

McDowell & Rackner PC



AMIE JAMIESON
Direct (503) 595-3927
amie@mcd-law.com

October 24, 2008

VIA ELECTRONIC FILING AND U.S. MAIL

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

Re: Docket No. UE 177

Enclosed for filing in Docket UE 177 are an original and one copy of PacifiCorp's Response in Opposition to ICNU's Motion for Service of the Complete Record. A copy of this filing has been served on all parties to this proceeding as indicated on the enclosed service list.

Very truly yours,

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

Amie Jamieson

Enclosure

cc: Service List

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document in Docket UE 177 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.

CUB – OPUC Dockets
Citizens' Utility Board Of Oregon
610 SW Broadway Ste 308
Portland OR, 7205
Dockets@oregoncub.org

Robert Jenks
Citizens' Utility Board
610 SW Broadway Ste 308
Portland OR, 7205
bob@oregoncub.org

Allen C. Chan
Davison Van Cleve PC
333 SW Taylor, Suite 400
Portland, OR 97204
mail@dvclaw.com

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

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

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

Linda K. Williams
Kafoury & McDougal
10266 SW Lancaster Rd.
Portland, OR 97219-6305
Linda@lindawilliams.net

DATED: October 24, 2008



Amie Jamieson

Of Attorneys for PacifiCorp

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 **UE 177**

4 In the Matter of:

5 PACIFICORP, dba PACIFIC POWER &
6 LIGHT COMPANY

7 Filing of tariffs establishing automatic
8 adjustment clauses under the terms of
9 SB 408

**PACIFICORP'S RESPONSE IN
OPPOSITION TO
ICNU'S MOTION FOR SERVICE OF THE
COMPLETE RECORD**

9 Pursuant to OAR 860-013-0050(3)(d), PacifiCorp submits this response to the
10 Public Utility Commission of Oregon ("Commission") in opposition to the Industrial
11 Customers of Northwest Utilities' ("ICNU") Motion for Service of the Complete Record
12 ("Motion"). ICNU's motion challenges the Commission's decision to seal portions of the
13 record containing Highly Confidential information. Under Oregon Rule of Appellate
14 Procedure ("ORAP") 3.07(1)(b), an agency may seal portions of the record that are closed
15 to inspection by parties, attorneys, and the public. This rule provides that such materials
16 are transmitted to the Court of Appeals in an envelope marked "SEALED," and are not
17 included in the copy of the record served on the parties to the appeal. *Id.*

18 ICNU argues that it is entitled to receive a full copy of the record under ORAP 4.20.
19 While ICNU claims that there is no exception to this rule for Highly Confidential
20 information, ICNU fails to cite ORAP 3.07(1)(b), which clearly provides such an exception.
21 To the extent that ICNU's Motion indirectly challenges the Commission's decision to
22 continue to protect Highly Confidential information under the terms of Protective Order
23 No. 06-033, *See re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses*
24 *Under the Terms of SB 408*, Docket UE 177, Order No. 06-033 at 3 (Jan. 25, 2006)
25 ("Protective Order"), the Commission should reject this challenge, just as it did ICNU's
26 previous challenges to the Protective Order.

1 **BACKGROUND**

2 On May 12, 2008, ICNU filed a petition for judicial review with the Oregon Court of
3 Appeals of the Commission's order accepting PacifiCorp's 2006 tax report and authorizing
4 a surcharge to account for the difference between taxes collected and taxes paid by
5 PacifiCorp in 2006.¹ The Commission filed the record with the court on August 4, 2008.
6 Pursuant to the terms of the Protective Order, the Commission filed the Highly Confidential
7 documents, consisting of the tax report and workpapers,² as "sealed" with the Court of
8 Appeals. Under Oregon Rule of Appellate Procedure ("ORAP") 3.07(1)(b), if an agency
9 determines that certain material in the record is not subject to inspection by anyone,
10 including any party or any party's attorney, it shall mark the material as sealed.³

11 When the Commission established the Protective Order, it found that significant
12 harm could occur from the disclosure of tax information and that a risk of disclosure exists
13 as a result of a previous illegal release of confidential documents filed with the
14 Commission. Protective Order at 4. As a result of these concerns, the Commission found
15 that it had "no choice but to adopt a safe-room discovery mechanism to govern the use of
16 highly confidential information in these dockets." *Id.* PacifiCorp supplied the safe rooms
17 in Portland and Salem with a copy of the tax report, along with a set of workpapers and
18 back-up documentation, in compliance with the Protective Order.

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20 ¹ *Re PacifiCorp Filing of tariffs establishing automatic adjustment clauses under the terms of*
21 *SB 408, Docket UE 177, Order No. 08-201 (Apr. 11, 2008).*

22 ² ICNU states that ICNU did not receive the "highly confidential rebuttal testimony exhibits of
23 PacifiCorp witness Ryan Fuller." Those exhibits, however, are the tax report and workpapers.
PPL/200, Fuller/3 at ll. 6-8. Therefore, the only Highly Confidential documents at issue are the tax
report and workpapers.

24 ³ Although ORAP 3.07 relates to records from the trial court, ORAP 4.05 provides that insofar
25 as practicable, and except where a statute or the ORAPs provide another procedure, the procedure
26 for judicial review is the same as for appeals in civil cases. ORAP 3.07(1)(a) also provides
procedures for confidential documents, meaning those that are subject to inspection only by the
parties or their attorneys.

1 ICNU opposed the terms of the Protective Order when the terms were proposed by
2 the PacifiCorp and other utilities.⁴ ICNU again challenged the Protective Order by filing a
3 Motion to Modify Protective Order No. 06-033. *Re PacifiCorp Filing of Tariffs Establishing*
4 *Automatic Adjustment Clauses Under the Terms of SB 408*, Docket UE 177, Motion to
5 Modify Protective Order No. 06-033 (Dec. 14, 2007). The Commission denied ICNU's
6 motion, noting that the inclusion of hundreds of unregulated companies in the Berkshire
7 Hathaway corporate group in the filing increases the need for heightened protection of the
8 tax information. *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses*
9 *Under the Terms of SB 408*, Docket UE 177, Order No. 08-002 at 5 (Jan. 3, 2008). The
10 Commission also found that ICNU failed to show that it made a reasonable attempt to
11 work within the Protective Order procedures before filing a motion to modify the order. *Id.*
12 at 6. Finally, ICNU presented direct testimony in this proceeding, later excluded from the
13 record, reiterating its arguments about the Protective Order.⁵

14 ARGUMENT

15 A. The Commission Acted Properly in Sealing the Highly Confidential Portions 16 of the Appellate Record.

17 Given the Protective Order in this case, the Commission followed the correct
18 procedure in sealing the Highly Confidential portions of the record. The ORAP provide
19 procedures for protecting material in appellate records from disclosure. ORAP 3.07(1)
20 states that an agency may designate material as "confidential" or "sealed." "Confidential"
21 material is that which is subject to inspection by the parties or their attorneys.

22 ORAP 3.07(1)(a). "Sealed" material is that which is not subject to inspection by anyone,

23 ⁴ *Re PacifiCorp Filing of tariffs establishing automatic adjustment clauses under the terms of*
24 *SB 408*, Docket UE 177, Order No. 06-033 at 3 (Jan. 25, 2006).

25 ⁵ *Re PacifiCorp Filing of tariffs establishing automatic adjustment clauses under the terms of*
26 *SB 408*, Docket UE 177, Direct Testimony of Ellen Blumenthal (Jan. 22, 2008); *Re PacifiCorp Filing*
of tariffs establishing automatic adjustment clauses under the terms of SB 408, Docket UE 177, Order
No. 08-176 (Mar. 20, 2008) (striking portions of the direct testimony related to the Protective Order).

1 including the parties and their attorneys. ORAP 3.07(1)(b). The Highly Confidential
2 material in this proceeding is only available for review by those parties who have signed
3 the Protective Order in a designated safe room. Protective Order Appendix A at 3.
4 Therefore, the Commission properly filed the Highly Confidential material as “sealed,”
5 because such material is not subject to inspection by anyone except in a designated safe
6 room.

7 **B. ICNU’s Motion Should be Denied as Untimely.**

8 Under ORAP 4.22(1)(b), a motion to correct the record must be filed within 15 days
9 after the agency files the record of such agency proceedings. The motion must also be
10 served on the Court of Appeals.⁶ ORAP 4.22(2).

11 ICNU’s motion seeks to correct the record by challenging the Commission’s
12 decision to seal portions of the record. ICNU’s motion was filed well over two months
13 after the Commission filed the record with the court. A delay of two months beyond the
14 deadline for filing a motion to correct the record is unreasonable. ICNU’s motion is
15 untimely and should be denied.

16 **C. The Commission Should Reject ICNU’s Attempt to Re-Litigate the Protective**
17 **Order.**

18 In approving the Protective Order, the Commission evaluated the risk and potential
19 harm of disclosure against the benefit to intervenors of access to tax reports. Protective
20 Order at 2. The Commission found, given that the risk of disclosure of the tax information
21 is uncontrollable by the Commission and that disclosure could seriously harm the
22 producing utility, it had “no choice but to adopt a safe-room discovery mechanism to
23 govern the use of highly confidential information.” *Id.* at 4, 5.

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⁶ ICNU did not serve the Motion on the Court of Appeals.

1 The Commission has already ruled that the protections for Highly Confidential
2 material in the Protective Order are necessary. ICNU's Motion does not present any new
3 facts or circumstances to justify reconsideration of this ruling. Therefore, the Commission
4 should preserve the procedures established in the Protective Order for access to Highly
5 Confidential information.

6 **D. ICNU Has Access to the Highly Confidential Material in Accordance with the**
7 **Protective Order.**

8 In its motion, ICNU claims prejudice from not having access to the "complete
9 evidentiary record." This is incorrect. ICNU has access to the Highly Confidential
10 documents in the safe room under the terms of the Protective Order. The Commission
11 found in its order denying ICNU's Motion to Amend the Protective Order that ICNU was
12 not prejudiced by the safe room procedure required by the Protective Order. *Re*
13 *PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of*
14 *SB 408, Docket UE 177, Order No. 08-002 at 6 (Jan. 3, 2008).* In denying ICNU's Motion,
15 the Commission should make clear that ICNU will continue to have access to Highly
16 Confidential material in the safe room throughout the pendency of this appeal.

17 Additionally, ICNU claims that it needs access to PacifiCorp's Highly Confidential
18 tax report to raise arguments on whether PacifiCorp's tax report complies with OAR 860-
19 022-0041. This statement is misleading. First, as just noted, ICNU does have access to
20 the tax report under the terms of the Protective Order. Second, ICNU never challenged
21 the compliance of PacifiCorp's tax report with OAR 860-022-0041 in this case; instead
22 ICNU challenged whether OAR 860-022-0041 complied with SB 408. Therefore, ICNU
23 has not preserved for judicial review the arguments it now claims it needs the tax report to
24 develop.

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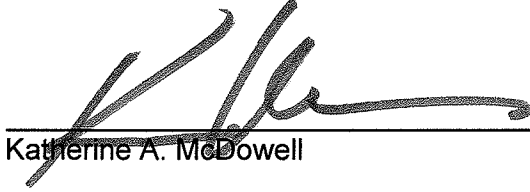
CONCLUSION

As the Commission found in the Protective Order, PacifiCorp's tax information remains highly sensitive and is at risk of disclosure without heightened protection. Sealing the Highly Confidential portions of the record under ORAP 3.07(1)(b) is required for the Commission to protect the information in accordance with the Protective Order and provides an exception to ORAP 4.20's requirement that the complete record be served upon all parties. In addition, ICNU's Motion has no legal basis except as a motion to correct the record under ORAP 4.22. ICNU's Motion, however, is untimely under that rule.

For the foregoing reasons, PacifiCorp requests that the Commission deny ICNU's Motion for Service of the Complete Record. ICNU has access to these documents under the safe room procedures in the Protective Order, undermining any claim of prejudice.

DATED: October 24, 2008.

MCDOWELL & RACKNER PC



Katherine A. McDowell

Attorneys for PacifiCorp