states: "[M]ost courts that have considered the issue have adopted the ultimate-destination rule rather than the place-of-delivery rule." I Hellerstein & Hellerstein, STATE TAXATION ¶ 9.18[1][a], p. 9-185 (Warren, Gorham & Lamont, 3d ed. 2001).

- Wisconsin (MTC member): In *Pabst Brewing Co. v. Wisconsin Dep't of Revenue*, 130 Wis.2d 291, 387 N.W. 2d 121 (Wis. Ct. App. 1986), sales of beer picked up by out-of-state wholesalers at the taxpayer's plant for out-of-state distribution were not sales within Wisconsin for apportionment purposes.

- Minnesota (UDITPA state and MTC member): In *Olympia Brewing Co. v. Comm'r of Revenue*, 326 N.W.2d 642 (Minn. 1982), sales of beer picked up dockside at taxpayer's brewery by out-of-state distributors in their own trucks for transportation and resale outside the state were not sales within Minnesota for apportionment purposes.

- Colorado (UDITPA state and MTC member): In *Lone Star Steel Co. v. Dolan*, 668 P.2d 916 (Colo. 1983), sales of pipe delivered by the taxpayer to an intermediate for wrapping and then shipped out-of-state by common carrier were not sales within Colorado for apportionment purposes.

- Ohio (MTC member): In *Dupps Co. v. Lindley*, 62 Ohio St.2d 305, 405 N.E.2d 716 (Ohio 1980), sales of heavy machinery picked up by purchaser's vehicles or purchaser-hired truckers at taxpayer's plant and sold to out-of-state customers were not sales within Ohio for apportionment purposes.

- Connecticut (MTC member): In *Texaco, Inc. v. Groppo*, 215 Conn. 134, 574 A.2d 1293 (Conn. 1990), sales of petroleum products picked up by purchaser's own vehicles or a common carrier from one of the taxpayer's terminals, and distributed out-of-state were not sales within Connecticut for apportionment purposes.

- Georgia (MTC member): In *Strickland v. Patcraft Mills, Inc.*, 251 Ga. 43, 302 S.E.2d 544 (Ga. 1983), sales of carpet to out-of-state customers who took possession at the taxpayer's place of business for immediate transport and resale out-of-state were not sales within Georgia for apportionment purposes.

- Pennsylvania (MTC member): In *Commonwealth v. Gilmour Mfg. Co.*, 573 Pa. 143, 822 A.2d 676 (Pa. 2003), sales of lawn and garden products to out-of-state customers who took possession at

the taxpayer's loading dock and transported the property to an out-of-state location were not sales within Pennsylvania for apportionment purposes.

- Kentucky (MTC member): In *Revenue Cabinet v. Rohm & Hass Ky., Inc.*, 929 S.W.2d 741 (Ky. Ct. App. 1996), sales of tangible personal property by a subsidiary to its parent corporation that were picked up by the parent in Kentucky and transported out of state were not sales within Kentucky for apportionment purposes.

Two additional states have adopted the destination rule by administrative, as opposed to judicial decision.[70]

The California Court of Appeal decision in *McDonnell Douglas*, which establishes a destination rule in California, is especially noteworthy. Not only is California a leading state in interpreting UDITPA, it is also a neighboring state which gives rise to a large volume of cross-border transactions with Oregon. Returning to the examples above of two dock sales involving San Francisco and Portland, if Oregon adopts a *destination* rule – consistent with the decisions of other states set forth above, then one and only one state is assigned that sale under both examples. If Oregon adopts a *delivery* rule as set forth in the Department's proposed treatment of Powerex's sales of natural gas, then

[70] In 2006, an Alabama Administrative Law Judge, interpreting Alabama's UDITPA sales factor, adopted the destination rule. *PACCAR Inc. v. Dep't of Revenue*, Docket No. Corp. 04-715, 2006 STT 29-9 (Jan. 11, 2006). Tennessee (MTC member) also adopted the destination approach by administrative decision. In 1995, the Tennessee Department of Revenue held that sales of tangible personal property delivered in Tennessee to an out-of-state purchaser and transported out of state were not sales within Tennessee for apportionment purposes. *Tenn. Dep't of Revenue*, Rev. Rul. 95-05 (Feb. 3, 1995).

neither state is assigned the sale under the first example (e.g., CA assigns it as an OR destination sale, and OR assigns it as a CA delivery sale), and both states are assigned the sale under the second example (e.g., CA assigns it as a CA destination sale and OR assigns it as an OR delivery sale).[71]

In sum, as found by the Tax Court, there is a very strong consensus among UDITPA and MTC member states that the ultimate destination rule, and not the place-of-delivery rule, let alone a *contractual* point of delivery rule, is the correct rule under UDITPA for determining how to assign sales of tangible personal property.

B. The Department Fails to Address How Contractual Delivery Points in Oregon Support Its Transfer of Title Argument

The Department claims the "only question" under ORS 314.665 and OAR 150.314.665(2)-(A) is "whether the electricity and natural gas were delivered to a purchaser who *took title* in Oregon." OB, p. 39, emph. added.

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[71] Oregon's Form 20, Oregon Corporation Excise Tax Return, Schedule AP, also suggests only sales that are delivered or shipped to *Oregon purchasers* are included in the sales factor numerator. Specifically, Schedule AP provides: "Sales factor – Sales delivered or shipped to Oregon purchasers: 12. Shipped from outside Oregon; 13. Shipped from inside Oregon." SE 4, pp. 1, 4, 7. While the Oregon corporate excise tax return is not legally binding on the interpretation of the sales factor statutory provisions, by only making reference to "Oregon purchasers" for purposes of the "delivered or shipped" statutory language, the return suggests adherence to an ultimate destination rule and not a place-of-delivery rule, let alone a contractual point of delivery rule.

Powerex disagrees. Nowhere do the words "took title," "takes title" or the like, appear in either the statute or the rule.[72] On the contrary, the statute states a sale is in Oregon if the property is "delivered or shipped to a purchaser ... within this state *regardless of ... other conditions of the sale*." ORS 314.665(2)(a), emph. added. Where title passes is merely one such "condition[] of the sale."[73]

The same title-based sourcing for sales factor purposes proposed by the Department was rejected by the drafters of UDITPA, and has been characterized as "arbitrary," "unsatisfactory" and dependent "wholly upon legal conclusions based upon construction of contracts, terms of waybills, customer in the business, evidence as to the intention of the parties, and other considerations having little or no relation to the problem of determining where income is earned. …" Keesling & Warren, *supra*, at 670, quotations omitted. The Oregon Tax Court also has noted that title-based apportionment is "hit or miss" for sales factor apportionment purposes. *Northwest Textbook Depository v. Dep't of Revenue*, 11 OTR 280, 288 (1989), quotations omitted.[74] As

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[72] The Department also cites to the 2011 version of this administrative rule (OB, pp. 39-40), which does not apply to this case.

[73] The Department's discussion of the various servicing agreements confirms this. OB, pp. 40-41.

[74] Department also claims sales of gas (and electricity) were "delivered to purchasers in Oregon as agreed by contract" and "there is no dispute factually that the title to the electricity passes from Powerex to its purchasers at the

discussed above, nothing could be more easily manipulated than a sourcing rule based on where the parties simply agree among themselves, in the language of contract, to the location where title passes (i.e., where sales will be assigned for tax purposes).

C. *Amicus Curiae* PGE's Sourcing Argument Also Lacks Merit

Turning to PGE's briefing on the issue, PGE refers to Hellerstein's treatise and claims the treatise "endorses the place-of-delivery rule as the simplest and most efficient method for resolving the sourcing problem." ACB, pp. 43. However, PGE should have read further. Hellerstein states that "most courts that have considered this issue have adopted the ultimate-destination rule rather than the place-of-delivery rule." Hellerstein & Hellerstein, *supra*, at 9-255-9-256. Ultimate destination is the position taken by Powerex.

IV. *Amicus Curiae* PGE Cannot Raise a New "Public Utilities" Issue on Appeal

PGE asks this Court to "expressly limit its decisions to taxpayers that are not 'public utilities' within the meaning of ORS 314.610(6)" should this Court uphold the Tax Court's decision. ACB, p. 44. By urging this Court to limit the Tax Court's decision to UDITPA taxpayers, PGE attempts to raise a new issue

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delivery point specified in their contracts." OB, p. 39. The record shows (and the parties stipulated) that during the years at issue, only some of its sales of natural gas had contractual delivery points in Oregon. JS ¶ 9.

on appeal beyond those raised and argued by the parties in Tax Court or presently before this Court.

This Court has spoken quite clearly and disapprovingly on the practice of *amicus curiae* raising new issues. As a general rule, parties are restricted to the questions raised and preserved in the trial court. *Christensen v. Murphy*, 296 Or 610, 612, 678 P.2d 1210 (1984). It is settled law that *amicus curiae* cannot raise new issues not previously raised by the parties. *See e.g., Smith v. Multnomah County Bd. of Comm'rs*, 318 Or 302, 311, fn. 13, 865 P. 2d 356 (1994); *Finney v. Bransom*, 326 Or 472, 481, fn. 8, 953 P.2d 377 (1998); *Walsh Constr. Co. v. Mut. of Enumclaw*, 338 Or 1, 11, 104 P.3d 1146 (2005).

As discussed above, the instant case does not involve public utility law. As discussed in Section I, there was never any issue as to whether Powerex is a public utility. Even *amicus curiae* PGE concedes: "The parties agree Powerex was not assessed as a 'public utility' for purposes of UDITPA and is therefore directly subject to UDITPA." ACB, p. 5. Nor did the Tax Court consider the various statutes and rules governing public utilities. PGE cannot now raise this new issue and Powerex respectfully requests this Court decline to consider such issue.

Should the Court decide to address PGE's new issue, Powerex's response is two-fold. First, Powerex does not dispute the Court's decision in *Crystal Communications, Inc. v. Dep't of Revenue*, 353 Or 300, 297 P.3d 1256 (2013).

However, for all the reasons stated above, the Department's construction of ORS 314.665 (defining tangible personal property to include electricity and sourcing tangible personal property to the contractual point of delivery) is wrong under UDITPA. Powerex expresses no opinion as to whether such construction is nevertheless valid for public utility taxpayers under ORS 314.280.[75] Second, to the extent PGE's position on this new issue is an attempt to discuss the merits of the 2007 rules and the 2011 rules (ACB, p. 47, fn. 15), recall the 2007 rules were held to be invalid by the Tax Court and the 2011 rules were held not to apply to Powerex because the years in issue were not "open to examination."[76]

CONCLUSION

For the above reasons, Powerex asks this Court to uphold the decision of the Oregon Tax Court.

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[75] Regarding PGE's argument the Department's policy of treating electricity as tangible personal property is proper (ACB, p. 51), Powerex has fully responded in Section I, *supra*. Regarding PGE's argument the Department's policy of sourcing sales of natural gas and power to the contractual delivery point is proper (ACB, pp. 47-51, 52-54), Powerex has fully responded in Section III, *supra*.

[76] Powerex does not agree the Department "adopted a place-of-delivery policy no later than 2007" as claimed by PGE. ACB, p. 45, fn. 14.

DATED this 25th day of October, 2013.

Respectfully Submitted,

MORRISON & FOERSTER LLP

By: /s *Eric J. Coffill*

Eric J. Coffill, SBN 84044
Admitted *Pro Hac Vice*
Jenny Choi, SBN 259492
Admitted *Pro Hac Vice*
400 Capitol Mall, Suite 2600
Sacramento, CA 95814

Carol Vogt Lavine, OSB #914571
Carol Vogt Lavine LLC
P.O. Box 697
Gladstone, OR 97027

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

The court granted a motion to exceed the length limit for this brief. The order granting that motion was dated September 16, 2013 and permits a brief of up to 28,000 words. I certify that (1) this brief complies with that order and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 22,834 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED this 25th day of October, 2013.

CAROL VOGT LAVINE, LLC

By: s/*Carol Vogt Lavine*
Carol Vogt Lavine
OSB #914571
Of Attorneys for Plaintiff-Respondent
Powerex Corp

CERTIFICATE OF SERVICE

I certify that on October 25, 2013, I electronically filed with the Appellate Court Administrator, Appellate Records Section, the original of Respondent's Answering Brief and served the same on:

Hon. Ellen F. Rosenblum
Anna M. Joyce
Denise G. Fjordbeck
Marilyn J. Harbur
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Attorneys for Defendant-Appellant
Department of Revenue

And

Scott G. Seidman
Michael J. Millender
Tonkon Torp LLP
1600 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204
Attorneys for *Amicus Curiae*
Portland General Electric Company

in accordance with ORAP 1.35(2)(d) by Electronic Mail.

DATED this 25th day of October, 2013.

CAROL VOGT LAVINE, LLC

By: s/*Carol Vogt Lavine*
Carol Vogt Lavine
OSB #914571
Of Attorneys for Plaintiff-Respondent
Powerex Corp