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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 are an original and one copy of PacifiCorp's Response to ICNU's Reply to PacifiCorp's Motion in Limine. A copy of this filing has been served on all parties to this proceeding as indicated on the attached service list.

Very truly yours,



Katherine McDowell

Enclosure
cc: Service List

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
SB 408

**PACIFICORP'S RESPONSE TO ICNU'S
REPLY TO PACIFICORP'S MOTION IN
LIMINE**

9 Pursuant to Administrative Law Judge ("ALJ") Allan Arlow's ruling at the hearing in
10 this docket on February 22, 2008, PacifiCorp submits this Response to the Industrial
11 Customers of Northwest Utilities' ("ICNU") Reply to PacifiCorp's Motion in Limine Objecting
12 to the Admission of the Direct Testimony of Ellen Blumenthal ("Response").

13 ICNU's Reply mischaracterizes Commission decisions, rules, and statutes to argue
14 that PacifiCorp's motion is procedurally inadequate, PacifiCorp has waived its right to ask
15 the ALJ to exclude ICNU's testimony, and the testimony of Ms. Blumenthal is relevant,
16 notwithstanding its collateral attack on the Commission's SB 408 rules and procedures.

17 ICNU's procedural objections to PacifiCorp's motion are groundless. This is
18 apparent upon review of OAR 860-014-0045(2), which provides that "parties objecting to
19 evidence shall state the grounds for objection at the time the evidence is offered." This
20 Commission rule, which ICNU failed to cite in its Reply, makes clear that PacifiCorp's motion
21 was timely, because it was filed well in advance of the time that ICNU's testimony will be
22 offered.

23 On the substance of PacifiCorp's motion, ICNU claims that its testimony is factual,
24 not legal. ICNU also claims inconsistently that it is not collaterally attacking the
25 Commission's rules, that its collateral attack is only a partial, as-applied type challenge, and
26 that its collateral attack is a procedurally proper means to preserve its challenge to the rules

1 on appeal. ICNU's arguments overlook the fact, however, that PacifiCorp has narrowly
2 drawn its motion, objecting only to Ms. Blumenthal's testimony directed at the validity of the
3 Commission's rules and its protective order, not to her testimony analyzing how these rules
4 apply to PacifiCorp. Even by the liberal standard of relevancy urged by ICNU, the testimony
5 PacifiCorp moves to exclude is irrelevant as legal argument.

6 For these reasons, the Commission should exclude the testimony of Ms. Blumenthal
7 collaterally attacking OAR 860-022-0041 and Protective Order No. 06-033. Alternatively,
8 the Commission could admit the testimony but give it no weight in deciding the issues in this
9 case. See *In re Crooked River Ranch*, Order No. 07-527 (2007) (denying Staff's motion to
10 strike, but finding that the issues it raised "seriously eroded the weight the Commission gave
11 the testimony.")

12 **I. DISCUSSION**

13 **A. PacifiCorp Has Not Waived Its Objections to ICNU's Testimony and the Motion**
14 **in Limine Is Procedurally Appropriate.**

15 **1. PacifiCorp Is Not Required to Object to Testimony Until the Testimony**
16 **Is Offered Into Evidence and Therefore Has Not Waived Its Objections.**

17 ICNU incorrectly claims that PacifiCorp waived its right to object to Ms. Blumenthal's
18 testimony. According to Commission rules, it is not the *filing* of the testimony that triggers
19 the need to object, but rather the *offering* of testimony. See OAR 860-014-0045(2)
20 ("[p]arties objecting to the introduction of evidence shall state the grounds for objection at
21 *the time the evidence is offered.*") (emphasis added); see also OAR 860-014-0060(4)(b)
22 (pre-filed testimony is subject to rules of admissibility and cross-examination).

23 The cases cited by ICNU are not to the contrary, holding that an objection must be
24 made when the evidence is offered into evidence at the hearing, not before. *McEwen v.*
25 *Ortho Pharmaceutical Corp*, 270 Or. 375, 421 (1974) ("However, it is equally well
26 established that 'a motion to strike improper testimony must be made as soon as the ground

1 for such motion is disclosed' . . . and that an objection to proffered evidence *not made in the*
2 *trial court* will not be considered for the first time on appeal" (citing *Wallender*)) (emphasis
3 added); *Wallender v. Michas*, 256 Or. 587, 591 (1970) (" . . . since no objection was made
4 *when the testimony . . . was offered in evidence . . .*") (emphasis added).

5 ICNU's argument that PacifiCorp waived its ability to object to ICNU's testimony
6 because PacifiCorp submitted rebuttal testimony similarly conflates the act of pre-filing
7 testimony with the act of offering such testimony into the record at hearing. PacifiCorp's
8 motion specifically noted that it would not seek to admit its testimony responding to
9 Ms. Blumenthal's testimony if its motion in limine was granted. PacifiCorp's Motion in Limine
10 at 2 n.1. At the hearing on February 22, 2008, PacifiCorp offered its testimony into the
11 record (including testimony responding to Ms. Blumenthal's contested testimony)
12 conditionally based upon the outcome of its motion.

13 In summary, the rules provide that a party may raise an objection to admissibility of
14 evidence at or before the hearing where the evidence is offered into the record. There are
15 no decisions of the Commission that hold that a party can waive its objections to the
16 admissibility of evidence through pre-hearing filings.

17 **2. A Motion in Limine Is an Appropriate Pleading to Request That an ALJ**
18 **Exclude Irrelevant Evidence.**

19 Contrary to ICNU's argument, motions in limine are routinely filed to address issues
20 of relevance, not just issues of prejudice. See, e.g., *Dew v. Scappoose*, 208 Or. App. 121,
21 128 (2006); *Central Lincoln People's Util. Dist. v. Verizon NW Inc.*, Motion in Limine Denied
22 at 2, Docket UM 1087 (Oct. 6, 2004). While motions in limine and motions to strike appear
23 to be used interchangeably, the latter form of motion is often directed at pleadings and
24 briefs, while the former is used, as here, for challenges to the admissibility of evidence.

25 In any event, OAR 860-011-0000(5) states that Commission rules are to be liberally
26 construed to secure just, speedy, and inexpensive determination of issues presented. For

1 the sake of administrative efficiency, the Commission has liberally construed filings to avoid
2 directing a party to file a new pleading. *See, e.g., In re Pacific Power & Light, dba*
3 *PacifiCorp*, Petition to Amend Protective Order Denied, Order No. 08-002, Docket UE 177
4 (Jan. 3, 2008) (construing ICNU's motion to modify the protective order as a petition to
5 amend an order). Even if ICNU's complaints about the form of PacifiCorp's motion were
6 technically accurate (which they are not), they should not impact the Commission's decision
7 on the merits of the motion.¹

8 **B. ICNU's Testimony Is Irrelevant as a Collateral Attack on the Commission's**
9 **Rules.**

10 Despite ICNU's attempt to characterize Ms. Blumenthal's testimony as relating to the
11 "result" in PacifiCorp's tax report, the testimony PacifiCorp seeks to exclude consists
12 exclusively of legal argument encouraging the Commission to waive its rules. ICNU admits
13 in its Reply that this testimony lays the groundwork for a challenge to the SB 408 rules when
14 it states that "Ms. Blumenthal's Testimony is Necessary Evidence for Challenging OAR
15 § 860-022-0041." ICNU's Reply at 7. As such, the testimony is an impermissible attack on
16 the validity of the Commission's SB 408 rules and is irrelevant to this docket. The proper
17 forum for such an attack is under the provisions of the Oregon Administrative Procedure Act
18 ("APA").

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21 ¹ Although the Commission's rules generally provide a party with 15 days to respond to a
22 motion, the ALJ can specify a shorter time period for a response. OAR 860-013-0031. The rule does
23 not require the moving party, in this case PacifiCorp, to request expedited review of the motion for the
24 ALJ or the Commission to shorten the response period, as ICNU implies in its Reply. ICNU's Reply
25 at 4-5. It is reasonable for the Commission or an ALJ to require a shorter response period in a
proceeding with strict statutory deadlines, especially when the motion is of the type that is reasonably
made and ruled upon at hearing rather than days before. ICNU actually received extra time to
respond to PacifiCorp's motion than it would have if PacifiCorp waited until the hearing to object.

26

1 Motion at 3–5. ICNU’s citations to the Commission’s ruling in UE 170 and Staff’s brief in the
2 *Crooked River* case do not support ICNU’s contrary argument. First, in UE 170, the
3 Commission held that it could change calculation of taxes without formally amending a rule,
4 because the current calculation of taxes was not based on a rule. *In re Pacific Power &*
5 *Light Co. dba PacifiCorp*, Order No. 06-379 at 9, Dockets UE 170 and UM 1229 (July 10,
6 2006). The Commission never said that it was waiving a rule in that case—it disagreed with
7 PacifiCorp that it was applying a rule at all.

8 ICNU also relies upon Staff’s brief before the Court of Appeals in *Crooked River*
9 *Ranch Water Co. v. Pub. Util. Comm’n*, CA A134177 (Jan. 22, 2008). Staff’s position in that
10 case is not that the Commission should waive application of a rule, but rather that it should
11 interpret a rule in the spirit of the statute. See *In re Crooked River Ranch Water Co.: An*
12 *Investigation Pursuant to ORS 756.515 to Determine Jurisdiction*, Order Asserting
13 Jurisdiction, Order No. 06-642 at 3, Docket WJ (Nov. 20, 2006).

14 In sum, ICNU has presented no authority for the proposition that the Commission
15 may waive OAR 860-022-0041 in this proceeding. Therefore, ICNU’s testimony urging such
16 a waiver is irrelevant and inadmissible.

17 **3. ICNU Is Not Required to Challenge Rules in This Docket and This**
18 **Docket Is Irrelevant to Such a Challenge.**

19 ICNU claims that that under ORS 183.400(1), it must challenge the validity of the rule
20 in this docket or risk waiving this challenge. ICNU cites *Minor v. Adult & Family Services*
21 *Division* for this proposition. In reality, *Minor* stands for the opposite proposition.

22 ORS 183.400(1) states that a petitioner may not challenge the validity of a rule when
23 the petitioner is “a party to an order or a contested case in which the validity of the rule may
24 be determined by the court.” This was interpreted in *Minor* to mean that a party does not
25 lose its ability to challenge the validity of a rule in the future if it fails to challenge the rule
26 when it is first applied. *Minor v. Adult & Family Services Div.*, 105 Or. App. 178, 182 (1991).

1 The prohibition under ORS 183.400(1) simply limits a party from simultaneously challenging
2 a rule in an appeal of an order in a pending contested case and in a case brought directly
3 under the Oregon APA. *Id.*

4 In any event, to the extent that ICNU asserts the need to raise arguments against the
5 validity of the SB 408 rules now to preserve them on appeal of the Commission's decision in
6 this case, the proper expression of such arguments is in legal briefing, not in testimony.
7 Evidence of the validity of OAR 860-022-0041 is not relevant, because the Commission
8 cannot waive its rules in this case and the Oregon APA provides a forum for ICNU's attack
9 on the rules.

10 **4. ICNU's Argument that this is the First Opportunity to Raise its**
11 **Arguments is Incorrect and Irrelevant.**

12 ICNU states that this docket is its first opportunity to determine how OAR 860-022-
13 0041 operates with actual tax data. This is incorrect. PacifiCorp's 2005 tax report included
14 actual tax data, even though it did not trigger a rate change. *See In re PacifiCorp, dba*
15 *Pacific Power & Light Company, et al.*, Order No. 07-138 (2007). ICNU had the opportunity
16 to review at that time how the rules would work as applied to PacifiCorp. If it wished, ICNU
17 could have brought a proper Oregon APA challenge to OAR 860-022-0041 at any point after
18 that filing.

19 **C. ICNU's Arguments Regarding the Protective Order Have Been Addressed by**
20 **the Commission and Are Therefore Irrelevant.**

21 Despite ICNU's strained characterization of Ms. Blumenthal's safe room testimony as
22 providing an explanation as to why she could not provide an alternative calculation for
23 PacifiCorp's tax report, it is evident on the face of her testimony that it simply reiterates
24 ICNU's previous objections to the Protective Order. This is now the third time the
25 Commission will review these arguments, so there is no need for ICNU to further add to its
26 record on this point. *See In re PacifiCorp, Petition to Amend Protective Order Denied, Order*

1 No. 08-002, Docket UE 177 at 5 (Jan. 3, 2008); *In re PacifiCorp*, Motion for Amended
2 Protective Order Granted in Part, Order No. 06-033, Docket UE 177 at 5 (Jan. 25, 2006).
3 These arguments have been decided by the Commission and are no longer relevant.

4 In addition, in Order No. 08-002, the Commission found that ICNU failed to show that
5 it made a reasonable attempt to work within the Protective Order. Ms. Blumenthal made no
6 additional attempts to visit the safe room after the Commission issued Order No. 08-002.
7 Therefore, her arguments pertaining to the safe room and the Protective Order should
8 receive little weight, if any, if the Commission does not exclude them as irrelevant.

9 **II. CONCLUSION**

10 For all of the foregoing reasons, PacifiCorp requests that the Commission grant its
11 Motion in Limine filed on February 19, 2008.

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13 DATED: February 25, 2008

MCDOWELL & RACKNER PC

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16 Katherine McDowell

17 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: February 25, 2008



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