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December 27, 2005

Lee Beyer, Chair
Public Utility Commission
550 Capitol St. NE, Ste 215
Salem, OR 97301-2551

Re: Oregon Laws 2005, Chapter 845

Dear Chair Beyer:

As part of the process of setting fair, just, and reasonable rates for regulated services, the Public Utility Commission ("Commission") calculates an estimated amount of tax liability to governmental units that a regulated utility will incur as a result of its future operations. That amount is one variable in the calculus by which the Commission establishes the price the regulated utility may charge its customers.

Federal and state tax laws allow a corporate holding company to file a consolidated income tax return for all of its subsidiaries. *See* 26 USC §§ 1501 to 1505; ORS 317.710. In a consolidated return, the holding company may offset taxable income generated by some subsidiaries, such as an Oregon utility, with losses or tax credits from other subsidiaries in computing the net taxable income of the consolidated group. Likewise, a utility that engages in both regulated and unregulated operations may offset taxable income and taxes generated by its regulated operations with losses or tax credits generated by unregulated operations.

The amount of tax revenue actually received by governmental units from a regulated utility may be more, or less, than the amount estimated during ratemaking. Choices made by a regulated utility and its parent corporation may affect the extent to which actual experience diverges from projected tax liability. Oregon Laws 2005, chapter 845 ("chapter 845") addresses the difference between what ***did*** happen and what was ***projected*** to happen with respect to taxes paid and taxes projected. Among other provisions, chapter 845 requires the Commission to review a utility's paid income taxes that are "properly attributed" to its regulated operations and compare them to the income taxes assumed in the Commission-approved rates for that utility. Depending upon the

results of the review, the Commission may require the utility to establish an "automatic adjustment clause" that may affect the rates that the utility charges.

You have asked several questions about the Commission's implementation of chapter 845. Below, we set forth those questions and our short answers, followed by a supporting discussion.

I. Questions Presented and Short Answers

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

The Commission must oversee adjustments under the conditions specified in chapter 845. The calculation of such adjustments depends in part on the application of the term "properly attributed." The Commission has discretion to define and implement the phrase "properly attributed," subject to the general policy and specific limits expressed in chapter 845. The general policy of chapter 845 is to more closely align taxes collected by a regulated utility from its ratepayers with taxes received by units of government. The specific limits include a cap on the maximum amount of taxes paid that the Commission may properly attribute to regulated operations of public utilities. In any event, the Commission's actions in "properly attributing" taxes paid must result in rates that are fair, just, and reasonable.

B. What did the Legislature intend in the adoption of subparagraph[1] 3(13)(f)(B)?

The provision mandates an increase in the "taxes paid" amount only for "tax savings" that arise from "tax credits" associated with capital outlays for property presently used for providing utility service to customers, but only to the extent that the Commission has not addressed the expenditures for such capital outlays in a general ratemaking proceeding.

C. May the Commission terminate the automatic adjustment clause upon a showing by a utility that the automatic adjustment clause has a material adverse effect on the utility?

No. Under subsection 3(9) of chapter 845, the Commission may terminate the automatic adjustment clause only to protect customers against rate increases that create a material adverse effect on those customers of public utilities. Subsection 3(9) limits consumers' exposure to rate increases resulting from application of the automatic

[1] We use the following convention in our references to cited portions of chapter 845: section 3, subsection 3(13), paragraph 3(13)(f), and subparagraph 3(13)(f)(A).

adjustment clause; other elements of the law limit regulated utilities' exposure to rate reductions stemming from the clause.

D. Section 3 of chapter 845 requires the Commission to establish an automatic adjustment clause within 30 days (or a 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 the utility pays quarterly estimated taxes, must the automatic adjustment clause be applied quarterly, or does the law allow it to be applied yearly?

The Commission may allow a chapter 845 automatic adjustment clause that requires an annual adjustment even if the utility pays estimated taxes on a quarterly basis.

E. Does chapter 845 require that the Commission, in determining the amounts identified in subparagraphs 3(13)(e)(B) and (C), use the numbers calculated from test year data that the Commission has previously authorized?

In the preparation of the "taxes authorized" portion of its annual tax report, a utility must use the ratio of net to gross revenues (3(13)(e)(B)) and the effective tax rate (3(13)(e)(C)) that the Commission previously determined or used in establishing rates for the utility. To the extent that the information necessary to derive these values appears in the test period data approved by the Commission in establishing rates for a specific utility, then the utility should use that information.

II. Discussion

A. Statutory Interpretation

In interpreting a statute, our goal is to determine the intent of the legislature. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993); ORS 174.020. In predicting how a court would interpret a statute or review an agency's interpretation of that statute, we must consider whether the phrase or phrases at issue in that statute are "exact terms," "inexact terms," or "delegative terms." *Springfield Education Assn. v. School Dist.*, 290 Or 217, 223, 621 P2d 547 (1980). "Exact terms" impart relatively precise meanings, and their applicability in a particular case involves only agency fact-finding. *Id.*, 290 Or at 223-24. Examples of exact statutory terms include "21 years of age, male, 30 days, Class II farmland [, and] rodent." *Id.*, 290 Or at 223.

"Inexact terms" are less precise. Although they embody a complete expression of legislative meaning, that meaning may not always be obvious. *Id.* As to "inexact terms," the task of the agency, and ultimately of the courts, is to determine what the legislature

intended by using those words. *Id.* In conducting a review of inexact terms, the courts use the interpretive analysis described in *PGE v. BOLI*, 317 Or at 610-12. *Bergerson v. Salem-Keizer Sch. Dist.*, 194 Or App 301, 311, 95 P3d 215 (2004), *citing Coast Security Mortgage Corp. v. Real Estate Agency*, 331 Or 348, 353-54, 15 P3d 29 (2000).

Under *PGE v. BOLI*, courts examine a statute's text and context, with text being the better evidence of legislative intent. *PGE v. BOLI*, 317 Or at 610. In interpreting text, courts consider statutory and judicially developed rules of construction that "bear directly on how to read the text," such as "not to insert what has been omitted, or to omit what has been inserted," and to give words of common usage their "plain, natural and ordinary meaning." *Id.*, 317 Or at 611; ORS 174.010. The context of a statute includes other provisions of the same statute, prior versions of the statute and other related statutes, as well as case law interpreting those statutes. *PGE v. BOLI*, 317 Or at 610; *SAIF Corporation v. Walker*, 330 Or 102, 108, 996 P2d 979 (2000); *Krieger v. Just*, 319 Or 328, 336, 876 P2d 753 (1994); *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 560 n 8, 871 P2d 106 (1994). If a statute's text and context unambiguously disclose the legislature's intent, the inquiry ends there. *PGE v. BOLI*, 317 Or at 610-11. If the legislative intent is not clear from the text and context of an inexact term, the courts then consider legislative history to attempt to discern that intent. *Id.*, 317 Or at 611-12; *see also Young v. State*, 161 Or App 32, 983 P2d 1044, *rev den* 329 Or 447 (1999).

By contrast, "delegative terms" express an incomplete legislative meaning that the agency is authorized to complete. *Springfield*, 290 Or at 228. Examples of "delegative terms" include "good cause," "fair," "unfair," "undue," "unreasonable," or "public convenience and necessity." *Id.*, 290 Or 228-229. As to such terms, the agency's task is to complete the general legislative policy decision. *Id.* The courts review an agency's decision concerning a "delegative term" to determine whether the decision is within the range of discretion allowed by the more general policy of the statute. *Id.*, 290 Or at 229. In other words, where a statutory term is "delegative," the agency must determine the legislative policy underlying the statute and construe and apply the term consistently with that policy. *Bergerson*, 194 Or App at 311. But "[d]etermining the general policy expressed in the statute is itself a matter of statutory construction[,]" and the courts apply the interpretive principles established by *PGE v. BOLI* in ascertaining the general statutory policy. *Id.* [2]

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[2] In 1995, the Oregon Supreme Court discussed the interplay between the *PGE v. BOLI* and *Springfield* interpretive approaches as follows:

> PGE sets a method of analysis for situations in which the court is asked to interpret what the legislature has specified directly. Here, the court is asked instead to interpret what the legislature has specified in generalities, indirectly; the question is the scope of a broad delegation to an administrative agency for rulemaking.

Meltebeke v. Bureau of Labor & Indus., 322 Or 132, 142, 903 P2d 351 (1995). The court went on to note that, in the case before it, "[n]onetheless, the result would be the same using the PGE methodology." *Id.*

B. "Properly Attributed"

1. Section 3 of Chapter 845

Neither chapter 845 nor any other statute defines the term "properly attributed" for purposes of chapter 845. The phrase appears eight times in chapter 845, and each use refers to "properly attributed" taxes. Seven of those appearances are as part of the phrase, "properly attributed to the regulated operations of the utility," or its functional equivalent, "properly attributed to the regulated operations of the public utility." *See* Oregon Laws 2005, ch 845, §§ 3(4), (6), and (12). The eighth is as part of the phrase "taxes paid that are properly attributed to any unregulated affiliate of the public utility or to the parent of the utility." Oregon Laws 2005, ch 845, § 3(7).

Section 3 of chapter 845 contains all of the statute's uses of the term "properly attributed":

> (1) Every public utility shall file a tax report with the Public Utility Commission annually, on or before October 15 following the year for which the report is being made. 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; * * *.
>
> * * * * *
>
> (4) * * * If the commission determines that the amount of taxes assumed in rates or otherwise collected from ratepayers for any of the three preceding years differed by $100,000 or more from the ***amount of taxes paid*** to units of government by the public utility, or by the affiliated group and ***properly attributed to the regulated operations of the utility***, the commission shall require the utility to establish an automatic adjustment clause, as defined in ORS 757.210 * * *.
>
> * * * * *
>
> (6) The automatic adjustment clause shall account ***for all taxes paid*** to units of government by the public utility that are ***properly attributed to the regulated operations of the utility***, or by the affiliated group that are ***properly attributed to the regulated operations of the utility***, and all taxes that are authorized to be collected through rates, so that ratepayers are not charged for more tax than:

> (a) The utility pays to units of government and that is ***properly attributed to the regulated operations of the utility***; or
>
> (b) In the case of an affiliated group, the affiliated group pays to units of government and that is ***properly attributed to the regulated operations of the utility***.
>
> (7) 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***.
> * * * * *
>
> (12) For purposes of this section, ***taxes paid*** that are ***properly attributed to the regulated operations of the public utility*** may not exceed the lesser of:
>
> (a) That 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 utility or by the affiliated group, whichever applies.

Oregon Laws 2005, ch 845, § 3 (emphasis added).

2. "Properly Attributed" – Delegative Term

As noted above, in order to evaluate how a court would interpret the phrase "properly attributed" on review of the Commission's construction of that phrase, we first must consider whether it is an "inexact term" or a "delegative term."[3] As discussed below, we conclude that "properly attributed" is a "delegative term" for purposes of chapter 845.

Whether a term is "delegative" or "inexact" depends largely on the nature of the term. *See Doherty v. Oregon Water Resources Director*, 92 Or App 22, 29-30, 758 P2d 865 (1988), *adhered to on reconsideration*, 93 Or App 352, 762 P2d 330, (1988). But in determining whether the Legislative Assembly intended the Commission to develop policy in the course of applying the term "properly attributed," it also is helpful to examine the role of the Commission in the regulation of utilities generally. *Id.* (referring to review of the Water Resources Director's authority in the administration of the Ground Water Act generally).

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[3] We perceive no principled basis upon which to conclude that the term "properly attributed" is an "exact term."

As noted above, chapter 845 does not define "properly attributed." The term does not have a well established legal meaning and is comprised of two words of "common usage." We therefore look to its "plain, natural and ordinary meaning" to assist our assessment as to its status as a "delegative" or "inexact" term.

"Attributed" is the past participle of the verb "attribute." The sense of the word most apt to the circumstances is "to explain as caused or brought about by **:** regard as occurring in consequence of or on account of <the collapse of the movement can be *attributed* to lack of morale>." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 2002) ("WEBSTER'S") at 142.

"Properly" is the adverbial form of the adjective "proper" and means "**1 :** SUITABLY, FITLY, RIGHTLY, CORRECTLY <tool ~ used> <~ dressed for the ceremony> <~ assembled machine> **:** STRICTLY <not ~ part of his duties>." *Id.* at 1818. While the definitions of the five synonyms given for "properly" are somewhat circular, they do serve to circumscribe the term's range of meaning. We examine these definitions below.

The plain meaning of "suitable," the root of "suitably," that is most apt to the circumstances is "appropriate from the viewpoint of propriety, convenience, or fitness **:** PROPER, RIGHT * * * <a ~ employment>." *Id.* at 2286. "Fit" means "**1 a :** adapted to an end, object, or design **:** suitable by nature or art * * * **b :** becoming from the standpoint of propriety, convenience or morality." *Id.* at 859. "Rightly" means "**1 :** according to justice or equity * * * FAIRLY, JUSTLY * * * **2 :** in the right or proper manner **:** APPROPRIATELY, FITLY * * * **3 :** according to truth or fact **:** ACCURATELY, CORRECTLY, EXACTLY." *Id.* at 1956. The fourth synonym for "properly" is "correct." The plain meaning of "correct" is "**1 a :** adhering or conforming to an approved or conventional standard * * * **2 a :** conforming to or agreeing with fact **:** ACCURATE * * * **:** conforming to logical or proven principles." *Id.* at 511. The last synonym for "properly" -- "strictly" -- means "* * * without latitude **:** CLOSELY, PRECISELY, RIGOROUSLY, STRINGENTLY, POSITIVELY * * * <certain rules need to be ~ carried out – Agnes M. Miall>." *Id.* at 2261.

"Suitably," "fitly" and some senses of "rightly" and "correctly" allow for a range of acceptable responses, *e.g.*, for many people, more than one kind of "employment" might be "suitable." Moreover, the concepts of "propriety" and "justice or equity" reflected in those senses are similar to other terms that the Oregon appellate courts have concluded are "delegative." As noted above, in the *Springfield* case, the Oregon Supreme Court stated that "good cause," "fair," "unfair," "undue," "unreasonable," and "public convenience and necessity" were examples of delegative terms. *Springfield*, 290 Or 228-229. Since that decision, the Court of Appeals has concluded that the following terms also are "delegative": "misconduct," *Sun Veneer v. Employment Div.*, 105 Or App 198, 201, 804 P.2d 1174 (1991); "perfected" to "the satisfaction of the department," *Hale v. Water Res. Dep't*, 184 Or App 36, 41, 55 P.3d 497 (2002); "good cause, as used in ORS 656.319," *SAIF v. Avery*, 167 Or App 327, 331, 999 P.2d 1216 (2000); and "fair, as used in ORS 711.112(1)(c)," *In re Banore Bancshares, Inc. for Bank of Oregon*, 87 Or

App 276, 283, 742 P2d 628, *rev den* 304 Or 547) (1987). Accordingly, as used in chapter 845, the phrase "properly attributed" appears to reflect a need to make a judgment as to what constitutes a "proper" allocation of income taxes.

On the other hand, other meanings of "properly" ("strictly", "without latitude") and other senses of "rightly" and "correctly" (*e.g.*, "agreeing with fact") suggest there may be a single acceptable response. We therefore turn to the term's context.

That context includes the legislative findings and declarations made in chapter 845. Paragraph 2(1)(f) of chapter 845 states that "[u]tility rates that include amounts for taxes should reflect the taxes that are paid to units of government to be considered fair, just and reasonable." The expression "properly attributed" is part of the machinery by which the Assembly's goal is to be achieved; paragraph 2(1)(f) expresses that goal in terms ("fair", "just," and "reasonable") that plainly are "delegative" as described by our courts.

The Assembly expressly commanded that Sections 2 and 3 of the bill be "added to and made a part of ORS Chapter 757." Oregon Laws 2005, ch 845, § 1. That chapter therefore forms part of the context in which chapter 845 must be interpreted.

ORS chapter 757 generally addresses the Commission's regulation of energy and water utilities. *See* ORS 757.005(1)(a) (defining "public utility" as used in chapter). ORS chapter 756 is the chapter that addresses the Commission's regulation of utilities generally.

The Commission routinely assumes a "delegative" role in the regulation of utilities pursuant to ORS chapters 756 and 757. For example, the legislature has granted the Commission broad power to do "all things necessary" to supervise and regulate public utilities. ORS 756.040. *See also Pacific Northwest Bell Telephone Co. v. Katz*, 116 Or App 302, 309, 841 P2d 652 (1992), *rev den* 316 Or 527 (1993). In addition, the Commission may adopt "reasonable and proper" rules "relative to all statutes administered" by it. ORS 756.060.

Moreover, the Oregon Court of Appeals has recognized the "delegative" authority of the Commission. In *Chase Gardens v. Oregon Pub. Util. Comm'n.*, 131 Or App 602, 607-608, 886 P2d 1087 (1994), the court examined whether certain terms ("undue or unreasonable preference or advantage" and "undue or unreasonable prejudice or disadvantage") in the Commission-administered unjust discrimination statutes were "delegative." The court concluded that "those terms are delegative, because the PUC's task in administering ORS 757.325 'is to complete the general policy decision [of prohibiting a public utility from unjustly discriminating against a particular customer] by specifically applying it * * * to various fact situations.'" *Id.*, 131 Or App at 607-608 (citing *Springfield*). Subsequently, the court cited *Chase Gardens* in holding that the "PUC is entitled to fulfill its authority to verify that access charges made by cooperatives

to other service providers are fair and reasonable," noting that "the court reviews PUC's construction of its delegated statutory authority in accordance with the general legislative policy underlying that authority, including its general powers under ORS 756.040." *Beaver Creek Coop. Tel. Co. v. PUC*, 162 Or App 258, 264, 986 P.2d 592 (1999).

In sum, many uses of the phrase "properly attributed" indicate that the application of chapter 845 requires the Commission to exercise judgment pursuant to a legislative delegation. Such a legislative delegation to the Commission is consistent with the Commission's overall statutory scheme for regulation of energy utilities. Accordingly, we conclude that, in the context of chapter 845, "properly attributed" is a "delegative" term.

3. Legislative History – "Properly Attributed"

Because our conclusion that the phrase "properly attributed" is a delegative term rests on what we consider to be unambiguous statutory terms, it is unnecessary to consult the legislative history of chapter 845. Administrative agencies, including the PUC, need not marshal legislative history if the text of a law is unambiguous. And even when the courts do consult legislative history, they are particularly reluctant to accord much weight to testimony by nonlegislators. *See, e.g., State v. Guzek*, 322 Or 245, 260, 906 P2d 272 (1995) (testimony of representative of Oregon District Attorneys Association "says little about the intent of the Oregon Legislative Assembly as a whole"); *State v. Stamper*, 197 Or App. 413, 424-425, 106 P3d 172 (2005) ("Even if the latter explanation is the more likely, we are hesitant to ascribe to the Legislative Assembly as a whole the single remark of a single nonlegislator at a committee hearing").

But even though unambiguous text alone is sufficient, and despite their skepticism about the persuasiveness of testimony from nonlegislators, the courts occasionally refer to legislative history to confirm their conclusions about the meaning of apparently clear statutes. *See, e.g., Bjurstrom v. Or. Lottery*, 202 Or App 162, 120 P3d 1235 (2005) ("legislative history confirms this conclusion"); *Liberty v. State*, 200 Or App 607, 617, 116 P3d 902 (2005) ("[a]lthough the statute does not appear to us to be ambiguous, we have examined the legislative history"); *State v. Stallcup*, 195 Or App 239, 249, 97 P3d 1229, (2004), *rev granted* 338 Or 124, 108 P3d 1173 (2005) ("to the extent that any uncertainty may remain concerning the content * * *, the legislative history * * * of the 1997 amendments * * * confirms * * *"). In this instance, while we do not believe that the "delegative" nature of "properly attributed" or the underlying general policy of chapter 845 are unclear, we have reviewed the legislative history of chapter 845 to test our conclusion that the Assembly intended to delegate authority to the Commission to make a wide range of judgments about how to execute the Assembly's basic policy.

Chapter 845 is the C-Engrossed version of SB 408 of the 2005 Legislative Assembly. The legislative history of chapter 845 reveals that the House Committee on State and Federal Affairs considered but did not ultimately adopt amendments to SB

408B-Engrossed that defined "properly attributed" for purposes of the bill. Specifically, at its June 30, 2005 hearing on SB 408B-Engrossed, the Committee simultaneously considered the B-13 (a utility-supported version), B-15 (the Department of Justice alternative), and B-16 (industrial and consumer groups-supported version) amendments to the bill. Testimony of Pete Shepherd, House State and Federal Affairs Committee (SB 408B), June 30, 2005, tape 14, side B, at 19-81 (identifying sources for amendments). The proposed B-13 and the B-15 amendments each included an identical definition of "properly attributed":

> "Properly attributed" means the attribution of tax liabilities or tax benefits to the entity or activity whose business or economic activities created the items of income, expenses, losses, deductions or credits that gave rise to the tax liabilities or tax benefits.

Minutes, House State and Federal Affairs Committee (SB 408B), June 30, 2005, Exhibits E and F. The B-16 amendments contained no such definition. This definition for "properly attributed" was not addressed explicitly by any legislator at the June 30 House committee hearing.

On July 15, 2005, the House Committee on State and Federal Affairs considered the B-20 amendments to SB 408B-Engrossed. Minutes, House State and Federal Affairs Committee (SB 408B), July 15, 2005, Exhibit B. The B-20 amendments also contained the same definition of "properly attributed" stated above. The committee also had B-21 amendments, which did not contain a definition of the phrase. Minutes, House State and Federal Affairs Committee (SB 408B), June 30, 2005, Exhibit D. Although the committee approved the B-20 amendments at the July 15, 2005 work session, again the members did not discuss the definition of "properly attributed."

Subsequently, on July 26, 2005, the House Committee on State and Federal Affairs held a further work session on SB 408B and reconsidered their prior vote on the bill. The committee ultimately approved the B-22 amendments to the bill. At the work session, the B-22 amendments were supported by the Industrial Customers of Northwest Utilities ("ICNU") and a coalition of business associations. Testimony of Mark Nelson, House State and Federal Affairs Committee (SB 408B), July 26, 2005, tape 47, side B at 113. The B-22 amendments did not contain a definition of "properly attributed." At the work session, Michael Early, Executive Director of ICNU, testified that the B-22 amendments would require the Commission to make certain judgments about "properly attributed" taxes in their implementation of the bill:

> Rep. Macpherson: Mr. Chair? What about the scenario in which there's a graduated tax effect and the effect of consolidation causes that income that was generated out of the regulated operations to then be subject to a higher rate because it's combined in with a larger base of income, so that in effect the consolidation causes the income that was generated out of regulated operations to

> be taxed at a higher rate than it would have been if it were just a standalone investor owned utility?
>
> Mr. Early: Well, again, that's a judgment for the Commission to make under our bill. 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 operation of the utility and that's the job of the Commission. That's the sort of decisions it makes and, as you point out, it's fact specific and not something that can be dealt with legislatively in any detail. So, that is a decision for the Commission to make*** and after it makes that decision, then it compares that number, you know, the amount of that $500 million attributable to the utility with the amount of tax that was collected in the same year through rates. And then it makes the adjustment up or down to the rates depending on whether it under-collected or over-collected.

Testimony of Michael Early, House State and Federal Affairs Committee (SB 408B), July 26, 2005, tape 47, side B at 179-194. (Emphasis added).

The House Committee subsequently approved the B-22 amendments to SB 408B-Engrossed and moved them to the floor with a do-pass recommendation. House State and Federal Affairs Committee (SB 408B), July 26, 2005, tape 47, side B at 240. After being engrossed as SB 408C, the B-22 amendments to SB 408B ultimately were enacted into law as part of chapter 845. The meaning of "properly attributed" was not addressed in floor speeches about SB 408C in either the House or the Senate.

Although limited, the foregoing legislative history tends to support our conclusions about the nature and scope of "properly attributed" in at least two ways. First, the House Committee on State and Federal Affairs' initial approval, and subsequent omission on reconsideration, of a statutory definition for "properly attributed" indicates that the legislators who supported that decision did not intend to prescribe a specific meaning for the term. Second, at the final work session on SB 408B, Mr. Early, the ICNU representative, was the principal witness concerning the ultimately enacted B-22 amendments. His testimony is consistent with our conclusion that the Assembly used delegative terms in entrusting the Commission with discretion to apply the expression "properly attributed."

4. Considerations in the Commission's Exercise of Delegated Authority

a. General Policy Underlying Chapter 845

The Commission's authority to interpret and apply "properly attributed" is not unfettered, however. The Commission must construe the phrase in accordance with the "general policy" underlying chapter 845. As noted above, in determining the general

policy expressed in a statute with "delegative" terms like chapter 845, we apply the interpretive principles of *PGE v. BOLI*, beginning first with an examination of statutory text in context. *See Bergerson*, 194 Or App at 311.

The text of chapter 845 contains several express indications of the general policy underlying the new law. In section 2 of chapter 845, the Legislative Assembly "finds and declares" seven items, including:

> (1) (a) The alignment of taxes collected by public utilities from utility customers with taxes paid to units of government by utilities, or affiliated groups that include utilities, is of special interest to this state.

Oregon Laws 2005, ch 845, § 2.

Together, section 5 and subsection 2(1) of chapter 845 contain further expressions of the general policy underlying the statute. Section 5 amends ORS 757.210 to require the Commission, in setting utility rates, to determine whether the rates are "are fair, just and reasonable" (formerly "just and reasonable"). In subsection 2(1), the legislature used identical words to "find[] and declare[]"
:

> (g) 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***.

(Emphasis added). In other words, in setting utility rates, the Commission generally must strive to include amounts of taxes in rates only to the extent that those amounts reflect taxes that are received by units of government from the regulated utility or from the affiliated group of which the utility is a member.

Because subsection 3(7) of chapter 845 uniquely refers to "taxes paid that are properly attributed" to unregulated affiliates or a parent (rather than "properly attributed to regulated operations"), we next examine that subsection to see if it articulates a further refinement of the foregoing general policies underlying chapter 845. Again, subsection 3(7) states:

> (7) 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***.

(Emphasis added). The text of subsection 3(7) states a simple prohibition: adjustments to rates cannot be based on taxes paid that the Commission "properly attributes" to a utility's unregulated affiliates or its parent. Accordingly, it is the obverse of the other references to "properly attributed" in chapter 845, which essentially state: adjustments to rates must be based on paid taxes the Commission properly attributes to the utility. Moreover, subsection 3(7) addresses the non-attribution of certain tax payments to the

utility, not an allocation of tax reductions to the utility. As such, it does not add to or detract from the general policy underlying chapter 845. At bottom, while subsection 3(7) limits the Commission's discretion to implement "taxes properly attributed" pursuant to chapter 845, it does not otherwise help in applying "properly attributed" as it appears elsewhere in chapter 845.

To achieve the general policy of aligning taxes collected with taxes paid, section 3 of chapter 845 establishes tax-related reporting and rate adjustment procedures for regulated utilities subject to the law. We next consider specific limits on the Commission's authority to "properly attribute" paid taxes to a utility's regulated operations.

b. Maximum Amount of Taxes Paid and Attributed to Regulated Operations

Subsection 3(12) of chapter 845 establishes the ***maximum***, but not the absolute, amount of taxes paid that may be "properly attributed" to regulated operations. The subsection does not prescribe a procedure for making the adjustment in rates required by chapter 845. Instead, subsection 3(12) limits the ***magnitude*** of the amount that the Commission may properly attribute to regulated operations of public utilities. As always, we begin with the text of the law. Subsection 3(12) states:

> For purposes of this section, ***taxes paid*** that are ***properly attributed*** to the regulated operations of the public utility ***may not exceed*** *the lesser of*:
>
> > (a) That 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 utility or by the affiliated group, whichever applies."

(Emphasis added). Significantly, subsection 3(12) does not state that "taxes paid that are properly attributed to regulated operations ***are*** the lesser of * * *." Had the Assembly used that formulation, then subsection 3(12) arguably would have circumscribed the Commission's options in the application of the phrase "properly attributed to." Instead, the Legislative Assembly said that taxes paid and properly attributable to regulated operations "may not exceed" certain amounts. While the Commission may elect to attribute taxes by any mechanism which yields a result that is equal to or less than the subsection 3(12) limitation, the Commission may not attribute taxes in excess of the amounts calculated under subsection 3(12). In other words, "may not exceed" is a limit to be calculated as prescribed by the Assembly in subsection 3(12). By contrast, the formula for calculating the variable governed by that limit – "properly attributed" taxes – has to be created by the Commission through the exercise of authority delegated to it by the Assembly.

Because subsection 3(12) caps the amount that the Commission may properly attribute to regulated operations of a public utility, it is necessary to understand how the Assembly has directed that the cap be calculated. That cap is structured in an alternative framed by paragraphs 3(12)(a) and 3(12)(b).

Both paragraphs use the statutorily defined term "taxes paid." This similarity means that whatever their differences, neither paragraph 3(12)(a) nor 3(12)(b) can ever exceed the amount of "taxes paid." For purposes of section 3 of chapter 845,

> 'Taxes paid' means ***amounts received by units of government from the utility or from the affiliated group*** of which the utility is a member, whichever is applicable, adjusted as follows * * *.

Oregon Laws 2005, ch 845, § 3(11)(f) (emphasis added). Thus, neither paragraph permits more to be attributed to a utility's regulated operations than the amount actually received by units of government from the utility or its affiliated group, depending upon which entity or group actually pays the taxes to government.

The alternatives differ in a key respect. Paragraph (a) modifies "total taxes paid" with the clause "that is incurred as a result of income generated by the regulated operations of the utility." Paragraph (b) is not so modified. Therefore, we must examine what is meant by "as a result of income." The phrase appears to be an "inexact" term. In other words, the phrase embodies a complete expression of legislative meaning, even if that meaning is not obvious. *PGE v. BOLI*, 290 Or at 223.

Consistent with *PGE v. BOLI*, we examine the text and context of the phrase "as a result of income" to understand subparagraph (a). We begin with the "plain, natural and ordinary meaning" of "as a result of," the most important part of 3(12)(a) for these purposes.

The most apt dictionary definition of "result" in this instance is:

> **2 :** something that results as a consequence, effect, issue, or conclusion <suffer from the ~*s* of war> <the cause and ~*s* of sleeping sickness> * * * **syn** see effect.

WEBSTER'S at 1937. The dictionary defines the synonym for result, "effect," in pertinent part as follows:

> **1 :** something that is produced by an agent or cause **:** something that follows immediately from an antecedent **:** a resultant condition. **:** RESULT OUTCOME < low mortality, the ~ of excellent social services in every village > * * *.

Id. at 724. According to the dictionary's synonym study of the term "effect," each of the synonyms is:

> similar in signifying something * * * ascribable to a cause or combination of causes. Effect is the correlative of the word cause and in general use implies something necessarily and directly following upon or occurring by reason of the cause, generally applying to intangibles * * * ***result, close to effect in meaning, implies a direct relationship with an antecedent action or condition although possibly less direct than effect, usu. suggesting an effect in the character of a termination of the operation of a cause, and applying more commonly than effect to tangible objects*** <the *result* of the investigation was a scandalous exposure of corruption> <his limp was the *result* of an automobile accident> <the *result* of the marriage was a family of seven children> <the subsiding flood or surface waters cause mineral deposits and the *result* is a mound * * * >.

Id. (emphasis added). The most relevant dictionary definition for "of" is:

> **6** – used as a function word to indicate the cause, motive, or reason by which a person or thing is activated or impelled < die ~ shame > <this milk tastes ~ garlic > < dead ~ violence> < afraid ~ his own shadow> * * *.

Putting the dictionary meanings of "result" and "of" together, the phrase "as a result of income" appears to mean something that directly occurs or is caused by the income from regulated operations. Therefore, 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. The amount specified in paragraph 3(12)(a) cannot include taxes reaching units of government as a result of profits earned by a utility from unregulated business operations; only the "portion" of taxes paid on the utility's regulated operations is counted for purposes of subparagraph 3(12)(a).

Paragraph 3(12)(b) is much more straightforward. It requires the Commission to count the "total" of taxes paid, whether or not those taxes resulted from regulated economic activity and regardless of whether the taxpayer is the utility alone, or an affiliated group. Because both paragraphs (a) and (b) use the defined term "taxes paid," however, application of (a) and (b) together always yields the same result when considering the utility alone or when it is applied to an affiliated group where losses, if any, incurred by the utility's sisters in the affiliated family offset, for tax purposes, gains realized by the utility in its regulated operations. We are cognizant of the general rule of statutory construction that courts should "give effect to all" provisions of a statute "if possible." ORS 174.010. But the use of the term "taxes paid" in both of these provisions makes the application of the two paragraphs together result in the same outcome in all such circumstances. The amount calculated under (a) which is a ***portion*** of the taxes paid

will always be an amount that is equal to or smaller than the amount that results under (b) which is the + of the taxes paid.

c. Regardless Of Method, Rates Must Be "Fair and Reasonable"

Regardless of the approach finally adopted by the Commission, the rates ultimately allowed must be "fair and reasonable" under ORS 756.040(1). That statute states in part:

> Rates are fair and reasonable for the purposes of this subsection if the rates provide adequate revenue both for operating expenses of the public utility or telecommunications 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.

ORS 756.040(1). This portion of ORS 756.040 essentially codifies the constitutional standard established by the United States Supreme Court for avoiding confiscatory utility rates. *See Federal Power Commission v. Hope Natural Gas Pipeline* ("*Hope*"), 320 US 591, 64 SCt 281, 88 LEd 333 (1944).[4] ORS 756.040 thus limits utilities' exposure to rate reductions, regardless of how the Commission exercises its discretion in the application of the expression "properly attributed." In other words, chapter 845 addresses the tax component of rates. ORS 756.040 deals more broadly with the Commission's obligation to set rates at or above the constitutional floor. And, as discussed more fully below in Part II.D of this advice, subsection 3(9) of chapter 845 similarly limits consumers'

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[4] The United States Constitution "protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." *Duquesne Light Company v. Barasch*, 488 US 299, 307, 109 SCt 609, 102 LEd2d 646 (1989). If the rates authorized by a Public Utility Commission "do not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and the Fourteenth Amendments." *Id.*, 488 US at 308. Whether a certain rate is "confiscatory * * * will depend to some extent on what is a fair rate of return given the risks under a particular rate-setting system, and on the amount of capital upon which investors are entitled to earn that return. ***Id.***, 488 US at 311. A Public Utility Commission does not need to use a specific method of ratemaking in order to meet the requirements of the United States Constitution. Rather, "[i]f the total effect of a rate order cannot be said to be unreasonable, judicial inquiry * * * is at an end." *Id.*, *quoting Hope*, 320 US at 602. But a "State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions." ***Id.***, 488 US at 315.

exposure to rate increases by preventing the application of any automatic adjustment when the adjustment would cause a "material adverse effect on consumers."

In sum, the text of chapter 845 indicates that the general policy underlying chapter 845 is to "align" estimated taxes collected from ratepayers with taxes paid by a utility or its affiliates and to include in rates only those taxes that are actually paid. In carrying out this general policy, the Commission cannot attribute more taxes to a utility's regulated operations than allowed by subsection 3(12) and must establish rates that are fair, just, and reasonable. And the Commission must comply with any specific adjustment requirements in chapter 845.

d. Commission's Range of Discretion – Examples

To illustrate some of the ways in which the Commission might exercise the discretion that we believe it possesses under chapter 845, we provide two examples. We emphasize that these are illustrations, not limitations; the fact that we have not tried to anticipate every option through which the Commission might express itself should not be misunderstood to mean that any option omitted here is beyond the Commission's authority.

Illustration A. The Commission may decide to attribute to a utility's regulated operations the maximum amount permitted under subsection 3(12) of chapter 845. Under such an approach, the Commission would not reduce rates if an affiliated group that includes the utility pays more income taxes than the Commission has assumed in the utility's rates. In other words, if $100 million of taxes are assumed in the utility's rates, $100 million in taxes paid are a result of the utility's regulated operations, and the consolidated group as a whole pays $101 million in taxes, then there would no reduction of rates.

Illustration B. The Commission could decide to follow an approach similar to that used in the past by Pennsylvania, an approach sometimes characterized as a "modified effective tax rate method." Under that approach, the Pennsylvania public utility commission has taken the consolidated tax savings generated by losses of non-regulated members of the group and allocated those savings to all members having positive tax income. *See, e.g., Barasch v. Pennsylvania Public Utility Commission*, 120 Pa Cmwlth 291, 548 A2d 1310, 1312-1315 (1988). In other words, if $100 million of taxes are assumed in the utility's rates, another affiliate generates income that results in another $100 million in taxes, and a third, unsuccessful affiliate generates $100 million worth of tax offsets, and the consolidated group pays only $100 million in taxes, the Commission could "properly attribute" only half of the paid taxes, or $50 million, to the utility. Because the utility could claim only $50 million as "taxes paid" – $50 million less than it was allowed to collect as part of its rate – the described approach (everything else being equal) would yield a reduction in rates.

Because the expression "properly attributed" unambiguously delegates to the Commission the responsibility of making judgments about how to achieve the Assembly's basic policy goal, neither of the foregoing approaches is required by chapter 845. Nor is either approach forbidden. The Department of Justice would defend either approach against legal attack.

C. Paragraph 3(13)(f) of SB 408 – Adjustments to "Taxes Paid"

1. Text of Paragraph 3(13)(f)

Subsection 3(13) of chapter 845 defines several terms for purposes of Section 3 of SB 408. "Taxes paid" is one of those terms. Oregon Laws 2005, ch 845, § 3(13)(f).

As described in Part II.B.4 of this advice, faithful execution of the basic policy choice expressed by the Assembly in chapter 845 depends on a comparison between "taxes paid" and the calculated estimated amount expected to be paid. Therefore, under paragraph 3(13)(f) of chapter 845, the amount of "taxes paid" and the amount yielded as the adjustment to rates under that paragraph are inversely related; the greater the amount of taxes paid, the lesser the potential reduction in rates. Conversely, the lesser the amount of taxes paid, the greater the potential reduction in rates.

The definition of "taxes paid" contains three rules for adjusting the amount of taxes paid. Oregon Laws 2005, ch 845, § 3(13)(f)(A)-(C). You have asked about part of that definition, subparagraph 3(13)(f)(B), which mandates an upward adjustment in the amount of "taxes paid" by the amount of certain "tax savings." As explained below, we conclude that subparagraph 3(13)(f)(B) mandates an increase in the "taxes paid" amount only for "tax savings" that (1) arise from "tax credits" associated with capital outlays for providing utility service to customers; and (2) are derived from expenditures for such capital outlays that the Commission has yet to take into account in a general ratemaking proceeding.

As prescribed by *PGE v. BOLI*, to ascertain the intent of the Legislative Assembly in enacting subparagraph 3(13)(f)(B), we begin with an examination of the statutory provision in context. Paragraph 3(13)(f) states:

> (13) As used in this section:
>
> * * *
>
> (f) "Taxes paid" means amounts received by units of government from the utility or from the affiliated group of which the utility is a member, whichever is applicable, adjusted as follows:

> (A) Increased by the amount of tax savings realized as a result of charitable contribution deductions allowed because of charitable contributions made by the utility;
>
> ***(B) 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;*** and
>
> (C) Adjusted by deferred taxes related to the regulated operations of the utility.

(Emphasis added).

Under *PGE v. BOLI*, we must interpret terms "of common usage" according to their "plain, natural, and ordinary meaning." *PGE v. BOLI*, 317 Or at 611. If a statute includes a technical "term of art," however, we may refer to well-established legal meanings for such a term. *See McIntire v. Forbes*, 322 Or 426, 431, 909 P2d 846 (1996).

2. Elements of Subparagraph 3(13)(f)(B)

We begin our analysis by breaking subparagraph 3(13)(f)(B) into its three principal elements. Then we examine each of those clauses in turn, beginning with the element allowing the largest addition to "taxes paid" and tracing the narrowing effect of each of the other elements. The three elements of subparagraph 3(13)(f)(B) are:

"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," and

"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[.]"

a. "Increased by the Amount of Tax Savings Realized as a Result of Tax Credits"

The first element of subparagraph 3(13)(f)(B) limits the increase in "taxes paid" to "tax savings" "realized" by the utility because of "tax credits" available to that utility.

Accordingly, to ascertain the meaning of this limit, we must determine the meaning of "tax savings" and "tax credit" in this context.

The phrase "tax savings" is not a recognized "term of art." The most apt dictionary meaning of "saving" is: "**2 :** the act or an instance of economizing **:** reduction in cost." WEBSTER'S at 2020. Thus, a "tax saving" is a reduction in tax cost.

By contrast, the phrase "tax credits" is a recognized "term of art." A leading law dictionary defines "tax credit" as follows:

> An amount subtracted directly from one's total tax liability, dollar for dollar, as opposed to a deduction from gross income.

BLACK'S LAW DICTIONARY at 1501 (eighth ed.; B. Garner, ed.; 2004) ("BLACK'S"). This "term of art" definition for "tax credit" is similar to the most apt ordinary meaning for "credit":

> **1 * * * g :** a deduction from an amount otherwise due < a tax ~ for dividends received > < a ~ for returned goods >

WEBSTER'S at 533.

Substitution of the foregoing definitions for the terms "tax savings" and "tax credit" yields a formula that is, at best, difficult to understand, namely: The amount of "taxes paid" is to be increased by an amount equal to the "reduction in tax costs realized from an amount subtracted directly from the utility's total tax liability." We next examine the context for the phrase "tax savings" in subparagraph 3(13)(f)(B) for additional evidence of the meaning of "tax savings."

We note that the term "tax savings" is used similarly in subparagraph (A) of paragraph 3(13)(f):

> Increased by the ***amount of tax savings realized as a result of charitable contribution deductions*** allowed because of charitable contributions made by the utility[.]

(Emphasis added). While subparagraph 3(13)(f) (B) requires adjustments for "tax savings" due to certain "tax ***credits***," in subparagraph 3(13)(f) (A), the adjustment in the latter is for "tax savings" due to "charitable ***deductions***." The same broad term, "tax savings," is modified successively by different clauses in (A) and (B), each of which creates a different subset within the broader term. "Tax savings" does not operate as an independent adjustment to taxes paid; only the described subsets of the broad classification of "tax savings" are allowed as adjustments to "taxes paid." This suggests that analysis of the adjustment required by subparagraph 3(13)(f) (B) should begin and

could end by examining the meaning of the definitive narrowing term "tax credits." And, as described above, "tax credits" has a readily understood meaning. From this alone it is clear that the adjustment for "tax savings" in subparagraph 3(13)(f)(B) must be realized from "tax credits" and not "tax deductions."

Under this construction of subparagraph 3(13)(f)(B), the dollar value of "savings" and "tax credits" may be the same. But the amount of "tax savings" actually "realized" from "tax credits" ***in a given year*** conceivably may vary from the total amount of tax credits generally available, if, for example, there are limits on the use of the credits in a given year. Thus, as used in subparagraph 3(13)(f)(B), the expressions "tax savings" and "tax credits" do have distinct legal and practical effect even when the former is defined as described above.

Finally, subparagraph 3(13)(f)(A) addresses tax savings realized from "deductions" whereas 3(13)(f)(B) addresses tax savings realized from "credits." Each subparagraph forms part of the interpretive context for the other. The fact that the Assembly distinguished in these subparagraphs between "deductions" and "credits" strongly suggests that no increase in taxes paid is allowed under authority of subparagraph 3(13)(f)(B) for anything other than dollar-for-dollar tax reductions realized from credits.

For the foregoing reasons, we believe it to be clear that the adjustment for "tax savings" in subparagraph 3(13)(f)(B) must be realized from "tax credits" and not "tax deductions."

b. "Associated with Investment by the Utility in the Regulated Operations of the Utility"

The second element of subparagraph 3(13)(f)(B) further limits the type of "tax credits" that can result in "tax savings" for purposes of increasing the "taxes paid." Under this element, "tax credits" must relate to a utility's "investment" in its regulated operations. The most likely dictionary meanings of "investment" in this context are:

> **1 a :** an expenditure of money for income or profit or to purchase something of intrinsic value **:** ***capital outlay*** < ~ in common stocks > < ~ in a diamond brooch >
> **b :** the sum invested or the property purchased < has a large ~ in a copper mine >

WEBSTER'S at 1190 (emphasis added). As noted above, ORS chapter 757 provides context for chapter 845.

In the area of utility regulation, the term "investment" is used often in connection with the phrase "rate base." The Oregon Court of Appeals has recognized that "rate base" is a term of art. *See Citizens' Util. Bd. v. PUC*, 154 Or App 702, 709, 962 P2d 744 (1998). "[R]ate base represents the invested capital upon which the utility is entitled to

earn a return." *Id.*, *quoting Pacific Tel. & Tel. Co. v. Hill*, 229 Or 437, 444, 365 P2d 1021, *reh'g denied*, 229 Or 485, 367 P2d 790 (1961). The Oregon Supreme Court has described a utility's rate base "as the historic cost less depreciation of the plant in service." *Pacific Power & Light Co. v. Department of Revenue*, 286 Or 529, 548, 596 P2d 912 (1979). By statute, the rate base for energy utilities does not "include the costs of construction, building, installation or real or personal property not presently used for providing utility service to the customer." ORS 757.355(1). The Court of Appeals has interpreted this statute to not permit "public utilities to obtain a profit from ratepayers on their investments in facilities that are not used to serve ratepayers." *Citizens' Util. Bd.*, 154 Or App at 714. The plain meaning of investment ("capital outlay") and the context of the term "investment" in subparagraph 3(13)(f)(B), therefore, indicate that the term refers to capital outlays for utility property used to provide regulated service to customers.

c. "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 tax savings adjustment prescribed in subparagraph 3(13(f)(B) is subject to a further significant condition: the "expenditures" associated with "investment" that cause the "tax savings" from "tax credits" cannot have been taken into account in the utility's last general rate case.

At the outset, we note that the term "expenditures," as used in subparagraph 3(13)(f)(B), does not include money spent for operating expenses (*i.e.*, deductions from gross income for tax purposes) such as contributions to the company's pension fund, and includes instead money spent on "investments" that generate "tax credits." As discussed above, the dictionary definition of "investment" includes the phase "expenditure of money." Thus, the use of the word "expenditure" in the final part of subparagraph 3(13)(f)(B) is consistent with the use of the term "investment" in the preceding part of the subparagraph. Moreover, the word "expenditure" appears in the limiting condition portion of subparagraph 3(13)(f)(B); *i.e.*, after "to the extent" phrase. Logically, a phrase in a limiting condition cannot expand the scope of the preceding general rule. Finally, the general rule for the subparagraph is that the "tax savings" must be realized from certain "tax credits." As noted above, the legal dictionary definition of "tax credit" states that the "dollar for dollar" reduction for "tax credits" is to be contrasted with "deductions" from gross income. BLACK'S at 1501. Since operating expenses generally are deducted from gross income to arrive at taxable income, tax savings that result from such deductions are not derived from "tax credits."[5]

[5] IRS Publication 535 (2004) states:

> To be deductible, a business expense must be both ordinary and necessary. An ordinary expense is one that is common and accepted in your industry. A necessary expense is one that is helpful and

We tested our conclusion about the meaning of subparagraph 3(13)(f)(B) by examining the legislative history. The provision was added to SB 408B-Engrossed by the B-22 amendments adopted by the House Committee on State and Federal Affairs on July 26, 2005. In an August 1, 2005, floor speech in support of SB 408C (including the B-22 amendments), Senator Metsger, one of SB 408's sponsors, stated:

> The House actually improved upon the bill that we passed out of here a few weeks ago.
>
> * * *
>
> There [were] two questions that, even in our discussion, were of issue, that they clarified in the House and did an excellent job. Number one, it says in section 3 that it makes it very clear that taxes can be included in rates to account for charitable contributions by the utility, so make sure that there's no question that this would not in any way inhibit charitable contribution by the utility. ***The second was the question of the actual investments by the utility and not wanting to deter investments, and so in sub(b) of that section*** [presumably subparagraph 3(13)(f)(B) of chapter 845]***, the House added the language that the taxes may be increased by the amount of tax savings realized over tax credits associated with investments by the utility. So if they receive credits for an investment, this does not in any way detract from their ability to do that and actually be reimbursed so that they can get the benefit of the credit.***

(Emphasis added). Senator Rick Metsger, Floor Speech, Senate Chamber, August 1, 2005 (SB 408C). Accordingly, Senator Metsger's use of the term "tax credits" is not inconsistent with our conclusion.[6]

> appropriate for your trade or business. An expense does not have to be indispensable to be considered necessary.
>
> It is important to distinguish business expenses from:
>
> - The expenses used to figure cost of goods sold.
> - Capital expenses.
> - Personal expenses.

[6] According to Avista Corporation and PacifiCorp, the Citizens Utility Board ("CUB") and ICNU distributed materials to members of the House as the latter began debate on the bill. Those materials characterized as a "misrepresentation" the claim allegedly made by unnamed parties that "the bill undermines Oregon's renewable energy industry." Exhibit B to the Joint Comments of Avista Corporation and PacifiCorp in PUC Docket AR 499. In rebutting that claim, CUB and ICNU quoted subparagraph 3(13)(f)(B) and went on to assert that "This means that the utility can take into account any tax credits *or incentives* when reporting its taxes paid, as long as those credits were not already accounted for in a previous rate case." (Emphasis added). *Id.* To the extent that "incentives" is construed as "deductions," CUB's and ICNU's explanation of the meaning of subparagraph 3(13)(f)(B) is inconsistent with our

In any event, the text of subparagraph 3(13)(f)(B) is clear. Subparagraph 3(13)(f)(B) mandates an increase in the "taxes paid" amount only for "tax savings" that arise from "tax credits" associated with capital outlays for property used in providing regulated utility service, provided the Commission has not yet taken into account the expenditures for such capital outlays in a general ratemaking proceeding.

D. Termination of Automatic Adjustment Clause – Material Adverse Effect

Under subsection 3(9) of chapter 845, the Commission may terminate an automatic adjustment clause if the Commission determines that such a clause "would have a material adverse effect on customers of the public utility." You have asked whether the Commission also may terminate an automatic adjustment clause if a utility demonstrates that the clause has a material adverse impact upon it. As explained below, we conclude that while the Commission may terminate an automatic adjustment clause only to protect customers from a material adverse effect, this does not preclude a utility from arguing that the automatic adjustment clause will impact its customers adversely because, for example, of the detrimental effect of the automatic adjustment clause upon the utility.

Subsection 3(9) of chapter 845 states:

> If the commission determines that establishing an automatic adjustment clause under this section ***would have a material adverse effect on customers of the public utility***, the commission shall issue an order terminating the automatic adjustment clause. The order shall set forth the reasons for the commission's determination under this subsection.

(Emphasis added).

Under subsection 3(9), a utility may contend, for example, that the customers and the utility are interdependent. The utility may attempt to prove that the automatic adjustment clause will prevent it from adequately recovering its costs. As a result, the utility may assert it will not be able to attract sufficient capital on reasonable terms for the

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conclusion that the provision is limited to tax credits. However, we have been unable to locate any discussion of the CUB and ICNU materials in the legislative records or any indication in those records that any legislator relied upon, that explanation. In the absence of any foundation in the record from which it could be inferred that legislators had the document before them as they voted, the Oregon appellate courts are unlikely to accord any weight as legislative history to those materials. Moreover, subsequent statements by legislators cannot cure this lack of contemporaneous evidence. *See Salem-Keizer Ass'n of Classified Employees v. Salem-Keizer Sch. Dist. 24J*, 186 Or App 19, 26-28, 61 P3d 970 (2003) ("subsequent statements by legislators are not probative of the intent of statutes already in effect"), *quoting United Telephone Employees PAC v. Secretary of State*, 138 Or App 135, 139, 906 P2d 306 (1995).

maintenance of its system or for additions to that system to meet load growth. Consequently, the utility may argue, the ultimate result will be a reduction in service quality and a need for rate increases that will adversely impact the customers. But the utility must prove the automatic adjustment clause's adverse impact upon the utility has a material adverse effect on its customers, and the Commission must find, in an order, that such a connection exists.

In any event, a utility may seek a rate increase if it believes that it needs increased revenues. *See* ORS 757.205. As noted above, in setting rates, the Commission must "balance the interests of the utility investor and the consumer in establishing rates and provide adequate revenue both for operating expenses * * * and for capital costs of the utility, with a return to the equity holder * * *. ORS 756.040; *Hope*, 360 US at 591.

E. Automatic Adjustment Clause – Estimated Taxes and Annual Application of Adjustments

Some or all utilities pay estimated income taxes upon a quarterly basis. As to these utilities, you have asked whether chapter 845 permits the Commission to allow an automatic adjustment clause that adjusts rates once a year. For the reasons that follow, we conclude that the Commission may allow annual adjustments.

Since chapter 845 does not explicitly state the frequency for rate adjustments under the new law, we first consult the general statutory framework for rate schedules and automatic adjustment clauses. Utilities must file their rate schedules with the Commission. ORS 757.205(1). Whenever a utility files a new rate schedule, the Commission ***may*** hold a hearing to determine whether "the rate or schedule is fair, just and reasonable." ORS 757.210(1)(a), as amended by Oregon Laws 2005, chapter 845, § 5. The Commission generally must hold a hearing on a new rate schedule "upon written complaint" filed by a utility, a customer, or any other "proper party." But "no hearing need be held if the particular change is the result of an automatic adjustment clause." *Id.* For purposes of ORS 757.210(1), an "automatic adjustment clause" is defined as follows:

> (b) As used in this subsection, "automatic adjustment clause" means a provision of a rate schedule that provides for rate increases or decreases or both, without prior hearing, reflecting increases or decreases or both in costs incurred, taxes paid to units of government or revenues earned by a utility and that is subject to review by the commission at least once every two years.

ORS 757.210(1)(b), as amended by Oregon Laws 2005, chapter 845, § 5. Accordingly, under ORS 757.210, the Commission ***may***, but is not compelled to, hold a hearing on a utility's new rates due to the effects of an automatic adjustment clause, but the Commission ***must*** review such a clause at least once every two years. And, under chapter 845, an automatic adjustment clause required under that law must reflect "taxes paid to units of government." But ORS 757.210, as amended by chapter 845, does not

specify a rate change frequency or expressly preclude adjustments on an annual basis under such clauses.

Moreover, chapter 845 provides an annual cycle for its fundamental reporting and continuation provisions. Subsection 3(1) of chapter 845 requires each public utility subject to the law to file a tax report annually:

> ***Every public utility shall file a tax report*** with the Public Utility Commission ***annually, on or before October 15 following the year for which the report is being made***. 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; and
> >
> > (b) The amount of taxes authorized to be collected in rates for the three preceding years.

(Emphasis added). And subsection 3(5) states that any automatic adjustment clause will continue on an annual basis after each adjustment:

> (5) If an adjustment to rates is made under an automatic adjustment clause established under this section, ***the automatic adjustment clause shall remain in effect for each successive year*** after an adjustment is made and until an order terminating the automatic adjustment clause is made under subsection (9) of this section.

(Emphasis added). Thus, an automatic adjustment clause that adjusts rates once a year is consistent with the administrative framework established in chapter 845.

In sum, neither ORS 757.210, as amended by chapter 845, nor chapter 845 requires a quarterly adjustment schedule for utilities that pay estimated taxes on a quarterly basis. And, as discussed above in connection with the phrase "properly attributed," the Commission has broad general regulatory powers over utilities under ORS 756.040 unless those powers are otherwise constrained. Accordingly, the Commission may allow annual rate adjustments for affected utilities that pay quarterly estimated taxes.

F. Subparagraphs 3(13)(e)(B) and (C) – Use of Prior Test Year Data

Subsection 3(13) of chapter 845 defines the phrase "taxes authorized to be collected in rates" as follows:

> "Taxes authorized to be collected in rates" means the product determined by multiplying the following three values:
>
> (A) The revenues the utility collects from ratepayers in Oregon, adjusted for any rate adjustment imposed under this section;
>
> (B) The ratio of the net revenues from regulated operations of the utility to gross revenues from regulated operations of the utility, as determined by the commission in establishing rates; and
> (C) The effective tax rate used by the commission in establishing rates.

This definition is used once in chapter 845: paragraph 3(1)(b) directs the Commission to require each utility to report the amount of "taxes authorized to be collected in rates" in its annual tax report.

You have asked whether chapter 845 requires the Commission to direct each utility to use ratios or rates calculated from "prior test year data" previously approved by the Commission as the "values" described in subparagraphs 3(13)(e)(B) and (C) (ratio of net revenues to gross revenues and the effective tax rate, respectively). As discussed further below, we conclude that chapter 845 requires the Commission to mandate that utilities use the (B) and (C) "values" that the Commission previously determined or used to set the utility's rates, without taking into account any adjustments due to the operation of chapter 845.

The terms "prior test year data" or "test year" do not appear in chapter 845 or in ORS chapters 756 and 757. We note, however, that a Commission rule, OAR 860-013-0075(1)(b)(D), requires a utility to propose a "test period" any time it seeks a "general rate revision." We are informed that, in the course of a general rate revision, the Commission typically states or approves test period figures for the subparagraphs 3(13)(e)(B) and (C) values.

We understand that this question about "taxes authorized to be collected in rates" arises out of a concern whether the subparagraphs 3(13)(e)(B) and (C) values are to be derived (1) on an ongoing basis from actual results,[7] or (2) from figures previously used by the Commission in setting rates in a general rate case. Since this question involves statutory construction, under the *PGE v. BOLI* approach, we start with the text and context of subparagraphs 3(13)(e)(B) and (C)

Both subparagraphs use the phrase "in establishing rates." The verb "establishing" generally is used as the progressive tense of the verb "establish." As such,

[7] Presumably, such an approach would mean that the net to gross revenue ratio and effective tax rate would be updated each time an adjustment was considered under an automatic adjustment clause.

it may signify an incomplete, ongoing action. But "establishing" does not stand alone in this instance. In subparagraphs 3(13)(e)(B) and (C), it appears immediately after the past tense verbs "determined" ("as determined by the commission") and "used" ("used by the commission"), which obviously refer to prior actions by the Commission. Therefore, the appearance of the word "establishing" in these statutory provisions does not indicate an ongoing process by the Commission.

Moreover, each of these past tense verbs ("determined" and "used") in subparagraphs 3(13)(e)(B) and (C) refers to acts by the Commission. Under the process established under section 3 of chapter 845, the utility must report the "amount of taxes authorized to be collected in rates." Oregon Laws 2005, ch 845, § 3(1)(b). Although the Commission may review that value, the Commission does not initially compute the "amount of taxes authorized." That is the utility's responsibility. Because the Commission is not involved in the initial computation of the tax report amounts, the utility obviously must look to prior acts by the Commission for the subparagraphs 3(13)(e) (B) and (C) values. This suggests that the Assembly did not intend to require ongoing adjustments due to actual results for these values.

As noted above, chapter 845 does not state explicitly that "test year data" approved by the Commission must be used for the (B) and (C) values. The law also does not specify that those values must be developed in the course of a general rate case. But subparagraphs 3(13)(e) (B) and (C) do require that the values described therein must be the values "determined" and "used" by the Commission in "establishing rates." Although this requirement is consistent with the use of test year data or values from a general rate case, it does not necessarily compel that result. Accordingly, we look to the context of subparagraphs 3(13)(e) (B) and (C) to help discern the Assembly's intent as to how or when the (B) and (C) values are to be derived.

The phrase "general ratemaking proceeding" appears once in chapter 845.[8] It is used in connection with the tax credit adjustment to "taxes paid" discussed above, *i.e.*, "resulting from the tax credits that have ***not*** been ***taken into account*** by the commission in the ***utility's last general ratemaking proceeding***." (Emphasis added); Oregon Laws 2005, ch 845, § 3(13)(f)(B). This reference to a "general ratemaking proceeding" indicates that the legislature understood generally that the Commission periodically conducts general rate cases for utilities, the requirements for which are described in OAR 860-013-0075.

Again, in the preparation of its annual tax report, a utility must use the ratio of net to gross revenues (3(13)(e) (B)) and the effective tax rate (3(13)(e) (C)) determined and used, respectively, by the Commission in previously establishing rates for the utility. In other words, the utility must refer to prior actions by the Commission. To the extent that the information necessary to derive these values appears in the test period data approved

[8] Neither that phrase nor any similar phrase appears at any other place in ORS chapters 756 or 757.

by the Commission in establishing rates for a specific utility, then the utility should use that information.

Please let us know if you have any further questions.

Sincerely,

HARDY MYERS
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cc: John Savage, Commissioner
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