BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 499

In the Matter of the Adoption of Permanent Rules Implementing SB 408 Relating to Utility Taxes.	)))))	OPENING LEGAL COMMENTS OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES

Pursuant to Administrative Law Judge ("ALJ") Kathryn Logan's Memorandum issued in Public Utility Commission of Oregon ("OPUC" or the "Commission") Docket No. AR 499 on October 5, 2005, the Industrial Customers of Northwest Utilities ("ICNU") submits these Opening Legal Comments regarding adoption of permanent rules to implement Senate Bill ("SB") 408. SB 408 was an important first step in ensuring the amounts that Oregon utilities collect in rates for income taxes reflect the actual amount of taxes paid to units of government. The OPUC's adoption of rules to implement SB 408 is an equally important step in this process, and ICNU offers these comments urging the Commission to enact rules that will implement the Bill in a manner that will result in a match between the costs collected in rates for income taxes and the amount of taxes paid that are properly attributed to the regulated operations of the utility.

The ALJ has identified the following four issues to be addressed in these opening legal comments:

1. How should the Commission apply the "properly attributed" standard as it appears in the individual sections of the bill?

2. What did the legislature intend in adoption of section 3(13)(f)(B)?

3. May the Commission terminate the automatic adjustment clause upon showing by a utility that the automatic adjustment clause has a material adverse effect on the utility?

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4. Section 3 of SB 408 requires the Commission to establish an automatic adjustment clause within 30 days (or later date, established by rule, not to exceed 60 days) once a determination is made regarding the $100,000 trigger amount. Section 4 states that if an automatic adjustment clause is established, it applies only to taxes paid to units of government and collected from ratepayers on or after January 1, 2006. If a utility pays quarterly estimated taxes, must the automatic adjustment clause be applied quarterly, or does the law allow it to be applied yearly?

Re Adoption of Permanent Rules to Implement SB 408, OPUC Docket No. AR 499, Memorandum at 1-2 (Oct. 5, 2005). ICNU's response to the issues identified by the ALJ is described below.

A. The Commission Adopted the Correct Interpretation of "Properly Attributed" in AR 498

The meaning of "properly attributed" is key to giving effect to the intent of SB 408, and the Commission applied the proper meaning when it adopted the temporary rule in AR 498. Re Adoption of Temporary Rules to Implement SB 408, OPUC Docket No. AR 498, Order No. 05-991, Appendix A at 1 (Sept. 15, 2005). "Properly attributed" modifies the term "taxes paid" in SB 408 in reference to taxes related to the regulated utility and unregulated affiliates. The legislative intent in modifying "taxes paid" in this manner was to allocate total "taxes paid" among all members of the affiliated group, including the utility. This allocation is necessary under SB 408 to make the authorized adjustment to the utility's rates through the automatic adjustment clause. SB 408 allows a rate adjustment to incorporate taxes paid that are properly attributed to regulated utility operations but specifically prohibits a rate adjustment that would impose on ratepayers any amount of taxes paid that is properly attributed to any unregulated affiliate.

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SB 408 does not explicitly define "properly attributed;" however, the text and context of the Bill demonstrate that the legislature intended to use the definition that the Commission adopted in its temporary rule. Under that definition, each member of the affiliated group is "properly attributed" its proportionate share of the total taxes paid by the group based on its individual tax liability, regardless of whether the member is the regulated utility or an unregulated affiliate.[1/] This interpretation results in the same meaning of "properly attributed" being applied in all sections of the Bill that deal with the affiliated group, and allows the amounts that are "properly attributed" to be determined in the same manner and on the same basis for the regulated utility as for unregulated affiliates. This definition is consistent with the intent of SB 408 and the rules of statutory construction, and it solves the problem that SB 408 was enacted to address.

1. Analyzing SB 408 Under PGE v. BOLI Establishes That The Commission's Temporary Rule Correctly Defined "Properly Attributed"

The Commission's task in interpreting the "properly attributed" language is to discern the legislature's intent, and the Oregon Supreme Court has set out a three-step analysis to help determine that intent. PGE v. BOLI, 317 Or. 606, 610 (1993). In the first step, the text of the statute is examined and provides the best evidence of the legislative intent. Id. The first step also involves examining the provision at issue in the context of other provisions of the same statute as well as related statutes. Id. at 611. In considering the text and context of the statute, the Commission can also utilize rules of construction that bear directly on the meaning of the text

[1/] The specific definition of "properly attributed" adopted in AR 498 is the product of two values: 1) the total amount of taxes paid by the public utility or affiliated group to units of government; and 2) the ratio of the tax liability of Oregon regulated operations of the public utility to the total tax liability from all affiliates of the public utility or the affiliated group with a positive tax liability. OPUC Docket No. AR 498, Order No. 05-991, Appendix A at 1.

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or the interpretation of the provision in context. Id. These rules provide that words of common usage typically should be given their plain, natural, ordinary meaning, and that use of the same term throughout a statute indicates that the term has the same meaning throughout the statute. Id.

Only if the intent of the legislature cannot be discerned from examining the text and context of the statute, should the Commission proceed to the second step of the analysis, which involves consideration of the legislative history. Id. at 611-12. If the legislature's intent still remains unclear after examining the text and context of the statute as well as the legislative history, then the last step is to resort to general maxims of statutory construction. Id. at 612.

Applying the PGE v. BOLI analysis in the context of SB 408 establishes that the Commission correctly interpreted the "properly attributed" language when it adopted its temporary rule in AR 498. Given that the legislature's intent with respect to the correct interpretation of "properly attributed" is evident from considering the plain meaning of that phrase in the context of multiple provisions of SB 408, ICNU has not identified in these Opening Comments the portions of the legislative history that confirm this interpretation. To the extent that other parties argue that the legislative history supports an alternative interpretation, ICNU will respond to those arguments in its Reply Comments.

2. "Properly Attributed" in the Affiliated Group Context Means That Each Member of the Group is Attributed Its Proportionate Share of Taxes Paid

In SB 408, the legislature intended to distinguish between "taxes paid" that are "properly attributed to the regulated operations of the utility" and those that are not. The purpose of this distinction ultimately is to determine the amount of taxes that should be included in any adjustment to rates under the automatic adjustment clause. Although there may be different methodologies for making this distinction, the focus in this proceeding should be to adopt a

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methodology that is consistent with all provisions of SB 408 and the legislative intent, keeping in mind that SB 408 was enacted to correct the problem of utilities collecting amounts in rates for estimated income taxes that did not account for offsetting losses of unregulated affiliates when taxes were filed on a consolidated basis. The interpretation that the Commission approved in the temporary rule adopted in AR 498 corrects this problem and does so in a manner that applies the "properly attributed" language to the regulated utility and unregulated affiliates on the same basis. The interpretation and approach that has been advocated by PacifiCorp and other utilities does not. The alternatives that the utilities have proposed for defining "properly attributed" would either preserve the current stand-alone policy with respect to utility income taxes or result in the regulated utility being attributed a disproportionate share of the overall "taxes paid" by the affiliated group. Such a result does not give the proper effect to SB 408 and is inconsistent with the Bill and the legislature's intent.

a. The Text and Context of SB 408 Demonstrate That the Commission Correctly Interpreted "Properly Attributed" in AR 498

The text and context of SB 408 establish the correct interpretation of "properly attributed." As an initial matter, SB 408 defines "taxes paid" as the "amounts received by units of government from the utility or from the affiliated group of which the utility is a member," subject to certain adjustments that are inapplicable to this discussion. SB 408 § 3(13)(f). The Bill defines "regulated operations of the utility" as "those activities of a public utility that are subject to rate regulation by the commission." SB 408 § 3(13)(c). Thus, using SB 408's definitions, the Commission's task in this proceeding is to determine the "amounts received by units of government from . . . the affiliated group" that are properly attributed to "activities of a

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public utility that are subject to rate regulation by the commission" as opposed to unregulated affiliates and operations.

i. The Plain Meaning of "Properly Attributed" Considered in the Context of SB 408 Demonstrates the Correct Definition

Considering the plain meaning of "properly attributed" in the context of multiple provisions of SB 408 demonstrates that the Commission adopted the correct definition of "properly attributed" in AR 498. First, as described above, "taxes paid" is defined in the Bill as "amounts received by units of government from the utility or from the affiliated group of which the utility is a member." SB 408 § 3(13)(f). This definition contemplates a "net" number that is determined by netting the gains and losses of all affiliates. In other words, the gain and losses of all affiliates must be taken into account in determining "taxes paid."

Second, two separate but related sections use "properly attributed" to establish that taxes paid that are "properly attributed to the regulated operations of the utility" may be included in rates, but taxes paid that are "properly attributed to any unregulated affiliate of the public utility" may not. Section 3(6) specifies amounts to be included in the automatic adjustment clause:

> The automatic adjustment clause shall account for <u>all taxes paid to units of government</u> by the public utility that are properly attributed to the regulated operations of the utility, or by the affiliated group that are properly attributed to the regulated operations of the utility, and <u>all taxes that are authorized to be collected through rates, so that ratepayers are not charged for more tax than</u>:
>
> (a) the utility pays to units of government and that is properly attributed to the regulated operations of the utility; or

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> (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.

SB 408 § 3(6) (emphasis added). Under this section, if the amount of "taxes paid" that is properly attributed to the utility is less (or more) than the amount of taxes collected, then the rates of the utility are adjusted with a refund (or surcharge) of the difference.

Section 3(7) uses the same "properly attributed" language to exclude from an adjustment to rates under the automatic adjustment any amounts of "taxes paid" that are "properly attributed to any unregulated affiliate of the utility" or to its parent:

> An automatic adjustment clause established under this section may not be used to make adjustments to rates for taxes paid that are properly attributed to any unregulated affiliate of the public utility or to the parent of the utility.

SB 408 § 3(7) (emphasis added). According to the rules applied in the first level of statutory interpretation, "use of the same term throughout a statute indicates that the term has the same meaning throughout the statute." PGE, 317 Or. at 611. Thus, in establishing how the Commission would determine the amounts to be included in the automatic adjustment clause, the legislature intended that the OPUC would properly attribute the "taxes paid" by an affiliated group among all affiliates, including the utility. In addition, because the legislature used the same phrase, "properly attributed," to refer to the allocation of "taxes paid" to both the "regulated operations of the utility" under Section 3(6) and "unregulated affiliates" under Section 3(7), the intent was that taxes paid would be attributed to each on the same basis according to a consistent meaning of that phrase. Thus, whatever the definition of "properly attributed," it must have one meaning that attributes taxes paid to the regulated utility and to unregulated affiliates on the same basis. Of the two competing proposals before the Commission, only Staff's

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definition of "properly attributed" applies a uniform attribution to both the regulated utility and unregulated affiliates.

ii. Staff's Interpretation Applies the Same Meaning of "Properly Attributed" Throughout SB 408

In AR 498, Staff proposed, and the Commission adopted, a meaning of "properly attributed" that results in the attribution of taxes paid among both the regulated utility and unregulated affiliates on the same basis. Under Staff's definition, the amount of "taxes paid" that is "properly attributed" to any member of the affiliated group is proportionate to the relative contribution of each member to the total amount of taxes paid by the affiliated group as a whole. This interpretation of "properly attributed" gives effect to all provisions of SB 408 and applies the same meaning of the phrase throughout all provisions of the Bill, regardless of whether the provision addresses the regulated utility or an unregulated affiliate. Table 1 depicts the example used by Staff to demonstrate the definition of "properly attributed" adopted in the temporary rule.

Table 1

	Stand-alone Tax Liability	Amount of Taxes Paid and Properly Attributed
Affiliate X (Regulated Utility)	$130	$100
Affiliate Y	$130	$100
Affiliate Z	$0 [2/]	$0
Consolidated Tax Payment	$200	$200

In this example, because Affiliate X (the Regulated Utility) and Affiliate Y contributed to the affiliated group's total taxes paid in equivalent amounts, each entity is properly attributed 50% of

[2/] This example assumes that Affiliate Z lost $60. Thus, Affiliate Z's stand-alone tax liability was zero, but the consolidated tax liability was $200.

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the total taxes paid. No amount of the taxes paid is "properly attributed" to Affiliate Z, because Affiliate Z had no positive contribution to the affiliated group's taxes paid.[3/] As a result, for each dollar of the total taxes paid, $0.50 is properly attributed to Affiliate X, $0.50 is properly attributed to Affiliate Y, and $0.00 is properly attributed to Affiliate Z.

Under this definition, customers are responsible for $100, which is the Regulated Utility's (Affiliate X) proportionate share of the total taxes paid by the affiliated group. If more than $100 had been collected in rates for taxes, an adjustment to rates would be made. No adjustment to rates would be made, however, to reflect amounts that are "properly attributed" to Affiliate Y or Affiliate Z. This interpretation of "properly attributed" is consistent with the requirements in Sections 3(6) and 3(7) of the Bill and applies the same definition of properly attributed across all provisions of the statute. Indeed, the Commission can determine the amount of taxes paid that are properly attributed according to the same meaning regardless of whether it was considering the Regulated Utility under Section 3(6) or an unregulated affiliate under Section 3(7). This definition reflects the legislature's intent that the taxes collected by the utility match the taxes paid by the affiliated group and attributed to regulated utility operations, and it is consistent with Oregon's rules regarding statutory interpretation. PGE, 317 Or. at 611.

iii. The Utilities Propose That "Properly Attributed" Have Different Meanings for the Utility and Unregulated Affiliates

The utilities have proposed an interpretation of "properly attributed" that requires a different meaning of the phrase depending on whether the Commission was determining the

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[3/] It is important to remember in this context that the amount to be attributed is the "taxes paid," which is a net number that takes into account the relative tax liabilities of each member of the affiliated group. "Properly attributed" does not refer to apportioning a net loss to any entity in the affiliated group, i.e., the least amounts of the positive net "taxes paid" that can be properly attributed to any affiliate is zero.

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amount "properly attributed" to the Regulated Utility or an unregulated affiliate. See, e.g., Re Adoption of Temporary Rules to Implement SB 408, OPUC Docket No. AR 498, Petition of PacifiCorp to Repeal or Amend Temporary Rule (Oct. 14, 2005). This interpretation is inconsistent with the basic rules of statutory interpretation and requires insertion of requirements that were not included SB 408. Furthermore, adoption of the utilities' interpretation would render certain provisions of SB 408 meaningless and would not fulfill SB 408's intent to ensure that the amount of taxes collected in rates reflect the amounts that were actually paid to units of government and attributed to utility operations.

The utilities propose an interpretation under which the amount of taxes paid that is "properly attributed" to the regulated operation of the utility would always be the utility's stand-alone tax liability unless that amount was greater than the total "taxes paid" by the affiliated group. Id. at 12. In addition, even if the utility's stand-alone tax liability was greater than the total taxes paid by the affiliated group, affiliate losses would be used to reduce the utility's stand-alone tax expense only if such losses were not fully offset by affiliate gains. Id. Table 2 illustrates the effect of the utilities' interpretation.

Table 2

	Stand-alone Tax Liability	Amount of Taxes Paid and Properly Attributed
Affiliate X (Regulated Utility)	$130	$130
Affiliate Y	$130	$70
Affiliate Z	$0 [4/]	$0
Consolidated Tax Payment	$200	$200

[4/] This example assumes that Affiliate Z lost $60. Thus, Affiliate Z's stand-alone tax liability was zero, but the consolidated tax liability was $200.

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Under the utilities' interpretation, 100% of every dollar of taxes paid by the affiliated group would be "properly attributed" to Affiliate X (the Regulated Utility) up to the amount of Affiliate X's stand-alone tax liability before any amount is attributed to Affiliate Y or Affiliate Z. In addition, amounts would be "properly attributed" to Affiliate X regardless of the relative contribution of Affiliate Y or Z to the overall taxes paid. Only after an amount equal to Affiliate X's stand-alone tax liability has been attributed to Affiliate X would any amount be "properly attributed" to any other affiliate.

The utilities' interpretation is inconsistent with the plain language and intent of SB 408, and it requires that different definitions of "properly attributed" be applied depending on whether the Commission is considering the amount properly attributed to the regulated utility under Section 3(6) or to an unregulated affiliate under 3(7). Indeed, under Section 3(6), all amounts of taxes paid would be "properly attributed" to regulated utility operations unless the utility's stand-alone tax expenses was greater than the total taxes paid. Under Section 3(7), however, no amount of taxes paid would be "properly attributed" to unregulated affiliates unless the utility's stand-alone tax expense was greater than the total taxes paid. There is no basis in either the text or context of SB 408 to apply a different meaning of "properly attributed" to the regulated utility than applies to an unregulated affiliate. Achieving the result contemplated by the utilities requires applying a different meaning to "properly attributed" in Section 3(6) than would apply in Section 3(7), which is improper and inconsistent with basic rules of statutory construction. In addition, as seen in the example above, even if the Regulated Utility and Affiliate Y contribute the same amount to the taxes paid by the affiliated group, a greater percentage of taxes paid would be "properly attributed" to the Regulated Utility than to

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Affiliate Y under the utilities' interpretation. "Properly attributed" is presumed to have the same meaning throughout the statute, and the amounts that are properly attributed to regulated and unregulated operations should be determined on the same basis.

The incorrect results that would stem from the utilities' interpretation are evident from applying that interpretation in the context of Section 3(12), which caps the amount of taxes paid that are properly attributed to the regulated operations of the utility:

> For purposes of this section, taxes paid that are properly attributed to the regulated operations of the public utility may not exceed the lesser of:
>
> (a) That portion of the total taxes paid that is incurred as a result of income generated by the regulated operations of the utility; or
>
> (b) The total amount of taxes paid to units of government by the utility or by the affiliated group, whichever applies.

If the utilities' interpretation is correct, this subsection would mean that the amount of taxes paid that is "properly attributed" to the utility is the lesser of these two amounts, because the amount of taxes paid that is properly attributed to regulated operations of the utility would always be either the utility's stand-alone tax expense or the total amount of taxes paid. Again, the only situation in which taxes paid and properly attributed to regulated utility operations would not be the utility's stand-alone tax liability would be when the amount of total taxes paid was less than that stand-alone liability. Interpreting "properly attributed" in this manner would eliminate the "may not exceed" language in Section 3(12) and rewrite that section to define "properly attributed to the regulated operations of the utility." This would eliminate the concept of "attributing" amounts of taxes paid among various members of an affiliated group under Sections 3(6) and 3(7), because the amount properly attributed to the utility would always reflect

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one of two amounts. The Commission should not adopt an interpretation that would render these provisions meaningless.

B. Section 3(13)(f)(B) Adjusts "Taxes Paid" Under Certain Circumstances to Reflect Tax Credits Related to Investment in the Utility

The adjustment to taxes paid in Section 3(13)(f)(B) is intended to take into account tax credits that arise from utility investments that have not been included in rate base as part of rates established in a general rate case. This section provides that "taxes paid" will be:

> Increased by the amount of tax savings realized as a result of tax credits associated with investment by the utility in the regulated operations of the utility, to the extent the expenditures giving rise to the tax credits and tax savings resulting from the tax credits have not been taken into account by the commission in the utility's last general ratemaking proceeding.

SB 408 § 3(13)(f)(B). Under typical circumstances, the cost of prudent investments is included in rate base and recovered from customers. Because customers bear the cost of the investment, any tax savings associated with a tax credit taken for that investment also are provided to customers. The starting point for the true-up and any rate adjustment is "taxes paid," in which the utility has taken all available tax credits. The "taxes paid" is increased, thereby allowing the utility to collect and retain more from ratepayers as a tax expense, only in the very limited circumstance in which the utility has made an investment with an associated tax credit between rate cases.

Under SB 408 § 3(13)(f)(B), "taxes paid" is increased to reflect tax savings associated with tax credits on investments that have not been included in rate base and, thus, in rates, in order to allow utilities to retain the benefit of the tax credit if the utility is not recovering the cost of the investment from customers in rates. As such, the adjustment in

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SB 408 § 3(13)(f)(B) is intended to apply in very limited circumstances to remove the tax savings in taxes paid that would otherwise benefit ratepayers through the automatic adjustment clause.

C. The Commission May Not Terminate the Automatic Adjustment Clause Based on a Material Adverse Effect on the Utility

SB 408 does not permit the Commission to terminate an automatic adjustment clause established under Section 3 based upon a "material adverse effect" to the utility. Section 3(9) of the Bill provides:

> If the commission determines that establishing an automatic adjustment clause under this section would have a material adverse effect on customers of the public utility, the commission shall issue an order terminating the automatic adjustment clause. The order shall set forth the reasons for the commission's determination under this subsection.

The plain language of this provision states that the Commission may terminate an automatic adjustment clause only if the clause would have a material adverse effect on *customers*. No provisions of the Bill provides for termination of an automatic adjustment clause based on the effects on utilities. There is no need to resort to legislative history, because the language is unambiguous and the legislative intent is clear.

SB 408 was passed in light of evidence that significant amounts have been collected in rates for the cost of income taxes that were not paid to a unit of government or that exceeded the utility's proportionate share of the total consolidated taxes that were paid. If SB 408 is implemented as intended, it will affect the ability of a utility or its parent to retain the amounts by which the income tax liability of the stand-alone utility can be offset by activities or losses of affiliate companies. Allowing utilities to argue that such impact constituted a "material

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adverse effect" that justifies terminating an automatic adjustment clause would undermine the intent of SB 408.

D. An Automatic Adjustment Clause Can Be Applied Yearly to a Utility That Pays Quarterly Estimated Taxes

ICNU believes that this matter is left to the Commission's discretion, consistent with the requirements of the Bill, to determine how to implement the Bill to best protect customers.

CONCLUSION

The legislature enacted SB 408 to address the problem of utilities collecting in rates amounts for estimated taxes that did not account for offsetting losses of affiliates when taxes are filed on a consolidated basis. The intent of the Bill was to provide a better matching of the amounts of taxes collected from ratepayers with the amounts of taxes paid that are properly attributed to the regulated operations of the utility. Interpretations of "properly attributed" that focus solely on the utility's stand-alone tax liability or attribute disproportionate amounts of taxes paid to the regulated utility and its customers only perpetuate the problem that SB 408 was enacted to resolve. Commission Staff has identified the correct interpretation of "properly attributed" and included it in the temporary rule adopted by the Commission in AR 498. The Commission should retain that definition for the permanent rules to implement SB 408.

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Dated this 28th day of October, 2005.

Respectfully submitted,

/s/ Matthew Perkins

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October 28, 2005

Via Electronically and US Mail

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Re: In the Matter of the Adoption of Permanent Rules Implementing SB 408 Relating to Matching Utility Taxes Paid with Taxes Collected
Docket No. AR 499

Dear Filing Center:

Enclosed please find an original and six (6) copies of the Opening Legal Comments of the Industrial Customers of Northwest Utilities 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 Opening Legal Comments of the Industrial Customers of Northwest Utilities, upon the parties, on the service list for AR 499, 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 28th day of October, 2005.

/s/ Ruth A. Miller
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