

# McDowell & Rackner PC



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

March 19, 2008

## VIA ELECTRONIC FILING AND U.S. MAIL

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**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 Motion for Expedited Certification. 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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**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.

Lowrey R. Brown  
Citizens' Utility Board of Oregon  
lowrey@oregoncub.org

Robert Jenks  
Citizens' Utility Board  
bob@oregoncub.org

Jason Eisdorfer  
Citizens' Utility Board  
jason@oregoncub.org

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

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

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

DATED: March 19, 2008

  
Amie Jamieson

Of Attorneys for PacifiCorp

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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 TO ICNU'S  
MOTION FOR EXPEDITED  
CERTIFICATION**

**I. INTRODUCTION**

Pursuant to OAR 860-013-0050(3)(d), PacifiCorp submits this Response to the Motion for Expedited Certification of the Industrial Customers of Northwest Utilities ("ICNU") to the Public Utility Commission of Oregon ("Commission"). While PacifiCorp does not object to Administrative Law Judge ("ALJ") Allan Arlow certifying his March 3, 2008 ruling granting PacifiCorp's Motion in Limine Objecting to the Admission of the Direct Testimony of Ellen Blumenthal for ICNU ("Motion in Limine"), PacifiCorp respectfully requests that the Commission uphold ALJ Arlow's ruling. If the Commission reverses ALJ Arlow's ruling, however, PacifiCorp requests that the Commission also reverse ALJ Arlow's ruling allowing PacifiCorp to withdraw its testimony that was responsive to ICNU's excluded testimony. (Tr. 38, Line 11-Tr. 38, Line 15.) PacifiCorp's withdrawal of this testimony was predicated on the Commission excluding ICNU's testimony, so PacifiCorp requests that the Commission re-admit PacifiCorp's testimony should it reverse ALJ Arlow's ruling. See *Re PacifiCorp's Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, PacifiCorp's Motion in Limine at 2 n.1 (Feb. 19, 2008).

1 For the reasons discussed by PacifiCorp in its Motion in Limine<sup>1</sup> and its response to  
2 ICNU's Reply to PacifiCorp's Motion in Limine ("PacifiCorp's Response")<sup>2</sup> filed in this docket  
3 and incorporated into this Response to Motion for Certification by reference, and for the  
4 reasons discussed below, the Commission should uphold ALJ Arlow's ruling excluding  
5 ICNU's irrelevant testimony from the record in this docket.

6 **II. DISCUSSION**

7 **A. The Excluded Testimony Is Irrelevant and Therefore Inadmissible.**

8 **1. The Commission Cannot Waive OAR 860-022-0041.**

9 ICNU does not deny that the excluded testimony serves solely to challenge the  
10 validity of OAR 860-022-0041. ICNU states that Ms. Blumenthal's testimony is "key  
11 evidence regarding the question of whether the Commission's rules comply with SB 408."  
12 Motion for Expedited Certification at 5. ICNU continues to argue that the testimony is  
13 relevant, because the Commission can choose whether or not to apply its SB 408 rules to  
14 PacifiCorp's tax report. Motion for Expedited Certification at 10.

15 This argument is flatly contradicted by the Oregon Administrative Procedure Act  
16 ("APA") and case law. The Oregon Supreme Court has stated that if an agency "has limited  
17 its own discretion by enacting [a] rule, *it may not disregard the rule while it is in effect.*"  
18 *Lombardo v. Warner*, 340 Or. 264, 272 (2006) (emphasis added). In the absence of a  
19 court's declaration of the rule to be invalid, the rule is binding on the agency until it is  
20 amended or repealed according to the APA. *Burke v. Children's Serv. Div.*, 288 Or. 533,  
21 538 (1980). ICNU has not cited case law or statutes that contradict this fundamental  
22 premise of administrative law.

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25 <sup>1</sup> Dated February 19, 2008.

26 <sup>2</sup> Dated February 25, 2008.

1 ICNU argues that ORS 183.482(8)(b)(B) allows the Commission to act inconsistent  
2 with its own rules, so long as the Commission explains the inconsistency. Motion for  
3 Expedited Certification at 10. The Oregon Supreme Court, however, explained that this  
4 provision “appears to contemplate that *in the absence of rules* agencies will articulate their  
5 position in making orders or at least in keeping records of their practices.” *Megdal v. Or.*  
6 *State Bd. of Dental Examiners*, 288 Or. 293, 320 n.25 (1980) (emphasis added). Indeed,  
7 the case law interpreting this statute applies it to agency orders, policy, and practices, not  
8 official rules promulgated in accordance with the APA. *See, e.g., Gordon v. Board*, 343 Or.  
9 618, 633–34 (2007); *Hays v. Tillamook Cty. Gen. Hosp.*, 160 Or. App. 55, 59 (1999). ICNU  
10 has not cited a case where the court held this statute to allow an agency to waive an official  
11 rule as long as the waiver was explained, and PacifiCorp is not aware of any case to that  
12 effect.

13 ICNU’s avenues for addressing what it perceives to be the inadequacies of the  
14 Commission’s rules are outlined in the APA. First, it may bring a challenge in the Court of  
15 appeals under ORS 183.400. Second, it may petition the Commission to amend or repeal  
16 the rules under ORS 183.390(1). Not only is ICNU not required to raise the issue of the  
17 relevancy of the rules in this proceeding as it claims it is, it cannot raise the issue.<sup>3</sup> Neither  
18 the APA nor the Commission’s rules allow ICNU to challenge the relevancy of or  
19 recommend amendments to the rules as a collateral matter in this proceeding. If collateral  
20 attacks on the Commission’s rules were generally permissible, the Commission would

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22 <sup>3</sup> ICNU persists in its misreading of ORS 183.400(1). *See* Opening Brief of ICNU at 18,  
23 Docket UE 177 (Mar. 14, 2008). ICNU is barred from challenging the rule under ORS 183.400(1)  
24 only while ICNU could challenge the order in this case. *Minor v. Adult & Family Serv. Div.*, 105 Or.  
25 App. 178, 182 (1999). Therefore, ICNU could challenge the validity of the rule by appealing the order  
in this case under ORS 183.400(2) or by challenging the rule without reference to these proceedings  
under ORS 183.400(1), so long as the time for challenging the order in this case has elapsed. The  
APA does not require ICNU to preserve its arguments on the validity of OAR 860-022-0041 in order  
to challenge the rule under ORS 183.400.

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1 theoretically be required to adjudicate the validity of its rules in every proceeding before it—  
2 an outcome that is obviously untenable and underscores the unreasonableness of ICNU's  
3 argument. ICNU's evidence on the validity of OAR 860-022-0041 is irrelevant and  
4 inadmissible.

5           **2. ALJ Arlow Did Not Exclude Relevant Testimony from the Record.**

6           Despite ICNU's claim that ALJ Arlow's ruling strikes testimony that discussed facts  
7 related to PacifiCorp's tax report, it is apparent on a review of the testimony that this is not  
8 the case. The ruling was selective and excluded only testimony that discussed the validity  
9 of OAR 860-022-0041 generally. For example, ICNU complains that the ruling struck  
10 testimony comparing PacifiCorp to other companies. See ICNU/100, Blumenthal/9. The  
11 testimony cited by ICNU in support of this statement, however, never actually discusses  
12 PacifiCorp or its tax report. The testimony is general objection to the calculations contained  
13 in OAR 860-022-0041 that does not address PacifiCorp. As ALJ Arlow noted at the hearing,  
14 legal arguments interpreting OAR 860-022-0041 do not belong in the testimony of an expert  
15 witness testifying on accounting issues. (Tr. 34, Lines 5–15.) Testimony discussing the  
16 general validity of the Commission's rules is irrelevant and was properly excluded.

17 **B. ICNU Has Not Suffered Undue Prejudice as a Result of Exclusion of the**  
18 **Testimony.**

19           ICNU has not suffered undue prejudice as a result of ALJ Arlow's ruling. First, a  
20 party does not suffer undue prejudice when its irrelevant evidence is excluded from the  
21 record. The Commission's rules specifically provide that irrelevant testimony is not  
22 admissible. OAR 860-014-0045(1)(a). A party does not suffer undue prejudice by the  
23 Commission merely applying its clear and long-standing rules to the proceeding. In fact,  
24 PacifiCorp could argue that it would be unduly prejudiced if the Commission considers the  
25 evidence, given that the APA and case law dictate that the testimony is not relevant in this  
26 proceeding.

1 Second, as discussed above, ICNU's relevant testimony remains in the record.

2 ICNU's testimony relating to PacifiCorp and its tax report remains in the record.

3 **C. The Time Period Required for ICNU's Response and the Timing of PacifiCorp's**  
4 **Motion in Limine Did Not Prejudice ICNU or Deprive it of Due Process.**

5 ICNU was not prejudiced by the time period imposed by ALJ Arlow for ICNU's  
6 Response to PacifiCorp's Motion in Limine. The parties and the Commission have  
7 acknowledged the limitations the statutory deadlines place on these proceedings. As a  
8 result, both PacifiCorp and ICNU have been required to respond to pleadings on an  
9 expedited basis. For example, ICNU filed its Reply to PacifiCorp's Motion in Limine on a  
10 Friday, and PacifiCorp's Response was due the following Monday—essentially a one  
11 business day reply time. ICNU's three-day response time on the Motion in Limine was  
12 reasonable given the constraints of the docket.

13 In addition, ICNU was not prejudiced by the timing of PacifiCorp's Motion in Limine.  
14 First, ICNU was aware of the scope of the docket before it filed its testimony. ICNU should  
15 have known it was risking the testimony not being admitted by filing testimony outside the  
16 scope of the docket. Second, no Commission rule prescribed the time period by which  
17 PacifiCorp was required to object to the admissibility of the testimony, other than at the time  
18 the testimony was offered. It would be unfair to retroactively apply a timeline to PacifiCorp  
19 that the Commission did not apply to PacifiCorp before PacifiCorp filed its motion. Finally,  
20 PacifiCorp filed its motion three days before the hearing, rather than at the hearing when the  
21 evidence was admitted. This provided ICNU a reasonable time based on the short time  
22 periods applicable to this docket to respond to the arguments in the Motion in Limine.  
23 Indeed, ICNU's Motion for Expedited Certification has provided ICNU with another  
24 opportunity to make its argument to the Commission. Therefore, ICNU has had ample time  
25 and opportunity to be heard by the Commission on this issue.

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1 **D. If the Commission Allows the Testimony, It Should Give the Testimony No**  
2 **Weight.**

3 Finally, if the Commission reverses ALJ Arlow's ruling and includes the testimony in  
4 the record, the Commission should give the testimony no weight. As discussed in detail in  
5 PacifiCorp's Post-Hearing Brief, Ms. Blumenthal's testimony shows that her review of  
6 PacifiCorp's tax report was cursory, she has limited experience with SB 408 and Oregon tax  
7 law, many of her statements about PacifiCorp's tax report were inaccurate, and her  
8 testimony failed to explain the inconsistencies between her testimony and ICNU's previous  
9 positions on the Commission's rules. These elements seriously erode the weight of her  
10 testimony to the degree that the testimony does not assist the Commission in making a  
11 decision in this docket.

12 **III. CONCLUSION**

13 For the reasons stated above, PacifiCorp respectfully requests that if ALJ Arlow's  
14 Ruling excluding ICNU's testimony is certified, that the Commission uphold the ruling in all  
15 respects.

16  
17 DATED: March 19, 2008

McDOWELL & RACKNER PC

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20 Katherine McDowell  
21 Amie Jamieson

22 Attorneys for PacifiCorp  
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