



900 S.W. Fifth Avenue, Suite 2600
Portland, Oregon 97204
main 503.224.3380
fax 503.220.2480
www.stoel.com

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SARAH J. ADAMS LIEN
Direct (503) 294-9896
sjadamslien@stoel.com

VIA ELECTRONIC FILING

PUC Filing Center
Public Utility Commission of Oregon
PO Box 2148
Salem, OR 97308-2148

**Re: PacifiCorp's Reply in Support of Application for Reconsideration or Rehearing
Docket UE 170**

Enclosed for filing please find PacifiCorp's Reply in Support of Application for Reconsideration or Rehearing in the above-referenced docket. A copy of this filing was served on all parties to this proceeding as indicated in the attached certificated of service.

Very truly yours,

A handwritten signature in black ink, appearing to read "SJL", written over a horizontal line.

Sarah J. Adams Lien

SJL:knp
Enclosure
cc: Service List

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 170

In the Matter of PACIFIC POWER &
LIGHT (d/b/a PacifiCorp) Request for a
General Rate Increase in the Company's
Oregon Annual Revenues

**PACIFICORP'S REPLY IN SUPPORT OF
APPLICATION FOR
RECONSIDERATION OR REHEARING**

I. INTRODUCTION

Pursuant to OAR 860-013-0005 through 860-013-0050, PacifiCorp files this Reply to the briefs filed by the Citizens' Utility Board of Oregon ("CUB") and the Industrial Customers of Northwest Utilities ("ICNU") in response to PacifiCorp's Application for Reconsideration or Rehearing of Oregon Public Utility Commission (the "Commission") Order No. 05-1050 ("Application for Reconsideration"). PacifiCorp believes that OAR 860-013-0005 through 860-013-0050 give PacifiCorp the right to file a reply in response to the pleadings filed by CUB and ICNU. *See* OAR 860-013-0035 and 0050 (providing for replies in response to responsive pleadings). However, if the Commission disagrees, PacifiCorp respectfully requests leave to submit the following Reply.

The Reply addresses a number of arguments raised in CUB's and ICNU's briefs, highlighting in particular the relevance to the Application for Reconsideration of the Commission's recent order regarding the rate standard applicable to the Klamath irrigators (the "Klamath Order"). (*See In re PacifiCorp*, UE 170, Order No. 05-1202 (Nov. 8, 2005) (concluding that the applicable rate standard is the Commission's long-standing fair, just and reasonable standard).)

II. REPLY ARGUMENTS

A. CUB's and ICNU's Argument that SB 408 Altered the Rate Standard in Oregon Ignores Contrary Oregon Law and Commission Precedent.

CUB and ICNU erroneously disregard long-standing Commission precedent, which states that the rate standard—before and after SB 408—is “fair, just and reasonable.” CUB and ICNU argue that SB 408’s insertion of the word “fair” into ORS 757.210 establishes a new actual-taxes-paid rate standard. (CUB Reply to PacifiCorp’s Application for Reconsideration (“CUB Response”) at 4-6; Answer of ICNU to PacifiCorp’s Application for Reconsideration or Rehearing (“ICNU Response”) at 8-10.) Not only does this argument ignore the plain language of the Act¹ and relevant legislative history to the contrary, (*see* PacifiCorp’s Application at 7-14), it erroneously presupposes that the pre-SB 408 rate standard was something other than “fair, just and reasonable.” (*See id.* at 9-10 (citing Commission orders stating that the rate standard is “fair, just and reasonable”).)

However, the Commission has announced on numerous occasions, including in this docket, that its long-standing rate standard is fair, just and reasonable. (*See* Order No. 05-1202 at 2 (citing pre- and post-SB 408 orders for the proposition that “the Commission requires utility rates to be fair, just and reasonable”); *see also In re Portland General Electric Co.*, UM 1105, Order No. 03-509 at 3 (OPUC Aug. 25, 2003) (approving equal pay packages as “fair, just and reasonable”).) One of these decisions was issued before the enactment of SB 408 and one after, making it clear that the new law did not change this standard.

In its recent Klamath Order, the Commission cited numerous orders and statutes that require the Commission to set rates that are “fair, just and reasonable.” (Order No. 05-1202

¹ CUB’s argument that SB 408’s emergency clause would be superfluous if the Act did not change the rate standard fails to recognize that, without the emergency clause, the Act’s requirement that utilities file tax reports by October 15, 2005 would have been meaningless as that due date would have occurred prior to the Act’s effective date. *See* SB 408 § 3(1).

1 at 2-3 (citing *In re PacifiCorp*, UE 170, Order No. 05-1050; *In re PacifiCorp*, UE 116, Order
2 No. 787; ORS 756.040 (referring to protection of customers from “unjust and unreasonable”
3 exactions and service at “fair and reasonable rates”).) Indeed, the Commission concluded in
4 the Klamath Order that the standard established by the ORS 756.040 and ORS 757.210(1), as
5 amended by SB 408, has been recognized and enforced in numerous court decisions, which
6 recognize the requirement that rates be fair, just and reasonable. (Order No. 05-1202 at 3
7 (citing *Multnomah Co. v. Davis*, 35 Or App 521, 526 (1978) (rates must be “fair and
8 reasonable”); *American Can Co. v. Lobdell*, 55 Or App 451 (1982) (Commission has duty to
9 set “just and reasonable rates”).) Rather than applying significance to the phrase “just and
10 reasonable,” which appeared without the word “fair” in ORS 757.210(1) prior to its
11 amendment by SB 408, the Commission observed that the “fair, just and reasonable
12 standard” is “commonly referred to as the ‘just and reasonable standard.’” (Order No. 05-
13 1202 at 2.)

14 The Klamath Order recognized that the Commission must strive to interpret identical
15 terms in related statutes as having the same meaning. (See Order No. 05-1202 at 6 (rejecting
16 arguments that word “reasonable” should mean different things in different ratemaking
17 statutes).) Consistent with this, the Commission should recognize in this proceeding that the
18 word “fair” in ORS 757.210(1) means the same thing as the word “fair” in ORS 756.040, the
19 statute which codifies the *Hope* standard. (See *id.* at 3 (recognizing that both statutes
20 establish the fair, just and reasonable rate standard).)

21 **B. Moreover, the Commission Cannot Change the Legal Standard Applicable in**
22 **this Case *After the Record Closes* Without Providing PacifiCorp an Opportunity**
23 **to Present Evidence and Argument Relevant to the Applicable Legal Standard.**

24 CUB’s and ICNU’s arguments about new evidence fail to appreciate that:

25 (1) PacifiCorp has a right to present evidence and argument in light of the applicable legal
26

1 standard; and, (2) the Commission does not have the discretion to announce a new legal
2 standard applicable to this case after the close of evidence.²

3 CUB argues that PacifiCorp was not deprived of the right to present evidence and
4 argument because the issue of “a tax adjustment” was before the Commission throughout this
5 case, PacifiCorp was a participant in the legislative debates regarding SB 408, and many of
6 the same issues were raised before the legislature and the Commission. (CUB Response at
7 7.) Similarly, ICNU argues that it would be “absurd” to say that “PacifiCorp did not receive
8 notice that a tax adjustment was at issue in this case.” (ICNU Response at 11.)

9 These arguments miss the point. The point is not whether PacifiCorp was aware that
10 the Commission was considering a tax adjustment, or that PacifiCorp was aware of many of
11 the issues before the legislature. Rather, the point is that the Commission changed the legal
12 standard applicable to this case after the record closed. (*See* CUB Response at 6
13 (acknowledging that the Commission departed from its historic legal standard, instead
14 applying the “principles” of SB 408 which became law on September 2, 2005).)

15 According to long-standing precedent, Oregon statute and administrative rule, the
16 legal standard in this case called for a stand-alone computation of the tax expense. (*See*
17 Order No. 05-1050 at 17-18 (acknowledging that past precedent had “always” been to
18 calculate the tax expense on a stand-alone basis); Application for Reconsideration at 16-17
19 (citing administrative rules, statutes and Commission orders stating that the legal standard
20 requires computation for ratemaking purposes of the tax expense on a stand-alone basis).)
21 Oregon and federal law require the Commission to apply the legal standard that existed while

22 ² The fact that ORS 183.415(3) does not, as ICNU observes, apply to the
23 Commission, does not diminish PacifiCorp’s other due process and administrative law
24 arguments. (*See* Application for Reconsideration at 17-22, 24-25 (citing authority
25 demonstrating that: (1) PacifiCorp has a right to present its case in light of the applicable
26 legal standard, (2) the Commission has an obligation to promulgate rules according to the
procedures established in the Oregon Administrative Procedures Act, and (3) the
Commission cannot apply SB 408 retroactively to a record that closed before the Act’s
effective date).)

1 the record was open in this case. *See Vier ex rel Torry v. State Office for Serv. to Children*
2 *and Families*, 159 Or App 369, 374-75, 977 P2d 425, 428 (1999) (“an agency remains bound
3 by the practices and policies declared by its rules, even in the face of newly enacted
4 legislation changing the agency’s responsibilities,” unless and until existing practices and
5 rules are judicially declared invalid or are changed by agency pursuant to formal rulemaking
6 procedures); *State ex rel Juv. Dept. v. Geist*, 310 Or 176, 189-90, 796 P2d 1193 (1990) (“The
7 essence of fundamental fairness is the opportunity to be heard at a meaningful time and in a
8 meaningful manner.”). (*See also* Application for Reconsideration at 17-18, 21-22 (citing
9 cases).)

10 **C. ICNU’s Arguments that PacifiCorp’s New Evidence Would Not Affect the**
11 **Outcome of this Case and Was Available Before the Record Closed Are Without**
12 **Merit.**

13 Contrary to ICNU’s argument that PacifiCorp’s evidence, if considered, would not
14 alter the Commission’s decision, PacifiCorp has presented evidence in support of its
15 Application for Reconsideration that shows that, were PacifiCorp provided an opportunity to
16 present a case in light of the applicable legal standard, the adjustment would be
17 \$2.3 million—as opposed \$26 million. Furthermore, as PacifiCorp’s witnesses testify, much
18 of this evidence was not available before the record closed. (*See, e.g.*, Supplemental
19 Testimony of Larry O. Martin at 2, 5 (discussing new evidence related to PHI’s recently
20 prepared 2005 tax return); *id.* at 3-4 (discussing a change in the PHI debt structure that
21 occurred after the record closed and that will decrease PHI’s interest payment in calendar
22 year 2006 to \$122 million, \$38 million less than the amount assumed in the Order); *id.* at 4
23 (discussing new evidence that ScottishPower will pay income tax on its interest income from
24 PHI at a rate of 30 percent).) Moreover, because SB 408 did not even exist when PacifiCorp
25 presented its case, PacifiCorp had no ability or reason to present evidence relevant to SB 408
26 principles, whether or not PacifiCorp had that evidence in its possession.

1 **D. The Commission Arbitrarily Adjusted PacifiCorp's Revenue Requirement by**
2 **\$26 Million Without Reference to *Any* Discernable Legal Standard.**

3 Ignoring Oregon administrative law, which requires an agency to establish standards
4 *before* it applies a new law, both CUB and ICNU argue that the Commission used its
5 discretion to apply the “principles” of SB 408. (CUB Response at 6 (“The Commission did
6 not use the procedural or the substantive direction provided in SB 408 to establish its tax
7 treatment in UE 170.”); *id.* at 8 (“The Commission did not rely on [the benefits and burdens]
8 test in crafting the UE 170 Order.”); ICNU Response at 8-9.³) However, the Commission
9 does not have the discretion to establish a new standard without providing notice of that
10 standard and an opportunity to comment on it. *Save Our Rural Oregon v. Energy Facility*
11 *Siting Council*, No. SC S52315, 2005 WL 2464570 at * 15 (Or Sept. 29, 2005); *Ray Drive-In*
12 *Dairy, Inc. v. Or. Liquor Contr. Comm’n*, 517 P2d 289, 293 (Or App 1973) (agency
13 improperly relied on statute to deny application prior to publication of rules or regulations
14 establishing standards by which statutory grounds for refusal were to be applied). Indeed,
15 “[w]ithout written, published standards, the entire system of administrative law loses its
16 keystone.” *Id.* (See also Application for Rehearing at 20-21 (discussing *Sun Ray Drive-In*
17 *Dairy*, 517 P2d 289, and *Save Our Rural Oregon*, 2005 WL 2464570).)

18 In this case, the Commission improperly applied a new legal standard without
19 providing for notice and comment on that standard and denied PacifiCorp the right to present
20 evidence and argument in this case with respect to the applicable standard. Reconsideration
21 or rehearing is therefore required.

22 _____

23 ³ ICNU claims that the Commission simply excluded from rates “taxes that are no
24 longer paid to the taxing authorities.” (ICNU Response at 8.) The Commission did not,
25 however, base the disallowance on an examination of the taxes actually paid to units of
26 government. Instead, the Commission based the disallowance on the amount of a tax-
deductible expense of PacifiCorp’s parent PacifiCorp Holdings Inc., allocated to PacifiCorp
based on its contribution to the gross profits of the consolidated group. (See Application for
Reconsideration at 19-22, 25-31 (discussing ad hoc application of SB 408).)

III. CONCLUSION

Based on the evidence and arguments presented above and in PacifiCorp's Application for Reconsideration, the Commission should reconsider and remove the tax adjustment in Order 05-1050. In the alternative, the Commission should rehear this case and reduce the tax adjustment to \$2.3 million.

DATED: November 29, 2005.

STOEL RIVES LLP



Katherine A. McDowell

Stephen S. Walters

Sarah J. Adams Lien

Attorneys for PacifiCorp

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document in Docket UE 170 on the following named person(s) on the date indicated below by email and first-class mail addressed to said person(s) at his or her last-known address(es) indicated below.

Rates & Regulatory Affairs
Portland General Electric
121 SW Salmon Street, 1WTC0702
Portland, OR 97204
pge.opuc.filings@pgn.com

Jim Abrahamson
Community Action Directors
of Oregon
4035 12th Street Cutoff SE, Suite 110
Salem, OR 97302
jim@cado-oregon.org

Greg Addington
Klamath Water Users Assoc.
2455 Patterson Street, Suite 3
Klamath Falls, OR 97603
greg@cvcwireless.net

Edward Bartell
Klamath Off-Project Water Users, Inc.
30474 Sprague River Road
Sprague River, OR 97639

Kurt Boehm
Boehm Kurtz & Lowry
36 E. Seventh Street, Suite 1510
Cincinnati, OH 45202
kboehm@bkllawfirm.com

Lisa Brown
WaterWatch of Oregon
213 SW Ash Street, Suite 208
Portland, OR 97204
lisa@waterwatch.org

Lowrey R. Brown
Citizens' Utility Board of Oregon
610 SW Broadway, Suite 308
Portland, OR 97205
lowrey@oregoncub.org

Phil Carver
Oregon Office of Energy
625 Marion Street NE, Suite 1
Salem, OR 97301-3742
philip.h.carver@state.or.us

John Corbett
Yurok Tribe
PO Box 1027
Klamath, CA 95548
jcorbett@yuroktribe.nsn.us

Joan Cote
Oregon Energy Coordinators Assoc.
2585 State Street NE
Salem, OR 97301
cotej@mwvcaa.org

Melinda J. Davison
Davison Van Cleve, PC
333 SW Taylor, Suite 400
Portland, OR 97204
mail@dvclaw.com

John DeVoe
WaterWatch of Oregon
213 SW Ash Street, Suite 208
Portland, OR 97204
john@waterwatch.org

Jason Eisdorfer
Citizens' Utility Board
610 SW Broadway, Suite 308
Portland, OR 97205
jason@oregoncub.org

Randall J. Falkenberg
RFI Consulting
PMB 362
8351 Roswell Road
Atlanta, GA 30350
consultrfi@aol.com

Edward Finklea
Cable Huston Benedict Haagensen
& Lloyd LLP
1001 SW Fifth Avenue, Suite 2000
Portland, OR 97204
efinklea@chbh.com

David Hatton
Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
david.hatton@state.or.us

Judy Johnson
Public Utility Commission of Oregon
PO Box 2148
Salem, OR 97308-2148
judy.johnson@state.or.us

Jason W. Jones
Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
jason.w.jones@state.or.us

Michael Kurtz
Boehm, Kurtz & Lowry
36 E. Seventh Street, Suite 1510
Cincinnati, OH 45202-4454
mkurtz@bkllawfirm.com

Jim McCarthy
Oregon Natural Resources Council
PO Box 151
Ashland, OR 97520
jm@onrc.org

Bill McNamee
Public Utility Commission of Oregon
PO Box 2148
Salem, OR 97308-2148
bill.mcnamee@state.or.us

Daniel W Meek
Daniel W Meek Attorney at Law
10949 SW 4th Ave
Portland OR 97219
dan@meek.net

Nancy Newell
3917 NE Skidmore
Portland OR 97211
ogec2@hotmail.com

Michael W. Orcutt
Hoopa Valley Tribe Fisheries Dept.
PO Box 417
Hoopa, CA 95546
director@pcweb.net

Stephen R. Palmer
Office of the Regional Solicitor
2800 Cottage Way, Rm. E-1712
Sacramento, CA 95825

Steve Pedery
Oregon Natural Resources Council
sp@onrc.org

Matthew Perkins
Davison Van Cleve PC
333 SW Taylor, Suite 400
Portland, OR 97204
mwp@dvclaw.com

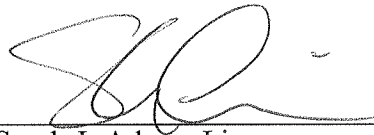
Janet Prewitt
Department of Justice
janet.prewitt@doj.state.or.us

1 Thomas P. Schlosser
2 Morisset, Schlosser, Jozwiak
& McGaw
3 801 Second Avenue, Suite 1115
Seattle, WA 98104-1509
4 t.schlosser@msaj.com

Glen H. Spain
PCFFA
PO Box 11170
Eugene, OR 97440-3370
fishlifr@aol.com

5 Douglas Tingey
6 Portland General Electric
121 SW Salmon, 1WTC13
Portland, OR 97204
7 doug.tingey@pgn.com

8 DATED: November 29, 2005

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Sarah J. Adams Lien

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12 Of Attorneys for PacifiCorp
13
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16
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19
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