

August 29, 2001

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Dear Mr. Lorenzen:

On August 29, 2001 the Oregon Government Standards and Practices Commission (GSPC) adopted the following advisory opinion:

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION
ADVISORY OPINION 01A-1001**

STATED FACTS: Oregon Trail Electric Consumers Cooperative (OTEC) is an Oregon cooperative corporation organized under the provisions of ORS Chapter 62. It is an income producing not-for-profit corporation that is tax exempt under Section 501(c) of the Internal Revenue Code. OTEC owns and operates an electric distribution system which serves the cities of La Grande, Baker City, John Day, Burns and the majority of the area lying between these cities. Its distribution system is located in the counties of Union, Baker, Grant and Harney. The total utility plant in service is listed on its balance sheet at approximately \$90,000,000 and the annual gross income is approximately \$38,500,000. As a cooperative organization, it is owned by the 22,000 members that it serves as customers.

The cooperative is governed by a nine member board of directors. The bylaws require that four of the directors reside in Union County, three in Baker County, one in Harney County and one in Grant County. The directors are elected by the members who are also the consumers of the electric power and distribution services supplied by the cooperative. The directors of the cooperative are elected to serve a three year term. An individual may become a candidate for director through nomination by a nominating committee.

Mr. Gary Potter, who contracts with local governments in Baker and Union Counties to provide electrical inspector services, has been elected as a director of OTEC. Other than Mr. Potter, directors receive \$100 per day for each day spent on cooperative business. In addition, directors receive between \$2,250

and \$5,800 as contribution to medical insurance costs each year. To date, Mr. Potter has served as a director without remuneration. Directors are required to attend twelve full day board meetings each year. Also, each director spends approximately twelve days per year attending educational seminars, national and regional meetings and special board meetings.

Electrical inspectors do not inspect or pass judgment upon the electrical distribution or transmission facilities of electric utilities such as OTEC. They are responsible for reviewing and approving the electrical installations of customers who are members of the cooperative. The electric utility may not connect its distribution system to the customer's electrical facilities unless the electrical inspector has indicated his or her approval of the customer's facilities built under permit. Also, if an unsafe condition is discovered with a customer's existing facilities, the inspector will request the electrical cooperative to disconnect the customer's electrical service. In carrying out these functions the electrical inspector has routine contact with personnel from the electrical utility cooperative.

RELEVANT STATUTES: The following Oregon Revised Statutes are applicable to the issues addressed herein:

244.020(1) " Actual conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (7) of this section.

244.020(2) " Business means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain but excluding any income-producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official is associated in a nonremunerative capacity.

244.020(3) " Business with which the person is associated means any business of which the person or the person's relative is a director, officer, owner or employee, or agent or any corporation in which the person or the person's relative owns or has owned stock worth \$1000 or more at any point in the preceding calendar year.

244.020(7) " Potential conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of

the person or the person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit arises out of the following:

(7)(c) Membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.

244.020(15) Public official means any person who, when an alleged violation occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services.

244.040 **Code of ethics; prohibited actions; honoraria.** The following actions are prohibited regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120:

(1)(a) No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this subsection, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official's relative, or for any business with which the public official or a relative of the public official is associated.

QUESTION NO. 1: Is Mr. Potter a public official in his capacity as a contract electrical inspector for local governments in Baker and Union counties?

OPINION: Yes. Oregon Attorney General Opinion Number 8214, dated 4/9/90, addressed the application of the definition of public official to contractors with government bodies. The opinion states that a private sector contractor does not become a public official merely by entering into a contract with government. The nature of the services provided is a key factor in this opinion. The determination of whether or not a contractor to government is a public official depends upon if the contractor performs services to the government or performs services on behalf of the government. The opinion concludes that a contractor who provides a service on behalf of government is a public official.

Consistent with the Attorney General's opinion, we believe that if a contractor performs governmental functions or responsibilities on behalf of the governing body, the contractor is a public official as defined in ORS 244.020(15).

However, if a contractor simply performs services for the government that are not governmental in nature, the contractor is not a public official. The stated facts indicate that Mr. Potter contracts to provide electrical inspections for local governments. Since these services are **performed on behalf of and would otherwise** be provided by the governments, Mr. Potter is a public official in his capacity as an inspector.

QUESTION NO. 2: Does the exemption of ORS 244.020(7)(c) apply to Mr. Potter's public official status in relation to his membership on the OTEC board?

OPINION: Yes. ORS 244.020(7)(c) exempts from the definition of potential conflict of interest situations when the pecuniary benefit or detriment arises out of membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code. This same exemption applies to actual conflicts of interest defined in ORS 244.020(1). According to the stated facts, OTEC is a 501(c) nonprofit corporation. Therefore, the exception to the conflict of interest definition applies to Mr. Potter's service on the OTEC board whether or not he receives compensation. Mr. Potter's actions as an electrical inspector do not constitute a conflict of interest because the pecuniary benefit or detriment arises out of service on the board of directors of a non-profit corporation.

The only impact of the exemption, however, is that Mr. Potter would not be required to notify public entities, for which he performs electrical inspections, of conflicts of interest for each electrical inspection when the result could or would be to the financial benefit or detriment of the OTEC.

QUESTION NO. 3: Do the prohibitions of ORS 244.040(1)(a) apply to Mr. Potter's actions as an electrical inspector that financially impact OTEC?

OPINION: The prohibitions do not apply if Mr. Potter is not compensated by OTEC. ORS 244.040(1)(a) prohibits a public official from using official position to obtain financial benefit or to avoid a financial detriment for a business with which the official is associated. The definition of business, in ORS 244.020(2), specifically excludes income producing not-for-profit corporation that is tax exempt under 501(c) of the Internal Revenue Code with which a public official is associated in a non-remunerative capacity. (Emphasis added)

Accordingly, if Mr. Potter were to receive compensation from OTEC, other than reimbursement of expenses, the above exclusion would not apply and OTEC would be a business with which he is associated. Therefore, actions he takes in his public official capacity as an inspector for local government entities, which would result in a financial gain or avoidance of a financial detriment to the OTEC, would result in a violation of ORS 244.040(1)(a).

THIS OPINION IS ISSUED BY THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION PURSUANT TO ORS 244.280. A PUBLIC OFFICIAL OR BUSINESS WITH WHICH A PUBLIC OFFICIAL IS ASSOCIATED SHALL NOT BE LIABLE UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS LIMITED TO THE FACTS SET FORTH HEREIN.

Issued by Order of the Oregon Government Standards and Practices Commission at Salem, Oregon on the _____ day of _____, 2001.

Katherine E. Tennyson, Chairperson

Lynn Rosik
Assistant Attorney General