ORDER NO. 06-400

ENTERED 07/14/06

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 499

In the Matter of	)	
	)	INTERIM ORDER
Adoption of Permanent Rules to Implement	)	
SB 408 Relating to Utility Taxes.	)	

DISPOSITION: PROPOSED RULES ON PROPERLY ATTRIBUTED ISSUED; PRELIMINARY DECISIONS ON RELATED ISSUES

On September 2, 2005, Governor Theodore Kulongoski signed into law Senate Bill 408 (SB 408), passed during the 2005 Legislative Assembly and generally codified at ORS 757.268.[1] SB 408 requires certain public utilities to file annual tax reports and other tax information with the Public Utility Commission of Oregon (Commission). In this annual filing, the affected utilities must identify the amount of taxes paid, either by the public utility itself or its consolidated group, and the amount of taxes authorized to be collected in rates during specified time periods. If amounts collected and amounts paid differ by more than $100,000, SB 408 requires this Commission to direct the public utility to implement a rate schedule with an automatic adjustment clause accounting for the difference.

This process of "truing up" a utility's cost for taxes constitutes a departure from ratemaking methods traditionally employed by the Commission. Instead of calculating taxes on a stand-alone basis, SB 408 requires this Commission to track the amount of taxes actually paid and determine what portion of those amounts are properly attributed to the regulated operations of the utility. Where taxes are paid on a consolidated basis by a utility parent, this task necessarily involves an apportionment of the paid taxes to all affiliates within a taxpaying entity, to ensure that ratepayers only pay the utility's share of the taxes paid.

Establishing a method to determine what amounts are "properly attributed" to the regulated operations of a utility has been difficult and controversial. In this interim decision, we state our intention to adopt a widely established methodology used by Oregon and other states to apportion income for multistate corporations' state tax liability. *See Fisher Broadcasting, Inc. v. Dept. of Rev.*, 321 Or 341, 351 (1995). We

[1] The discussion in this interim order generally refers to the part of the statute codified at ORS 757.268, in Section 3 of SB 408. References in this order to sections of the law refer to citations of ORS 757.268.

refer to this approach as the "Apportionment method." For reasons further explained in this interim decision, the Apportionment method provides a sound basis for calculating taxes "properly attributed" to the utility. This methodology fairly balances the interests of the utility and its ratepayers and, by utilizing readily available information, is easy to administer. Moreover, the process is legislatively sanctioned, well established, and has been widely utilized to apportion income for the purpose of state taxation for over fifty years. Finally, we believe that the Apportionment method is consistent with the letter and spirit of SB 408.

This interim order sets forth preliminary decisions regarding the determination of "properly attributable" and other aspects necessary to implement SB 408. The purpose of issuing this order is to indicate the intention of the Commission, so that participants can further develop proposed rules for the implementation of SB 408. Public comment may still be made on any issue in this order, until August 21, 2006, the date of the rulemaking hearing. After that date, the Commission will not take any further comment and will issue final rules.

Background

Temporary rules were adopted in Order No. 05-991, on September 15, 2005. Subsequently, several workshops and rounds of public comments were held to assess legal issues associated with SB 408, and a letter of advice regarding several questions was issued by the Department of Justice on December 27, 2005. Further workshops were held to develop and evaluate straw proposals put forth by participants in the rulemaking process on application of various interpretations of "properly attributed" in SB 408. After the straw proposals were revised, two rounds of comments were submitted and a workshop with Commissioners was held to discuss the merits of various interpretations of "properly attributed." The comments also addressed whether an earnings test should be adopted, whether actual figures should be used for certain components of the "taxes authorized to be collected" calculation, whether deferred accounting and offsets from other deferred accounts should be used, and how Section (12)(a) should be interpreted.

"Properly Attributed"

Section (6) states:

> The automatic adjustment clause shall account for all taxes paid to units of government * * * by the affiliated group[2] that are properly attributed to the regulated operations of the utility, and all taxes that are authorized to be collected

[2] The statute also contains similar provisions for just a utility, but since the four relevant utilities, as defined in ORS 757.268(13)(b), are part of larger affiliated groups with non-utility operations, we address only the provisions related to affiliated groups.

> through rates, so that ratepayers are not charged for more tax than * * * the affiliated group pays to units of government and that is properly attributed to the regulated operations of the utility.

Under Section (12), the amount of "properly attributed" taxes that are paid may not exceed the lesser of (a) the 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 affiliated group.

On December 27, 2005, the Department of Justice issued a letter of advice stating that "properly attributed" is a delegative term, which requires the Commission "to make a judgment as to what constitutes a 'proper' allocation of income taxes." Letter from Hardy Meyers, Or Atty Gen, to Lee Beyer, Commn Chair, at 8 (Dec 27, 2005) (available at http://www.puc.state.or.us/PUC/leg/sb408/index.shtml) (hereinafter "Letter from Atty Gen"). The letter states that the Commission may craft a "properly attributed" method that is equal to or lesser than the cap as determined by the calculation set forth in Section 12. *See* Letter from Atty Gen,13-14. Whichever method the Commission chooses, rates must be "fair and reasonable" under ORS 756.040. *See* Letter from Atty Gen, 16.

Straw Proposals

In discussing straw proposals for implementation of the "properly attributed" language, participants identified what have been referred to as the two "book ends" that represent the opposite ends of participants' positions. The first book end, which was put in the temporary rule and supported by customer groups, allocates taxes paid within the affiliated group, on the basis of taxable income, to every affiliate with taxable income within that company. *See* OAR 860-022-0039 (adopted in AR 498, Order No. 05-991). Opponents criticize this approach, however, because it gives utility customers the tax benefit of losses in other businesses even though they do not bear any portion of those losses. Further, it may require auditing the tax liability of every affiliate in the group in order to determine the utility's ratio, which could be impractical to implement.

The opposite book end, generally supported by the utilities and the Commission Staff (Staff), seeks to match the costs borne by ratepayers with the corresponding tax benefits. Represented by the "with and without" method, this approach requires determining the consolidated tax payment with the regulated operations of the utility factored in, and then the consolidated payment without the regulated operations of the utility. *See* PacifiCorp straw proposal. The difference between the two amounts would be considered the tax that is properly attributed to the utility. A perceived flaw with this approach is that it mirrors one of the caps set forth in the bill, Section (12)(a), which states that taxes paid may not exceed that "portion of the total taxes paid that is incurred as a result of income generated by the regulated

operations of the utility."[3] While we have the discretion to craft a "properly attributed" method equal to the lesser of the two caps set out in Section (12), *see* Letter from Atty Gen, 17, critics of the "with and without methodology" question whether a "properly attributed" calculation equal to the Section (12) cap is the most appropriate method of implementing the statute.

There were other variations presented by the rulemaking participants. Several proposals required numerous adjustments to a utility's hypothetical stand-alone tax liability. *See* CUB straw proposal; Avista straw proposal. Such a starting point appears contrary to the policy underlying the statute, which begins with taxes paid and "attributes" them to various affiliates, including the utility. *See* ORS 757.268(6). Other proposals require identification of a subgroup of affiliates with a defined transactional nexus. *See* ICNU/ NWIGU straw proposal. Again, the proposed adjustments would be to the hypothetical utility's stand-alone liability, not to taxes paid by the parent. Further, the Commission would be required to identify the subgroup each year, taking the "automatic" out of "automatic adjustment clause." *See* ORS 757.210(1)(a)("no hearing need be held if the particular rate change is the result of an automatic adjustment clause").

Proposed Resolution

The task before us is to determine what amounts of taxes paid to units of government by an affiliated group are "properly attributed" to the regulated operations of a utility. On its face, the concept of "attributing" a utility's share from a consolidated tax bill appears straightforward. We need only establish a formula to divide the amount of taxes paid among entities in the taxpaying group. The difficulty is determining what factors should be used to develop a formula suited for properly isolating the taxes of a regulated utility from other corporations in a consolidated tax return.

[3] Participants appear to have interpreted Section (12)(a) as the stand-alone calculation. We note that this is not entirely accurate. There are two parts to the section: (1) the portion of taxes paid, which is defined in SB 408 as "amounts received by units of government" from the taxpaying entity that contains the utility, and subject to certain adjustments, and (2) that is incurred as a result of regulated operations of the utility. This implies a certain amount of attribution; that is, a determination of the portion of taxes actually paid that result from regulated operations. Where a utility stands alone, or its tax-paying owner does not have a negative tax liability that is counteracted by the utility's taxes, the calculation *may* be the equivalent of a stand-alone computation. However, a tax-paying parent may have a negative tax liability that is offset by the utility's taxes, resulting in an amount less than stand-alone. In keeping with this logic, the Attorney General explained that "paragraph 3(12(a) addresses those taxes that would not have been received by units of government 'but for' the existence of the regulated operations." Letter from Atty Gen,15.

For these reasons, we believe that PacifiCorp's with and without proposal best reflects the application of the language in Section (12)(a). To determine the effect of a utility's income on the consolidated parent's tax liability, the utility should first calculate the parent's tax liability without the regulated operations of the utility, and then calculate liability with the regulated operations factored in. The difference will reflect the portion of taxes paid that is incurred as a result of the income from the regulated operations of the utility.

To perform this task, we believe the methodology used to determine amounts "properly attributed" should seek to balance the interests of the utility and ratepayers. To be consistent with the spirit and letter of SB 408, the methodology should also begin with the amount of taxes actually paid to governmental units. Such a method, moreover, should be easy to administer, use readily available information, and be "automatically" applied without a hearing, *see* ORS 757.210. Finally, the adopted methodology should be flexible enough to apply to any corporate structure currently in place or in place in the future.

After extensive consideration of this matter, we find that we need not create a new apportionment process to meet these parameters. The task of determining the amounts of taxes "properly attributed" to the regulated operations of a utility is similar to the task facing state taxing authorities in determining the state tax liability for multistate corporations. To accomplish this, our Legislative Assembly and other states have adopted a methodology, which we will call the Apportionment method, to fairly determine a multistate corporation's portion of income so that, when summed up, the corporation pays state taxes on no more than one hundred percent of its net income. This three-factor Apportionment method, first proposed by a committee of the National Tax Association in 1939, has enjoyed widespread acceptance. *See* Jerome Hellerstein, Walter Hellerstein, *State Taxation: Constitutional Limitations and Corporate Income and Franchise Taxes*, ¶ 8.06 n 174 (3rd ed). The Apportionment method was adopted by Oregon in 1965, *see* Or Laws 1965, c 152, § 10, and is utilized, with some variation, by nearly every state. *See* Hellerstein, ¶ 9.02, table 9-3.

As used by state taxing authorities to determine a corporation's state tax liability, this Apportionment method apportions a multistate corporation's federal taxable income based on the amounts of property, payroll, and sales in each state.[4] As the Oregon Supreme Court has described it,

> The three-factor formula works in the following way: Dollar values are assessed to each of three aspects of taxpayer's business: property, sales and payroll. Each of these factors is a fraction. The numerator of each fraction is the Oregon portion of the value and the denominator is the total value everywhere. Each fraction is rendered a percentage. The three percentages are added together and divided by three. The resultant percentage represents the extent of taxpayer's business in Oregon. It is multiplied by taxpayer's income during the tax year to determine the

[4] We acknowledge that the State of Oregon has weighted the factors unequally for economic development purposes. At this time, we have no reason to weight one factor more heavily than another, and propose to use an average of the ratios based on the three equally-weighted factors. This three factor system has wide support, as noted by the United States Supreme Court, but we remain open to comments from the participants on this point. *See Container Corp. v. Franchise Tax Bd.*, 463 US 159, 170, 183 (1983); *Gen. Motors v. District of Columbia*, 380 US 553, 561 (1965).

> Oregon taxable income. The resultant dollar figure, after modifications not relevant to this case, is multiplied by the applicable excise tax rate to determine the amount taxpayer must pay.

Twentieth Century-Fox Film v. Dept. of Rev., 299 Or 220, 224 (1985). The Court later provided an example of how the Apportionment method is applied in *Crocker Equipment Leasing, Inc. v. Dept. of Rev.*, 314 Or 122 (1992). In that case affirming the Department of Revenue's interpretation of "property," the Court upheld the Department's findings for the tax years 1978-1980, a payroll ratio of zero percent for each year, property ratios of .931 percent, .748 percent, and .502 percent; and sales ratios of .123 percent, .093 percent, and .061 percent. *See id.* at 127. The Court then averaged the ratios and found apportionment factors of .351 percent, .046 percent, and .031 percent for 1978-1980, respectively. After multiplying those ratios by the company's total federal taxable income, the Court came up with the amount of income apportioned to Oregon and the resulting Oregon income tax.

The principles underlying the Apportionment method may also be used to determine taxes paid "that are properly attributed to the regulated operations of the utility." To start, we must determine the amount of taxes paid by the utility or its affiliated group. Under Section 13(a), the "affiliated group" includes all entities comprising the tax-paying group of which the utility is a member and that files a consolidated federal income tax return.

We must make this determination for federal, state, and local income taxes. For federal taxes, the determination is simple: the amount of taxes paid is reported on the consolidated return of the affiliate group that includes the utility. On a state basis, it is more complicated. In Oregon, taxes are filed by unitary groups, which may not be the same as the affiliated group that files a consolidated federal income tax. *See* ORS 317.715(2). For a large conglomerate involved in several different industries, there may in fact be several unitary groups that file taxes in Oregon. To comply with the language of SB 408, particularly the definitions set forth in the law,[5] the various unitary groups that include entities in the consolidated federal return must be aggregated to determine the amount of taxes paid by the affiliated group in Oregon.[6]

[5] ORS 757.268(6) states, "The automatic adjustment clause shall account for all taxes paid to units of government by the * * * *affiliated group* that are properly attributed to the regulated operations of the utility * * *." Taxes paid is defined as "amounts received by units of government * * * from the *affiliated group* of which the utility is a member," with certain adjustments. ORS 757.268(13)(f). An affiliated group is defined as "an affiliated group of corporations of which the public utility is a member and that files a consolidated federal income tax return." ORS 757.268(13)(a).

[6] We recognize that not every entity in the federal consolidated return necessarily pays state income taxes. Those entities that are in the federal consolidated return and that also pay state income taxes, regardless of the state tax structure, are considered part of the affiliated group. ORS 757.268(13)(a).

After the amount of taxes paid has been determined on a federal, state, and local level, the amount attributable to the regulated operations of the utility must be found. To determine that amount, we may apply the Apportionment method to isolate the amount of taxes related to a utility's regulated operations from other entities and activities in an affiliated group.

Applying the Apportionment method to a utility, we must determine the property, payroll, and sales of the regulated operations of the utility, as well as those factors for the total affiliated group. Ratios must be calculated for each amount and averaged on the federal, state and local levels. Once a ratio has been determined, it is then multiplied by the taxes paid in that jurisdiction to establish the amount of taxes paid in that jurisdiction which are attributable to the regulated operations of the utility. Then the attributed amount is adjusted by the items listed in ORS 757.268(13)(f).

The amount of taxes paid, properly attributed to the regulated operations of the utility as set out above, will then be measured against taxes collected in rates to determine whether an adjustment is required to account for the difference. We acknowledge that this system varies from generally accepted ratemaking principles, but we note that we are not implementing a typical ratemaking law. SB 408 was enacted to address the discrepancy between taxes collected and taxes paid by utilities, regardless of the regulatory principles behind the long-standing practice of calculating taxes on a stand-alone basis. In adopting the Apportionment method, we implement SB 408 using a method based on tax principles, developed by a national panel, and adopted to determine taxes by the Legislative Assembly. *See* ORS 314.605-314.675. The wide acceptance of the Apportionment method, albeit with some variations, and the resulting thorough consideration of the definitions and problems of application, weighs in favor of its adoption. *See, e.g.,* Hellerstein, §§ 8-9.

Furthermore, the Apportionment method may be adapted for SB 408 purposes using information that is either already reported by the corporation to determine its multistate taxes or can be readily determined from work papers or calculated using well established definitions. In addition, the methodology starts with taxes paid, the starting point for the legislation, and provides for an automatic adjustment clause that is actually automatic and, contrary to some proposals, does not require refiguring a relevant subgroup for adjustments each year. This will provide some degree of certainty to the utilities that the process will be consistent from year to year. Because it is simple and used for other purposes, there is also less potential for gaming by any one group seeking a particular result. Finally, this method has been sanctioned by the Legislative Assembly, which repudiated the stand-alone calculation, but did not endorse any particular approach to "properly attributed." For all of the reasons cited above, we state our intention to choose the Apportionment method to calculate taxes "properly attributed" to a utility, as reflected in the draft rule language attached at Appendix A.

Earnings Test and the "Double Whammy"

The so-called "double whammy" situation arises because taxes vary with a utility's earnings. When lower than expected earnings reduce the amount of taxes that will be paid, provision of service is more expensive than was predicted in the rate case, and consumers pay less than the utility's actual costs. At the same time, customers will receive a SB 408 refund because income taxes are less than expected. Utilities argue that this result is unreasonable because it exacerbates their under-recovery and customers do not bear the higher cost of service. Conversely, when a utility's earnings are higher than expected as a result of higher revenues or lower costs, income taxes will also rise, and SB 408 requires a surcharge on ratepayers to compensate for those higher taxes. This would result in further increases in the utility's earnings.

To mitigate the effect of the "double whammy" problem, PGE and NW Natural propose using an earnings test to modify the effect of the automatic adjustment clause. Under this proposal, SB 408 refunds would not be implemented if they result in the utility earning below its authorized rate of return, and surcharges would not be made if they cause the utility to earn above its authorized return. NW Natural states that "the earnings test is an adjustment for excess or deficient earnings, made to the extent needed to avoid an arbitrary and capricious surcharge or refund order that would undermine the Commission's determination of what constitutes a fair, just, and reasonable return." NW Natural Opening Comments, 2 (May 3, 2006). NW Natural goes on to say that an earnings test would prevent double recovery or double-penalization by the utility. *See id.* at n 1. PGE also argues that, by failing to take into account actual earnings, the Commission could adjust rates below the "fair, just, and reasonable" standard, in contravention of the Commission's duty under ORS 757.210. *See* PGE Opening Comments, 17 (May 3, 2006).

ICNU and NWIGU argue that adoption of an earnings test would conflict with the intent of the law. Further, they assert that such a test would "turn[] each SB 408 tax filing into a mini rate case and eliminat[e] the incentives to control costs." Opening Comments of ICNU and NWIGU, 20 (May 3, 2006). This test, which would balance a downward tax adjustment against upward costs, or vice versa, would provide inappropriate insulation for the utility and "enhanc[e the utility's] ability to earn its authorized return each year." *Id.* Staff also opposes an earnings test, arguing that an adjustment for taxes below a utility's approved rate of return is not necessarily confiscatory. *See* Staff's Opening Comments, 6 (May 3, 2006).

While we can see the predicament of the utilities, we find existing protections in law eliminate the need for the utilities' proposed earnings test. First, ORS 756.040 requires that rates ultimately allowed must be "fair and reasonable" to avoid confiscation. As the Attorney General made clear, ORS 756.040 provides a limitation to the effect on utilities of rate reductions flowing from the automatic adjustment clause. Letter from Atty Gen, 16. Moreover, the law provides ample opportunities to adjust rates if there is over- or under-earnings. Utilities may file a rate

case under ORS 757.210 if it is under-earning, and Commission Staff or another party may initiate a rate case if it has reason to believe that a utility is significantly over-earning.

That said, we do acknowledge the general concerns raised by the utilities. In response, we will consider the tax effects when evaluating issues in other dockets, such as power cost adjustment mechanisms.

We believe that it would be contrary to the intent of the legislature to effectively offset the automatic adjustment clause so that it did not "adjust" rates, as it was designed to do. That is, the earnings test offset could net out the automatic adjustment clause. Because this would strike at the heart of the intent behind SB 408 to adjust rates for the difference between taxes collected and taxes paid, we decline to adopt the earnings test proposed by the utilities.

Actual Amounts

As discussed above, SB 408 requires this Commission to track amounts of taxes paid by the utility and compare these amounts against taxes authorized to be collected in rates. *See* ORS 757.268(6). "Taxes authorized to be collected in rates" is defined in the bill according to a specific formula: revenues collected from ratepayers, multiplied by the ratio of net to gross revenues from regulated operations, multiplied by the effective tax rate used by the commission in setting rates. *See* ORS 757.268(13)(e)(A)-(C).

PGE attempts to modify the definition of "taxes authorized to be collected in rates" by replacing it with a new definition for "taxes charged." Under this new definition, the automatic adjustment clause would use, to determine taxes paid, the revenues actually collected from Oregon customers, excluding certain revenues as selected by the Commission, multiplied by the utility's actual ratio of net to gross revenues from regulated operations, as derived from PGE's FERC Form 1 data, multiplied by the utility's actual effective tax rate, also derived from PGE's FERC Form 1 data from that period. PGE argues that this proposal would calculate an amount for "taxes charged" to customers that incorporates both the amount of "taxes authorized to be collected" per Commission rate setting and variances from that amount caused by tax effect of utility's actual financial results. This proposal, PGE believes, would address the potential mismatch of comparing actual amounts of taxes paid with rate case estimates for taxes paid.

Staff opposes PGE's proposed interpretation of "taxes charged," because the term does not actually appear in the statute. *See* Staff's Opening Comments, 7 (May 6, 2006). In addition, Staff reads the definition of "taxes charged for" as the difference between taxes authorized to be collected in rates and taxes properly attributed to the utility. *See id.* at 7-8.

We decline to adopt PGE's interpretation of "taxes charged" under Section (6). First, the structure of Section (6) refers to calculation of taxes paid and "taxes that are authorized to be collected through rates," so that the amount of taxes charged is not inequitable. The "taxes that are authorized to be collected" is a directive to the Commission to consider a certain calculation; "so that ratepayers are not charged for more tax than" taxes paid refers to a consequence to be avoided. Second, the tax reports filed with the Commission are to include information on taxes paid and properly attributed to the utility, and "the amount of taxes authorized to be collected in rates for the three preceding years." ORS 757.268(1)(b). PGE's argument that this amount should not be used to compute the difference in taxes collected and taxes paid would render the information useless, an illogical interpretation of the legislation which is to be avoided. *See FOPPO v. Washington County*, 142 Or App 252, 259, *rev den* 324 Or 394 (1996). We are not persuaded by PGE's arguments and conclude that Section (6) requires use of the statute's formula to calculate "taxes authorized to be collected in rates," for purposes of the automatic adjustment clause.[7]

Deferred Accounting and Related Offsets

PGE also proposes a deferral mechanism to ensure "the proper treatment of disallowed expenses, non-utility expenses, and expenses that have not been included in rates." PGE Straw Proposal, 1. That is, PGE is concerned that the tax impact of these expenses cannot fairly be considered in the forecast of taxes authorized to be collected from ratepayers, and therefore should not be credited to ratepayers in the adjustment for taxes paid. PGE uses the example of a turbine not included in rates, and which was sold at a loss. This sale would result in a tax deduction, which PGE argues should not flow to ratepayers because they did not pay for the turbine. *See* PGE Opening Comments, 19 (May 3, 2006).

ICNU and NWIGU counter that a deferral mechanism is contrary to the intent of SB 408. Further, they assert that the statute governing deferrals, ORS 757.259, was not meant to serve as an ongoing mechanism to recover for this type of event or for an event of this scale. *See* Opening Comments of ICNU and NWIGU, 18 (May 3, 2006).

Staff argues that we should not permit a deferred account to make adjustments for items not included in rates. The only items for which adjustments should be made are set forth in Section (13)(f)(A)-(C), which provide for adjustments to "taxes paid" for charitable contribution deductions, tax credits associated with investment in the regulated operations of the utility not considered in the last rate case, and deferred taxes related to the regulated operations of the utility.

[7] The Attorney General's letter weighed in on whether rate case data or actual data should be used to calculate the ratio of net revenues to gross revenues and the effective tax rate under ORS 757.268(13)(e)(B) and (C), respectively. *See* Letter from Atty Gen, 26-28. The letter stated that the bill appeared to intend that data be taken from the last rate case, and not updated for purposes of the tax adjustment. *See id.*

In a recent order setting forth guidelines for future and pending deferral applications, we clarified our intent to balance the foreseeability of a cost against the magnitude of its impact on the utility in determining whether to grant the deferral application:

> Initially, the proper approach in analyzing an event is to examine the nature of the event, its impact on the utility, the treatment in ratemaking, and other factors used to evaluate whether a deferred account is appropriate. The next step is to examine the magnitude of the underlying event in terms of the potential harm. The type of event—modeled in rates or not, foreseeable or not—will affect the amount of harm that must be shown by the utility. If the event was modeled or foreseen, without extenuating circumstances, the magnitude of harm must be substantial to warrant the Commission's exercise of discretion in opening a deferred account. If the event was neither modeled nor foreseen, or if extenuating circumstances were not foreseen, then the magnitude of harm that would justify deferral likely would be lower.

UM 1147, Order No. 05-1070, 7.

The automatic adjustment clause for taxes is certainly foreseeable; it is set in statute. As to variances as a result of items not included in rates, those too are foreseeable. In keeping with our prior decisions to consider deferral applications on a case by case basis, we will consider applications for deferral with a skeptical eye in light of the principles set forth in this order and other orders related directly to deferred accounting.

Finally, we believe that adoption of a deferral mechanism would be in opposition to the intent of the legislature, because it would effectively offset the automatic adjustment clause so that it did not "adjust" rates, as it was designed to do. Just as with the utilities' proposed earnings test, this deferral mechanism could net out the automatic adjustment clause. Because this would be contrary to the intent behind SB 408 to adjust rates for the difference between taxes collected and taxes paid, we decline to adopt a deferral mechanism as proposed by PGE.

Made, entered, and effective JUL 14 2006.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

"Properly attributed" means the share of taxes paid that is apportioned to the Oregon regulated operations as calculated in [the rule with the Apportionment method calculation].

"Taxpayer" means the utility or the affiliated group, whichever files income tax returns with units of government.

Properly Attributed

(1) The amount of federal income taxes paid to units of government that is properly attributed to the regulated operations of a utility will be the product of the following two figures:

(a) the total amount of federal income taxes paid by the taxpayer; and

(b) the average of the ratios calculated for the utility's property, payroll and sales, as defined in ORS 314.650 through 314.675, using amounts for regulated operations of the utility in Oregon in the numerator and amounts for the taxpayer in the denominator.

(2) The amount of state income taxes paid to units of government that is properly attributed to the regulated operations of a utility will be the product of the following two figures:

(a) the total amount of Oregon income taxes that is paid by the taxpayer; and

(b) the average of the ratios calculated for the utility's property, payroll and sales, as defined in ORS 314.650 through 314.675, using amounts for regulated operations of the utility in Oregon in the numerator and amounts for the taxpayer in the denominator.

(3) The amount of local income taxes paid to units of government that is properly attributed to the regulated operations of a utility will be the product of the following two figures for each local taxing authority in Oregon:

(a) the total amount of income taxes paid by the taxpayer to the local taxing authority; and

(b) the average of the ratios calculated for the utility's property, payroll and sales, as defined in ORS 314.650 through 314.675, using amounts for regulated operations of the utility in the local taxing authority in the numerator and amounts for the taxpayer in the local taxing authority in the denominator.