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November 14, 2005

Via electronic and US Mail

Filing Center
Administrative Hearings Division
Public Utility Commission of Oregon
PO Box 2148
Salem, OR 97308-2148

Re: In the Matter of PACIFIC POWER & LIGHT Request for a
General Rate Increase in the Company's Oregon Annual Revenues
Docket No. UE 170

Dear Filing Center:

Enclosed please find the original and two copies of the Industrial Customers of Northwest Utilities' Answer to PacifiCorp's Application for Reconsideration or Rehearing in the above-referenced proceeding.

Please return one file-stamped copy in the enclosed, postage-prepaid envelope. Please call me if you have any questions. Thank you for your assistance.

Sincerely,

/s/ Christian Griffen
Christian W. Griffen

Enclosures

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 170

In the Matter of)	
)	
PACIFIC POWER & LIGHT)	ANSWER OF THE INDUSTRIAL
(dba PACIFICORP))	CUSTOMERS OF NORTHWEST
)	UTILITIES TO PACIFICORP'S
Request for a General Rate Increase in the)	APPLICATION FOR RECONSIDERATION
Company's Oregon Annual Revenues.)	OR REHEARING
_____)	

I. INTRODUCTION

The Industrial Customers of Northwest Utilities ("ICNU") submits this Answer in opposition to PacifiCorp's Application for Reconsideration or Rehearing of Order No. 05-1050 ("Application"). PacifiCorp's Application requests that the Oregon Public Utility Commission ("Commission" or "OPUC") reconsider its decision to reduce PacifiCorp's revenue requirement by approximately \$26.6 million to remove the costs of taxes that will never be paid to the taxing authorities. In the alternative, PacifiCorp requests that the Commission grant rehearing to review evidence for the purpose of reducing the revenue requirement impact of the Commission's tax adjustment to approximately \$2.3 million.

PacifiCorp's Application should be denied because it fails to state grounds upon which reconsideration or rehearing should be granted. Specifically:

- PacifiCorp raises evidence and arguments regarding the tax adjustments that is not new evidence under OAR § 860-014-0095 because this information would not materially change the

Commission's decision, and/or could have been submitted in the general rate case record;

- PacifiCorp had adequate notice and an opportunity to raise all of its arguments regarding the proposed tax adjustments;
- The Commission appropriately determined as a matter of law and policy that Senate Bill ("SB") 408 required the Commission to ensure that the estimated taxes included in PacifiCorp's rates align with the amount that PacifiCorp will eventually pay;
- The Commission accurately calculated its tax adjustment based on all relevant evidence in the record; and
- PacifiCorp reargues issues the Commission previously rejected in Order No. 05-1050 without raising any legitimate evidence or rationale for changing the Commission's previous conclusions.

II. ARGUMENT

A. PacifiCorp Has Failed to Establish That There Is Any New Evidence Essential to the Decision That Was Unavailable Prior to Order No. 05-1050

PacifiCorp has requested reconsideration or rehearing of the Commission's decision to order a \$26.6 million adjustment that removed income taxes that will never be paid to the taxing authorities. PacifiCorp's request is based on the claim that the Commission should consider new evidence. PacifiCorp Application at 4. In support of its Application, PacifiCorp has submitted supplemental testimony and exhibits regarding taxes and earnings. PacifiCorp's new supplemental testimony does not constitute new evidence that warrants granting reconsideration or rehearing because it: 1) is not essential to the Commission's decision in Order No. 05-1050; 2) was available during the rate case; and/or 3) is not relevant to PacifiCorp's Application.

The Commission may grant reconsideration or rehearing if PacifiCorp can demonstrate that there is “[n]ew evidence which is essential to the decision and which was unavailable and not reasonably discoverable before issuance of the order.” OAR § 860-014-0095.^{1/} PacifiCorp retains the burden of showing that its alleged new evidence meets the standard for granting reconsideration or rehearing. Indeed, PacifiCorp had the burden of proof to establish that the Commission should allow it to include its unpaid income taxes in rates, and the Company had the responsibility to submit all relevant information in the general rate proceeding that disputed the tax adjustments proposed by ICNU and the Citizens’ Utility Board (“CUB”). See Richter v. Northwest Natural Gas Co., OPUC Docket No. UC 526, Order No. 00-649 at 2-3 (Oct. 19, 2000) (“Order No. 00-649”). Thus, any new information that was not included in the record, but was available to PacifiCorp prior to the issuance of the Order, cannot justify reconsideration or rehearing. Id.

PacifiCorp must also demonstrate that any new evidence is material and significant enough to change the outcome of the Commission’s decision. Re Portland Gen. Elec. Co., OPUC Docket No. UE 115, Order No. 01-988 at 7 (Nov. 20, 2001). If the new information would not alter the Commission’s previous decision, it does not provide grounds for rehearing or reconsideration. Order No. 00-649. Finally, additional information that merely reiterates PacifiCorp’s position does not constitute new evidence. Re Qwest Corp., OPUC Docket No. ARB 365, Order No. 02-367 at 7 (June 5, 2002).

^{1/} Given that the information contained in PacifiCorp’s new testimony was in PacifiCorp’s or ScottishPower’s possession, the “not reasonably discoverable” language is inapplicable to PacifiCorp’s Application.

1. PacifiCorp's New Testimony and Arguments Are Not New Evidence That Warrant Reconsideration or Rehearing

PacifiCorp has failed to demonstrate that the testimony and exhibits sponsored by Bruce Williams and Larry Martin constitute previously unavailable evidence that is essential to the Commission's decision. The Commission's rules do not permit an applicant to submit new evidence unless the new evidence was unavailable and essential to the decision. OAR § 860-014-0095(3)(a).

In its Application, PacifiCorp argues that the alleged "new" evidence sponsored by Messrs. Williams and Martin would establish that: 1) there has been a change in PacifiCorp Holdings, Inc.'s ("PHI") interest that demonstrates PHI's interest deduction is not constant; 2) the United Kingdom's tax laws have changed so that most of the Commission-approved tax adjustment will be offset; and 3) net taxable income should be utilized, and PacifiCorp's relative taxable income was 49% of PHI's total taxable income. PacifiCorp Application at 4-5. As explained below, this information was neither unavailable to PacifiCorp prior to the Order nor essential to the Commission's decision in the rate case.

The remaining supplemental testimony of Messrs. Martin and Williams addresses numerous other issues that are unrelated to these three grounds upon which PacifiCorp seeks to have the Commission review this allegedly new evidence. For example, Mr. Williams' testimony addresses the impact of the Commission's order on the Company's return on equity, the risk of a credit downgrade, and the benefits of PacifiCorp's association with ScottishPower. PPL/317, Williams/1. In addition, Mr.

Martin addresses issues related to how he believes a SB 408 tax calculation should occur. PPL/1303, Martin/1. Since PacifiCorp has not even alleged in its Application that this new information was unavailable and essential, the Commission cannot consider it when deciding whether to grant reconsideration or rehearing.

2. PacifiCorp’s “New” Evidence Was Available at the Time of the Commission’s Decision

PacifiCorp has failed to demonstrate that the information supporting the Application was unavailable before the Commission issued Order No. 05-1050. The Commission should not allow PacifiCorp to selectively update the record with evidence that could have been included in the general rate proceeding, because doing so would be inconsistent with the purpose behind holding hearings and closing the record.

Mr. Martin does not allege that any of the information in his supplemental testimony could not have been included in the record. Mr. Martin admits that much of his testimony regarding gross profits and net taxable income was already addressed in his sur-surrebuttal testimony, and he provides no justification why the alleged “new” information regarding the Company’s federal income tax return could not have been submitted earlier. PPL/1303, Martin/2. While Mr. Martin’s testimony addresses changes to PHI’s debt structure and United Kingdom taxes, Mr. Martin does not allege that this information was unavailable or could not have been provided in a timely manner to be included in the rate case record. Id. at Martin/4-5. The Commission should only grant reconsideration or rehearing under exceptional circumstances, and PacifiCorp has not provided any justification as to why this information could not have been submitted

earlier. Instead, PacifiCorp merely reargues and bolsters its positions on issues that it has already lost.

Similarly, Mr. Williams does not demonstrate that much of the information that he provides was unavailable prior to the Commission's final order in this proceeding. The Company was well aware of the revenue requirement amount proposed in ICNU's and CUB's proposed tax adjustments, and nothing prevented PacifiCorp from submitting most of Mr. Williams' testimony regarding PacifiCorp's rate of return or the potential credit impacts. Finally, much of Mr. Williams' testimony merely reiterates PacifiCorp's prior position regarding credit and earnings, and even Mr. Williams' own testimony admits that some of his supplemental testimony is intended to provide "additional reaffirmation of my prior testimony" PPL/317, Williams/5.

PacifiCorp's Application and the supporting testimony also disingenuously claim that the Company did not submit evidence on certain tax issues because PacifiCorp was not aware that the Commission would make a tax adjustment based on SB 408's principles. PPL/1303, Martin/2. While the Commission relied upon SB 408 to make its policy and legal decision, PacifiCorp was aware that the Commission was contemplating the adoption of a tax adjustment. Indeed, the actual tax adjustment adopted by the Commission was based upon evidence submitted by ICNU and CUB, and all parties had an opportunity to refute and cross examine this evidence. Order No. 05-1050 at 18-19. PacifiCorp elected not to provide an alternative tax adjustment in response to the proposals in the record, and the Company should not now be permitted a second opportunity to submit evidence on issues that have been fully litigated.

3. PacifiCorp's Supplemental Testimony is Not Essential to the Commission's Tax Adjustment

PacifiCorp's alleged "new" evidence is not grounds for reconsideration or rehearing because it is not essential to the Commission's decision. Mr. Martin's new testimony addresses new information that could change the Commission's tax adjustment, but only if the Commission adopted a tax adjustment based on relative taxable income rather than gross profits. PPL/1303, Martin/2. However, the Commission decided that gross profits was the better allocation factor. Order No. 05-1050 at 18. Therefore, Mr. Martin's testimony regarding a relative taxable income tax adjustment is not relevant to the tax adjustment adopted by the Commission.

Mr. Martin's testimony regarding tax changes in the United Kingdom are irrelevant—not essential—to the Commission's decision. The Commission's tax adjustment removed from PacifiCorp's rates the costs associated with state and federal taxes that were to be collected from ratepayers, but never would be paid to the taxing authorities. Order No. 05-1050 at 17. Issues related to ScottishPower's United Kingdom taxes were not raised in this proceeding, and are not relevant to the Commission's decision. Finally, PacifiCorp's post-order proposal to include the offsetting effect of ScottishPower's United Kingdom taxes is one-sided because it does not reflect all associated costs.

Similarly, Mr. Williams' testimony regarding earnings and the Company's financial ratios should not alter the Commission's decision. The Commission already had sufficient information on these issues when it approved its tax adjustment. Finally,

the Commission is not permitted to change a rate case decision merely because a credit ratings agency may not like the original order.

B. The Commission Appropriately Determined That SB 408 Applies to This Proceeding

PacifiCorp argues that the Commission committed errors of law and fact in concluding that SB 408 required the Commission to consider the taxes paid by a utility when setting rates. Application at 6-14, 18-24. PacifiCorp specifically argues that: 1) SB 408 did not change the rate standard in Oregon; 2) the OPUC incorrectly applied SB 408 retroactively; and 3) the OPUC cannot apply SB 408 before establishing standards. Id. at 7-11, 19-21, 24-25. PacifiCorp’s Application has failed to demonstrate that SB 408 does not immediately apply or, if the Legislature did not intend for SB 408 to apply to this proceeding, that the Commission improperly exercised its discretion to ensure that PacifiCorp’s rates only include taxes that are actually paid to the taxing authorities.

1. SB 408 Requires the Commission to Prevent the Utilities from Including in Rates Taxes That Are No Longer Paid to the Taxing Authorities

PacifiCorp argues that the plain meaning and legislative history of SB 408 establish that the statute did not change the ratemaking process, but only addressed the “mismatch between taxes collected in rates and taxes paid to government through a narrowly crafted mechanism—that is, an automatic adjustment clause.” Id. at 7. In support of its position, PacifiCorp parses out individual sections of SB 408 and its legislative history without considering the overall legislative purpose of the statute. Further, PacifiCorp’s selective use of the legislative history is misleading and

unnecessary because the sections of SB 408 relied upon by the Commission are unambiguous.

Contrary to PacifiCorp's argument, the purpose of SB 408 was not to adopt an automatic adjustment clause, but to require the Commission to depart from historic practice and ensure that utility rates reflect the actual taxes paid to governmental authorities. As the Commission recognized, the Legislature directed that SB 408 was to take effect on its passage, and the preamble to SB 408 states: "Utility rates that include amounts for taxes should reflect the taxes that are paid to units of government to be considered fair, just and reasonable." Order No. 05-1050 at 17. The preamble is directly tied to changes to ORS § 757.210 that are included in section 5(1)(a) of SB 408, which provide that the Commission may investigate whether rates are "fair, just and reasonable" and may not authorize a rate or schedule of rates that is not fair, just, and reasonable. SB 408 § 5(1)(a); ORS § 757.210. Thus, under the new statute, it would have been inappropriate for the Commission to approve fair, just, and reasonable rates that include taxes that would never be paid to the government. PacifiCorp would have the Commission ignore the fundamental purpose of the statute and continue to allow utilities to include in rates taxes that are never paid.

PacifiCorp's references to the legislative history of SB 408 do not support its argument that SB 408 should not apply immediately. PacifiCorp fails to produce a single citation or reference stating that SB 408 should not take effect immediately or that it should not be applied to this proceeding. Application at 11-14. In addition, PacifiCorp declines to note that the Legislature did not adopt the utilities' proposed amendment to

the preamble to SB 408 that stated, “Nothing in this section creates any claim for relief,” or another proposed amended that stated, “Utility rates that include amounts for taxes should, over time, reflect the taxes that are actually received by units of government to be considered fair, just and reasonable.” Public Hearing on SB 408, House Comm. on St. and Fed. Affairs, 73d Leg., Regular Sess., Exh. E at 2 (June 30, 2005); Work Session on SB 408, House Comm. on St. and Fed. Affairs, 73d Leg., Regular Sess., Exh. B at 3 (July 15, 2005).

2. The Commission Did Not Apply SB 408 Retroactively

PacifiCorp asserts that the Commission inappropriately applied SB 408 retroactively. Application at 24-25. The cases cited by PacifiCorp are inapposite as they hold that administrative agencies cannot, without adequate justification, apply new rules or statutes to actions taken during time periods that pre-date the adoption of the new rules or statutes. Id. In contrast, the Commission did not apply SB 408 retroactively to PacifiCorp’s past rates. Instead, the Commission applied SB 408 on a prospective basis when it established new rates after the passage of the statute.

3. PacifiCorp Was Provided Notice That the Commission Could Prevent the Company from Including Taxes in Rates That Are Never Paid

PacifiCorp argues that the Commission’s application of SB 408 deprived the Company of an opportunity to present evidence in this proceeding. Specifically, PacifiCorp asserts that: 1) the Commission should have adopted standards before applying SB 408; 2) federal law requires the Commission to allow PacifiCorp to present evidence and argument regarding SB 408; and 3) the Oregon Administrative Procedure

Act (“APA”) prevents the Commission from changing its established interpretation during a contested case proceeding. Application at 18-23. The Commission provided PacifiCorp with sufficient due process and notice, and the Commission should reject PacifiCorp’s efforts to misinterpret the Commission’s Order and the applicable law.

The cases cited by PacifiCorp require the Commission to ensure that parties to contested proceedings be provided an opportunity to submit evidence applicable to the relevant legal standards. Id. at 21-23. The Company’s assertion that it was never provided notice that the Commission could change its tax policy is a blatant misrepresentation of the record in this proceeding. Early in this proceeding PacifiCorp was aware that the Commission could change its past policies and adopt ICNU’s or CUB’s proposal regarding the inclusion of taxes in rates. PacifiCorp was provided a full and fair opportunity to present testimony on this issue. In fact, PacifiCorp utilized its opportunity to argue that the Commission should reject ICNU’s and CUB’s adjustments, and could have argued that the Commission should adopt a different tax adjustment. To say that PacifiCorp did not receive notice that a tax adjustment was at issue in this case is absurd.

Finally, PacifiCorp misconstrues the applicable Oregon law when it claims that “the Commission’s application of SB 408, or the principles of SB 408, to PacifiCorp’s case was a violation of Section 183.415(3) of the APA.” Id. at 22-23. It is hard to envision how the Commission can violate ORS § 183.415 when the Legislature has determined that this provision of the APA does “not apply to the Public Utility Commission.” ORS § 183.315(6).

4. The Commission Was Not Required to Apply All of SB 408's Provisions

PacifiCorp argues that the Commission may not apply SB 408 “outside parameters of the Act, which restricts adjustments to an automatic adjustment clause mechanism in certain circumstances only.” Application at 25-26. PacifiCorp then identifies each specific provision of SB 408 that the Commission did not apply when it adopted its tax adjustment in this proceeding. Id. at 25-31.

The Commission correctly recognized that SB 408 should apply to this proceeding, despite the fact that there are certain provisions of the statute that will be implemented in the future. Order No. 05-1050 at 16-17. The Legislature intended that the Commission should act immediately to attempt to reconcile the amount of taxes collected from ratepayers with the amount paid to government and properly attributed to the regulated utility. Id. at 17-18. Regardless of whether the Commission will implement an automatic adjustment clause pursuant to SB 408 in the future, the Commission made the correct decision to adopt a tax adjustment that was consistent with the principles of SB 408 and based entirely on the evidence already included in the record.

C. The Commission Should Reject PacifiCorp's Effort to Relitigate Issues

PacifiCorp inappropriately seeks to reargue numerous issues that have already been resolved by the Commission. An applicant for rehearing or reconsideration is not permitted to urge the Commission to consider the same evidence and legal arguments to make a different ruling. Re Verizon Northwest, Inc., OPUC Docket No.

UD 13, Order No. 02-639 at 4 (Sept. 12, 2002). PacifiCorp's Application and testimony reargue issues related to whether: 1) the adoption of a tax adjustment would result in unfair or confiscatory rates; 2) the benefits/burdens test should apply in this proceeding; 3) the Commission's stand-alone accounting rule prevents the Commission from adopting a tax adjustment; 4) a tax adjustment should be based on relative taxable income or gross profits; and 5) the adoption of ICNU's or CUB's tax standard is consistent with the U.S. Constitution. PacifiCorp Application at 14-17, 31-42. PacifiCorp argued these points in its Briefs and at oral argument. In this Answer, ICNU will not respond to these arguments, except to urge the Commission to deny PacifiCorp's Application and not allow the Company to utilize the reconsideration or rehearing process to have an opportunity to reassert arguments that the Commission already rejected.

III. CONCLUSION

PacifiCorp has failed to demonstrate that the Commission should reconsider or rehear Order No. 05-1050. The Commission's conclusions regarding the adoption of a \$26.6 million tax adjustment are well reasoned, consistent with the applicable law, and fully supported by the evidence included in the record. In addition, the Commission should not consider the supplemental testimony of Messrs. Williams and Martin because it is not new evidence under OAR § 860-014-0095. The Company has not demonstrated that this alleged "new" information is relevant, is essential to the Commission's decision, or was unavailable prior to the issuance of Order No. 05-1050.

Dated this 14th day of November, 2005.

Respectfully submitted,

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/s/ Irion Sanger

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Of Attorneys for Industrial Customers
of Northwest Utilities

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the Industrial Customers of Northwest Utilities' Answer to PacifiCorp's Application for Reconsideration or Rehearing upon the parties on the service list by causing the same to be mailed, postage-prepaid, through the U.S. Mail.

Dated at Portland, Oregon, this 14th day of November, 2005.

/s/ Christian Griffen
Christian W. Griffen

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