by Richard Lorenz and Timothy Smith

Oregon court finds public utility power purchase agreement exempt from public records disclosure

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Are your power purchase agreements (PPA) subject to disclosure as public records? The answer, it turns out, may depend on what state you are in.

In Oregon, a court recently held that a specific PPA for a public utility was exempt from public records disclosure. On October 6, 2011, Judge Karsten Rasmussen for the Lane County Circuit Court held that a fully executed PPA between a public utility and a wholesale power seller was exempt from disclosure under Oregon's Public Record Law, ORS 192.420-192.505. The court found that the PPA constituted sensitive business, commercial, or financial information exempt from disclosure as a public record.

In 2010, the Eugene Water & Electric Board (EWEB) and Seneca Sustainable Energy, LLC (Seneca) signed a PPA for the purchase and sale of power. In the PPA, the parties agreed that the terms and conditions of the PPA would remain confidential.

The Register-Guard and its publisher, Guard Publishing Company (collectively the "Register Guard"), requested a copy of the PPA. EWEB denied disclosure and claimed that the entire PPA was exempt from disclosure. As required by Oregon's Public Record Law, the Register Guard initially petitioned the Lane County District Attorney, who then directed EWEB to disclose the PPA. EWEB ultimately sought review in the Lane County Circuit Court in a case entitled *Eugene Water & Electric Board and Seneca Sustainable Energy, LLC v. Guard Publishing Company*, Lane County Circuit Court No. 16-10-26544 (the "EWEB case"). (The District Attorney later filed an amicus brief, saying that had he had more time initially to review the newspaper's request, he would have ruled that the contract was exempt from disclosure. Seneca filed as an intervenor in the court case.)

In the EWEB case, the court found that under the Oregon Public Records Law, public records are subject to disclosure unless an express exemption from disclosure protects the document. The EWEB court also concluded that Oregon has a "strong and enduring policy" favoring disclosure of public records, citing *In Defense of Animals v. Oregon Health Sciences Univ.*, 199 Or. App. 160, 168 (2005). The court further determined that "disclosure is the rule and exemptions from disclosure are to be narrowly construed."

In opposition to disclosure of the PPA, EWEB and Seneca argued that ORS 192.505(26) exempted the PPA from disclosure in its entirety. ORS 192.502(26) provides as follows:

> *Sensitive business, commercial, or financial information furnished to or developed by a public body engaged in the business of providing electricity services, if the information is directly related to a transaction described in ORS 261.3489, or if the information is directly related to a bid, proposal, or negotiations for the sale or purchase of electricity or electricity services, and disclosure of the information would cause a competitive disadvantage for the public body or its retail electricity customers. This subsection does not apply to cost-of-service studies used in the development or review of generally applicable rate schedules.*

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EWEB and Seneca argued that they had treated the PPA with a high degree of discretion by limiting full disclosure of the PPA and its terms to select individuals and counsel and by limiting public discussion of the PPA. The court agreed, finding that EWEB and Seneca had "gone to great lengths and exercised a high degree of discretion to keep the *actual* Contract and its agreed-upon terms confidential."

The court also held that disclosure of the PPA would cause a competitive disadvantage for EWEB or its retail electricity customers because it could harm EWEB's ability to attract bidders, such as Seneca, which would, in turn, reduce competition for power purchase

agreements. The court also held that disclosure of the PPA would reveal EWEB's sensitive business, commercial, and financial information to its competitors and other suppliers of electricity, and would place EWEB and its customers at a competitive disadvantage over EWEB's privately owned competitors, who are not subject to the Public Records Laws, when bargaining or competing for electrical purchase or supply contracts.

In the final review, the court did not hold that all PPAs with public utilities "are categorically exempt" from disclosure. Instead, the court found that the PPA between EWEB and Seneca reflected the "sum of negotiations for the purchase of electricity or electrical services" and that under those circumstances the PPA was exempt from disclosure in its entirety.

In contrast to the *EWEB* case, Washington courts appear to have reached a different conclusion. Like Oregon, Washington has a broad Public Records Act (RCW 42.56.001-42.56.904) that reflects a strongly worded mandate for broad disclosure of public records. However, in *W. v. Port of Olympia*, 146 Wash. App. 108, 115 (2008) (the "Port of Olympia case") the Washington Court of Appeals held that once the Port of Olympia executed a lease with a tenant, documents reflecting policies or recommendations pertaining to that lease no longer fell within an exemption from disclosure under the Public Records Act, even if public disclosure might adversely impact the port's ability to get the "best deal" in future negotiations with other tenants. The Port of Olympia case suggests that Washington courts will not follow the reasoning underlying the decision in the *EWEB* case.

Back in Oregon, the Register Guard and EWEB both have the option to appeal their case to the Oregon Court of Appeals. We will update you on any further developments. NWPPA

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