

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 517

In the Matter of)	
)	REPLY COMMENTS OF THE
Housekeeping and Clarification Changes to)	INDUSTRIAL CUSTOMERS OF
OAR 860-022-0041.)	NORTHWEST UTILITIES
_____)	

The Industrial Customers of Northwest Utilities (“ICNU”) submits these Reply Comments regarding the proposed amendments to OAR § 860-022-0041. Oregon Public Utility Commission (“OPUC” or the “Commission”) Staff has proposed limited changes to the rule implementing SB 408 to address “housekeeping” matters, correct certain flaws that the utilities’ tax report filings revealed, and address any changes in the law following the 2007 Legislative Session. The opening comments submitted by PacifiCorp and Portland General Electric Company (“PGE”) urge the Commission to go beyond this limited scope and address issues that reflect disagreement with the apportionment method rather than adopting “housekeeping” changes to the rules. The Commission should reject PacifiCorp and PGE’s proposals regarding the floor calculation and deferred taxes. Staff’s proposed amendments ensure that the “floor” serves its intended purpose and that deferred taxes are dealt with to prevent any normalization violation. ICNU supports Staff’s proposed rules, except as clarified below regarding the business energy tax credits (“BETCs”).

1. The Floor Calculation Is Not Intended to Be Used as a “Buffer” Around Deferred Taxes

PacifiCorp and PGE oppose Staff’s proposal to eliminate the “add back” for depreciation tax benefits related to public utility property (“PUP”) in the floor calculations, arguing that doing so will increase the risk of normalization violations. PacifiCorp Opening Comments at 9; PGE Opening Comments at 2-3. PGE argues that the purpose of the floor is “manifold,” quoting the following passage from the Staff and utility joint comments in AR 499 that addressed *all* revisions to the OPUC’s interim order:

These changes are proposed to decrease the risk of violation of normalization requirements of federal tax law, eliminate unnecessary inconsistencies between how taxes paid and taxes collected are calculated, conform the attribution of the [Multnomah County Business Income Tax] to the method used by the county to allocate the unitary group’s gross income, and remove the potential for utility customers to receive more than 100 percent of the benefits from losses within the affiliated group.

PGE Opening Comments at 3 (quoting Re Adoption of Permanent Rules to Implement SB 408 Relating to Utility Taxes, OPUC Docket No. AR 499, Joint Comments at 3 (Aug. 14, 2006)).

Any suggestion that the OPUC adopted the floor to address concerns about normalization violations is incorrect. The floor addressed concerns that the apportionment method could result in customers receiving a benefit greater than 100% of all the losses of a consolidated group, “ensur[ing] that the SB 408 calculation attributes to the utility no more than 100 percent of the tax benefits from other affiliates’ losses.” OPUC Docket No. AR 499, Joint Comments at 8.

The floor had nothing to do with normalization. OPUC Docket No. AR 499, Order No. 06-532 at 9. The passage that PGE quotes addresses the purposes for *all* the revisions to the OPUC’s interim order that Staff and the utilities proposed in joint comments in AR 499. OPUC Docket

No. AR 499, Joint Comments at 3. These revisions addressed multiple issues, including a specific adjustment for normalization violation concerns that was entirely separate from the floor. The Commission should not be persuaded by any attempt to preserve the flaw in the current rules on the basis that the floor is necessary to avoid violating normalization requirements.

The revision to the floor calculation that Staff proposes, however, includes two important protections to address normalization concerns. First, the starting point for the floor calculation is the stand-alone tax liability for regulated operations, which excludes all PUP-related tax benefits prior to applying the adjustments that Staff proposes to eliminate from the floor provision. This provides a substantial safeguard against normalization violations. Second, Staff proposes to continue the adjustment for PUP-related tax benefits of those entities with losses. As PacifiCorp admits, this provides an additional safeguard against including PUP-related tax benefits in any refund under SB 408. PacifiCorp Opening Comments at 8.

PGE and PacifiCorp do not identify and explain with specificity the normalization violation that would occur if the Commission limited the “add back” for PUP in the floor calculation to only those affiliates with losses, as Staff proposes. Instead, PacifiCorp argues that the “more robust the floor is in operation,” the less likely a “normalization-threatening outcome[]” will occur and that Staff’s proposal reduces the “buffer effect” for normalization protection. Id. at 9. If there is a problem with a potential normalization violation, then the rule should address it. The floor is not, however, a “buffer” against normalization violations and is not intended to be manipulated to operate robustly or feebly.

According to Staff, adding back the tax benefits of PUP of only those regulated affiliates with losses is sufficient to avoid a normalization violation. Staff Opening Comments at 3. Adding back all PUP tax benefits is unnecessary under these circumstances and causes the floor to operate in an unintended manner. As ICNU explained in its opening comments, adding back the tax benefits of all affiliates' PUP can result in those benefits offsetting all group losses. ICNU Opening Comments at 5. The end result when this happens is that the stand-alone amount becomes the floor. Id. PacifiCorp points out that this does not occur in the "Enron scenario," in which affiliate tax losses are so significant that they do not offset PUP-related tax benefits. PacifiCorp Opening Comments at 8. PacifiCorp does not mention, however, that it was the offset of affiliate losses by PUP-related tax benefits of affiliates in PacifiCorp's October 2006 tax report that alerted parties to the flaw in the rule. *See Re PacifiCorp*, OPUC Docket No. UE 177, Staff Initial Findings for Pacific Power & Light Co. at 4 (Dec. 15, 2006). PacifiCorp's proposal merely reduces the amount that flows to customers through the rate adjustment that SB 408 requires without providing any additional protection against an identifiable normalization violation.

PGE and PacifiCorp state concern that removing the adjustments associated with PUP could make it more likely that the "taxes paid" value calculated using the apportionment method could be negative. As PGE acknowledges, however, the examples of the situations in which this result may occur are not common. PGE Opening Comments at 3. In fact, the circumstances that would lead to this are extremely rare and, even if they occurred, would not necessarily demonstrate that a normalization violation occurred. The OPUC has found that SB 408 provides it discretion to make adjustments not specifically identified in the bill. Re

Adoption of Permanent Rules to Implement SB 408 Relating to Utility Taxes, OPUC Docket No. AR 499, Order No. 06-532 at 5 (Sept. 14, 2006). In the unlikely event that a particular tax report identifies a negative taxes paid value and the Commission concludes that normalization violations are a concern, it may be appropriate to order a specific adjustment to address the issue. PGE and PacifiCorp propose an overly broad approach to address a highly unlikely situation.

2. Staff’s Revisions Regarding Deferred Taxes Appropriately Address Normalization Issues

PacifiCorp urges the Commission to expand on the proposed rule revisions that address the adjustments for deferred taxes in order to invalidate any calculation that produces a negative result for current taxes. PacifiCorp Opening Comments at 10-11. PacifiCorp proposes “setting aside” such calculations to take any normalization risk “out of the picture entirely” rather than simply substituting a zero value as Staff suggests. Id. Once again, PacifiCorp’s proposal is overly broad and seeks to establish a “buffer” around deferred taxes rather than address an identified normalization violation.

PacifiCorp acknowledges that resetting any negative result to zero safeguards against potential normalization associated with the reduction of deferred taxes. Id. at 11. PacifiCorp nevertheless urges the Commission to sweep aside all such negative results because: 1) the internal revenue code does not recognize such results; and 2) simply setting such results to zero produces an “arbitrary outcome” for taxes paid. Id. at 11-12. First, the apportionment method, taxes paid, and the SB 408 adjustment itself are not based on the Internal Revenue Code (“IRC”) and criticizing any aspects of SB 408 based on the IRC mixes apples and oranges. SB 408 is not a tax law.

Second, even if SB 408 were based on the IRC, the IRC recognizes a zero value. Staff merely seeks to reset a negative result to the minimum value that the IRC recognizes.

Third, the IRC requires all kinds of calculations that may result in negative values. A common requirement when that occurs is to reset the negative value to zero. Staff's proposal is entirely consistent with this approach.

Finally, even assuming for the sake of argument that resetting a negative value to zero produces an arbitrary outcome, PacifiCorp's proposal to disregard any negative result is more arbitrary. The Commission has chosen the apportionment method as a means to determine how much of a consolidated group's total tax liability is "properly attributed" to regulated utility operations in Oregon. PacifiCorp's complaint appears to be more a result of disagreement with the apportionment method in general than a concern about "arbitrary" outcomes.

3. Customers Should Retain the Benefit of BETCs that Are Included in Rates

The most important point regarding Staff's proposed revision to account for changes to the treatment of BETCs as a result of HB 3201 is that any rule revisions must ensure that the tax benefit of BETCs may be retained by the utility except when customers bear the cost of those BETCs. The OPUC plainly enunciated this concept in AR 499. Order No. 06-532 at 5. If customers are paying for the action that gives rise to the BETC, customers should receive the tax benefit through SB 408.

ICNU explained in its opening comments why Staff's proposed revisions go beyond the limited changes needed to account for HB 3201. ICNU urges the Commission to retain the adjustment for BETCs in the portion of the rule calculating state taxes paid. In addition, ICNU recommends that the rule limit the add back for transferred BETCs to only those

credits that are transferred to the utility. BETCs transferred to utility affiliates should continue to be excluded from the rule.

4. Conclusion

ICNU appreciates the opportunity to comment on the proposed amendments to the rules implementing SB 408 as well as Staff's efforts to produce a rule revision that is largely supported by the parties.

Dated this 10th day of August, 2007.

Respectfully submitted,

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August 10, 2007

Via Electronic and US Mail

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Re: In the Matter of Housekeeping and Clarification Changes to OAR 860-022-0041
Docket No. AR 517

Dear Filing Center:

Enclosed please find the Reply Comments of the Industrial Customers of Northwest Utilities in the above-referenced docket.

Thank you for your assistance.

Sincerely,

/s/ Christian Griffen
Christian W. Griffen

Enclosures

cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Reply Comments of the Industrial Customers of Northwest Utilities upon the parties on the service list by causing the same to be deposited in the U.S. Mail, postage-prepaid, and via electronic mail to those parties who waived paper service.

Dated at Portland, Oregon, this 10th day of August, 2007.

/s/ Christian Griffen
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