IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF ON THE MERITS OF *AMICUS CURIAE* PORTLAND GENERAL ELECTRIC COMPANY

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

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INTERESTS OF *AMICUS CURIAE*

Amicus curiae Portland General Electric Company ("PGE") is the largest electric utility in Oregon, serving nearly half of the state's inhabitants. PGE produces much of the electricity it sells to retail customers from natural gas, wind farms and coal plants in Oregon as well as hydroelectric plants producing power from dams on the Clackamas, Willamette and Deschutes rivers. PGE also purchases electricity at wholesale, usually at times of high demand by its consumers, from other producers, including out-of-state producers. PGE correspondingly sells electricity at wholesale, generally at times of lower PGE customer demand, for use in other states, such as in California during the summer.

PGE's interest in this case lies in the questions of whether electricity is "tangible personal property" under the Uniform Division of Income for Tax Purposes Act ("UDITPA"), which is codified in Oregon at ORS 314.605 to ORS 314.675, and, if so, where sales of electricity should be sourced for purposes of calculating the seller's Oregon sales factor. PGE has long understood it to be the policies of the Oregon Department of Revenue (the "department") to treat electricity as tangible personal property and to source sales of electricity to the state where the contractual point of delivery is located. PGE has historically filed its Oregon tax returns in accordance with these policies.

PGE has never challenged the department's policies because PGE believes them to be correct. However, the Tax Court ruled in this case that (1) electricity is *not* tangible personal property for UDITPA purposes and (2) sales of natural gas – which the parties agree is tangible personal property – should be sourced to the state of ultimate destination instead of the state where the buyer takes possession and control of the natural gas. PGE supports the department's appeal of both of these rulings.

ADOPTION OF DEPARTMENT'S STATEMENT OF THE CASE

PGE adopts the department's statement of the case, including the statement of facts and the statement of questions presented on appeal, and includes no separate statements of its own, except for the following additional question:

If the court upholds either or both of the Tax Court's rulings concerning (1) whether electricity is tangible personal property and (2) where sales of electricity should be sourced, whether the department's positions on these issues are nevertheless valid for public utilities taxed under ORS 314.280.

SUMMARY OF ARGUMENT

A. The Tax Court Erroneously Held That Electricity Is Not Tangible Personal Property

The Tax Court erroneously held that electricity is not tangible personal property for UDITPA purposes. To begin with, the Tax Court failed to give appropriate deference to the department's construction of the term "tangible

personal property." This Court held over 25 years ago in *Atlantic Richfield Co. v. Dep't of Rev.*, 300 Or 637, 644-46, 717 P2d 613, 617-18 (1986) ("*Arco*"), that Oregon courts give the department "some latitude" in construing UDITPA in audit determinations, provided the department's construction results in the reasonable approximation of the taxpayer's Oregon income (the "reasonableness" requirement) and effectuates the general purpose of making uniform the laws of those states that have enacted UDITPA (the "uniformity" requirement). The department's construction of "tangible personal property" satisfies this standard, yet the Tax Court failed to acknowledge, let alone apply, the decisional framework announced in *Arco*.

As to the fairness prong of the *Arco* test, the classification of electricity as tangible personal property for UDITPA purposes does not *per se* distort any taxpayer's Oregon income. To the extent that a particular taxpayer can show distortion, UDITPA permits the taxpayer to request, or the department to require, the use of an alternative apportionment method.

The department's determination that electricity is tangible personal property is not barred by the uniformity prong of the *Arco* test, because no uniform position has emerged on the proper classification of electricity under UDITPA. Income tax decisions from UDITPA and Multistate Tax Compact ("MTC") states are split on this issue. If the inquiry is broadened to include other types of tax cases and non-

tax cases, courts in a majority of UDITPA and MTC states have concluded that electricity is tangible personal property. Treating electricity as tangible personal property is also consistent with the purposes behind UDITPA's distinction between tangible and intangible property.

Despite the substantial number of cases from UDITPA and MTC states holding that electricity is tangible personal property, the Tax Court relied solely on two cases from California and Massachusetts that reached the opposite conclusion. Both of these cases were decided by administrative tribunals and have been called into question in their own states. The Tax Court's eagerness to defer to such scant authority is inconsistent with the searching review that this Court undertook in *Arco* before it reversed the department's application of UDITPA at issue in that case.

If the department's construction of UDITPA satisfies the fairness and uniformity prongs of the *Arco* test, it receives deference under ordinary principles of Oregon administrative law. *Arco*, 300 Or at 646. Here, the department's determination that electricity is tangible personal property is entitled to deference, because it is reasonable both as a factual matter and as a matter of statutory construction. The large number of state court decisions concluding that electricity is tangible personal property shows that it is reasonable to conclude that electricity has sufficient physical properties to be classified as tangible personal property.

These state cases are also consistent with how the Internal Revenue Service ("IRS") has uniformly treated electricity under federal tax law. Even the Tax Court concluded only that it was more probable than not that electricity is not tangible personal property, which is an insufficient basis under *Arco* to reject the department's construction.

The department's position is also a reasonable construction of the text of UDITPA. The statute contemplates that tangible personal property is property that can be "delivered or shipped to a purchaser" within a particular state. As the record in this case clearly establishes, the wholesale electricity market is based upon transactions occurring at well-established points of delivery where the purchaser assumes possession and control of the electricity, thereby fulfilling the statute's requirements.

B. The Tax Court's Rulings, If Upheld, Should Be Expressly Limited to Taxpayers That Are Directly Subject to UDITPA

If the Court upholds the Tax Court's rulings on the major issues in this case – that is, whether electricity is tangible personal property and whether sales of energy should be sourced to the state of delivery or the state of ultimate destination – the Court should expressly limit its decision to taxpayers that are directly subject to UDITPA.

The parties agree that Powerex was not assessed as a "public utility" for purposes of UDITPA and is therefore directly subject to UDITPA. However, PGE

and other Oregon sellers of electricity and natural gas are public utilities. Their income is apportioned pursuant to ORS 314.280, a separate statutory scheme under which the department has enacted rules that incorporate by reference virtually all of UDITPA and the regulations thereunder.

In its recent decision in *Crystal Communications, Inc. v. Dep't of Rev.*, 353 Or 300, 297 P3d 1256 (2013) ("*Crystal*"), the Court indicated that the department's construction of a statute or rule could be invalid under UDITPA yet be upheld under ORS 314.280, provided that the department's construction is plausible and not inconsistent with the ORS 314.280 rule, its context, or any other source of law. Regardless of how the Court resolves this case with respect to UDITPA taxpayers, the department's positions on both the proper classification of electricity and the sourcing issue withstand scrutiny under *Crystal*. For this reason, if the Court upholds either or both of the Tax Court's rulings, it should expressly exclude ORS 314.280 taxpayers from its decision.

ARGUMENT

I. The Tax Court Failed to Give Appropriate Deference to the Department's Construction of the Term "Tangible Personal Property"

The Tax Court addressed the question whether electricity is tangible personal property without considering, or even acknowledging the existence of, the standard for reviewing the department's determinations under UDITPA that this Court developed in *Arco*. In *Arco*, the Tax Court upheld a department audit

determining that Arco had failed to pay the full amount of excise taxes based on its inclusion of intangible drilling and development costs ("IDCs") as part of the "original cost" of property held in Oregon. ORS 314.655(2) provides that the property of a multistate taxpayer is to be valued at "original cost" in determining the property factor for apportionment purposes. The department had a general rule, subject to exception, that "original cost" meant the federal unadjusted tax basis of the property, which would exclude IDCs even if they were expensed under federal tax law. The question was whether the department should apply the general rule to Arco's tax return or instead should be required to recognize an exception and permit Arco's IDCs to be included in the original cost calculation. 300 Or at 640-41.

This Court made clear in *Arco* that Oregon courts defer to the department's audit determinations implicating the proper construction of UDITPA, if those determinations advance the basic goals of UDITPA, which the court identified as "fair apportionment of income among the taxing jurisdictions and * * * uniformity of application of the statutes." *Id.* at 641-42 (quoting *Twentieth Century-Fox Film v. Dep't of Rev.*, 290 Or 220, 227, 700 P2d 1035, 1039 (1985); *see also id.* at 644 (identifying these goals as the "fairness" and "uniformity" goals of UDITPA).

The court held that the fairness goal is satisfied if the department's application of UDITPA "reasonably approximates the taxpayer's income in

Oregon." *Id.* at 645. In cases involving an undefined term under UDITPA, such as "tangible personal property" here or "original cost" in *Arco*, an Oregon court determines uniformity by looking not only to case law from UDITPA states but also to states that have clarified an undefined term through statutory language added to UDITPA or through administrative rules that clarify the meaning of an undefined term.[1] *Id.* at 650. In *Arco*, Alaska and Nebraska had by statute required IDCs to be capitalized and depreciated, while Utah and North Dakota had done the same by rule. *Id.* at 647-49.

The Court began its uniformity analysis in *Arco* by noting that, if Oregon had been the first state to determine the "original cost" issue, it would have upheld the department's determination:

> "If we were the first state to address this question, we likely would affirm the department and the Tax Court, for the department has some latitude in interpreting the phrase 'original cost' in ORS 314.655(2)."

Id. at 646 (citing *Trebesch v. Employment Div.*, 300 Or 264, 710 P2d 136 (1985), and *Springfield Educ. Assn. v. School Dist.*, 290 Or 217, 621 P2d 547 (1980)).

However, given the uniform authority for the contrary view in other UDITPA states, the Court overruled the department's determination, concluding:

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[1] Presumably, the Court would not look to state statutes that have changed a defined term under UDITPA, as Iowa and Kentucky have done with the UDITPA definition of "business income," for example. *See* Iowa Code Ann § 422.32(1)(b) & Ky Rev Stat § 141.120(1)(a).

> "[B]ecause uniformity is a predicate for UDITPA's success, we believe that we must consider the statutes and rules discussed above. *In the absence of any indication that other UDITPA states apply ORS 314.655(2) as did the department and the Tax Court*, and in order to meet the UDITPA 'uniformity' criterion, we hold that IDCs should be included in 'original cost.'"

Arco, 300 Or at 650 (emphasis added).

For purposes of the dispute here, *Arco* teaches three key lessons. First, the department's audit determinations are entitled to deference, so long as the result (1) reasonably approximates the taxpayer's income in Oregon and (2) does not violate UDITPA's purpose to achieve uniformity of treatment among UDITPA states. Second, in deciding uniformity, the Court looks to both case law and statutory and regulatory clarifications in other UDITPA jurisdictions.[2] Third, if other UDITPA states do not treat the issue in a uniform manner, but instead there is a split in UDITPA authority, then (1) considerations of uniformity will not trump the department's reasonable audit determination and (2) if that audit determination is based on the department's construction of a UDITPA term, the Court will defer to the department's construction.

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[2] The Court in *Arco* underscored the importance of determining whether there is, in fact, uniformity by granting the department's petition for reconsideration and then considering evidence on the treatment of the "original cost" issue in the UDITPA states that was more comprehensive than the evidence introduced in the earlier proceedings. *Atlantic Richfield Company v. Dep't of Rev.*, 301 Or 242, 244-46, 722 P2d 727, 727-29 (1986).

II. The Classification of Electricity as Tangible Personal Property Does Not Result in the Distortion of Taxpayers' Income

In applying the fairness prong of the *Arco* test, a court considers whether the department's construction of UDITPA advances the statute's goal of fair apportionment of income by resulting in a reasonable approximation of the taxpayer's income in Oregon. *Id.* at 644.

The classification of electricity or any other commodity as tangible personal property is one component of a three-step process for determining a taxpayer's Oregon sales factor under UDITPA. First, certain transactions are excluded altogether from the determination. ORS 314.665(6). Second, sales includible in the sales factor are classified as sales of tangible personal property, or as "sales, other than sales of tangible personal property." *See* ORS 314.665(2), (4). Third, each sale includible in the sales factor is sourced under the rules applicable to its classification. *Id.* Sales of tangible personal property are generally sourced to the state where the property is delivered or shipped to the purchaser. ORS 314.665(2)(a). The sourcing of other sales, by contrast, is based on where the income-producing activity giving rise to the sale took place. ORS 314.665(4).

The chief consequence of classifying something as tangible personal property under UDITPA is that the "place of delivery" sourcing rule will apply instead of the "income-producing activity" sourcing rule. Many commodities (including natural gas) that are clearly tangible personal property are traded in

multistate wholesale markets that are similar to the market for wholesale electricity in the western states. The classification of the commodities traded in such markets as tangible personal property under UDITPA does not *per se* result in a distortion of the seller's income in a particular state, and Powerex has not argued to the contrary.[3]

In fact, UDITPA uses the place-of-delivery sourcing rule for tangible personal property because, in the three-factor apportionment formula originally adopted in Oregon and still used in many states, it *avoids* the distortion that would result if such sales were sourced to the state where the seller maintains its manufacturing and distribution facilities. As William J. Pierce, the drafter of UDITPA, explained in a 1957 article:

> "Manufacturing states probably would prefer a system attributing sales to the place from which goods are shipped in every case. However, the national conference was of the opinion that such a system would merely duplicate the property and payroll factors which emphasize the activity of the manufacturing state, so that there would tend to be a duplication by such a sales factor."

William J. Pierce, *The Uniform Division of Income for State Tax Purposes*, 35 Taxes 747, 780 (October 1957).

[3] As discussed in Parts V and VI below, the parties dispute whether ORS 314.665(2)(a) sources sales to the place where the buyer takes possession and control of the property or, instead, the ultimate destination of the property.

Mr. Pierce's analysis is no longer entirely applicable in Oregon, because the legislature amended UDITPA to replace the original three-factor apportionment formula with a single sales factor formula. ORS 314.650; *see, however*, ORS 314.280(3)(b) (allowing telecommunications and utility companies to elect the former three-factor formula). The new formula arguably distorts sellers' income by failing to recognize the contributions of the state where tangible personal property is produced. *See Moorman Mfg. Co. v. Bair*, 437 US 267, 273-75, 98 S Ct 2340, 2344-45 (1978) (discussing the distortive effect of single-factor apportionment formulas and noting that such formulas are presumptively valid under the U.S. Constitution). However, to the extent that classifying electricity or any other product as tangible personal property results in the distortion of income under Oregon's single sales factor apportionment formula, such distortion is by legislative design. Subject to constitutional challenge, the legislature's policy choice should not be undermined by a court in implementing the fairness prong of the *Arco* test.

It should also be noted that UDITPA authorizes taxpayers to request, and the department to require, alternative allocation and apportionment methods if the standard provisions of UDITPA "do not fairly represent the extent of the taxpayer's business activity" in Oregon. ORS 314.670. If Powerex or any other seller

believes that the classification of electricity as tangible personal property results in impermissible distortion of its Oregon income, it has a remedy.

In sum, the "fairness" prong of the *Arco* test is not an obstacle to the department's classification of electricity as tangible personal property.

III. The Department's Construction of the Term "Tangible Personal Property" Is Consistent With the Majority of UDITPA and MTC States

The Tax Court concluded that the goal of uniformity among UDITPA states required a finding that electricity is not tangible personal property. The Tax Court relied on two decisions to reach this conclusion, one by the California State Board of Equalization ("SBE"), *Appeal of PacifiCorp*, Cal St Bd of Equal, No 90027, 2002 WL 31153476 (Sept 12, 2002) ("*PacifiCorp*"), and one by the Massachusetts Appellate Tax Board, *EUA Ocean State Corp. et al. v. Comm'n of Rev.*, No C258405-406, 2006 WL 1085380 (Apr 24, 2006) ("*EUA Ocean State*").

The Tax Court made three errors in reaching this conclusion. First, the court failed to account for all of the relevant authority, which predominantly treats electricity as tangible personal property. Second, the court failed to consider the dubious quality of these two decisions, whose validity has been called into question by subsequent rulings within California and Massachusetts. By failing to evaluate the substance of the decisions, the Tax Court effectively abandoned a reasoned consideration of how electricity should be treated under Oregon law. Third, the Tax Court failed to consider UDITPA's purpose for distinguishing

between tangible and intangible property, a purpose that favors finding that electricity is tangible.

A. The Tax Court Erred in Finding Uniformity Sufficient to Trump the Department's Reasonable Conclusion That Electricity Is Tangible Personal Property

Unlike the department's application of UDITPA in *Arco*, where there was no evidence that any other UDITPA states excluded IDCs in the "original cost" calculation, there ***is*** a split among UDITPA states in their treatment of electricity as tangible or intangible. In such circumstances, there is no "uniformity" that can trump the department's reasonable determination.

Of the 23 states that have adopted UDITPA as a stand-alone statutory scheme,[4] courts in Alabama, Arizona, California, Colorado, Kentucky, Missouri, Pennsylvania, South Dakota and Texas have determined in differing contexts whether electricity is tangible personal property. Only California and South Dakota courts have ever ruled in any context that electricity is not tangible personal property, and authority in both states is split.

Also relevant to the uniformity inquiry are states that have some membership status in the MTC, which includes UDITPA as one section of its statutory scheme. Of these states, courts in Connecticut, Florida, Georgia, Illinois, Indiana, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Ohio,

[4] Attached as an Appendix are tables from Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 9.01, at 9–13-15 (3d ed 2000 & 2012 Cum Supp No 3), showing the stand-alone UDITPA states and the MTC states.

Rhode Island, Tennessee and Wisconsin have considered the proper classification of electricity in different contexts. Only courts in Massachusetts, Nebraska, New York and Ohio have ever concluded that electricity is not tangible personal property for the purposes at issue, and authority in Massachusetts and Nebraska is split.

We summarize this case law from UDITPA and MTC states below, starting with income tax cases, moving to other kinds of tax cases, and concluding with non-tax cases.

1. Income Tax Cases Are Split on Whether Electricity Is Tangible Personal Property

At the time UDITPA was drafted in the 1950s, most states already had well-established methods for taxing the income of public utilities, such as retailers of electricity, water and natural gas. To avoid having the existence of these separate statutory schemes pose a barrier to broad adoption of the uniform law, the drafters specifically excluded public utilities from UDITPA. Since most sales of electricity are by public utilities at the retail level, it is hardly surprising that there are not many cases deciding whether electricity is tangible personal property for income or franchise tax purposes. If anything, it is surprising that there are as many cases as there are, most of which involve either wholesale electricity sales or tax deduction or credit issues. To date, courts and administrative tribunals in four UDITPA and MTC states – Arizona, Illinois, California and Massachusetts – have considered

whether electricity is tangible personal property for income or franchise tax purposes in decisions that are relevant to the Court's inquiry in this case.[5]

Arizona is a UDITPA state. In *Tucson Electric Power Co. v. Arizona Department of Revenue*, 170 Ariz 145, 822 P2d 498 (1991), the Arizona Supreme Court ruled that electricity is tangible personal property whose sale is subject to the state's tax on gross income. The specific issue in the case was whether Tucson Electric was entitled to a refund for taxes paid on minimum demand charges received under a contract the utility had with Pima Mining Company, under which Pima was required to pay a minimum of $200,000 per month whether or not it was

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[5] A fifth case, *Omaha Public Power District v. Nebraska Department of Revenue*, 248 Neb 518, 537 NW2d 312 (1995), also examines the tangible personal property issue, but it should be excluded from the court's uniformity analysis because it turns on the narrowly focused legislative intent behind a tax credit. Omaha Public Power sought to claim tax credits against its income tax liability for expanding its facilities and adding to its employment base during the tax years in question. To qualify for the credits, the utility had to be engaged in the manufacture of tangible personal property as opposed to providing a service. The Nebraska Supreme Court had long ago ruled in *State ex rel. Spillman v. Interstate Power Co.*, 118 Neb 756, 226 NW 427 (1929), that electricity is a commodity. However, the court concluded in *Omaha Public Power* that *Spillman* did not control the result under the tax statute at issue. 248 Neb at 523-25, 537 NW2d at 316-17.

The court found that a scientific discussion of electricity was both legally inconclusive and peripheral to whether Omaha Public Power was eligible for the credit. Rather, the legislature's intent was the determining factor. *Id.* 526-28, 537 NW2d at 317-18. The court found that the legislature intended to classify electricity as a service for purposes of Nebraska's sales and use tax laws, and it concluded that the legislature must have intended the same classification to apply to the tax credit. *Id.* 527-30, 537 NW2d at 318-20.

using any electricity at all. During the tax period at issue, Pima was shut down, and Tucson Electric was not delivering any electricity to Pima.

Arizona had two tax provisions that potentially subjected the minimum demand charges to income tax. Arizona Revised Statutes section 42-1312(A) imposed a two-percent tax on the gross proceeds of sales "from the business of selling any tangible personal property at retail." "Tangible personal property" was defined to include "property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses" under section 42-1301(21). Sections 42-1309(A) and 42-1310(2)(b) further combined to impose a one-percent tax on gross income from the business of producing and furnishing electricity.

The court rejected Tucson Electric's argument that it could be taxed only on income from electricity actually furnished to Pima, not on minimum demand charges that Tucson Electric characterized as "incidental or extraneous activities" for the utility. 170 Ariz at 148, 822 P2d at 501. Instead, the court noted that the utility's argument would render the separate tax on income from "producing and furnishing * * * electricity" superfluous; actual retail sales were already covered under section 42-1312(A) as sales of tangible personal property, because electricity is personal property that may be measured. To the contrary, the business of furnishing electricity that sections 42-1309(A) and 42-1310(2)(b) subjected to taxation "logically includes not only the actual selling of electricity as a

commodity, but also providing the numerous continuing services necessary to deliver the electricity to the customer reliably and in a useful form." *Id.* at 149, 822 P2d at 502. The court went on to list the numerous services Tucson Electric provided to Pima under the contract. *Id.* Under *Arco*, *Tucson Electric* is relevant authority for purposes of the Court's uniformity inquiry, because that inquiry looks to states that have added clarifying language to otherwise undefined UDITPA terms such as "tangible personal property."

The Supreme Court of Illinois, an MTC state, similarly held in *Exelon Corp. v. Dep't of Rev.*, 234 Ill2d 266, 917 NE2d 899 (2009), that electricity constitutes tangible personal property under the state's Income Tax Act. The Illinois Department of Revenue denied the taxpayer's claim for tax credits against its tax liability under a law that allowed credits for investments in property made by "retailers." The law defines "retailing" as "the sale of tangible personal property." *Id.* at 270, 917 NE2d at 903. The case thus turned on whether the taxpayer qualified as a retailer, which in turn depended on whether its sales of electricity constituted sales of tangible personal property. *Id.* The court agreed with the taxpayer that the utility was engaged in sales of tangible personal property: '"The word "intangible" from its Latin roots means something that cannot be touched or perceived by touch. Electricity can be touched, and when a person does so and thereby completes an electrical circuit, it may be the last earthly sensation he or she

feels.'" *Id.* at 910 (internal citation omitted), *quoting Utilicorp Utd. Inc. v. Dir. of Rev.*, 75 SW3d 725,728 n 6 (Mo 2001) (finding electricity to be tangible but the production of electricity not to be "manufacturing" under Missouri sales tax law). Illinois thus joined Arizona in ruling that electricity is tangible personal property for state income or franchise tax purposes.

The two relevant income or franchise tax cases ruling that electricity is intangible are the *PacifiCorp* and *EUA Ocean State* cases cited by the Tax Court. In *PacifiCorp*, the SBE primarily relied on the Ohio Supreme Court's decision in *Otte v. Dayton Power & Light Co.*, 37 Ohio St 3d 33, 523 NE2d 835 (1988), to conclude that power companies provide a service, not a product that may be considered tangible personal property. 2002 WL 31153476, at *7.

The SBE's reliance on *Otte* is perplexing for two reasons. First, *Otte* expresses a thinly followed minority view that electricity is a service for strict product liability purposes. *See Bryant v. Tri-County Elec. Membership Corp.*, 844 F Supp 347, 350 n 6 (WD Ken 1994) (collecting cases and noting that eight out of ten states hold that electricity is a product that is sold by its passage through the customer's meter, and adding Kentucky as the ninth state to so hold); *see also Monroe v. Savannah Elec. and Power Co.*, 267 Ga 26, 471 SE2d 854 (1996) (adding Georgia as the tenth out of 12 states finding that electricity is tangible

personal property for strict product liability purposes).[6] The SBE's reliance on *Otte* is especially strange, given that California courts have ruled that sales of electricity are subject to strict product liability claims. *See Pierce v. Pacific Gas & Elec. Co.*, 166 Cal App 3d 68, 80-83, 212 Cal Rptr 283, 290-292 (1985) (as the SBE noted, *Pierce* was decided more on public policy grounds than on "product" grounds).

Second, it is arguable that *Otte* did not even decide whether electricity is tangible personal property for strict product liability purposes, because the alleged defect in the case was in the "neutral-to-earth" voltage that passed through ground wires in Dayton Power's electrical system and that has long been noted to cause problems such as the ones the Ottes experienced when their dairy cattle stopped producing milk. This is stray voltage that is neither marketed nor marketable to customers, as distinguished from the standard 120-volt electricity that passes through consumers' meters. 37 Ohio St 3d at 36-37, 523 NE2d at 838-39.

The Massachusetts Appellate Tax Board decision in *EUA Ocean State* is no more persuasive than the SBE decision in *PacifiCorp*, because the board relied primarily on *PacifiCorp* and *Otte* to find that electricity is not tangible personal property under UDITPA.

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[6] Product liability cases are summarized more fully in Part III.A.3. below dealing with non-tax cases that have considered whether electricity is tangible personal property.

In the end, there is an even split in income tax decisions from UDITPA and MTC states. As *Arco* teaches, the Court should defer to the department's audit determination when there are no fairness or uniformity concerns that would trump the department's reasonable application of an undefined UDITPA term such as "tangible personal property."

While these income tax cases are certainly the most important decisions to our inquiry here, we also consider other kinds of tax cases and non-tax cases in the next two sections, particularly because they undermine any force the *PacifiCorp* and *EUA Ocean State* decisions might otherwise have.

2. Decisions in Non-Income Tax Cases Overwhelmingly Treat Electricity as Tangible Personal Property

There are at least six cases from UDITPA and MTC states determining whether electricity is tangible personal property under state sales and use taxes. *See Curry v. Ala. Power Co.*, 243 Ala 53, 8 So2d 521 (1942); *Public Serv. Co. v. Dep't of Rev.*, __ P3d __, 2011 WL 4089971 (Colo Ct App Sept. 15, 2011), *cert. granted*, 2013 WL 105015 (Colo Jan 7, 2013) (No 11SC759); *Searles Valley Mineral Operations, Inc. v. State Bd. of Equalization*, 160 Cal App 4th 514, 72 Cal Rptr 3d 857 (2008); *Sommers v. Sec'y, Dep't of Rev. & Tax'n*, 593 So2d 689 (La App 1991); *Northwestern Pub. Serv. Co. v. Housing & Redev. Comm'n*, 320 NW2d

515 (SD 1982); *Texas Eastern Trans. Corp. v. Benson*, 480 SW2d 905 (Tenn 1972). All recognize that electricity is tangible personal property.[7]

Alabama was the first UDITPA state in which a court decided that electricity is tangible personal property for tax purposes, albeit in a case predating UDITPA. In *Curry*, the Alabama Supreme Court considered whether a statutory exemption from the state's use tax law applied to a power company's boilers, engines, condensers, generators and transformers as "machines used in manufacturing tangible personal property." The court had to determine whether producing electrical power is "manufacturing" and, if so, whether electricity is "tangible personal property." The court first concluded that Alabama Power was engaged in manufacturing, because generating electricity, like other forms of manufacturing, involves taking something that exists in a natural state and applying labor and skill to give it a new and useful property. Electricity that is delivered to homes and businesses to provide illumination or run machines is very different from water

[7] The South Dakota decision is a mixed one. The issue was whether a housing authority was exempt from paying taxes under the state sales and use tax law on its electricity purchases from the plaintiff utility, based on a tax exemption that excused non-profits from paying sales taxes on purchases of tangible personal property. While acknowledging that the use tax defined tangible personal property to include electricity, the majority determined that the legislature specifically intended a different meaning under the tax exemption at issue. 320 NW2d at 516. A strong dissent argued that the court should be bound by the use tax definition. *Id.* at 518. The dissent arguably proved to be correct, as the legislature subsequently amended the exemption to include electricity. *See* SDCL 10-45-1.

held behind dams or fossil fuels used to turn generators to create a flow of useable electrons. *Id.* at 56-60, 8 So2d at 523-26.

The court further concluded that the electric power produced by such manufacturers is tangible personal property:

> "The proof shows that electricity consists of negative electrons. Electrons have mass or weight. Electricity can be tasted. It can be detected by the sense of smell. It can be perceived by touch. A sufficient charge will tear a hole in the body as it enters and as it leaves. Electrons may be fired against a target as in the case of the X-ray machine.
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> * * * * *
>
> "Many other examples of the use and performance of electrons support the view of their tangibility.
>
> "We conclude, therefore, that appellee is engaged in manufacturing tangible personal property."

Id. at 60, 8 So2d at 526. The issue appears so well-settled in Alabama that there have been no challenges to this conclusion post-UDITPA. Indeed, it is almost unimaginable that Alabama would reach a different conclusion under UDITPA.

The decision of the Colorado Court of Appeals in *Public Serv. Co.*, a sales and use tax case, is typical of modern decisions on whether electricity is tangible personal property. The court noted that, although scientific testimony about the nature of electricity is fascinating and informative, it is of limited value in construing Colorado's exemption from sales and use tax for machinery used in the

manufacture of tangible personal property. Rather, it is the language of the statute and implementing regulations that governs the disposition of the dispute. 2011 WL 4089971, at *6. The court observed that electricity is a commodity traded on futures exchanges, placing it in the same category as other forms of tangible personal property. *Id.* at *7.

The decision by the California Court of Appeals in *Searles Valley* is perhaps the most instructive for our analysis. There, the SBE argued that its decision in *PacifiCorp* mandated that electricity be excluded from the definition of tangible personal property under California's sales and use tax statute. The court disagreed, noting that "electricity can be measured and felt and is perceptible to the senses," thus fitting it squarely within the law's definition of tangible personal property as property "that may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses." 160 Cal App 4th at 521, 72 Cal Rptr 3d at 862. Of course, the court was not reviewing the *PacifiCorp* decision and did not purport to overrule it. The cases were easy to distinguish based on the presence of an expanded definition for tangible personal property under the sales tax law, which is absent from the UDITPA definition. However, the decision at least calls into question whether the SBE's *PacifiCorp* decision would have withstood review. Of particular note is the court's quotation of *Roth Drugs, Inc. v. Johnson*, 13 Cal App 2d 720, 734, 57 P2d 1022, 1028 (1936), which rejected a constitutional

challenge over the differing treatment of tangible and intangible personal property under a prior version of the sales tax, stating: "'The reason for distinguishing between tangible and intangible property for the purpose of taxation is very evident. The first is visible, accessible and easy to identify and levy upon, while the other is not so readily located * * *.'"[8] 160 Cal App 4th at 522, 72 Cal Rptr 3d at 863.

Similar results were reached in three cases involving other kinds of taxes. In *Davis v. Gulf Power Corp.*, 799 So2d 298 (Fla App 2001), the court found that electricity was tangible personal property for purposes of an *ad valorem* property tax exemption, relying on the *Curry*, *Texas Eastern* and *Tucson Electric* cases. *Accord Minn. Power & Light Co. v. Taxing Dist.*, 289 Minn 64, 182 NW2d 685 (1970) (an MTC state, Minnesota follows the reasoning of *Curry* and holds that tools and machinery used in the production, sale and distribution of electricity are covered by an exemption from state *ad valorem* property tax for machinery used in the production of a "marketable product"). And in *Tax Comm'n v. Marcus J. Lawrence Mem. Hosp.*, 107 Ariz 198, 199, 495 P2d 129, 130 (1972), the court recognized that sales of electricity are tangible personal property subject to a charitable organization's exemption from the state's transaction privilege tax.

[8] We argue the importance of this purpose more fully in Part III.C below.

We do not suggest that these other tax cases are as persuasive as the income tax cases discussed in the preceding section. However, they make at least two key points. First, they show that both the department's audit determination in this case and its adoption, for purposes of UDITPA, of a 2011 rule mirroring the California sales tax definition of tangible personal property as property "that may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses" were reasonable and entitled to deference. Second, the *Searles Valley* decision calls into question the Tax Court's heavy reliance on the SBE's decision in *PacifiCorp*.

3. Decisions in Non-Tax Cases Likewise Overwhelmingly Treat Electricity as Tangible Personal Property

Most of the non-tax cases dealing with whether electricity is tangible personal property have arisen in the strict product liability context. It is arguable that these product liability cases should be especially persuasive here, because there are public policy reasons *not* to treat electricity as a tangible product in the strict liability context. Electricity is more fundamental to everyday life than products such as lawnmowers or ladders, and the authority to supply it is accordingly limited to statutorily authorized consumer-owned utilities, such as the Clatskanie People's Utility District, or regulated investor-owned utilities, such as PGE. Electricity is also inherently dangerous, because the very quality that makes it useful also makes it deadly. Notwithstanding these public policy considerations,

most states treat electricity the same as they treat other tangible products for strict product liability purposes. This strongly supports treating sales of electricity the same as sales of automobiles and chain saws for income tax purposes.

As noted in our discussion of the *PacifiCorp* case above, we are aware of at least 12 cases that have decided this issue, ten of which have ruled that electricity is a tangible product for this purpose and two of which have ruled that it is not. In addition to the Kentucky *Bryant*, the Georgia *Monroe* and the California *Pierce* decisions mentioned above, the other seven decisions holding that electricity is a tangible product are *Smith v. Home Light & Power Co.*, 734 P2d 1051, 1054–55 (Colo 1987); *Carbone v. Conn. Light & Power Co.*, 40 Conn Sup 120, 121-22, 482 A2d 722, 723 (1984); *Petroski v. N. Ind. Pub. Serv. Co.*, 171 Ind App 14, 29, 354 NE2d 736, 747 (1976); *Aversa v. Pub. Serv. Elec. & Gas Co.*, 186 NJ Super 130, 135-36, 451 A.2d 976, 979–80 (Law Div 1982); *Smithbower v. Sw. Cent. Rural Elec. Coop.*, 374 Pa Super 46, 52-53, 542 A2d 140, 143 (1988); *Houston Lighting & Power Co. v. Reynolds*, 765 SW2d 784, 785–86 (Tex 1988); and *Ransome v. Wis. Elec. Power Co.*, 87 Wis2d 605, 610, 620-22, 275 NW2d 641, 643, 648-49 (1979). As noted in *Bryant*, the majority have had little trouble concluding that electricity is a product, made or produced by man and confined, controlled, transmitted and distributed. 844 F Supp at 349, citing *Ransome*, 87 Wis2d at 610, 275 NW2d at 643.

Besides Ohio in the *Otte* case, New York is the only other state where a court has rejected the majority definition of electricity as tangible in the strict product liability context. *See Bowen v. Niagara Mohawk Power Corp.*, 183 AD2d 293, 590 NYS2d 628 (1992). These courts have declared instead that electricity is a service, not a tangible product, and injuries caused by voltage surges do not give rise to strict product liability but may only be pursued in negligence. *Otte*, 37 Ohio St 3d at 36, 523 NE2d at 838; *Bowen*, 183 AD2d at 296-98, 590 NYS2d at 631-32.

The only other non-tax cases that have considered the tangible personal property issue involved claims for conversion or under the U.S. Bankruptcy Code. MTC member Rhode Island, for example, ruled in *Narragansett Elec. Co. v. Carbone*, 898 A2d 87 (RI 2006), that electricity is the type of tangible personal property that would allow a public utility to sue for conversion. *Id.* at 97; *see also DeLong v. Osage Valley Elec. Coop. Ass'n*, 716 SW2d 320, 323-24 (Mo Ct App 1986) (same). The *Narragansett* court relied on the *Curry, Gulf Power Corp.* and *Texas Eastern* cases in support of its conclusion that "electricity possesses many of the characteristics of tangible personal property." 898 A2d at 97-98. The court also relied on a statement from the United States Supreme Court in *Utah Power and Light Co. v. Pfost*, 286 US 165,180; 52 S Ct 548, 552, 76 L Ed 1038 (1932), that, "'[h]owever lacking it may be in body or substance, electrical energy, nevertheless, possesses many of the ordinary tokens of materiality. It is subject to

known laws; manifests definite and predictable characteristics; [and] may be transmitted from the place of production to the place of use * * *.'" 898 A2d at 98.

Especially interesting is the decision by the U.S. Bankruptcy Court for the District of Massachusetts in *In re Erving Inds., Inc.*, 432 BR 354 (D Mass 2010), which calls into question the Massachusetts Appellate Tax Board's ruling in *EUA Ocean State*. The issue in *Erving* was whether a claim by electricity reseller NewEnergy, Inc., for electricity supplied to the debtor within 20 days before the bankruptcy petition date, was an administrative claim entitled to priority under the Bankruptcy Code. Section 503(b)(9) of the Bankruptcy Code gives priority to the provision of goods (but not services) within that 20-day window, but it does not define the term "goods." The debtor urged the court to adopt the Black's Law Dictionary definition of goods as tangible personal property, while NewEnergy urged the court to use the UCC § 2-105 definition of goods as things that are moveable at the time they are identified to the contract for sale. *Id.* at 359. While the court was persuaded that NewEnergy's UCC argument was the better position, the court analyzed the issue under both proposed definitions and concluded that electricity is a good covered by both the UCC and the Black's Law Dictionary definitions. *Id.* at 367-70.

In rejecting the debtor's argument that electricity is not tangible and should be considered a service, the court cited favorably to the strong majority position in

strict product liability cases. *Id.* at 368 n 34. The court further distinguished electricity from forms of signals such as television and radio, as well as from intellectual property:

> "But this Court discerns a marked difference between electricity and television, radio, telephone, and internet signals ('telecommunication signals'). Although their manifestations may appear similar, they are differentiated by both their physical attributes and the purposes for which they are purchased. Telecommunication signals are properly considered services because they are mechanisms by which other non-goods – intellectual property, ideas, sounds, music, images, and words – are sent from one location to another. Electricity, in contrast, is not merely a medium of delivery, but is *the thing* the customer seeks to purchase. Customers paying for telecommunication signals may, on the whole, be fairly unconcerned with the physical properties or mechanics of the telecommunications signals, except to the extent that those physical properties enhance the delivery of information. On the other hand, electricity customers are undoubtedly concerned with the intimate physical properties of electricity. That is, customers rely on the specific physical properties of electricity to fulfill their needs – anything deviating from those properties simply will not do. And it is those physical properties, the very nature of electricity, that customers contract to purchase.
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> "The Court agrees with NewEnergy that, although its ultimate nature may be mystifying to most, electricity *is* tangible and *does* possess physical properties. It is not simply an 'idea' akin to intellectual property. Although perhaps lacking in corporeal shape and not easily observed, electricity really is some *thing*, something that can be felt (although we are loathe to) and something that can be created, measured and stored."

Id. at 368-69. This Massachusetts federal court holding thus debunks the contrary conclusion in *EUA Ocean State* and fairly calls into question whether the Massachusetts state appellate courts would have agreed with the Massachusetts Appellate Tax Board had the case been reviewed. In particular, the *Erving* holding highlights a distinction between electricity and intangibles, such as intellectual property rights, that is important to the purpose underlying UDITPA's distinction between tangible and intangible property, as we discuss more fully in Part III.C below.

Whether these non-tax cases indicate how the respective states might rule in a tax case is no doubt debatable. *Compare, e.g.*, Colorado's decisions in *Pub. Serv. Co.* and *Smith v. Home Light,* in which the courts have been consistent in both tax and product liability cases, *with* California's decisions in *PacifiCorp, Searles Valley* and *Pierce,* in which the courts have been inconsistent. However, it is difficult to read the descriptions of electricity in cases such as *Bryant* and *Narragansett* – acknowledging the many characteristics of tangible personal property that electricity possesses – and conclude that Kentucky or Rhode Island, for example, would rule that electricity is intangible under UDITPA.

B. The Tax Court Was Too Quick to Defer to the *PacifiCorp* and *EUA Ocean State* Decisions

The Tax Court's error in concluding that there is any uniformity in the tax treatment of electricity sales among UDITPA states provides reason enough to

reverse. However, there is something equally troubling about the Tax Court's eagerness to defer to what it believed to be the first decision on point out of a UDITPA state: Should it be the law that the first UDITPA decision on an issue, no matter at what judicial or administrative level, requires that Oregon (and all UDITPA states) must follow? If the *PacifiCorp* and *EUA Ocean State* rulings had been the only decisions on point, would that divest the Tax Court and this Court of the authority to analyze what the Oregon legislature's intent was in distinguishing between tangible and intangible property?

We suggest that such an approach would give far too much deference to the historical accident of which state's taxing authority – in this instance not a California court but instead the State Board of Equalization in *PacifiCorp* – had the first chance to answer a UDITPA question. As it does when federal courts sitting in diversity must decide what state law is, it surely must matter in a UDITPA uniformity analysis at what level the UDITPA decisions were made. Federal courts must determine how the state supreme court would rule. They may consider but are not bound by lower court rulings. The rule should be the same for UDITPA uniformity purposes.

The *Arco* decision does not suggest otherwise. There was no question in *Arco* what the legislative intent was in Alaska and Nebraska, as those states had by statute required that IDCs be capitalized and depreciated. This equally became the

unambiguous law in Utah and North Dakota when those two states by regulation required IDCs to be included in the property factor. By contrast, a decision by the SBE or the Massachusetts Appellate Tax Court, which is also an administrative tribunal, may not reflect how the respective state appellate courts might rule. Indeed, the *PacifiCorp* decision itself states that it is "Not to be Cited as Precedent." 2002 WL 31153476, at *1. Moreover, the *Searles Valley* and *Pierce* decisions raise questions about whether the SBE decision in *PacifiCorp* would have survived review, while the *Erving* decision does likewise for the *EUA Ocean State* ruling.

As *Arco* shows, Oregon courts should not, in the name of uniformity, abandon reasoned consideration of the legislature's intent in adopting a UDITPA term and simply defer to the first administrative proceeding or lower court case to decide an issue. Rather, uniformity sufficient to trump a reasoned audit determination by the department should be found only where the court is convinced that the decisions the court is being asked to follow (1) accurately reflect how the highest courts in those states would rule and (2) fairly illustrate a uniform trend as opposed to one or a few outlier rulings.[9]

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[9] Indeed, this Court decided *Arco* only after it had the parties brief the uniformity issue again and only after it obtained a survey from the Multistate Tax Commission ("Commission") on how states were treating IDCs, which showed no deviation from the Alaska model. 301 Or at 244-46.

C. Treating Electricity as Tangible Is Consistent With UDITPA's Purpose for Distinguishing Between Tangible and Intangible Property

Before UDITPA, the majority of states that had income taxes employed both allocation and apportionment methodologies to tax the income of multistate corporations. The states distinguished between "business income" and "nonbusiness income," apportioning the former and allocating the latter within or without the state depending on the kind of asset involved. *See* George T. Altman and Frank M. Keesling, *Allocation of Income in State Taxation* (2d ed. 1950), 67 and n 179.

Although income from intangibles was theoretically subject to apportionment as "business income," in practice, income from intangibles, such as dividends and interest, capital gains from the sale of stock, and royalties from patents and copyrights, were characterized without exception as allocable "nonbusiness income." *Id.* at 67-68. Income from intangibles was thought to be discrete from other profits on sales earned by manufacturing and mercantile firms. It was allocated to a single *situs*, most commonly to the company's domicile under the maxim *mobilia sequuntur personam* (moveables follow the person). *See Blodgett v. Silberman*, 277 US 1, 9-10, 48 S Ct 410, 413, 72 L Ed 749 (1928); *see also Del. v. N.Y.*, 507 US 490, 502-03, 113 S Ct 1550, 1558, 123 L Ed 2d 211

(1993) (relying on the *mobilia* principle to determine rule of escheat for income from abandoned intangibles).

UDITPA eliminated the invariable practice of characterizing income from intangibles as "nonbusiness income" by defining "business income" to include "income from tangible and intangible property if the acquisition, the management, use or rental, and the disposition of the property constitute integral parts of the taxpayer's regular trade on business operations." ORS 314.610(1). At the same time, however, UDITPA retained much of the old tax regime, including *situs* rules and the *mobilia* principle. Thus, nonbusiness income from tangible property is allocated to the state where the property is located, while nonbusiness income from intangibles is allocated to the company's domicile following the *mobilia* principle. ORS 314.635.[10] UDITPA similarly retains older sales factor rules for apportioning "business income." As detailed in Part II above, sales of tangible personal property are generally considered to have occurred in Oregon if the property is delivered or shipped to a person in this state. ORS 314.665(2). By contrast, sales of intangibles are considered to have occurred in Oregon if all or a greater proportion of the income-producing activity occurred in this State. ORS 314.665(4).

[10] ORS 314.645 alters the allocation rules for two kinds of intangibles: patents and copyrights. Royalties are allocated to Oregon if the patented device is manufactured here or the copyrighted material is printed here.

These distinctions reflect the differences between tangibles and intangibles recognized by the California Court of Appeals in the *Roth Drug* case: It is easier to identify where tangible property is located and the income earning activity associated with it takes place. Intangible property rights created by law, such as stocks and bonds, legal causes of action, and patents and copyrights, are not so readily located. 267 Cal App 2d at 416-17, 72 Cal Rptr at 863. The *mobilia* principle is applied to these intangible property rights, which are considered to reside at the company's domicile.[11]

Given this reason for UDITPA's distinctions between tangible and intangible property, it makes more sense to treat electricity sales as sales of tangible personal property than of intangible property. Electricity is not property created by law the way contract rights, patents and copyrights, debts, litigation claims, and the like are. This case illustrates that electricity sales are readily located. Powerex expressly contracts to deliver set volumes of electric power at wholesale to specific locations. The path the electricity travels is determined by transmission rights owned or purchased by the wholesaler and the power company buyer. The rules for determining where sales of tangible property take place apply readily to

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[11] Patents and copyrights are government-granted monopolies that have no readily identifiable location. But the manufacture of products pursuant to a patent and the publication of copyrighted materials do have a recognizable *situs*. Under Oregon's version of UDITPA, these activities are used as a substitute for the legal grants and result in different allocation rules for these specific intangibles under ORS 314.645.

electricity, which has an identifiable place of delivery whether the sale is a wholesale transaction taking place at a well-established point of delivery in Washington or Oregon (as detailed below in Part IV.B) or at retail through a homeowner's or business owner's meter.

Based on UDITPA's purpose, electricity should be characterized as tangible personal property.

IV. In the Absence of Supervening UDITPA Considerations, the Department's Determination that Electricity Is Tangible Personal Property Is Entitled to Deference

For the reasons provided in Parts II and III, the department's determination that electricity is tangible personal property meets both the "fairness" and "uniformity" requirements of the *Arco* test. With these requirements satisfied, the remaining question under *Arco* is whether the department's construction of the phrase "tangible personal property" is entitled to deference under ordinary principles of Oregon administrative law. *See Arco*, 300 Or at 646. For the reasons provided below, the department's construction is entitled to deference because it is reasonable, both as a factual matter and as a matter of statutory construction.

A. The Department's Classification of Electricity as Tangible Personal Property Is a Reasonable Factual Determination

Judges, scientists, taxpayers and departments of revenue have engaged in a lively and longstanding debate on whether electricity is tangible personal property.

However, the many cases cited in Parts II and III, not to mention the IRS guidance cited in Part IV.B, confirm that although there is room for disagreement on whether electricity is tangible personal property, the department's view on this issue is reasonable. Even the Tax Court held in this case that it was only "more probable than not" that electricity is not tangible personal property under UDITPA. The Tax Court went on to explain in a footnote that "[m]ore probably than not may be the best anyone can do on these fundamental questions as to the nature of the world and the matter and forces found in this world." *Powerex v. Dep't of Rev.*, TC 4800, Memorandum Opinion at 11 n 3 (Sept 17, 2012) (hereafter "Mem Op").

To the extent there is any remaining doubt as to the reasonableness of the department's determination, that doubt should be erased by the federal tax treatment of electricity. The IRS has addressed the question of whether electricity is tangible personal property in several private letter rulings ("PLRs") and has established a policy of treating electric power as tangible. For example, in each of five letter rulings addressing whether coal transportation and handling costs were deductible as incurred, the IRS concluded:

> "Producers of electricity are subject to IRC 263A. Generation of electricity constitutes production of tangible personal property. [Citations omitted.] Thus, all direct and indirect costs attributable to the production of electricity for sale to customers are subject to capitalization in accordance with the requirements of IRC 236A and the regulations thereunder."

PLR 200152013 (Dec 28, 2001), PLR 200151035 (Dec 24, 2001), PLR 200151018 (Dec 24, 2001), PLR 200146033 (Nov 17, 2001), and PLR 200146009 (Nov 16, 2001).

Besides the foregoing PLRs, the IRS has consistently treated electricity as tangible personal property in a number of Technical Advice Memoranda ("TAMs"), Chief Counsel Advice memoranda ("CCAs"), and other advisory memoranda. *See, e.g.,* TAM 200811021 (Mar 14, 2008), Non-Docketed Serv Adv Rev 20062801F (Jul 14, 2006), CCA 200931007 (July 31, 2009), and TAM 9641004 (Oct 11, 1996). The IRS has described electricity as both a commodity and a good, but in either case has considered it to be tangible property. *See* TAM 9527003 (Jul 7, 1995), TAM 9523001 (Jun 9, 1995), CCA 201132021 (Aug 12, 2011), and PLR 201213029 (Mar 30, 2012). Similarly, in a Tax Advice Memorandum, the IRS stated that the furnishing of electricity constitutes the sale of a product or good rather than the sale of a service. TAM 200543050 (Oct 28, 2005). So far as we are able to determine, the IRS has never treated electric power as a service or an intangible. While these statements do not have the same force as a precedential federal court ruling or a formally adopted IRS rule, the IRS's

consistent treatment of electricity as tangible personal property supports the department's determination here.[12]

B. The Department's Classification of Electricity as Tangible Personal Property Is a Reasonable Construction of ORS 314.665(2)

The department's classification of electricity as tangible personal property is also a reasonable construction of ORS 314.665(2) that is entitled to deference. The Tax Court reached the opposite conclusion because paragraph (2)(a) of the statute refers to property that is "delivered or shipped" and is of a type as to which shipping terms such as "f.o.b." could apply. The Tax Court also noted that paragraph (2)(b) addresses property that can be shipped "from an office, store, warehouse, factory, or other place of storage in this state." Mem Op at 5-6. The conclusions that the Tax Court drew from these statutory references do not bear close scrutiny.

The first problem with the Tax Court's statutory analysis is that the record in this case clearly establishes that electricity is "delivered or shipped." In fact, the wholesale power market in the western states is premised on deliveries that occur at particular points of delivery. Significant points of delivery in the western states are at the "California Oregon Border" (also known as "COB"), a contractual term of art covering the Malin and Captain Jack Substations in Klamath County,

[12] We have found no federal tax case ruling one way or the other on this issue. There is thus no controlling federal case law calling the Commissioner of Internal Revenue's position into question.

Oregon, for exchanges between Oregon and California; at the Mid-Columbia point (known as "Mid C") in eastern Washington for exchanges between Oregon and Washington or British Columbia; and at the "Nevada Oregon Border" (known as "NOB"), a contractual term of art for the point where the major transmission line between Big Eddy, Oregon, and Los Angeles, California, crosses the Nevada-Oregon border, for exchanges between Oregon and Nevada. *Powerex Corp. v. Dep't of Rev.*, TC 4800, Transcript of Proceedings (Sept 12-13, 2011) at 53:8-21 (COB and Mid C); 54:9-21 (hereafter "Tr").

Transmission rights are a driving force behind designating points of delivery for wholesale electricity exchanges. To transfer electricity from seller to purchaser, one of the parties must have the right to carry the load over transmission wires. For example, PGE has contracts with the Bonneville Power Administration ("BPA") for a certain percentage of BPA's transmission capacity and has rights to carry the load from Mid C into Oregon and through Oregon to COB. PGE's transmission rights end at the California border. For a California utility, such as Pacific Gas & Electric or San Diego Gas & Electric, to take wholesale deliveries from PGE, the utility must have transmission rights in California. Tr at 63:20-23; 367:8-18; 397:2-400:4; 412:7-16.

Transmission rights are a key determinant in the cost of wholesale exchanges. Tr at 92:21-93:11. California utilities have to bear that cost (and

attendant losses) during peak summer months because they have a duty under state law to serve their loads. By contrast, transfers of things that are conventionally understood to be intangible, such as contracts, debt instruments, patents, copyrights, and other incorporeal things, generally do not depend on whether the transferor has contractually-based transmission rights to deliver the thing to a particular location and do not entail delivery costs that have an impact on their pricing. There is no cost difference because intangibles are "paper" rights created by law.

The second problem with the Tax Court's statutory analysis is that the text of ORS 314.665(2) makes it clear that property is not precluded from being tangible personal property merely because it cannot be delivered "free on board" or shipped from a warehouse or factory. Subparagraph (a) refers to f.o.b. points and other conditions of delivery in order to *exclude* these contractual terms from the determination of where delivery or shipment occurs. Subparagraph (2)(b) solely applies to property that is shipped from a place of storage, but this subparagraph was included to provide an alternative to the primary sourcing rule found in subparagraph (2)(a). Specifically, subparagraph (2)(b) ensures that sales will not be excluded from the taxpayer's sales factor if they are made to the U.S. government or would be sourced under subparagraph (2)(a) to a state where the taxpayer is not taxable.

The more reasonable construction of ORS 314.665(2) is that it contemplates that the term "tangible personal property" *generally* includes, but is not strictly limited to, forms of property that are subject to conventional shipping arrangements, such as delivery f.o.b. at the seller's warehouse.

V. The Department Correctly Determined That Sales of Electricity and Natural Gas Should Be Sourced Under UDITPA to the State Where the Buyer Takes Possession and Control

The second major issue in this case is whether the Tax Court correctly determined that sales of natural gas by Powerex and other UDITPA taxpayers should be sourced to the state of ultimate destination – and not to the state where the contracted point of delivery is located – for purposes of computing its sales factor under ORS 314.665(2).

The text of ORS 314.665(2) can reasonably be read to embody the place-of-delivery rule applied by the department in this case. The place-of-delivery rule has been clearly adopted in OAR 150-314.665(2)-(A)(4), an MTC model regulation examined in greater detail in Part VI below with respect to its application to public utilities. Without repeating the department's arguments on this issue as it relates to UDITPA taxpayers, we note that Jerome R. and Walter Hellerstein's *State Taxation*, the leading treatise on the subject, endorses the place-of-delivery rule as the simplest and most efficient method for resolving the sourcing problem:

> "[I]n determining what is the destination of the goods, the decisive consideration should be the facilitation of simple and inexpensive taxpayer compliance and administration by the taxing authorities.
>
> * * * * *
>
> "The MTC construction of UDITPA enables the vendor to classify the destination of sales by the buyer's invoice address, without making it necessary for it to examine the facts as to the purchase's reshipment or transshipment of the goods, except for reshipments by common carrier, which should be relatively easy to identify. The * * * *ultimately received* rule * * * introduce[s] time-consuming and burdensome complexities that require vendors to inquire to the course of a product's journey after it is turned over to the customer, the local trucker, or other local recipient. These practical considerations should outweigh the * * * desire – albeit legitimate – to attribute sales to the market for the goods, which will typically be the state of ultimate destination."

Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 9.18[1][a] at 9-254-55 (3d ed 2000 & 2012 Cum Supp No 3).

VI. If the Court Upholds the Tax Court's Rulings, Its Decision Should Be Limited to Taxpayers That Are Directly Subject to UDITPA

If the Court upholds the Tax Court's rulings on either the proper classification of electricity or the sourcing issue, PGE respectfully submits that the Court should expressly limit its decision to taxpayers that are not "public utilities" within the meaning of ORS 314.610(6) but nevertheless trade in natural gas and electricity – and are therefore directly subject to UDITPA. *See* ORS 314.615

(excluding public utilities from allocation and apportionment under UDITPA). PGE and several other Oregon taxpayers that sell electricity and natural gas are public utilities engaged in unitary businesses. Allocation and apportionment of these taxpayers' income is determined under ORS 314.280, and they are only indirectly subject to UDITPA through the incorporation-by-reference scheme adopted by the department in its rules for unitary businesses under ORS 314.280.[13]

A rule in that scheme, OAR 150-314.280-(F) (the "F Rule") incorporates by reference "ORS 314.665 and the rules pertaining thereto." Since at least 2007, the department has taken the position that, pursuant to the UDITPA rules incorporated by reference into the F Rule, electricity is tangible personal property and sales of tangible personal property, including electricity and natural gas should be sourced to the contracted point of delivery.[14]

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[13] UDITPA allocation and apportionment rules do not apply to ORS 314.280 taxpayers that do not engage in a unitary business and are entitled to use separate accounting. *See* OAR 150-314.280-(M).

[14] In 2007, the department adopted OAR 150-314.665(2)-(C), which sources sales of tangible personal property (including electricity and natural gas) to the state where the contracted point of delivery is located for purposes of calculating a taxpayer's sales factor. The Tax Court held that the rule was invalidly enacted in 2007, and the department re-enacted the rule in 2010 as a temporary rule and in 2011 as a permanent rule. The parties disagree on when the department first implemented the policy expressed in OAR 150-314.665(2)-(C). However, both parties would presumably agree that, in view of the department's attempt to adopt that rule, the department adopted a place-of-delivery policy no later than 2007.

In *Crystal*, the Court confirmed that the department's construction of an incorporation-by-reference rule under ORS 314.280 will be upheld if the construction (1) gives effect to all of the rule's provisions, to the extent possible, (2) is "plausible," and (3) is "not inconsistent with the rule, its context, or any other source of law." 353 Or at 311. The Court indicated that, as a result of this deferential standard of review, a construction that is invalid under UDITPA could nevertheless be valid under ORS 314.280, and that it is unlikely such different treatment of taxpayers would violate the Uniformity Clauses of the Oregon Constitution. *See Crystal*, 353 Or at 3113-14.

For the reasons provided below, a construction of the F Rule that classifies electricity as tangible personal property and sources a public utility's sale of natural gas or electricity to the state where the contracted point of delivery is located satisfies the standard of review applied in *Crystal*, regardless of whether such constructions also apply to UDITPA taxpayers. Given the potentially different treatment of these two groups of taxpayers, if the Court upholds the Tax Court's rulings on either or both issues, it should expressly reserve resolution of those issues for ORS 314.280 taxpayers until presented with such a case.

A. The Department's Policies Give Effect to All Provisions of the Department's "F Rule" Under ORS 314.280

The first question in the *Crystal* analytical framework is whether the department has construed the F Rule in a manner that gives effect to both ORS 314.665 and "the rules pertaining thereto."

The department's classification of electricity as tangible personal property does not raise any concerns under the first question in the *Crystal* framework. "Tangible personal property" is not defined in UDITPA, and there are no rules under ORS 314.665 that conflict with the department's classification.

The department's policy of sourcing sales of natural gas and power to the point of contracted delivery requires closer examination. For purposes of sourcing such sales, the relevant provision of ORS 314.665 is paragraph (2)(a), which states:

> "(2) Sales of tangible personal property are in this state if:
>
> > (a) The property is delivered or shipped to a purchaser * * * within this state regardless of the f.o.b. point or other conditions of the sale * * *."

For the years at issue in this case,[15] the relevant rule incorporated by reference into the F Rule was OAR 150-314.665(2)-(A), which applies ORS 314.665 to a variety of factual situations. OAR 150-314.665(2)-(A) enacts provisions of a model

[15] As noted in footnote 7 above, the department reenacted OAR 150-314.665(2)-(C) as a temporary rule in 2010 and as a permanent rule in 2011. The re-enacted rule has retrospective effect for all years open to examination. For purposes of construing the F Rule, OAR 150-314.665(2)-(C) would also be a relevant rule with respect to all years open for reexamination on its reenactment dates.

regulation adopted by the Commission in 1973. Paragraph (4) of the rule provides that:

> "(4) 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."

The department's policy of sourcing sales of electricity and natural gas to the point of contracted delivery gives effect to both ORS 314.665(2)(a) and paragraph (4) of the rule. By contrast, paragraph (4) of the rule would not be given effect if the "ultimate destination" rule adopted by the Tax Court were extended to public utilities. To understand why this is so, it is necessary to examine the longstanding controversy over the sourcing of sales of tangible personal property under UDITPA.

For over 40 years, commentators and courts have wrestled with whether the phrase "within this state" found in Section 16(a) of UDITPA (adopted in Oregon as ORS 314.665(2)) refers to *the delivery or shipment of the property*, or to *the purchaser*. If "within this state" refers to the former, then UDITPA section 16(a) sources sales to the state where the place of delivery is located, regardless of whether the purchaser maintains an ongoing physical presence in that state. If, however, "within this state" refers to the latter, then UDITPA section 16(a) embodies an ultimate-destination rule. *See* Hellerstein & Hellerstein, *State*

Taxation ¶ 9.18[1][a], at 9–251-56 (summarizing controversy over construction of UDITPA section 16(a)).

Although a number of state courts have concluded that Section 16(a) embodies the ultimate-destination rule,[16] the Commission takes the view that it embodies the place-of-delivery rule. The Commission's view is specifically expressed in paragraph (4) of the model regulation adopted in Oregon as OAR 150-314.665(2)-(A).[17] As Hellerstein explains:

> "[U]nder UDITPA, as construed by the [Commission] regulations, it appears that if goods are sold to the buyer in State A and it sends its trucks to the terminal in State A to pick up the goods and transport them to its branches in other states, the goods would be treated as having been 'delivered or shipped to a purchaser' in State A."

Id. at ¶ 9.18[1][a], at 9-252 & n 943.

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[16] For a summary of cases adopting the ultimate-destination rule, *see* Hellerstein & Hellerstein, *State Taxation* ¶ 9.18[1][a] at 9-255 n 954.

[17] In the Tax Court, Powerex argued that paragraph (4) of the Commission regulation should be construed as requiring that the purchaser maintain a place of business in the state where the delivery occurs. It based this argument on an example in paragraph (4) that discusses a purchaser who maintains a central warehouse in Oregon where it receives goods and then reships them to another state. However, the text of the rule itself does not support such a narrow reading; it sources a sale to Oregon if "the shipment terminates in this state." OAR 150-314.280(2)-(A). As a general matter, the examples provided in an administrative rule merely illustrate the application of the rule and are not exhaustive expressions of the rule's scope. *See, e.g., Cocker v. Comm'r of Internal Rev.*, 68 TC 544, 561 (1977) (applying IRC Section 483 and holding that "[t]he examples in the regulations * * * dealing with future earnings are simply examples. They were not intended to be exclusive.").

Given that paragraph (4) of OAR 314.665(2)-(A) adopts the place-of-delivery rule, the department's construction of ORS 314.665(2) reconciles the statute with the rule. Under the standard applied in *Crystal*, it is therefore the preferable reading of the F Rule, which incorporates by reference both ORS 314.665(2) *and* "the regulations pertaining thereto." *Crystal*, 353 Or at 314.

In fact, if ORS 314.665(2) is construed to embody the ultimate-destination rule, then it is in direct conflict with paragraph (4) of OAR 314.665(2)-(A). For this reason, the ultimate-destination reading of the statute does not pass muster under *Crystal*.

The Pennsylvania Supreme Court faced this issue in a 2003 case. Pennsylvania has not adopted UDITPA in its entirety, but it has adopted a version of UDITPA section 16(a) that uses the operative phrase "delivered or shipped to a purchaser within this State." 72 Pa Cons Stat § 7401(3)2(a)(16). In *Commonwealth v. Gilmour Mfg. Co.*, 573 Pa 143, 822 A2d 676 (2003), the Pennsylvania Supreme Court held that the statute embodied the ultimate-destination rule. Turning to a regulation of the Pennsylvania Department of Revenue that adopted the place-of-delivery rule, the court held that "the regulation is contrary to the clear wording" of the statute and invalidated it. *Id.* at 156, 822 A2d at 684. Because *Crystal* gives preference to a reading of the F Rule that gives effect to both ORS 314.665 and paragraph (4) of the regulation, the Court should

avoid the conflict confronted in *Gilmour* and reject the ultimate-destination reading of ORS 314.665(2).

B. The Department's Policies Reflect a Plausible Construction of the F Rule

The second question in the *Crystal* analytical framework is whether the department's classification of electricity as tangible personal property and its adoption of the place-of-delivery rule reflect a "plausible" construction of the F Rule.

1. The Classification of Electricity as Tangible Personal Property Is Plausible Reading of the Scientific Evidence and Construction of ORS 314.665

The department's classification of electricity as tangible personal property is plausible for the reasons provided in Part IV above. In classifying electricity as tangible personal property, the department is following the majority of courts in UDITPA and MTC states to consider the issue, as well as the longstanding policy of the IRS. Moreover, the classification is a reasonable construction of ORS 314.665(2), because that statute broadly contemplates that tangible personal property is property that can be delivered or shipped. As detailed in Part IV, electricity is routinely delivered by Powerex, PGE and other sellers at well-established trading hubs. In the face of this evidence, it cannot be said that the department's classification is implausible.

2. The Department's Adoption of the Place-of-Delivery Rule Is a Plausible Reading of ORS 314.665(2)

The department's view that ORS 314.665(2) embodies the place-of-delivery rule is plausible, because courts and commentators alike have noted that the text of UDITPA section 16(a) supports both the place-of-delivery and ultimate-destination readings. Hellerstein has observed that "[a]s a matter of statutory construction, one can easily answer the question * * * either way." Hellerstein & Hellerstein, *State Taxation* ¶ 9.18[1][a], at 9-254.

The fact that a large number of courts have adopted the ultimate-destination construction as the best reading of UDITPA section 16(a) does not detract from the plausibility of the place-of-delivery reading. First, most of these courts have adopted the ultimate-destination reading after first holding that the text of UDITPA section 16(a) (or their state's variant) is ambiguous – or these courts have cited earlier decisions that acknowledge the ambiguity of the statutory language. *See, e.g., Olympia Brewing Co. v. Comm'r of Rev.*, 326 NW2d 642, 645 (Minn 1982) (acknowledging ambiguity of text); *Rev. Cabinet v. Rohm & Haas Ky., Inc.*, 929 SW2d 741, 744 (Ky 1996) (same); *Texaco, Inc. v. Groppo*, 215 Conn 134, 141, 574 A2d 1293, 1297 (1990); *Pabst Brewing Co. v. Wisconsin Dep't of Rev.*, 130 Wis2d 291, 295, 387 NW2d 121, 122 (Wis Ct App 1986); *McDonnell Douglas Corp. v. Franchise Tax Bd.*, 26 Cal App 4th 1789, 1794-95, 33 Cal Rptr 2d 129, 131-32 (Cal Dist Ct App 2nd 1994) (citing, inter alia, *Pabst, Olympia* and *Texaco*);

Paccar, Inc. v. State Dep't of Rev., No Corp 2004-715, 2006 WL 370805 (Ala Dep't of Rev Admin Law Div Jan 11, 2006) (applying rules of construction for statutes that are "vague and susceptible to two meanings").

Second, the reasons articulated by courts for resolving the ambiguous language of UDITPA section 16(a) in favor of the ultimate-destination construction are UDITPA-centric. Some courts have stated that the ultimate-destination construction expresses the intent of UDITPA's drafters. *See, e.g., McDonnell Douglas,* 26 Cal App 4th at 1796, 33 Cal Rptr 2d at 133; *Rohm & Haas*, 929 SW2d at 744; *Lone Star Steel Co. v. Dolan*, 668 P2d 916, 920-21 (Colo 1983). Other courts have stated that *not* adopting the ultimate-destination construction after so many other states have done so would run counter to the goal of achieving uniformity among the states in taxation matters. *See, e.g., McDonnell Douglas*, 26 Cal App 4th at 1796, 33 Cal Rptr 2d at 132; *Rohm & Haas*, 929 SW2d at 744-45; *Gilmour*, 573 Pa at 153, 822 A2d at 682.

These UDITPA considerations have no bearing on the proper interpretation of ORS 314.280 or the F Rule. As this Court explained in *Fisher Broadcasting, Inc. v. Dep't of Rev.*, 321 Or 341, 898 P2d 1333 (1995), ORS 314.280 and UDITPA have different purposes. The goal of ORS 314.280 is to apportion the taxpayer's income so as to reflect fairly and accurately the net income of its business done within Oregon. *Id.* at 354. The purpose of UDITPA, by contrast, is

to fairly represent the extent of the taxpayer's business activity in this state and to promote the goals of uniformity and 100-percent taxation among the states. *Id.* at 358. Even if the Court finds that the ultimate-destination construction is a preferable reading of ORS 314.665(2) for UDITPA taxpayers, the place-of-delivery construction is nevertheless a plausible reading of that statute in its incarnation as a rule under ORS 314.280.

C. The Department's Policies Are Consistent With the Goals of ORS 314.280

The final question in the *Crystal* analytical framework is whether the department's classification of electricity as tangible personal property and its application of the place-of-delivery construction to ORS 314.280 taxpayers via the F Rule are "not inconsistent with the rule, its context, or any other source of law." *Crystal*, 353 Or at 311. As detailed in Part II, the chief consequence of classifying electricity as tangible personal property (whether directly under ORS 314.665 or under the F Rule) is that the "place of delivery" sourcing rule for sales of tangible personal property will apply instead of the "income-producing activity" sourcing rule that applies to other sales. For this reason, our discussion below does not separately examine the classification of electricity as tangible personal property but instead focuses solely on how the department's resolution of the sourcing issue is consistent with the goals of ORS 314.280.

The trial record in the Tax Court demonstrates that sourcing sales of electricity to the contracted point of delivery is an appropriate method of achieving ORS 314.280's goal of fair and accurate apportionment of net income. The points of delivery used in electricity trades in the western states are not arbitrarily chosen by the parties to those transactions. Instead, they are long-established "trading hubs" at which high volumes of trades are regularly conducted. Tr at 48:9-54:21; 51:23-54:21. The price of electricity varies from hub to hub. Tr at 86:4-19. Buyers' and sellers' transactions at particular trading hubs are netted or "booked" out on a daily basis. Tr 41:15-43:22. The transmission of power sold in a particular transaction is tracked from the location of production, to the trading hub, and then to its destination. Tr 69:10-15. Sellers are responsible for the transmission of power to the trading hub, which requires obtaining or utilizing existing transmission rights; buyers are responsible for the transmission of power to the ultimate destination, which also requires obtaining or utilizing existing transmission rights. Based on their respective transmission rights (or willingness to bear the cost of obtaining those rights), buyers and sellers have found that Oregon trading hubs are a convenient point of delivery for power transmitted into the California market. Tr at 63:20-23; 367:8-18; 397:2-400:4; 412:7-16.

In sum, the contracted points of delivery used in the electricity industry constitute well-established hubs at which buyers and sellers repetitively elect to

conduct trade based on prevailing prices, the parties' respective transmission rights and other factors. For a variety of reasons, buyers and sellers have found that Oregon trading hubs are convenient points of delivery. The department could reasonably conclude that the sale of electricity at an Oregon point of delivery is business activity conducted at an Oregon commercial hub, and that sourcing gross receipts from such sales to Oregon fairly and accurately reflects net income from business done in Oregon.[18]

CONCLUSION

The Court should rule that electricity is tangible personal property under UDITPA. The department's determination on this issue satisfies the "fairness" and "uniformity" criteria against which this Court evaluates constructions of UDITPA. It is also inherently reasonable, as confirmed by the many court decisions holding that electricity is tangible personal property. The department's determination is therefore entitled to deference, and the Tax Court's ruling on the classification

[18] In gauging whether a point-of-delivery rule is consistent with ORS 314.280, it is also important to consider that such rule is not the exclusive means of sourcing ORS 314.280 taxpayers' sales. The Court has characterized ORS 314.280 as a "flexible and nonuniform" tax regime. *Fisher Broadcasting*, 321 Or at 354. The statute expressly permits taxpayers to request an alternative apportionment method, and it authorizes the department to permit or require taxpayers to utilize the segregated method, the apportionment method, or an alternative method. ORS 314.280(1)-(2). Given the flexibility that is hard-wired into ORS 314.280, a particular rule can be deemed consistent with ORS 314.280 even if it would not result in the fair and accurate reflection of *all* taxpayers' net income from business done in Oregon.

issue should be reversed. The department's place-of-delivery rule for sourcing sales of electricity is a reasonable reading of ORS 314.665(2), accords with a longstanding departmental rule that is based on an MTC model regulation, and has been endorsed by the leading treatise on state taxation.

If the Court upholds the Tax Court's rulings on either the classification of electricity or the sourcing of sales of natural gas and electricity, it should expressly exclude ORS 314.280 taxpayers from its decision. The department's position on both issues satisfies the standard recently announced by the Court in *Crystal*. For this reason, if the Court ever considers a case on whether the department's positions on the classification and sourcing issues validly apply to ORS 314.280 taxpayers, it will almost certainly conclude that the positions are entitled to deference and should be upheld. Given the potentially different treatment of UDITPA taxpayers and ORS 314.280 taxpayers on the classification and sourcing issues, the court should avoid any implication that the latter are subject to a decision upholding the Tax Court's rulings.

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DATED this 8th day of July, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 13,854 words.

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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 8th day of July, 2013.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the date set forth below, I directed the original **BRIEF ON THE MERITS OF *AMICUS CURIAE* PORTLAND GENERAL ELECTRIC COMPANY** to be filed electronically with the Appellate Court Administrator, Appellate Records Section, through the eFile system and served said document electronically through the same eFile system on:

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