

BEFORE THE STATE BOARD OF EQUALIZATION
FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF)
PACIFICORP INC. FROM A DECISION BY) Docket No. **2012-51**
THE DEPARTMENT OF REVENUE)
(Adverse Department Ruling))

IN THE MATTER OF THE APPEAL OF)
PACIFICORP INC. FROM A DECISION BY) Docket No. **2013-03**
THE DEPARTMENT OF REVENUE)
(Refund Denial))

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES

Richard G. Smith, Hawley Troxell Ennis & Hawley LLP, Boise, Idaho, appeared on behalf of PacifiCorp, Inc. (Petitioner or PacifiCorp).

Cathleen D. Parker, Senior Assistant Attorney General, appeared on behalf of the Wyoming Department of Revenue (Respondent or Department).

DIGEST

PacifiCorp is an electric utility company operating four coal-fired electric generation facilities in Wyoming. On March 27, 2012, PacifiCorp requested that the Department issue a ruling exempting certain “chemicals and catalysts used and consumed in the treatment of emissions in the manufacturing and processing of electricity” from Wyoming’s sales or use tax. The Department denied PacifiCorp’s request by letter dated May 9, 2012. PacifiCorp appealed the ruling to the Wyoming State Board of Equalization (State Board).

On October 1, 2012, PacifiCorp filed a sales tax refund claim with the Department for the time period from September 2009 to August 2012. (Ex. 109-2). It based its claim, in part, on its earlier exemption request but included additional chemicals used at its facilities. The Department denied PacifiCorp’s refund request on January 7, 2013, and

PacifiCorp appealed that decision to the State Board. The State Board consolidated the two appeals for review.

The State Board,¹ consisting of Chairman E. Jayne Mockler and Board Member Robin Sessions Cooley, reviewed the Board record, hearing transcripts, and exhibits.

Upon review, the State Board concludes PacifiCorp's electrical generation at its four facilities in Wyoming is neither manufacturing nor processing under Wyoming's excise tax exemption statutes, nor are its chemical purchases exempt as wholesale purchases. The State Board affirms the Wyoming Department of Revenue's final administrative decisions denying PacifiCorp's request for a manufacturing or processing sales tax exemption, or a wholesale purchase exemption, and denying PacifiCorp's refund request.

ISSUES

PacifiCorp identified the following issues:

- Whether the generation of electricity constitutes “manufacturing” or “processing” within the meaning of the production exemption in W.S. § 39-15-105(a)(iii)(A), and as defined, respectively in W.S. § 39-15-101(a)(xxi) and Department Rule Chapter 2, section 3(hh);
- Whether the chemicals are “used directly” in the manufacturing or processing operation, as required by the production exemption in W.S. § 39-15-105(a)(iii)(A). . .
- Whether the chemicals and catalysts qualify under the “wholesale sales” exemption provided in W.S. § 39-15-105(a)(iii)(F), where they are products purchased on a wholesale basis and used in the production of another product that itself is subject to tax.

(Pet'r's Pre-IIr'g Mem. 2).

¹ Board members at the hearing of these consolidated matters included Paul Thomas Glause and Steven D. Olmstead. Mr. Glause resigned from the Board, effective January 2, 2015. Mr. Olmstead's term expired March 1, 2015. After the hearing, Governor Mead appointed E. Jayne Mockler, Martin L. Hardsocg, and Robin Sessions Cooley to the Board. Mr. Hardsocg notified the parties of his intent to participate in this matter unless a party objected. Because PacifiCorp objected, Mr. Hardsocg recused himself from participation in the matter on April 22, 2015.

The Department identified three mixed questions of fact and law:

1. Whether the generation of electricity is manufacturing or processing for purposes of Wyo. Stat. Ann. § 39-15-105(a)(iii)(A). (Mixed question of fact and law).
2. Whether the chemicals at issue are used directly in manufacturing or processing. (Mixed question of fact and law).
3. Whether the purchase of chemicals is exempt as a wholesale sale. (Mixed question of fact and law).

(Dep't Issues of Fact & Law & Ex. Index 1).

The State Board restates the issues as follows:

- I. Is PacifiCorp's electrical generation "manufacturing" under Wyoming Statutes section 39-15-105(a)(iii)(A)?
- II. Is PacifiCorp's electrical generation "processing" under Wyoming Statutes section 39-15-105(a)(iii)(A)?
- III. If PacifiCorp's electrical generation is manufacturing or processing, are PacifiCorp's chemicals "used directly in" its electrical generation and "consumed or destroyed during that process"?
- IV. Alternatively, do PacifiCorp's chemical purchases qualify as tax exempt wholesale purchases under Wyoming Statutes section 39-15-105(a)(iii)(F)?

JURISDICTION

The State Board shall "review final decisions of the department upon application of any interested person adversely affected," Wyo. Stat. Ann. § 39-11-102.1(c) (2011), and "[h]old hearings after due notice in the manner and form provided in the Wyoming Administrative Procedure Act and its own rules and regulations of practice and procedure." Wyo. Stat. Ann. § 39-11-102.1(c)(viii) (2011). A taxpayer's appeal must be filed with the State Board within thirty (30) days of the Department's final decision. Rules, Wyo. State Bd. of Equalization, ch. 2 § 5(e) (2006).

In response to PacifiCorp's ruling request, the Department issued a final decision on May 9, 2012, concluding PacifiCorp was not entitled to an exemption for chemical purchases related to its electrical generation. PacifiCorp appealed the Department's final decision to the State Board on May 31, 2012. Docket No. 2012-51. Thereafter, PacifiCorp

filed a refund request based, in part, on its exemption request. The Department issued a separate final decision on January 7, 2013, denying the refund request, relying on its earlier ruling. PacifiCorp appealed the Department's refund denial to the State Board on January 10, 2013. Docket No. 2013-03. Both appeals were timely filed and the State Board has jurisdiction to decide both appeals.

FINDINGS OF FACT

PacifiCorp's Position

Electrical Generation

1. PacifiCorp owns and operates four coal-fired electrical generation facilities in Wyoming:
 - a. Jim Bridger located in Sweetwater County, Wyoming, owned jointly by PacifiCorp and Idaho Power;
 - b. Dave Johnston located in Converse County, Wyoming;
 - c. Naughton located in Lincoln County, Wyoming; and
 - d. Wyodak located in Campbell County, Wyoming, owned jointly by PacifiCorp and Black Hills Power.

(Stip. ¶ 1; Tr. vol. I, 28, 63-64, 84-86).

2. As the operator of all four facilities, PacifiCorp handles billing, tax returns, and remittal of sales tax on behalf of all owners. (Tr. vol. I, 82-84).
3. Robert Arambel, a PacifiCorp employee since 1973 and Jim Bridger Manager/Director since 1996, testified on behalf of PacifiCorp. Mr. Arambel has a Bachelor's Degree in mechanical engineering and has worked at PacifiCorp's coal-fired generating facilities, including Naughton and Jim Bridger. He is familiar with the operations at PacifiCorp's four facilities, including the generation of electricity, the use of chemicals, and the operation of the emissions control equipment. (Tr. vol. I, 25-28; vol. II, 217-24).
4. Mr. Arambel described three operations performed in the four facilities: 1) the boiler process; 2) the cooling process; and, 3) the emissions control process. He further described PacifiCorp's use of chemicals in each operation. (Tr. vol. I, 28-45, 49-52, 58-61; Exs. 100, 103, 114).

5. Mr. Arambel first explained the boiler operation. The boiler is lined with approximately two-inch diameter tubes containing treated, ultrapure water in a closed loop. In the boiler, coal is burned to heat water in the tubes, converting it into steam. The steam in these tubes is then directed to a turbine. (Tr. vol. I, 30-31; Ex. 100).

6. In the turbine, the steam spins rotors. The turbine is, in turn, connected to a generator that contains a large two-pole magnet with north and south poles surrounded by a coil of wires. The rotors spin the magnets. (Tr. vol. I, 31-33).

7. The strong magnetic field from the spinning magnets inside the coil of wires generates an electrical current, coming out of the generator to the main transformer where PacifiCorp raises the voltage for transmission. (Tr. vol. I, 33-34; Exs. 100, 110, 111).

8. PacifiCorp claims that during its electrical generation, it transforms coal's latent energy into thermal energy in heated steam, which at high temperatures and pressure drives turbines that produce mechanical energy, which in turn spins the magnets in the generator's coils to produce electrical energy. (Tr. vol. I, 29-34; Exs. 100, 110, 111). It further claims electrical generation from coal is "manufacturing" because "electricity is a distinctive product very different from the raw material coal, and has different functions, characteristics, and uses." (PacifiCorp's Post-Hr'g Br. 2). Alternatively, it claims to satisfy the definition of "processing" because it transforms coal into electricity. *Id.* at 3.

9. Second, Mr. Arambel explained the cooling system. After passing through the turbine, steam is diverted to a condenser containing tubes of cool water from the cooling tower. The cool tubes of water cause the steam to condense back into water. The water then returns to the boiler through a boiler feed pump. This water system is a closed loop system. (Tr. vol. I, 38-40, 51; Ex. 100). Mr. Arambel summarized:

... So that's basically a closed loop. In other words, it takes - - we take water from the Green River, pump it into that tower. And it pumps it through the condenser, picks up the heat of steam, back to the cooling tower, pumps over the top of the cooling tower, and it is recooled again.

(Tr. vol. I, 39). PacifiCorp uses this evaporative cooling system in its Jim Bridger, Naughton, and Dave Johnston facilities. The Wyodak facility uses an air-cooled condenser system that runs through large radiators. Although some water is necessary for this process, the amounts are not as significant as in the evaporative cooling system. (Tr. vol. I, 49-51).

10. Finally, Mr. Arambel explained the emissions system. Coal burned in the boiler produces fly ash and sulfur dioxide gas. PacifiCorp must treat the gas before it is released into the atmosphere to comply with environmental regulations. (Tr. vol. I, 34-35, 47-49). PacifiCorp can generate electricity without treating the gas; treatment is a regulatory

requirement, not a requirement for electrical generation. Mr. Arambel described the emissions system as part of the “integrated process” both physically and in the systems’ operations. (Tr. vol. I, 48-49; Ex. 103).

Chemicals

11. PacifiCorp uses chemicals in all three of the above-described operations. PacifiCorp claims these chemicals are exempt from sales tax because they are “used directly in” these operations. (PacifiCorp’s Post-Hr’g Br. 4). PacifiCorp agrees that these chemicals are not “catalysts.” (Tr. vol. I, 53).

12. In addition to Mr. Arambel, Norman Ross, PacifiCorp’s Tax Director, who is responsible for all taxes other than income tax, generally testified about the chemicals PacifiCorp claimed as exempt and to their use in emissions control or water treatment. (Tr. vol. I, 87-93; Exs. 109, 112, 114).

13. In its ruling request, PacifiCorp sought an exemption for chemicals used for emissions control. (Ex. 500). It then submitted a refund request, including those same chemicals, but included additional chemicals it used for the preservation and maintenance of its equipment. (Ex. 109). A number of PacifiCorp’s chemicals are injected into its water supplies to maintain purity, to “soften” the water, maintain pH levels, and suspend minerals in the water used in its facilities. A lime softener removes the bigger impurities from the water, and it is then treated with additional chemicals to make it “ultrapure.” PacifiCorp uses sulfuric acid to bring the pH of the alkaline water to a neutral state, and uses other chemicals to keep the minerals in suspension, so they do not precipitate out and interfere with the heat transfer. (Tr. vol. I, 42-43; vol. II, 219-20, 222-23).

14. PacifiCorp adds chemicals because the boiler manufacturer has specific operational requirements for the purity of the water, so minerals will not build up (“plate” or “scale”) on the inside of the boiler and restrict the heat transfer from the coal fire to the water in the tubing. (Tr. vol. I, 40-43, 51-52, 54, 60-61, 66-67; Ex. 114). PacifiCorp also injects chemicals into the water for pollution control purposes in compliance with its permitting requirements. (Tr. vol. I, 69-70).

15. PacifiCorp’s third system is emissions control, which requires it to use chemicals that attach to and neutralize sulfur dioxide emissions. PacifiCorp produces these emissions when coal is burned in the boiler to heat the water. The spent gases from the boiler move into the electrostatic precipitator (precipitator), and then exhaust out of the precipitator into the scrubber. (Tr. vol. I, 44; Exs. 100, 111). Perforated trays in the scrubber contain a layer of reagent solution. As the gases bubble up through the reagent, a chemical reaction occurs capturing the sulfur dioxide. (Tr. vol. I, 34-36, 92-93; Exs. 100, 114). Failure to treat these emissions violates Department of Environmental Quality (DEQ) permit requirements. (Tr. vol. I, 47-48; Ex. 107).

16. At Jim Bridger and Naughton, PacifiCorp uses sodium bicarbonate, or “soda liquor,” as the reagent. (Tr. vol. I, 35; Stip. ¶ 4). At Dave Johnston and Wyodak, it uses calcium carbonate (limestone) as the reagent. (Tr. vol. I, 34-36; Exs. 112, 114).

17. PacifiCorp summarized its chemical purchases and itemized costs and chemical uses in the facilities. (Ex. 114). Mr. Arambel explained this summary, but in a confusing and sometimes conflicting manner agreed that PacifiCorp had inappropriately included some chemicals. For instance, Mr. Arambel testified that chemicals PacifiCorp used to maintain a facility, including cleaning the boiler when it is shut down, are not required to generate electricity. Nor were chemicals used to treat drinking water, control dust, calibrate laboratory instruments, and soda ash in 50-pound buckets, necessary to generate electricity. (Tr. vol. I, 54-59, 66-71, 75-79; Ex. 114). Further, Mr. Arambel could not explain why PacifiCorp included a chemical identified to “neutralize chemical spills” in its summary, as a chemical spill does not involve electrical generation. (Tr. vol. I, 58-59). Mr. Arambel agreed with the Department that these chemicals were taxable, and not appropriately included in its exemption request. (Tr. vol. I, 55-58; Exs. 112, 114).

18. During his testimony, Mr. Ross also agreed that the exemption did not apply to chemicals used to treat drinking water or the calibration of equipment. (Tr. vol. I, 56-58, 76-77, 93-95; Ex. 114). And neither of PacifiCorp’s witnesses knew whether “quills, injection” was a chemical or hardware. (Tr. vol. I, 71, 77, 94-95; Ex. 114-4). Mr. Ross agreed that PacifiCorp should remove it if it was hardware. (Tr. vol. I, 94). Nor did PacifiCorp’s witnesses explain how PacifiCorp used some of the itemized chemicals “directly in” electrical generation. For example, neither witness explained “Bearing cooling water” described as “[u]sed to help passivate metal surfaces in auxiliary cooling in the plant.” Nor did either witness explain “Defoamer” which was described as “[u]sed to prevent foaming in the cooling tower and minimize drift problems. (Environmental issues with the drift mandate its use).” (Ex. 114-1, 114-2).

19. Moreover, Mr. Arambel and Mr. Ross each interpreted the statutory phrase “used directly” differently and did not agree on the classification of some of the chemicals. (Tr. vol. I, 61, 88-89, 94-95). Mr. Arambel based his opinion on whether PacifiCorp used the chemicals to generate electricity. (Tr. vol. I, 55-57, 66-68, 75). Mr. Ross broadened the list to include chemicals that facilitated electrical generation. (Tr. vol. I, 95-99).

20. PacifiCorp alternatively argued that if the Department did not classify it as a manufacturer or processor, these chemical purchases fell within the wholesale tax exemption as property used and consumed in a process that is ultimately taxed. (PacifiCorp’s Pre-Hr’g Mem. 2, 11-12). However, neither witness testified about how or why PacifiCorp’s chemical purchases fell within the wholesale tax exemption.

The Department's Position

Manufacturing or Processing Exemption

21. Daniel W. Noble, the Administrator of the Department of Revenue, Excise Tax Division at the time of the hearing, testified on behalf of the Department. To determine whether PacifiCorp manufactured or processed electricity, the Department looked at the nature of electricity and the exemption statutes. (Tr. vol. I, 112-207).
22. Prior to its current request, PacifiCorp had never sought classification as a manufacturer under the exemption statutes. (Tr. vol. I, 99-100). Nor had any electrical generation facility in Wyoming ever claimed to be a manufacturer. (Tr. vol. I, 117-18). The Department has always interpreted the statutes to conclude that electrical generation is not a manufacturing activity. (Tr. vol. I, 117-18, 144-45; Exs. 501, 502, 504, 505, 506). The Department has never extended either the manufacturing or processing, or other manufacturing related exemptions, *infra* ¶¶ 27, 29-30, to an electrical generation facility. (Tr. vol. I, 118, 144).
23. The Department did not consider PacifiCorp a manufacturer because it did not create a product from a raw material. (Tr. vol. I, 121). The Department considers coal in electrical generation as fuel for the operation, not a raw or prepared material that PacifiCorp turns into another product. (Tr. vol. I, 119-21). The Department also views electrical generation as the conversion of one form of energy into another form of energy. As such, the Department concluded PacifiCorp does not create a new product, article, substance, or commodity. (Tr. vol. I, 118-22; Exs. 501, 503).
24. The Department concluded PacifiCorp was not a processor for the same reason it was not a manufacturer; PacifiCorp did not substantially change one product into another. (Tr. vol. I, 125, 127-28).
25. Further, the Department has always interpreted manufacturing to include only those entities classified as manufacturers under the NAICS Codes 31 through 33. (Tr. vol. I, 130-31, 173). “ ‘NAICS’ means the Northern American Industry Classification System manual of 2002 that organizes establishments into industries on the basis of the activity in which they are primarily engaged[.]” Wyo. Stat. Ann. § 39-15-101(a)(xxii) (2011). NAICS does not classify electrical generation as manufacturing; it classifies it as a utility. (Tr. vol. I, 203).
26. The Department also relied on the manufacturing machinery exemption, enacted in 2004, in support of its statutory interpretation and final decisions in this case. (Tr. vol. I, 131-39). The manufacturing machinery exemption requires a machinery purchaser to be classified under NAICS Codes 31 through 33 to qualify for the exemption. Wyo. Stat. Ann. § 39-15-105(a)(viii)(O) (2011); 2004 Wyo. Sess. Laws 38-40. Using the NAICS

Codes to define manufacturing, the legislature limited this exemption to industries previously recognized as manufacturing, specifically excluding electrical generation. (Tr. vol. I, 141-42, 203; Exs. 502, 503²).

Chemicals

27. PacifiCorp seeks an exemption for chemicals used to maintain equipment. (Ex. 104). The Department has never allowed a manufacturing exemption for chemicals used to clean, treat or maintain manufacturing equipment because the chemicals are not used directly in manufacturing, as required by statute. (Tr. vol. I, 155). By analogy, the Department does not exempt oil or lubricant purchases regardless of whether or not the failure to lubricate machinery would cause it to seize up. (Tr. vol. I, 156). Because PacifiCorp could generate electricity without using these cleaning, treatment or maintenance chemicals, the Department found it did not qualify for the manufacturing exemption. (Tr. vol. I, 149-50).

28. PacifiCorp also claimed that because it was legally required to treat emissions and water discharge, the mandated treatment is part of its manufacturing process. (Tr. vol. I, 47-48; Ex. 104-9). The Department disagreed that a chemical is statutorily exempt because environmental regulations require its use. (Tr. vol. I, 150-51).

29. The Department has never exempted the purchase of pollution control chemicals under the manufacturing exemption. Nor has the Department allowed a sales tax exemption for pollution control machinery. Allowing an exemption for pollution control chemicals, according to the Department, would inappropriately broaden not only the manufacturing exemption but also the corresponding manufacturing machinery exemption at Wyoming Statutes section 39-15-105(a)(viii)(O) (2011). (Tr. vol. I, 151; Exs. 504-506).

30. The Department has issued similar rulings for other taxpayers finding that pollution control equipment was not exempt: “Currently Wyoming does not offer sales tax exemptions for pollution control equipment, specifically, ‘flue gas desulfurization units’ or ‘scrubbers[.]’ ” (Ex. 504 at 112). Explaining further, the Department noted to a taxpayer:

Given our understanding that the machinery in question does not actually perform a manufacturing function, defined . . . as producing a new product, article, substance or commodity different from and having a distinctive nature, character or use from the raw or prepared material, but rather collects

² The Department submitted Exhibit 503, which lists entities classified as manufacturing as of October 25, 2012. (Ex. 503 at 81). Technically, Docket No. 2012-51 falls under the previous version, or the 2007 NAICS classifications, and Docket No. 2013-03 falls within the 2012 classifications. PacifiCorp did not object to this exhibit and neither party indicated any relevant changes from the previous 2007 NAICS industry classification.

particulate so that exhaust from the cracking unit meets governmental regulations, we would not grant that the machinery which you are manufacturing meets the definition of manufacturing machinery. While we understand that a cracker cannot be operated without an air pollution system being installed per environmental regulation, it is not actually necessary for the cracker to accomplish its intended function. In the absence of regulation, the cracker could be operated without an air pollution system.

(Ex. 505 at 122). Similarly, the Department has previously found that “[a]ir quality equipment is only considered manufacturing machinery if it is directly involved in manufacturing tangible personal property, not if it is merely placed to comply with federal, state, local or self-imposed emission regulations.” (Ex. 506 at 130).

Wholesale sales

31. In the alternative, PacifiCorp claimed its chemical purchases were wholesale purchases and were, therefore, not subject to sales tax. Wyo. Stat. Ann. § 39-15-105(a)(iii)(F) (2011). However, because PacifiCorp generated and sold electricity, and the chemicals it purchased were not in the electricity, the Department opined that the chemicals were never re-sold as contemplated by the wholesale tax exemption. (Tr. vol. I, 46, 159).

32. PacifiCorp did not refute that it used the chemicals for electrical generation operations and that it never intended to resell the chemicals. In fact, PacifiCorp’s witnesses did not testify about the wholesale exemption claim.

33. Any portion of the Conclusions of Law: Principles of Law or the Conclusions of Law: Application of Principles of Law set forth below, which includes a finding of fact, may also be considered a Finding of Fact and is, therefore, incorporated herein by reference.

CONCLUSIONS OF LAW: PRINCIPLES OF LAW

General Standards of Review

34. The Board must “[d]ecide all questions that may arise with reference to the construction of any statute affecting the assessment, levy and collection of taxes, in accordance with the rules, regulations, orders and instructions prescribed by the department[.]” Wyo. Stat. Ann. § 39-11-102.1(c)(iv) (2011).

35. The role of this Board is strictly adjudicatory:

It is only by either approving the determination of the Department, or by disapproving the determination and remanding the matter to the Department, that the issues brought before the Board for review can be resolved successfully without invading the statutory prerogatives of the Department.

Amoco Prod. Co. v. Wyo. State Bd. of Equalization, 12 P.3d 668, 674 (Wyo. 2000).

36. The Board's Rules provide that:

[T]he Petitioner shall have the burden of going forward and the ultimate burden of persuasion, which burden shall be met by a preponderance of the evidence. If Petitioner provides sufficient evidence to suggest the Department determination is incorrect, the burden shifts to the Department to defend its action. **For all cases involving a claim for exemption, the Petitioner shall clearly establish the facts supporting an exemption.** In proceedings involving the question of whether or not there is a taxable event under Wyoming law, the Petitioner shall have the burden of going forward and the Department shall have the ultimate burden of persuasion.

Rules, Wyo. State Bd. of Equalization, ch. 2 § 20 (2006) (emphasis added).

37. "A preponderance of the evidence is 'proof which leads the trier of fact to find that the existence of the contested fact is more probable than its non-existence.'" *Mitcheson v. State, ex rel. Wyo. Workers' Safety & Comp. Div.*, 2012 WY 74, ¶ 11, 277 P.3d 725, 730 (Wyo. 2012) (quoting *Kenyon v. State, ex rel. Wyo. Workers' Safety & Comp. Div.*, 2011 WY 14, ¶ 22, 247 P.3d 845, 851 (Wyo. 2011)).

General Rules of Statutory and Rule Construction

38. Statutory interpretation starts with consideration of the legislative intent found in the plain language of the statute:

As we have often stated, our rules of statutory construction focus on discerning the legislature's intent. In doing so, we begin by making an "inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection."

Chevron U.S.A., Inc. v. Dep't of Revenue, 2007 WY 79, ¶ 15, 158 P.3d 131, 136 (Wyo. 2007) (quoting *Parker Land & Cattle Co. v. Wyo. Game & Fish Comm'n*, 845 P.2d 1040, 1042 (Wyo. 1993)).

39. In addition, the Wyoming Supreme Court summarized a number of useful precepts concerning statutory interpretation:

All statutes must be construed in *pari materia* and, in ascertaining the meaning of a given law, all statutes relating to the same subject or having the same general purpose must be considered and construed in harmony. Statutory construction is a question of law, so our standard of review is de novo. We endeavor to interpret statutes in accordance with the legislature's intent. We begin by making an inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection. We construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe all parts of the statute in *pari materia*. When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction. Moreover, we must not give a statute a meaning that will nullify its operation if it is susceptible of another interpretation.

Moreover, we will not enlarge, stretch, expand, or extend a statute to matters that do not fall within its express provisions.

Cheyenne Newspapers, Inc. v. Bldg. Code Bd. of Appeals of the City of Cheyenne, 2010 WY 2, ¶ 9, 222 P.3d 158, 162 (Wyo. 2010) (quoting *BP Am. Prod. Co. v. Dep't of Revenue*, 2005 WY 60, ¶ 15, 112 P.3d 596, 604 (Wyo. 2005) (internal citations and quotations omitted)). See also *Chevron U.S.A., Inc.* ¶ 15, 158 P.3d at 136.

40. “We must accept statutes as they are written; neither omitting words that are included, nor including words that are omitted.” *Cheyenne Newspapers, Inc.*, ¶ 9, 222 P.3d at 162 (citing *BP Am. Prod. Co.*, ¶ 15, 112 P.3d at 604); *Hede v. Gilstrap*, 2005 WY 24, ¶ 6, 107 P.3d 158, 163 (Wyo. 2005); *Fontaine v. Bd. of Cty. Comm'rs of Park Cty.*, 4 P.3d 890, 895 (Wyo. 2000); *In re Adoption of Voss*, 550 P.2d 481, 485 (Wyo. 1976).

41. Also applicable is the oft-repeated rule that we “must assume that the legislature did not intend futile things.” *Hamlin v. Transcon Lines*, 701 P.2d 1139, 1142 (Wyo. 1985) (citing *Thomson v. Wyo. In-Stream Flow Comm.*, 651 P.2d 778, 787 (Wyo. 1982)). See *TPJ v. State*, 2003 WY 49, ¶ 11, 66 P.3d 710, 713 (Wyo. 2003).

42. The Wyoming Legislature has codified several rules of interpretation, found at Wyoming Statutes section 8-1-103 (2011), which provide, in part:

(a) The construction of all statutes of this state shall be by the following rules, unless that construction is plainly contrary to the intent of the legislature:

(i) Words and phrases shall be taken in their ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import[.]

43. When interpreting a statute, the State Board will give deference to the statutory interpretation of the agency charged with administration of a statute, unless that interpretation is clearly erroneous. *Wilson Advisory Comm. v. Bd. of Cty. Comm'rs*, 2012 WY 163, ¶ 22, 292 P.3d 855, 862 (Wyo. 2012) (citing *Powder River Basin Res. Council v. Wyo. Dep't of Envtl. Quality*, 2010 WY 25, ¶ 6, 226 P.3d 809, 813 (Wyo. 2010)); *Parker Land & Cattle Co.*, 845 P.2d at 1042.

44. Moreover, “[p]roperly promulgated rules and regulations have the same force and effect of law. We construe them as we construe statutes.” *Johnson v. City of Laramie*, 2008 WY 73, ¶ 7, 187 P.3d 355, 357 (Wyo. 2008) (citing *Olivas v. State, ex rel., Wyo. Workers' Safety & Comp. Div.*, 2006 WY 29, ¶ 15, 130 P.3d 476, 484 (Wyo. 2006)).

45. The State Board is also mindful that exemptions from taxation are not favored.

First, exemptions are not favored and generally taxation is held to be the rule and exemption the exception, which means there is a presumption against a grant of exemption and in favor of the taxing power. *Appeal of Chicago & North Western Ry. Co.*, 70 Wyo. 84, 246 P.2d 789, 795 [Wyo. 1952], rehearing denied 70 Wyo. 119, 247 P.2d 660; *State Tax Commission v. Graybar Electric Company, Inc.*, 86 Ariz. 253, 344 P.2d 1008, 1012 [Ariz. 1959]; *Cornell College v. Board of Review of Tama County*, 248 Iowa 388, 81 N.W.2d 25, 26 [Iowa 1957]. See also 84 C.J.S. Taxation § 225, pp. 431-432.

State Bd. of Equalization v. Wyo. Auto. Dealers Ass'n, 395 P.2d 741, 742 (Wyo. 1964).

46. A statutory exemption from taxation must be clearly conferred in plain words. *Comm'rs of Cambria Park v. Bd. of Cty. Comm'rs of Weston Cty.*, 174 P.2d 402, 405 (Wyo. 1946).

Wyoming Statutes and Department Rules

47. The primary issue raised by PacifiCorp involves application of the following exemption provision:

(iii) For the purpose of exempting sales of services and tangible personal property consumed in production, the following are exempt:

(A) Sales of tangible personal property to a person engaged in the business of **manufacturing, processing** or compounding when the tangible personal property purchased becomes an ingredient or component of the tangible personal property manufactured, processed or compounded for sale or use and sales of containers, labels or shipping cases used for the tangible personal property so manufactured, processed or compounded. This subparagraph shall

apply to chemicals and catalysts used directly in manufacturing, processing or compounding which are consumed or destroyed during that process[.]

Wyo. Stat. Ann. § 39-15-105(a)(iii)(A) (2011) (emphasis added). The legislature included the final sentence in 2001. 2001 Wyo. Sess. Laws 233.

48. “ ‘Tangible personal property’ means all personal property that can be seen, weighed, measured, felt or touched, or that is in any other manner perceptible to the senses. ‘Tangible personal property’ includes electricity, water, gas, steam and prewritten computer software[.]” Wyo. Stat. Ann. § 39-15-101(a)(ix) (2011).

49. “ ‘Manufacturing’ means the operation of producing a new product, article, substance or commodity different from and having a distinctive nature, character or use from the raw or prepared material[.]” Wyo. Stat. Ann. § 39-15-101(a)(xxi) (2011). The Department’s Rule further clarified this statutory definition stating:

“Manufacturing” means a transformation or conversion of material or things into a different state or form from that in which they originally existed, and the actual operation incident to changing them into marketable products. The change in form, composition, or character must be a substantial change and it must result in a transformation of the property into a different product having a distinctive name, nature and use.

Rules, Wyo. Dep’t of Revenue, ch. 2 § 3(bb.) (2006); ch. 2 § 3(x) (2012).³

50. The legislature did not define “processing” in the exemption statute. Instead, the Department defined “processing” as “the transformation of tangible personal property into a different state or form from which it originally existed ” Rules, Wyo. Dep’t of Revenue, ch. 2 § 3(ll.) (2006); ch. 2 § 3(hh) (2012).

51. The legislature passed a narrow exemption for boiler fuel used in generating electricity in 1998. “For the purpose of exempting sales of services and tangible personal property consumed in production, the following are exempt: (C) Sales of fuel for use as boiler fuel in the production of electricity.” 1998 Wyo Sess. Laws 770 (codified at Wyo. Stat. Ann. § 39-15-105(iii)(G) (2011)). (Ex. 502 at 78). Section two (2) of the enactment provided: “The intent of this act is to clarify the long standing interpretation of W.S. 39-6-405(a)(iii)(D) that all sales of fuel for use as boiler fuel are, and have been, exempt from sales and use tax.” 1998 Wyo. Sess. Laws 770.

³ The 2006 Rule was superseded by the 2012 Rule, although this definition remained the same. The initial appeal in this matter falls within the 2006 Rule, while the subsequent appeal falls within the 2012 Rule. Where appropriate, the State Board will cite to both the 2006 and 2012 Rules.

52. The manufacturing machinery sales and use tax exemptions are found at Wyoming Statutes sections 39-15-105(a)(viii)(O) (2011) and 39-16-105(a)(viii)(D) (2011). These exemptions provide, in part:

(viii) For the purpose of exempting sales of services and tangible personal property as an economic incentive, the following are exempt:

...

[(D) or (O)] Until December 31, 2017, the sale or lease of machinery to be used in this state directly and predominantly in manufacturing tangible personal property, if the sale or lease:

(I) Is to a manufacturer, classified by the department under the NAICS code manufacturing sector 31 33[.]

53. PacifiCorp claims that, in the alternative, it is entitled to the wholesale exemption, which provides: “For the purpose of exempting sales of services and tangible personal property consumed in production, the following are exempt: Wholesale sales[.]” Wyo. Stat. Ann. § 39-15-105(a)(iii)(F) (2011). “ ‘Wholesale sale’ means a sale of tangible personal property or services to a vendor for subsequent sale[.]” Wyo. Stat. Ann. § 39-15-101(a) (xvi) (2011).

CONCLUSIONS OF LAW: APPLICATION OF PRINCIPLES OF LAW

I. Is PacifiCorp’s electrical generation “manufacturing” under Wyoming Statutes section 39-15-105(a)(iii)(A)?

54. The State Board begins its analysis of whether PacifiCorp’s electrical generation is manufacturing by looking at the plain or ordinary and usual meaning of the term “manufacturing.” *Supra* ¶¶ 38-39, 42. Wyoming Statutes define “manufacturing” as “the operation of producing a new product, article, substance or commodity different from and having a distinctive nature, character or use from the raw or prepared material.” Wyo. Stat. Ann. § 39-15-101(a)(xxi) (2011). *Supra* ¶ 40. This statutory definition contemplates changing a “raw or prepared material” into a different and distinctive product.

55. The Department further clarified this statutory definition in its rules providing that a manufacturer must convert raw material into a marketable product:

“Manufacturing” means a transformation or conversion of material or things into a different state or form from that in which they originally existed, and the actual operation incident to changing them into marketable products. The change in form, composition, or character must be a substantial change and it must result in a transformation of the property into a different product having a distinctive name, nature and use.

Rules, Wyo. Dep't of Revenue, ch. 2 § 3(bb.) (2006); ch. 2 § 3 (x) (2012). *Supra* ¶ 49.

56. Applying these definitions to PacifiCorp's electrical generation model, *supra* ¶¶ 4-10, it is the magnets rotating within the coil of copper wires of the generator that actually generate electricity. *Supra* ¶¶ 6-7. Raw materials are not transformed into electricity. Rather, coal and steam fuel the turbine that spins the magnets within the coil of the generator. *Supra* ¶¶ 5-7. The State Board finds that neither coal nor water are raw or prepared materials that are, themselves, transformed into electricity, as required by the definitions of "manufacturing." *Supra* ¶ 49.

57. This interpretation of "manufacturing" is consistent with the Wyoming Supreme Court's plain and ordinary or common usage of the same word in *Morrison-Knudson Co. v. State Board of Equalization*, 135 P.2d 927, 931 (Wyo. 1943). In *Morrison-Knudson Co.*, the Court discussed the meaning of "manufacturing":

In a broad sense, no doubt, the term, "manufacturer" may be said to include the construction of a dam, but courts have recognized that the term must be construed in **connection with the subject matter with which it is used, and that the legislative intention must be sought**. In some cases the term has been given a broad, in others a narrow, meaning. **In speaking of the making of a dam, we ordinarily use the term "construction," not "manufacture."** Section 112-101, Rev.St. 1931 [currently Wyo. Stat. Ann. § 8-1-103(a)(i)], provides that "words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." We have no reason to believe that the legislature in the instant case used the term "manufacturing" in a technical sense, and unless we can find that they used it in that sense we presume that the legislature used the term in its natural, ordinary and every-day meaning.

Id. at 931 (citation omitted) (emphasis added). Similarly, the State Board has no reason to believe the legislature intended to include electrical generation in its manufacturing definition because electricity is ordinarily referred to as generated, not "manufactured." *Id.*

58. The State Board also considers the Department's long-standing position that electrical generation is not manufacturing, *supra* ¶ 22, and the Department's policy of classifying companies as manufacturers only if they fall within the NAICS Codes section 31 through 33. *Supra* ¶¶ 25-26.

59. The Department has historically limited manufacturers to only those identified as such in the NAICS Codes sections 31 through 33. The NAICS explanation of manufacturing is similar to the statutory and rule definitions:

The Manufacturing sector comprises establishments engaged in the mechanical, physical, or chemical transformation of materials, substances, or components into new products. . . The materials, substances, or components transformed by manufacturing establishments are raw materials that are products of agriculture, forestry, fishing, mining, or quarrying as well as products of other manufacturing establishments. . . .

(Ex. 503 at 96). *Compare supra* ¶ 49. While the State Board is mindful that neither it nor the Department may add words to the statute, *supra* ¶ 40, the Board finds that the Department, as the agency vested with the authority to administer the Selective Sales Tax Act of 1937, did not exceed its statutory authority when relying on the NAICS to assist it in identifying entities where the boundaries “can be somewhat blurry.” (Ex. 503 at 97). The State Board thus finds the Department’s interpretation is not clearly erroneous and is entitled to deference. *Supra* ¶ 49.

60. In excluding electrical generation from manufacturing, the Department also relied on section 2 of the boiler fuel exemption for electrical generation, enacted in 1998. Wyo. Stat. Ann. § 39-15-105(a)(iii)(G) (2011). (Tr. vol. I, 143-44). *Supra* ¶ 51. Section 2 of the session law explained the exemption: “The intent of this act is to clarify the long standing interpretation of W.S. 39-6-405(a)(iii)(D) [currently 39-15-105(a)(iii)(D)] that all sales of fuel for use as boiler fuel are, and have been, exempt from sales and use tax.” 1998 Wyo. Sess. Laws 770. Subsection (iii)(D), mentioned in section 2, provided a power and fuel exemption for manufacturers and processors in 1937.⁴

61. The power and fuel exemption mentioned in section 2, *supra*, applies generally to “manufacturing, processing or agriculture,” while the boiler fuel exemption applies solely to the “production of electricity.” *Compare* Wyo. Stat. Ann. §§ 39-15-103(a)(iii)(D) *with* (iii)(G) (2011).

62. The legislature, in section 2, provided a clear statement that it chose to treat electrical generation separate from manufacturing, processing and agriculture. That is, the legislature did not need to enact a boiler fuel exemption for electrical generation if it already considered it manufacturing, and thus already exempt from sales tax. As Mr. Noble

⁴ The legislature added a power and fuel exemption for manufacturers, processors, and agriculture to subsection 2(f) in 1937. 1937 Wyo. Sess. Laws 161. That portion of the exemption provided:

Each purchase of power and/or fuel or any substitute for the same, made by a person engaged in the business of **manufacturing** or agriculture and **consumed directly in manufacturing** or by a person engaged in the transportation business and consumed directly in generating motive power for actual transportation purposes, shall be deemed a wholesale sale and shall be exempt from taxation under this Act.

Id. (emphasis added). (Ex. 502 at 19). The legislature subsequently amended this provision, but the relevant portion of it remains at Wyoming Statutes section 39-15-105(a)(iii)(D) (2011).

recognized, if the Department interpreted manufacturing to include electrical generation, that interpretation would render the boiler fuel exemption for electrical generation meaningless. (Tr. vol. I, 145). The State Board agrees. In assuming the legislature did not intend futile things, *supra* ¶ 41, the Department correctly interpreted this differential treatment of manufacturers, processors and agriculture in (iii)(D), as compared to electrical generation in (iii)(G), as the legislature's recognition that electrical generation is not manufacturing. (Tr. vol. I, 142). *Supra* ¶ 60.

63. The legislature only granted electrical generators an exemption for boiler fuel. In construing statutes, the State Board must not give a statute a meaning that would nullify it, or another statute having the same general purpose, if it is susceptible of another interpretation. *Supra* ¶ 39. Reading these exemption statutes in *pari materia*, the State Board cannot include electrical generation in the definition of manufacturing, because doing so would nullify the operation of the boiler fuel exemption.

64. In support of its argument, PacifiCorp cited *State Board of Equalization v. Stanolind Oil & Gas Co.*, 94 P.2d 147 (Wyo. 1939) as the Wyoming Supreme Court's definitive statement that generating electricity is manufacturing. (PacifiCorp's Post-Hr'g Br. 2). The State Board's review of the case does not bear out such a clear statement, however, as applied to current statutes. In *Stanolind*, the Court interpreted a 1937 exemption statute, providing very little analysis other than to agree with several other jurisdictions that generating electricity is "manufacturing." *Id.* at 156. The statute in *Stanolind* was more broadly written and the legislature had not separately defined "manufacturing." *Stanolind Oil & Gas Co.*, 94 P.2d at 150.⁵

65. Without further analysis from the Court in *Stanolind*, it is unclear what it relied on when it provided a general statement that the better reasoning and authorities at the time indicated generating electricity was manufacturing. *Id.* at 156. Because the current statute defines manufacturing, and because the statutes have changed since 1937 to limit the application of this exemption, *Stanolind* is not a definitive statement that electrical generation is "manufacturing" under the current statutory scheme.

⁵ In 1937, the legislature adopted the Selective Sales Tax Act of 1937. Subsection 2(f) at issue in *Stanolind* provided:

(f) Each purchase of tangible personal property or product made by a person engaged in the business of **manufacturing**, compounding for sale, profit or use, any article, substance or commodity which **directly enters into and becomes an ingredient or component** part of the tangible personal property or product which he **manufactures** or compounds, or the furnished container, label, or the shipping case thereof, shall be deemed a whole sale and shall be exempt from taxation under this Act.

1937 Wyo. Sess. Laws 161 (emphasis added). (Ex. 502 at 19).

66. PacifiCorp also cited a Colorado decision, *Public Service Co. v. Department of Revenue*, 2011 WL 4089971 (Colo. App. 2011), finding electrical generation was manufacturing. (PacifiCorp's Post-Hr'g Br. 2, 10). The State Board notes the Colorado Supreme Court subsequently reversed this decision, finding, under its particular statutory scheme that electricity was taxed as a service, not as tangible personal property. The Colorado Supreme Court did not address whether electricity was manufacturing under Colorado law. *Dep't of Revenue v. Public Service Co. of Colo.*, 330 P.3d 385, 386 and fn.7 (Colo. 2014).

67. Other courts are split on whether the generation of electricity is manufacturing, and both parties refer to supporting cases from various jurisdictions. Compare *Potomac Edison Co. v. Commonwealth*, 411 A.2d 1287, 1289 (Pa. Commw. Ct. 1980) ("an electric company is not entitled to the manufacturing exemption because the production of electricity is not manufacturing."); *United Illuminating Co. v. Groppo*, 601 A.2d 1005, 1009 (Conn. 1992) ("While the generation of electricity may in some sense be a 'manufacturing' process, we conclude that the legislature did not intend to exempt businesses engaged in the generation of electricity[.]"); *Frederick Elec. Light & Power Co. v. City of Frederick City*, 36 A. 362, 363 (Md. 1897) ("We think it is clear that an electric light company is not included within the terms 'manufacturing industry,' as used in this ordinance.") with *Utilicorp United, Inc. v. Dir. of Revenue*, 75 S.W.3d 725, 726 (Mo. 2001) ("The parties agree that generating electricity is manufacturing within the meaning of the statute[.]"); *Curry v. Ala. Power Co.*, 8 So.2d 521 (Ala. 1942) (finding Alabama Power Company is a "manufacturing corporation."); *Beggs v. Edison Elec. Light & Illuminating Co.*, 11 So. 381, 383 (1892) ("According to the above [statutory] definitions of the word 'manufacture,' we are constrained to consider and declare an electric light company a manufacturing corporation to all intents and purposes."). See generally C.P. Jhong, J.D., Annotation, *What constitutes manufacturing and who is a manufacturer under tax laws*, 17 ALR 3d 107, § 44 (1968). (PacifiCorp's Post-Hr'g Br. 10-12; Dep't of Revenue's Pre-Hr'g Br. 5-6).

68. The State Board notes that the Annotation cited above, *supra* ¶ 67, recognizes ten (10) states that consider the generation of electricity to constitute manufacturing, while four (4) states have found it is not. *Id.* These cases all rely, however, on case specific evidence, state-specific statutory tax schemes, and specific language defining the relevant terms. These cases are, consequently, of limited applicability.

69. Like these other jurisdictions, the State Board is limited in its analysis to the plain language in Wyoming Statutes and Department Rules. Wyoming Statutes and Department Rules require PacifiCorp to substantially transform or convert coal or water into a distinctively different state or form. *Supra* ¶¶ 47-49. In considering that necessary transformation, the State Board considers the following analysis in *Potomac Edison Co.*, *supra* ¶ 67, persuasive given the evidence adduced in this case, the legal arguments of the parties, and the law in Wyoming:

Thus, the touchstone of the legal concept of the term “manufacturing” is the application of skill and labor to original “material” whereby it is substantially changed into a new, different and useful “article”. The traditional legal concept assumes tangible “material” as a starting point, and a continuity of existence of that material into the final product.

We therefore find crucial to our determination the fact, as the parties' stipulation and the testimony of taxpayer's expert witness point out, that the original material here, coal, is not material which survives in the new “product”; coal is simply the chemical energy source from which the entire process of electric generation begins, and in the process it is consumed and discarded. The harnessing of heat energy from the coal fuel, its conversion into mechanical energy in the turbine and the final conversion to electrical energy in the form of an electric current, is hence not “manufacturing” in the ordinary understanding of that term. Where no molecules of the original raw material survive in the final product, we thus do not have manufacturing in the judicial sense of “application of labor or skill” to “material.”

Potomac Edison Co., 411 A.2d at 1290-91.

70. The State Board concludes that PacifiCorp does not create a new product from coal or water that has a distinctive character or use. Like the Court in *Potomac Edison Co.*, the State Board must construe legislation using ordinary concepts, and give that legislation a “popular and practical understanding.” *Id.* The coal and water used in the generation of electricity provide power for the turbines, and for the generators. *Supra* ¶¶ 5-9. However, the coal and water are not ultimately changed into electricity. Coal is simply an energy source to heat the water. Similarly, the water is turned into steam to spin the rotors in the turbine. *Supra* ¶¶ 5-6. Neither coal nor water become part of the electricity generated. The State Board finds that PacifiCorp failed to meet its burden of proof to establish its electrical generation was “manufacturing” under Wyoming Statutes section 39-15-105(a)(iii)(A) (2011).

II. Is PacifiCorp’s electrical generation “processing” under Wyoming Statutes section 39-15-105(a)(iii)(A)?

71. Mr. Noble testified the Department considers “manufacturing” and “processing” analogous functions. (Tr. vol. I, 130). However, the legislature used both words for a reason. To find otherwise would nullify one or the other, which neither the Department nor the State Board can do. *Supra* ¶¶ 39-41. Moreover, the Department provided a separate, although similar, definition for processing in its Rules, which clarified that PacifiCorp, as a “processor,” must transform “tangible personal property into a different state or form from which it originally existed[.]” Rules, Wyo. Dep’t of Revenue, ch. 2 § 3(II.) (2006); ch. 2 § 3(hh) (2012). This Rule has the force and effect of law.

Supra ¶ 44. The State Board agrees with PacifiCorp that “manufacturing” and “processing” are different, although similar, activities.

72. PacifiCorp argued it was a processor under two theories: that it transformed coal into electricity; or that it transformed the energy in coal into different forms of energy resulting in electricity. (Tr. vol. I, 29, 46-47). PacifiCorp argued that this was a “substantial” change because it was very technical and expensive. It explained:

Hundreds of millions of dollars are invested in order to accomplish this conversion, and the process involves not only one transformation but three: from the latent chemical energy embedded in coal, to thermal energy when that coal is burned to produce steam, to mechanical energy when steam under pressure causes turbines to rotate, to electrical energy when the turbines cause generators to rotate in a magnetic field that produces an electric current.

(PacifiCorp’s Post-Hr’g Br. 3).

73. The Department responds first that PacifiCorp does not change coal into electricity; coal simply provides fuel for the operation that eventually generates electricity. It further responds to PacifiCorp’s energy theory that even though the type of energy changes, it is still energy that is never transformed into another state or form as required by the rule. (Tr. vol. I, 126-27, 169-77). *Supra* ¶ 50.

74. PacifiCorp does burn coal, substantially changing its state or form into ash and other emissions. *Supra* ¶¶ 5, 10. However, coal is burned to fuel several operations that ultimately generate electricity, *supra* ¶¶ 5-7, but it does not change its own state or form to become part of the processed product, in this case electricity. For this reason, coal’s change in state or form during PacifiCorp’s operations is not “processing.” This interpretation is confirmed when considering the Department’s definition of “processing” in *pari materia* with Wyoming Statutes section 39-15-105(a)(iii)(A). That is, the State Board construes the plain language of the Department’s Rule and the exemption statute to require a change in the “state or form” of coal, such that it becomes an “ingredient or component of the tangible personal property . . . processed . . . for sale” *Id.* The State Board finds that because coal does not become an ingredient or component of electricity, its change in state or form is not processing within the exemptions statute or Department Rules.

75. The State Board next considers PacifiCorp’s alternative claim that energy changes into “a different state or form” during its electrical generation, thus bringing it within the definition of “processing.” (PacifiCorp’s Post-Hrg Br. 3). In response, the Department referred the State Board to its decision in *American Linen*, Docket No. 99-07, 2000 WL 33934217 (Wyo. State Bd. of Equalization, March 29, 2000) to support its position that energy is not changed in this process as required for “processing.” In *American Linen*, the

State Board found that laundering, sanitizing, pressing, and bundling clothing and linens for consumers was not manufacturing or processing because it did not “place tangible personal property in a form, composition, or character substantially different from that which it was *acquired*.” *Id.* at *6 (emphasis in original) (quoting *Mechanics Laundry & Supply, Inc. v. Ind. Dep’t of State Revenue*, 650 N.E.2d 1223, 1229 (Ind. Tax 1995)). That is, in *American Linen*, no “tangible personal property” was changed “into a different state or form from which it originally existed.” Rules, Wyo. Dep’t of Revenue, ch. 2 § 3(II.) (2006); ch. 2 § 3(hh) (2012). *American Linen* is helpful but not definitive in this case. While the clothing and linens were unchanged in laundering, PacifiCorp’s operation started with one energy form and ended with an entirely different type of energy.

76. *Potomac Edison Co.*, *supra* ¶ 67, is again instructive:

We recognize that, in this electronic age, it may be scientifically myopic to recognize only continuity of tangible material and to ignore the equally real although less tangible continuity of elemental energy. However, we are construing legislation and therefore believe that the legislature intended to use the ordinary (and perhaps more easily applied) concept of tangible material. Until the legislature expressly indicates an intent to embrace more scientific concepts, we must assume adherence to “the popular and practical understanding,” as the Supreme Court said in *Deitch* [295 A.2d 834, 837 (Pa. 1972)], *supra* and *Berlo Vending* [202 A.2d 94, 96 (Pa. 1964)], *supra*.

Potomac Edison Co., 411 A.2d at 1291. Similarly, the State Board finds that the Wyoming Legislature likely did not consider a change in energy forms “processing” when it enacted the exemptions statute. The legislature instead considered a “popular and practical” understanding of “processing” with reference to “tangible material” unless specifically identified in the exemption statute, as it did with electricity and steam. *Id.* See Wyo. Stat. Ann. § 39-15-101(a)(ix) (2011). See also *Morrison-Knudson Co.*, *supra* ¶ 57.

77. In any event, like coal, the various energy forms do not become ingredients or components in electricity. These energy forms fuel the operations that create electricity. As discussed above, *supra* ¶ 74, reading the plain language of the Department’s Rule and the exemption statute in *pari materia* requires that the energy forms change in “state or form” and become an “ingredient or component of the tangible personal property . . . processed . . . for sale” Wyo. Stat. Ann. § 39-15-105(a)(iii)(A) (2011); Rules, Wyo. Dep’t of Revenue, ch. 2 §3(II.) (2006); ch. 2 §3(hh) (2012). The State Board concludes that the various types of energy that change state or form during PacifiCorp’s generation of electricity do not ultimately become ingredients or components of electricity. Thus, the State Board finds that PacifiCorp failed to meet its burden of proof to establish that its electrical generation was “processing” under Wyoming Statutes section 39-15-105(a)(iii)(A).

III. If PacifiCorp's electrical generation is manufacturing or processing, are PacifiCorp's chemicals "used directly in" its electrical generation and "consumed or destroyed during that process"?

78. The State Board concludes PacifiCorp's electrical generation is neither manufacturing nor processing. However, even if it were manufacturing or processing, the chemical and catalyst exemption sought by PacifiCorp requires that it establish it used the chemicals "directly in" electrical generation and the chemicals were "consumed or destroyed during that process[.]" Wyo. Stat. Ann. § 39-15-105(a)(iii)(A) (2011). *Supra* 47.

79. In 2001, the legislature added the chemical and catalyst exemption to the manufacturing and processing exemption. 2001 Wyo. Sess. Laws 233. Ex. 502 at 79. The legislature included words in this exemption requiring that the chemicals and catalysts are consumed in this process; words the Wyoming Supreme Court noted were missing in earlier iterations of the statute. *See State Bd. of Equalization v. Cheyenne Newspapers, Inc.*, 611 P.2d 805, 810-11 (Wyo. 1980) ("No express language, such as 'consumed or destroyed or loses its identity in the manufacture,' or 'in the process of manufacture,' appears in the Wyoming statute."). In that case, the Court considered whether certain supplies used in the process of printing newspapers were subject to use tax under Wyo. Stat. § 39-312(e) (1957).⁶ The Court found:

The construction of the language "enters into" when separated from "becomes an ingredient or component part of any manufactured article" by the word "or" does not mean that the purchased property must in a physical sense enter into the purchaser's product. Rather, it means it must enter in an economic sense. We might even say that in an artistic sense the images created by the various processes do actually appear on the published newsprint in the case before us.

⁶ Wyo. Stat. 39-312 provided, in part:

The storage, use or consumption in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this act (ss 39-309 to 39-335):

....
“(e) Tangible personal property or product which **directly enters into or becomes an ingredient or component part of any manufactured** article or substance or commodity including any printed publication, and the furnished container, label or the shipping case thereof.”

Cheyenne Newspapers, Inc., 611 P.2d at 806-07 (emphasis omitted in original) (emphasis added).

Id. at 809. The Court held “that the pre-printing supplies directly entered into the printed publications and were exempt” from use tax. *Id.* at 812. The legislature subsequently added the words the Court noted were missing in *Cheyenne Newspapers, Inc.*, and the State Board must give effect to those words. *Supra* ¶¶ 29, 41.

80. PacifiCorp chemically treats water it uses to maintain its equipment. This maintenance prevents corrosion and subsequent breakdowns caused by the minerals in the water. It also uses the chemicals in the water for pollution control and waste treatment. In addition, PacifiCorp uses chemicals to treat emissions from the burning coal for federal and state pollution control requirements. *Supra* ¶¶ 12-16. Like the argument made by *Cheyenne Newspapers, Inc.*, PacifiCorp claims that chemicals used in the boiler and cooling operations, and in the emissions control system, are part of the “integrated manufacturing process,” and are “used directly in” all of these “integrated” systems. (PacifiCorp’s Post-Hr’g Br. 14).

81. The Department argues that this expansive view of the phrase “used directly in” renders this statutory language meaningless because a taxpayer could argue that any chemical in any way connected with the operation like the treatment of office water with chlorine to ensure healthy drinking water fell within PacifiCorp’s broad interpretation of the exemption language. (Dep’t of Revenue’s Pre-Ir’g Br. 10).

82. The State Board interprets the phrase “used directly in” to require that the chemical is directly used in the operation producing the final product, in this case electricity. Moreover, although neither party mentions it, the last part of this sentence requiring that the chemical or catalyst be “consumed or destroyed during that process” supports this interpretation making it clear the taxpayer must use the chemical in the physical process to ensure it is also “consumed or destroyed during that [manufacturing] process.” Wyo. Stat. Ann. § 39-15-105(a)(iii)(A) (2011). Unlike the statute at issue in *Cheyenne Newspapers, Inc.*, *supra*, the legislature was clear in the chemical and catalyst exemption that to claim the exemption, PacifiCorp must use the chemicals directly in the generation of electricity, and they must be destroyed or consumed in that operation, as well. *Id.*

83. None of the chemicals used in the water or for emissions control are “used directly in” electrical generation, nor are they “consumed or destroyed” when PacifiCorp generates electricity. The chemicals in the water maintain the equipment; they are not directly used or destroyed to generate electricity. *Supra* ¶¶ 5-6, 9. PacifiCorp admits that although the equipment might fail after some time without this treatment, it could generate electricity without adding the chemicals to the water. (Tr. vol. I, 54-55). Nor are the emissions control chemicals directly used or destroyed to generate electricity; they are used in another entirely separate system in the scrubber. *Supra* ¶ 10. PacifiCorp admits emissions treatment is not a necessary process to create electricity, stating “it would be possible to burn coal to heat water to create steam to rotate turbine blades, without treating the waste.” (Ex. 500 at 8).

84. The Department has never exempted pollution control chemicals under the manufacturing exemption. *Supra* ¶¶ 29-30. Other states have determined that legally mandated chemical pollution controls are not automatically exempt from taxation. See *Ariz. Dep't of Revenue v. Capitol Castings, Inc.*, 88 P.3d 159, 165 (Ariz. 2004) (Cement and lime used in dust control “served the ancillary purpose of pollution control and therefore were not as integrally related to the process.”); *Comm'r of Revenue v. V.H. Blackinton & Co., Inc.*, 649 N.E.2d 160, 162 (Mass. 1995) (Rejecting taxpayer’s contention that the legal necessity of the chemicals supported a tax exemption. “Although the taxpayer’s pollution control equipment may be required by Federal, State, and local environmental laws and regulations and in that respect, may be viewed as legally necessary to the manufacturing process, the board must make a determination whether the equipment effects any physical change on the property sold.”). Instead, the pollution control chemicals, like the water treatment chemicals, must comply with the statutory requirement that PacifiCorp use them “directly in” the generation of electricity and, PacifiCorp must “consume[] or destroy[] [the chemicals] during that process.” Wyo. Stat. Ann. § 39-15-105(a)(iii)(A) (2011). *Supra* ¶ 47.

85. The State Board finds that PacifiCorp’s emissions control chemicals are not “used directly in” the generation of electricity, as admitted by PacifiCorp. (Ex. 500 at 8). Just as clear is the fact that these chemicals are not “consumed or destroyed during that process.” *Id.* Consequently, these chemicals do not fall within the plain language of the chemical and catalyst exemption.

86. The State Board finds that the Department’s interpretation of the claimed exemption is consistent with both the plain and ordinary meaning of “used directly in” as well as the plain language of “consumed or destroyed during that process.” *Supra* ¶ 47. Moreover, the Department’s interpretation recognizes the presumption against exemptions and in favor of taxation if the exemption is not clearly stated. *Supra* ¶¶ 45-46.

87. The State Board further finds that PacifiCorp has failed to meet its burden of proof to establish that it used its maintenance and emissions control chemicals directly in its electrical generation, and that it consumed or destroyed the chemicals during that operation.

IV. Alternatively, do PacifiCorp’s chemical purchases qualify as tax exempt wholesale purchases under Wyoming Statutes section 39-15-105(a)(iii)(F)?

88. In the alternative, PacifiCorp claims its chemical purchases were tax exempt wholesale purchases. Wyo. Stat. Ann. § 39-15-105(a)(iii)(F) (2011). *Supra* ¶¶ 20, 31-32. Wyoming statutes define a “wholesale sale” as “a sale of tangible personal property or services to a vendor for subsequent sale.” Wyo. Stat. Ann. § 39-15-101(a)(xvi) (2011).

89. The legislature enacted the wholesale exemption to prevent a pyramiding of taxes, not to shelter all business purchases from sales tax. *See Morrison-Knudson Co. v. State Bd. of Equalization*, 135 P.2d 927, 932 (Wyo. 1943). There is no pyramiding of taxes in the instant case because PacifiCorp is the end consumer of the chemicals.

90. The Department's Rules further explain that business purchases of equipment, tools, and supplies "for use in conducting their businesses . . . shall be subject to the sales or use tax." Rules, Wyo. Dep't of Revenue, ch. 2 § 15(bb.) (2006); ch. 2 § 15(bb) (2012). Thus, the wholesale exemption does not apply to items a vendor buys, uses, and consumes itself, and such items, therefore, are subject to tax.

91. In support of its claim to the wholesale exemption, PacifiCorp refers the State Board to specific taxability issues identified in Department Rules providing a wholesale exemption for certain business purchases. (PacifiCorp's Post-Hr'g Br. 8). PacifiCorp specifically refers to the rule for automotive repair, laundry, and welding businesses as evidence there is no requirement that PacifiCorp purchase items for resale to fall within the exemption. PacifiCorp claims it only needs to use and consume the purchased items in the taxed service for it to fall within the exemption. *Id.* See Rules, Wyo. Dep't of Revenue, ch. 2 § 15 (2006); ch. 2 § 15 (2012). These specific instances in rule allow the wholesale exemption for products used to perform certain services such as solvents, lubricants and parts used to perform services at a garage or service station; detergents, starch, and cleaning solvents for use in dry cleaning services; and, parts, materials, or supplies which become an ingredient of the welding services such as welding rod, acetylene and oxygen in welding and machine shops. *Id.* ch. 2 § 15(m)(ii.), (q.), (s.) (2006); ch. 2 § 15(m)(ii), (q), (s) (2012). Notably, the rule does not provide exemptions for products used to maintain the equipment in these businesses, nor does it exempt chemicals these businesses may use for pollution control. The rule allows a wholesale exemption for the purchase of products that ultimately become an ingredient in, or that are used directly in, the service provided. As the State Board found above, PacifiCorp did not use these chemicals directly in electrical generation. *Supra* ¶¶ 82-85.

92. Because PacifiCorp did not buy the chemicals for resale, nor were the chemicals used directly in electrical generation and did not become a part of the electricity generated, these chemical purchases were not tax exempt wholesale purchases. Wyo. Stat. Ann. § 39-15-105(a)(iii)(A) (2011). *Supra* ¶¶ 82-85. The State Board finds that PacifiCorp failed to meet its burden of proof to establish it was entitled to the wholesale tax exemption.

Conclusion

93. The State Board concludes that PacifiCorp failed to meet its ultimate burden of persuasion to show by a preponderance of evidence it was entitled to either a manufacturing or processor exemption, or a wholesale exemption. As a result, the State Board holds that

the Department's decision denying PacifiCorp's request for those exemptions was supported by the facts and the applicable law.

ORDER

IT IS, THEREFORE, ORDERED that the Wyoming Department of Revenue's final administrative decisions denying PacifiCorp's request for a manufacturing or processing sales tax exemption, or a wholesale purchase exemption, and denying PacifiCorp's refund request are **affirmed**.

Pursuant to Wyoming Statutes section § 16-3-114 and Rule 12, Wyoming Rules of Appellate Procedure, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days of the date of this decision.

Dated this 8th day of January, 2016.

STATE BOARD OF EQUALIZATION



E. Jay Mockler, Chairman



Robin Sessions Cooley, Board Member

ATTEST:



Je'ca M. Brown, Executive Assistant

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of January, 2016, I served the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

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