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October 28, 2005

VIA ELECTRONIC MAIL
and **U.S. MAIL**

Oregon Public Utility Commission
Attn: Filing Center
550 Capitol Street, N.E., #215
P.O. Box 2148
Salem, Oregon 97308-2148

RE: **Docket No. AR-499**
In the Matter of the Adoption of Permanent Rules Implementing SB408 Relating to Utility Taxes
Our File No. 26678.501

Dear Filing Center:

Enclosed please find an original and one (1) copy of **Northwest Industrial Gas Users' Opening Comments,** filed electronically with the OPUC on this date, and also e-mailed to all parties listed on the Master Service List obtained on this date from the OPUC web site. A hard copy will also be served by U.S. Mail on said parties.

Thank you for your assistance.

Respectfully submitted,

Edward A Finklea

Edward A. Finklea

EAF/nh
Enclosures
cc: Master Service List

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	)	NORTHWEST INDUSTRIAL GAS USERS' OPENING COMMENTS

Pursuant to the schedule adopted by Administrative Law Judge Logan in the above-referenced docket, the Northwest Industrial Gas Users ("NWIGU") submit these Opening Comments. SB 408 requires public utilities to file annual reports and other tax information with the Oregon Public Utility Commission ("OPUC" or "Commission") to remedy the mis-match between taxes collected in rates and taxes ultimately paid to the government. To implement the provisions of SB 408, the Commission adopted temporary rules in AR 498, and has initiated this rulemaking to adopt permanent rules.

In the previous workshop, the parties narrowed the issues to be addressed in these opening legal comments to the four questions outlined below.

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

As the stakeholders have recognized, the definition of "properly attributable" is central to the implementation of SB 408 and the automatic adjustment clause. The term is not defined and

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is used in several different places in the bill. Accordingly, stakeholders have raised various arguments regarding the legislative intent behind the definition of "properly attributed". As described below, NWIGU believes the Commission applied the correct meaning of "properly attributed" in the temporary rules, adopted in AR 498.

Several electric utilities have indicated that the public utility's stand-alone tax liability, up to the amount of the consolidated tax payment, should be used as the amount of taxes paid to government units that is properly attributed to the utility. *See* PacifiCorp Responses to Staff's Questions (Aug. 30, 2005); *see also* Portland General Electric's Response to Staff's Questions (Aug. 30. 2005). Adopting this definition of "properly attributed", however, would render Section 3(7) of the bill requiring a properly-attributed calculation for unregulated affiliates superfluous. *See* Staff Report, p. 2, AR 498 (Sept. 7, 2005). This would violate the rule that, whenever possible, statutes must be interpreted to give effect to all provisions. *See Bolt v. Influence, Inc.*, 333 Or. 572, 581, 43 P.3d 425 (2002) ("we are to construe multiple provisions, if possible, in a manner that will give effect to all"). Accordingly, Staff rejected this approach, determining that it would lead to unreasonable results. *Id.*

In the Staff Report, Staff explained that the attribution of taxes paid among both the regulated utility and unregulated affiliates should be made on the same basis. In other words, the total taxes paid should be allocated among all members of the affiliated group, including the utility. NWIGU supports Staff's interpretation of SB 408 and its definition of "properly attributed".

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As described above, the term "properly attributed" is not defined in the law. Using the guidelines established in *Portland General Electric Co., v. Bureau of Labor and Industries ("PGE v. BOLI")*,[1] demonstrates that Staff's interpretation of the law is consistent with the legislative intent. Under *PGE v. BOLI*, the text and context of the law are clear that the definition of "properly attributed" is applicable to both the regulated and unregulated affiliate. The definition supported by the utilities, would perpetuate the current stand-alone approach, and render provisions of the bill meaningless. Such a result is untenable. *See EQC v. City of Coos Bay*, 171 Or.App 106, 110, 14 P.3d 649 (2000) ("We are required, if possible, to avoid construing statutes in a way that renders any provision meaningless.")

Context for interpreting a statute is provided by the entirety of the statute in question and by related statutes. *PGE v. BOLI*, 317 at 611, 859 P2d at 1146. Courts "do not look at one subsection of a statute in a vacuum; rather, [they] construe each part together with the other parts in an attempt to produce a harmonious whole." *Lane County v. Land Conservation & Dev. Comm'n*, 325 Or 569, 578, 942 P2d 278 (1997) *citing Davis v. Wasco IED*, 286 Or 261, 593 P2d 1152 (1979). The meaning of "properly attributed" must be read consistently, and under Staff's definition, the amount of "taxes paid" that are "properly attributed" to any member of an affiliated group is proportionate. Staff's temporary rule harmonizes the use of "properly attributed" in Sections 3(1), 3(4), 3(6) and 3(7) of the bill and applies the same definition of

[1] 317 OR 606, 859 P.2d 1143 (1993)(Holding that the intent of the legislature is first discerned by examining the text and context of the statute. *Id.* at 610. If the language and immediate context alone are not enough, then the court may "consider legislative history to inform the court's inquiry into legislative intent." *Id.* at 610-11. If the intent is still unclear, the court will refer to general maxims of construction to divine the legislature's intent, including construing the term to be consistent with the statute's purpose. *Id. PGE v. BOLI's* methodology has been modified by amendments to ORS 174.020. Parties may also offer legislative history of a statute to assist a court in its construction. *See* ORS 174.020.

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"properly attributed" across all provisions of the bill.

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

SB 408 provides that the term "taxes paid," defined as the amounts received by units of government from the utility or from the affiliated group of which the utility is a member, whichever is applicable…is 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;"

Section 3(13)(f)(B).

This provision provides a utility the ability to retain a tax credit by increasing its taxes paid as reported on the tax report filed with the Commission, associated with utility investments in the regulated part of the company that occur after the utility's most recent general rate case. This provision does not apply if the Commission accounted for the investment during the utility's last general rate case.

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?

The text of SB 408 is absolutely clear that the Commission may only terminate an automatic adjustment clause if it has a material adverse effect on customers. There is no ambiguity in this provision of the bill. This provision of the bill is not reciprocal. The only plausible way for a utility to terminate the automatic adjustment clause under this provision

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would be if the utility could demonstrate that the automatic adjustment clause impacted the utility in a manner that would have a material adverse effect on customers. The circumstances under which this provision could be used in this manner should be extremely narrow and should impose a high burden of proof on any utility attempting to invoke the provision.

4. If the utility pays quarterly estimated taxes, must the automatic adjustment clause be applied quarterly, or does the law allow it to be applied yearly?

NWIGU agrees with the Comments of the Industrial Customers of Northwest Utilities ("ICNU") that because SB 408 is silent regarding the application of the automatic adjustment clause to a utility that pays quarterly estimated taxes, the Commission should, in its discretion, decide how to implement the law to protect customers.

CONCLUSION

NWIGU appreciates the opportunity to participate in the development of permanent rules to implement SB 408. The intent behind the law is to better match utility taxes actually paid with those collected from customers. Staff's temporary rules are consistent with the intent of the law and should be adopted as the permanent rules.

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DATED: This 28th day of October, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing NORTHWEST INDUSTRIAL GAS USERS' OPENING COMMENTS on the parties that appear on the attached Service List obtained on October 28, 2005 from the Oregon Public Utility Commission's Website:

[XX] by **MAILING** a full, true and correct copy thereof in a sealed, postage-paid envelope, addressed as shown on the attached Service List, and deposited with the U.S. Postal Service at Portland, Oregon, on the date set forth below;

[XX] **and** by **electronic mail** ("e-mail") to those parties on the Oregon Public Utility Commission's Website Service List who listed an e-mail address.

DATED: October 28, 2005.

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