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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 the above-referenced docket is an original and one copy of PacifiCorp's Response in Opposition to the Motion to Compel of Industrial Customers of the Northwest Utilities. A copy of this filing has been served on all parties to this proceeding as indicated on the attached service list.

Very truly yours,

A handwritten signature in black ink, appearing to read "Amie Jamieson".

Amie Jamieson

Enclosure

cc: Service List

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 177

In the Matter of:

PACIFICORP, dba PACIFIC POWER &
LIGHT COMPANY

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

**PACIFICORP'S RESPONSE IN
OPPOSITION TO
ICNU'S MOTION TO COMPEL**

Pursuant to OAR 860-13-0050(3)(d), PacifiCorp submits this response to the Public Utility Commission of Oregon ("Commission") in opposition to the Expedited Motion to Compel ("Motion") of the Industrial Customers of Northwest Utilities ("ICNU").

In its Motion, ICNU seeks disclosure of net operating loss deductions and special deductions for "each and every" entity in the ScottishPower Holdings, Inc. ("SPHI") and Berkshire Hathaway Inc. ("Berkshire Hathaway") tax returns for 2006. Together, this covers almost 600 separate unregulated companies. Because this unregulated entity tax data is not required for the Commission's review of PacifiCorp's tax report, it is outside of the Commission's jurisdiction under ORS 757.268(2) (mandating disclosure of tax data "require[d] to review the tax report and to implement and administer [SB 408]"). Similarly, because this data is not relevant to an audit of PacifiCorp's tax report, it is not subject to discovery under normal Commission rules and practice.

ICNU's Motion seeks to expand and distort the scope of the proceeding now underway to review PacifiCorp's tax report. Indeed, the Motion implies either a misunderstanding or rejection of the Commission's Apportionment Method because it seeks information on individual affiliate losses and special deductions, information rendered irrelevant by the Commission's adoption of the Apportionment Method in Docket

1 AR 499. ICNU's attempt to relitigate issues resolved in AR 499 is apparent in its Issues
2 List in this docket, which includes the following: "Did PacifiCorp properly include affiliate
3 losses in calculating its tax liability?" *Re PacifiCorp Filing of Tariffs Establishing Automatic*
4 *Adjustment Clauses Under the Terms of SB 408*, Docket UE 177, Issues List of Industrial
5 Customers of Northwest Utilities (Dec. 19, 2007). The Commission should deny ICNU's
6 Motion and reject ICNU's attempt to reopen resolved issues regarding the allocation of
7 affiliate tax losses. The Commission should make clear that the Commission's rules
8 apportion total taxes paid and do not allocate specific affiliate losses and deductions.

9 **BACKGROUND**

10 PacifiCorp filed its tax report in this docket as required by SB 408 on October 15,
11 2007. Concurrently with this filing, PacifiCorp supplied the tax report safe rooms with work
12 papers, consisting of an annotated version of the tax report with supporting documentation
13 for all figures contained in the tax report. The documentation includes several hundred
14 pages of excerpts from the SPHI, Berkshire Hathaway, and PacifiCorp federal, state, and
15 local tax returns.

16 On December 3, 2007, ICNU served PacifiCorp with data requests that included a
17 request for unredacted copies of SPHI's and Berkshire Hathaway's consolidated federal
18 income tax returns. PacifiCorp objected to this request, explaining that its work papers
19 included all portions of the tax returns required to audit PacifiCorp's tax report. PacifiCorp
20 also offered to supplement its work papers if ICNU demonstrated that required information
21 was missing.

22 PacifiCorp did not produce the entire consolidated tax returns for SPHI and
23 Berkshire Hathaway in its work papers for three reasons: (1) the information is highly
24 confidential; (2) the bulk of the data in the tax returns is not required to audit PacifiCorp's
25 SB 408 tax report; and (3) the tax returns are voluminous; Berkshire Hathaway's tax
26 return, for example, is approximately nine feet thick.

1 On December 18, 2007, ICNU requested copies of the consolidated schedules for
2 taxable income, which separately state each and every entity included in the federal
3 income tax returns of SPHI and Berkshire Hathaway, with Lines 28 and 29 unredacted.
4 Line 28 contains the entity's taxable income before net operating loss deductions and
5 special deductions. Line 29 contains the entity's net operating loss deduction and special
6 deductions. Mathematically, subtracting Line 29 from Line 28 produces Line 30, which is
7 the entity's taxable income.

8 PacifiCorp's work papers include Lines 28 through 30 for both SPHI's and
9 Berkshire Hathaway's consolidated tax returns. PacifiCorp has provided portions of the
10 tax returns that show losses, special deductions, and taxable income before and after
11 losses on a total taxpayer basis, but not on an affiliate by affiliate basis as requested by
12 ICNU. These work papers are at FED-2, FED-10, FED1-2, FED1-6 and FED1-7.¹

13 On December 21, 2007, PacifiCorp responded to ICNU's request by explaining
14 why individual affiliate loss and deduction information was unnecessary to an audit of
15 PacifiCorp's tax report.

16 On December 24, 2007, ICNU filed its Motion requesting that ALJ Grant or the
17 Commission issue an order requiring PacifiCorp to provide copies of all affiliate
18 consolidated schedules with Lines 28 and 29 unredacted.

19 ARGUMENT

20 **A. The Information ICNU Seeks Is Not Required for Review of PacifiCorp's** 21 **SB 408 Compliance Filing, So the Commission May Not Compel Its** 22 **Production.**

23 The Commission's authority to compel disclosure of information is a function of the
24 Commission's general jurisdiction. Under ORS 756.070, the Commission has jurisdiction

25 _____
26 ¹ PacifiCorp understands that the Commissioners and ALJ Grant may need to review
PacifiCorp's tax report and work papers in the Salem Safe Room in order to rule on the Motion.
PacifiCorp consents to such a review.

1 over the management of the business of all public utilities and “has the right to obtain from
2 any public utility or telecommunications utility all necessary information to enable the
3 commission to perform duties.” The Commission’s ability to obtain information about
4 unregulated companies thus depends on whether the information is necessary to the
5 Commission’s regulatory function.

6 SB 408 takes a consistent approach, mandating disclosure of information the
7 Commission “requires to review the tax report and to implement and administer [SB 408].”
8 ORS 757.268(2). Under SB 408, the Commission may obtain unregulated company tax
9 data otherwise unrelated to the Commission’s regulatory function only if it is “required” for
10 review of the tax report.

11 The information ICNU seeks to compel is not required for a review of PacifiCorp’s
12 tax report. Indeed, the information is three steps removed from anything required for such
13 an audit. First, ICNU claims that the affiliate loss information on an entity by entity basis
14 “is necessary to verify that the total taxable income used for purposes of the tax report is
15 accurate.” As just explained, PacifiCorp has provided information from Lines 28 through
16 30 on a total taxpayer basis, which permits ICNU to verify taxable income on a total
17 taxpayer basis. ICNU has not explained why it needs loss data at the individual affiliate
18 level to verify taxable income at the total taxpayer level.

19 Second, under the Commission’s rules, tax liability, not taxable income, is used in
20 the tax report. In fact, the only time taxable income would ever impact the results of the
21 tax report is through the calculation of the floor under the Apportionment Method.
22 OAR 860-022-0041(3)(b). Because the Apportionment Method floor was not implicated in
23 PacifiCorp’s 2006 tax report, taxable income is not a part of any calculation necessary to
24 the outcome of the tax report. Thus, ICNU’s claim that it needs to verify the accuracy of
25 the taxable income used in the tax report is specious, because the tax report results do
26 not depend in any way on taxable income data.

1 Third, even if taxable income was material to PacifiCorp's tax report, ICNU's claim
2 that it needs individual affiliate loss information to verify reported taxable income conflates
3 an audit of PacifiCorp's tax report with an audit of PacifiCorp's tax return. An audit of
4 PacifiCorp's tax report requires only verification that the taxable income amounts reflected
5 in the report (if any) match those included on the tax return. PacifiCorp has provided total
6 taxable income information. Individual affiliate loss information is unnecessary to this
7 verification process and instead relates only to whether taxable income included on the tax
8 return (as distinguished from the tax report) is correct.

9 An audit of PacifiCorp's tax return to verify the accuracy of taxable income is
10 outside the scope of this proceeding, because SB 408 and OAR 860-022-0041 require
11 that the calculation of taxes paid be based on "amounts received by units of government
12 from the utility." ORS 757.268(13)(f). *See also Re Adoption of Permanent Rules to*
13 *Implement SB 408 Relating to Utility Taxes*, Order No. 06-400, Docket AR 499 (July 14,
14 2006) (to "be consistent with the spirit and letter of SB 408," the methodology used to
15 determine taxes properly attributed to a utility under the Apportionment Method should
16 begin with the taxes actually paid to units of government). SB 408 does not address taxes
17 that a utility could have or should have paid to government, instead focusing only on what
18 the utility actually paid. ICNU cannot argue to reduce PacifiCorp's surcharge on the basis
19 that PacifiCorp overpaid taxes any more than PacifiCorp can argue to increase it on the
20 basis that it underpaid taxes.

21 ICNU argues that affiliate loss information "goes to the essence of why SB 408
22 was passed, which is to ensure that unregulated affiliate losses are properly reflected and
23 accounted for in calculating the income tax liability of the regulated utility." This was the
24 same position ICNU took in the AR 499 rulemaking, a position that the Commission
25 rejected when it adopted the Apportionment Method for determining taxes paid. *See Re*
26 *Adoption of Permanent Rules to Implement SB 408 Relating to Utility Taxes*, Order

1 No. 06-400, Docket AR 499 (July 14, 2006) (describing ICNU “book end” and noting
2 criticism that it would give customers the benefit of losses in other businesses even
3 though they do not bear any burden of the losses and could require auditing of every
4 affiliate in the group which would be impractical to implement). One of reasons that the
5 Commission adopted the Apportionment Method was to avoid the need to audit taxable
6 income and loss data on an affiliate by affiliate basis, providing “for an automatic
7 adjustment clause that is actually automatic.” *Id.* The Commission should not allow ICNU
8 to relitigate the issues resolved in AR 499 in this case. This case should remain focused
9 on PacifiCorp’s compliance with the AR 499 rules and not be expanded to include a
10 challenge to those rules.

11 ICNU also cites as support the Staff’s Initial Findings for PacifiCorp, a report filed in
12 this case in December 19, 2007. In that report, Staff raised a general concern that the
13 redaction of information in PacifiCorp’s work papers made Staff’s review of PacifiCorp’s
14 tax report more difficult. While PacifiCorp regrets any inconvenience that its redaction of
15 unregulated company tax data may have caused Staff, the legal standard for disclosure
16 under SB 408 is not whether information would be convenient and helpful to reference in
17 conjunction with a review of a tax report, but whether the information is *required* for a
18 review of the tax report. Staff’s report did not point out any area of PacifiCorp’s tax report
19 and work papers where PacifiCorp failed to furnish information required for a thorough
20 audit. And the substance of Staff’s Initial Findings makes clear that Staff does not share
21 ICNU’s view that affiliate loss data is in any way required for a review of PacifiCorp’s tax
22 report. *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under*
23 *the Terms of SB 408*, Docket UE 177, Staff’s Initial Findings (Dec. 19, 2007).

24 The information that ICNU seeks is highly confidential and would be burdensome
25 to produce. ICNU disputes PacifiCorp’s claim that ICNU’s request is burdensome,
26 claiming that PacifiCorp must have gathered information prior to its redaction. ICNU’s

1 position is misleading, because ICNU has requested consolidated schedules showing
2 Lines 28 and 29 for all entities in the tax returns. As noted above, PacifiCorp produced
3 this information on a total taxpayer basis. Individual affiliate loss information for Berkshire
4 Hathaway's affiliates was not provided in any form in PacifiCorp's work papers, redacted
5 or otherwise. Because there are almost 600 individual entities in the 2006 consolidated
6 tax returns which included PacifiCorp, ICNU's request implicates potentially hundreds of
7 pages of highly confidential tax return data.

8 **B. The Information ICNU Requested Is Not Relevant to an SB 408 Compliance**
9 **Filing and ICNU Has Not Explained How the Information Is Reasonably**
10 **Calculated to Lead to Admissible Evidence.**

11 In proceedings before the Commission, parties may request discovery "regarding
12 any matter, not privileged, which is relevant to the claim or defense of the party seeking
13 discovery." OAR 860-011-0000(3); ORCP 36(B)(1). Evidence is considered relevant if it
14 tends to make the existence of any fact at issue in the proceeding more or less probable
15 than it would be without the evidence. OAR 860-014-0045(1)(a); *Or. Sch. Employees*
16 *Ass'n v. Salem-Keizer Sch. Dist.*, 103 Or. App. 221, 225 (1990). If the party seeking the
17 evidence does not show how the information is relevant to the proceeding, the
18 Commission will preclude discovery. *See Re Portland Gen. Elec. Co.*, Order No. 98-163,
19 Docket UE 102 (1998).

20 For example, in a case where the Commission was considering a restructuring
21 application filed by a utility, the estimates of market value of the utility's supply portfolio
22 were at issue. *Id.* The Commission found that the estimates would not affect the
23 Commission's decision, so the bases for the estimates were irrelevant and intervenors
24 could not obtain them on discovery. *Id.* Similarly, in MidAmerican Energy Holdings
25 Company's application to acquire PacifiCorp, the Commission denied ICNU's motion to
26 compel information regarding a possible acquisition of PGE on the basis that the
information related solely to PGE and would not provide a sound basis to analyze the

1 proposed PacifiCorp transaction. *In re MidAmerican Energy Holdings Company's*
2 *Application for Authorization to Acquire PacifiCorp*, Ruling, Docket UM 1209 (Nov. 18,
3 2005).

4 In this case, individual affiliate loss information contained in Lines 28 and 29 of
5 consolidated federal tax returns cannot make any fact at issue in this proceeding more or
6 less probable. ICNU states in a conclusory fashion that "[t]here is little question that the
7 information ICNU is seeking is relevant," but fails to explain how that information would
8 make any fact at issue in this proceeding more or less probable or lead to relevant
9 information. Applying ICNU's definition of relevance, any information related to any entity
10 in the consolidated group that is reflected in the consolidated tax return is relevant and
11 discoverable. ICNU is mistaken in its overly broad interpretation of relevance. Information
12 is relevant only if it makes a fact at issue in a proceeding more or less probable. If the
13 information could not affect the Commission's decision, it is not discoverable. *See Re*
14 *Portland Gen. Elec. Co.*, Order No. 98-163, Docket UE 102 (1998).

15 **CONCLUSION**

16 As explained above, under the Commission rules for implementing SB 408, the
17 loss and special deduction information contained in Lines 28 and 29 of PacifiCorp's
18 unregulated affiliates' tax schedules can have no effect on the Commission's decision in
19 this proceeding. The information is not discoverable in this case because it is neither
20 required for a review of PacifiCorp's tax report nor relevant to any issue in the case. The
21 Commission should not allow ICNU to use the Motion to expand this proceeding beyond
22 the scope contemplated by the Commission's rules, especially because the forced
23 production of the information would be prejudicial to PacifiCorp's unregulated affiliates and
24 burdensome to PacifiCorp to produce.

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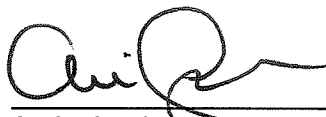
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1 For all of the foregoing reasons, the Commission should deny ICNU's Expedited
2 Motion to Compel.

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DATED: January 2, 2008.

MCDOWELL & RACKNER PC



Amie Jamieson

Attorneys for PacifiCorp

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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.

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DATED: January 2, 2008



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