October 28, 2005

Via Electronic Filing and U.S. Mail

Oregon Public Utility Commission
Attention: Filing Center
PO Box 2148
Salem OR 97308-2148

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

Attention Filing Center:

Enclosed for filing in the above-captioned docket is Portland General Electric's Opening Comments. This document is being filed by electronic mail with the Filing Center.

An extra copy of this cover letter is enclosed. Please date stamp the extra copy and return it to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,

/s/ INARA K. SCOTT

Inara K. Scott

IKS:am

cc: AR 499 Service List

Enclosure

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing OPENING COMMENTS OF PORTLAND GENERAL ELECTRIC COMPANY to be served by First Class US Mail, postage prepaid and properly addressed, and by electronic mail, upon each party on the attached service list.

Dated at Portland, Oregon, this 28th day of October, 2005.

/s/ INARA K. SCOTT_____
Inara K. Scott

AR 499
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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 COMMENTS OF PORTLAND GENERAL ELECTRIC

I. Introduction

With this docket, the Public Utility Commission of Oregon (Commission) embarks on the daunting task of defining terms and creating mechanics to implement Senate Bill 408 (SB 408), an act relating to the complex subjects of taxes and ratemaking. The Legislature's statement of intent appears relatively clear: "Utility rates that include amounts for taxes should reflect the taxes that are paid to units of government to be considered fair, just and reasonable." Section 2(1)(f).[1] SB 408, however, contains undefined terms and definitions that will require further definition and interpretation. It is silent on the mechanics of its operative section, 3(6), which is an automatic adjustment clause to "account for...taxes paid to units of government [and] taxes that are authorized to be collected through rates so that ratepayers are not charged for more tax" than the utility or an affiliated group to which it belongs "pays to units of government." SB 408 also requires that the Commission "ensure compliance with the normalization requirements of federal tax law." Section 3(8)(b).

Administrative Law Judge (ALJ) Logan's Memorandum of October 5, 2005, which set four questions for briefing, recognized the efficiency of resolving legal disputes before the parties attempt to develop definitions and mechanics. Portland General Electric Company (PGE) will address these four legal disputes below. PGE believes, however, that this stage of the

[1] All section references are to sections of SB 408 unless otherwise indicated.

proceeding requires more of the parties and the Commission to ensure all of the decisions to follow in this docket support, rather than work against, the Commission's statutory responsibility to obtain for utility customers "adequate [utility] service at fair and reasonable rates." ORS 757.040.

We discuss first the framework within which we urge the Commission to guide the work of parties to this proceeding. That framework is one that places SB 408 within the body of law and policy that already exists regarding the regulation of utilities. We next provide our responses to the four specific legal questions posed.

A. Regulatory Framework

The purpose of this rulemaking docket is to develop the definitions and mechanics needed to implement SB 408 within the existing framework of public utility regulation. SB 408 is not a model of clarity, and in its short existence has already generated a divergence of opinions regarding its meaning and appropriate implementation. The Commission should not and, to some extent, cannot resolve these ambiguities and disagreements solely by reference to SB 408. This statute is now part of a legal framework that includes the federal and state constitutions, other Oregon statutes, Commission rules, and a vast number of regulatory decisions. It is also part of a regulatory framework that exists not only to effectuate this legal framework, but that has at its core the <u>result</u> the Legislature intends the Commission to achieve in carrying out its duties.

The Commission is unusual among administrative agencies because it is responsible for a result, not simply the performance of various programs. While its governing statutes include sections that require it to do certain things, such as adopt safety rules, review utility budgets and approve or reject utility tariff filings, all of these specific actions stem from its overall charge to

"protect . . . [utility] customers, and the public generally, from unjust and unreasonable exactions and practices and obtain for them adequate service at fair and reasonable rates." ORS 756.040(1). ORS 756.062 further explains, "The provisions of . . . [laws administered by the Public Utility Commission] shall be liberally construed in a manner consistent with the directives of ORS 756.040(1) to promote the public welfare, efficient facilities and substantial justice between customers and public . . . utilities."

The result required is not a one-time result; it is continuing. Over time, utility service must be adequate and at fair and reasonable rates. The indefinite time dimension adds to the Commission's decision-making a necessary review of the effects and consequences of a given decision. Any decision has consequences, both intended and unintended.

The strength of a regulatory system that has at its core a result, rather than a process, is the ability to work toward that result even in the face of complex and rapidly changing circumstances. Regulation is both flexible and adaptable, elements that are critical to achieving success.

Thus, in this docket as in any docket, the Commission must ask not one but three questions regarding rulemaking proposals offered to it:

- Does this proposal meet all statutory and constitutional standards?
- Are the intended consequences of this proposal to achieve the result of adequate service at fair and reasonable rates? and
- Is the chance of encountering unintended consequences that work against the goal of adequate service at fair and reasonable rates remote, or are there ways to address those consequences should they arise?

The latter two questions have particular importance in this docket, because the complexity of the subject matter dramatically increases the risk of unintended consequences.

PGE urges the Commission to require that, as parties make specific rulemaking proposals for the implementation of SB 408, the proponents consider what the proposal is intended to accomplish under the set of common circumstances likely to occur and how that intent supports a positive answer to the questions above. The Commission should also require that the parties' proposals consider the means by which the Commission can respond to and avert unintended consequences that work against the required results.

The Commission must also recognize that any interpretation of the terms of SB 408 must follow the legal principles of statutory construction. The tenets of statutory interpretation are prescribed by *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993) (*PGE v. BOLI*). Under those standards, the Commission must first examine the plain text and context of a statute. *Id.* at 610-11. If the statute can be read unambiguously, it should be. Statutory context includes other provisions of the same statute and other related statutes, as well as the preexisting common law and the statutory framework within which the statute was enacted. *Denton and Denton*, 326 Or 236, 241, 951 P2d 693 (1998). In this case, the statutory framework includes all existing public utility regulatory statutes, including all of ORS chapters 756 and 757. Only where the statutory language is open to ambiguity after this analysis of the text and context of the statute is there further analysis, including examination of legislative history. There are undoubtedly portions of SB 408 that will remain ambiguous after this analysis, but the Commission should first look to the statutory language and its context before resorting to legislative history.

B. Short Answers

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

Short Answer: The phrase "properly attributed" is a descriptive term, not a standard to be applied. In 3(1)(a), 3(4), and 3(6), as affected by 3(12), the phrase "taxes paid [that are] properly attributed to the regulated operations of the utility" identifies the lesser of the taxes that are incurred as a result of income generated by the regulated operations of the utility for a given year and taxes paid for that year by the utility or the affiliated group to which it belongs. Section 3(7) is a limiting provision that precludes adjustments to rates for taxes that are incurred as a result of income generated by the income of unregulated affiliates.

Intended consequences:

- If the affiliated group or utility pays taxes <u>equal to or in excess of</u> the amount of taxes incurred based on the income of the regulated operations of the utility, the amount of "taxes paid" should only reflect the amount of taxes incurred based on the income of the regulated operations. For example, if taxes incurred based on regulated operations are $100, and taxes paid by the utility or affiliated group (as determined by the application of 3(13)(f) to the taxpayer) are $150, for purposes of Sections 3(1), 3(4), and 3(6), the amount of taxes paid that are properly attributed to the utility would be $100.
- If the affiliated group or utility pays an amount of taxes <u>less than</u> the amount of taxes incurred based on the income of the regulated operations of the utility, the amount of "taxes paid" should reflect that lesser amount, provided that adjustments are made as described in Section 3(13)(f)(A)-(C). For example, if

taxes owed on regulated operations are $150, and taxes paid by the utility or affiliated group (as determined by the application of 3(13)(f) to the taxpayer) are $100, for purposes of Sections 3(1), 3(4), and 3(6), the amount of taxes paid that are properly attributed to the utility would be $100.

- The portion of the taxes paid by the affiliated group that relate to the income of unregulated affiliates must not be used to make adjustments to rates, regardless of whether those unregulated affiliates have net losses or net income. For example, if taxes incurred based on income generated by regulated operations are $100 and taxes paid (as determined by application of 3(13)(f) to the taxpayer, which was an affiliated group with some companies that had a net income and some that had a net loss) are $150, for purposes of Sections 3(1), 3(4), and 3(6), the amount of taxes paid that are properly attributed to the utility would be $100.

Question 2: What did the legislature intend in the adoption of Section 3(13)(f)(B)?

Short Answer: Section 3(13)(f)(B) is not clear on its face and lacks sufficient legislative history to completely direct its interpretation. At a minimum, PGE believes this section provides for adjustments to "taxes paid" for tax credits, such as Business Energy Tax Credits (BETCs), that are related to investment by the utility in the regulated operations of the utility, to the extent that those tax credits are not taken into account in base rates.

Intended Consequence:

- Utilities will be encouraged to continue investments in regulated operations, particularly those investments that demonstrate clear public policy support through tax credits and incentives, by increasing the amount of "taxes paid" by

the amount of these tax credits and savings to the extent they have not been previously recognized in utility rates.

Question 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?

Short Answer: Yes.

Intended Consequence:

- The automatic adjustment clause, like any rate, will be fair, just and reasonable, or the Commission will terminate it.

Question 4: Section 3 of SB 408 requires the Commission to establish an automatic adjustment clause within 30 days (or later date, established by the 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?

Short Answer: SB 408 requires an annual, not quarterly, assessment and adjustment of the automatic adjustment clause.

Intended Consequence:

- The automatic adjustment clause will be assessed on an annual basis.

II. How Should The Commission Apply the "Properly Attributed" Standard As It Appears In the Individual Sections of the Bill?

PGE believes the plain language of SB 408 and context of the subsections where the term "properly attributed" appears should be the first guide to determining the meaning of those

sections. *See PGE v. BOLI*, 317 Or at 610-611. Where the plain language of the statute and the context of the term is ambiguous, the next step is to consider the legislative history and intent of the legislature in enacting the provision in question. After consideration of plain language, context, and legislative history, one can understand the phrase "taxes paid … [that are] properly attributed," as it appears in Sections 3(1), 3(6), 3(7), and 3(12), in quite simple terms. "Taxes paid…[that are] properly attributed to the regulated operations of the utility," as referenced in Section 3(1), 3(6), and 3(12), refers to the lesser of the utility's stand alone tax liability[2] or the amount of "taxes paid" calculated according to the statutory formula set forth at Section 3(13)(f). "Properly attributed" by itself has no meaning—it is merely a descriptive phrase that refers to outcome of the "lesser of" comparison.

"Taxes paid that are properly attributed to any unregulated affiliate," as referenced in Section 3(7), refers simply to the stand alone tax liability of that affiliate, either positive or negative. SB 408 requires no "lesser of" calculation when determining this amount. Importantly, however, it is <u>not</u> necessary for the utility or the Commission to determine a specific amount of taxes attributable to individual unregulated affiliates to comply with SB 408. As long as the Commission only bases the automatic adjustment clause on the difference between taxes paid that are properly attributed to the regulated utility and taxes authorized to be collected by that utility, SB 408 requires no further calculation of affiliate tax liabilities.

A. Applying the Plain Language of SB 408

Question 1 suggests that "properly attributed" can and should be considered a "standard" or defined term. PGE believes "properly attributed" is a descriptive term that does not have meaning outside of the context and language of the sections in which it appears. Notably, each

[2] *See* discussion *infra* Part II.A.1.

time the phrase appears, it is linked to the term "taxes paid." "Taxes paid" is statutorily defined as amounts received by units of government from the utility or affiliated group, increased by a number of specific factors (charitable contributions, deferred taxes, tax credits).

Section 3(13)(f). The statutory definition of the term "taxes paid" does not include a reference to "properly attributed."[3] In fact, the legislative history suggests that the legislature intended for "taxes paid" to be calculated without any reference to attribution.[4] Therefore, before one can calculate the amount of taxes paid that are properly attributed to the regulated utility, one must determine the total amount of "taxes paid."

Example 1: Public Utility files taxes as part of Affiliated Group. In 2006, the "taxes paid" calculation for Affiliated Group was as follows:

Tax liability assessed in Consolidated Group's tax return for 2006:	$ 200
Tax savings for charitable contributions by Public Utility:	$ 20
Tax savings for tax credits earned by Public Utility:	$ 30
Deferred taxes related to regulated operations of Public Utility	$ 50
TOTAL TAXES PAID (Section 3(13)(f)):	$ 300

Following the statutory language, taxes paid that are properly attributed must then be informed by Section 3(12), which states that "taxes paid that are properly attributed to the regulated portions of the public utility may not exceed the lesser of…that portion of the total taxes paid that is incurred as a result of income generated by the regulated operations of the utility or the total amount of taxes paid to units of government." Looking at this section, it is

[3] OAR 860-022-0039(2)(h) redefines "taxes paid" to mean "net amounts received by units of government from the public utility or from the affiliated groups and properly attributed to regulated operations of the public utility…" This language changes the definition of "taxes paid" found at SB 408 Section 3(13)(f).

[4] Testimony of Michael Early on Behalf of ICNU (June 30, 2005) (page 9: "'Taxes paid' is not the amount that is compared to taxes collected in the automatic adjustment clause; rather the amount compared is that portion of 'taxes paid' that is 'properly attributed to the regulated operations of the utility.'").

clear why one cannot define "properly attributed" as a specific ratio or term—it was never intended to have one meaning. It described the result of a comparison, not a ratio or formula itself.

Section 3(12) compares two values: Section 3(12)(b), the "total amount of taxes paid" and Section 3(12)(a), the "portion of the total taxes paid that is incurred as a result of income generated by the regulated operations of the utility." Section 3(12)(b) refers to the term defined in Section 3(13)(f) and portrayed in the above example, which is amounts received by units of government from the utility or affiliated group, adjusted by deferred taxes, charitable contributions, and tax savings from tax credits. The remaining question is: What is meant by the "portion of the total taxes paid that are incurred as a result of income generated by the regulated operations of the utility"? Section 3(12)(a).

1. Section 3(12)(a) Refers to the Stand Alone Tax Liability of the Utility's Regulated Operations.

SB 408 does not directly define Section 3(12)(a). However, the plain language gives a clear guide. "Incurred" means "to become liable or subject to."[5] The utility becomes liable or subject to taxes based on the net revenues generated by utility activities. Thus, "incurred as a result of income generated by the regulated operations of the utility" means the tax liability the utility is subject to based on its net revenues from regulated operations. Section 3(12)(a) expressly limits the calculation to the amount incurred as a result of income generated by the <u>regulated</u> operations of the utility. This amount will generally correlate with the amount of taxes the utility reports in its FERC Form 1 and Results of Operations report.

[5] Merriam-Webster Dictionary of Law (1996).

The methodology used to determine the utility's tax liability for purposes of complying with SB 408 correlates with the methodology used to determine the amount of taxes the utility is authorized to collect in rates on a test year basis. In the case of a utility that files taxes as part of a consolidated group, this amount is commonly referred to as the "stand alone tax liability" of the utility, because it refers to the tax liability the utility would have incurred had it filed taxes on a non-consolidated, or "stand alone" basis.

The legislative history of SB 408 demonstrates the legislature's intent to compare the total amount of "taxes paid" (per Section 3(12)(b)) with the "stand alone tax liability" of the regulated utility (per Section 3(12)(a)). On July 30, 2005 in the House Chamber (pages 8-9, 12, of legislative history compiled by the PUC), in a lengthy question and answer session between Representative Brian Boquist and Representative Tom Butler, Representative Boquist referred to the "stand alone liability" and the "consolidated tax liability" as providing the boundaries for the potential adjustment to rates. Representative Butler summarized the point that day by saying, "with regard to Section 3, subsection 12 … if you'll read that section you'll see that you always must use the lesser of one, the consolidated, or two, the standalone …" Michael Early, executive director, Industrial Customers of Northwest Utilities, presented an example to the House of Representatives in a Work Session held July 26, 2005, in which he contrasted the stand alone liability of the company ("[the amount the] Oregon Public Utility Commission could include in rates, say $50 million") with the consolidated tax return of a parent corporation ("Let's say its income tax liability is $500") and concludes that under the terms of SB 408, "the Commission looks at the $500 and asks itself what portion of that $500 million was attributable to regulated operations … and that answer's going to be, it's going to be $50 million."

Section 3(12)(a) refers in full to "[t]hat portion of the total taxes paid that is incurred as a result of income generated by the regulated operations of the utility." Because the total tax liability of an affiliated group includes both positive and negative individual affiliate liabilities, a "portion of the taxes paid" amount could be larger than the total.

Example 2: Pulling apart the total amount of "taxes paid" by Affiliated Group:

Public Utility stand alone tax liability:	$ 130
Affiliate X stand alone tax liability:	$ 130
Affiliate Y stand alone tax liability:	$ -60
Affiliated Group TOTAL TAX LIABILITY:	$ 200

In this example, the stand alone tax liability of each entity is assessed based on the net revenues of that entity. Some are negative, some are positive, but the overall total exceeds the stand alone tax liability for Public Utility. However, if we changed the facts of this example, the total tax liability could be less than Public Utility's stand alone liability:

Public Utility stand alone tax liability:	$ 130
Affiliate X stand alone tax liability:	$ 65
Affiliate Y stand alone tax liability:	$ -95
Affiliated Group TOTAL TAX LIABILITY:	$ 100

Even though the net tax liability of Affiliated Group changed in this second example due to changed affiliate liabilities, the portion of the total amount of taxes paid incurred as a result of income generated by the regulated operations of the utility has not changed: it is still $130, or the stand alone tax liability of the utility.

2. Performing the "Lesser Of" Calculation Required by Section 3(12)

One cannot overstate the importance of the legislative "lesser of" test. The legislative history demonstrates that one of the primary reasons cited for enacting SB 408 was to address the situation in which the affiliated group paid less in taxes than the utility collected in rates. The "lesser of" test directly addresses this situation by comparing the utility's stand alone liability with the total amount of taxes paid. It is logical to use the utility's stand alone tax liability as the comparator to the taxes paid by the affiliated group because a utility is traditionally authorized to collect in rates — on a test year basis — the amount of taxes due on the net revenues earned by the utility in the test year period, calculated on a stand alone basis. Thus, the legislature did exactly what Representative Butler suggested it had intended to do: "use[d] the lesser of one, the consolidated, or two, the stand alone" tax liability of the public utility.

Example 3: To determine the "taxes paid that are properly attributed to the regulated operations of the public utility" (per Section 3(12), 3(6) and 3(1)) you compare the total amount of "taxes paid" (per Section 3(13(f)), with the stand alone tax liability of the utility.

Total "taxes paid" by Affiliated Group:	$ 300
Public Utility stand alone tax liability:	$ 130
"Taxes paid that are properly attributed":	$ 130

Example 4: In this example, the total amount of taxes paid by Affiliated Group is less than the portion of taxes paid incurred as a result of income generated by the regulated operations of the utility.

Total "taxes paid" by Affiliated Group:	$ 100
Public Utility Stand Alone Tax Liability:	$ 130
"Taxes paid that are properly attributed":	$ 100

C. OAR 860-022-0039 Ignores the Plain Language of SB 408 and Requires Significant Statutory Modification that has no Basis in Legislative History or Intent

The temporary rule defines "properly attributed" as a ratio applied to the positive tax liabilities of the entities in the consolidated group prior to the adjustments for deferred taxes, charitable contributions, and other tax credits.[6] However, the term "taxes paid" does not reference attribution, so the temporary rule modifies the definition of taxes paid found at Section 3(13)(f).[7] This modification creates a number of problems in interpreting SB 408. First, one must guess where to apply the statutory definition of taxes paid and where to apply the temporary rule definition. For example, which definition is operative in Section 3(12)(b)? Second, if the properly attributed ratio is included in the "taxes paid" calculation, it must then be excluded and not applied everywhere else it appears. For example, Section 3(1)(a) requires the utility to disclose a tax report containing "the amount of taxes that was paid … and that is properly attributed…" (emphasis added). Must utilities apply the properly attributed ratio twice to comply with this section? These problems arise because the legislature did not intended "properly attributed" to be a defined term.

Example 5: Consider attempting to apply the plain language of SB 408 and OAR 860-022-0039 to a calculation of "taxes paid that are properly attributed to the regulated operations of the public utility" using the following basic facts:

Public Utility stand alone tax liability:	$ 130
Affiliate X stand alone tax liability:	$ 130

[6] OAR 860-022-0039(2)(d) provides: " 'Properly attributed' means the product determined by multiplying the following two values: (A) the total amount of taxes paid by the public utility or affiliated group to units of government; and (B) 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 affiliated group with a positive tax liability."

[7] OAR 860-022-0039(2)(h) provides: " 'Taxes paid' means net amounts received by units of government from the public utility or from the affiliated group and properly attributed to regulated operations of the public utility, adjusted as follows…" (emphasis added).

Affiliate Y stand alone tax liability:	$ -60
[Affiliated Group TOTAL TAX LIABILITY:	$200]
Tax savings for charitable contributions by Public Utility:	$ 20
Tax savings for tax credits earned by Public Utility:	$ 30
Deferred taxes related to regulated operations of Public Utility	$ 50

1. Determining "taxes paid" per OAR 860-022-0039(2)(h):

Net amounts received by units of government from the affiliated group and properly attributed: 200[8] x (130 / (130 + 130)) = 200 x .5 = 100.

Increased by charitable contributions, tax credits, deferred taxes:

100 + 20 + 30 + 50 = 200

2. Applying OAR 860-022-0039 to Section 3(12)

Section 3(12)(A): This amount is undefined.

Section 3(12)(B): Unclear if this amount refers to the defined term "taxes paid" (OAR 860-022-0039(2)(h)), or to the total tax liability of the consolidated group prior to the adjustments for charitable contributions, deferred taxes and tax savings for tax credits.

Section 3(12): Most importantly, what does the primary statement in 3(12) mean when it refers to "taxes paid that are properly attributed?" If Section 3(12) is read to refer to the defined terms "taxes paid" and "properly attributed," do we apply the properly attributed ratio **again** to the "taxes paid" amount, resulting in:

[8] The definition of "properly attributed" actually refers to "taxes paid," but we assume it does not intend to refer to the defined term "taxes paid," which would create an impossibly circular reference, but rather refers to the total tax liability of the affiliated group.

200 x .5 = 100? This result would effectively nullify the specific adjustments found in SB 408 Section 3(13)(f).

Example 5 demonstrates that the temporary rules render Section 3(12) virtually meaningless: Section 3(12)(a) is undefined, Section 3(12)(b) has the same meaning as "taxes paid" (as defined in the temporary rule, not the statute), and the resulting "taxes paid that are properly attributed" may require that the amount calculated for purposes of Section 3(12)(b) be multiplied twice by a "properly attributed" ratio, reversing the adjustments for charitable contributions, tax credits for tax savings, and deferred taxes.

Arguably, the definition of "properly attributed" and modification of the statutory definition of "taxes paid" in the temporary rule replaces the statutory "lesser of" calculation found in Section 3(12). This result patently violates the basic tenets of statutory construction requiring that statutes be interpreted: 1) according to their terms,[9] and 2) to give effect to every section, clause, and word.[10] Neither plain language and context nor legislative history support this definition of "properly attributed" and this significant modification of SB 408.

C. Properly Attributed and Unregulated Affiliates

Section 3(7) states "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." The plain language of this section, read in context with Section 3(12), simply means tax losses or tax burdens of unregulated affiliates cannot form the basis of the automatic adjustment clause. Section 3(7) does not, as has been suggested, require the PUC to independently assess the tax liabilities of

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[9] *PGE v. BOLI*, 326 Or at 611.

[10] *See Murphy v. Nilsen*, 19 Or App 292, 298, 527 P2d 736 (1974) (rejecting proposed interpretation of a statute that would nullify particular subsections) (*citing Blyth & Co. v. City of Portland*, 204 Or 153, 282 P2d 363 (Or. 1955).

each of the unregulated affiliates of the utility. As long as the only amount used for determining the automatic adjustment clause is the amount of taxes paid and properly attributed according to the lesser of calculation in Section 3(12), no additional calculations need to be performed.

III. What Did the Legislature Intend In the Adoption of Section 3(13)(f)(B)?

Section 3(13)(f)(B) provides an addition to the amount of "taxes paid" for "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." The key terms "tax credit" and "investment" may be broadly interpreted to include anything in the Internal Revenue Code that give rise to tax savings and any expenditure on utility service. The most narrow interpretation of these terms directs the utility to increase the amount of taxes paid for credits such as BETCs or Production Tax Credits (PTC), to the extent such tax credits were not taken into account by the Commission in a rate setting proceeding. These types of tax credits result directly from capital investments in regulated utility operations, such as wind power development (PTC) or improvements in energy conservation, recycling, renewable energy resources, and less-polluting transportation fuels (BETCs). The Commission and the State of Oregon encourage these investments, and utilities make these investments at shareholder expense. If they are not able to achieve the tax savings associated with these credits, many utilities may simply stop making these investments.

The legislative history of SB 408 does not provide a clear answer as to whether Section 3(13)(f)(B) should be given the more narrow or broad interpretation, or something in between. At a minimum, however, the plain language of this section dictates that the types of tax credits identified above must be included and added to the computation of "taxes paid." PGE

also believes that it would be helpful to revisit the interpretation of this section to ensure that it harmonizes with the entirety of the rules the Commission develops to implement SB 408.

IV. 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?

The Commission's ultimate responsibility is to ensure – over time and on a continuing basis – adequate service at fair and reasonable rates. ORS 756.040(1).[11] ORS 757.210(1)(a), as amended by SB 408, provides "[t]he commission may not authorize a rate or schedule of rates that is not fair, just and reasonable." Any automatic adjustment clause established pursuant to Section 3(6) must meet this standard. If a utility would suffer a material adverse effect from the imposition of an automatic adjustment clause such that rates were no longer fair, just and reasonable, the Commission must terminate that clause. Section 3(9) of SB 408 also requires the Commission to terminate an automatic adjustment clause if the imposition of that clause would have a material adverse effect on the utility's customers. Some results of an automatic adjustment clause, such as a violation of normalization or a downward impact on a utility's credit rating, would impact both the utility and its customers, and would consequently be prohibited under SB 408 Section 3(9), ORS 757.040 and ORS 757.210.

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[11] ORS 757.040(1) provides:
Rates are fair and reasonable for purposes of this subsection if the rates provide adequate revenue both for operating expenses of the public utility…and for capital costs of the utility, with a return to the equity holder that is:
(a) Commensurate with the return on investments in other enterprises having corresponding risks; and
(b) Sufficient to ensure confidence in the financial integrity of the utility, allowing the utility to maintain its credit and attract capital.

V. Section 3 Of SB 408 Requires the Commission To Establish an Automatic Adjustment Clause Within 30 Days (Or Later Date, Established By the 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?

SB 408 provides that automatic adjustment clauses are to be considered and continued on an annual basis. Section 3(5). Utilities must identify in their tax reports amounts of taxes paid and taxes authorized to be collected for each of the three years preceding the filing date for the report. Section 3(1). SB 408 requires the Commission to compare the amount of "taxes paid" with the amount of "taxes authorized to be collected" for each of the three years that are the subject of the tax report to determine if an automatic adjustment clause has been triggered. Section 3(4). In short, the plain language of the bill requires the automatic adjustment clause to be assessed and applied on an annual, not quarterly, basis. Neither the plain language, context, nor legislative history of SB 408 provide any reference to a quarterly adjustment.

VI. Conclusion

Although SB 408 leaves some key terms undefined, a thorough consideration of the plain language and context of the bill, as well as the other statutes that direct the Commission's duty as an agency — particularly ORS 757.040, .062, and .210 — reveals the answers to the questions posed for briefing. The legislative history confirms that this plain language reading corresponds with legislative intent. In its attempt to effectuate the goals of SB 408, the Commission must carefully consider both the intended and unintended consequences of its actions, and bear in mind that this statute must be read consistently with the larger goal of providing to customers "adequate [utility] service at fair and reasonable rates."

DATED this 28th day of October, 2005.

Respectfully submitted,

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