BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 499

In the Matter of	)	
ADOPTION OF PERMANENT RULES,	)	OPENING BRIEF OF THE CITIZENS' UTILITY BOARD OF OREGON
To Implement SB 408, Relating to Matching Utility Taxes Paid with Taxes Collected.	)	

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OF THE
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October 28, 2005

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I. Introduction

In a memorandum dated October 5, 2005, Judge Logan asked parties to brief the Commission on the following questions:

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?
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?

II. "Properly Attributed" & The Intent Of SB 408

In regard to the first question posed by Judge Logan, CUB supports the interpretation of "properly attributed" that the Commission adopted for the temporary rules implementing Senate Bill 408. Under this definition, the corporate family's consolidated tax liability is allocated among affiliates "based on the stand-alone tax liability of the affiliates that have a positive tax liability." Staff Memo, September 7, 2005, AR 498.

Under Staff's definition as adopted for the temporary rules, the consolidated tax liability would be distributed in equal proportions between the corporate affiliates – parent and siblings – according to the positive stand-alone tax liabilities which they bring to the consolidated liability. The tax deduction from an affiliate with a negative stand-alone tax liability must be distributed proportionally between the other affiliates; a corporate parent may not exclude the utility and allocate those deductions only to itself or other affiliates, which is what has been done in the past, and what would happen under PacifiCorp's proposal.

PacifiCorp would have us believe, despite ample evidence to the contrary, that what the legislature really had in mind was to single out those cases where the corporate family's consolidated tax liability is less than the utility's stand-alone tax liability, and then the consolidated tax liability would serve as a cap on what utility customers would pay in taxes. This completely ignores the use of utility customers within holding company structures to bring in tax dollars that cover a greater proportion of the consolidated taxes than unregulated affiliates must pay. It was the legislature's intent to end the injustice of this use of captive utility customers, and PacifiCorp's proposal does not do that.

A. "Properly Attributed" Is A Delegative Term

How the Commission applies a statutory term such as "properly attributed" depends on the Commission's responsibility in its interpretation of the statute. The starting place for determining the Commission's responsibility is *Springfield Education Association v. School District No. 19*, et al, 290 Or. 217 (1980). The Court formalized and clarified an agency's role in interpreting statutes by creating three distinct classes of statutory terms: exact terms, inexact terms, and delegative terms. *Id.* at 223.

Exact terms are those that impart fairly precise meaning. The Court includes examples of exact terms such as 30 days, Marion County, and the like. *Ibid*. On its face, "properly attributed" does not fall into this category.

Whether "properly attributed" is an inexact term or a delegative term, and what responsibilities flow from each category is best divined by directly comparing the two categories. An inexact term is less precise than an exact term, but it is a term that presumably is intended to convey a particular meaning and is part of a "completed legislative policy judgment." *Id.* at 225. The Court recognizes that sometimes words that are part of a completed legislative policy are capable of contradictory applications, *i.e.,* they can be subject to differing interpretations. The agency's responsibility in such cases is to interpret the word so as to be consistent with, or to advance a more generally expressed, but completed, legislative policy. *Id.* at 226.

In contrast, a delegative term is part of "non-completed legislation" for which the agency is given delegated authority to complete. In the case of a delegative term, the legislature chooses not to completely define a term itself, but "deems it operationally preferable to give to an agency the authority, responsibility, and discretion for refining and executing generally expressed legislative policy." *Ibid*. The responsibility of the agency in this case is to complete the general policy by specifically applying it to the real-life situation.

Springfield cites *McPherson v. Employment Division*, 285 Or. 541 (1979) as a stage in the development of the three categories of agency interpretation of statutory terms. In *McPherson*, the Court does not specifically enumerate the three categories of terms, but it does recognize them. In attempting to describe them, the Court offers two sets of examples of terms that require different types of interpretive responsibility. In one set, the Court lists terms such as "employment" and "independently established business." *Id.* at 550. These terms would, in *Springfield*, be placed in the category of inexact terms, because while they may not be perfectly defined, they are attempting to communicate a particular meaning. *McPherson's* other set of examples, that *Springfield* would put into the delegative terms category, includes terms such as "fair," "unreasonable," and "good cause". These are terms that require some kind of judgment upon application.

In which category would "properly attributed" fall? It seems clear that this phrase does not indicate a particular – even if unclear – meaning that the Commission must simply determine how to apply. Rather, like terms such as "fair" or "unreasonable," "properly attributed" delegates to the Commission the responsibility to complete the general policy by determining what attribution is "proper." *Springfield* applies this principle of delegative term to larger regulatory contexts, and offers, as an example, the "just and reasonable" standard in ORS 757.210 that directs the Public Utility Commission in setting rates. *Springfield* at 230. When setting rates to be "just and reasonable" or in identifying taxes that are "properly attributed," the Commission must use its expertise and judgment "to make delegated policy choices of a legislative nature within the broadly stated legislative policy." *Ibid*. Judicial review of the Commission's interpretation and application will be limited to whether the Commission's determination is within the delegated authority. *Id.* at 223.

To determine whether the Commission's determination is within the legislature's delegation, the agency and, if necessary the court, must discern the intent of the legislature. The Court has set out the levels of analysis inherent in statutory interpretation in *PGE v. Bureau of Labor and Industries*, 317 Or. 606 1993. The first level of analysis is the statutory provision itself. The language of the statutory text is the best evidence of the legislature's intent. *Id.* at 610. As part of this first level of analysis, the agency should also consider the context of the statute, including other provisions in the same statute and related statutes. *Id.* at 611.

If the intent of the legislature is not clear from the text and context analysis, then the agency must move to the second level which is to consider the legislative history. *Id.* at 611-12. The legislative history must be read alongside the text and context. Finally, if analysis of the text, context, and history of a statute does not reveal the legislature's intent, the court may resort to general maxims of statutory construction, such as attempting to determine what the legislature would have intended had it considered an issue. *Ibid*.

In applying the term “properly attributed,” the Commission must attempt to discern the general policy direction of the legislature by examining the text and the context of the statute, and, if necessary, the legislative history.

B. Statutory Text: What The Law Says

In many respects the phrase, “properly attributed,” is the central issue in the implementation of SB 408. Where there is a difference of $100,000 between the rates collected from customers and the taxes paid to government, the law requires that the Commission establish an automatic adjustment clause that compares the following two variables:

1. The “taxes that are authorized to be collected through rates” or the “amount of taxes that are assumed in rates.” Section 3(6) and Section 3(4).
2. The amount the utility or its affiliated group “pays to units of government and that is properly attributed to the regulated operations of the utility.” Section 3(6).

In order to determine the amount that the utility or its affiliated group pays, the Commission is prohibited from making an adjustment “to rates for taxes paid that are properly attributed to any unregulated affiliate of the public utility or to the parent of the utility.” Section 3(7).

To comply with Senate Bill 408, the Commission must look at the taxes that are actually paid to units of government, and attribute them. In the case of a consolidated tax filing, Section 3(6) requires the Commission to properly attribute part of the consolidated tax liability to the regulated operations of the utility, and Section 3(7) requires the Commission to properly attribute part of the consolidated tax liability to the unregulated affiliates and to the parent company. In this way, the Commission must begin with actual taxes paid by the consolidated group. This value is then allocated or attributed to both the regulated utility and its parent and affiliates.

It is also important to note that, under PacifiCorp's proposed interpretation of the bill, there is no reason for the bill to say "properly attributed to the regulated operations of the utility." Under PacifiCorp's proposal, the comparison is between a utility's stand-alone tax liability and the consolidated tax liability of the consolidated company. An adjustment would only be made if the tax liability of the consolidated company were less than the tax liability of the stand-alone utility. This interpretation fails to recognize that SB 408 calls for taxes to be "properly attributed" to both the utility and to the unregulated affiliate. This attribution has to have a meaning, and we believe the legislature intended to give the term meaning when it included "properly attributed" in the statute.

C. Statutory Context: The Allocation Of Taxes Must Be Fair

While the legislature did not define "properly attributed," it did change ORS 757.210 to add the word "fair" to Oregon's "just and reasonable" standard of ratemaking. SB 408, Section 5. Rates must be fair, just, and reasonable. This contextual change makes clear that the legislature's general policy direction was to reject the Commission's past approach to taxes, and to replace it with a statutorily-required "fair" method of determining taxes in utility rates. In defining the phrase "properly attributed," the Commission must make a decision that results in rates that are fair.

We believe that the approach recommended by Staff, wherein the Commission would attribute total consolidated tax liability to affiliates based on the net income of each affiliate that contributed to the consolidated tax liability, passes this fairness test. PacifiCorp's approach, which would continue to determine taxes in the same manner that they have been determined in the past, except for a cap that would limit taxes to no more than the entire consolidated company's tax liability, does not pass this fairness test.

i. Unfair To Allocate Taxes Differently Between Affiliates

If a utility and some of its affiliates are in similar positions, it would not be fair to attribute taxes in a manner that placed the bulk of the tax burden for an entire consolidated company on the utility and little of the tax burden on its affiliates. Consider a utility with several affiliates:

	Stand-Alone Tax Liability	PacifiCorp Allocation	CUB Allocation
Utility	$ 100 million	$ 100 million	$ 55 million
Affiliate A	$ 100 million	$ 10 million	$ 55 million
Affiliate B	$ - 50 million	$ 0	$ 0
Parent	$ - 40 million	$ 0	$ 0
Consolidated Tax Liability is $110 million		PacifiCorp proposal favors affiliate in allocating tax burden at the expense of the utility	

In this example, the utility and Affiliate A are in identical circumstances. They both have $100 million of stand-alone tax liability. Under the PacifiCorp approach, the utility would be attributed $100 million in taxes, because its stand-alone liability is less than the consolidated company's overall tax liability of $110 million. This would then create an unfair situation, because, although the utility and Affiliate A have identical stand-alone tax liabilities, the bulk of the consolidated tax liability falls on the shoulders of the utility's customers, while the unregulated affiliate pays far less of the consolidated tax liability.

However, if you attribute the consolidated taxes based on net income, which is the basis for the tax liability, the utility and Affiliate A would each be attributed half of the tax liability of the consolidated group. The two affiliates with positive tax liability are treated equally. This is fair.

ii. Unfair To Double-Count Taxes

Consider an example where there are two utilities to which this rule applies that are part of the same consolidated company, and both utilities have a positive tax liability.

	Stand-Alone Tax Liability	PacifiCorp Allocation	CUB Allocation
Utility A	$ 100 million	$ 100 million	$ 67 million
Utility B	$ 50 million	$ 50 million	$ 33 million
Other Affiliates	$ - 30 million	$ 0	$ 0
Parent	$ - 20 million	$ 0	$ 0
Consolidated Tax Liability is $100 million		PacifiCorp's proposal collects $150 million from ratepayers for $100 million in tax liability	

In this example there are two utilities with positive tax liability. Each utility has a tax liability that is less than the consolidated tax liability. Under PacifiCorp's proposal, each utility would have its taxes determined on a stand-alone basis and then compared to the consolidated tax liability. As, individually, neither Utility A's nor Utility B's stand-alone liability is greater than the consolidated tax liability, PacifiCorp would have the parent collect $150 million in taxes from both utilities' customers when the consolidated tax payment for the whole corporate family is only $100 million.

Allocating the above tax example based on net income, however, would solve this problem. If we allocate the consolidated tax liability based on each affiliate's contribution to net income (net income of affiliates with tax liability), then the ratepayers of Utility A would have a tax liability of $67 million and the ratepayers of Utility B would have a tax liability of $33 million.

iii. Unfair To Treat Unregulated Affiliates Preferentially

SB 408 requires the Commission to attribute the tax liability of a consolidated company to the utility and to affiliates of the utility. It would not be a reasonable policy for the Commission to give preferential treatment to the affiliates it does not regulate at the expense of the utility it does regulate.

The core of PacifiCorp's argument is that if we attribute taxes in the manner prescribed by the temporary rules, we would unfairly capture tax deductions that are unrelated to the utility. Unfortunately, one cannot make this argument without also arguing that, somehow, it IS fair for an unregulated affiliate of a holding company to get preferential treatment, while a utility affiliate bears a disproportionately large portion of the consolidated tax burden. PacifiCorp's argument is nonsensical.

The allocation method that we advocate does not touch affiliate deductions that are used within that affiliate; this methodology only considers the stand-alone tax liability of each affiliate, including the parent and the utility. If an affiliate has a tax deduction which it uses to reduce its tax liability, then that deduction stays with the affiliate. However, when an affiliate has more tax deductions than it can use – dropping its tax liability below zero – then those deductions are used to reduce the overall tax liability of the remaining affiliates in the consolidated corporate tax liability, and it is unfair to allocate that reduction in taxes differently between affiliates.

The consolidated tax deductions reduce the consolidated tax burden; that's the tax burden that utility customers are a part of. If an affiliate uses a tax deduction in such a way that the affiliate's stand-alone tax liability – which it contributes to the consolidated filing – is reduced, then this deduction stays with the affiliate. If, however, affiliate tax deductions are brought to the consolidated filing, then they become of concern to us, as the regulated utility is a part of the consolidated filing.

Holding company shareholders use a utility within the corporate family as a tax mule. Under PacifiCorp's proposed methodology, the shareholders, with the acquiescence of the Commission, would charge the utility for a greater share of the consolidated taxes than other affiliates, by attributing less of the consolidated tax deductions to the utility. This makes a utility more valuable to shareholders of a holding company than to the utility's shareholders if the utility were independently traded. First, we see no rational reason a utility should be more valuable to shareholders in a holding company than it would be as an independently-traded company. Second, by regulating taxes in the manner proposed by PacifiCorp, we encourage the absorption of Oregon utilities into massive holding companies, and actively discourage investors from purchasing them as independently-traded utilities.

One of the most egregious examples of this use of a utility by a holding company is, of course, Enron's notorious tax two-step. Enron used the tax deductions of its affiliates to reduce the consolidated tax liability of the corporate family to near zero. The taxes that were forecast in PGE's rates were based on what PGE's stand-alone tax liability would have been. PGE, however, was not a stand-alone utility. This resulted in two distinct abuses of ratepayers: 1) The amount of tax money that actually reached government entities was infinitesimal compared to the amount of tax money collected from the customers of PGE, money which went instead into shareholder pockets; and 2) whatever token taxes were actually paid by the corporate family were paid entirely by PGE customers; no other affiliate had to share the tax burden.

This is a key point in understanding the problem not only with how taxes have been calculated in the past, but also the problem with PacifiCorp's proposed attribution of consolidated taxes. If a utility is part of a consolidated tax filing, and tax deductions are used to reduce the consolidated tax liability (beyond those deductions used within an individual affiliate's stand-alone tax liability), then the utility, as a participant in the consolidated filing, should not be allocated a greater share of the tax burden than the other affiliates in the tax filing.

D. Legislative History

The approach CUB supports, that was developed by Staff and adopted by the Commission for the temporary rules implementing SB 408, while based on the language in the law itself, is also well supported by the legislative history of the bill. A review of legislative history is not an exercise in highlighting individual statements plucked out of context, for many statements are made by many parties; rather, it is an effort to identify the trend of the legislation as it made its way through the process, and, ultimately, to divine the legislative policy that emerged from that process. Since we believe that "properly attributed" is a delegative term, and there is, in fact, legislative history to support this position, we did not expect to find much history specifically defining the term. The more important search is for the legislative policy that the Commission must complete by applying the delegative term.

i. Legislature Demanded Change In Calculating Customer Tax Charges

There can be little doubt that the legislature intended to change the way taxes are calculated and charged to customers. The legislature very clearly and very loudly rejected the stand-alone approach that the Commission has historically used to calculate taxes. Legislators clearly believed that the stand-alone approach was overcharging customers for taxes and they were demanding a change.

The preamble to SB 408 is a veritable Bill of Rights for utility ratepayers on the tax issue. Section 2. The legislature found and declared that: the alignment of taxes and rates is a special interest of the state (Section 2(1)(a)); taxes are a unique utility cost because they are affected by the parent or affiliates ((1)(b)); the Commission currently assumes the utility is not part of an affiliated group ((1)(c)); the way regulation treats taxes in rates and the accounting methods used by the parent company may result in a difference between the actual consolidated tax liability and taxes in rates ((1)(d) and (e)); and rates are fair, just, and reasonable only if they include amounts for taxes that are actually paid to the government ((1)(f)). While the preamble is not part of the statutory language, it is an excellent gauge of the sentiment of the legislature and the policy direction of the statute.

The legislature recognized a problem with the current regulatory treatment of taxes in that the taxes included in rates did not recognize the consolidated tax liability of which the utility is a part, and resulted in a chasm between taxes collected in rates and those paid to the government. The legislature found this to result in inequitable rates, and SB 408 was designed to change that.

ii. Statements Of Those Who Helped Draft Bill Support Our Interpretation

The legislative history includes a significant discussion from people who participated in writing the bill and legislators who cosponsored the bill. An analysis of these statements and the trend of the bill supports the interpretation of the statute adopted in temporary rules.

a. Jason Eisdorfer

Jason Eisdorfer, CUB's staff attorney, was asked to be on the Senate work group that produced the Senate version of SB 408. At the same time, CUB was also pursuing an adjustment in PacifiCorp's rate case, UE 170, that would recognize the interest deduction taken at PacifiCorp's holding company as a known and measurable adjustment to the forecast of PacifiCorp's tax burden. Clearly, in concurrently participating in drafting the Senate version of SB 408 and testifying in UE 170 that taxes forecast for rates should account for holding company deductions, CUB firmly believed that SB 408 would address deductions that corporate accountants were hiding elsewhere in the corporate family tree.

In May of 2005, Mr. Eisdorfer's testimony to the Senate Committee makes clear that SB 408 addresses a utility holding company's interest deductions from debt at the holding company.

> We pay utility shareholders a profit in rates. We cannot avoid that, it's hardwired into our rates, and we pay shareholders a profit so they will make good business decisions to invest in resources, to invest in utility infrastructure in an efficient manner, and to take some risk. We do not provide the shareholders a profit based on how creative the parent company's accountants, tax accountants are, we don't pay the utility a profit based on where the holding company stores debt, which is a source of tens of millions of dollars of mismatch in what customers are charged versus what is actually paid. Literally it simply is where debt is stored, whether it's at the utility or holding company, and credit rating agencies look at the overall amount of the debt anyway, and simply where you store it creates a mismatch.

Jason Eisdorfer, Testimony to the Senate Business and Economic Development Committee. SB 408 Work Session, May 31, 2005.

b. Dan Meek

PacifiCorp claims that SB 408 was limited to the Enron problem where the consolidated company paid taxes well below what was collected from customers of the regulated utility. No one has been more closely associated with criticism of this "Enron problem," than Dan Meek. He was also part of the Senate Work Group that developed SB 408. In his testimony at the Work Session in May, he is clear that the bill is intended to allocate the consolidated tax liability to the affiliates, not simply cap the stand-alone tax liability of the utility.

> I believe what the committee is trying to do here is to avoid the problem of potential double counting of taxes paid by a consolidated group that includes more than one utility, and that is the circumstance we may well face if Mid-America buys Pacific Power & Light. Let's say Pacific Power & Light charges rate payers $80,000,000 for taxes, the Iowa subsidiary of Mid-America charges rate payers $100,000,000 for taxes, the consolidated group pays actually $80,000,000 in taxes. Who gets credit for the $80,000,000 that was paid? Does Pacific get credit for it? Or, does the Iowa utility get credit for it? What I think you are trying to avoid here is a situation where both utilities get credit for the same $80,000,000 that was paid, when in fact there was only one $80,000,000 paid, and there wasn't two of them. I think what you are trying to accomplish here is that amounts that are paid by the parent or by the consolidated group to government are not to be double counted, and that in fact the tax liability of the group is to be assigned to or allocated to the individual members of the group in some reasonable way. States that have done these adjustments, for example, often use the, often allocate the tax liability to members of the group based upon each member of the group's contribution to the net taxable income of the group. That would be a reasonable way to do it, and I think that is what you are trying to get at here.

Dan Meek, Testimony to the Senate Business and Economic Development Committee. SB 408 Work Session, May 31, 2005.

c. Senator Vicki Walker

In June, after listening to input on SB 408 from numerous parties, Senator Vicki Walker echoed the sentiments expressed by Mssrs. Eisdorfer and Meek. Senator Walker was the original sponsor of the first bill addressing the problem with utility taxes, and participated in the hearings and work sessions that developed SB 408. In her statement on the floor of the Senate in support of SB 408, Senator Walker made clear that the bill is intended to incorporate into rates the losses from affiliates:

> But it's fair to say that Oregon ratepayers over the past eight years have certainly paid to these utilities over $1 billion for federal income taxes and state income taxes that have not been paid to any government. How do utilities get away with this despite their very large net incomes? That's because most of these utilities are corporate conglomerates and do not even file their own tax returns. The returns are filed by their corporate parents, such as Enron, which deducts billions of dollars in alleged losses experienced by the corporate parents and affiliates…
>
> Senate Bill 408 requires each regulated utility, except the water utilities, to file an annual tax report with the PUC stating the amount of income taxes actually paid to government by the utility or by its consolidated group and properly attributed to the utility…Because most of these utilities are consolidated with their corporate parents for income tax purposes, it is important that the Commission not allocate to the utility, credit for income taxes paid to the government by the consolidated group, that is more than the amount of income tax payments properly attributed to the utility.

Senator Vicki Walker, Senate Chamber, June 8, 2005.

d. Senator Rick Metsger

Senator Metsger too carried the sentiments of Mssrs. Eisdorfer and Meek to the Senate floor when describing his support for the bill. Senator Metsger was the Chair of the Committee that developed SB 408 in the State Senate. In his floor speech, he was clear that the approach when looking at the consolidated company in SB 408 was "the same actual taxes paid standard" that is used by Pennsylvania.

> A couple of issues were brought about other states, and I wanted to talk a little bit about that. There are other states that take into account the taxes. Connecticut, this is from the Public Utility Commission in their white papers and their investigation. The study that was done. Connecticut, Florida, Indiana, Pennsylvania, Tennessee, Virginia and West Virginia, report that they do consider the savings from the consolidated returns and recognize those for the rate making purposes. Additionally, the

> Pennsylvania PUC, consistent with the state supreme court decisions, applies this same actual taxes paid standard by including a utility's share of federal taxes benefits when they do set the rates.

Senator Rick Metsger, Senate Chamber, June 8, 2005.

e. Michael Early

When SB 408 reached the Oregon House, it went through a series of hearings and was amended several times. The final version of the bill was the –B 22 amendments. In the July 26, 2005 work session of the House State and Federal Affairs Committee, it was Michael Early of ICNU who offered the Committee an analysis of this final bill. According to Mr. Early, the starting point of the tax adjustment is the actual taxes paid by the consolidated company, which amount is then allocated to the regulated operations of the utility by the Public Utility Commission. The starting point is not the stand-alone tax liability of the utility.

> The starting point in our bill is it looks at, for the parent, it says how much tax did the parent pay and you look at the check. And then the Commission asks itself how much of that tax is attributable to a regulated operations of the utility and that's the job of the Commission.

Michael Early, Testimony to the House State and Federal Affairs Committee. Senate Bill 408 Work Session, July 26, 2005.

In an earlier hearing before the same Committee, Mr. Early had explained that the comparison the Commission makes is not between the taxes paid to government entities and the taxes that are collected in rates, which is what PacifiCorp is now arguing, but instead requires an allocation to the utility of taxes paid in order to determine what is "properly attributed to the regulated operations of the utility."

> "Taxes paid" is <u>not</u> 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 <u>properly attributed to the regulated operations of the utility</u>." This is defined and determined by applying a fraction (not greater than one) to "taxes paid", based on the amount of taxes paid that is

> attributed to revenues collected for service provided in Oregon (and activities that were intended to provide such services) from the regulated operation of the utility.

Michael Early, Written Testimony to the House State and Federal Affairs Committee. Hearing on SB 408, June 30, 2005. Emphasis added.

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

The second question posed by Judge Logan in her October 5th memo regards the legislature's intent in Section 3(13)(f)(B). This section appears to simply match utility investment with tax credits when calculating the taxes that are paid. This section applies only to the regulated operations of the utility; it does not apply to affiliates. Section 3(13)(f)(B) dictates that tax credits associated with an investment that is not yet in rates, will not count when determining taxes paid. If a utility invests in wind generation, but rates do not yet reflect the cost of that wind generation, then the tax credits associated with that investment are not counted when determining taxes paid.

IV. Material Adverse Effect On The Utility

Section 3(9) of SB 408 includes an off-ramp providing that, after a hearing, the Commission can terminate the automatic adjustment clause if continuing it would have "a material adverse effect on customers of the public utility." Question three of Judge Logan's memo addresses the application of "material adverse effect" to the utility itself. Here the law is very clear. The Commission may terminate the automatic adjustment clause if it finds that such a clause would have a "material adverse effect on customers of the public utility." There is no language in the bill that allows it to be terminated based on a finding of a material adverse effect on the utility.

Of course, the relationship between a utility and its customers is in many respects interdependent, and the health of the utility would probably be raised in the hearing determining the effect on the utility's customers. Customers need a financially solvent utility with access to capital to make necessary investments and to absorb the normal variability of costs and revenues to which the utility is subject. This suggests that, in at least some cases, an outcome that causes a material adverse effect on the utility would also create a material adverse effect of the utility's customers. However, in order for the Commission to suspend the automatic adjustment clause due to a material adverse effect on the utility, the Commission would have to determine that the material adverse effect went beyond the utility, and also had a material adverse effect on customers of that utility.

V. Quarterly Estimated Taxes

Finally, addressing the fourth question posed by Judge Logan, we do not read the bill as prescribing any particular treatment to quarterly estimated taxes. The bill clearly is dealing with annual tax payments and, as such, we believe that it would allow the automatic adjustment clause to be applied annually rather than quarterly.

Respectfully Submitted,
October 28, 2005,

Jason Eisdorfer

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2005, I served the foregoing Opening Brief of the Citizens' Utility Board of Oregon in docket AR 499 upon each party listed below, by email, and upon the Commission by email and by sending 6 copies by U.S. mail, postage prepaid, to the Commission's Salem offices.

Respectfully submitted,

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