Oregon
John A. Kitzhaber, MD, Governor

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March 7, 2014

Chad M. Stokes, Attorney at Law
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1001 SW Fifth Avenue, Suite 2000
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Dear Mr. Stokes:

This is in response to your correspondence received February 13, 2014 regarding conflict of interest implications for members of the Board of Directors of a People's Utility District when considering providing payments to current Directors for certain personal legal expenses.

OREGON GOVERNMENT ETHICS COMMISSION STAFF ADVISORY OPINION NO. 14S-001

STATED FACTS: People's Utility Districts are granted statutory authority "[t]o make contracts, to employ labor and professional staff, to set wages in conformance with ORS 261.345, to set salaries and provide compensation for services rendered by employees and by directors, to provide for life insurance, hospitalization, disability, health and welfare and retirement plans for employees, and to do all things necessary and convenient for full exercise of the powers herein granted...." [ORS 261.305(10)]

The Board of Directors (Board) of a People's Utility District (District) is considering voting on a legal reimbursement policy (Policy) authorizing any Director to be reimbursed for certain and specific legal expenses the Director incurs in defending a claim brought against the Director as an individual in relation to the performance of his or her official duties.

The proposed Policy is set out below:

"If a Director expects to incur legal expenses defending a legal claim brought against the Director individually, then the Director shall notify the Board of the pending claim promptly and keep the Board aware of progress and disposition of the claim, provided that:

1. The claim concerns conduct or activities related to the performance of a Director's duties at a District board meeting or authorized conference that the Director attended on behalf of the District;

2. The legal expenses are not fully reimbursable by the District's insurer; and

3. The Director intends to seek reimbursement for the expenses to be incurred.

Upon application by the affected Director, within sixty (60) days following the conclusion of the claim, the Board shall authorize the reimbursement of legal expenses incurred by the affected Director from District funds, provided that:

1. The Director establishes that (a) the Director's conduct or activities were intended to be in furtherance of the District's interests, and (b) the claim is dismissed, and the Director is found not be [sic] culpable or is otherwise exonerated;

2. If the legal expenses were reimbursable by insurance in part, proof of application to the insurer and confirmation that the insurer allowed the claim to the extent of its coverage;

3. The affected Director provides a sufficiently detailed billing invoice to verify that the legal expenses for which reimbursement is sought, were incurred for the defense of the claim arising out of the Director's conduct on behalf of the District; and

4. An affidavit signed by the Director, delivered to the District's General Manager within sixty (60) days of conclusion of the legal matter, verifying that the submitted information is accurate and truthful and that the charges were reasonable in amount and necessary to the defense of the claim.

If the District is named as a party to any such claim, a Director shall not be entitled to reimbursement of legal expense unless the District has refused to provide a defense for the Director. In no event will a Director be entitled to reimbursement if he or she is found culpable of violating Oregon law in the proceeding."

QUESTION 1: Would Directors be met with an actual or potential conflict of interest under Oregon Government Ethics law when discussing, debating or voting on the Policy above?

ANSWER: Yes. A conflict of interest is defined as any action, decision or recommendation by a person acting in their capacity as a public official, the effect of which would or could be to the private financial benefit or detriment of the person, the person's relative, or a business with which the person or their relative is associated. Public officials such as Board Directors are met with a conflict of interest when, in the conduct of their duties as Directors, they discuss, debate, or vote on a Policy that would or could confer a financial benefit or detriment on themselves, their relatives, or a business with which they or a relative are associated. If the effect of their vote would be to their financial benefit or detriment, an actual conflict of interest exists. If the effect of their vote could be to their financial benefit or detriment, a potential conflict of interest exists.

In the given situation, the Directors propose discussing, debating, and voting on a Policy which would financially benefit them as individuals in limited and specific situations. Because the proposed Policy would confer a specific and certain personal financial benefit on the current Directors as individuals, each Director would be met with an actual conflict of interest when discussing, debating, or voting on the Policy. When met with an actual conflict of interest, a Director must publicly announce the nature of his or her conflict of interest and then refrain from participation in official action including discussing, debating or voting on the Policy. [ORS 244.120(2)(b)(A)].

If the current Directors were to vote on a Policy that financially affected only **future** Directors, then a Director would either not be met with a conflict of interest if ineligible to serve another term, or would be met with a potential conflict of interest if eligible for a future term of service. For example, if the Policy did not become effective until after the expiration of the term of service of a current Director, that Director could, if eligible for another term of service, publicly announce the nature of the potential conflict and then proceed to participate in any discussion, debate, or vote on the Policy. [ORS 244.120(2)(a)].

In addition to the conflict of interest provisions, ORS 244.040(1) prohibits public officials from using or attempting to use their official position to gain a financial benefit or avoid a financial detriment that would not otherwise be available but for the holding of their official position. Therefore, ORS 244.040(1) would require the current Directors to refrain from participating in conferring benefits upon themselves which would immediately and certainly affect their personal financial interests, as is proposed in the Policy.

While the current Directors would be statutorily prohibited under ORS 244.040(1) from granting themselves a financial benefit as described in the proposed Policy, it does not appear that they would be prohibited from participating in adopting such a Policy for future Directors.

QUESTION 2: Regardless of whether a conflict of interest exists, would the financial impact of the Policy affect the Directors to the same degree as other members of an identifiable group or "class" as described in ORS 244.020(12)(b), thereby exempting the Directors from complying with the conflict of interest provisions of ORS 244.120?

ANSWER: No. Only the Oregon Government Ethics Commission (Commission) has the authority to determine the existence of a class or the size of a class for the purpose of compliance with ORS Chapter 244. Previous opinions offered by the Commission or its staff have identified a class whose members would all be affected to the same degree by the actions or votes of a public official who was also either a member or relative of a member, of that same class, thereby providing an exception to the public official's duty to comply with the conflict of interest provisions of ORS 244.120

However, in each of these prior opinions, the public official was determined to be a member of a class *distinct from* their official position. For example, a volunteer firefighter who also served on the city's budget committee, was found to be a member of a class of volunteer firefighters who would all be affected to the same degree by an action of the budget committee and therefore exempt from complying with the conflict of interest provisions concerning that issue [Opinion 98S-039]. Another opinion determined that an individual who served on a school board was also one of 200 property owners who could be financially impacted by a sewer line change to the same degree, thereby exempting the board member from the conflict of interest requirements in that instance [Opinion 02S-003]. In another opinion, a school teacher in one district who also was an elected board member of a neighboring school district, was found to be a member of a class of district teachers who could all be financially affected to the same degree by a contract negotiation in the neighboring school district, thereby exempting the teacher from compliance with the conflict of interest requirements when taking official action as a board member on that issue [Opinion 99S-007].

The facts in this situation are distinguishable from those in prior Commission staff opinions. The Commission and its staff have never identified the governing body of a public body *itself* to constitute a class, and staff declines to do so in this opinion.

QUESTION 3: If an actual conflict exists and the Directors themselves do not constitute a class, does the "rule of necessity" apply, thereby allowing the Board to take official action concerning Policy?

ANSWER: No. The term "rule of necessity" is not found in any statutory language contained in ORS Chapter 244, but rather in judicial decisions. In a footnote in a 1996 opinion concerning the Oregon Public Employee Retirement System (PERS), the "rule of necessity" was invoked by the Oregon Supreme Court justices to explain that, although the justices may have had personal financial interests in the outcome of PERS cases, they are obligated, as the justices of the court of last resort for Oregon, to adjudicate PERS claims, despite their conflicts of interest [Oregon State Police Officers' Assn v. State, 323 Or 356, 361 n.3 (1996)].

In contrast to that situation, where the highest court in the state was the only avenue through which due process rights could be adjudicated, in this instance, the current Directors of the District are not legally obligated to provide themselves with the benefits identified in the proposed Policy. The Policy as described makes clear that the legal expenses to be paid by the District are for the personal benefit of the individual Directors rather than the District itself. For example, if the District is also named as a party to the legal claim, the individual Director will only be entitled to payment of their legal expenses if the District has refused to provide a defense for the individual Director.

There is no indication that any statute obligates the District to implement such a Policy. To the contrary, the consideration of the proposed Policy which would pay Directors the cost of their personal legal expenses is discretionary, rather than obligatory.

District Directors are elected, or appointed when necessary, to represent utility ratepayers for a term of service. Presumably, each Director had the opportunity to ascertain, prior to election or appointment to the position, exactly what benefits or remuneration they would receive from the District for their services. If the current Directors feel that new benefits or increased remuneration is necessary, a process exists for the current Directors to both comply with the conflict of interest provisions and simultaneously discuss, debate and vote on financial benefits for future Directors, as described in the answer to Question one above.

ORS 244.120(2)(b)(B) uses the word "necessary" in the context of when the vote of a public official such as a Director, who is met with an actual conflict of interest, is necessary to meet the minimum number of votes in order for the governing body to take action on a matter. In those instances, the public official must publicly announce the nature of the actual conflict of interest, refrain from discussion or debate, but be eligible to vote on the issue. These circumstances occur rarely. This provision does not apply in situations where there are insufficient votes because of a member's absence when the governing body is convened. Rather, it applies in those infrequent situations where a governing body is required to take an action on a matter, yet a majority of members of the governing body are met with an actual conflict of interest that arises due to circumstances apart from their official positions.

In this instance, each current Director is met with an actual conflict of interest concerning the discussion, debate or vote on a discretionary Policy which was created by the Directors to provide a personal financial benefit to each of them. The narrow statutory exception found in ORS 244.120(2)(b)(B) is not applicable in matters where the conflict of interest arises from an action item promulgated by the governing body itself which directly and specifically financially benefits themselves only.

Some prior staff opinions relied upon the "rule of necessity" rationale to support the analysis of the application of government ethics statutes to specific situations. Upon further review, it is determined that those opinions are incorrect to the extent that they rely upon the "rule of necessity" as an implicit exception to the application of government ethics statutes. This opinion is intended to supersede any prior opinions which conflict with the analysis provided here.

QUESTION 4: Could the adoption of the Policy by the Directors satisfy either the official compensation or reimbursement of expenses exceptions under ORS 244.040(2)(a) and (c)?

ANSWER: Yes, under the conditions described below. As discussed in the answer to Question one, current Directors could not participate in the creation or adoption of the Policy if it were to apply to them personally during their current term. However, the Policy may satisfy the official compensation exception under ORS 244.040(2)(a) for future Directors. The Policy as described does not appear to satisfy the reimbursement of expenses exception under ORS 244.040(2)(c).

A public official is allowed to accept certain financial benefits from their government employer or the public body they serve if the benefits qualify as part of an official compensation package or as a reimbursement of expenses, as defined in administrative rules. In order to be part of a Director's "official compensation package," the wages and benefits must have been specifically approved by the public body in a formal manner, such as through a union contract, an employment contract, or other adopted personnel policies that apply generally to employees or other public officials. Administrative rule further defines the "reimbursement of expenses" as the payment by a public body to a public official serving that public body, of expenses incurred in the conduct of official duties on behalf of the public body. Further, any such repayment must comply with any applicable laws and policies governing the eligibility of such repayment. [OAR 199-005-0030 (3) and (4)]

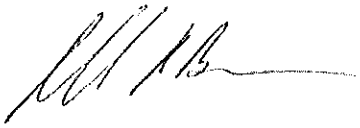
If the proposed Policy in this case were to be specifically approved as part of an official compensation package for future Directors in a formal manner by the District, and if any financial benefit realized under the Policy by a Director were administered as a unit of compensation, it appears that a future Director would be allowed to receive those benefits as part of their official compensation, under ORS 244.040(2)(a). As noted

above, it does not appear that the proposed Policy benefits for legal expenses would ever meet the definition of expenses incurred in the conduct of the Director's official duties on behalf of the District, which would be necessary to qualify as a reimbursement of expenses under ORS 244.040(2)(c).

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS 244 TO THE FACTS STATED HEREIN. ANY RELEVANT INFORMATION, WHICH WAS NOT INCLUDED BY THE REQUESTER OF THIS OPINION IN THE STATED FACTS, COULD COMPLETELY CHANGE THE OUTCOME OF THIS OPINION. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. THIS OPINION DOES NOT EXEMPT A PUBLIC OFFICIAL FROM LIABILITY UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS ONLY MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT ETHICS COMMISSION.

Please contact this office again if you would like this opinion submitted to the Oregon Government Ethics Commission for adoption as a formal advisory opinion pursuant to ORS 244.280.

Sincerely,



Ronald A. Bersin
Executive Director

RAB/dg 14S-001

ADDENDUM

The following Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OAR) are applicable to the issues that are addressed in this opinion:

ORS 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 (12) of this section."

ORS 244.020(12) "'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 or detriment arises out of the following:"

(a) "An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position."

(b) "Any action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person's relative or business with which the person or the person's relative is associated, is a member or is engaged."

(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."

ORS 244.020(14) "'Public official' means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body as defined in ORS 174.109 as an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the services."

ORS 244.040(1) "Except as provided in subsection (2) of this section, a public official may not use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment for the public official, a relative or

member of the household of the public official, or any business with which the public official or a relative or member of the household of the public official is associated, if the financial gain or avoidance of financial detriment would not otherwise be available but for the public official's holding of the official position or office."

(2) "Subsection (1) of this section does not apply to:"

(a) "Any part of an official compensation package as determined by the public body that the public official serves."

(b) "The receipt by a public official or a relative or member of the household of the public official of an honorarium or any other item allowed under ORS 244.042."

(c) "Reimbursement of expenses."

ORS 244.040(7) "The provisions of this section apply regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed under ORS 244.120."

ORS 244.120(2) "An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:"

(a) "When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or "

(b) "When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:"

(A) "Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue."

(B) "If the public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises."

ORS 244.290(3) "The commission may adopt rules that:"

> (a) "Limit the minimum size of, or otherwise establish criteria for or identify, the smaller classes that qualify under the class exception from the definition of 'potential conflict of interest' under ORS 244.020."

OAR 199-005-0030 (3) "An 'official compensation package' means the wages and other benefits provided to the public official. To be part of the public official's 'official compensation package', the wages and benefits must have been specifically approved by the public body in a formal manner, such as through a union contract, an employment contract, or other adopted personnel policies that apply generally to employees or other public officials. 'Official compensation package' also includes the direct payment of a public official's expenses by the public body, in accordance with the public body's policies."

OAR 199-005-0030 (4) "As used in ORS 244.040(2)(c), 'reimbursement of expenses' means the payment by a public body to a public official serving that public body, of expenses incurred in the conduct of official duties on behalf of the public body. Any such repayment must comply with any applicable laws and policies governing the eligibility of such repayment. Expenses paid by the public body to their own public officials need not be reported by the public official under ORS 244.060."