

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 498

In the Matter of the Adoption of)
Temporary Rules to Implement SB 408)
Relating to Annual Tax Reports and) ORDER
Automatic Adjustment Clauses Relating to)
Public Utility Taxes.)

DISPOSITION: PETITION DENIED

On October 14, 2005, PacifiCorp filed a petition to repeal or amend temporary OAR 860-022-0039 pursuant to ORS 183.390 and OAR 137-001-0070. On November 3, 2005, the Industrial Customers of Northwest Utilities and the Citizens' Utility Board of Oregon filed responses to the petition.

Background

On September 2, 2005, Governor Kulongoski signed into law Oregon Laws 2005, chapter 845 (SB 408). This bill required certain public utilities to file a tax report by October 15, 2005. On September 15, 2005, the Public Utility Commission of Oregon (Commission) adopted temporary OAR 860-022-0039, which established the tax report filing requirements. As part of that rule, we adopted a definition of the term "properly attributed." OAR 860-022-0039(2)(d).

In the order accompanying the temporary rule, we acknowledged that a review of issues related to SB 408 implementation would occur in the permanent rulemaking proceedings (Docket No. AR 499). We also stated that none of the temporary rulemaking decisions should be considered as precedent for the decisions to be made in the permanent rulemaking docket.

Discussion

Under ORS 183.390, an interested person may file a petition asking that we amend or repeal an administrative rule. The statute requires that we invite public comment on the disputed rule. When reviewing the petition, we must consider the continued need for the rule; the nature of the complaints and comments received from the public; the complexity of the rule; the extent to which the rule overlaps, duplicates or conflicts with other governmental rules and regulations; the degree to which technology, economic conditions or other factors have changed in the subject area affected by the rule; and the legal basis for the rule. See ORS 183.390(3). We must either deny the petition in writing or initiate rulemaking proceedings no later than 90 days after the petition is filed.

Initially, we question whether ORS 183.390 was ever intended to apply to the repeal or amendment of temporary rules, particularly since such rules expire 180 days after being filed with the Secretary of State's office. However, we invited public comment on the rule as required by ORS 183.390 and received two responses. Both responses supported the temporary rule as adopted.

PacifiCorp filed a petition seeking to repeal or amend OAR 860-022-0039. The crux of the dispute is PacifiCorp's opposition to the temporary rule's definition of "properly attributed." PacifiCorp makes two arguments against the temporary rule. First, the utility asserts that the Commission exceeded the legislative authority granted under SB 408. Second, it argues that the Commission failed to abide by the applicable statutes under the Oregon Administrative Procedures Act (APA).

The first allegation is unfounded. Attorney General Hardy Myers issued an opinion stating that the term "properly attributed" is a delegative term, which must be interpreted by the Commission. *See* Attorney General Letter of Advice dated December 27, 2005, to Chair Lee Beyer at 9-11. The opinion goes on to illustrate some ways we could exercise our discretion, including one which is consistent with the definition of "properly attributed" used in the temporary rule. *See id.* at 17. As the temporary rule definition is consistent with the legal interpretation of SB 408 given to us by the Attorney General, we clearly did not exceed our legislative authority by using an allocation approach to define the term "properly attributed."

The second allegation, that we violated ORS 183.335(5)(a) in adopting the temporary rules, is also without merit. That statute requires us to make a clear statement as to why immediate action is necessary. Such a statement should include the specific consequences that would result from our failure to take action, including what persons or entities would suffer if the temporary rule was not adopted. The statement should also include how the temporary rule will either avoid or mitigate the consequences. *See Oregon Attorney General's Administrative Law Manual*, 40 (2004).

In the order adopting the temporary rule, we stated:

Failure to immediately adopt a temporary rule will result in serious prejudice to the public interest. Without this temporary rule, the utilities have not been told what is required in the October 15, 2005 tax report filing. The temporary rule meets this need by defining certain terms included in SB 408. Order No. 05-991, 1 (citation omitted).

This statement specifically sets forth the consequences of failure to take immediate action and identifies the entities that would suffer or be harmed, that is, utilities that would not know what to include in their tax reports. We go on to state that the rule aids utilities in knowing what to include in their tax reports.

PacifiCorp asserts that SB 408 defines what is required for the tax report, and no further definition by rule is needed. We disagree. SB 408 states, in pertinent part:

* * * The tax report shall contain the information required by the commission, including:

(a) The amount of taxes that was paid by the utility in the three preceding years, or that was paid by the affiliated group and that is *properly attributed* to the regulated operations of the utility, determined without regard to the tax year for which the taxes were paid * * *
Or L 2005, c 845, § 3 (emphasis added).

Contrary to PacifiCorp's assertion, SB 408 does not, on its own, detail what is required for the tax report. Without a definition, a utility would not know how to calculate the amount of taxes that is "properly attributed" to the regulated operations. It is up to this Commission to define the term "properly attributed" so that the utilities can make an appropriate calculation for their tax reports.

We have considered the statutory requirements under ORS 183.390. The temporary rule will remain until its expiration in March. The subject matter upon which the rule is based is complex, and will remain so as we complete the process for adopting permanent rules. This temporary rule explains the term "properly attributed" and it does not overlap, duplicate, or conflict with other governmental rules or regulations. Finally, the rule has been properly promulgated under ORS 183.335(5). We reject the claims raised by PacifiCorp and deny the petition.

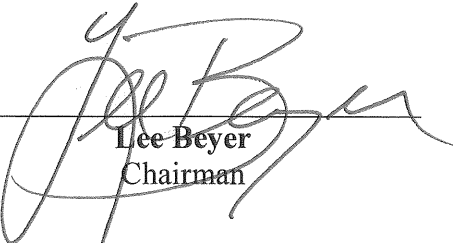
Finally, as part of its petition, PacifiCorp requested an extension of time under OAR 860-014-0093 in which to comply with the temporary rule. This extension was granted by an administrative law judge on October 18, 2005. In light of our decision in this order, PacifiCorp should file its tax report in compliance with temporary OAR 860-022-0039. PacifiCorp will have 14 days from the date of this order make the requisite filing.

ORDER

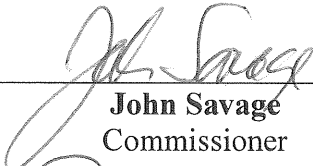
IT IS ORDERED that:

1. The petition filed by PacifiCorp to repeal or amend temporary OAR 860-022-0039 is denied.
2. PacifiCorp must file a revised tax report complying with temporary OAR 860-022-0039 within 14 days of the date this order is entered.


Made, entered, and effective JAN 05 2006.



Lee Beyer
Chairman



John Savage
Commissioner



Ray Baum
Commissioner



A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.