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October 14, 2005

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VIA ELECTRONIC FILING

PUC Filing Center
Oregon Public Utility Commission
PO Box 2148
Salem, OR 97308-2148

Re: Docket AR 498
Petition of PacifiCorp to Repeal or Amend Temporary Rule OAR 860-014-0039

Attached for filing is PacifiCorp's Petition to Repeal or Amend Temporary Rule OAR 860-014-0039. A copy of this filing has been served on all parties to this proceeding

Very truly yours,

A handwritten signature in black ink, appearing to be "Katherine A. McDowell".

Katherine A. McDowell

KAM:knp
Enclosure
cc: Service List

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 498

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

**PETITION OF PACIFICORP
TO REPEAL OR AMEND
TEMPORARY RULE
OAR 860-022-0039**

Pursuant to ORS 183.390 and OAR 137-001-0070, PacifiCorp (“PacifiCorp” or the
“Petitioner”) petitions the Public Utility Commission of Oregon (the “Commission”) to repeal
Temporary Rule OAR 860-022-0039 (the “Temporary Rule”), which purports to implement
Senate Bill 408 (“SB 408”), or, in the alternative, to amend the Temporary Rule by deleting or
revising the definition of the term “properly attributed” in subsection 2(d) for the reasons set
forth below.

1. The Commission exceeded its authority under the Oregon Administrative
Procedures Act (ORS 183.310 *et seq.* (the “APA”)), specifically, ORS
183.335(5), in adopting the Temporary Rule because the Rule does not prevent
“serious prejudice to the public interest or the interest of the parties concerned.”
The Temporary Rule is neither necessary nor required to establish the
requirements for filing the tax report set forth in SB 408. Because the 2005 tax
report is informational only and cannot under SB 408 § 4(2) produce a rate
change, a rule pertaining to this report cannot satisfy the “serious prejudice to the
public interest” standard; and
2. The Temporary Rule is invalid because it is neither within the legislative
delegation of authority to the Commission nor is it reasonably calculated to
accomplish the legislative purpose.

As further alternative relief, Petitioner requests an extension of time under OAR 860-
014-0093 to comply with the Temporary Rule’s definition of “properly attributed” until after the
Oregon Department of Justice has issued its Legal Opinion ruling on the key legal issues in
Docket AR 499. Under the ALJ’s October 5, 2005 Memorandum in Docket AR 499, the Legal
Opinion is targeted for circulation in mid-December 2005.

1 In support of this Petition, PacifiCorp states:

2 **I. IDENTITY OF PETITIONER AND INTERESTED PARTIES**

3 1. The name and address of the Petitioner are:

4 PacifiCorp
5 825 NE Multnomah
6 Portland, OR 97232

7 2. The names and addresses of Petitioner's representatives are:

8 Christy Omohundro
9 Managing Director
10 PacifiCorp
11 825 NE Multnomah, Suite 800
12 Portland, OR 97232
13 Telephone: (503) 813-6092
14 Fax: (503) 813-6060
15 E-mail:
16 christy.omohundro@pacificorp.com

17 Katherine A. McDowell
18 Stoel Rives LLP
19 900 SW Fifth Avenue, Suite 2600
20 Portland, OR 97204
21 Telephone: (503) 294-9602
22 Fax: (503) 220-2480
23 E-mail: kamcdowell@stoel.com

24 3. PacifiCorp has served this Petition on persons listed in the attached certificate of
25 service from OPUC Dockets AR 498 and AR 499. OAR 137-001-0070(1).

26 **II. FACTS**

1 SB 408 was signed into law on September 2, 2005. Its stated purpose is to align
2 amounts of income tax collected in rates from Oregon ratepayers with the taxes actually paid by
3 utilities to government taxing authorities. Among other things, SB 408 requires utilities to file
4 with the Commission, on or before October 15 of each year, a report providing information
5 regarding the amount of taxes paid and the amount authorized to be collected in rates for the
6 most recent prior three tax years. On September 15, 2005, the Commission issued an order
7 adopting Temporary Rule OAR 860-022-0039, which establishes filing requirements for the
8 2005 report. Order No. 05-991.

9 2. The first tax report required by SB 408 must be filed on or before October 15,
10 2005. The tax report is used to determine whether an automatic adjustment clause is triggered.
11 See SB 408 §§ 3(1), (4). Because SB 408 precludes rate changes under the automatic adjustment

1 clause for taxes collected or paid before January 1, 2006, however, the triggering of the
2 automatic adjustment clause based on the 2005 tax report is informational only and cannot result
3 in a rate adjustment. *See* SB 408 § 4(2); *see also* Docket AR 499, Parties’ Statement of
4 Agreement (“The October 2005 and 2006 Reports are for the sole purpose of determining
5 whether there is a trigger for the automatic adjustment clause, not to support a rate change.”).

6 3. Under SB 408, the Commission must determine whether a tax report triggers an
7 automatic adjustment clause within 90 days following the filing of the report unless, by rule, the
8 Commission extends this time period for up to a total of 180 days. If the Commission
9 determines that there is a difference of at least \$100,000 between taxes collected and taxes paid,
10 it must require the utility to establish an automatic adjustment clause within 30 days of its
11 determination, unless by rule, the Commission extends this period for up to a total of 60 days.
12 SB 408 § 3(4). The Temporary Rule extended both of these time periods to the maximum period
13 under SB 408. *See* OAR 860-022-0039(6), (7). As a practical matter, the \$100,000 plus-or-
14 minus standard is low enough that the automatic adjustment clause is likely to be triggered every
15 year. However, as noted above, the triggering of the clause in 2006 is informational only
16 because no rate adjustment can occur based upon the 2005 tax report.

17 4. The Temporary Rule requires the utility to report: (a) the amount of taxes paid to
18 units of government by the utility, without regard to the tax year for which the taxes were paid,
19 and (b) the amount in (a) that is “properly attributed” to Oregon regulated operations of the
20 utility. The term “properly attributed” is defined in OAR 860-022-0039(2)(d), which states:

21 “Properly attributed” means the product determined by multiplying
22 the following two values:

23 (A) The total amount of taxes paid by the public utility or
24 affiliated group to units of government; and

25 (B) The ratio of the tax liability of Oregon regulated
26 operations of the public utility to the total tax liability from all

1 affiliates of the public utility or the affiliated group *with a positive*
2 *tax liability*. (Emphasis added.)

3 5. This definition of “properly attributed” allocates a share of affiliate tax losses to
4 the utility even when the utility’s consolidated group pays more taxes than the utility collects in
5 rates. This is because the definition can serve only to decrease the consolidated taxes allocated
6 to the utility. The definition compares taxes paid by the utility only to taxes of affiliates with a
7 positive tax liability, rather than to the total tax payments by the group. It is axiomatic that, if the
8 denominator in the ratio provided in OAR 860-022-0039(2)(d)(B) is increased, the ratio will
9 decrease.

10 6. The Temporary Rule’s definition of “properly attributed” would also produce
11 different results depending on the composition of the utility’s affiliated group. For example, the
12 allocation of affiliate losses could be decreased by merging loss companies with gain companies
13 to ensure that the loss company ultimately had a positive tax liability. Under the definition, this
14 would decrease the tax losses available for allocation to the utility even though the total tax
15 payments by the group remained the same.

16 7. Permanent rulemaking regarding implementation of SB 408, including details
17 regarding the automatic adjustment clause, was commenced in Docket AR 499. As noted above,
18 on October 5, 2005, ALJ Kathryn Logan issued a memorandum setting forth the scope of legal
19 briefing and establishing a schedule. The memorandum specifically requested briefing on how
20 the Commission should “apply the ‘properly attributed’ standard as it appears in the individual
21 sections of the bill.” ALJ Logan Memorandum at 1 (Oct. 5, 2005).
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1 **III. ARGUMENTS**

2 **A. The Temporary Rule Should Be Repealed.**

3 **1. The Commission Failed to Comply with the Temporary Rule Requirements**
4 **of the APA When Adopting the Temporary Rule.**

5 ORS 183.335(5)(a) provides, among other things, that an agency may adopt a rule
6 without prior notice and hearing or upon any abbreviated notice and hearing that it finds
7 practicable if the agency prepares a “statement of its findings that its failure to act promptly will
8 result in *serious prejudice to the public interest or the interest of the parties concerned and the*
9 *specific reasons for its findings of prejudice.*” (Emphasis added.)

10 In its order adopting the Temporary Rule, the Commission states that:

11 “Failure to immediately adopt a temporary rule will result in
12 serious prejudice to the public interest. *See* ORS 183.335(5).
13 Without this temporary rule, the utilities have not been told what is
14 required in the October 15, 2005, tax report filing. The temporary
15 rule meets this need by defining certain terms included in SB 408.”
16 Order No. 05-991 at 1.

17 Contrary to the Commission’s finding, SB 408 itself defines what is required for the tax
18 report, the purpose of which is to provide the information necessary to allow the Commission to
19 determine “if the amount of taxes assumed in rates differed by at least \$100,000 from the amount
20 of taxes paid by the public utility to units of government.” *See id.* SB 408 provides that the tax
21 report shall contain the information required by the Commission, including: (a) the amount of
22 taxes that was paid by the utility in the three preceding years, or that was paid by the affiliated
23 group and that is properly attributed to the regulated operations of the utility, determined without
24 regard to the tax year for which the taxes were paid; and (b) the amount of taxes authorized to be
25 collected in rates for the three preceding years. SB 408 § 3(1)(a), (b). The Commission’s Order
26 adopting the Temporary Rule fails to make the specific findings required as to why this
information provides insufficient direction for the 2005 tax report, particularly given the

1 acknowledgement that “[n]one of the decisions made in this temporary rule should be considered
2 as precedent for our findings in the permanent rulemaking.” Order No. 05-991 at 1.

3 The fact that the term “properly attributed” is not defined in SB 408 does not change this
4 analysis. Because the difference between taxes “collected” and “paid” that is required to trigger
5 an automatic adjustment clause is so small—\$100,000 plus or minus—there is no question that
6 the utilities’ tax reports will trigger the automatic adjustment clause however the term “properly
7 attributed” is interpreted. And because the triggering of the automatic adjustment clause from
8 the 2005 tax report is informational only, the Commission does not need the specific unregulated
9 affiliate loss information required by subsection 2(d) of the Temporary Rule to inform rate
10 change decisions.

11 Moreover, developments in connection with the permanent rulemaking in Docket AR 499
12 also have confirmed that subsection 2(d) of the Temporary Rule is both premature and
13 unnecessary. As observed above, those developments include the recognition that a substantial
14 legal question exists as to how the Commission should “apply the ‘properly attributed’ standard
15 as it appears in the individual sections of the bill.” *See* ALJ Logan Memorandum at 1 (Oct. 5,
16 2005). The briefing schedule in Docket AR 499 will allow parties and the Commission to
17 consider the legal issues inherent in the application of the “properly attributed” standard,
18 including a number of state and federal constitutional concerns. For example, if applied to
19 justify a rate change, the Temporary Rule raises a host of serious constitutional concerns,
20 including the appropriation of federal tax benefits in violation of the Supremacy Clause, U.S.
21 Const. Art. VI, cl. 2, and the Takings Clauses of the federal Constitution, U.S. Const. Amend. V,
22 and the Oregon Constitution, Or. Const. Art. I, § 18; arbitrary allocation of tax benefits among
23 entities filing consolidated tax returns in violation of the federal Equal Protection Clause, U.S.
24 Const. Amend. XIV, and Oregon’s Uniformity of Taxation Clause, Or. Const. Art. I, § 32; and
25 impairment of contractual rights, in violation of both the federal Contracts Clause, U.S. Const.

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1 Art. I, § 10, cl. 1, and the Oregon Contracts Clause, Or. Const. Art. I, § 21. To avoid the
2 constitutional issues implicated, the Commission can and should wait until it decides the
3 meaning of “properly attributed” in Docket AR 499 before requiring utilities to disclose affiliate
4 loss information as a part of the tax report.

5 Because there is no prejudice to the public interest serious enough to justify adoption of a
6 temporary rule in this context, OAR 860-022-0039 violates the requirements of ORS
7 183.335(5)(a).¹ See *Waterwatch of Oregon, Inc. v. Oregon Water Resource Com’n*, 97 Or
8 App 1, 5, 774 P2d 1118 (1989) (invalidating temporary rule adopted without sufficient findings
9 of prejudice and a sufficient statement of need); *Metropolitan Hospitals, Inc. v. State Health*
10 *Planning and Development Agency*, 52 Or App 621, 628 P2d 783 (1981) (invalidating temporary
11 rule because it did not meet “serious prejudice” standard).

12 **2. The Temporary Rule Is Invalid Because It Is Neither Within the Legislative**
13 **Delegation of Authority nor Reasonably Calculated to Accomplish the**
14 **Legislative Purpose.**

15 Rules adopted by administrative agencies, including the Commission, must be within the
16 legislative delegation of authority and reasonably calculated to accomplish the legislative
17 purpose. See *Pacific Northwest Bell Telephone Co. v. Davis*, 43 Or App 999, 1005, 608 P2d
18 547 (1979) (citing *Crouse v. Workmen’s Comp. Bd.*, 26 Or App 849, 852, 554 P2d 568 (1976)).
19 Furthermore, expansive statutes setting out the Commission’s general rulemaking authority do
20 not compel the conclusion that a particular statute delegates to the Commission particularly
21 expansive authority under that statute. *Id.* at 1006. Here, there is no basis in the statute or its

22 ¹ The Temporary Rule also extended the timelines for the Commission’s determination
23 regarding the triggering of the automatic adjustment clause and for the utility’s compliance
24 filing. Because the triggering of the automatic adjustment clause based on the 2005 tax report is
25 without consequence from a rate perspective, it is not clear that these extensions of time are
26 necessary to avoid serious prejudice to the public. To the extent that the Commission believes
that they are, however, the Commission could promulgate a Temporary Rule providing only for
these time extensions, accompanied by appropriate findings.

1 legislative history that would permit the Commission by rule to require a utility to submit tax
2 information on an affiliate-by-affiliate basis. The disputed portions of the Temporary Rule do
3 not fall “within a clearly defined statutory grant of authority,” as required by the law:

4 “In the absence of a statute which grants a presumption of validity
5 to administrative regulations, an administrative agency must, when
6 its rule-making power is challenged, show that its regulation falls
7 within a clearly defined statutory grant of authority. *Safeway
8 Stores v. State Bd. of Agriculture*, 198 Or. 43, 71, 255 P.2d 564
9 (1953); and see, for cases elsewhere, 1 Cooper, *State
10 Administrative Law*, supra at 252. The reason behind this rule is
11 that the people, by adopting the state constitution, conferred upon
12 the Legislative Assembly the power to legislate. Therefore this
13 power is not by implication to be delegated to nonelective officers.
14 The tendency of administrators to expand the scope of their
15 operations is perhaps as natural as nature’s well-known abhorrence
16 of a vacuum. But no matter how highly motivated it may be, the
17 tendency to make law without a clear direction to do so must be
18 curbed by the overriding constitutional requirement that substantial
19 changes in the law be made solely by the Legislative Assembly, or
20 by the people. Oregon Constitution, Art. IV, § 1.” *Oregon
21 Newspaper Pub. v. Peterson*, 244 Or 116, 123-24, 415 P2d 21
22 (1966) (footnotes omitted), *quoted in Pacific Northwest Bell*, 43 Or
23 App at 1006-07.

24 The plain language of SB 408, which refers repeatedly to the tax liability of the entire
25 “affiliated group”—not just affiliates with a positive tax liability—and which expressly prohibits
26 the Commission from making adjustments “for taxes paid that are properly attributed to any
27 unregulated affiliate,” provides no grant of authorization for the Commission to exercise
28 rulemaking power in the manner in which it has done. Accordingly, there is no presumption of
29 validity for the Commission’s definition of “properly attributed” taxes in subsection 2(d). To the
30 contrary, by allocating to ratepayers the tax benefits of losses generated by the independent
31 economic activities of unregulated affiliates, subsection 2(d) is contrary to the language of SB
32 408 quoted above and the legislative intent underlying SB 408.²

25 ² See SB 408 §§ 3(3), (4), (6), (7), (12).

1 The history of SB 408 confirms that the legislature did not intend that utilities be required
2 to report to the Commission the stand-alone tax information of each and every affiliate within the
3 utilities' affiliated groups. *See* Work Session on SB 408 before the Senate Business and
4 Economic Development Committee (May 26, 2005) (colloquy between Sen. Rick Metsger and
5 Pamela Lesh, Vice President for Regulatory Affairs, Portland General Electric Company):

6 Chair [Metsger]: * * * [W]hen they file the report with the
7 commission, it will be those taxes which are
8 attributable only to the operations of that utility,
9 even if you have multiple other affiliates.
10 That's going to have to be figured in the tax
11 report that in this case PacifiCorp would have to
12 file, is to then break that down.

13 Lesh: Mr. Chairman, if I could ask a question. Would
14 that work for the losses then as well if the other
15 corporations had had losses and those are offset,
16 would this tax report...

17 Chair: It has nothing to do with other corporations, it's
18 only the utility itself. No other affiliations are
19 affected by this. It would be your responsibility
20 to delineate the utility in filing the report with
21 the PUC, what their actual costs were, what
22 their taxes are. It has nothing to do with any
23 other affiliates you have. And that would be
24 your responsibility is to have to extract that cost
25 just like you did in your scenarios, but to
26 actually be able to do that.

* * * * *

27 Chair: You can consolidate all you want, but you're
28 not going to be allowed to collect other than the
29 taxes that you owe on this particular, in this
30 case, in the rates that you are collecting for the
31 operation of actually that utility. File anywhere
32 you want.

1 Other portions of the legislative history similarly make clear that any rate adjustment
2 clause will “not apply to the activities of other entities however they are related to the utility, but
3 only to the utility itself.” Work Session on SB 408 before the Senate Business and Economic
4 Development Committee (May 31, 2005) (statement of Dexter Johnson, Legislative Counsel).

5 The legislative history also demonstrates that SB 408 does not require an automatic
6 adjustment whenever an affiliate suffers a loss, but instead only when a utility’s consolidated
7 group pays less tax than the utility collects in rates. Representative Brian Boquist explained this
8 point when he carried the bill on the House floor, *see* House Floor Session (July 30, 2005)
9 (statement of Rep. Brian Boquist), and his statement was consistent with the analysis by Deputy
10 Attorney General Peter Shepherd, which was distributed to each member of the House during the
11 floor debate. *See* House Floor Letter (memorandum from Dep. Att’y Gen. Peter Shepherd to
12 Rep. Tom Butler, July 30, 2005) (concluding that rates would stay the same when the
13 consolidated group pays more tax than the utility’s standalone tax liability); *see also* Work
14 Session on SB 408 before the House State and Federal Affairs Committee (July 26, 2005)
15 (statement of Michael Early, Executive Director, Industrial Customers of Northwest Utilities):

16 So, for example, if one of our utilities was owned by an out-of-
17 state entity that was engaged in very profitable unregulated
18 businesses, the Commission, the Oregon Public Utilities
19 Commission, could include in rates, say \$50 million recovered
20 from Oregon citizens, but the parent chooses to file under a
21 consolidated basis, it’s very profitable. Let’s say its income tax
22 liability is \$500 million, it’s ten times the amount that is recovered
23 from utility customers and rates. * * * [O]ur bill gets to the heart
24 of the question. * * * [W]hat we’re truing-up is, we’re saying is
25 we want to match the dollars collected from rate payers with the
26 tax dollars [paid] by the utility and attributable to regulated
operations. So, the Commission looks at the \$500 million and asks
itself what portion of that \$500 million was attributable to
regulated operations in Oregon and that answer’s going to be, it’s
going to be \$50 million. So, then it says, well, it did collect and
did pay to taxing authorities the amount of taxes collected. So, in
that case, the adjustment is, there would be no adjustment, because
in fact what was expected to happen, did happen. It collected \$50
million and it paid \$50 million.”

1 The Staff recommendation describing the rationale for subsection 2(d) relied on “the
2 approach the Pennsylvania PUC uses for allocating tax benefits.” *See In re Adoption of*
3 *Temporary Rules*, AR 498, Staff Report at 3 (Sept. 7, 2005). There is no legislative history
4 indicating that Oregon modeled SB 408 after Pennsylvania’s law; indeed, the Pennsylvania
5 approach was cited only twice in the entire SB 171/SB 408 legislative record, and then only as a
6 reference to one of several states that do not follow a stand-alone tax approach. *See Public*
7 *Hearing on SB 171 before the Senate Revenue Committee* (Apr. 14, 2005) (statement by Chair
8 Sen. Ryan Deckert: “Well, other states do, I mean, we’ve heard a lot about Pennsylvania, who
9 does a true-up. We can get that, I mean, there are other states. I want to say 41 states have the
10 consolidated form on their regulated utilities.”); *Senate Floor Debate on SB 408* (June 8, 2005)
11 (statement by Sen. Metsger: “A couple of issues were brought about other states, and I wanted
12 to talk a little bit about that. There are other states that take into account the taxes. Connecticut,
13 this is from the Public Utility Commission in their white paper and their investigation. The study
14 that was done. Connecticut, Florida, Indiana, Pennsylvania, Tennessee, Virginia and West
15 Virginia, report that they do consider the savings from the consolidated returns and recognize
16 those for the rate making purposes. Additionally, the Pennsylvania PUC, consistent with the
17 state supreme court decisions, applies this same actual taxes paid standard by including a utility
18 share of federal taxes benefits when they do set the rates. Now, in Oregon, why do we have a
19 situation in Oregon that’s a little more difficult? Well, one of the major reasons is we’re an
20 income tax state.”).

21 The fact that Pennsylvania was not the legislature’s model for SB 408 is also
22 demonstrated by the many differences between the two states’ approaches. Unlike SB 408,
23 Pennsylvania’s rule (a) is not based on statutory prescriptions; (b) does not apply to stand-alone
24 utilities; (c) does not use an automatic adjustment clause; (d) does not apply a cash taxes

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1 approach; and (e) does not include statutory offsets for deferred taxes, investment tax credits, and
2 charitable deductions.

3 The plain language of SB 408 is consistent with the approach favorably passed on by the
4 Supreme Court in *Federal Power Commission v. United Gas Pipeline*, 386 US 237, 87 S Ct
5 1003, 18 L Ed 2d 18 (1967). There, affiliate losses were applied to reduce utility stand-alone tax
6 expense only if such losses were not fully offset by affiliate gains. *See id.*; *Cities Service Gas*
7 *Co.*, 30 FPC 158, 49 PUR3d 229 (1963). Under this approach, as apparently intended by
8 SB 408, affiliate losses are taken into account only if the consolidated tax liability is less than the
9 utility’s stand-alone tax liability, implicating the so-called “Enron problem.” This is not the
10 approach used in Pennsylvania. *See Barasch v. Public Utility Com’n.*, 548 A2d 1310 (Pa
11 Commw 1988). Accordingly, the model adopted by Pennsylvania should not be recognized as
12 supporting the methodology of subsection 2(d).

13 **B. Even if the Commission Does Not Repeal the Temporary Rule, the Temporary Rule**
14 **Should Be Amended.**

15 If the Commission declines to repeal the Temporary Rule in its entirety, the Temporary
16 Rule should be amended to delete subsection 2(d) in its entirety as follows:³

17 860-022-0039 Annual Tax Reports and Automatic Adjustment
18 Clauses Relating to Public Utility Taxes

19 * * * * *

20 (2) As used in this rule:

21 * * * * *

22 [(d) “Properly attributed” means the product determined by
23 multiplying the following two values:

24 ³ The language that Petitioner proposes be deleted from the Temporary Rule is marked in
25 brackets.

1 (A) The total amount of taxes paid by the public utility or affiliated
group to units of government; and

2 (B) The ratio of the tax liability of Oregon regulated operations of
3 the public utility to the total tax liability from all affiliates of the
public utility or the affiliated group with a positive tax liability.]

4 In the alternative, PacifiCorp proposes that the definition of “properly attributed” in
5 subsection 2(d) of the Temporary Rule be modified as follows:⁴

6 860-022-0039 Annual Tax Reports and Automatic Adjustment
7 Clauses Relating to Public Utility Taxes

8 * * * * *

9 (2) As used in this rule:

10 * * * * *

11 (d) “Properly attributed” means the **utility’s standalone tax**
12 **liability**. [the product determined by multiplying the following
two values:

13 (A) The total amount of taxes paid by the public utility or affiliated
14 group to units of government; and

15 (B) The ratio of the tax liability of Oregon regulated operations of
16 the public utility to the total tax liability from all affiliates of the
public utility or the affiliated group with a positive tax liability.]

17 In summary, there are substantial legal questions to be resolved relating to subsection
18 2(d) as promulgated. Moreover, there is no justification, purpose or reason for the inclusion of
19 the current definition of “properly attributed” in the Temporary Rule under the text or legislative
20 history of SB 408. As a result, the inclusion of this definition in the Temporary Rule prior to the
21 scheduled determination of the various issues raised is unnecessary and, in fact, prejudicial to the
22 impacted utilities.

23
24 _____
25 ⁴ The language that Petitioner proposes be deleted from the Temporary Rule is marked in
brackets and the language that Petitioner proposes to insert is in bold.

1 **C. Request for Extension of Time to Comply with Disputed Portion of Temporary**
2 **Rule.**

3 For all of the foregoing reasons, PacifiCorp requests an extension of time under
4 OAR 860-014-0093 to comply with the disputed aspect of the Temporary Rule until after the
5 Department of Justice has issued its Legal Opinion on the key legal issues in Docket AR 499.

6 **IV. ADDITIONAL REQUIREMENTS OF OAR 137-001-0070**

7 Pursuant to OAR 137-001-0070, PacifiCorp alleges:

8 1. **Options for Achieving the Existing Rule’s Substantive Goals While Reducing**
9 **Negative Economic Impact on Businesses.** The options proposed by PacifiCorp to repeal or
10 amend the Temporary Rule would reduce the negative impact on businesses by either
11 eliminating the Temporary Rule in its entirety or conforming the Temporary Rule in the manner
12 indicated to the requirements of SB 408. Either of these proposals preserves the meaning of
13 SB 408 and does not interfere with implementation of the Act. In addition, the Temporary Rule
14 could result in the disclosure of highly sensitive business information that is protected from
15 disclosure by federal law. *See* IRC § 6103(a) (no officer or employee of any state may disclose
16 any tax return or return information provided to the IRS). This risk is not justified by any
17 benefits from retention of the Temporary Rule.

18 2. **Continued Need for Existing Rule.** PacifiCorp does not believe that a
19 Temporary Rule is needed to meet the October 15, 2005 tax report filing deadline. However, if
20 the Commission determines that a temporary rule is required such rule should be limited to
21 providing guidance on the information required for utilities to file the required October 15, 2005
22 report. The Temporary Rule does not need to extend beyond such limited purpose by resolving,
23 on a “non-precedential” basis, significant issues that are more properly addressed through the
24 permanent rulemaking process in Docket AR 499. Specifically, the need for defining “properly
25 attributed” in the Temporary Rule has not been established by the Commission and as a result,
26 the Commission should not insert such a definition in a Temporary Rule.

1 3. **Complexity of Existing Rule.** As noted above, the Temporary Rule raises a
2 number of complex issues that have not been fully analyzed by Staff or the Commission. In
3 addition, for the Commission to understand the tax liabilities of PacifiCorp's affiliates, it may
4 need to audit those affiliates. This step will not be needed if the Temporary Rule is repealed or
5 modified as proposed.

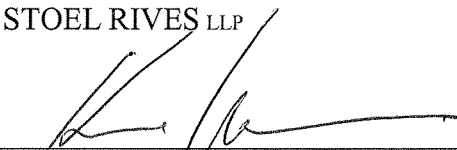
6 4. **Overlap with Federal or Local Regulations.** SB 408 and the Temporary Rule
7 purporting to implement certain provisions of SB 408 interfere with federal income tax
8 regulation of consolidated tax returns. The full extent of this interference is not clear at this time.
9 However, this problem is exacerbated by the Commission's allocation of income taxes based on
10 positive liabilities as set forth in subsection 2(d). Thus, the Temporary Rule creates potential
11 overlap with federal law and should be repealed or modified as proposed.

12 5. **Changes in Technology, Economic Conditions or Other Factors.** There have
13 been no changes in these factors.

14 WHEREFORE, PacifiCorp respectfully petitions the Commission to repeal Temporary
15 Rule OAR 860-022-0039 or, in the alternative, to amend the Temporary Rule by deleting and/or
16 amending certain provisions of the Temporary Rule. Further, PacifiCorp requests the
17 Commission to delay any implementation of subsection 2(d) until after the Department of Justice
18 issues its Legal Opinion on key legal issues in Docket AR 499.

19 DATED: October 14, 2005.

20 STOEL RIVES LLP

21 
22 _____
23 Katherine A. McDowell
24 Steven S. Walters

25 Attorneys for PacifiCorp
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document in docket AR 498 on the following named person(s) on the date indicated below by

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to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at his or her last-known address(es) indicated below.

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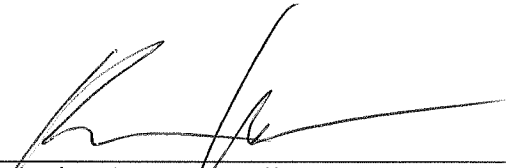
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