IN THE SUPREME COURT OF THE STATE OF OREGON

CITY OF SEATTLE, a municipal corporation of the State of Washington, acting by and through its City Light Department,
Plaintiff-Appellant,

v.

DEPARTMENT OF REVENUE, State of Oregon,

Defendant-Respondent.

Tax Court 4946, 4957

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, a municipal corporation of the State of Washington,
Plaintiff-Appellant,

v.

DEPARTMENT OF REVENUE, State of Oregon,
Defendant-Respondent.

Tax Court 4959

CITY OF TACOMA, a municipal corporation of the State of Washington, acting by and through its Department of Public Utilities, Light Division,
dba Tacoma Power,
Plaintiff-Appellant,

v.

DEPARTMENT OF REVENUE, State of Oregon,
Defendant-Respondent

Tax Court 4958

S061813

RESPONDENT'S BRIEF

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

7/22/14

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STATEMENT OF THE CASE

Defendant-Respondent, Oregon Department of Revenue (department), agrees with Plaintiffs-Appellants' (plaintiffs') statements as to the Nature of the Judgment appealed from, the court's Jurisdiction, and the Timeliness of Appeal. The department also agrees with plaintiffs' statement of the Nature of the Action and Relief Sought, except as set out below. While the facts material to this case are not disputed, the department disagrees with plaintiffs' characterization of the Questions Presented on Appeal and their Summary of Facts and provides its own statements below.

Nature of the Action and Relief Sought

The department disagrees with plaintiffs' characterization of the Capacity Ownership Agreements that are at the center of this case as mere "transmission service agreements." The department agrees with the remainder of plaintiffs' statement of the Nature of the Action and Relief Sought.

Questions Presented on Appeal

1. Is the Intertie property owned, used or held by plaintiffs under their Capacity Ownership Agreements taxable, under either ORS 307.060 or ORS 308.505 to 308.665?

2. Was Senate Bill (SB) 495 (2009), which repealed the exemption for plaintiffs' Intertie property under ORS 307.090 enacted in compliance with Article IV, section 18, of the Oregon Constitution?

Summary of the Arguments

The plaintiffs' Capacity Ownership Agreements (COAs) reflect and define the taxable real and personal property owned, held and used by plaintiffs in Oregon. These are not ordinary electricity transmission agreements, as plaintiffs argue. This court has previously construed the COA as providing a taxable possessory interest in the Pacific Northwest AC Intertie (Intertie), part of the federally-owned electrical grid located in Oregon. *See Power Resources Coop. v. Dept. of Revenue*, 330 Or 24, 996 P2d 969 (2000). In *Power Resources* this court held that plaintiffs' Intertie property is taxable under ORS 307.060, because the COA creates a possessory interest in the Intertie.[1] The court should adhere to that well-reasoned, legally correct decision. Plaintiffs have a taxable possessory interest in the Intertie, and they fail to provide any valid basis for this court to overrule *Power Resources*.

Even if the COA does not create a possessory interest in the Intertie, the plaintiffs' property is taxable under the central assessment statutes, ORS 308.505

[1] All references are to the 2009 version of the Oregon Revised Statutes unless otherwise specifically noted. The 2009 version applies to property tax year 2010-11, which is the tax year at issue in this appeal. (ER-41).

to 308.665, as property that is used or held for use in the plaintiffs' electric business. *Pacificorp Power Marketing v. Department of Revenue (PPM)*, 340 Or 204, 131 P3d 725 (2006). In *PPM*, this court concluded that when a centrally assessed company uses property of an otherwise exempt government entity, that property is taxable, even if the use does not rise to the level of a "possessory interest" in the property. *Id.* at 217-218. Under the centrally assessed property statutes, ORS 308.505 to 308.665. Oregon may tax any real or personal property used or held for future use by plaintiffs in performing or maintaining an electricity business or service, or in the sale of electricity, including the plaintiffs' Intertie property, regardless of whether or not plaintiffs have a possessory interest in that property. Plaintiffs use the Intertie under the COAs, which renders plaintiffs' capacity ownership interest in that property taxable by the State of Oregon.

SB 495 (2009) repealed the property tax exemption enacted for the plaintiffs' Intertie property in 2005, and in so doing "leveled the playing field" with regard to property tax for all entities with Capacity Ownership Agreements. SB 495 was validly enacted and did not violate the requirement in Article IV, section 18, of the Oregon Constitution (Origination Clause), that "bills for raising revenue" originate in the Oregon House of Representatives, because (1) a bill repealing a property tax exemption is not one for raising revenue under the Constitution, (2) the primary purpose of SB 495 was not for raising revenue, and

(3) even if the bill is one for raising revenue, the revenue raising aspect of SB 495 originated in the House.

This court narrowly construes what constitutes a "bill for raising revenue" and has adopted the view that a bill is not one for raising revenue unless it was designed for the primary purpose of raising revenue and that the phrase is confined to bills that levy taxes in the strict sense. *Northern Counties Investment Trust v. Sears*, 30 Or 388, 402-403, 41 P 931 (1895). Consistent with this narrow construction, the Oregon Supreme Court has never struck down a statutory provision on the ground that it violated the state's origination clause.

This court and others have held that a bill repealing a property tax exemption does not violate the Origination Clause even though the bill may originate in the Oregon Senate. *Mumford v. Sewall*, 11 Or 67, 71, 4 P 585 (1883); *Dundee v. Parrish*, 24 F 197, 201 (D Or 1885). A bill repealing a property tax exemption is not a bill to levy taxes in the strict sense; it is a bill regulating the underlying basis upon which the tax is imposed. *Id.* Consequently, SB 495, which repealed the exemption for plaintiffs' Intertie property, was not a "bill for raising revenue" under the Oregon Constitution.

SB 495 is not a "bill for raising revenue," because its purpose was not to raise revenue. The primary purpose of SB 495 was to return to equal tax treatment for all property owned or used under Capacity Ownership Agreements with BPA, and its revenue raising aspect, if any, was incidental to that primary purpose. Hence, the bill does not constitute a "bill for raising revenue" under the Origination Clause.

Even assuming, *arguendo*, that the effective provisions in SB 495 render it a "bill for raising revenue," it does not violate the Origination Clause, because it actually originated in the House of Representatives. SB 495 bears the number of a bill introduced initially in the Oregon Senate, but the original bill, as introduced, granted an expanded property tax exemption to include the Intertie property of electric cooperatives, owned pursuant to a COA exactly like that of the plaintiffs. SB 495, as introduced and originally passed by the Oregon Senate, was *not* a bill for raising revenue. The provisions of the bill repealing plaintiffs' property tax exemption originated in and were passed first by the Oregon House as a "gut and stuff" amendment to SB 495. Thus, even if those provisions render SB 495 a "bill for raising revenue," they originated in the Oregon House in compliance with the Origination Clause.

Summary of Facts

The property owned and used by plaintiffs in Oregon is identified in plaintiffs' Capacity Ownership Agreements, and the Intertie property owned and used under those agreements is the property assessed by the department for tax year 2010-11. (*See generally* SER 1-278 (PNW AC Intertie Capacity Ownership

Agreement, between Bonneville Power Administration and City of Seattle, Washington)[2]; Declaration of Michael Olson (Decl of Olson) at ¶ 1). Other than differences in the amount of megawatts of capacity, the property owned and used by plaintiffs, *i.e.*, their capacity ownership interest in the Intertie, is identical to the property owned and used by the taxpayer in *Power Resources*.

The Bonneville Power Administration's (BPA) stated intent for the COAs was to allow[3] the Capacity Owners to "acquire a share of transmission capacity in the Intertie that is "as close to 'full ownership' as possible" in exchange for a lump-sum payment equal to the cost of the construction necessary to create the additional capacity. (Defendant's Exhibit (Def Ex) E at 12, 86).[4] Pursuant to the COAs, plaintiffs City of Seattle, City of Tacoma and Snohomish PUD own,

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[2] The department has included in its Supplemental Excerpt of Record a copy of the COA between the City of Seattle and BPA. Other than as specifically noted in the department's brief, the COA included in the Supplemental Excerpt of Record is identical in all material respects to the COAs between the City of Tacoma and BPA and between PUD No. 1 of Snohomish County and BPA.

[3] In their summary of facts, plaintiffs characterize the COAs as simply "imposing on customers a new form of transmission rate" and assert that they were "required" to enter into the COAs in order to obtain transmission service on the expanded Intertie. (App Br 6). Plaintiffs wrongly assert that the department admitted this in its Answer. The plaintiffs' assertions are not supported by documentary evidence in the record, and the department did not admit that characterization of the facts. Instead, the record reflects that the option to enter the COAs was *offered* to the plaintiffs, in part in response to their desire for an interest in the Intertie that was as close to full ownership as possible. (SER 3; Def Ex E at 12).

[4] Defendant's Exhibits A through E were filed as attachments to Defendant's Response to Plaintiff's Second Motion for Summary Judgment and Defendant's Second Cross-Motion for Summary Judgment. (Tax Court File Index at 1291).

respectively, 160, 41 and 42 megawatts (MW) of the PNW AC Intertie facilities' capacity. (SER 215).

The features of the Capacity Ownership Agreements include:

- The term of the COAs is for the life of the Intertie facilities described in the agreements. (SER 15).
- Plaintiffs' Capacity Ownership interest in the Intertie was obtained in return for an up-front, lump-sum payment equal to a proportionate share of the cost of those facilities. (SER 32).
- The Capacity Owners have the exclusive use of their respective megawatt shares of the Intertie capacity. (SER 22, 279).
- BPA is the operator of the Intertie facilities, but each Capacity Owner must pay a percentage of the annual maintenance, repair and operation costs for the Intertie relative to its ownership share. (SER 29, 40).
- The Capacity Owners, like all those transmitting electricity over the Intertie, must submit scheduling requests to BPA as operator. (SER 22-24).
- BPA must consult with the Capacity Owners in developing any plans for upgrading the Intertie facilities. (SER 24).

- The Capacity Owners have the right to obtain additional capacity ownership pursuant to any upgrades to the Intertie facilities, in return for a payment of the associated capital costs and annual costs for the upgrade. (SER 24-25).
- The Capacity Owners were offered the option to forego the ability to use their capacity under the COA to "wheel" or transmit electricity for third-parties, in which case BPA would compensate the Capacity Owner a pro-rata share of revenues received by BPA for any use of its capacity to provide short-term transmission to other utilities. (SER 16-17).
- Alternatively, the Capacity Owners could choose to transmit or "wheel" electricity for other parties using their Intertie capacity, and do not need to make any of their excess capacity available to BPA. SER (20-21).
- An Owner's Committee was established for the Capacity Owners, with authority to review the operation, management and maintenance of the Intertie facilities and to audit BPA's books. (SER 52-69).

(*See also* Def Ex E at 6-8; BPA Notice, "Proposal to Establish Transmission Rate for AC Intertie Non-Federal Capacity Ownership," 57 FR 38490-02, August 25, 1992).

Under the COAs, plaintiffs have a life-of-facilities, capacity ownership in the PNW AC Intertie facilities. (SER 1). The agreement defines "Capacity Ownership Percentage" and "Capacity Ownership Share," in relevant part, as the percentage or megawatt amount of Bonneville's PNW AC Intertie Rated Transfer Capability "*owned* by [plaintiff] pursuant to this Agreement." (SER 6 (emphasis added); *see also* SER 5, 6 (defining "Capacity Owner," "Capacity Ownership Agreement," and "Capacity Ownership Rights")).

Plaintiffs own a portion of the total capacity of the PNW AC Intertie transmission system through which their transmitted electricity travels. (*See* SER 14 ("Scheduling Percentage" "means the percentage of the PNW AC Intertie Rated Transfer Capability *owned* by [plaintiffs] pursuant to this agreement." (emphasis added)); SER 16 (describing the "purchase and sale of capacity" by the plaintiffs from BPA)).

BPA documents describe the parameters of Capacity Ownership as follows: "When a New Owner purchases a Capacity Ownership share of the PNW AC Intertie rated transfer capability owned by BPA, that New Owner will be entitled to *exclusive use of its MW share* of the corresponding [Operational Transfer Capability] for scheduling in a given hour." (*See* Def Ex C at 11; *see also* Def Ex E at 29 (COAs "[p]rovide New Owners the ability to exclusive use of their capacity share without regulation by BPA except in the areas of (1) Protected Areas; (2) third-party wheeling; and (3) PNW resource exports.”)).

All of the COAs provide that if the Capacity Owner chooses the option not to transmit power for third-parties (Third-Party Wheeling) and does not use its full capacity share, BPA may use that capacity but “shall” compensate the Capacity Owner. (SER 17). The COAs also provide that if the Capacity Owner chooses to use its capacity to transmit power for third-parties, it has no obligation to make the excess capacity available to BPA. (SER 20).

BPA expanded the physical Intertie facilities, in part, to accommodate new capacity owners, including plaintiffs. (SER 3; Def Ex E at 6). Accordingly, charges paid by plaintiffs under the COAs cover plaintiffs’ share of both capital and related costs of the facilities, for which the Capacity Owners paid an initial capacity ownership price of $215 per kilowatt of capacity. (SER 8). The Capacity Ownership Price for plaintiffs’ Intertie interest consists of “the Capacity Ownership Share of the actual capital and related costs of facilities as determined by the formula [in the COA].” (SER 113).

BPA does not exclusively maintain and operate the Intertie. All Capacity Owners, including plaintiffs, are assessed annual fees for their share of maintenance costs. (SER 40). Charges payable by plaintiffs under the COAs are intended to cover plaintiffs’ prorated share of various annual expenses for the

Intertie, including operations, maintenance and repair. (SER 113-115). Plaintiffs pay BPA to maintain the physical property that includes their capacity ownership share of the PNW AC Intertie.

As would reasonably be expected, careful scheduling of the transmission of electricity by each Capacity Owner, as well as BPA, insures that the system can be operated efficiently in accordance with Prudent Utility Practice. (SER 22-24).

Plaintiffs' use of the Intertie facilities is subject to compliance with scheduling requirements, as is the use of the Intertie by all other users including BPA, but the capacity purchased by plaintiffs pursuant to the COAs is reserved to the respective plaintiffs for their exclusive use. (Def Ex C at 12). The COAs for the City of Seattle and Snohomish PUD state:

> [Plaintiff] (and only [Plaintiff]) shall be entitled to schedule on the PNW AC Intertie, in any hour, a MW amount up to [Plaintiff]'s Scheduling Share for such hour. The MW amount of [Plaintiff]'s Scheduling Share deemed to be scheduled on the PNW AC Intertie pursuant to this Agreement, in any hour, shall be determined as the net of [Plaintiff]'s north-to-south schedules and south-to-north schedules (net schedules) for such hour.

(SER 22).

Pursuant to the COA's provisions allowing Capacity Owners to elect to use their capacity to "wheel" power for third-parties, the City of Tacoma amended its COA to substitute an alternative paragraph, which plainly states that it has the right to use the Intertie to transmit power for itself and others. The amended paragraph reads:

> Tacoma may use its Scheduling Share to transmit any and all power and energy, whether or not such power or energy is owned by Tacoma. Tacoma agrees to provide Bonneville access to its available unused Scheduling Share on any hour under terms and conditions comparable to those provided by Bonneville to Tacoma under the open market provisions of section 5(c)(2) of Bonneville's Long-Term Intertie Access Policy * * *.

(SER 279). While this paragraph allows some use by BPA of Tacoma's unused share of Intertie capacity, Tacoma retains the right to use its Capacity Ownership share and also has the right to be compensated for any use of that share by BPA under terms comparable to those provided to other Intertie transmission customers.

Pursuant to the COAs, the plaintiffs also participate in the "Capacity Owner's Committee," which must be convened by BPA at least annually for a meeting to discuss the operating plan for the Intertie, and the Owner's Committee may object or make recommendations regarding the operating plan proposed by BPA. (SER 52). In addition, the Owner's Committee may audit the records of BPA regarding any adjustments to the Capacity Ownership Price or other charges to the owners. (SER 85).

ANSWER TO ASSIGNMENT OF ERROR[5]

The Tax Court properly granted the department's motions for summary judgment based on its legal conclusions that plaintiffs have a taxable possessory interest in the Intertie and that the 2009 bill repealing the exemption for plaintiffs' property was constitutionally enacted.

A. Preservation of Error

The department agrees that plaintiffs preserved their argument that *Power Resources* was wrongly decided, their argument that the Intertie property used or held by them in their electricity business is not, alternatively, subject to taxation under ORS 308.505 to 308.665, and their argument that SB 495 (2009) was not validly enacted under Article IV, section 18, of the Oregon Constitution.

B. Standard of Review

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." ORS 305.445

ARGUMENT

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[5] Plaintiffs include only one assignment of error in their Opening Brief, and that one assignment of error includes only the general statement that the Tax Court erred in granting the department's motions for summary judgment and denying the plaintiffs' motions. The assignment of error fails to state with specificity what legal error is assigned. The department responds to the assignment of error by addressing the two legal questions at issue on appeal.

I. *Power Resources* correctly decided that the plaintiffs' Intertie property is taxable.

A. Background

All property in the state is taxable, except as otherwise specifically provided by law. ORS 307.030. ORS 308.505 to 308.665 (the central assessment statutes) provide a complete and comprehensive scheme of assessment for the taxation of property used or held by certain designated utilities. *Southern Pacific Transportation Co. v. Dept. of Revenue,* 295 Or 47, 52-53, 664 P2d 401 (1983). Pursuant to the central assessment statutes, the department is required to make an annual ad valorem tax assessment of all property located within Oregon and used or held for use by certain utilities, including electric utilities like plaintiffs. ORS 308.510, 308.505. On the central assessment roll, the department assesses property, as defined under ORS 308.510, to the *user* of the property.[6] ORS 308.517(1).

Likewise, federally-owned property subject to private use is taxable under ORS 307.060. *See Sproul et al v. Gilbert et al,* 226 Or 392, 359 P2d 543 (1961); *R.L.K. and Co. v. Tax Comm'n,* 249 Or 603, 606, 438 P2d 985 (1968). In *Power Resources,* this court determined that the Capacity Ownership Agreement creates a possessory interest in the federally-owned Intertie under ORS 307.060. Because

[6] After the department assesses the property, it apportions the value of the property among the several counties in which the taxpayer has property and certifies the assessment to the county assessor. ORS 308.621. The counties then levy and collect property taxes based upon the department's assessment. ORS 308.621.

there exists no material distinction between Power Resources' Capacity Ownership Agreement and the Capacity Ownership Agreements belonging to the plaintiffs in the present case, the outcome of this case is controlled by the holding in *Power Resources*.

In *Power Resources*, this court construed the terms of the COA as granting the Capacity Owner a possessory interest in the Intertie property. 330 Or at 32. Plaintiffs argue that *Power Resources* was decided based on an insufficient or misleading factual record, but the COA reflects the entire agreement between BPA and the Capacity Owners and constitutes the relevant factual record at issue in *Power Resources* and this one. (*See* SER 107).

In *Power Resources,* this court considered the taxpayer's argument made in that case, virtually identical to the plaintiffs' argument here, that all the taxpayer had under the COA was "a prepaid, long-term transmission service agreement." 330 Or at 30. This court disagreed, and it reasoned that "possession" is a flexible concept that "has different meanings in different circumstances." *Id.* In holding that Power Resources' capacity ownership interest in the Intertie was a taxable one, the court considered the rights of the taxpayer under the COA and the agreement's grant of the exclusive use of a definable part of the Intertie property to the capacity owner, *i.e.*, the capacity owner's megawatt share under the COA. *Id.* at 31. The court concluded that the capacity owner held a share of the Intertie property and could be assessed and taxed on that share pursuant to ORS 307.060. *Id.* at 32. The decision in *Power Resources* was fully considered and correctly decided and compels a holding here that the plaintiffs have a taxable possessory interest in the Intertie.

B. Plaintiffs offer no support for a decision by this court to abandon *Power Resources.*

As plaintiffs acknowledge, this court does not overrule its decisions lightly. (App Br 13). On the contrary, this court "begin[s] with the assumption that issues considered in [its] prior cases are correctly decided, and 'the party seeking to change a precedent must assume responsibility for affirmatively persuading [the court] that [it] should abandon that precedent.'" *Farmers Ins. Co. of Oregon v. Mowry*, 350 Or 686, 698, 261 P3d 1(2011). (citing *State v. Ciancanelli*, 339 Or 282, 290, 121 P3d 613 (2005)). In *Mowry*, the court, assuming that its fully considered prior cases were correctly decided, refused to overrule them where the defendant in that case raised no arguments that had not been rejected by the court in the prior decisions. *Id.* at 700. Likewise, the plaintiffs here raise no argument regarding their possessory interest in the Intertie that was not rejected by the court in *Power Resources*, so there is no principled reason for the court to overrule that decision.

In order to overcome the presumption of correctness that attaches to a prior decision of this court, a party must demonstrate that the court has erred in deciding a case because: 1) it was not presented with an important argument, 2) it failed to apply the usual framework for decision or to adequately analyze the controlling issue, or 3) where the legal or factual context has changed to the extent it undermines the reasoning or result of the prior case. *Mowry*, 350 Or at 698. Plaintiffs in this case fail to demonstrate that the court's decision in *Power Resources* was in error on these or any other bases.

Plaintiffs do not argue that the parties in *Power Resources* failed to present an important legal argument or that the legal context has changed since that decision. Nor do they appear to argue that the court in *Power Resources* failed to apply its usual framework for decision or adequately analyze the controlling issue. Plaintiffs' only argument in their attempt to overcome the holding in *Power Resources* appears to be that the decision was based on misleading stipulated facts, which they argue resulted in faulty reasoning by the court. (App Br 19). Plaintiffs' argument fails, because the relevant facts in this case are no different from those in *Power Resources*.

In *Power Resources*, the court fully considered the COA and the rights obtained by the Capacity Owners under that agreement. It makes no difference that Power Resources stipulated that it used the Intertie, because the court itself reviewed the rights obtained by Power Resources in the COA, including "an exclusive right to use and control the [Intertie] to the extent necessary to permit transmission of 50 MW of electricity for taxpayer's own benefit." *Power Resources,* 330 Or at 32. As discussed further in Section III below, the COAs themselves demonstrate that the Capacity Owners *do* use the Intertie, consistent with this court's decision in *Power Resources* and despite plaintiffs' assertions to the contrary. Plaintiffs fail to overcome the presumption of correctness of the decision in *Power Resources*.

Another factor that the court must consider under *stare decisis* principles is the extent to which the prior decision has been relied upon, because "[s]tability and predictability are important values in the law." *Mowry,* 350 Or at 698. In this case, it is apparent that the legislature has relied on *Power Resources*, both in granting the plaintiffs an exemption for their property in 2005 and in repealing it in 2009. This court "generally presume[s] that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing on those statutes." *Engweiler v. Persson,* 354 Or 549, 562 n8, 316 P3d 264 (2013) (internal citations omitted).

Here, the legislature relied on the court's decision in *Power Resources* in 2005 when it granted the exemption to plaintiffs' Intertie property under ORS 307.090, and again when it repealed the exemption. (*See* Supp App 2 (Testimony of Gil Riddell, House Committee on Revenue, SB 495, May 26, 2009, Ex Q)). This court should not upset that reasonable reliance by overruling its decision issued more than 14 years ago, particularly since the plaintiffs have failed to provide any good reason to do so.

C. The Capacity Ownership Shares of plaintiffs in this case constitute a possessory interest in the Intertie, just as the court decided in *Power Resources.*

The plain language of the COAs unambiguously grants to plaintiffs the exclusive use of their shares of the Intertie, which constitutes a possessory interest in that property. "The general rule applicable to the construction of contracts is: Unambiguous contracts must be enforced according to their terms." *Oregon School Employees Ass'n v. Rainier School District*, 311 Or 188, 194, 808 P2d 83 (1991) (internal citations omitted).

As plaintiffs note on page 20 of their Opening Brief, "simply saying a contract is ambiguous does not make it so." *See Portland Fire Fighters' Assn. v. City of Portland,* 181 Or App 85, 45 P3d 162 (2002) (Landau, J., dissenting, joined by Edmonds, Linder, and Kistler, J.J.). Plaintiffs ineffectively attempt to recharacterize the terms of an agreement that on its plain terms provides them with a capacity ownership interest in the Intertie facilities. They point to nothing in the Tax Court record that supports their construction of the COA as just another transmission service agreement, other than the self-serving statements of their own employees that are contrary to the explicit terms of the contract itself. (App Br 12-26).

Plaintiffs' citation to and reliance on the Declaration of Anna Miles is misleading. (App Br 21). Anna Miles is an employee of PUD No. 1 of Snohomish County. (SER 287 (Declaration of Anna Miles at ¶ 1)). Notably, the assertion in paragraph 11 of her declaration that BPA remarkets to third-parties the capacity belonging to Snohomish PUD and does not "credit" to Snohomish any revenue obtained from that remarketing are entirely absent from the declarations of the employees of the other two plaintiffs. (ER-13 to ER-16 (Declaration of Robert W. Cromwell, Jr.) and SER 283-286 (Declaration of Travis Metcalfe)). Thus, Miles' assertions are, at most, only a statement with regard to one of the plaintiffs.

Moreover, the statement by Miles fails to reference any provision in the COA supporting her assertion that Snohomish PUD receives no "credit" for revenues from BPA's remarketing of its capacity to third-parties. (SER 290 at ¶ 11)). And the assertion itself is ambiguous. By its plain terms, the COA states that Snohomish PUD is either 1) entitled to compensation for use of its Capacity Share by BPA or 2) does not have to allow BPA to use any part of its Intertie capacity if it chooses to "wheel" power for third-parties. (SER 17, 20). If Snohomish PUD sometimes allows BPA to use its Intertie capacity without compensation, as Miles asserts, that does not mean that Snohomish PUD or the other plaintiffs lack a possessory interest in the Intertie or that they do not use their Intertie capacity.

In *Power Resources,* this court construed the COA—the same agreement at issue in this case—and determined that the agreement granted a possessory interest in the Intertie. Plaintiffs' arguments are not based on the COA or any documentary evidence in the record. The declarations of plaintiffs' employees construing the terms of the COA cannot, and do not, trump the terms of the agreement or this court's prior construction of it.

Plaintiffs purchased their Intertie capacity from BPA up front and *for the life of the Intertie facilities*. (SER 15). Plaintiffs were granted full ownership of their capacity shares. (SER 6, 16). As the BPA stated, the intent of the COAs was to give the Capacity Owners "a share of 725 megawatts (MW) of transmission capacity in the Intertie, a share as close to 'full ownership' as possible." (Def Ex E at 86).

In addition, the plaintiffs were granted the exclusive use of their share of the Intertie capacity. BPA described the parameters of Capacity Ownership as follows: "When a New Owner purchases a Capacity Ownership share of the PNW AC Intertie rated transfer capability owned by BPA, that New Owner will be entitled to *exclusive use of its MW share* of the corresponding [Operational Transfer Capability] for scheduling in a given hour." (Def Ex C at 11).

Plaintiffs provide no basis for distinguishing *Power Resources* from the present case. The evidence in the record here is the same COA construed by the court in *Power Resources*. The court has been presented with a complete record in both cases. Plaintiffs appear to assume that by alleging some similarity between the COAs and ordinary transmission service agreements that somehow prevents the COAs from being construed as creating a taxable possessory interest in the Intertie. However, this court has already determined that the COAs do create a possessory interest. The department does not concede that the COAs are the same as other transmission agreements, but assuming, *arguendo*, that the COAs were no different from any other transmission service agreement as plaintiffs claim, that fact does not negate the plaintiffs' possessory interest in the Intertie. Instead, it may be that other entities also have a taxable possessory interest.

The documents defining the plaintiffs' ownership, use, occupancy and possession of the subject property—the Capacity Ownership Agreements—are in the record. Plaintiffs fail to overcome the presumption of correctness of the decision in *Power Resources*. Plaintiffs have a taxable possessory interest in the Intertie under ORS 307.060.

III. ORS 308.505 to 308.665 subjects plaintiffs' Intertie property to assessment and taxation.[7]

It makes no substantive difference whether the plaintiffs' Intertie interests are characterized as legal title ownership, a possessory interest, or a contractual interest, because their Intertie property is assessable by virtue of its use by the plaintiffs pursuant to their COAs. Under the decision in *PPM,* and cases cited therein, plaintiffs' use of the Intertie property renders their Intertie property taxable under ORS 308.505 to 308.665, regardless of whether they have a possessory interest under ORS 307.060.

A. The central assessment statutes render taxable all Intertie property used or held for use by plaintiffs.

Under the central assessment statutes, ORS 308.505 to 308.665, any property used or held for future use by utility entities, like the plaintiffs, in performing or maintaining an electricity business or in the sale of electricity is taxable.

ORS 308.515provides:

> (1) The Department of Revenue shall make an annual assessment of any property that has a situs in this state and that, except as provided

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[7] Given its conclusion that this court's decision in *Power Resources* was controlling, the Tax Court did not reach the department's alternative argument that the Intertie property is assessable under the central assessment statutes based on plaintiffs' "use" of the property.

> in subsection (3) of this section, is used or held for future use by any company in performing or maintaining any of the following businesses or services or in selling any of the following commodities, whether in domestic or interstate commerce or in any combination of domestic and interstate commerce, and whether mutually or for hire, sale or consumption by other persons:
> * * * *
> (k) Electricity[.]

ORS 308.505(9) defines the "property" subject to central assessment as "all property of any kind, whether real, personal, tangible or intangible, that is *used or held* by a company as owner, occupant, lessee or otherwise, for the performance or maintenance of a business or service or for the sale of a commodity, as described in ORS 308.515" and explicitly includes property such as transmission lines, poles, wires, and conduits. (Emphasis added). ORS 308.517(1) requires the department to "assess to the property *user* all property owned, leased, rented, chartered or otherwise held for or used by it in performing a business, service or sale of a commodity enumerated in ORS 308.515." (Emphasis added). Thus, under the centrally assessed property statutes, ORS 308.505 to 308.665, any real or personal, tangible or intangible, property used or held for future use by the plaintiffs in performing or maintaining an electricity business or service or in the sale of electricity is taxable.[8]

B. The Capacity Ownership Agreement demonstrates plaintiffs' use of the Intertie.

Plaintiffs maintain that they do not have sufficient exclusive control of the Intertie transmission lines to be characterized as having either ownership or the "use" of their share of the Intertie capacity. Plaintiffs claim that the COAs "do not provide for the exclusive use of the Intertie improvements by the capacity owners, or the right to use a 'portion of the PNW AC Intertie facility'" as was stipulated by the parties in *Power Resources.* (App Br 20). Plaintiffs' arguments are contradicted by the evidence in the record.

Plaintiffs use or hold for future use the rights to the transmission capacity and the use of the Intertie transmission lines to transmit their power under the Capacity Ownership Agreements. (*See* SER 16-21; Second Amended Complaint, ¶12, 13 (referencing the ratemaking applicable to the COA for "utilities using BPA's surplus Transfer Capacity")). BPA has said as much, describing "Capacity Ownership" as "allow[ing] non-Federal PNW scheduling utilities to purchase

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[8] ORS 308.510(3)describes transmission lines and substations as property, and depending on whether the user owns the land under these types of property, they may be either real or personal property. Consistent with ORS 308.517 the department must assess plaintiffs for the value of the Intertie property used by them.

contract *rights to use* portions of BPA's share of AC Intertie capacity for the life of the Intertie facilities." (Def Ex C at 6 (emphasis added)).

Furthermore, Revised Code of Washington (RCW) 35.92.052, the Washington statute that authorizes the plaintiffs to enter into the COAs with BPA, plainly provides that the plaintiffs may enter into the agreements in order to obtain the use of the Intertie facilities. The statute limits the municipalities' authority to enter into agreements "for the *use or undivided ownership* of high voltage *transmission facilities and capacity rights* in those facilities * * * with * * * any agency of the United States authorized to generate or transmit electrical energy." RCW 35.92.052(1)(e) (emphasis added). Under this statute, the plaintiffs have the authority to enter into agreements for either the "use" or the "undivided ownership" of the facilities or the "capacity rights" in those facilities.

The Washington statute goes on to require such agreements to provide "that each city *shall use or own* a percentage of any common facility equal to the percentage of the money furnished or the value of property supplied by it for the acquisition and construction of or additions or improvements to the facility and *shall own and control or provide use of* a like percentage of the electrical transmission * * *."[9] RCW 35.92.052(1) (emphasis added).

[9] The statute also provides authority to the plaintiffs to issue bonds to finance "the city's share of the use or ownership of the common facilities." RCW 35.92.052(2).

Most significantly for this case, the reference to the "use" of transmission facilities and the inclusion of "capacity rights in those facilities" as property that could be used or owned were added to the statute in 1992 in contemplation of the COAs that were being negotiated between BPA and the plaintiffs at that time. (Supp App 14-15 (HOUSE BILL REPORT ON HB 2347, H COMM ON ENERGY & UTILS, 52D LEG, AT 3 (Wash June 11, 1992)). The Washington Legislature stated that the effect of the bill was to allow municipal electric utilities to "participate and enter into agreements for use of transmission facilities and capacity rights in those facilities" and to allow cities to "issue revenue bonds or other obligations to finance the city's share of the use of those facilities."[10] *Id.* Plaintiffs use the Intertie under the terms of the Washington statutes authorizing entry into the COAs.

C. Plaintiffs' use of the Intertie renders their property taxable under the decision in *Pacificorp Power Marketing.*

In *Pacificorp Power Marketing (PPM)*, this court held that the exemption for municipally-owned property in ORS 307.090 did not apply to exempt such when "used" by a private utility. 340 Or at 206. PPM argued in that case that it did not have a possessory interest in the co-generation facility owned by the City

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[10] Moreover, the City of Tacoma has asserted, as recently as 2011, that it has rights to "use" the PNW AC Intertie. *See* City of Tacoma Resolution No. 38314, August 23, 2011, describing the COA as "granting Tacoma Power certain capacity ownership rights related to the use of the Pacific Northwest AC Intertie."

of Klamath Falls and thus the facility property was not taxable to it under ORS 307.110, a statute that has been interpreted by the courts as requiring a possessory interest in the property holder in the same fashion as ORS 308.060. *Id.* at 210. However, this court held that, since PPM was the centrally assessable *user* of the co-generation property at issue, that property was taxable to PPM under the central assessment statutes, ORS 308.505 to 308.665, even if PPM did not have a possessory interest under ORS 307.110. *Id.* at 211.

In *PPM*, this court recognized the authority of the department to assess users of centrally assessable property regardless of whether they have a possessory interest in that property under some other property tax statutes. In providing for the assessment of “property used or held for use,” the centrally assessed property tax statutes make no distinction between publicly and privately owned properties. “Any” property used by an electricity providing entity whose Oregon property is otherwise taxable is required to be assessed. ORS 308.515(1)(a). Relying in part on the prior decisions in *PGE* and *Western Generation*, the court concluded that when a centrally assessed company “uses” property of an otherwise exempt entity, that property is taxable, even if the company does not have a possessory interest in the property. *PPM*, 340 Or at 216-217.

In *PGE Company v. Tax Comm’n (PGE)*, 249 Or 239, 437 P2d 827 (1968), the Oregon Supreme Court held that PGE’s rights to use certain otherwise federally owned, tax-immune property of the Confederated Tribes of the Warm Springs appeared to be "non-possessory" but were nonetheless includable in PGE's property to be assessed under the centrally assessed property tax statutes. *Id.* at 249, 251. The court stated there was "no distinction of substance between PGE's right to use the tribal lands and the rights usually enjoyed by a lessee of property from a tax-exempt owner." *Id.* at 251. Likewise, plaintiffs' right to use the Intertie property pursuant to their COAs, even if they may be considered "non-possessory" under ORS 307.060, renders the Intertie property "used or held" by the plaintiffs taxable under ORS 308.505 to 308.665. *See also Western Generation Agency v. Dept. of Revenue*, 327 Or 327, 333, 959 P2d 80 (1998) (holding that an electricity generation facility owned by an Oregon municipality was taxable under the central assessment statutes, because the facility was "controlled" by a people's utility district whose property "owned, used, operated or controlled" was otherwise taxable).

Here, plaintiffs use their defined capacity ownership share in the Intertie pursuant to their respective COAs. They exercise a degree of control over their share of the capacity to the exclusion of others. Pursuant to plaintiffs' Capacity Ownership Agreements with BPA, they exclusively use the specific portion of the Intertie necessary to transmit electricity up to the amount allowed by its specified capacity ownership megawatt limit. (*See* SER 6, 16-21; *see also* SER 197).

Plaintiffs' COAs assure them that they may use their capacity ownership shares of the Intertie facilities for transmission of electric power for the life of those facilities.

The capacity purchased by plaintiffs pursuant to the COAs is reserved to the respective plaintiffs. The Snohomish and Seattle COAs state: "[Municipality] (and only [Municipality]) shall be entitled to schedule on the PNW AC Intertie, in any hour, a MW amount up to [Municipality]'s Scheduling Share for such hour." (SER 22). And the Tacoma COA states: "Tacoma may use its Scheduling Share to transmit any and all power and energy, whether or not such power or energy is owned by Tacoma." (SER 279). Under each of the COAs, plaintiffs had the option to use the Intertie to transmit their own power up to their capacity share or to transmit or "wheel" power for third parties using their capacity share. (SER 16-22). Considered together, the plaintiffs' rights under the COA are indicia of their control and use of their shares of the Intertie.

Also pursuant to the COAs, plaintiffs participate in the "Capacity Owner's Committee," which must be convened by BPA at least annually for a meeting to discuss the Operating Plan for the Intertie, and the Owner's Committee may object or make recommendations regarding the operating plan proposed by BPA. (SER 52). The Owner's Committee may audit the records of BPA regarding any adjustments to the Capacity Ownership Price or other charges to the owners. (SER

85). And capacity owners have exercised that right to audit and contest such charges. *See Puget Sound Energy, Inc. v. U.S.,* 310 F3d 613, 619-620 (9th Cir 2002). Pursuant to the COAs, plaintiffs have sufficient control over their respective Capacity Ownership Shares in the Intertie to constitute "use" of that property, which renders such property subject to assessment and taxation under ORS 308.505 to 308.665.

In sum, whether the COAs are construed as conveying ownership of or a possessory interest in the plaintiffs' capacity share of the Intertie facilities, taxable under ORS 307.060, or whether plaintiffs' use of the Intertie pursuant to the COAs renders the property centrally assessable under ORS 308.505 to 308.665, the plaintiffs' Intertie property is taxable.

IV. SB 495 did not violate the Origination Clause of the Oregon Constitution.

Senate Bill 495 (2009) repealed the property tax exemption enacted for the plaintiffs' Intertie property in 2005, and in so doing "leveled the playing field" with regard to property tax for all entities with Capacity Ownership Agreements. SB 495 was validly enacted and did not violate the requirement in Article IV, section 18, of the Oregon Constitution (Origination Clause), that "bills for raising revenue" originate in the Oregon House of Representatives.

Plaintiffs argue that SB 495 is a bill for raising revenue and that it should be declared void because it originated in the Oregon Senate, in violation of the Oregon Constitution's Origination Clause. Plaintiffs claim that, because SB 495 ultimately removed a tax exemption for their Intertie property, it violated Article IV, section 18, of the Oregon Constitution. Plaintiffs' arguments fail for several reasons. First and foremost, a bill repealing a property tax exemption, such as SB 495, is not a "bill for raising revenue." SB 495 is not a "bill for raising revenue" under the Origination Clause, because it did not levy a tax in the strict sense.

In addition, SB 495 is not a "bill for raising revenue," because its primary purpose was not to raise revenue but to impose equal tax treatment on all Capacity Owners' interests in the Intertie. Finally, even if SB 495 is considered a "bill for raising revenue," the provisions alleged to raise revenue originated in the Oregon House of Representatives in compliance with the Oregon Constitution.

A. SB 495 is not a bill for raising revenue.

The Origination Clause of the Oregon Constitution provides:

> Bills may originate in either house, but may be amended, or rejected in the other; except that bills for raising revenue shall originate in the House of Representatives.

Or Const, Art IV, § 18. In interpreting a provision of the original Oregon Constitution such as Article IV, section 18, the court considers its "specific wording, the case law that surrounds it, and the historical circumstances that led to its creation." *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992).

This court has held that the determination of whether a bill is a "bill for raising revenue" consists of two inquiries: Does the bill bring money into the treasury[11] and, if so, does the bill possess "the essential features of a bill levying a tax*."* *Bobo v. Kulongoski*, 338 Or 111, 122, 107 P3d 18 (2005). In considering the second part of that inquiry, the court has held: "[N]ot every bill that collects or brings in revenue to the treasury is 'a bill for raising revenue.' Rather, the definition of 'revenue' suggests that the framers had a specific bill in mind – bills to levy taxes and similar exactions." *Id.* at 120.

In other words, Oregon case law narrowly defines a bill for raising revenue. In *Northern Counties Investment Trust v. Sears*, the Oregon Supreme Court strictly construed the phrase "bills for raising revenue" to include only those bills with a primary purpose of raising revenue and to exclude bills which only incidentally generate revenue. 30 at 403. The characteristic feature of a bill for raising revenue

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[11] Plaintiffs assert as fact that SB 495 raised additional revenue. (App Br 32). But there is no evidence in the Tax Court record as to any actual additional tax revenues collected as a result of the repeal of plaintiffs' exemption. One likely reason for that is that the determination as to how much revenue is raised at the county level is complex and dependent on multiple factors, including the amount of the tax levies made by the various local taxing districts pursuant to their budgets (*See* ORS 294.398) and whether there is "compression" in the taxing district due to the limitations imposed under Article XI, section 11b, of the Oregon Constitution (Measure 5) (*See* ORS 310.070, 310.150).

is that it *imposes a tax* on the people for the use of government. *Id.* at 403; *Twin City Bank, v. Nebeker*, 167 US 196 (1897); *Dale v. Kulongoski*, 322 Or 240, 242-43, 905 P2d 844 (1995). After reviewing the historical background of and cases construing the state and federal origination clauses, the court in *Northern Counties* concluded that a law requiring payment of filing fees in legal proceedings was not a bill for raising revenue. 30 Or at 403. The court cited federal cases and Story's commentaries for the proposition that "bills for raising revenue" should be *strictly construed* not to include bills for other purposes which incidentally create revenue. *Id.* at 402; *see* J. Story, *Commentaries on the Constitution*, § 876, 880 (1858) (the reach of the federal origination clause is "confined to bills that levy taxes in the strict sense of the word, and has not been understood to extend to bills for other purposes which may incidentally create revenue.").

Here, plaintiffs fail to prove that SB 495 was enacted in violation of the Oregon Constitution's Origination Clause. At most, all that can be said is that the bill removed an exemption. It did not impose a tax, so it cannot be a bill for raising revenue.

1. A bill repealing a property tax exemption is not a bill for raising revenue.

Under long-standing Oregon precedent, a bill repealing a property tax exemption is not a bill for raising revenue, and thus does not violate the

Origination Clause, even if the bill originates in the Oregon Senate. *Mumford v. Sewall*, 11 Or at 71; *Dundee v. Parrish*, 24 F at 20. The origination clause applies only to bills that have the direct and principle object of raising revenue and not to bills that incidentally generate revenue. Although an act regulating assessment of a tax, like a property tax exemption, may ultimately result in more revenue, the act itself is not revenue-raising if it does not authorize or provide for the *levying* of any tax. *Dundee,* 24 F at 201.

In *Mumford v. Sewall,* the Oregon Supreme Court upheld, against an Origination Clause challenge, a bill that originated in the Senate and had the effect of repealing a property tax exemption. *Mumford*, 11 Or at 71. The court in *Mumford* declined to declare the law repealing a property tax exemption unconstitutional on Origination Clause grounds because it was "not sufficiently clear that a law which merely declares that certain property theretofore exempt from taxation shall thereafter be subject to taxation is strictly a law for raising revenue." *Id*.

In a federal court decision issued two years after the decision in *Mumford,* Judge Deady held that the same measure considered by the Oregon Supreme Court in *Mumford,* was definitely *not* a "bill for raising revenue" under Article IV, section 18, of the Oregon Constitution. *Dundee*, 24 F at 200-201. After acknowledging the Oregon Supreme Court's doubt in *Mumford* about whether the measure removing a property tax exemption for mortgages was a bill for raising revenue and its consequent refusal to declare the law unconstitutional, Judge Deady stated:

> But I am clear that this is not a bill for raising revenue. True it provides that when revenue is to be raised mortgages shall contribute thereto as land; but it does not authorize or provide for levying any tax or raising a cent of revenue. A bill for raising revenue, or a "money bill," as it was technically called at common law, is a bill levying a tax on all or some of the persons, property, or business of the country for a public purpose; and the assessment, or listing and valuation of the polls or property preliminary thereto, and all laws regulating the same, are merely measures to secure what may be deemed a just or expedient basis for the levying of a tax or raising a revenue thereon.

Id. at 201. As held by the court in *Dundee*, a bill amending a statute to remove a property tax exemption is a bill regulating the basis for the assessment of property tax, and it is not a bill *levying* a tax. *Id.* Thus, such a bill is not a "bill for raising revenue" under Article IV, section 18. Likewise, SB 495 (2009), which removed a property tax exemption for plaintiffs' Intertie property, did not levy a tax. Instead, SB 495 amended a statutory basis for the levying of a tax. Such a bill is not a "bill for raising revenue."

Although SB 495 and the repeal of the property tax exemption for plaintiffs' Intertie property may incidentally bring a relatively small amount of money into the treasury of counties around the state, the bill does not actually levy any tax and thus is not a bill for raising revenue. In contrast, ORS 310.055(3) authorizes all taxing districts to *levy* the full amount of their operating taxes on all taxable property in the district. The bill that enacted that provision was a "bill for raising revenue," because it authorizes the imposition of a tax.

Plaintiffs attempt to distinguish *Mumford v. Sewall* based on the supposed differences between the old Oregon property tax system and the current property tax system, after Measure 50, but there is nothing in the court's decision in *Mumford* indicating that its holding hinged on the structure of the property tax system as a levy versus a rate-based system.[12] Furthermore, plaintiffs point to no Oregon cases, or *any* cases, where a court has held that a bill repealing a property tax exemption was a "bill for raising revenue."

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[12] On page 31 of their Opening Brief, plaintiffs cite to the legislative bill drafting manual promulgated by Legislative Counsel. That document does not reflect the law with regard to what constitutes a "bill for raising revenue" and is not relevant to this court's analysis. However, to the extent documents drafted by Legislative Counsel are considered relevant, they fail to support plaintiffs' contentions. For example, the legislature's Form and Style Manual for Legislative Measures requires that the title of the bill include a clause stating that a bill is one for raising revenue if that is the intent of the bill. (Supp App 10). Likewise, that same manual requires that the title of a bill for raising revenue include a clause reflecting the requirement that the bill requires a three-fifths majority for passage, pursuant to Article IV, section 25, of the Oregon Constitution. (Supp App 11).
Notably, the title for SB 495 contained no clause stating that it was a bill for raising revenue, nor did it contain a clause stating that it required a three-fifths majority for passage. The implication of which is that the legislature did not consider the bill a "bill for raising revenue." This conclusion is further supported by the opinion of Legislative Counsel, dated May 9, 2009, and made part of the legislative record for SB 495, in which Legislative Counsel concluded that a bill to amend ORS 307.090 to remove the tax exemption for the plaintiffs' Intertie property *would not* be a bill for raising revenue. (Supp App 7-8).

The court in *Dundee v. Parrish* distinguished between revenue raising bills and bills that deal with the assessment, regulation, and basis for levying a tax. 24 F at 201. Because SB 495 does not levy a tax, it is not a bill for raising revenue. Instead, it is a bill governing property tax assessment or the basis for levying a tax, as discussed in *Dundee*. In amending ORS 307.090 to remove an exemption, SB 495 enacted an amendment of a statute governing only the taxable property *upon which* the already enacted operating taxes of a taxing district are to be imposed.

SB 495 does not possess the essential features of a bill levying a tax. SB 495 does not create a new tax, does not increase the amount or rate of an existing tax, and does not even extend a tax to property that has never been subject to a tax. The text of the bill deals exclusively with the repeal of a tax exemption granted to the Intertie property of these three specific plaintiffs, the same property that is taxable when owned or used by all other entities other than these three plaintiffs. SB 495 lacks the essential features of a bill levying a tax.

The case law demonstrates the court's strict and narrow construction of the term "bills for raising revenue." As in *Mumford* and *Dundee*, SB 495 is an act repealing a tax exemption, not a bill for raising revenue.

2. **The purpose of SB 495 was not to raise revenue.**

SB 495 is not a bill for raising revenue. Its primary purpose was to level the playing field for those entities with capacity ownership shares in the Intertie by repealing an exemption from an existing tax. The property tax exemption that was repealed applied only to three particular Washington municipal entities, the plaintiffs in this case, and any additional revenue resulting from the repeal of the exemption is incidental, particularly when compared to the revenue generated by property tax across the state.

The legislature intended SB 495 (2009) as a bill to "level the playing field" for all of those entities that have property in Oregon in the form of capacity ownership in the Intertie.[13] *See* Recording, House Revenue Committee, SB 495, May 26, 2009, Testimony of Sandy Flicker, Oregon Rural Electric Cooperative Assoc. at 9:27:39 (discussing Senate version of bill (A-Engrossed SB 495) as a "tax equity bill" designed to remedy inequitable treatment of electric cooperatives and also stating "it's not about money"). This intent is demonstrated by the fact that the Introduced and A-Engrossed versions of SB 495 originally extended the 2005 tax exemption beyond plaintiffs' Intertie property to include the Intertie property of Oregon electric cooperatives that also had Intertie capacity ownership agreements with BPA, specifically encompassing electric co-ops such as Power Resources.

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[13] Legislative history is offered and may be considered by the court under ORS 174.020 and *State v. Gaines*, 346 Or 160, 172-73, 206 P3d 1042 (2009).

However, instead of extending the exemption, the House "leveled the playing field" by passing a "gut and stuff" amendment that replaced the Senate bill's provisions and eliminated both the proposed exemption for the Intertie property belonging to Power Resources *and* the 2005 exemption for plaintiffs' Intertie property. *See* Senate Floor Debate, SB 495, June 18, 2009, Statement of Senator Burdick in support of concurrence with House amendments and passage of B-Engrossed version of SB 495 (noting that the repeal of the exemption for plaintiffs' property was a fair policy and stating "It will put everybody on the same playing field in terms of the Intertie.") In order to accomplish the goal of equal treatment for all entities with Capacity Ownership Agreements, the legislature repealed the exemption for the plaintiffs' Intertie property instead of extending the exemption to other entities with similar Intertie property.

The Oregon Supreme Court has held in a long line of decisions that, unless a court can say that it is satisfied beyond a reasonable doubt that an Act of the Legislative Assembly is unconstitutional, it is the duty of the court to uphold it. *See Cline v. Greenwood*, 10 Or 230, 241 (1882) ("Before a statute is declared void, in whole or in part, its repugnancy to the constitution ought to be clear and palpable and free from all doubt. Every intendment must be given in favor of its constitutionality."); *Cresap v. Gray*, 10 Or 345, 349 (1882); *Miller v. Henry*, 62 Or 4, 7, 124 P 197 (1912). These cases demonstrate the court's strict and narrow construction of the term “bills for raising revenue” along with the court’s proper reluctance to declare as void a bill enacted by both houses of the legislature and signed by the governor, at least in the absence of compelling indicia of unconstitutionality.

In sum, the Oregon Supreme Court, together with other states and the federal courts, have narrowly construed what constitutes a “bill for raising revenue” and have expressly adopted the view that a bill is not one for raising revenue unless it was “designed for the purpose of raising revenue.” The primary purpose of SB 495 was to level the playing field for all Intertie Capacity Ownership Agreements with BPA, and its revenue raising aspect, if any, was incidental to that primary purpose. Significantly, this court has never struck down a statutory provision on the ground that it violated the origination clause, and the court should not do so here. SB 495 is not a “bill for raising revenue” under Oregon law.

3. The SB 495 that “originated” in the Senate was not a bill for raising revenue.

While SB 495 bears the number of a bill introduced initially in the Oregon Senate, the original bill, as introduced and first passed by the Senate, would have granted a property tax exemption to electric cooperatives for their Intertie property, and it is indisputable that SB 495, as it “originated” in the Oregon Senate, was not a bill for raising revenue. Therefore, the bill did not violate the Origination Clause.

Under the plain language of the Origination Clause, both houses of the legislature may originate bills. Likewise, bills originated in either house "may be amended, or rejected in the other." Or Const, Art IV, § 18.

The word "originate" is used twice in Article IV, section 18, of the Constitution. The first use is in the statement that bills may "originate" in either house, and the second use is in the provision that bills for raising revenue must "originate" in the House of Representatives. "Originate," in the form of the verb used in Article IV, section 18, is defined as "[t]o take first existence; to have origin; to be begun." Noah Webster, *An American Dictionary of the English Language* (1828). The framers presumably intended the term to mean the same thing in both contexts. Consequently, a bill that is not one for raising revenue, such as SB 495A, may take its first existence or "originate" in the Senate and then be amended on the House side as authorized under Article IV, section 18. Whereas, the *first existence* of a revenue raising bill must be "originated" in the House under the plain terms of Article IV, section 18. Here, SB 495, as introduced and originally passed by the Senate, was not a "bill for raising revenue," and the House amended the bill to repeal the property tax exemption, as it is authorized to do under the Origination Clause. SB 495 was constitutionally enacted.

B. Alternatively, even if SB 495 is a bill for raising revenue, it complies with the Origination Clause.

Assuming, *arguendo*, that the effective provisions in Enrolled SB 495 (2009) render it a bill for raising revenue, the revenue raising provisions of the bill originated in and were first passed by the Oregon House. Thus, the bill complies with the Origination Clause.

The Senate is not prevented from originating a bill related to revenue, provided that the bill is not one for raising revenue. The revenue raising aspect of SB 495, if any, originated in the "gut and stuff" amendment to the bill that was introduced and first passed on the House side of the legislature. (*See* House Amendments to A-Engrossed version of SB 495, adopted June 3, 2009). Accordingly, even if the enrolled version of SB 495 were held to constitute a "bill for raising revenue," the revenue raising provisions of that bill were introduced in and passed first in the House in compliance with the Origination Clause, Article IV, section 18, of the Oregon Constitution.

As noted above, both houses of the Oregon Legislature may originate bills and either house may amend or reject a bill. Or Const, Art IV, § 18. Here, SB 495, as introduced and amended by the Senate, was unarguably not a "bill for raising revenue." As such, it passed out of the Senate properly on a vote of 26 in favor to 3 opposed. (Supp App at 1). It was only when the bill came to the House side that the even arguably "revenue raising" provisions were added in an amendment that *completely replaced* the bill passed by the Senate. In turn, that amendment was passed by the House as SB 495B, on a vote of 45 to 10, and unanimously concurred in by the Senate. (Supp App at 1).

Counsel has found no Oregon case law to guide the court on this specific factual situation. However, New Hampshire's Supreme Court has directly addressed this issue in *Baines v. New Hampshire Senate President*, 152 NH 124, 876 A2d 768 (2005). *Baines* involved a question as to whether a "money bill" (considered as and analyzed by the court under the same standard as a federal "bill for raising revenue") originated in the New Hampshire Senate in violation of the New Hampshire Constitution's Origination Clause. *Id.* at 125, 876 A2d at 772. The bill at issue in *Baines* was a bill originally introduced in the New Hampshire Senate as a bill to make education funding formula corrections, which had nothing to do with imposing taxes, and was not "revenue raising." *Id.* at 126, 876 A2d at 772. Then, on the House side of the legislature, the bill was amended to add an increase in the cigarette tax rate. *Id.* at 126, 876 A2d at 772-73. The New Hampshire Senate did not concur in that amendment, so a conference committee was formed to report on the bill. *Id.* at 126, 876 A2d at 773.

Subsequently, the conference committee, which was comprised of a majority of House members, recommended a complete rewrite of the bill, a "gut and stuff," that replaced the entire bill with new revenue raising provisions *increasing the state property tax rate*. *Id*. That version of the bill was first voted on and passed by the New Hampshire House of Representatives, then by the Senate. *Id.* at 127, 876 A2d at 773. The New Hampshire appellate court acknowledged the state law presumption, similar to Oregon's, that legislative acts are constitutional and should not be declared "invalid except upon inescapable grounds." *Id.* 133, 876 A2d at 778. In upholding the bill as constitutionally enacted, the court pointed to the fact that it was the House-dominated conference committee that introduced the revenue raising aspect of the bill and that the amended bill with the revenue raising provisions was *first* passed by the House. *Id.* at 138-39, 876 A2d at 782.

Likewise, after passage by the Oregon Senate of the original version of SB 495, which expanded the ORS 307.090 exemption, the Oregon House amended the bill by passing a "gut and stuff" amendment to SB 495A that replaced the Senate bill and eliminated both the proposed expanded exemptions for cooperatives *and* the exemption for plaintiffs' Intertie property. That version of the bill (SB 495B) was then concurred in and passed by the Senate. The enrolled version of SB 495 reflects the House amendments that replaced the original bill's provisions and repealed the exemption for plaintiffs' Intertie property. That repeal of the exemption originated in and was first passed by the Oregon House of Representatives. Therefore, the bill did not violate the Origination Clause requirement that bills for raising revenue originate in the House. Like the bill in *Baines*, the enrolled version of SB 495 complied with the origination requirements of the constitution, and plaintiffs fail to prove beyond a reasonable doubt that the bill is unconstitutional.

Plaintiffs dismiss the New Hampshire Supreme Court's decision in *Baines v. New Hampshire*, and claim "Oregon is not New Hampshire." (App Br 32-33). They imply, for that reason, that this court should not treat that decision as relevant or persuasive. But Oregon employs the same methodology for reviewing this type of constitutional question as New Hampshire.[14] The *Baines* decision is directly on-point and is persuasive authority here.

After acknowledging that federal cases on this issue are few, plaintiffs state that "those cases" do not permit the House of Representatives to add revenue raising provisions to a Senate Bill. (App Br 38). Yet they cite *only one* federal district court decision from New York in support of their argument. *See Hubbard*

[14] Oregon follows the same "journal entry rule" followed in New Hampshire in analyzing questions related to the enactment of legislative measures. *See Young v. Galloway*, 177 Or 617, 164 P2d 427 (1945). The court in *Young v. Galloway* identified its rule for analyzing whether bills have been constitutionally enacted as the "journal entry rule," as distinguished from the "enrolled bill rule." *Id.* at 625. A bill is presumptively valid unless the legislative journals affirmatively show otherwise. *Id.* at 626; *Baines v. New Hampshire,* 152 NH at 133, 876 A2d at 778 ("'The presumptive validity of a statute will be overcome only if the journals give a clear indication that constitutionally required procedures were not followed.'" (internal citation omitted)).

v. Lowe, 226 F 135 (SDNY 1915), *appeal dismissed,* 242 US 654 (1916). And that case is easily distinguishable from the current case.

Hubbard involved a federal district court's consideration of whether the Cotton Futures Act violated the federal Origination Clause because the Act originated in the Senate. 226 F at 137. Noting that "what the Constitution requires to originate in the House of Representatives is not the final product of the legislative will, not the statute, but a project for a statute, which may by amendment take a very different shape by the time it is ready for promulgation as law," the court determined that the provisions raising revenue had actually been added in the House. *Id.* at 138. But the federal district court in *Hubbard* then held that it could not consider the fact that the revenue raising provisions actually originated in the House. *Id.* at 139. The court held it could look no further than the certification on the face of the bill at issue, certifying that the act had originated in the Senate, stating: "I hold as a matter of law that this court must accept the statement of the records * * * that the Cotton Futures Act originated in the Senate." *Id*. This court is not so constrained. As discussed above, Oregon does not follow the enrolled bill doctrine that would limit this court's ability to review the legislative record, as the court was limited in *Hubbard*. Thus, *Hubbard* is inapposite here and does not provide support for plaintiffs' argument.

Plaintiffs argue that the "bill" that must originate in the House under Article IV, section 18, is the shell vehicle with the designation of "House Bill" at the top of the document and that the substance of the law that is in the body of the measure is not relevant. However, that position is inconsistent both with plaintiffs' own arguments and with the plain language definition of the word "bill." Currently, the word "bill" means "a draft law presented to a legislature for enactment: a proposed or projected law."[15] *See Webster's Third New International Dictionary* 215 (unabridged ed 2002). Similarly, at the time the Origination Clause was adopted as part of the Oregon Constitution the word "bill" meant "[a] form or draft of a law, presented to a legislature, but not enacted," and the word "law" meant "a law or rule of action prescribed or enacted by a sovereign, and promulgated and recorded in writing; a written statute, ordinance, edict or decree." Noah Webster, *An American Dictionary of the English Language* (1828). These definitions, both past and present, focus not on the form of a bill document, but on the substantive "law" that is presented to the legislature for consideration and enactment.

Accordingly, a "bill" for raising revenue must refer to the proposed law that is presented to the legislature to consider and vote on, *i.e.*, the substance of the

[15] On pages 35 and 36 of their Opening Brief, plaintiffs cite several times to the legislative bill drafting manual and the legislative form and style manual promulgated by Legislative Counsel. As noted above, those documents do not reflect the law with regard to what constitutes a "bill" or meaning of other terms in Article IV, section 18, and are not relevant to this court's analysis.

legislative measure rather than the form of the vehicle in which it is placed.[16] *See also Application of Forsythe,* 185 NJ Super 582, 588, 450 A2d 594, 597 (1982) (Deciding that a bill had complied with constitutionally required formalities and stating: “We do not regard a bill as being a piece of paper with a number at the top and a name of a sponsor at its head, or a particular color on its backer. A bill in the legislative sense consists of its content—the words which are to be adopted by the Legislature that ultimately will become law.”).

Rather than elevate form over substance, as plaintiffs would have the court do, the court should, instead, consider the substance of the law enacted and where that substance originated. It would be a complete triumph of form over substance if, as plaintiffs argue, the “bill” that must originate in the House of Representatives under Article IV, section 18, of the Oregon Constitution is simply the shell document with the number at the top of the page, rather than the content of the law itself.

Consistent with the Oregon and New Hampshire courts’ presumption in favor of the constitutionality of a legislative act and the courts’ willingness to

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[16] To the extent that plaintiffs rely on The Form and Style Manual for Legislative Measures for authority, that document supports the department’s argument here. The manual states that “[t]he body of a bill follows the enacting clause and contains the actual legislation. The body sets forth proposed laws, amended laws and provisions for the repeal of laws.” (Supp App 12). In addition, the manual defines the word “bill” as “[a] measure that creates new law, amends or repeals existing law, or takes other action * * *.” (Supp App 13).

review the legislative record underlying the enactment of the bill at issue, review of the legislative history shows that the enrolled version of SB 495 reflects the House amendments that completely replaced the original bill's provisions and repealed the exemption for plaintiffs' Intertie property. The law repealing the plaintiffs' property tax exemption originated in, and was first passed by, the Oregon House of Representatives. Like the bill at issue in *Baines,* the enrolled version of SB 495 complied with the origination requirements of the constitution, and plaintiffs fail to overcome the presumption that the bill was constitutionally enacted.

CONCLUSION

The Tax Court's judgment should be affirmed.

DATED this 22nd day of July 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH ORAP 5.05(2)(d)

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 12,194 words.

Type size

I certify that the size of 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 22nd day of July, 2014.

By: /s/ Melisse S. Cunningham
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CERTIFICATE OF SERVICE

I certify that on July 22, 2014, I directed the original DEFENDANT-RESPONDENT'S BRIEF to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and Gregory A Chaimov, of attorneys for plaintiffs; and served upon Gregory C Narver by regular United States Mail and addressed to the following:

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