ORDER OF THE DEPARTMENT OF REVENUE REPEALING AND RECREATING AND CREATING RULES

The Wisconsin Department of Revenue adopts an order to: **repeal and recreate** Tax 2.50; and **create** Tax 2.502; **relating to** the computation of the apportionment fraction by multistate public utilities and telecommunications companies.

Analysis by the Department of Revenue

Statutes interpreted: ss. 71.04 (8) (b) and (c) and 71.25 (10) (b) and (c), Stats.

Statutory authority: ss. 71.04 (8) (c) and 71.25 (10) (c), Stats.

Explanation of agency authority: The net business income of public utilities and telecommunications companies requiring apportionment shall be apportioned pursuant to rules of the department of revenue.

Related statute(s) or rule(s): ss. 71.04 (4), (4m), (5), (6), and (7) and 71.25 (6), (6m), (7), (8), and (9), Stats., ss. 71.04 (5), (6), and (7) and 71.25 (7), (8), and (9), 2001 Stats., and s. Tax 2.39.

Plain language analysis: This rule order prescribes the method to be used for apportioning the apportionable income of the following business entities:

- interstate public utilities, other than telecommunications companies, and
- interstate telecommunications companies, including interstate cable television companies.

Section 1. The special apportionment formula for interstate public utilities, other than telecommunications companies and cable television companies, is being eliminated. For taxable years beginning before 2006, the three factors will be equally weighted in the apportionment formula. The phase-in of the single sales factor apportionment formula will apply to public utilities, other than telecommunications companies and cable television companies.

Section 2. Interstate telecommunications companies, including interstate cable television companies, will compute their property, payroll, and sales factors under the 2001 statutes and rules. The three factors will be equally weighted in the apportionment formula. Gross receipts from the use of computer software and from services will continue to be included in the numerator of the sales factor based on the location of the income-producing activity. The phase-in of the single sales factor apportionment will not apply to telecommunications companies.

Summary of, and comparison with, existing or proposed federal regulation: There is no existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.

Comparison with rules in adjacent states:

Illinois does not have a special apportionment formula for interstate public utilities and telecommunications companies. Their apportionment formula consists solely of a sales factor. Sales of tangible personal property are sourced on a destination basis. Sales of services are attributed to the state where the income-producing activity occurred. If the income-producing activity occurred in more than one state, the sale is attributed to the state with the greater costs of performance.

Iowa does not have a special apportionment formula for interstate public utilities and telecommunications companies. The apportionment formula consists solely of a sales factor. Sales of tangible personal property are sourced on a destination basis. Sales of services are sourced where the benefit of the service is received. In the case of the transportation of electricity, "traffic units" are used to determine where the benefit is received. Rules prescribe where the benefit is received for services provided by telecommunications companies.

Michigan does not have a special apportionment formula for interstate public utilities and telecommunications companies. The apportionment formula consists of a three-factor formula with sales weighted 90%, and property and payroll each weighted 5%. Sales of tangible personal property are sourced on a destination basis. Sales of services are sourced where the income-producing activity occurred. If the income-producing activity occurred in more than one state, the sale is attributed to the state with the greater costs of performance.

Minnesota does not have a special apportionment formula for interstate public utilities and telecommunications companies. The apportionment formula consists of a three-factor formula with sales weighted 75%, and property and payroll each weighted 12.5%. Sales of tangible personal property are sourced on a destination basis. Sales of services are sourced where the benefit of the service is received, where the service was ordered, or where the service was billed, depending on the circumstances.

Summary of factual data and analytical methodologies: 2003 Wisconsin Act 37 changed the apportionment formula used by multistate businesses for determining the income taxable by Wisconsin. As a result of this legislation, single sales factor apportionment will be phased in for most businesses, including any public utility that owns or operates any plant, equipment, property, franchise, or license for the production, transmission, sale, delivery, or furnishing of electricity, water, or steam, the rates of charges for goods or services of which have been established or approved by a federal, state, or local government or governmental agency. The phase-in of single sales factor apportionment begins for taxable years beginning on January 1, 2006. 2003 Act 37 also provides that multistate telecommunications companies are to apportion their income under rules of the Department of Revenue. 2005 Wisconsin Act 25 changed how gross receipts from the use of computer software and from services are sourced for purposes of the apportionment formula. Receipts from the use of computer software are sourced to the location where the software is used. Receipts from services are sourced where the benefit of the service is received. The change in the sourcing rules first applies to taxable years beginning January 1, 2005. Telecommunications companies have requested that in addition to excluding them from single sales factor apportionment as provided by 2003 Act 37, the rule would exclude them from the special sourcing rules for gross receipts from the use of computer software and from services. In consultation with telecommunications company personnel, the department developed language and used it to create this rule order.

Analysis and supporting documents used to determine effect on small business: The department has prepared a fiscal estimate regarding this rule order. It was determined that there is not a significant fiscal effect on small business.

Also, this rule order will only apply to public utilities, telecommunications companies, and cable television companies that are required to use apportionment. Apportionment applies to public utilities, telecommunications companies, and cable television companies that are large, multistate corporations. Therefore, this rule order does not have a significant effect on small business.

Anticipated costs incurred by private sector: This rule order does not have a significant fiscal effect on the private sector.

Effect on small business: This rule order does not have a significant fiscal effect on small business.

Agency contact person: Please contact Dale Kleven at (608) 266-8253 or dkleven@dor.state.wi.us, if you have any questions regarding this rule order.

SECTION 1. Tax 2.50 is repealed and recreated to read:

Tax 2.50 Apportionment of apportionable income of interstate public utilities. (1) SCOPE. A public utility that is engaged in business both in and outside this state shall apportion its apportionable income as provided in this section. Nonapportionable income shall be allocated as provided in s. 71.25 (5) (b) 1., Stats.

(2) DEFINITIONS. In this section:

(a) “Payroll factor” means the payroll fraction computed under s. 71.04 (6) or 71.25 (8), Stats., and s. Tax 2.39.

(b) “Property factor” means the property fraction computed under s. 71.04 (5) or 71.25 (7), Stats., and s. Tax 2.39.

(c) “Public utility” means any business entity that owns or operates any plant, equipment, property, franchise, or license for the production, transmission, sale, delivery, or furnishing of electricity, water, or steam the rates of charges for goods or services of which have been established or approved by a federal, state, or local government or governmental agency.

(d) “Sales factor” means the sales fraction computed under ss. 71.04 (4m) and (7) or 71.25 (6m) and (9), Stats., and s. Tax 2.39.

(3) APPORTIONMENT FORMULA COMPUTATION. For taxable years beginning after December 31, 2004, a public utility that does business in and outside this state shall determine its net income for state franchise or income tax purposes as provided in this section. The public utility shall first deduct from its total net income its nonapportionable income, less related expenses. Nonapportionable income shall be allocated as provided in s. 71.25 (5) (b) 1., Stats. The public utility shall apportion its remaining net income to this state as follows:

(a) For taxable years beginning before January 1, 2006, apportionable income shall be apportioned using an apportionment fraction obtained by taking the arithmetical average of the sales factor, property factor, and payroll factor.

(b) For taxable years beginning after December 31, 2005, and before January 1, 2007, apportionable income shall be apportioned using an apportionment fraction composed of the sales factor, representing 60% of the fraction, the property factor representing 20% of the fraction, and the payroll factor representing 20% of the fraction.

(c) For taxable years beginning after December 31, 2006, and before January 1, 2008, apportionable income shall be apportioned using an apportionment fraction composed of the sales factor representing 80% of the fraction, the property factor representing 10% of the fraction, and the payroll factor representing 10% of the fraction.

(d) For taxable years beginning after December 31, 2007, apportionable income shall be apportioned using an apportionment fraction composed of the sales factor.

Note: The provisions of s. Tax 2.50 first apply for taxable years beginning on January 1, 2005.

Note: Section Tax 2.50 interprets ss. 71.04 (8) (b) and (c) and 71.25 (10) (b) and (c), Stats.

SECTION 2. Tax 2.502 is created to read:

Tax 2.502 Apportionment of apportionable income of interstate telecommunications companies. (1) SCOPE. A telecommunications company that is engaged in business both in and outside this state shall apportion its apportionable income as provided in this section. Nonapportionable income shall be allocated as provided in s. 71.25 (5) (b) 1., Stats.

(2) DEFINITIONS. In this section:

(a) "Cable television service" means cable service as defined in 47 USC 522(6) when provided over a cable system as defined in 47 USC 522(7).

(b) "Payroll factor" means the payroll fraction computed under s. 71.04 (6) or 71.25 (8), 2001 Stats., and s. Tax 2.39.

(c) "Property factor" means the property fraction computed under s. 71.04 (5) or 71.25 (7), 2001 Stats., and s. Tax 2.39.

(d) "Sales factor" means the sales fraction computed under s. 71.04 (7) or 71.25 (9), 2001 Stats., and s. Tax 2.39.

(e) "Telecommunications company" means any person that owns, operates, manages, or controls any plant or equipment used to furnish telecommunications services and cable television services within this state directly or indirectly to the public and derives at least 70 percent of its gross income for the current taxable year from the provision of telecommunications services and cable television services, not including internet service. For purposes of the 70 percent test, gross income does not include interest, dividends, rents, royalties, capital gains or ordinary gains from assets dispositions, other than in the normal course of business. "Telecommunications company" does not include internet service providers.

(f) "Telecommunications service" means the offering for sale of the conveyance of voice, data, or other information at any frequency over any part of the electromagnetic spectrum, including the sale of service for collection, storage, forwarding, switching, and delivery incidental to such communication. "Telecommunications service" does not include resale of telecommunications by telecommunications resellers as defined in s. 196.01(9), Stats., broadcast service as defined in s. 196.01(1m), Stats., or satellite television service.

(3) APPORTIONMENT FORMULA COMPUTATION. For taxable years beginning after December 31, 2004, a telecommunications company that does business in and outside this state shall determine its net income for state franchise or income tax purposes as provided in this section. The telecommunications company shall first deduct from its total net income its nonapportionable income, less related expenses. Nonapportionable income shall be allocated as provided in s. 71.25 (5) (b) 1., Stats. The telecommunications company shall apportion its remaining net income to this state using an apportionment fraction obtained by taking the arithmetical average of the property factor, payroll factor, and sales factor.

Note: The provisions of s. Tax 2.502 first apply for taxable years beginning on January 1, 2005.

Note: Section Tax 2.502 interprets ss. 71.04 (8) (b) and (c) and 71.25 (10) (b) and (c), Stats.

The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

Final Regulatory Flexibility Analysis

This rule order does not have a significant economic impact on a substantial number of small businesses.

DEPARTMENT OF REVENUE

Dated: ____________________________ By: ____________________________
Michael L. Morgan
Secretary of Revenue

E:Rules/250 2502 Final Order