

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UG 171(4)

In the Matter of)
)
)
OREGON PUBLIC UTILITY STAFF,)
)
Requesting the Commission direct)
AVISTA UTILITIES to file tariffs)
establishing automatic adjustment clauses)
under the terms of SB 408)

**OPENING TESTIMONY
OF THE
CITIZENS' UTILITY BOARD OF OREGON**

January 11, 2011



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1 My name is Gordon Feighner, and my qualifications are listed in CUB Exhibit
2 101.

3 **I. Introduction**

4 Avista's original filing in this docket indicated that the Company under-collected
5 taxes in the 2009 tax period by roughly \$900,000, resulting in a proposed surcharge of
6 \$1.0 million including interest. In response to Avista's second amended filing made on
7 October 29, 2010, Staff initially recommended a surcharge of roughly \$1.5 million
8 including interest. However, upon further review and discussion with counsel, Staff
9 determined that there is an inconsistency between the legislative intent expressed in ORS
10 757.267 and ORS 757.268(12) (SB 408), which govern utility tax payments, and the
11 implementing Oregon Administrative Rule OAR 860-022-0041(4)(d), which guides

1 calculation of utility tax payments. This inconsistency significantly changed Staff's initial
2 determination of Avista's 2009 tax liability, as described below.

3 **II. Methodology**

4 SB 408, codified as ORS 757.267 and 757.268 provides, in ORS 757.267 the
5 following declaration of legislative intent:

6 **757.267 Legislative findings relating to inclusion of tax liabilities in**
7 **rates.** (1) The Legislative Assembly finds and declares that:

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

11 (b) Taxes are a unique utility cost because the tax liability is affected
12 by the operations or tax attributes of the parent company or other affiliates
13 of the utility.

14 (c) The Public Utility Commission permits a utility to include costs for
15 taxes that assume the utility is not part of an affiliated group of
16 corporations for tax purposes.

17 (d) The parent company of a utility may employ accounting methods,
18 debt, consolidated tax return rules and other techniques in a way that
19 results in a difference between the tax liability paid to units of government
20 by the utility, or the affiliated group of corporations of which the utility is
21 a member, and the amount of taxes collected, directly or indirectly, from
22 customers.

23 (e) Tax uncertainty in the ratemaking process may result in collecting
24 taxes from ratepayers that are not paid to units of government.

25 (f) *Utility rates that include amounts for taxes should reflect the taxes*
26 *that are paid to units of government to be considered fair, just and*
27 *reasonable.* (emphasis added by CUB)

28 (g) Tax information of a business is commercially sensitive. Public
29 disclosure of tax information could provide a commercial advantage to
30 other businesses.

31 (2) The definitions in ORS 757.268 apply to this section. [2005 c.845
32 §2]

1 ORS 757.268 then provides regulatory language to put the policy set forth in ORS
2 757.267 into practice. ORS 757.268(12) speaks specifically to the policy:

3 (12) For purposes of this section, taxes paid that are properly attributed to
4 the regulated operations of the public utility may not exceed the lesser of:

5 (a) That portion of the total taxes paid that is incurred as a result of
6 income generated by the regulated operations of the utility; or

7 (b) The total amount of taxes paid to units of government by the utility
8 or by the affiliated group, whichever applies.
9

10 Staff has determined that applying the provisions of OAR 860-022-0041(4)(d) to
11 each of the three methods that can be used to calculate taxes due under the rule has the
12 potential to yield a result that is inconsistent with the above legislative intent.¹ Staff
13 contends that section (4)(d) requires only a comparison between the calculation of taxes
14 paid in methods that could potentially be impacted by accelerated depreciation and the
15 balance attributable to the deferred tax floor. This comparison is mandated to protect
16 against a normalization violation.

17 CUB agrees with Staff's assessment that this comparison, also known as "the
18 (4)(d) limitation", should be limited to the method in which a benefit of accelerated
19 depreciation could exist (the Apportionment Method), rather than applied to each of the
20 three methods that can be used to calculate taxes due under the rule. CUB bases its
21 opinion on a reading of the statute on its face, the Commission's prior interpretations of
22 the statutes and rules, and Staff's current analysis. Indeed, Commission Order 07-401
23 evidences the Commission's interpretation of the statute, so as to protect against

¹ "The inconsistency involves the manner for determining the existence of a normalization violation (footnote omitted) under (4)(d) of the commission rule and under Staff's template." Staff's Issues List at page 3 of Staff's Initial Findings memo (December 23, 2010).

1 normalization violations by using the (4)(d) limitation only in the Apportionment
2 Method.²

3 **III. Application of Methodology**

4 When the (4)(d) limitation is applied to the Stand-Alone Method, the tax amount
5 paid by Avista as a stand-alone utility is significantly lower than the tax amount assessed
6 to customers. This situation is directly in conflict with the intent of SB 408, which aims
7 to ensure that taxes collected from customers are not greater than the taxes that are paid
8 by the utility. Staff's calculation shows that eliminating the use of the (4)(d) limitation in
9 the Stand-Alone Method yields a calculation of Avista's taxes that results in a refund of
10 roughly \$1.0 million (before interest calculations). CUB agrees with Staff's revised
11 calculation under the Stand-Alone methodology.

12 **IV. Conclusion**

13 CUB concurs with Staff's recommendation that Avista issue a refund to
14 customers in the amount of \$1,209,551 on June 1, 2011. CUB also recommends that Staff
15 and other parties initiate an interim rulemaking proceeding to update the Commission
16 rules so as to ensure consistency with the legislative intent of SB 408.

² Commission Order No. 07-401, pages 4-6.

WITNESS QUALIFICATION STATEMENT

NAME: Gordon Feighner

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ADDRESS: 610 SW Broadway, Suite 400
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EDUCATION: Master of Environmental Management, 2005
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WORK EXPERIENCE: I have previously provided testimony in dockets including UE 196, UE 204, UE 207, UE 208, UE 210, UE 213, UE 214, UE 216, UE 217, UE 219, UM 1355, UM 1431, and UM 1484. I have also completed the Annual Regulatory Studies Program at the Institute of Public Utilities at Michigan State University in 2010.

Between 2004 and 2008, I worked for the US Environmental Protection Agency and the City of Portland Bureau of Environmental Services, conducting economic and environmental analyses on a number of projects. In November 2008 I joined the Citizens' Utility Board of Oregon as a Utility Analyst and began conducting research and analysis on behalf of CUB.

UG 171(4) – CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of January, 2011, I served the foregoing **OPENING TESTIMONY OF THE CITIZENS' UTILITY BOARD OF OREGON** in docket UG 171(4) upon each party listed in the UG 171(4) PUC Service List by email and, where paper service is not waived, by U.S. mail, postage prepaid, and upon the Commission by email and by sending five copies and one original by U.S. mail, postage prepaid, to the Commission's Salem offices.

(W denotes waiver of paper service)
(HC denotes Highly Confidential)

(C denotes service of Confidential material authorized)

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