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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 is for filing in the above-referenced docket is an original and one copy of PacifiCorp's Response in Opposition to the Industrial Customers of Northwest Utilities' Motion to Modify the Protective Order. 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 cursive script that reads "Wendy L. McIndoo".

Wendy L. McIndoo

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 MODIFY THE  
PROTECTIVE ORDER**

Pursuant to OAR 860-13-0050(3)(d), PacifiCorp submits this response to the Public Utility Commission of Oregon ("Commission") in opposition to the Industrial Customers of Northwest Utilities' ("ICNU") Expedited Motion to Modify the Protective Order ("Motion"). The modification ICNU requests in its Motion would result in stripping PacifiCorp's tax data of the protection the Commission previously recognized as necessary when it implemented the protective order in this docket ("Protective Order"). *In re PacifiCorp*, Docket UE 177, Order No. 06-033 at 3 (Jan. 25, 2006).

ICNU's Motion is, in essence, an untimely motion for reconsideration because it simply reiterates the arguments ICNU made before the Commission in opposing the Protective Order. *See In re PacifiCorp*, Docket UE 177, Response of the Industrial Customers of Northwest Utilities in Opposition to Joint Motion for Protective Order (Dec. 28, 2005). The Commission already considered these arguments and addressed them in the Protective Order.

ICNU has presented the Commission with no new facts upon which a modification to the Protective Order is justified. The tax data remains highly sensitive and at risk of disclosure without heightened protection, and the safe room procedures are both workable and necessary to protect the tax material. Any obstacles to ICNU's discovery in this docket have largely been the result of ICNU's delay in commencing discovery under the

1 procedures outlined by the Commission in the Protective Order. The issues in this case  
2 are not so complex as to preclude effective discovery within the safe room framework,  
3 because this is an automatic adjustment clause compliance filing, involving only auditing  
4 and verification under OAR 860-022-0041. PacifiCorp seeks to maintain the Protective  
5 Order in its current form and therefore opposes ICNU's motion.

#### 6 **BACKGROUND**

7 PacifiCorp filed its tax report in this docket as required by SB 408 on October 15,  
8 2007. Pursuant to the terms of the Protective Order, PacifiCorp supplied the safe rooms  
9 in Portland and Salem with a copy of the tax report, along with a set of workpapers and  
10 back-up documentation. Since October, PacifiCorp has also supplied the safe room with  
11 responses to highly confidential data requests from Commission Staff.

12 Staff held two informal workshops on November 8, 2007, and November 26, 2007,  
13 addressing PacifiCorp's tax report. These workshops were noticed to all parties in this  
14 docket. At the workshops, PacifiCorp discussed its tax report with Staff and other  
15 participants and reviewed PacifiCorp's responses to Staff's data requests. ICNU did not  
16 attend either workshop.

17 ICNU did not visit the safe room to review PacifiCorp's tax report until December 3,  
18 2007—more than six weeks after PacifiCorp filed its tax report with the Commission. At  
19 ICNU's request, PacifiCorp made its tax expert available to discuss the tax report with  
20 ICNU's consultant on December 4, 2007. ICNU concluded the meeting early and did not  
21 request the overview or general explanation of the tax report which PacifiCorp's tax expert  
22 was prepared to provide.

23 In addition to scheduled visits to the safe room on December 3 and 4, on the  
24 morning of December 6, 2007, ICNU requested a visit to the safe room the afternoon of  
25 December 6. Although the Protective Order provides for 24-hour advance notice for  
26

1 access to the safe room, PacifiCorp accommodated ICNU's short notice, as the  
2 Commission encouraged the utilities to do in the Protective Order. Protective Order at 5.

3 On December 5, 2007, ICNU asked PacifiCorp that ICNU's consultant be allowed  
4 to take copies of "requested pages from the tax report and work papers" to Texas, but did  
5 not designate what pages it was requesting. PacifiCorp agreed to provide ICNU copies of  
6 documents that did not contain tax data of unregulated third-parties, if ICNU agreed to  
7 keep those documents confidential. The documents PacifiCorp would provide to ICNU  
8 under this arrangement include PacifiCorp's regulated tax data, information related to  
9 the stand-alone tax calculations in the tax report, and information related to the taxes  
10 collected calculation. PacifiCorp asked ICNU for a list of requested pages and agreed to  
11 promptly respond to ICNU's request. Instead of providing a list of specific pages,  
12 however, ICNU responded by requesting copies of all safe room documents and then filing  
13 this Motion.

14 On December 5, 2007, ICNU sought increased intervenor funding for this case,  
15 citing the Commission's willingness to entertain requests for increased intervenor funding  
16 to cover additional expenses resulting from the requirements of the Protective Order. *In re*  
17 *PacifiCorp*, Docket UE 177, Proposed Budget for Issue Fund Grant of the Industrial  
18 Customers of Northwest Utilities (Dec. 5, 2007). See Protective Order at 5.

#### 19 ARGUMENT

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

26

1 In its Motion, ICNU simply rehashes its previous arguments against the safe room  
2 concept and fails to present any reasonable basis for abandoning the Protective Order's  
3 requirements. Indeed, PacifiCorp's need for additional protection for extremely sensitive  
4 tax data has increased this year because its tax report and supporting documentation for  
5 the first time contain tax information from the hundreds of unregulated companies that are  
6 part of the Berkshire Hathaway consolidated tax group. PacifiCorp's increased need for  
7 confidentiality and ICNU's failure to show that it has made a reasonable attempt to work  
8 within the Protective Order's requirements before filing its Motion justify the Commission's  
9 denial of ICNU's Motion.

10

11 **A. Additional Protection Contemplated by the Protective Order Is Necessary  
and Justified.**

12 The tax report and supporting information required under SB 408 is unprecedented  
13 in terms of the amount of highly confidential unregulated third-party data it contains. To  
14 comply with SB 408, a utility must provide a tax report that includes the information  
15 required by the Commission and provide copies of all workpapers and documents  
16 supporting the utility's calculations. ORS 757.268(1); OAR 860-022-0041(6). In the case  
17 of PacifiCorp, this requires it to provide commercially sensitive tax information for  
18 hundreds of unregulated third parties within its consolidated tax group. While some of this  
19 information can be partially protected through redaction, the most sensitive data—taxable  
20 income and consolidated tax liability—must be produced to allow auditing and verification  
21 of the tax report.

22 SB 408 expands the scope of the Commission's jurisdiction to include obtaining  
23 this information, but also gives the Commission the responsibility to strictly protect this  
24 data through protective orders. ORS 757.268(11). Intervenors may only obtain the tax  
25 information under the terms of a protective order prepared by the Commission. *Id.*;  
26 OAR 860-022-0041(7). The Commission recognized its responsibility to protect tax data

1 and the difficulty of effectively doing so without a safe room discovery mechanism in  
2 establishing the Protective Order. Protective Order at 2, 5. The Protective Order states  
3 that "there is no dispute that the public disclosure of the tax information required by SB  
4 408 could seriously harm the producing utility. Furthermore, the risk of such disclosure is,  
5 unfortunately, uncontrollable by this Commission without the use of a safe room discovery  
6 mechanism." Protective Order at 5.

7 Consistent with its position in approving the Protective Order in this case, the  
8 Commission previously denied requests from *The Oregonian* and *Willamette Week* under  
9 Oregon's Public Records Law for copies of the utilities' tax reports. Letter from the  
10 Commission to Nigel Jaquiss and Gail Kinsey Hill (Nov. 18, 2005). The Commission  
11 concluded that the information sought was privileged from disclosure under SB 408, which  
12 "unambiguously express[ed] the legislature's intent to restrict the use and disclosure of the  
13 utilities' tax information required to be filed." In its ruling, the Commission noted that  
14 intervenors would be able to obtain the tax information for use in "auditing and verifying  
15 the reports," under the terms of a protective order. *Id.*

16 The fact that two newspapers previously requested the utilities' SB 408 tax reports  
17 shows that parties other than those bound by the terms of the Protective Order are  
18 interested in obtaining the information, presumably for public disclosure. Given this  
19 interest, it is critical that the Commission preserve the Protective Order as it is written to  
20 prevent public disclosure of commercially sensitive tax information. Nothing has changed  
21 between the time when the Commission enacted the Protective Order and when ICNU  
22 filed its Motion that would reduce the harm caused to a producing utility should the tax  
23 information be disclosed or to reduce the risk of disclosure. Therefore, the safe room  
24 discovery mechanism established in the Protective Order is necessary and the  
25 Commission should preserve it as written.

26

1     **B.     The Safe Room Procedure Is Workable and Is a Necessary Result of the**  
2     **Highly Sensitive Nature of Tax Data.**

3             ICNU has declared the requirements of the Protective Order to be unworkable  
4 without making a good faith effort to work within the requirements. The Commission  
5 acknowledged the inconvenience imposed by the use of the safe room in the Protective  
6 Order. Protective Order at 4. The reasons given by ICNU in its Motion for modifying the  
7 Protective Order are inconveniences already put forth by ICNU as bases for rejecting the  
8 safe room approach and that were ameliorated or rejected by the Commission in the  
9 Protective Order. The Commission has already weighed the limitations of the safe room  
10 approach against the risk and harm of disclosure and found that heightened protection is  
11 necessary. The procedures in the Protective Order should not preclude ICNU from  
12 effectively participating in the docket if ICNU makes a good faith effort to conduct  
13 discovery within those procedures.

14

15             **1.     ICNU Has Not Made a Good Faith Effort to Work Within the Protective**  
16             **Order's Procedures.**

17             ICNU states that due to the impending date for Opening Testimony in this docket,  
18 the Protective Order has made it "infeasible" for ICNU to produce effective testimony.  
19 Motion at 4. Given that ICNU waited six weeks before visiting the safe room and did not  
20 participate in Staff's informal workshops in November, any infeasibility in producing  
21 effective testimony is the result of ICNU's delay in engaging in this case, not the  
22 requirements of the Protective Order. ICNU was aware that PacifiCorp would be filing its  
23 tax report on or before October 15, 2007, and knew that the terms of the Protective Order  
24 required review of that tax report in a safe room. ICNU was also aware that SB 408  
25 provides parties with a relatively short amount of time in which to review the tax reports.  
26 Instead of proceeding (like Staff) to immediately commence review the tax report in  
October, ICNU waited until early December. ICNU's complaint now that it does not have

1 time to explore PacifiCorp's proposal to provide ICNU with copies of specific documents is  
2 largely a self-inflicted problem. The discovery protections afforded the tax information of  
3 non-regulated companies should not be compromised simply because ICNU waited an  
4 unreasonable length of time to become fully engaged in this docket.

5 **2. Safe Room Procedures Allow Intervenors to Fully and Effectively**  
6 **Participate in This Docket.**

7 The safe room procedures allow intervenors to fully participate in auditing and  
8 verifying PacifiCorp's tax report. ICNU states that being able to access the highly  
9 confidential documents only during normal business hours and only in Portland is a  
10 significant hardship. PacifiCorp allowed ICNU to access the safe room on short notice  
11 previously, however, and will work to accommodate ICNU's reasonable requests for  
12 access to the safe room outside the terms of the Protective Order in the future.

13 The Protective Order permits note-taking in the safe room, as long as it is not  
14 verbatim copying. While the Protective Order is silent on these points, to accommodate  
15 ICNU, PacifiCorp has agreed that such notes are privileged, has allowed ICNU to take  
16 notes on a personal computer, and has permitted ICNU to remove its notes from the  
17 saferoom, as long as ICNU maintains their confidentiality. These accommodations are all  
18 designed to permit ICNU to effectively develop its position in this case.

19 In addition, the safe room procedures protect privileged communications among  
20 intervenors. Upon request, the monitor will leave the safe room with the highly confidential  
21 materials to allow for private conversations. Alternatively, there is a separate conference  
22 room near the safe room to which intervenors may adjourn to have private conversations.  
23 Although such conversations may be less spontaneous than if the intervenors did not  
24 need to ask the monitor to leave and could review the materials without the presence of  
25 the monitor, this drawback is a necessary outgrowth of the high risk of disclosure and the  
26 serious harm resulting from such disclosure that the Commission recognized in crafting



1 the Protective Order. These communications may be more time consuming than they  
2 would be otherwise, but they are certainly feasible. The logistical inconveniences of the  
3 safe room procedure are modest compared with the potential for harm and the risk of  
4 disclosure that has been established in recent proceedings before the Commission. See  
5 Protective Order at 4.

6 **3. The Tax Report and Work Papers Are Not So Complex as to Preclude**  
7 **Effective Safe Room Review**

8 ICNU professes concern regarding the complexity of PacifiCorp's SB 408 tax  
9 report and workpapers. It appears that ICNU's concern is largely a function of ICNU  
10 attempting to audit the tax returns of all Berkshire Hathaway companies in the tax group.  
11 That is not the objective of this proceeding or even material to it. PacifiCorp's tax  
12 report filing is a compliance filing, not a general rate case. As such, the task of an  
13 intervenor such as ICNU is to audit PacifiCorp's compliance filing, not to audit PacifiCorp's  
14 or other entities' tax returns or propose general consolidated tax adjustments. Therefore,  
15 the complexity of PacifiCorp's corporate structure has little bearing on the information  
16 necessary to review while auditing an SB 408 compliance filing and the safe room  
17 discovery mechanism does not preclude effective review of the filing.

18 OAR 860-022-0041 outlines the requirements for the tax report filing. These have  
19 been distilled into a tax report template. The rule and template necessarily circumscribe  
20 the scope of this docket to auditing and verifying PacifiCorp's compliance filing. Thus, this  
21 case is very different from the type of cases ICNU's consultant has previously engaged in,  
22 where a consolidated tax adjustment is proposed in a general rate case. In those cases,  
23 where methodology questions remain subject to litigation, the scope of the case, and the  
24 documentation required may be considerably broader than in this one.

25 The auditing exercise can be conducted through a safe room, especially given  
26 PacifiCorp's willingness to provide copies of some of the highly confidential documents

1 outside of the safe room and its other accommodations. PacifiCorp has used safe rooms  
2 in other states, such as Utah, successfully for many years. There is no reason why ICNU  
3 cannot conduct its analysis and audit of the limited information required by OAR 860-022-  
4 0041 within the safe room.

5 **4. The Accommodations Cited by ICNU in Other Proceedings or With**  
6 **Respect to Other Parties Do Not Mitigate the Risk of Disclosure or the**  
7 **Potential for Serious Harm to PacifiCorp in This Proceeding.**

8 The earlier proceeding cited by ICNU in which PacifiCorp allowed confidential tax  
9 documents to be reviewed outside of the Portland safe room is inapt to the current  
10 proceeding. See Motion at 4. Previously, PacifiCorp allowed an ICNU consultant based  
11 in St. Louis, Missouri, to review confidential tax documents in St. Louis. ICNU failed to  
12 mention in its Motion, however, that the tax documents did not include tax information for  
13 Berkshire Hathaway non-regulated companies, that PacifiCorp required ICNU's consultant  
14 to review the documents in a safe room format, and that ICNU had access to the  
15 documents for only a day or two. In any event, in this case ICNU has requested increased  
16 intervenor funding related to the protective order. This increase in funding, which  
17 PacifiCorp supports, should permit ICNU's consultant to travel to the Portland safe room.

18 As noted above, PacifiCorp's tax report this year contains significantly more  
19 unregulated company tax data than its previous tax reports. While PacifiCorp is unwilling  
20 to agree to remote access to documents including this type of information, PacifiCorp is  
21 willing to provide ICNU copies of less sensitive documents that do not contain tax data of  
22 unregulated third-parties, if ICNU agrees to keep those documents confidential.

23 ICNU also references its agreement with Portland General Electric Company  
24 ("PGE") in this proceeding to establish a safe room in Houston, Texas, closer to ICNU's  
25 consultant's place of business, and encourages the Commission to modify the Protective  
26 Order to establish such a safe room for PacifiCorp's data. Motion at 2. PacifiCorp and  
PGE, however, are not similarly situated with respect to their tax reports, and the

1 Commission should not use PGE's accommodation for a model for PacifiCorp. As ICNU  
2 states in the Motion, PGE is, for the most part, a stand-alone company. Motion at 7.  
3 Consequently, PGE does not have the same concerns about the release of tax data of  
4 hundreds of unregulated affiliates as PacifiCorp does. Given the potential for serious  
5 harm to these entities should the data be released, the need for confidentiality precludes  
6 such an accommodation.

7 **CONCLUSION**

8 As the Commission found in the Protective Order, PacifiCorp's tax data remains  
9 highly sensitive and is at risk of disclosure without heightened protection. ICNU presents  
10 no reasonable basis for diluting the protection that the Commission previously found it had  
11 no choice but to adopt. The Commission must provide reasonable assurances that the  
12 utilities' tax data will be protected from disclosure and it cannot do so without safe room  
13 protection. The logistical inconveniences described by ICNU are modest compared with  
14 the potential for harm and the risk of disclosure and can be minimized by ICNU making a  
15 good faith effort to engage in discovery as contemplated by the Commission in the  
16 Protective Order.

17 PacifiCorp remains open to ICNU's reasonable requests for accommodations of  
18 the safe room procedure and agrees to provide copies of documents that do not contain  
19 tax data of unregulated third-parties, subject to a confidentiality agreement. In addition,  
20 PacifiCorp supports ICNU's pending request for increased intervenor funding to mitigate  
21 the increased costs of complying with the safe room procedures.

22 *////*

23 *////*

24 *////*

25 *////*

26 *////*

1 For the foregoing reasons, PacifiCorp requests that the Commission deny ICNU's  
2 Expedited Motion to Modify the Protective Order.

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4 DATED: December 21, 2007.

MCDOWELL & RACKNER PC

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Katherine A. McDowell

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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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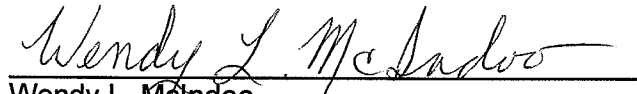
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