BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 499

In the Matter of the Adoption of Permanent Rules to Implement SB 408, Relating to Utility Taxes	STAFF'S COMMENTS ON STRAW PROPOSALS

Background on "Properly Attributed"

The Department of Justice opinion to the Commission dated December 27, 2005 (DOJ Opinion), stated that "The Commission has discretion to define and implement the phrase 'properly attributed,' subject to the general policy and specific limits expressed in chapter 845 [Senate Bill 408]." Thus, there is no specific legal requirement how the Commission must define the amount of taxes paid that are "properly attributed" to the regulated operations of the utility.

Staff believes SB 408 requires that "taxes paid" be calculated using the least of three amounts:

(1) Taxes paid that are "properly attributed" to the regulated operations of the utility, as defined by the Commission in this rulemaking;
(2) The utility's stand-alone tax liability (the 3(12)(a) cap); and
(3) The amount of taxes paid to taxing authorities by the holding company or parent that files tax returns on behalf of the utility (the 3(12)(b) cap).

The amount produced by the comparison is then adjusted by the tax effects of charitable contributions, certain tax credits and deferred taxes, as required by section 3(13)(f). The result is the "taxes paid" amount that is compared to the amount of taxes collected in rates for purposes of both the tax report and the automatic adjustment clause.

DOJ's opinion described two approaches that participants in AR 499 have referred to as "bookends": a loss-allocation or proportionate share method that was adopted in the AR 498 temporary rule, and a purely stand-alone utility approach. DOJ concluded that neither approach is either required or forbidden by the law.

Generally, the utilities continue to promote a stand-alone approach and the customer groups continue to support a loss allocation approach. However, Avista, PacifiCorp, CUB, and ICNU/NWIGU have each proposed an alternative method for the Commission to consider. Staff has summarized its understanding of each alternative in *Attachment A.*

In determining the how the properly attributed amount is to be calculated, the Commission must decide two things: first, what is the "group" that will be used for the calculation (that is, based on income taxes for the entire affiliated group or a subgroup defined in some manner), and second, within that group, how is the utility's properly attributed amount computed?

Staff's Review of the Two Bookends

In the loss-allocation approach (also called a modified effective tax rate or proportionate share method), any consolidated tax savings generated by losses of other affiliates in the corporate group are allocated to all members with positive taxable income. In Docket AR 498, staff recommended the Commission adopt this definition, because: (a) it produces a "properly attributed" result that is consistent for both the utility and other affiliates with positive taxable income, and (b) staff interpreted this result as a requirement under subsection 3(7) of the law.

DOJ's opinion is that subsection 3(7) does not require an allocation of tax reductions to the utility or otherwise determine how the Commission must determine the amount "properly attributed" to regulated operations of the utility. Nonetheless, as a matter of policy, it could be argued that the Commission should determine it is equitable to attribute taxes paid to the regulated utility in the same manner as for all other affiliates (both non-regulated and, potentially, regulated) of the tax-paying entity. The modified effective tax rate method would accomplish this by allocating losses that reduce corporate taxable income proportionately to all affiliates that have positive taxable income and, hence, contribute to the net tax amount that is actually paid to units of government. Without this type of approach, in a situation where the utility and an affiliate have the same stand-alone tax liability, the affiliate could be attributed less of the total taxes paid than the utility.

Under the stand-alone approach that the Commission has traditionally employed, properly attributed would be defined as the attribution of tax liabilities or benefits to the entity whose activities created the items of income and expenses that produced the tax liabilities or tax benefits. This definition would result in an amount of taxes paid that is properly attributed to the utility based on the stand-alone tax liability generated by regulated operations.

Staff believes that there are several policy reasons supporting a stand-alone approach. The first and most important consideration is discussed in Staff's February 2005 White Paper on Treatment of Income Taxes in Utility Ratemaking. Attributing income taxes on a stand-alone utility basis is consistent with the fundamental principle of basing utility rates on utility costs and revenues, and prohibiting cross-subsidization between utility and non-utility operations. This principle states that ratepayers should bear only costs for which they are responsible. If ratepayers are responsible for costs, they should receive the tax benefits associated with the costs; if they do not bear the costs, they should not get the related tax benefits. Thus, the tax benefits of losses should be excluded from customer rates unless the underlying costs are recognized. Likewise, the stand-alone approach meets the "benefits and burdens" test (described

in the February 18, 2005, memorandum from Assistant Attorney General Jason Jones) that the Commission should consider in choosing a policy for calculating utility income tax expense.[1]

Other reasons also favor a stand-alone approach. Attributing taxes paid to the utility's regulated operations using its stand-alone tax liability is fair to the utility. PGE, for example, made cash payments to Enron based on its stand-alone tax liability under the terms of the corporate tax allocation agreement. It would be unreasonable not to recognize as taxes paid (again, limited by the caps in subsection 3(12)) those payments, made for purposes of income taxes, when they are a genuine cost, at least for the utility itself. As a practical matter, the stand-alone attribution method may reduce the chances that an adjustment under SB 408 would result in rates that are confiscatory and violate ORS 756.040.[2]

Moreover, a loss-allocation approach could result in inequitable results among the four Oregon utilities subject to the new law. The amount of taxes paid attributed to each utility—even if they all had the same amount of taxable income in a given year—could vary widely simply due to the structure of the corporate family and the financial results of individual members. Staff and intervenor workload aside, an attribution method that necessitated gathering and auditing the confidential financial and tax records of, in some cases, dozens or even hundreds of companies over which the Commission has no regulatory authority would seem to be questionable public policy.

Staff's Recommendation regarding Calculation of "Properly Attributed"

Staff believes the calculation of "properly attributed" should meet three main criteria. First, it should account for the amount of the affiliated group's tax liability that is directly attributable to the revenues and expenses of the utility. Second, it should reflect other income tax effects that the Commission, in a utility's general rate proceeding, has determined are related to a burden borne by utility customers. Third, it should be administratively practical.

With respect to the first and third criteria, Staff believes PacifiCorp's "with and without" approach would be most accurate for capturing the effect of the regulated utility's operations on the amount of the actual tax liability of the entity that files tax returns for the affiliated group. The company's straightforward approach uses the entire affiliated group's actual tax returns and performs a pro forma calculation—using tax forms—to determine the amount of tax liability without the utility. The difference is the amount attributable to the utility. As PacifiCorp stated in its proposal, this figure may be different from a traditional utility standalone tax liability due to factors such as affiliate losses offset by the utility's taxable income, alternative minimum taxes, and general business tax credits. Staff and other parties should be able to readily verify this "with and without" calculation. It is simply a mathematical computation that does not entail the factual determinations that other approaches require.

[1] This is not to say that the Commission should not make other adjustments to income taxes if it finds that utility customers are bearing a burden related to financial or other operations of an unregulated affiliate.
[2] The Commission will need to determine how a rate adjustment under SB 408 will be treated for purposes of determining a utility's earnings and whether ORS 756.040 would be violated. Staff believes such a factual determination is outside the scope of this rulemaking.

The second criterion addresses the key question the Commission must decide in defining properly attributed: whether to adopt an approach that automatically reduces the utility's "properly attributed" tax liability for tax savings such as an affiliate's losses or debt at the parent or holding company level. Staff does not support a method that automatically passes those tax benefits to utility customers. Rather, if the Commission has found in a general rate case that, as a factual matter, the utility is affected by any factors that are not reflected in a stand-alone calculation of the utility's taxes, the corresponding ratemaking adjustment to income taxes should be carried forward in determining the amount of "properly attributed" taxes paid. For example, if the Commission makes a ratemaking adjustment to income taxes such as it made in docket UE 170 (Order 05-1050), that adjustment should also be reflected in the annual calculation of properly attributed under SB 408, assuming it has not been reflected in the "with and without" calculation.

For instance, assume the Commission made an adjustment in a utility's general rate case that reduced income taxes in rates by $10 million. The amount of "taxes collected" under section 3(13)(e) would be lower by that $10 million by virtue of the effective tax rate from the rate case used in the calculation. Since a calculation of "taxes paid" using the tax returns would not capture that ratemaking adjustment, a separate adjustment would need to be made to avoid undoing the $10 million adjustment directed by the Commission in the rate case.

In summary, staff supports the proposed "without and without" approach with other adjustments as necessary to reflect income tax ratemaking decisions the Commission has made in general rate proceedings.

Other Proposals for "Properly Attributed"

Avista, CUB and ICNU/NWIGU each submitted an alternative proposal that would require (to a greater or lesser extent) a calculation of each affiliate's tax liability, including adjustments for deferred taxes or accelerated depreciation. Each of these approaches would pass through to utility customers, in all or limited circumstances, tax benefits associated with affiliate losses or non-utility ownership debt. Staff believes that these proposals introduce a level of complexity that is unwarranted, unless the Commission disagrees with staff's position that there should not be an automatic reduction in the utility's properly attributed amount by those tax effects.

Avista's alternative proposal would use the stand-alone tax liability of Oregon regulated operations for properly attributed, except that amount would be reduced by a share of non-regulated tax savings when the group or subgroup has a net loss. Among the three proposals, the Avista approach seems the most justifiable because it would allocate losses to the utility only to the extent income of regulated operations enables non-utility losses to reduce the group's taxes.

ICNU/NWIGU propose a method that would identify a subgroup of affiliates with defined transactional nexus, then allocate a share of tax savings from affiliates with losses to the utility (apparently with no adjustments for deferred taxes). The ICNU/NWIGU proposal also would require the Commission to make a factual determination within the SB 408 review period

whether or not an affiliate making a sale to the utility has included tax credits in the sales price; if not, an adjustment would be made to allocate those credits to the utility.

CUB's proposal is even more complex. The tax liability for each affiliate within the utility's chain of ownership would be adjusted for accelerated depreciation, and then the share of net interest-related deductions would be allocated across those units with positive tax liabilities. In addition, if the utility were earning above its authorized ROE, the negative tax liability of affiliates would be allocated among the utility and all other members of the group (after adjusting each member's tax liability for the effects of accelerated depreciation).

Staff believes each of these methods would require time-consuming calculation and verification of each affiliate's tax liability, including adjustments for deferred taxes so as to avoid IRS normalization violations. The calculation would be arduous when a utility has numerous affiliates. More importantly, the proposals would mechanically reduce taxes paid for the tax benefits of non-utility debt or affiliate losses; again, we believe those are utility-specific factual determinations that should be made within the context of a general rate proceeding.

ICNU/NWIGU proposal for the 3(12)(a) cap

Section 3(12)(a) provides that the amount of tax paid that is properly attributed to the utility may not exceed "That portion of the total taxes paid that is incurred as a result of income generated by the regulated operations of the utility." ICNU and NWIGU interpret that to mean income taxes on the stand-alone regulated utility operations should be reduced by any tax liabilities or credits supported, directly or indirectly, by the utility's regulated operations. These amounts would include interest payments on debt held by an affiliate or parent when the payments are supported by utility revenues, as well as income tax credits on affiliate generating resources when there is a power sale to the utility.

Staff disagrees with the parties' interpretation of 3(12)(a). The DOJ opinion stated that "paragraph 3(12)(a) addresses those taxes that would not have been received by units of government 'but for' the existence of regulated operations." That statement might be viewed as supporting consideration, for example, of holding company interest expense supported by revenues from the utility. However, the opinion goes on to say that "only the 'portion' of taxes paid on the utility's regulated operations is counted for purposes of subparagraph 3(12)(a)," which indicates the utility's stand-alone tax liability. For that reason, we believe that if the Commission considers the type of indirect income tax adjustments that ICNU and NWIGU are proposing, that should not be done within the 3(12)(a) cap. Instead, the Commission should make any such adjustment only in determining "properly attributed" (in staff's view, to the extent the Commission has identified ratemaking adjustments in a general rate case).

Earnings Test

Each of the four utilities proposes to reduce any surcharge (surcredit) under the automatic adjustment clause to the extent the utility's earnings are higher (lower) than its authorized ROE. (NW Natural recommends that a separate adjustment be made along with the surcharge or surcredit, but the net result is the same.) The utilities argue that the earnings test is required to

ensure that rates, including SB 408 adjustments, are fair, just and reasonable under ORS 756.040 and 757.210.

Staff disagrees that an earnings test is routinely required under SB 408. Nowhere in SB 408 is there any reference to an earnings review. Rate adjustments will be calculated for income taxes on an annual basis in the same manner as, for example, purchased gas cost changes for the natural gas utilities and net variable power cost changes for PGE and PacifiCorp.[3] The former (as described below) does not involve an earnings test that limits rate changes to the utility earning its authorized ROE; the latter includes no earnings review at all. There is a presumption that rates are reasonable unless a party makes a case to the contrary. Both of these annual pass-through mechanisms involve far more of the utility's overall revenue requirement than do income taxes.

The Department of Justice opinion clearly states that rates must be "fair and reasonable" under ORS 756.040(1). Staff does not believe this requires the Commission to conduct an earnings review as a matter of course in determining a rate adjustment pursuant to the SB 408 automatic adjustment clause. Instead, if the utility or any other party believes that a particular rate adjustment will result in rates that are not fair and reasonable, they should ask the Commission to make that determination—in the same manner as any party may request the Commission find that there is "a material adverse effect on customers" under section 9 of the law. The AR 499 rules should include a process by which a party makes a request and the Commission makes a determination, on a case by case basis, whether or not implementation of a proposed rate adjustment, in and of itself, would cause a 756.040 violation or material adverse effect.

If the Commission decides to include in the AR 499 rules a requirement for an earnings review, staff agrees with ICNU and NWIGU that rates, after a SB 408 adjustment, are not necessarily confiscatory if the utility earns less than its authorized return. The level at which rates become confiscatory is far below the utility's authorized return. For example, the Commission's decisions in deferred accounting dockets UM 995, UM 1007, UM 1008/1009, UM 1187 and UM 1198 required electric utilities to absorb excess power costs up to 250 basis points ROE—with sharing between customers and stakeholders thereafter. Similarly, the Commission conducts a separate spring earnings review for the LDCs that occurs because these utilities have a purchased gas adjustment mechanism; the utilities retain 100 percent of over-earnings up to 300 basis points above an adjusted authorized ROE, with sharing above that level. As stated above, staff recommends that the Commission make a factual determination regarding a claim of ORS 756.040 violation or material adverse effect specific to a particular utility's circumstances.

Expenses Between Rate Cases

As an alternative to an earnings review, Avista argues that the Commission, in determining taxes paid and properly attributed to the regulated operations of the utility, should make adjustments to remove the tax effects of net cost changes since the last rate case and for

[3] Staff is not proposing that the annual SB 408 adjustment should have a forward-looking component in addition to the true-up, such as the PGA does.

regulatory disallowances. Similarly, PGE proposes that the AR 499 rules require a deferred account under which customers would be charged for the tax benefits related to disallowed utility expenditures and investments, and for investments not included in rates. The rationale for those adjustments is that customers should not get the tax benefit (that reduces the amount of taxes paid) for costs not included in rates.

While the utilities' proposal might result in a more "fair" outcome for taxes paid, staff does not believe the Commission has discretion to make those adjustments—or, if does have that discretion, should not do so as a matter of policy. In crafting SB 408, the legislature considered various elements and explicitly limited adjustments to taxes paid to three items in 3(13)(f):

1. Tax savings realized as a result of charitable contributions made by the utility;
2. Tax savings realized as a result of tax credits to the extent the expenditures have not been taken into account in the last general rate proceeding; and
3. Deferred taxes related to the regulated operations of the utility.

An adjustment related to tax benefits for expenses and investments not included in rates clearly is not on this list. In fact, the DOJ opinion at 20-24 squarely addressed this issue, concluding that 3(13)(f)(B) was limited to tax credits related to capital outlays the Commission have not yet taken into account in a general rate proceeding, not tax deductions for other utility costs such as the utilities have proposed. For the Commission to adopt AR 499 rules that allow those adjustments to taxes paid would be poor policy and circumvent the plain intent of the new law.

PGE Proposal for "Taxes Charged to Customers"

PGE's first straw proposal is that "Taxes Charged" should be defined in a manner similar to "Taxes Collected" in section 3(13)(e), except that the ratios for net to gross revenues and effective tax rate would be calculated using actual FERC Form 1 data rather than ratemaking data that the DOJ opinion stated is required. PGE's rationale is the law does not define "taxes charged," and the use of actual utility data is necessary to reach a fair result.

Staff completely disagrees with PGE's interpretation. The company's proposal to define "taxes charged" is remarkable given that the phrase does not even appear in SB 408. PGE somehow contends that the "taxes collected" definition in 3(13)(e) applies only to the tax report filing and not the calculation of a rate adjustment in the automatic adjustment clause in section 3(6)—despite the explicit use of "authorized to be collected through rates" in 3(6). Staff believes that the language in section 3(6) below clearly defines "charged for" as the difference between the amount of taxes paid that are properly attributed to the regulated operations of the utility and the amount of taxes authorized to be collected in or through rates:

> "The automatic adjustment clause shall account for all taxes paid to units of government. . .that are properly attributed to the regulated operations of the utility, and all taxes that are authorized to be collected through rates, so that ratepayers are not charged for more tax than:

(a) The utility pays to units of government and that is properly attributed of government and that is properly attributed to the regulated operations of the utility; or
(b) In the case of an affiliated group, the affiliated group pays to units of government and that is properly attributed to the regulated operations of the utility."

In short, the automatic adjustment clause requires the calculation of "taxes authorized" as defined in 3(13)(e), including the use of ratemaking data for the net to gross and effective tax rate ratios.

DATED this 3rd day of May 2006.

Respectfully submitted,

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Attachment A
AR 499 - April 24, 2006 Straw Proposals
Calculation of Properly Attributed (before 12(a) and 12(b) caps and 13(f) adjustments)

	PacifiCorp[4]	Avista	CUB*[5]	ICNU/NWIGU[6]
Method	"With & Without"	Stand-alone adjusted for net negative tax liability of nonregulated affiliates	Stand-alone adjusted for interest deductions and negative tax liabilities.	Proportionate share / allocation of negative tax liabilities
Group	Affiliated Group	Nonregulated affiliates (or subgroup with nexus to utility)	(a) Chain of ownership / (b) Affiliated group	Subgroup = utility subsidiaries, all affiliates with same immediate parent, and affiliates with nexus (transactions > $100,000 unless FERC or OPUC pricing).
How Calculated	Difference between the affiliated group's tax liability including regulated operations and the group's tax liability excluding regulated operations. Proforma "but for" analysis using group's consolidated tax returns.	Stand-alone tax liability of Oregon regulated operations, unless group of nonregulated affiliates has a net negative tax liability. Then, after adjusting that negative liability for deferred taxes, allocate net liability among Oregon and non-Oregon regulated operations based on proportionate share of positive tax liabilities (adjusted for deferred taxes).	Adjust stand-alone tax liability by (a) share of interest-related tax deductions utility's chain of ownership, allocated on proportional share of parent & subsidiary positive tax liabilities (adjust for accelerated depreciation); and (b) share of negative tax liabilities (after adjustiments) if utility earnings above authorized ROE.	Total taxes paid by subgroup allocated among all affiliates based on stand-alone positive net taxable income.

[4] PacifiCorp also proposed a "Lesser of" approach that would define properly attributed (prior to the 12(a) and (b) caps) as the utility's stand-alone tax liability.

[5] CUB, ICNU and NWIGU continue to support full loss allocation or proportionate share method as defined by the temporary rule.

[6] ICNU/NWIGU also propose the 12(a) cap (stand-alone utility amount) include adjustments for tax liabilities or credits supported directly or indirectly by the utility's regulated revenues; e.g., interest payments, tax credits.

CERTIFICATE OF SERVICE

I certify that on May 3, 2006, I served the foregoing upon the parties hereto by electronic mail and sending a true, exact and full copy by regular mail, postage prepaid or by shuttle mail/hand deliver to the parties accepting paper service.

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