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Circuit Courts  
For Lane County, Oregon  
BY *DR*

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

In the Matter of the Petition of Sandra Bishop,  
Melvin Menegat, John Simpson, Patrick  
Lanning, and Ron Farmer, as Directors of  
EUGENE WATER & ELECTRIC BOARD, an  
Oregon municipal corporation,

Case No. 16-06-13725

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For the Judicial Examination and Judgment of  
the Court as to the Validity of a Contract for the  
Purchase of Power,

OPINION and ORDER

EUGENE WATER & ELECTRIC BOARD, an  
Oregon municipal corporation,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF WATER  
RESOURCES; and CALIFORNIA ENERGY  
RESOURCES SCHEDULING DIVISION,

Defendants.

**Summary**

The State of California's (California) motion to dismiss or, in the alternative, for a stay requires the court to determine whether or not the two causes of action asserted by the Eugene Water and Electric Board (EWEB) are properly in Lane County. As described below, the dispositive issue presented by this motion is whether or not ORS 33.710(2)(d) permits the validity of contracts that have been authorized and executed by a municipal corporation to be retrospectively determined by the court in proceedings brought pursuant to that statute. Because the court holds that it can retrospectively determine the validity of the contracts at issue, California's motion is denied.

## Discussion

### I. Factual and Procedural Background

This case arises out of the energy crisis that occurred in California during 2000 and 2001. EWEB is a public utility chartered by the City of Eugene. It was one of multiple public utilities that sold electricity to California during the energy crisis. Specifically, EWEB entered into short-term power contracts with the California Energy Resources Scheduling Division, which is a division of the California Department of Water Resources.

The parties' power contracts have been the subject of three lawsuits. California filed its first action against EWEB in Sacramento County Superior Court on February 14, 2005. The state voluntarily dismissed that case, without prejudice, on April 28, 2005, predicated upon the parties entering into a tolling agreement whereby the limitations period would be tolled while settlement discussions took place. On June 13, 2006, the parties entered into a second tolling agreement that had the same effect over a broader scope of claims. On July 17, 2006, roughly one month after the second tolling agreement went into effect, EWEB brought suit against California in this court.<sup>1</sup> Most recently, California filed a new lawsuit against EWEB in Sacramento County on September 14, 2006.

In the latest California proceeding, California seeks money damages from EWEB under various theories, including duress, undue influence, rescission, restitution, unjust enrichment, public policy, and mutual mistake. California filed its motion to dismiss or stay in this case in Oregon on September 18, 2006. The gist of California's motion is that the parties should resolve their disputes in the third lawsuit before the Sacramento County Superior Court rather than in this action.

### II. Legal Analysis

California moves against both causes of action stated in EWEB's complaint. EWEB's first cause of action presents a petition for judicial validation of the "validity, legality, and sufficiency" of the parties' power transactions pursuant to ORS 33.710(2). The court uses the term "validation proceeding" to describe the proceeding that disposes of petitions filed under that statute. Relatedly, EWEB's second cause of action requests a judicial declaration that the parties' power transactions are valid and enforceable pursuant to ORS 28.010-.160, which codifies the Uniform Declaratory Judgment Act (UDJA).

The court's disposition of California's motion ultimately turns on the scope of ORS 33.710(2)(d). In the final analysis, the court interprets that provision to permit it to retrospectively determine the validity of the parties' power contracts in a validation proceeding. EWEB was thus statutorily allowed to file its validation petition in Lane

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<sup>1</sup> The parties pose different motives to explain EWEB's decision to bring suit. EWEB states that it was motivated by a desire to resolve the uncertainty surrounding the power transactions. In contrast, California alleges that EWEB was reacting to an adverse ruling handed down by the Sacramento County Superior Court on June 29, 2006, in a similar case. California also asserts that EWEB intended to preempt a second suit that it expected the state to file. Ultimately, the parties' motives are irrelevant to the court's analysis.

County.<sup>2</sup> California's secondary arguments regarding UDJA principles, due process concerns, and jury trial rights do not alter the court's conclusions under the statute. In turn, in light of the fact that EWEB was allowed to bring its validation petition in Lane County, dismissal of the second cause of action would be improper. No sufficient countervailing reason exists to warrant splitting the two causes of action.

#### **A. Petition for Judicial Validation under ORS 33.710**

The dispositive issue presented by EWEB's first cause of action is whether or not ORS 33.710(2)(d) confers this court with jurisdiction to retrospectively determine the validity of the parties' power contracts. As set forth in full below, this issue requires the court to utilize *PGE v. BOLI* analysis to interpret ORS 33.710(2)(d). Specifically, the court must determine whether or not (1) the statute designates contract validation as an independent subject for validation proceedings, and (2) the statute permits retrospective determination of contract validity. Because the court answers both questions in the affirmative, it rules that EWEB was statutorily allowed to bring its validation petition here in Lane County. None of the secondary arguments asserted by California alter the court's conclusion.

##### **1. *PGE v. BOLI* Analysis**

California urges dismissal of EWEB's validation petition on the grounds that the nature of the parties' dispute makes this case the improper subject of a validation proceeding under ORS 33.710. This argument implicates *PGE v. BOLI* analysis of that statute. *PGE v. BOLI* reiterates that the ultimate goal of statutory interpretation is to discern legislative intent.<sup>3</sup> Toward this end, Oregon courts must initially interpret statutes by looking at the text and context of the provision.<sup>4</sup> When attempting to decipher the statutory text, the court considers rules of construction, including "the statutory enjoiner 'not . . . to omit what has been inserted.'"<sup>5</sup> With respect to its evaluation of statutory context, the court considers "other provisions of the same statute and other related statutes." Of course, rules of construction also apply here, including the statutory maxim that "'where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.'"<sup>6</sup> In addition to related provisions, statutory context also consists of interpretive case law.<sup>7</sup> Ultimately, "if the legislature's intent is clear from the [court's]

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<sup>2</sup> The parties do not dispute the meaning of "may" as that term appears in the text of ORS 33.710(2), "[t]he governing body *may* commence a proceeding in the circuit court of the county in which the municipal corporation or the greater part thereof is located." (Emphasis added.) The court construes "may" as referring to the municipal corporation's decision to commence a proceeding under that statute rather than as conferring the municipal corporation with discretion to choose the venue in which the proceeding is commenced. Thus, although EWEB was statutorily allowed to commence a validation proceeding, once it exercised its discretion to file such a proceeding, it was statutorily required to file its petition in this court due to its location in Lane County.

<sup>3</sup> *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 610, 859 P2d 1143 (1993) ("In interpreting a statute, the court's task is to discern the intent of the legislature.").

<sup>4</sup> *Id.* at 611.

<sup>5</sup> *Id.* (citing ORS 174.010).

<sup>6</sup> *Id.* (citing ORS 174.010).

<sup>7</sup> *Gaston v. Parsons*, 318 Or 247, 253, 864 P2d 1319 (1994) (describing that statutory context "includes case law interpreting . . . statutes" for purposes of *PGE v. BOLI* analysis.)

inquiry into text and context, further inquiry is unnecessary.”<sup>8</sup>

**a. Relevant Law**

ORS 33.710(2)(d) controls the court’s analysis of EWEB’s validation petition, providing:

“(2) *The governing body may commence a proceeding in the circuit court of the county in which the municipal corporation . . . is located, for the purpose of having a judicial examination and judgment of the court as to the regularity and legality of:*

(d) *The authorization of any contract and as to the validity of the contract, whether or not it has been executed.*” (Emphasis added.)

ORS 33.710(2)(b),(c), (e)-(g), and (4) are also relevant to the dispositive issue and are set forth below in the discussion regarding statutory context.<sup>9</sup>

**b. Text**

California argues that a plain reading of ORS 33.710(2)(d) shows that validation proceedings are limited to determining the validity of contracts over which there is a dispute about authorization. California asserts that there is a referential relationship between the terms “any contract” and “the contract” as those appear within the clause “[t]he authorization of *any contract* and as to the validity of *the contract*.” According to California, “the contract” refers to a contract over which there is a dispute regarding its authorization. That is, a dispute over authorization is a predicate to determining contract validity. In turn, because no dispute exists regarding EWEB’s authority to contract or authorization procedures here, California argues that the validity of the power contracts is a subject that falls outside the scope of ORS 33.710(2)(d).

EWEB disputes the referential relationship between “any contract” and “the contract” proffered by California. It views the clause, “[t]he authorization of any contract and as to the validity of the contract” as stating two independent subjects under ORS 33.710(2)(d). Thus, according to EWEB, a validation proceeding may properly address (1) whether a party had authority to contract, *and* (2) whether the contract entered into is valid. EWEB asserts that, because this case falls squarely within the latter category, it has a statutory right to bring suit in Lane County where it is located.

Notwithstanding the novelty of California’s argument, the text of ORS 33.710(2)(d) favors EWEB’s view that subsection (d) articulates contract validity as an independent subject for validation proceedings rather than as a referent and contingent subject. The

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<sup>8</sup> *PGE v. BOLI*, 317 Or at 611.

<sup>9</sup> ORS 33.710(1) is not at issue here. California does not argue that EWEB is not a “municipal corporation” under that statute: “‘Municipal corporation’ means any county, city, port, school district, union high school district, community college district and all other public or quasi-public corporations *including a municipal utility or dock commission operated by a separate board or commission.*” (Emphasis added.)

following plain reading emerges when subsections (2) and (d) are read together:

“The governing body may commence a proceeding . . . for the purpose of having a judicial examination and judgment of the court *as to* the regularity and legality of . . . the authorization of any contract *and as to* the validity of *the* contract . . .” (Emphasis added.)

Thus, the statute designates authorization and validity as two independent subjects that are delineated by the prefatory use of “as to” and the conjunction “and.” With respect to the statute’s inclusion of the article “the” before “contract,” the court does not consider this usage to evidence that a dispute over contract authorization is an intended predicate to a determination of contract validity. As EWEB pointed out at oral argument, because lack of authorization is itself a ground for challenging contract validity, a partially duplicative and redundant relationship between the two subjects would result under California’s construction. Instead, the text evidences that the existence of an authorized contract is implied such that a validation proceeding may address both (1) the regularity and legality of the authorization procedures, and (2) the validity of the contract that was authorized. In other words, “the contract” refers to an extant authorized contract that may be scrutinized with respect to both its authorization and validity.

Of course, the text must also be consulted to determine whether ORS 33.710(2)(d) permits the court to retrospectively determine the validity of an authorized contract.<sup>10</sup> This issue is controlled by the final clause of subsection (d), which provides that contract validity may be determined in a validation proceeding “whether or not [the authorized contract] has been executed.” Taken together, this text and the preceding clause reveal that contract validity may be determined either (1) prospectively subsequent to contract authorization but prior to execution, or (2) retrospectively subsequent to both contract authorization and execution. To read the statute as exclusively permitting prospective determinations of contract validity would wholly omit the “execution” clause. Thus, the text supports EWEB’s position that this court may retrospectively determine the validity of the parties’ authorized and executed contracts within a validation proceeding.

### **c. Statutory Context**

Regarding statutory context, California relies exclusively on case law to argue that a validation proceeding would be improper here because it would require the court to (1) retrospectively determine the validity of the parties’ contracts, and (2) construe California public policy when making this determination. The court finds California’s latter distinction to be without merit. None of the cases cited by California preclude this court from applying both Oregon law and, to the extent necessary, construing California policy when evaluating contract validity. Accordingly, the following discussion exclusively addresses whether retrospective determinations of contract validity are statutorily permitted in validation proceedings.

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<sup>10</sup> California’s argument that retrospective determinations of contract validity are outside the scope of the statute relies solely on statutory context—specifically, interpretive case law—and thus is set forth below.

### i. Case Law

California's argument regarding statutory context rests solely on interpretive case law—namely, *Cole v. Baker*.<sup>11</sup> Based on this court's review, *Cole* is the only appellate decision that interprets ORS 33.710(2)(d). At issue in that case was whether financing contracts between the City of Beaverton and First Interstate Bank were valid.<sup>12</sup> The contracts had been authorized by the city council but had not been executed.<sup>13</sup> The appellants alleged that the trial court lacked jurisdiction over the validation proceeding because several terms of the authorized contracts had not been finalized.<sup>14</sup> The Court of Appeals disagreed with the appellants, holding that the trial court had jurisdiction. After quoting the text of ORS 33.710(2)(d), the court described:

“The purpose of that statute is to allow the legality of contemplated governmental actions to be determined before they are undertaken.”<sup>15</sup>

California relies on this statement to argue that retrospective determinations of contract validity are outside the scope of the statute.

This court is bound by the Court of Appeal's view that ORS 33.710(2)(d) has a prospective purpose. As described above, that view finds support in the text, which reveals an intent to permit validation proceedings to address the validity of contracts that have been authorized but not yet executed. In light of the fact that the contracts at issue in *Cole* were in such a posture, it makes sense that the Court of Appeals focused on this prospective purpose. However, the existence of a prospective purpose does not preclude the simultaneous existence of a retrospective one. At least three of the ORS 33.710(2) subsections appear to provide for both prospective and retrospective determinations of “regularity,” “legality,” and “validity,” including subsection (d). Ultimately, the Court of Appeal's recognition of the statute's prospective purpose does not sway this court's view that the statute was also intended to permit retrospective determination of the validity of contracts that have been both authorized and executed. Construing the statute in this nonexclusive manner comports with the statutory maxim to interpret provisions and particulars so as to give effect to all. In this court's view, it is likely that the court of appeals simply did not have occasion to examine the retrospective purpose of ORS 33.710(2)(d) in *Cole* because the contracts were in a different posture.

Although it solely involved *application* of ORS 33.710(2)(d), rather than *interpretation* thereof, *Select County Employees* illustrates the foregoing distinction.<sup>16</sup> The Court of Appeals decided *Select County Employees* eleven years after *Cole*; it is the most recent appellate decision involving subsection (d). Like the case at bar, *Select County Employees* involved a retrospective determination of the validity of an authorized and

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<sup>11</sup> 82 Or App 108, 727 P2d 171 (1986).

<sup>12</sup> *Id.* at 110.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 110 n1.

<sup>15</sup> *Id.*

<sup>16</sup> *Bd. of Klamath County Comm'rs v. Select County Employees*, 148 Or App 48, 939 P2d 80 (1997).

executed contract. The relevant facts are as follows. In 1994, the Board of Klamath County Commissioners (Commission) entered into an employment contract with the county director of personnel that prohibited termination of the director except for death, disability, or cause.<sup>17</sup> Shortly after new membership took office in 1995, the Commission terminated the director and sought a determination of the validity of the termination provision under ORS 33.710(2)(d).<sup>18</sup> Ultimately, the Court of Appeals held that the termination provision constituted an invalid attempt to bind successor administrations.<sup>19</sup> The court did not interpret ORS 33.710(2) in reaching its holding, but the case implicitly holds that a validation proceeding may be utilized to retrospectively determine the validity of a contract that has been authorized and executed.

## ii. The Other Subsections of ORS 33.710

The other subsections of ORS 33.710(2) reinforce the court's view that subsection (d) was intended to permit the court to retrospectively determine contract validity in a validation proceeding. Subsections (b), (f), and (g) are useful analogues. Conversely, the exclusively prospective focus of subsection (e) makes it distinguishable.

Subsections (f) and (g) together constitute the closest analogue to subsection (d). Those subsections permit a validation proceeding to address the "regularity and legality" of:

"(f) The authority of the governing body to enact any ordinance, resolution or regulation.

(g) Any ordinance, resolution or regulation enacted by the governing body, including the constitutionality of the ordinance, resolution or regulation."

Thus, these subsections designate the same subjects as subsection (d)—authorization and validity— but applied to ordinances, resolutions, and regulations rather than contracts.

Of equal importance, however, is the fact that subsection (g) provides that the validity of an enacted ordinance, resolution, or regulation is to be determined subsequent to its enactment. In other words, subsection (g) reveals that the legislature intended to permit the courts to retrospectively determine the validity of an enacted ordinance, resolution, or regulation in a validation proceeding. Subsection (d) shares this retrospective focus with respect to the validity of contracts that have been both authorized and executed.

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<sup>17</sup> *Id.* at 50.

<sup>18</sup> *Id.* at 52.

<sup>19</sup> *Id.* at 55.

Subsection (b) is also relevant to the dispositive issue, providing that a validation proceeding may address:

“(b) The proceedings of the governing body and of the municipal corporation providing for and authorizing the issue and sale of bonds of the municipal corporation, whether the bonds or any of them have or have not been sold or disposed of.”

The clause “whether the bonds or any of them have or have not been sold or disposed of” resembles the “execution” clause in subsection (d), which permits contract authorization and validity to be determined in a validation proceeding “whether or not [the authorized contract] has been executed.” Ultimately, as a result of its “sold-or-disposed-of” clause, subsection (b) permits courts in validation proceedings to (1) prospectively determine the regularity and legality of bond authorization and sale proceedings where bonds have been authorized but not yet sold, and (2) retrospectively determine the same where bonds have been both authorized and sold. The simultaneous existence of these purposes reinforces the court’s view that both prospective and retrospective determinations of contract validity are permitted under subsection (d).

Briefly noted, subsection (c) permits the court in a validation proceeding to address the “regularity and legality” of “any order of the governing body levying a tax.” This provision arguably contemplates both prospective and retrospective determinations. One scenario involving the latter would be when an order has been issued, a tax has been levied, and a challenge to the legality of the order then arises.

In contrast to the foregoing subsections, subsection (e) is the sole provision that appears to focus exclusively on prospective determinations. Subject to three criteria, it provides that a validation proceeding may address the “regularity and legality” of:

“(e) Any decision of the governing body that raises novel or important legal issues that would be efficiently and effectively resolved by a proceeding *before the decision becomes effective . . .*” (Emphasis added.)

The exclusively prospective focus of this provision is clearly distinguishable from the dual focus of subsection (d). One means by which the legislature could graft such a purpose onto subsection (d) would be to delete the “execution” clause and insert language stating that determinations of contract validity may only be made prior to execution. Subsection (d) stands open-ended instead. It is worth noting that, in this court’s view, ORS 33.710(4) largely addresses the justiciability concerns raised by the prospective focus of subsection (e), stating that “[n]othing in this section allows a governing body to have a judicial examination and judgment of the court without a justiciable controversy.”

#### **d. Summary**

Pursuant to the foregoing *PGE v. BOLI* analysis, the court concludes that retrospective determinations of contract validity fall within the scope of ORS 33.710(2)(d). Accordingly, because the parties' controversy over the power contracts involves precisely this subject, the court further concludes that EWEB was statutorily allowed to bring its validation petition in Lane County where it is located.

#### **2. Secondary Arguments—UDJA Principles, Due Process Concerns, and Jury Trial Rights**

Beyond its *PGE v. BOLI* arguments, California asserts that a validation proceeding is improper in this case for three additional reasons. First, California contends that validation proceedings are in the nature of declaratory relief such that principles of the UDJA—namely, prevention of forum shopping and respect for a plaintiff's choice of forum—compel the court to disallow a validation proceeding. Second, California argues that validation proceedings are summary in nature and thus due process concerns arise if a case of this size and complexity is disposed of in this manner. Finally, the state asserts that adjudication of this matter may also be unconstitutional because its claims that require damages calculations are triable to a jury under California law, whereas validation proceedings are tried to the court without a jury under ORS 33.720.

California's secondary arguments do not alter the court's conclusion that it is proper for this court to entertain a validation proceeding in this case. Although the principles of the UDJA are certainly relevant to disposing of EWEB's second cause of action, the court does not consider these principles relevant to determining the propriety of a validation proceeding. *PGE v. BOLI* analysis controls this issue, and the court does not view the UDJA principles as playing any role in that analysis. Regarding California's due process concerns, EWEB correctly identifies that ORS 33.720(1) does not limit the nature and extent of evidence that may be presented to the court in a validation proceeding. In short, a full and fair adjudication may be had. Finally, although California is correct that ORS 33.720(1) contemplates validation proceedings to proceed in the manner of "an action not triable by right to a jury," this limitation does not preclude damages calculations from being made by a jury in the counterclaims that California will undoubtedly file in the proceeding that mimic the pending case filed in Sacramento County.

#### **II. Declaratory Relief Action Under the UDJA**

Pursuant to the UDJA, EWEB's second cause of action seeks a declaration that the parties' power contracts are valid and enforceable. The parties agree that the court's decision to entertain a declaratory judgment action is a discretionary one.<sup>20</sup> However, the parties dispute at great length whether or not "valid countervailing reasons" exist to

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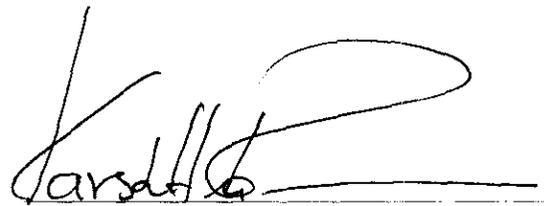
<sup>20</sup> ORS 28.060 provides: "The court may refuse to render or enter a declaratory judgment where such judgment, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

warrant the court dismissing the action on the facts of this case.<sup>21</sup> The litany of factors proffered by the parties includes prevention of forum shopping, convenience and efficiency, judicial expertise, investment of judicial resources, nonfulfillment of the purposes of the UDJA, and principles of comity.

Ultimately, because the court determines that EWEB was statutorily allowed to bring its validation petition action in Lane County, the court will refrain from a full discussion of the parties' arguments regarding whether or not the competing factors weigh toward the court entertaining a declaratory judgment action. In short, no sufficiently weighty countervailing reason exists to warrant splitting the two causes of action.

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss Complaint for Declaratory Relief or, in the Alternative, for a Stay (OJIN 9 and 10) is DENIED.

Dated: December 22, 2006.



Karsten H. Rasmussen, Circuit Judge

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<sup>21</sup> *Brown v. Oregon State Bar*, 293 Or 446, 451, 648 P2d 1289 (1982).