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VIA ELECTRONIC FILING

PUC Filing Center
Public Utility Commission of Oregon
PO Box 2148
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Re: Joint Response of Avista Corporation and PacifiCorp to Reply Legal Comments of ICNU
Docket AR 499

Enclosed for filing please find the Joint Response of Avista Corporation and PacifiCorp to Reply Legal Comments of ICNU in the above-referenced docket. A copy of this filing has been served on all parties to this proceeding as indicated on the attached certificate of service.

Very truly yours,

Katherine A. McDowell

KAM:knp
Enclosure
cc: Service List

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

AR 499

In the Matter of the Adoption of Permanent Rules to Implement SB 408, Relating to Matching Utility Taxes Paid with Taxes Collected.	**JOINT RESPONSE OF AVISTA CORPORATION AND PACIFICORP TO REPLY LEGAL COMMENTS OF ICNU**

I. REQUEST FOR LEAVE TO FILE RESPONSE

PacifiCorp and Avista Corporation ("Avista") respectfully request leave to submit the following short response to arguments raised for the first time in the Reply Legal Comments of Industrial Customers of Northwest Utilities ("ICNU"). ICNU should have raised its arguments on SB 408's legislative history in its Opening Comments to permit a fair opportunity for PacifiCorp and Avista to respond to these arguments. Because ICNU raised these arguments in its Reply Brief, the Commission should permit PacifiCorp and Avista to supplement their Joint Reply Brief with this Response to ensure the development of a full record for this rulemaking.

II. RESPONSE TO NEW ARGUMENTS

A. Contrary to Oregon Law, ICNU Urges the Commission to Infer from the Rejection of Entire Packages of Amendments that the Legislature Disapproved of Specific Provisions Therein.

In its Reply Legal Comments, ICNU argues for the first time that the legislature's rejection of various packages of amendments (in particular SB 408-B13 and SB 408-B20) and its ultimate adoption of SB 408-B22 reflects the legislature's intent to reject particular provisions contained in the rejected amendments. (*See* ICNU Reply at 5-15.) In particular, ICNU argues that, by adopting the -B22 amendments, the legislature specifically rejected the "properly attributed" definitions contained in the -B13 and -B20 amendments. (*Id.* at 8-9 ("The Commission should refuse the IOU's request to define "properly attributed" in a manner that the legislature has already rejected."); *id.* at 14 (by refusing to adopt the -B13 and -B20 amendments, the legislature "refused to adopt" an approach that reduces rates only

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when the consolidated group pays less tax than the utility's stand-alone tax expense).) ICNU's argument is contrary to Oregon law, SB 408's legislative record, and the text and context of SB 408.

ICNU's position is contrary to Oregon case law, which expressly provides that the defeat of an entire package of amendments provides no guidance as to the legislature's intent as to one of the provisions therein. *Springfield Educ. Ass'n v. Springfield School Dist. No. 19*, 24 Or App 751, 758, 547 P2d 647 (Or App 1976) (where amendments contain numerous provisions, many of which were controversial and hotly debated, "the defeat of the entire package tells us nothing regarding the legislative intent as to any one particular section thereof"), *modified in other respect by* 25 Or App 407, 549 P2d 1141.[1]

In direct contravention of the rule articulated in *Springfield*, ICNU urges the Commission to infer from the legislature's rejection of entire packages of amendments that the legislature objected to single provisions therein—namely, the "properly attributed" definition. (ICNU Reply at 5-15.) ICNU urges this inference despite the fact that the version of SB 408 adopted by the legislature differed in many respects from the -B13 and -B20 amendments. For example, unlike the -B22 amendments:

- The -B13 amendments did not provide for automatic rate adjustments when the consolidated group paid less tax than the utility's stand-alone tax liability. SB 408-B13 § 3(5)(b), 3(12)(b).

[1] Other courts and commentators also caution against using as an interpretive aid the legislature's failure to adopt an amendment. *See, e.g., Maiter v. Chicago Bd. of Educ.*, 82 Ill 2d 373, 415 NE2d 1034, 1039 (Ill 1980), *cert denied*, 451 US 921, 101 S Ct 2000, 68 L Ed 2d 312 (1981) ("the failure of a committee [of the legislature] to act favorably on a proposed bill should not be relied upon, in the absence of an indication as to the reason for the failure, to ascertain legislative intent"); 2A Sands, Sutherland Stat. Const., § 48:18 (6th ed 2004) ("[a]n amendment may have been adopted only because it better expressed a provision already embodied in the original bill or because the provision in the original bill was unnecessary as unwritten law would produce the same result without it. Thus caution must be exercised in using the action of the legislature on proposed amendments as an interpretive aid.").

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- The -B20 amendments provided for rate adjustments, upward and downward, based entirely on the tax payments of the consolidated group without regard to the utility's stand-alone tax liability. SB 408-B20 § 3(5).
- The -B20 amendments expressly limited the definition of "unit of government" to the United States, the State of Oregon and political subdivisions of the State of Oregon. *Id.* § 1a(6).
- Both the -B13 and -B20 amendments provided a 3-year study period before tax reports could result in rate adjustments. *Id.* § 6(1); SB 408-B13 § 6(1).

The legislature's decision to adopt the -B22 amendments may have been motivated by any one of these or other differences between the various amendments, or indeed some other factor unrelated to the wording of the rejected amendments.

Moreover, the legislative record provides no support for ICNU's new argument. The Ninth Circuit has commented that rejection of amendments that is unilluminated by committee or conference reports explaining the reasons for rejection does not shed light on the legislature's intent. *See Tahoe Regional Planning Agency v. McKay*, 769 F2d 534, 539 (9th Cir 1985) ("'[t]he light shed by such unadopted proposals is too dim to pierce statutory obscurities'") (construing Nevada law), quoting *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 263 Cal App 2d 41, 69 Cal Rptr 480, 492 (1968). Here, the legislative record does not provide support for ICNU's argument that the legislature adopted the -B22 amendments because it objected to the definitions of "properly attributed" contained in other sets of amendments.

Indeed, during the legislative work session at which the -B22 amendments were passed to the House floor and the -B20 amendments were withdrawn, no one even mentioned the definition of "properly attributed" contained in the -B13 or -B20 amendments. (*See* SB 408 Legislative History at 327-331 (transcript of SB 408 Work Session, House State and Federal Affairs Committee, July 26, 2005).) Nor were these definitions mentioned during subsequent House and Senate floor debates. (*Id.* at 341-356, 357-360 (transcripts of House Floor Debate, July 30, 2005, and Senate Floor Debate, August 1, 2005).) Considering the

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myriad possible reasons the legislature may have adopted the -B22 amendments as opposed to the -B13 or -B20 amendments and the absence of any explanation in the legislative record demonstrating that the legislature actually intended to specifically reject the definition of "properly attributed" in the -B13 or -B20 amendments, it would be pure speculation to conclude that the legislature rejected the amendments because of their approach to this term.[2]

Although the record does not illuminate the legislature's intent in rejecting the -B13 and -B20 amendments, it does demonstrate that the legislature intended the Commission to recognize as "properly attributed" the tax liability that results from the economic activities of an entity without consideration of the tax effects of other affiliated business entities. (*See* PacifiCorp/Avista Opening Comments at 7-10 (providing citations to legislative record demonstrating that SB 408 does not require an automatic adjustment whenever *any* affiliate suffers a loss, but instead only when a utility's affiliated group paid less tax than the utility collected in rates).)

The analysis provided by Deputy Attorney General Peter Shepherd to Members of the House of Representatives during the floor debate on SB 408 is particularly clear on this point. *See* House Floor Letter, Memorandum from Dep. Att'y Gen. Shepherd to Rep. Tom Butler, July 30, 2005. There, Deputy Attorney General Shepherd did not conclude that rates

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[2] Nor does the memorandum from ICNU's Executive Director Michael Early to Legislative Counsel Dexter Johnson, Attachment C to ICNU's Reply Legal Comments, provide any illumination on the legislature's intent. *See Resolution Trust Corp. v. Gallagher*, 10 F3d 416, 421 (7th Cir 1993) (implied overruling on other grounds by *FDIC v. Gravee*, 996 F Supp 622 (ND Ill 1997)); *Stone v. Bd. of Registration in Medicine*, 503 A2d 222, 227 (Maine 1986) ("For extrinsic material to constitute legislative history, the proponent must show that the material was widely available and generally relied upon by legislators considering a bill."); 2A Singer, *Sutherland Stat. Const.* § 48.03 (5th ed Supp) (material not before lawmakers is not part of legislative history). Mr. Early and Mr. Johnson are not legislators and this memorandum is not part of the record that was before the legislature when it considered SB 408. (*See* SB 408 Legislative History; ICNU Reply Legal Comments, Attachment C (recipients of memorandum limited to Mr. Johnson and ICNU lobbyist Mark Nelson).) The memorandum was not included as a part of the official legislative history compiled by the Commission and, for the reasons just outlined, it should not be added to that history.

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would decrease if *any* single company in an affiliated group suffered a loss; rather, he concluded that rates would decrease if "losses incurred by affiliated companies offset the tax liability in the return so that the amount of tax received by the government is less than the amount allowed as estimated taxes [*i.e.,* in rates]." ICNU attempts to cloud this unambiguous legislative history by arguing that Deputy Attorney General Shepherd's conclusion must be read in the context of the "properly attributed" language in the bill. (ICNU Reply Legal Comments at 21.)

However, if Deputy Attorney General Shepherd had understood the "properly attributed" language in the -B22 amendments as providing for a loss-allocation approach, he would not have concluded that rates would decrease whenever losses incurred by affiliated companies offset the tax liability in the return so that the amount of tax received by the government is less than the amount allowed in rates. Instead, he would have concluded that rates would decrease whenever *any affiliate suffered a loss*. He made no such conclusion. Thus, rather than showing that the legislature rejected the PacifiCorp/Avista approach to "properly attributed," the legislative record demonstrates that this was the legislature's intended approach.

This is consistent with the text and context of SB 408, which is the starting point for any analysis of legislative intent. *See PGE v. Bureau of Labor and Industries*, 859 P2d 1143, 1146 (Or 1993) (directing that the first step of any analysis of legislative intent is to look at the text and context of the statute). The text demonstrates that the legislature intended the Commission to take a cost-causation approach to "properly attributed," because this is the only approach consistent with those words' plain meaning and which does not require the Commission to read into the Act provisions that the legislature did not enact. *See PGE*, 859 P2d at 1146; *Webster's New World Dictionary* 92 (4th ed 2001) (common meaning of "attribute" is "belonging to, produced by, resulting from or originating in").

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Likewise, the PacifiCorp/Avista approach, and not the ICNU approach, is consistent with the context of SB 408, which includes other related statutes preventing cross-subsidization and the Commission's historic practice of computing taxes for ratemaking purposes based on the regulated operations of the utility only. A stand-alone attribution approach, unlike the ICNU approach, results in consistent treatment of the tax liability of regulated and unregulated affiliates, (*see* PacifiCorp/Avista Joint Reply Comments at 2-4), and recognizes the context in which the Act was enacted—that is, in response to the so-called "Enron problem." *See* Staff Report, AR 498 at 2 (September 7, 2005) (recognizing that PacifiCorp's "attribution approach would remedy the Enron-type situation that proponents of the bill cited").

Thus, PacifiCorp and Avista urge the Commission to reject ICNU's argument that the legislature's adoption of the -B22 amendments necessarily reflects an intent to reject any specific provisions of other packages of amendments.

B. The Commission Should Reject ICNU's Unsupported Argument that PacifiCorp Believed During the Legislative Debates that the -B22 Amendments Did Not Require a Net-Loss Allocation Approach.

Additionally, ICNU misrepresents the *FPC v. United Gas Pipe Line* case, arguing that: (1) PacifiCorp acknowledged in its Petition to Repeal or Amend the Temporary Rules that the US Supreme Court approved of the constitutionality of a net-loss allocation approach (also called a "pour-over" approach); and (2) PacifiCorp argued during the legislative debates on SB 408 that the bill was unconstitutional; therefore (3) PacifiCorp must have understood that the bill did not adopt a net-loss allocation approach. (*See* ICNU Reply Legal Comments at 21-22.) This syllogism is erroneous on all counts.

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 Federal Power Commission's

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statutory authority. *FPC v. United Gas Pipe Line*, 386 US 237, 87 S Ct 1003, 18 L Ed 2d 18 (1967). Thus, PacifiCorp's citation to *United Gas Pipe Line* did not suggest, as ICNU argued, that PacifiCorp believes that a net-loss allocation approach is constitutional. (*See* ICNU Reply Legal Comments at 22.)

PacifiCorp has consistently voiced its concern that *any* approach that allocates to ratepayers tax savings from affiliate losses raises serious constitutional concerns. (*See, e.g.,* PacifiCorp/Avista Opening Comments at 3 n.1 ("PacifiCorp and Avista find objectionable *any* allocation of affiliate losses to a utility because such allocations violate cost-causation principles and are likely unconstitutional") (emphasis added).) Thus, the Commission should reject ICNU's unsupported invitation to infer from PacifiCorp's citation to *United Gas Pipe Line* that PacifiCorp understood at the time of the legislative debates on SB 408 that the -B22 amendments provided for a loss-allocation approach to "properly attributed."

III. CONCLUSION

For the foregoing reasons and based upon arguments made previously, PacifiCorp and Avista respectfully urge the Commission to adopt their approach to the term "properly attributed" and reject the approach advocated by ICNU.

DATED: November 23, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document in Docket AR 499 on the following named person(s) on the date indicated below by email and first-class mail addressed to said person(s) at his or her last-known address(es) indicated below.

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