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December 5, 2005

Via Electronically and US Mail

Public Utility Commission
Attn: Filing Center
550 Capitol St. NE #215
P.O. Box 2148
Salem OR 97308-2148

Re: In the Matter of the Adoption of Permanent Rules Implementing SB 408 Relating to Matching Utility Taxes Paid with Taxes Collected
Docket No. AR 499

Dear Filing Center:

Enclosed please find an original and two (2) copies of the Response to PacifiCorp and Avista Corporation's Joint Request for Leave to File Response, Motion for Leave to Reply, and Reply of the Industrial Customers of Northwest Utilities in the above-captioned Docket.

Please return one file-stamped copy of the document in the self-addressed, stamped envelope provided. Thank you for your assistance.

Sincerely yours,

/s/ Ruth A. Miller
Ruth A. Miller

Enclosures
cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the foregoing Response to PacifiCorp and Avista Corporation's Joint Request for Leave to File Response, Motion for Leave to Reply, and Reply of the Industrial Customers of Northwest Utilities, upon the parties, on the official service list for AR 499, by causing the same to be electronically served, to those parties with an email address, as well as mailed, postage-prepaid, through the U.S. Mail.

Dated at Portland, Oregon, this 5th day of December, 2005.

/s/ Ruth A. Miller
Ruth A. Miller

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 499

In the Matter of the Adoption of Permanent Rules Implementing SB 408, Relating to Matching Utility Taxes Paid with Taxes Collected	)	RESPONSE TO PACIFICORP AND AVISTA CORPORATION'S JOINT REQUEST FOR LEAVE TO FILE RESPONSE, MOTION FOR LEAVE TO REPLY, AND REPLY OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES

Pursuant to OAR § 860-013-0050, the Industrial Customers of Northwest Utilities ("ICNU") submits this Response in Opposition to the Request of PacifiCorp ("PacifiCorp" or the "Company") and Avista Corporation ("Avista") for Leave to File a Response to ICNU's Reply Legal Comments. ICNU requests that Administrative Law Judge ("ALJ") Logan deny PacifiCorp and Avista's Request, which is an unjustified attempt to have the last word on these issues. In the alternative, if the ALJ does not deny the Request, ICNU moves that the ALJ grant ICNU leave to file a Reply to PacifiCorp and Avista's Joint Response ("Joint Response"), and that the ALJ and the Public Utility Commission of Oregon ("OPUC" or the "Commission") consider ICNU's Reply submitted herein.

RESPONSE IN OPPOSITION TO REQUEST FOR LEAVE TO FILE RESPONSE

PacifiCorp and Avista have not demonstrated good cause to justify granting leave to respond to ICNU's Reply Legal Comments. PacifiCorp and Avista argue that "ICNU should have raised its arguments on SB 408's legislative history in Opening Comments to permit a fair

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opportunity for PacifiCorp and Avista to respond to these arguments." Joint Response at 1. This complaint is unfounded.

In Portland General Electric ("PGE") v. Bureau of Labor and Industries ("BOLI"), the Oregon Supreme Court set out a three-step process for statutory interpretation that starts with examining the text and context of the statute. PGE v. BOLI, 317 Or. 606, 610 (1993). The court stated that "[i]f, but only if, the intent of the legislature is not clear from the text and context inquiry, the court will move to the second level, which is to consider legislative history to inform the court's inquiry into legislative intent." Id. at 611-12. ICNU stated in its Opening Legal Comments that the text and context of SB 408 demonstrated that the legislature intended to apply the definition of "properly attributed" adopted by the Commission in the temporary rule in AR 498, and that examining the legislative history was unnecessary under these circumstances. ICNU Opening Legal Comments at 4. ICNU added, however, that if "other parties argue that the legislative history supports an alternative interpretation, ICNU will respond to those arguments in its Reply Comments." Id.

PacifiCorp, Avista, and other parties raised arguments regarding the legislative history in opening comments. As a result, ICNU's Reply Legal Comments discussed the legislative history in response to the arguments made by parties such as PacifiCorp and Avista. ICNU demonstrated that the piecemeal selections of the legislative history chosen by PacifiCorp and Avista without the benefit of any context obscured the legislative intent rather than providing an accurate view. ICNU responded to these selected excerpts of the legislative history by discussing those statements in the context of an overview of the development of SB 408 and the various iterations of the bill. ICNU's response to the arguments put forth by parties such as

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PacifiCorp and Avista does not provide good cause to grant leave to respond. ICNU urges the Administrative Law Judge to deny the Joint Request for Leave to Respond.

MOTION FOR LEAVE TO REPLY

In the event that the ALJ does not deny the Joint Request of PacifiCorp and Avista for leave to Respond, ICNU requests that the ALJ grant leave for ICNU to file the attached Reply. Good cause exists for allowing ICNU to reply to PacifiCorp and Avista's arguments, because the Joint Response inaccurately depicts ICNU's arguments and provides an incorrect and incomplete view of the relevant legal authority. If the ALJ finds good cause to allow PacifiCorp and Avista's Joint Response, then ICNU should be granted leave to file the attached Reply, which corrects PacifiCorp and Avista's misstatements.

REPLY

PacifiCorp and Avista put forth two main arguments in the Joint Response: 1) the legislature's rejection of the investor-owned utilities' ("IOUs") definition of "properly attributed" does not indicate that the legislature did not intend for that definition to apply under SB 408 as enacted; and 2) ICNU has misrepresented the U.S. Supreme Court's decision in Federal Power Commission ("FPC") v. United Gas Pipe Line. As described below, both of these arguments lack merit.

1. The Oregon Courts and Attorney General Consider the Adoption or Rejection of Legislative Amendments Under the Appropriate Circumstances

PacifiCorp and Avista argue that the Commission should not rely on the legislature's rejection of the IOUs' proposed amendments to SB 408 because any such reliance is "contrary to Oregon law, SB 408's legislative record, and the text and context of SB 408." Joint Response at 2. PacifiCorp and Avista claim that that Oregon law "expressly provides" that the

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rejection of an amendment gives "no guidance" as to the legislature's intent regarding any provision of such amendment. Id. (citing Springfield Educ. Ass'n v. Springfield School Dist. No. 19, 24 Or. App. 751 (1976)). In characterizing this as a hard and fast prohibition, PacifiCorp and Avista fail to acknowledge that the Oregon courts and the Oregon Attorney General ("Attorney General") have considered the fate of particular amendments in determining legislative intent in a number of opinions issued since Springfield. These decisions demonstrate that the rejection of substantive amendments is relevant to determining legislative intent under circumstances similar to those presented by SB 408.

a. The Attorney General Has Determined That It Is Appropriate Under Certain Circumstances to Infer Meaning from the Legislature's Adoption or Rejection of Particular Amendments

PacifiCorp and Avista contend that the Commission should assign no probative value to the fact that the legislature rejected amendments that included the IOUs' proposed definition of "properly attributed," and, instead, adopted ratepayers' proposed amendments regarding the same issues. In 1998, the Attorney General stated that it was appropriate to infer legislative intent from the legislature's adoption of amendments that removed certain definitional language and added other language that clarified the intended meaning of the statute. 1998 Or. AG LEXIS 10 (1998). One of the issues that the Attorney General considered was whether "lobbying," as defined in ORS § 171.725, included research and preparation of testimony to be presented to the legislature.[1/] Id. at *19. The Attorney General concluded that "lobbying" did not include such activities, explicitly relying on the legislature's adoption of an amendment

[1/] "Lobbying" is defined as "influencing, or attempting to influence, legislative action through oral or written communication with legislative officials, solicitation of others to influence or attempt to influence legislative action or attempting to obtain the good will of legislative officials." ORS § 171.725(8).

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proposed by the Oregon Government Ethics Commission that removed "research and preparation of testimony" from the definition of "lobbying" and the addition of language that clarified this action. Id. at *23-24. Although the Attorney General acknowledged that it generally would not give weight to the legislature's rejection of particular language, the opinion went on to state:

> But the legislature not only rejected the proposal to include the preparation of testimony in the definition of "lobbying," the legislature instead added language clarifying that "influencing or attempting to influence legislative action" was only "lobbying" when it was done "through oral or written communication with legislative officials." This new language addressed the ambiguity created in 1975 when the phrase "by direct communication" was deleted from the definition of "lobbying," which is what the Ethics Commission sought to accomplish. The legislature resolved the ambiguity as to whether research and preparation of testimony was "lobbying" not only by refusing to add those acts to the definition, but also by limiting the influence aspect of "lobbying" to communication "with" legislative officials.

Id. at *23 (internal citations omitted). As discussed below, in adopting the Ratepayers' amendments to SB 408, the legislature did just what the Attorney General described—rejected certain proposed definitional language and adopted clarifying language. PacifiCorp and Avista are wrong; under these circumstances the Commission should consider the rejection of the IOU's proposed amendments to determine the legislature's intent.

In rejecting the IOUs' bill and adopting the bill proposed by Ratepayers, the legislature clarified the meaning of "properly attributed." First, the legislature rejected the IOUs' proposed amendments that would have defined "properly attributed" as:

> The attribution of tax liabilities or tax benefits to the entity or activity whose business or economic activities created the items of income, expenses, losses, deductions or credits that give rise to the tax liabilities or tax benefits.

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ICNU Reply Legal Comments at 9, 11. This definition defines both what is to be allocated and how it is to be allocated. The amounts that would be "properly attributed" are the "tax liabilities" or "tax benefits" of individual members of the affiliated group, not the total amount of "taxes paid."

Second, the legislature adopted two changes in the Ratepayers' bill that clarified the meaning of "properly attributed." The legislature adopted an amendment that defined "taxes paid" as the "amounts received by units of government from the utility or from the affiliated group of which the utility is a member, whichever is applicable," subject to certain adjustments. This definition refers the dollars paid to governmental taxing authorities, i.e., the net positive tax liability of the entire consolidated tax group. This definition rejects the unbundling of "taxes paid" into individual "tax liabilities" and "tax benefits" as part of the "properly attributed" determination, as contemplated by the IOUs' proposed definition.

In addition, the legislature adopted a change to Section 3(7) plainly identifying that the amount to be "properly attributed" among each affiliate is the total "taxes paid." ICNU explained in its Reply Legal Comments that there had been confusion in earlier SB 408 work sessions regarding the meaning of Section 3(7). ICNU Reply Legal Comments at 13. The Ratepayers' bill proposed, and the legislature adopted, an amendment that resolved this confusion by inserting the phrase "for taxes paid" in front of "properly attributed" in Section 3(7). Id. As a result, Section 3(7) as enacted provides that the amount to be "properly attributed" among each affiliate must be "taxes paid": "An automatic adjustment clause established under this section may not be used to make adjustments to rates *for taxes paid that are properly attributed* to any unregulated affiliate of the public utility or to the parent of the

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utility." (emphasis added). Section 3(6) also provides that the amount to be "properly attributed" is taxes paid: "[t]he automatic adjustment clause shall account for all *taxes paid* to units of government by the public utility *that are properly attributed* to the regulated operations of the utility, or by the affiliated group that are properly attributed to the regulated operations of the utility[.]" (emphasis added).

Thus, the IOUs' definition of "properly attributed" would have attributed unbundled individual "tax liabilities" or "tax benefits" to each member of the affiliated group. However, the legislature rejected that definition *and* added language clarifying that: 1) "taxes paid" is the net positive tax liability of the entire consolidated tax group; and 2) that the amount to be "properly attributed" among the utility and each affiliate is "taxes paid." This deletion of certain definitional language and the simultaneous addition of clarifying language are precisely the circumstances under which the Attorney General determined that it was appropriate to infer meaning from the legislature's adoption or rejection of particular amendments.[2/]

b. The Oregon Courts Have Considered the Legislature's Adoption or Rejection of Particular Amendments Under Certain Circumstances

The Oregon courts also have departed from the rule cited by PacifiCorp and Avista under certain circumstances. For example, in 1982, the Oregon Court of Appeals based

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[2/] Other Attorney General opinions also reflect the consideration of amendments that were rejected by the legislature to determine legislative intent. 1980 Or. AG LEXIS 299 (1980); see also 1983 Or. AG LEXIS 14 (1983). In 1980, the Attorney General issued an opinion regarding the meaning of a phrase in ORS § 527.726(1)(c), which creates an exception to the preemption of local regulations of conduct on forest lands governed by the Oregon Forest Practices Act. 1980 Or. AG LEXIS 299 (1980). The Attorney General found that the provision at issue was ambiguous but noted that the Oregon Environmental Council ("OEC") had put forth a particular interpretation of the bill in a committee hearing and proposed an amendment that would have given the provision a different meaning. Id. at *2-3. The committee rejected that amendment. Id. In interpreting the provision, the AG acknowledged the general rule regarding the meaning assigned to the rejection of a particular amendment by the legislature, but stated "[n]evertheless, in the absence of any other relevant legislative history, we conclude that the more probably correct construction is that stated and objected to by [OEC]." Id. at *3.

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its interpretation of ORS § 162.415 on the Senate Criminal Law and Procedure Committee's adoption of a version of a bill that excluded language that had been in an initial draft of a statute. State v. Rodda, 56 Or. App. 580 (1982). ORS § 162.415 provides that a "public servant commits the crime of official misconduct in the first degree if with intent to obtain a benefit or to harm another" the public servant commits certain acts. An initial draft of the statute provided that official misconduct involved a public servant committed certain acts "with intent to obtain a benefit *for himself* or to harm another." Rodda, 56 Or. App. at 583 (emphasis in original). The court disagreed with arguments similar to PacifiCorp and Avista's that the removal of the phrase "for himself" from the statute did "not evidence an intent on the part of the legislature to remove the requirement that a public servant act with intent to obtain a benefit for himself in order to commit official misconduct in the first degree." Id. at 584 n.2. In fact, the court found, "[t]o the contrary, this is *exactly* the intent to be inferred from such action on the part of a legislative body." Id. (emphasis in original). In other words, considering the language included in a particular amendment that was rejected by the legislature is appropriate to determine legislative intent under certain circumstances, and PacifiCorp and Avista are incorrect that Oregon law "expressly provides" that the rejection of proposed amendments give "no guidance" as to legislative intent.

2. The United Gas Pipe Line Court Determined that the Pour-Over Allocation Methodology Was Constitutional

PacifiCorp disputes ICNU's argument that the Company's assertions that the Ratepayers' bill and SB 408 as adopted intended no more that the "pour-over" allocation approach is at odds with the Company's prior claims that the Ratepayers' bill and SB 408 are unconstitutional. Joint Response at 6. In its petition to repeal the temporary rule in AR 498,

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PacifiCorp stated that SB 408 "apparently intended" that a "pour-over" allocation approach would apply to the "properly attributed" determination and that this approach was "favorably passed on by the Supreme Court in Federal Power Commission v. United Gas Pipeline[.]" OPUC Docket No. AR 498, Petition of PacifiCorp to Repeal or Amend Temporary Rule at 12 (Oct. 14, 2005). ICNU pointed out that PacifiCorp's admission that the Supreme Court had ruled that the pour-over approach was constitutional conflicts with the Company's prior statements and current argument that SB 408 intended no more than a pour-over sharing of losses. ICNU Reply Legal Comments at 21-22. In the Joint Response, PacifiCorp argued that:

> Contrary to ICNU's assertions, *United Gas Pipe Line* did not hold that a net-loss allocation approach (also called a "pour-over" approach) is constitutional. That case did not even address the constitutionality of the approach. Rather, *United Gas Pipe Line* addressed whether use of a net-loss allocation approach was within the [FPC's] statutory authority.

Joint Response at 6.

In FPC v. Hope Natural Gas Company, 320 U.S. 591 (1944), the Court considered whether the FPC acted within its authority under the Natural Gas Act in authorizing the particular rates at issue. United Gas Pipe Line, 386 U.S. at 238.[3/] PacifiCorp cites Hope as the leading case on the constitutional prohibition against confiscatory rates. PacifiCorp/Avista Opening Comments at 29. The Hope Court explicitly stated that "[s]ince there are no constitutional requirements more exacting than the standards of the [Natural Gas] Act, a rate order which conforms to the latter does not run afoul of the former." Hope, 320 U.S. at 607

[3/] Compare Hope, 320 U.S. at 593 ("The primary issue in these cases concerns the validity under the Natural Gas Act of 1938 . . . of a rate order issued by the [FPC] reducing the rates chargeable by Hope Natural Gas.") and United Gas Pipe Line, 386 U.S. at 238 ("The question here is whether the [FPC], in the course of determining just and reasonable rates for United Gas Pipe Line Company under s (4)(e) of the Natural Gas Act, made a proper allowance for federal income taxes in calculating the company's cost of service.") (internal citations omitted).

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(emphasis added). PacifiCorp acknowledges that the United Gas Pipe Line Court found that the FPC's use of the pour-over allocation approach "did not exceed the powers granted to it by Congress" under the Natural Gas Act. United Gas Pipe Line, 386 U.S. at 243; OPUC Docket No. AR 498, Petition of PacifiCorp to Repeal or Amend Temporary Rule at 12. Thus, given the statements in Hope, the decision in United Gas Pipe Line demonstrates that the Court concluded that the pour-over allocation method was constitutional.

The United Gas Pipe Line Court explicitly relied on Hope for its decision. Indeed, in describing the basis for upholding the rate at issue, the United Gas Pipe Line Court quoted Hope, stating that "'[i]f the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end.'" United Gas Pipe Line, 386 U.S. at 1008-09 (quoting Hope, 320 U.S. at 602). In other words, the decision in United Gas Pipe Line is directly tied to the principles Hope. Under these circumstances, PacifiCorp's repeated constitutional objections to the Ratepayers' bill and SB 408 as adopted establish that the Company understood that the legislature intended to define "properly attributed" in manner that entails something more than the constitutionally-approved pour-over allocation approach.

CONCLUSION

PacifiCorp is intent on defeating SB 408 and the OPUC's efforts to implement the law in a manner that is consistent with the legislature's intent. The Company has not demonstrated good cause for its flawed and unwarranted attack on ICNU's Reply Legal Comments. ICNU urges the ALJ to deny PacifiCorp and Avista's unjustified request to respond to matters that ICNU properly raised in its Reply Legal Comments. If the ALJ does not deny

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that Request, the ALJ should grant ICNU leave to Reply in order correct the misstatements in the Joint Response.

Dated this 5th day of December, 2005.

Respectfully submitted,

/s/ Melinda J. Davison

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