

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**AR 498**

In the Matter of the Adoption of Temporary	)	
Rules to Implement SB 408 Relating to	)	Response of the Citizens' Utility Board
Annual Tax Reports and Automatic	)	of Oregon to PacifiCorp's Petition to
Adjustment Clauses Relating to Public	)	Repeal or Amend Temporary Rule
Utility Taxes	)	OAR 860-022-0039
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The Citizens' Utility Board of Oregon responds to PacifiCorp's Petition to Repeal or Amend Temporary Rule OAR 860-022-0039, filed October 4, 2005.

**1. All of PacifiCorp's arguments are based on its interpretation of the law, but PacifiCorp provided nothing that was not considered in the rule-making.**

PacifiCorp does not like the Commission's temporary rule. This is not a surprise. They opposed adoption of the temporary rule and in AR 499, the docket examining the adoption of a permanent rule, they are opposed to enacting SB 408 in a manner consistent with the temporary rule.

PacifiCorp's two basic arguments, that the Commission failed to comply with rule-making requirements and that the Commission went beyond its delegated authority,

are both based on PacifiCorp's interpretation of SB 408. PacifiCorp had its opportunity to convince the Commission of what SB 408 means during the temporary rule-making process. Once the Commission interprets SB 408 and adopts temporary rules, PacifiCorp's interpretation of those rules is of no moment. The agency that must interpret the law interpreted the law and PacifiCorp's opinion is no longer relevant. Only the courts can cause changes to the temporary rule.

Not only is PacifiCorp's interpretation of SB 408 different from the Commission's temporary rule, but PacifiCorp uses its interpretation of SB 408 to argue that the rule-making process and authority of the Commission is somehow flawed. To say again, to be clear, PacifiCorp's complaints in its filing are themselves based on the Company's personal, and officially rejected, interpretation. This is a brassy kind of bootstrapping: the Commission interpretation of SB 408 did not follow PacifiCorp's interpretation, and because the Commission's interpretation of SB 408 did not follow PacifiCorp's interpretation, the rule-making was flawed.

In its petition, PacifiCorp makes a number of these kinds of complaints.

First, PacifiCorp claims that SB 408 does not require a rule, because what is required to be included in the tax report is defined in the law:

Contrary to the Commission's finding, SB 408 itself defines what is required for the tax report...

Petition to Repeal or Amend Temporary Rule 860-022-0039, page 5.

Then PacifiCorp says:

Because the triggering of the automatic adjustment clause from the 2005 tax report is informational only, the Commission does not need the specific unregulated affiliate loss information...

Petition, page 6.

Next, PacifiCorp argues that:

The plain language of SB 408, which refers repeatedly to the tax liability of the entire “affiliated group” – not just affiliates with a positive tax liability – and which expressly prohibits the Commission from making adjustments “for taxes paid that are properly attributed to any unregulated affiliate,” provides no grant of authorization for the Commission to exercise rulemaking power in the manner in which it has done.

Petition, page 8.

PacifiCorp goes on and on. The legislative history said this, then it said that, and Pennsylvania is not the model for SB 408, etc. These are arguments that go to the substance of the rule, and the fact remains that the Commission did not agree with PacifiCorp. In not agreeing with PacifiCorp’s interpretation of SB 408, the Commission has already dismissed these new arguments from PacifiCorp which are based on PacifiCorp’s rejected interpretations.

CUB also disagrees with PacifiCorp’s analysis of SB 408. We believe that SB 408 demands that the Commission change the way taxes are calculated for ratemaking purposes. It requires that the Commission stop using the traditional stand-alone method for calculating taxes. Instead, it requires that the Commission look at actual taxes paid by a utility or a consolidated group that includes a utility, and then attribute (allocate) this tax amount to the regulated operations of the utility and to unregulated affiliates. See CUB’s Opening Brief in AR 499.

As part of this change, the Legislature requires that “Every public utility shall file a tax report” with the Commission that “shall contain the information required by the commission.” SB 408, Section (3)(1). Section (3)(1)(a) goes on to say that that report shall contain the “amount of taxes that was paid by the utility in the three preceding

years, or that was paid by the affiliated group and that is properly attributed to the regulated operations of the utility.” In addition, Section (3)(2) says that “every public utility shall be required to obtain and provide to the Commission any other information that the commission requires to review the tax report and to implement and administer this section.”

Based on this language, the Commission had to interpret “properly attributed” to make sense of the statutory provision. Furthermore, the law says that whatever information, in whatever form, that the Commission deems necessary to implement and administer SB 408, including information about utility affiliates, must be provided by the utility, no matter how that utility personally interprets SB 408.

## **2. Regardless of the Debate Over the Permanent Rule, PacifiCorp’s Refusal to Comply with the Temporary Rule Is Illegal and Inappropriate.**

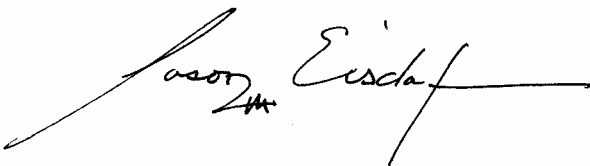
The real purpose of PacifiCorp’s petition to repeal the rule is to provide the pretext for the Company’s flat-out refusal to comply with the rule. The rule was adopted by the Commission and is in place until it is repealed, amended, or replaced by a permanent rule. PacifiCorp should comply with the rule.

But PacifiCorp is not just bucking a Commission rule, the Company is violating the statute itself. The mandates of Sections (3)(1) and (2) apply to PacifiCorp itself. The law says “Every public utility shall file a tax report” with the Commission that “shall contain the information required by the commission,” and that “every public utility shall be required to obtain and provide to the Commission any other information that the commission requires to review the tax report and to implement and administer this section.”

Instead of following the Commission's definition of "properly attributed," the Company makes up its own definition for the purposes of filing its Tax Report. This makes the public information required by SB 408(3) unreliable to the public. Since the public generally cannot view PacifiCorp's methodology and analysis, and only knows that the analysis is different that what is required under PUC rules, the numbers produced by this analysis are useless, if not misleading. SB 408 clearly intended to make these numbers public and the law is undermined when the utility can simply make up and report whatever numbers it wants (or make up whatever methodology will produce the numbers it wants).

While there has been a great deal of discussion about the legislative intent of SB 408, no one has argued that legislators intended to allow utilities to determine for themselves how to implement the law. PacifiCorp is placing itself in the role of the regulator. This cannot stand. The Commission should reject PacifiCorp's petition and the Commission should order PacifiCorp to file a tax report that complies with the rules and the law. PacifiCorp can disagree with the Commission rules. PacifiCorp can petition to amend or repeal the rules. But PacifiCorp is not allowed to ignore the law or the rule and instead pretend that the rule that they proposed, and that was rejected by the Commission, is in place.

Respectfully Submitted,  
September 22, 2005,

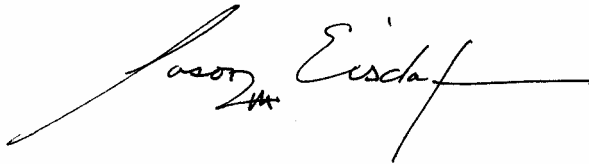
A handwritten signature in black ink, appearing to read "Jason Eisdorfer". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jason Eisdorfer #92292  
Attorney for the Citizens' Utility Board of Oregon

**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of November, 2005, I served the foregoing Response of the Citizens' Utility Board of Oregon in docket AR 498 upon each party listed below, by email, and upon the Commission by email and by sending 2 copies by U.S. mail, postage prepaid, to the Commission's Salem offices.

Respectfully submitted,



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