

Davison Van Cleve PC

Attorneys at Law

TEL (503) 241-7242 • FAX (503) 241-8160 • mail@dvclaw.com
Suite 400
333 SW Taylor
Portland, OR 97204

November 3, 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 Temporary Rules to Implement SB 408
Relating to Annual Tax Reports and Automatic Adjustment Clauses
Relating to Public Utility Taxes
Docket No. AR 498

Dear Filing Center:

Enclosed please find an original and six (6) copies of the Response of the Industrial Customers of Northwest Utilities to PacifiCorp's Petition to Repeal or Amend Temporary Rule OAR 860-022-0039 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 of the Industrial Customers of Northwest Utilities to PacifiCorp’s Petition to Repeal or Amend Temporary Rule OAR 860-022-0039, upon the parties, on the service list for AR 498, 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 3rd day of November, 2005.

/s/ Ruth A. Miller
Ruth A. Miller

RATES & REGULATORY AFFAIRS PORTLAND GENERAL ELECTRIC RATES & REGULATORY AFFAIRS 121 SW SALMON STREET, 1WTC0702 PORTLAND OR 97204 pge.opuc.filings@pgn.com	LOWREY R BROWN CITIZENS' UTILITY BOARD OF OREGON 610 SW BROADWAY, SUITE 308 PORTLAND OR 97205 lowrey@oregoncub.org
JIM DEASON 521 SW CLAY ST STE 107 PORTLAND OR 97201-5407 jimdeason@comcast.net	JASON EISDORFER CITIZENS' UTILITY BOARD OF OREGON 610 SW BROADWAY STE 308 PORTLAND OR 97205 jason@oregoncub.org
KELLY FRANCONI ENERGY STRATEGIES 215 SOUTH STATE ST STE 200 SALT LAKE CITY UT 84111 kfranconi@energystrat.com	PAUL GRAHAM DEPARTMENT OF JUSTICE REGULATED UTILITY & BUSINESS SECTION 1162 COURT ST NE SALEM OR 97301-4096 paul.graham@state.or.us
JASON W JONES DEPARTMENT OF JUSTICE REGULATED UTILITY & BUSINESS SECTION 1162 COURT ST NE SALEM OR 97301-4096 jason.w.jones@state.or.us	KEN LEWIS P.O. BOX 29140 PORTLAND OR 97296 kl04@mailstation.com
KATHERINE A MCDOWELL STOEL RIVES LLP 900 SW FIFTH AVE STE 1600 PORTLAND OR 97204-1268 kamcdowell@stoel.com	RON MCKENZIE AVISTA UTILITIES PO BOX 3727 SPOKANE WA 99220-3727 ron.mckenzie@avistacorp.com

<p>DANIEL W MEEK DANIEL W MEEK ATTORNEY AT LAW 10949 SW 4TH AVE PORTLAND OR 97219 dan@meek.net</p>	<p>SENATOR RICK METSGER STATE CAPITOL 900 COURT ST NE S-307 SALEM OR 97301 sen.rickmetsger@state.or.us</p>
<p>DAVID J MEYER AVISTA CORPORATION PO BOX 3727 SPOKANE WA 99220-3727 david.meyer@avistacorp.com</p>	<p>CHRISTY OMOHUNDRO PACIFICORP 825 NE MULTNOMAH BLVD STE 800 PORTLAND OR 97232 christy.omohundro@pacificorp.com</p>
<p>MATTHEW W PERKINS DAVISON VAN CLEVE PC 333 SW TAYLOR, STE 400 PORTLAND OR 97204 mwp@dvclaw.com</p>	<p>AUSEY H ROBNETT III PAINE, HAMBLIN, COFFIN, BROOKE & MILLER LLP PO BOX E COEUR D'ALENE ID 83816-0328</p>

4. PacifiCorp has not justified its request for an extension of time to submit a tax report that complies with the OPUC's definition of "properly attributed" until after the Oregon Department of Justice ("DOJ") has issued its legal opinion in AR 499. The Commission has adopted a temporary rule reflecting its interpretation of SB 408, and PacifiCorp should be ordered to comply with that rule.

The Commission should deny PacifiCorp's Petition and enforce

OAR § 860-022-0039 as written. The Commission's temporary rule was a necessary and appropriate step in implementing SB 408. PacifiCorp's disagreement with the Commission's temporary rule provides no excuse for the Company's refusal to comply with the OPUC regulations.

ARGUMENT

PacifiCorp puts forth a number of unconvincing arguments regarding why the Commission should repeal the temporary rule or remove the provisions that are inconsistent with the Company's interpretation of SB 408. PacifiCorp's claims, for the most part, reassert points made by the Company in response to Staff's proposal of the temporary rule that the Commission ultimately adopted. These arguments are no more compelling now than when the Commission considered and rejected them previously in this Docket. The Commission's adoption of OAR § 860-022-0039 was within its statutory authority, and the provisions of the temporary rule are consistent with SB 408. PacifiCorp's Petition should be denied.

A. The Commission's Order in AR 498 Justifies the Need to Adopt the Temporary Rule

PacifiCorp argues that the Commission failed to comply with the requirements for adopting temporary rules in adopting OAR § 860-022-0039, because the Commission did not make specific findings to demonstrate why it needed to define "properly attributed" in the

temporary rule. Petition at 5-6. According to PacifiCorp, SB 408 provided the necessary guidance for the utilities to file tax reports on October 15, 2005, and the Commission should have made “specific findings” as to why the plain language of SB 408 provided insufficient direction for the tax reports in order to satisfy the requirements for temporary rules.

First, as PacifiCorp points out in the Petition, the Commission’s order justified its adoption of the temporary rule:

Failure to immediately adopt a temporary rule will result in serious prejudice to the public interest. *See* ORS 183.335(5). Without this temporary rule, the utilities have not been told what is required in the October 15, 2005, tax report filing. The temporary rule meets this need by defining certain terms included in SB 408. Further, the rules grant the Commission additional time after the filing of the tax report in which to make certain determinations as required by SB 408. We adopt these provisions granting this additional time so that we may hopefully conclude the permanent rulemaking in time to apply the new rules to our decision process.

Re Temporary Rules to Implement SB 408, OPUC Docket No. AR 498, Order No. 05-991 at 1 (Sept. 15, 2005) (“Order No. 05-991”); Petition at 5. ORS § 183.335(5)(a) requires an agency adopting temporary rules to include in its order a statement of the agency’s “findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice.” The OPUC complied with this requirement in Order No. 05-991. The OPUC found that serious prejudice would result by not adopting the rule because the requirements for filing the October 15, 2005 tax report would be unclear. Order No. 05-991 at 1. PacifiCorp argues that SB 408 provides adequate guidance with respect to the information to be included in the tax report and, as a result, defining “properly attributed” in the rule was unnecessary. Petition at 5-6. Moreover, PacifiCorp claims

that Order No. 05-991 is unlawful because the Commission did not make “specific findings” as to why SB 408 provides insufficient direction. Id. at 5. At the same time, however, PacifiCorp puts forth its alternative interpretation of SB 408 to justify why the Company filed a tax report that did not comply with the temporary rule. PacifiCorp’s contradictory arguments demonstrate why it was necessary for the Commission to define the filing requirements for the tax reports. If the Commission provided no guidance, each utility would interpret the statutory language as it saw fit.

PacifiCorp also argues that adopting the temporary rule was unnecessary and premature because legal questions regarding the definition of “properly attributed” remain to be answered. Id. at 6. PacifiCorp lists a “host of serious constitutional concerns” that would arise if the temporary rule were “applied to justify a rate change.” Id. First, PacifiCorp’s claims regarding a violation of no less than seven constitutional provisions rests on hyperbole. Second, PacifiCorp’s argument about the substantial legal questions that would need to be resolved if a rate change were at issue is directly contrary to the Company’s repeated acknowledgment that no rate change was at issue in relation to the filing of the tax reports. See id. at 3, 6. PacifiCorp’s claim that the Commission could avoid the “constitutional issues implicated” by not defining “properly attributed” for the purposes of filing the tax report is untenable. There is no constitutional right implicated by requiring PacifiCorp to *file* tax information with the OPUC.

B. The Temporary Rule Is Consistent With the Legislative Purpose of SB 408

PacifiCorp also argues that the OPUC’s temporary rule exceeds the legislative delegation of authority in SB 408, because “there is no basis in the statute or its legislative history that would permit the Commission by rule to require a utility to submit tax information

on an affiliate-by-affiliate basis.” Id. at 7-8. According to PacifiCorp, the OPUC’s temporary rule does not fall within a “clearly defined statutory grant of authority” for the Commission to adopt a rule that requires tax information of affiliates, because SB 408 refers to only the tax liability of the entire affiliate group. Id. at 8.

PacifiCorp provides lengthy quotes from the legislative history, all of which are taken out of context, to justify its claim. However, the Commission need not look further than the text of SB 408 to find the authority that PacifiCorp claims is lacking. Section 3(2) of SB 408 states that “[e]very 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 and ORS 757.210.” In other words, SB 408 specifically provides that even if the tax report itself does not include the information that is necessary for the Commission to make the required determinations, the Commission has the authority to request the necessary information and the utility is obligated to provide that information. Under these circumstances, the Commission also possesses the authority to adopt a rule establishing that utilities must file affiliate tax information as part of the tax report. PacifiCorp’s argument that SB 408 restricts the information that the Commission may obtain from utilities conflicts with the letter and spirit of the law.

C. PacifiCorp’s Petition is Moot

Even if the Commission does not deny the Petition because PacifiCorp’s claims about the temporary rule lack merit, the Company’s Petition is moot because the Commission already had initiated a rulemaking to consider permanent rules to implement SB 408.

ORS § 183.390 provides that the Commission must either deny PacifiCorp’s Petition within

ninety days or initiate a rulemaking. The Commission already has initiated a rulemaking in Docket AR 499 to adopt rules to implement SB 408. Thus, even if the Commission does not agree that PacifiCorp's Petition should be denied on the merits, the Commission should deny the Petition as moot.

D. PacifiCorp Has Not Demonstrated a Valid Basis to Repeal the Temporary Rule Under ORS § 183.390

ORS § 183.390 directs the Commission to consider certain factors in reviewing a Petition such as PacifiCorp's. PacifiCorp has not stated any valid legal basis to repeal the OPUC's temporary rule, including when the factors cited in the statute are considered.

Negative Economic Impact on Businesses. The temporary rule creates no negative economic impact for businesses. The rule requires the utilities to file tax information to comply with the requirements of SB 408. The rule does not impose any rate change on utilities. Businesses overwhelmingly supported SB 408, and the rules merely implement this pro-business and pro-consumer law.

Continued Need for the Rule. The rule continues to be needed for the reasons stated by the Commission in Order No. 05-991. Without the rule, utilities may be able to lawfully file the tax reports according to differing interpretations of SB 408, which will hinder the OPUC's ability to implement and apply the law as intended.

Nature of Public Complaints or Comments. ICNU understands that the Commission has received correspondence regarding the temporary rule from the public, primarily from legislators. First, this correspondence has not been made part of the record in this proceeding in order to provide parties the opportunity to fully respond. Second, after-the-fact

correspondence from legislators who had the opportunity to create a legislative record when SB 408 was passed merely extends into this proceeding a political fight that was lost in the legislature. The Commission should assign those comments whatever weight it sees fit.

Complexity of the Rule. SB 408 deals with a complex subject matter and it was contemplated that rules would be necessary to outline and implement the mechanics of the Bill. The temporary rule addresses one of the more complex and controversial aspects of the rule, and the rule should be retained to define “properly attributed” as it relates to filing the tax report.

Duplication and Conflict with Other Laws and Regulations. The OPUC’s temporary rule provides necessary definition to SB 408 and does not duplicate or conflict with any other laws or regulations.

Impact of Technology, Economic Conditions, and Other Factors. There has been no effect of technology, economic conditions, or other factors on the subject area affected by the rule—rates related to utility income taxes.

Legal Basis for the Rule. The legal basis for the rule is SB 408, which went into effect on September 2, 2005.

CONCLUSION

PacifiCorp’s Petition lacks merit and is merely an attempt to justify the Company’s refusal to comply with the OPUC’s temporary rule and SB 408. For the reasons stated above, ICNU requests that the Commission deny PacifiCorp’s Petition and order the Company to file a tax report that complies with OAR § 860-022-0039.

Dated this 3rd day of November, 2005.

Respectfully submitted,

/s/ Melinda J. Davison

Melinda J. Davison

Matthew Perkins

Davison Van Cleve, P.C.

333 S.W. Taylor, Suite 400

Portland, Oregon 97204

(503) 241-7242 phone

(503) 241-8160 facsimile

mail@dvclaw.com

Of Attorneys for Industrial Customers
of Northwest Utilities