BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF	)	**FINAL FINDINGS OF FACT**
	)	**CONCLUSIONS OF LAW**
	)	**AND ORDER ON MOTIONS FOR**
	)	**SUMMARY DETERMINATION**
CLACKAMAS GROCERY OUTLET	)	
WAREHOUSE and	)	
GROCERY OUTLET, INC.	)	**Case No. OLCC-08-M-001**
	)	
And	)	
Oregon Beer and Wine Distributors	)	
Association,	)	
Intervenor	)	
	)	
In the Matter of the Off-Premises Sales	)	
License Application of	)	
	)	
CLACKAMAS GROCERY OUTLET	)	**Case No. OLCC-08-L-011**
WAREHOUSE and	)	
GROCERY OUTLET, INC.	)	
JAMES PETER READ, JR., Chairman	)	
12100 SE Jennifer St.	)	
Clackamas, Oregon	)	
	)	
And	)	
Oregon Beer and Wine Distributors	)	
Association,	)	
Intervenor	)	

HISTORY OF THE CASE

By letters dated January 30 and May 9, 2008, the Oregon Liquor Control Commission (OLCC or Commission) notified Clackamas Grocery Outlet Warehouse and Grocery Outlet, Inc. (collectively "Grocery Outlet") that "the practice of central warehousing of alcoholic beverages by retailers is not authorized under Oregon law." Grocery Outlet timely requested a contested case hearing on these letters, collectively referred to as the "charging documents." By letter dated August 29, 2009, the Commission granted the hearing request and referred the matter to the Office of Administrative Hearings.

The case was assigned to Administrative Law Judge (ALJ) Alison Greene Webster.

In the second matter, on October 14, 2008, the Commission approved Clackamas Grocery Outlet Warehouse's application for an Off-Premises Sales license at the 12100 SE Jennifer St, Clackamas location with a restriction prohibiting activities associated with the

wholesale sale and distribution of alcoholic beverages to other licensed premises. Grocery Outlet timely requested a hearing challenging the restriction. Grocery Outlet also requested that the hearing be consolidated with the hearing arising from the January 30 and May 9, 2008 charging documents (Case no. OLCC-M-001).

In a December 10, 2008 telephone conference, ALJ Webster granted the request to consolidate the two matters for hearing. In April 2009, the Oregon Beer and Wine Distributors Association, Inc. (OBWDA) filed a petition with the Commission to participate as a party in these matters. By Order dated May 21, 2009, the Commission granted party status to OBWDA.

In a June 22, 2009 telephone conference, the parties agreed that the dispute was appropriate for resolution through cross-motions for summary determination. The Commission, through its attorney, Senior Assistant Attorney General Lynn Rosik, filed a motion for summary determination on July 24, 2009. OBWDA, through its attorneys Paul Romain and John A. Hirschy, filed a motion for summary determination on July 24, 2009. Grocery Outlet, Inc. and Clackamas Grocery Outlet Warehouse, through its attorney John DiLorenzo, Jr., filed a cross-motion for summary determination and opposition to the Commission's and OBWDA's motions on August 21, 2009. The Commission and OBWDA filed responses and replies to the cross-motion. Grocery Outlet filed a surreply memorandum and affidavit in support of its cross-motion for summary determination.

Oral argument on the motions and cross-motion for summary determination was presented before ALJ Webster on September 17, 2009. The Commission was represented by AAG Rosik and case presenter Donna Vandall. Grocery Outlet and Clackamas Grocery Outlet Warehouse were represented by Attorneys DiLorenzo and Aaron Stuckey. OBWDA was represented by Attorneys Romain, Hirschy and Margaret Schroeder.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed October 20, 2009. Staff filed Comments on the Proposed Order on November 4, 2009. OBWDA filed exceptions on November 4, 2009. Grocery Outlet filed a response to the comments and exceptions regarding the proposed order on November 25, 2009. OBWDA filed a response to Grocery Outlet's response on December 2, 2009. The Administrative Law Judge issued a response to the Comments and Exceptions on December 2, 2009.

On December 17, 2009, February 18, 2010 and April 16, 2010 the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Staff's Comments on the Proposed Order, OBWDA's Exceptions to the Proposed Order, the responses filed by Grocery Outlet and OBWDA, and the Administrative Law Judge's Response to Staff's Comments and OBWBA's Exceptions. Based on this review and the preponderance of the evidence, the Commission enters the following:

ISSUES FOR SUMMARY DETERMINATION[1]

1. Whether Grocery Outlet is permitted to continue its business practice of storing wine at its Clackamas facility and delivering the wine to its separately licensed retail stores for sale to the general public?

2. Whether the retail license granted to Grocery Outlet for its Clackamas warehouse must be issued with the restrictions in order to limit the license to only those privileges conveyed by an off-premises sales license (O License)?

EVIDENTIARY RULING

The following documents were admitted into the record in connection with the parties' motions: The Statement of Stipulated Facts, including Exhibits 1 to 9; Affidavit of Paul R. Romain (July 23, 2009) with Exhibits A through C; Affidavit of John DiLorenzo (August 21, 2009) with Exhibits 1 to 4; Affidavit of Paul R. Romain (August 28, 2009) with Exhibit 1; Affidavit of John DiLorenzo (September 4, 2009) with Exhibits 1 to 6; and Declaration of Paul J. Williamson with Exhibit 1.

FINDINGS OF FACT

1. Since October 14, 2008, Grocery Outlet, Inc. (GOI) has held an off-premises retail sales license pursuant to ORS 471.186 at its Clackamas, Oregon, facility. GOI does not hold, and has never held, a wholesale malt beverage and wine license in Oregon. (Stipulation.)

2. GOI purchases wine at wholesale from suppliers licensed by the OLCC. GOI stores the wine at its Clackamas facility until it delivers the wine to retail stores that operate under the trade name Grocery Outlet. These retail stores each have separate off-premises retail sales licenses held jointly by the store operator and GOI. GOI has been authorized to conduct retail sales of wine and beer to the public at its Clackamas facility. (Stipulation.)

3. The operators of the Grocery Outlet retail stores operate the stores under contracts with GOI.[2] The operators receive wine from GOI's Clackamas facility and sell the wine at retail under 31 separate off-premises retail sales licenses held jointly with GOI and the operators of individual stores.[3] (Stipulation.)

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[1] The Commission has restated the issues for summary determination to reflect the issues presented in the original charging document.

[2] Pursuant to the contract between GOI and its independent store operators, "GOI procures, distributes and consigns merchandise." The independent store operator is responsible, "as a consignee of GOI merchandise, for the operation of the retail store and for the safe and efficient handling and sale of GOI merchandise. * * * Operator is not an employee of GOI, nor is Operator a franchisee, partner, reseller or owner with GOI." Operators receive, as a commission from GOI, a percentage of the store's gross margin, generated from the sale of merchandise. (Ex. 1 to Stipulation.)

[3] For example, the off-premises sales license for the East Salem/Lancaster Drive Grocery Outlet is held jointly by Grocery Outlet, Inc. and Donnelly Inc. and the Albany, Oregon Grocery Outlet is held by Grocery Outlet, Inc. and Shannon Browning, an individual. (Ex. C to Romain Aff.).

4. GOI retains title to the wine transported from GOI's Clackamas facility to the 31 Grocery Outlet retail stores until the wine is sold by the retail store. At that time, title is transferred to the retail customer. The proceeds of the sale of wine are at all times the property of GOI, subject to the right of the independent store operator to receive a commission. No money is transferred from the retail store to GOI until after the wine is sold to the public. The retail store operator is paid only after the wine is sold to the public. (Stipulation.)

5. In April 1986, GOI asked OLCC if GOI could lawfully store beer and wine in an unlicensed warehouse for distribution to its individual stores. In a May 20, 1986 letter to GOI's then-treasurer, OLCC explained as follows:

> [Y]ou have asked if [GOI], a grocery retailer licensed at several locations in Oregon, may lawfully store beer and wine in an unlicensed warehouse for distribution to its individual stores. The answer is a qualified "yes".
>
> Based on our understanding of the facts as you represented to the Commission in your letter of April 28, 1986, and our numerous phone conversations over the last several weeks, nothing in the method of distribution of beer and wine by [GOI] suggests any conflict with the Liquor Control Act or Administrative Rules of this state. Our understanding is that the [GOI] warehouse merely co-signs [sic], and does not sell beer and wine to retail stores. We further understand that there is no fee or charge associated with the delivery of beer and wine to the retail stores.
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> * * * Wine on the other hand, may be delivered directly to the central warehouse by a licensed wholesaler.
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> (Ex. 4 to Stipulated Facts.)

6. For more than 20 years, GOI has used the Clackamas facility or similar locations to receive and store beer and wine. In July 2008, GOI decided to transport only wine for delivery to the Grocery Outlet retail stores. (Stipulation.)

7. In 2005, OLCC staff considered whether Oregon law prohibits the holder of a retail liquor sales license from purchasing alcoholic beverages from another licensed retailer for resale at retail prices. OLCC staff concluded that although the "Tied House" statutes, ORS 471.392 to 471.396, prohibit an entity from selling at both wholesale and retail, OLCC cannot "prohibit a retailer from purchasing alcohol from another retailer and reselling that alcohol at retail to customers, providing no factors that would contribute to wholesaling (like price discounts, delivery of product from one retailer to another, etc.) are present." (Exs. 3, 4 and 5 to September 4, 2009 DiLorenzo Aff.)

8. In March 2006, in the context of a Dotty's Deli licensing matter, OLCC staff considered whether a retail licensee may "operate a central warehouse to store and distribute beer and wine for its other licensed locations." OLCC staff recognized that this question is not directly answered by the provisions of ORS chapter 471 or any rule promulgated thereunder:

> There is no retail license type that allows for the storage of alcohol as a specified license privilege. Wholesale licenses, such as a [wholesale malt beverage and wine] license, include storage and distribution among the license privileges, but a retail licensee is precluded from holding a wholesale license under the tied house laws.
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> Because there is no available license that specifically includes the privileges associated with a central warehouse or storage facility, the Commission has taken the position in some cases that central warehousing by a retail licensee is not allowed. In other cases, such as Dotty's, retailers have been allowed to operate a separate storage facility under an extension of the retail license.
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> It could be argued that the retail license statutes should be interpreted to include the storage or products as incidental to the privilege to sell, because all retailers store some alcohol inventory at their licensed premises. However, this does not resolve the issue of whether a retail sales license is appropriate for a facility that only provides storage and has no retail sales.
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> Allowing central warehousing would allow a retailer to obtain all of its products at a single location and to transport the products to its other licensed locations. This may not be a major concern as long as the retailer obtains the products from Oregon distributors. However, if legislation is enacted allowing retailers to obtain products directly from out-of-state manufacturers, this could encourage more retailers to bypass the use of distributors, which would make it more difficult for the Commission to track and collect taxes on products coming into the state.
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> If the Commission decides that retailer central housing should be permitted, then the most appropriate license for a storage facility would seem to be the O license. The F and L license authorize sales for on-premises consumption and limit sales for off-premises consumption to particular circumstances. These licenses also require the holder to maintain liquor liability insurance which is not necessary for the storage of alcohol. The O license does not have these requirements and limitations and the license fee is less that the L or F license fee.

(Ex. 6 to September 4, 2009 DiLorenzo Aff.)

9. In a May 31, 2006 email to Christopher Hansen, a paralegal at Davis Wright Tremaine LLP,[4] Donna Vandall of OLCC wrote, in pertinent part as follows:

> This responds to your e-mail in which you asked about the OLCC's prohibition on central warehousing by retail off-premises sales licenses. The OLCC's position is that central warehousing of alcoholic beverages is not permitted. However, your statement that this practice is not directly prohibited by law is not correct. There are several statutes that provide the basis for this prohibition.

[4] Davis Wright Tremaine did not represent GOI at the time of Ms. Vandall's email message. (Stipulation.)

In the email, Ms. Vandall discussed ORS 471.186, 471.220, 471.223, 471.305, 471.394 and 471.404. She concluded that a "retailer's warehouse may not import alcohol directly from out of state manufacturers." (Ex. 5 to Stipulated Facts.)

10. In May 2007, OLCC contacted GOI about its practice of "central warehousing" alcoholic beverages at GOI's Clackamas facility. OLCC had concerns that GOI was importing alcoholic beverages directly from an out of state manufacturer rather than from an Oregon wholesaler or manufacturer. In a May 25, 2007 letter to GOI addressing OLCC's 1986 approval of GOI's beer and wine warehousing and distribution system, an OLCC Regional Manager wrote:

> We do not believe the letter written in 1986 authorized [GOI] to import alcoholic beverages into Oregon. Retail licensees are not authorized to import alcohol under their license privilege. We believe the letter only authorized the storage of alcoholic beverages that the licensee had purchased from an Oregon licensed manufacturer or wholesaler/distributor. By receiving products directly from out-of-state manufacturers, rather that from an Oregon wholesaler or manufacturer, your warehouse is importing alcoholic beverages which is outside the authorized privileges of your retail license.

(Ex. 1 to September 4, 2009 DiLorenzo Aff.)

11. In December 2007, counsel for the OBWDA sent an electronic message notifying OBWDA members as follows:

> The Oregon Liquor Control Commission no longer allows the central warehousing of wine by a retailer. The Commission determined that wine may only be delivered to a licensed retail account, and the retail license does not allow the retailer to transport wine or beer from one licensed location to another, even if the two locations are owned by the same entity. Malt beverages also may not be delivered to a central warehouse.
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> The new law on direct delivery of wine by an out of state winery to an Oregon retailer also has a specific provision in it that the wine must be delivered to a licensed retail location, not a central warehouse. As with wine or beer delivered by an Oregon winery, brewery or wholesaler, the beverages may not be transported by the retailer from one licensed location to another.
>
> Please review your delivery practices and determine if you are delivering product to a central warehouse. If so, please end the practice.

(Ex. 6 to Stipulated Facts.)

12. Shortly after the date of this message, GOI's wholesale wine and beer distributors refused to process orders for delivery to GOI's Clackamas facility. (Stipulation.)

13. In a January 30, 2008 letter to GOI's attorney, Jesse Lyon of Davis Wright Tremaine, OLCC Executive Director Stephen Pharo confirmed that "it has been the OLCC's position for at least the past several years that the practice of central warehousing of alcoholic beverages by retailers is not authorized under Oregon law." The letter also provided, in part, as follows:

> We understand that your client has been operating an unlicensed central warehouse for sometime in reliance on a 1986 letter from OLCC that seems to authorize the practice. The 1986 letter does not reflect the agency's current position on this issue. However, we recognize that your client could reasonably have relied on that letter in structuring its operations.
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> This letter confirms our current interpretation that central warehousing (including receiving, storing and/or distributing alcoholic beverages at a central location), by a retail licensee is not allowed under Oregon law. However, the OLCC will allow your client a period of time, up to 90 days from the date of this letter, to develop alternatives to meet our regulatory requirements. During that time, the OLCC will not take any enforcement action against your client or its alcoholic beverage suppliers for continuing their current business activities at the warehouse facility.

(Ex. 7 to Stipulated Facts.) Shortly after OLCC's letter, distributors resumed delivering wine to GOI's Clackamas facility. (Stipulation.)

14. On April 28, 2008, OLCC issued GOI a 90-day temporary authority to operate for the Clackamas facility. GOI proposed to open the facility for retail sales to the public on Fridays for two to three hours. Prior to April 28, 2008, GOI did not hold any liquor license for the Clackamas facility. (Stipulation.)

15. In a May 9, 2008 letter to GOI's attorney regarding GOI's application for an off-premises sales license at its Clackamas facility, OLCC wrote:

> We've reviewed your letter and the information you provided in connection with the application for an Off-Premises Sales ("O") license at this location. You stated in your letter that the Clackamas facility will receive and store products for other Grocery Outlet locations. It appears clear from the information you provided that this premises is a warehouse operation that may have some incidental retail sales. We believe that the warehouse activities being proposed at the Clackamas location are not consistent with the O license privileges.
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> * * * *
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> In order to operate under an O license, Grocery Outlet, Inc. would need to discontinue the warehouse activities at the Clackamas location and conduct only retail sales at that location. Continuing the warehouse operations under an O license could result in a violation of ORS 471.405(1), which prohibits the sale of alcohol other than as the license permits.

(Ex. 9 to Stipulated Facts.) In a separate letter that same date, OLCC granted GOI an additional 30 days to "transition to an operation that will comply with the requirements expressed in our January 30 and May 9 letters. (Ex. 8 to Stipulated Facts.)

16. OLCC subsequently agreed to extend the deadline for compliance with the requirements expressed in the January 30, 2008 letter until July 26, 2008. On July 25, 2008, the Clackamas County Circuit Court entered an order expressly enjoining OLCC from taking any adverse action against GOI based upon the positions taken in the agency's January 30 and May 9, 2008 letters. (Stipulation.)

17. On October 14, 2008, OLCC issued a letter to GOI approving GOI's application for an off-premises retail sales license at the Clackamas facility with the following restriction on the license:

> This license allows the sale of alcoholic beverages only at retail directly to the consumer for off-premises consumption. It does not authorize activities associated with the wholesale sale and distribution of alcoholic beverages to other licensed premises. Specifically, the following are prohibited: storing alcoholic beverage products except for products that will be sold to consumers at this location; wholesale sale of alcoholic beverage products (this means selling product to a person who will not consume the product but instead intends to resell it); and transportation or distribution of alcoholic beverage products to other licensed premises.

Based on the Clackamas County Circuit Court's injunction, however, OLCC agreed "not to take action to enforce this restriction until after the conclusion of any administrative proceeding involving this restriction, including any appeal." (Stipulation.)

18. On October 30, 2008, the Clackamas County Circuit Court injunction was amended to allow OLCC to issue an off-premises retail sales license to GOI with the proposed restrictions, and to allow GOI to appeal the restrictions through appropriate administrative and legal venues. (Stipulation.)

19. In October 2008, OLCC and GOI also agreed to the following stipulation:

> The OLCC will not take the position, in the pending administrative proceeding or any administrative proceeding stemming from the OLCC's action on Grocery Outlet's pending license application or in any appeal from such administrative proceedings[,] that Grocery Outlet is not authorized to store wine and beer at a central location and ship it thereafter to other locations because of the restrictions contained [in the off-premises retail license]. In addition, if it is determined by final administrative or appellate decision in the [p]roceedings that a standard, unrestricted "O" License allows a licensee to engage in storage and shipping of beer or wine to other locations, then the OLCC will remove the restrictions from the Restricted "O" License issued to Grocery Outlet.

(Stipulation.)

CONCLUSIONS OF LAW[5]

1. Grocery Outlet, Inc. may not continue its business practice of storing wine at the Clackamas facility and delivering it to other Grocery Outlet retail stores throughout Oregon for sale to the general public.

2. Grocery Outlet, Inc.'s practice of receiving and storing wine at the Clackamas facility and delivering it to other Grocery Outlet retail stores throughout Oregon exceeds the privileges conveyed by an off-premises sales license (O License). Grocery Outlet, Inc. is entitled to receive an O license for its Clackamas facility only with the restriction limiting its activities to retail privileges permitted under the O license.

OPINION

There are no genuine issues of material fact in dispute relevant to the legal issues in this case and all parties agree that the matter is ripe for summary determination pursuant to OAR 137-003-0580.

As background, the Oregon Legislature identified the following express purpose of the Liquor Control Act when it enacted the law in 1934:

> (a) To prevent the recurrence of abuses associated with saloons or resorts for the consumption of alcoholic beverages.
> (b) To eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of such beverages and to promote temperance in the use and consumption of alcoholic beverages.
> (c) To protect the safety, welfare, health, peace and morals of the people of the state.

ORS 471.030.

In furtherance of this purpose, OLCC is required to license "persons and cities within the state to manufacture, distribute, take orders for and sell, spirits, wines, beer and other alcoholic liquors." ORS 471.155(1). With regard to the manufacture, distribution and sale of wine, malt beverages and cider, the Legislature created a tier system that divides liquor distribution in Oregon into distinct groups: manufacturers, wholesalers and retailers.

The Three Tier system is the defining feature of Oregon's liquor control laws. As a general rule, licensees within each tier are prohibited from engaging in the functions reserved for the other two. When the legislature has chosen to deviate from this general rule, it has done so

[5] Upon careful consideration of the arguments presented by the parties and the proposed order issued by the Administrative Law Judge, the Commission has determined that the conclusions reached by the Administrative Law Judge are inconsistent with the applicable law, for the reasons explained in this order.

with specific statutory exceptions.[6] Liquor licensing in Oregon begins with the premise that whatever activity is not explicitly allowed is forbidden. "No licensee shall sell or offer for sale any alcoholic beverage in a manner, or to a person, other than the license permits the licensee to sell." ORS 471.405(1). This fundamental principle governs the Commission's view of the questions presented by this proceeding.

An essential characteristic of the Three Tier system is the creation of separate roles and responsibilities for licensees within each tier - manufacturer, wholesale and retail - that are distinct from those of the other tiers. These distinctions are maintained through the license privilege statutes, which give each type of license a set of specific, limited privileges, as well as through other statutes and rules including the Tied House and financial assistance prohibitions. The definitions and privileges that attach to the various liquor licenses, as set out in ORS 471.175-471.242, are a fundamental component of the Three Tier regulatory structure and must be read in a way that is consistent with maintaining that structure.[7] ORS 471.405(1) supports this principal by stating explicitly that no licensee may sell alcoholic beverages in a manner or to a person "…other than the license permits the licensee to sell." If the privileges of a license were not limited to those expressly granted by the statute, there would be nothing to prevent a retail licensee from manufacturing the alcoholic beverages it sells and distributing the products to other retail licensees. The Three Tier system was created expressly to prohibit this concentration of activities in a single entity that had previously led to abuses.[8]

The privileges conveyed by a liquor license are specifically listed in the statute establishing the license. The Off-Premises Sales or "O" license specifically grants holders the privilege to "sell factory-sealed containers of wine, malt beverages and cider," and "provide sample tasting of alcoholic beverages on the licensed premises" with OLCC permission. ORS 471.186 (1) *et seq.* ORS 471.392(2) specifies that the Off-Premises Sales license is a retail license; i.e., limited to sales in small quantities directly to the ultimate consumer. *See* Webster's Third International Dictionary 1938 (2002). Support for this interpretation comes from the other licenses classed as retail licenses under ORS 471.392(2): the Full On-Premises Sales license, ORS 471.175, and Limited On-Premises Sales license, ORS 471.178, each of which grant the licensee the privilege only to "sell by the drink" to consumers.

By contrast, selling and distributing alcohol to retailers, who subsequently make sales to the general public, is wholesale activity, which is outside of the scope of a retail license. Only

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[6] For example, the Brewery-Public House license in ORS 471.220 and the Winery license in ORS 471.223 permit limited distribution and retail sales rights to licensees in the manufacturing tier. Wholesalers licensed under ORS 471.235 are granted limited rights to make retail sales.

[7] Oregon's Three Tier system encompasses much more than just the Tied House statutes discussed by the ALJ. As discussed below, the Tied House Laws, ORS 471.392 to 471.398, dovetail with the licensing statutes to reinforce the Three Tier system. Where the licensing statutes allow licensees to engage only in certain enumerated activities, the Tied House statutes specifically forbid licensees from engaging in specific business arrangements.

[8] Oregon, like many other states, adopted its Three Tier model of alcohol regulations in order to prevent the recurrence of abuses that had existed prior to Prohibition. These abuses resulted in part from manufacturer control of retail outlets, which led to a lack of competition in the marketplace and the ability of the manufacturer to maximize sales resulting in over-consumption and other public safety concerns. In order to achieve these objectives, the Three Tiers are required by state law to remain separate.

certain licenses allow the storage of wine at one location for sale at different locations and allow the transportation of that wine to those locations. Those licenses are the manufacturing licenses, the warehousing licenses and the wholesale malt beverage and wine ("WMBW") license.[9] Under each of these licenses, the privilege of storing alcohol goes hand-in-hand with the privilege to transport alcohol. *Id.* Conversely, none of the retail licenses mention "store" or "storage." The retail licenses also do not mention the words "transport," "transportation," "deliver," or "delivery," except in the limited exception set forth in ORS 471.186(5). In particular, ORS 471.186, the statute establishing the O license, makes no mention of a privilege to store or distribute alcoholic beverages. Therefore, the holder of an O license may not store, transport or distribute alcohol other than incidentally in connection with the exercise of their retail sales privileges.

Nothing about this conclusion is inconsistent with the common sense understanding that retail licensees must have product on hand at the licensed premises to sell to the public. Inherent in the word "sell" is the concept that the retail licensee has product available for retail sale. That does not, however, justify determining that a retail licensee may store and transport product beyond what is necessary to have on hand for direct sales to retail customers from the licensed premises. Indeed, the sale of alcoholic beverages under any license that authorizes retail sales is restricted to the premises described in the license. ORS 471.305. GOI's activities at the Clackamas warehouse are not limited, as required, to having product available for sales to customers at that licensed location. Instead, the warehouse is used to store quantities of product for shipment to thirty-one different licensees. This is not a privilege "inherent" in the retail sales license privileges.

A liquor license grants to the holder of the license the ability to operate only in accordance with the privileges specified by statute for that particular license. No license may be used in a way that would allow the holder of that license to perform activities that are the province of another license in another tier, as this would undermine the separation of the tiers which is a necessary part of the Three Tier system. The Commission concludes that the activities conducted by GOI at the Clackamas warehouse are wholesale activities reserved to holders of a license that includes these privileges, such as a wholesale malt beverage and wine licensee under ORS 471.235, and are not activities permitted under an O license.

GOI may not conduct its storage and distribution activities with regard to wine from an unlicensed location. Under the Three Tier system, all activities concerning alcoholic beverages, from its manufacture, to storage and distribution, to sale to the ultimate consumer, are highly regulated. Licenses are required for each step of the process, consistent with the purposes expressed in ORS 471.030(1)(b). Alcoholic beverages must be stored at a licensed location, whether at the premises of a WMBW, ORS 471.235, a warehouse, ORS 471.242, a brewery-public house, ORS 471.200, a brewery, ORS 471.220, a winery, ORS 471.223, or a grower sales

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[9] ORS 471.200(1)(a) (brewery-public house licensee may "store, transport, sell"); ORS 471.220(1) ("brewery license shall allow the manufacture, importation, storage, transportation, wholesale sale and distribution to licensees"); ORS 471.227(1)(a) (grower sales privilege license may "import, store, transport or export"), ORS 471.235(1) ("wholesale malt beverage and wine license shall allow the importation, storage, transportation, wholesale sale and distribution to licensees"): ORS 471.242(1) ("warehouse license shall allow the licensee to store, import, bottle, produce, blend, transport and export") (emphasis added).

privilege licensee, ORS 471.227. Each of those licensees has express statutory authority to store and distribute alcoholic beverages at the licensed premises.

The evidence in this proceeding demonstrates that GOI accepts the delivery of wine at its Clackamas warehouse facility and distributes it to the 31 licensed retail stores through its own distribution system. Until the recent granting of the retail O license, GOI stored and delivered the wine entirely as an unlicensed operation. It is clear that, under Oregon law, the sale, storage and transportation of alcohol without a license authorizing those activities is prohibited. [10] The OLCC must ensure that all alcohol in the state that is within the commercial distribution chain is held and accounted for by licensed entities. ORS 471.404 through 471.406 clearly prohibit a wide range of activities related to the importation, possession and sale of alcohol in this state, including keeping alcohol for sale (ORS 471.406(2)), delivering alcoholic beverages for value (ORS 471.406(3) and keeping alcohol with the intent to sell, i.e., storage (ORS 471.406(5)), unless the person conducting the activity holds a liquor license that allows the activity. While adult consumers are allowed to purchase and import reasonable amounts of alcohol for personal use, *see* ORS 471.405(4), there is no allowance for the storage, transportation or sale of alcohol in the commercial context without a license.

GOI argues that it is allowed to conduct its activities at the Clackamas warehouse without a license because although each of the other 31 Grocery Outlet locations have a separate O License permitting the sale of wine, beer and cider at the premises, its distribution model does not involve the "sale" of this product by GOI to the individual retail outlets. GOI asserts that it owns each of the retail stores, and that the independent operators only function as GOI's agent for sales to the general public. GOI also notes that it is a retail licensee at each location, and that it retains title to the inventory until the product is purchased by the customer in-store. GOI adds that it does not charge the independent store operators anything to deliver the wine to the stores.

The Commission disagrees with the contention that no "sale" occurs under GOI's business model. Just because GOI does not receive payment from the operator until after the sale of the wine to the consumer does not mean there is no "sale" between GOI and the retail stores or that GOI is not acting as a wholesaler of the product. ORS 471.406(3) defines the term "sale" for prohibited sales under the Oregon Liquor Control Act to include the delivery of "alcoholic beverages for value or in any way other than purely gratuitously." ORS 471.406(3); *State v. Laughlin,* 148 Or 485, 488-89, 36 P2d 350 (1934) ("In thus defining the words 'to sell', it is believed that the Legislature intended to guard against illicit traffic in alcoholic liquors and to prevent subterfuge in sales or indirect methods of circumventing the law"); *Haeger v. Johnson,* 25 Or App 131, 135, 548 P2d 532 (1976) ("'Sale' is a word of precise legal meaning") (citing *State v. Laughlin).*[11]

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[10] ORS 471.405(3) states: "No person not licensed under the Liquor Control Act shall sell, solicit, take orders for or peddle alcoholic beverages." ORS 471.406 further defines the activities covered by the prohibition on sale of alcoholic beverages.

[11] The ALJ improperly relied on the definition of "sale" used by the court in *Ban v. OLCC*, 196 Or App 545 (2004). In that case, the issue was what constitutes a "sale" under ORS 471.480, which permits the sale of alcohol by employees over 18 years of age. For prohibited sales, the term "sale" is statutorily defined by ORS 471.406. See *State v. Laughlin* and *Haeger v. Johnson,* quoted above.

The delivery of wine by GOI to its retail outlets is clearly not gratuitous. GOI is using its trucks and its employees to transport the wine, and its costs are recovered from the store's gross margin when the ultimate sale is made by the other licensees to the public. When ORS 471.406(3) uses the phrase "purely gratuitously", it means that the delivery has no financial component whatsoever, or is in the nature of a gift. Here, both GOI and the retail store benefit financially by the delivery, by realizing profits from the sale of the product. This is not a gratuitous delivery. The Commission concludes that the delivery of the wine by GOI to the stores is not gratuitous, when the GOI ultimately profits from the sale of the product, thus reimbursing its services of taking delivery of the wine in its warehouse and providing delivery services to the individual licensed stores.[12] Because there has been a sale, GOI is prohibited from conducting this activity without a license.

Under the Three Tier system, explained above, liquor licenses are required for each of the stages of the movement of alcoholic beverages, from the manufacture of the product, to its importation from out of state manufacturers, through the distribution of the product to individual on-premises and off-premises retail licensees, to its direct sale to ultimate consumers. No part of the Three Tier system of alcohol manufacture, distribution and sales to consumers may be conducted from unlicensed premises or by unlicensed parties. Under the Oregon Liquor Control Act, all parties within the system must be licensed in order to document where alcoholic beverages are located, and in order to be able to sanction licensees for any violations of the Act. Therefore, GOI may not continue to conduct its business operations with respect to wine at the Clackamas warehouse facility without a license at that facility authorizing those activities.

Consistent with the Three Tier system and the licensing statutes which divide the privileges granted to each tier, the Legislature also enacted the "Tied House" prohibitions, ORS 471.392 to 471.398. The Tied House laws dovetail with the licensing statutes to support the Three Tier system. Where the licensing statutes allow licensees only to engage in certain types of activities, the Tied House statutes specifically forbid licensees from engaging in certain business arrangements. Of particular importance, ORS 471.394(1) provides that "a person licensed under the provisions of this chapter may not sell alcoholic liquor at both retail and wholesale." ORS 471.394(2) and ORS 471.394(3) likewise holds that retail and wholesale licensees "may not acquire or hold any right, title, lien, claim or other interest, financial or otherwise, in, upon or to the premises, equipment, business or merchandise" of one another.

GOI's use of the Clackamas facility to store and distribute wine to other retail locations violates Oregon's Tied House laws. The Clackamas facility distributes goods, including alcoholic beverages, to GOI's 31 Oregon retail locations, from whence the beverages are

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[12] As an alternative basis for the conclusion that the delivery is not gratuitous, and thus that there is a sale between GOI and the retail stores, the Commission accepts the argument presented by intervenor OBWDA that the arrangement is a consignment sale.

The operator of each store owns the equipment and employs the personnel who work there. *Facts,* Exhibit 1, Sections 7 and 10. GOI does not own the trade fixtures or hire the stores' employees. *Id.* GOI purchases the wine from a licensed wholesaler or manufacturer, and then delivers the wine to each of the separately owned and operated retail locations. *Facts,* ¶ 2. GOI does not sell the wine to the operator of the retail store; it consigns the wine to the store operator, retains the rights to the proceeds from the sale of the wine, and compensates the operator after the wine is sold to the consumer. *Facts,* ¶ 4.

Under these facts, GOI is engaged in the consignment sale of wine, which is prohibited under ORS 471.485.

subsequently sold at retail to the general public. This is wholesale activity. GOI is a retail licensee; it is the holder along with the individual store operators of the O licenses issued to the 31 Grocery Outlet retail stores. Even though GOI's 31 Oregon locations are operated by independent contractors, they are nonetheless owned by GOI. Since each of those locations makes retail sales to the public, GOI's wholesale activity at the Clackamas facility violates the ban on selling alcohol at both the wholesale and retail levels contained in ORS 471.394(1).[13]

As explained above, the Commission concludes that GOI may not continue its business practice of storing wine at the Clackamas facility and delivering it to other Grocery Outlet retail stores throughout Oregon based on the following: (a) the storage and distribution of wine are activities which are outside of the privileges of the O retail license and are reserved to wholesale licensees; (b) GOI's activities with respect to wine may not be conducted from an unlicensed location; and (c) the Tied House laws, in particular ORS 471.394, prohibit GOI, as a retail licensee, from engaging in the wholesale sale and distribution of wine to other retail outlets.

The second issue presented in this proceeding involves the O license issued to GOI with the restriction forbidding the storage of wine at the Clackamas facility for distribution to other retail premises.[14]

ORS 471.186 establishes the off-premises sales license. It provides as follows:

(1) The holder of an off-premises sales license may sell factory-sealed containers of wine, malt beverages and cider. Containers of malt beverages sold under the license may not hold more than two and one-quarter gallons.

(2) The holder of an off-premises sales license may provide sample tasting of alcoholic beverages on the licensed premises if the licensee makes written application to the Oregon Liquor Control Commission and receives approval from the commission to conduct tastings on the premises. Tastings must be limited to the alcoholic beverages that may be sold under the privileges of the license.

(3) An off-premises sales license may not be issued for use at a premises that is mobile.

(4) Except as provided in ORS 471.402, a manufacturer or wholesaler may not provide or pay for sample tastings of alcoholic beverages for the public on premises licensed under an off-premises sales license.

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[13] GOI contends that its business model does not involve "selling" wine to the 31 retail outlets. As discussed previously in this order, the Commission concludes that GOI's distribution activities at the Clackamas warehouse involve the sale of alcohol under ORS 471.406, and thus GOI is selling at wholesale and retail in violation of ORS 471.394(1).

[14] The restriction is described in Finding of Fact 17.

(5) The holder of an off-premises sales license may deliver wine or cider that is sold under the privileges of the license to retail customers in this state without a direct shipper permit issued under ORS 471.282. * * * Deliveries under this subsection:

(a) May be made only to a person who is at least 21 years of age;
(b) May be made only for personal use and not for the purpose of resale; and
(c) Must be made in containers that are conspicuously labeled * * *.

Pursuant to OAR 845-005-0355, the OLCC may place restrictions upon a license when there is a need to "eliminate or prevent conditions that have contributed to or that the Commission reasonably believes will contribute to liquor or criminal law violations by the licensee, patrons of the licensed premises or the public." [15] The circumstances surrounding GOI's application for an O License for the Clackamas facility strongly indicated that GOI intended to engage in conduct that violates several provisions of Oregon's liquor laws, including ORS 471.405 and 471.394. GOI's business operation at the Clackamas facility following the issuance of the O license confirms that GOI intends to continue to use the facility for storage and distribution of wine to the retail locations. Under these circumstances, OLCC has grounds to impose a restriction on the O license to prevent the activities which exceed the scope of the O license privileges.

The restriction imposed on GOI's O license for the Clackamas facility does not prevent GOI from exercising the privileges actually conveyed by an O license. An O license is a retail license, conveying the privilege of selling alcoholic beverages to the general public for off-premises consumption. *See* ORS 471.186(1); ORS 471.392(2). Even if it is conceded that the retail sales privilege includes the privilege of engaging in other conduct necessarily incidental to retail sales at a given retail outlet, GOI's Clackamas facility distributes alcoholic beverages to 31 GOI retail stores throughout the state. This falls well outside of even the most liberal construction of "retail."

Nor is GOI's Clackamas wholesale operation merely incidental to its retail operations at the Clackamas facility. The Clackamas facility was proposed to be open for retail sales one day every week, for roughly three hours. For the remainder of every week, the Clackamas facility operates exclusively as a warehouse for GOI's other Oregon locations. Clearly, GOI's limited retail hours at the Clackamas facility are meant only to allow the facility to qualify for some form of liquor license so as to continue to receive shipments from suppliers.

The restriction on GOI's O license is needed precisely because it was evident that GOI intended to engage in conduct at the Clackamas facility that falls outside of the statutory scope of

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[15] OAR 845-005-0355 states: "(1) The Commission may restrict a license when:
(a) In the absence of a restriction, the Commission has a basis to deny the license, …or
(c) The Commission determines that a restriction is in the public interest or convenience."
Subsection (2)(b) of the rule provides that in determining public interest or convenience reasons to restrict a license, the Commission considers factors that include but are not limited to the need to eliminate or prevent conditions that have contributed to or that the Commission reasonably believes will contribute to liquor or criminal law violations by the licensee, patrons of the licensed premises, or the public.

an O license. GOI's contention that the warehousing activity it engages in at the Clackamas facility is somehow permitted under an O license is incorrect.

By using the Clackamas warehouse facility as a distribution hub for wine to its 31 Oregon locations, GOI is engaging in wholesale alcohol sales in violation of ORS 471.405 (selling alcohol in a manner "other than the license permits the licensee to sell") and ORS 471.394 (prohibition on selling at both wholesale and retail). The restriction OLCC imposed on GOI's Clackamas facility's O license does nothing more than require GOI to comply with the laws governing the O license. The restriction on GOI's O license for the Clackamas facility is appropriate under OAR 845-005-0355 in order to ensure that GOI's activities at that location comply with Oregon law.

The Commission concludes that the O license requested by GOI can be issued only with the restriction proposed by the agency. The restrictions prevent GOI from conducting activities that are outside the scope of the O license and are reserved to licensed wholesalers.

RULINGS

OLCC's Motion for Summary Determination is granted.

Intervenor OBWDA's Motion for Summary Determination is granted.

Respondents Grocery Outlet, Inc.'s and Clackamas Grocery Outlet Warehouse's Cross-Motion for Summary Determination is denied.

FINAL ORDER

The Commission issues the following order:

Grocery Outlet, Inc. is not authorized to continue its business practice of receiving and storing wine at the Clackamas facility and delivering it to Grocery Outlet retail stores throughout Oregon for sale to the general public.

The application of Grocery Outlet, Inc. and Clackamas Grocery Outlet Warehouse for an Off-Premises Sales License at Clackamas Grocery Outlet Warehouse, 12100 SE Jennifer Street, Clackamas, Oregon is GRANTED with the following restriction:

> This license allows the sale of alcoholic beverages only at retail directly to the consumer for off-premises consumption. It does not authorize activities associated with the wholesale sale and distribution of alcoholic beverages to other licensed premises. Specifically, the following are prohibited: storing alcoholic beverage products except for products that will be sold to consumers at this location; wholesale sale of alcoholic beverage products (this means selling product to a person who will not consume the product but instead intends to resell it); and transportation or distribution of alcoholic beverage products to other licensed premises.

It is further ordered that notice of this action, including the reasons for it, be given.

Dated this 27th day of April 2010.

/s/ Stephen A. Pharo
Stephen A. Pharo
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 27th day of April, 2010.

THIS ORDER IS EFFECTIVE ON THE DATE MAILED.

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for judicial review within 60 days from the service of this Order. Judicial review is pursuant to the provisions of ORS Chapter 183.