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November 17, 2010

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 please find an original and one copy of PacifiCorp's Response in Opposition to ICNU's 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 certificate of service.

Very truly yours,

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.

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DATED: November 17, 2010


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 & LIGHT
6 COMPANY

7 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**

8
9 Pursuant to OAR 860-001-0420(5), PacifiCorp (or the Company) submits this
10 response to the Public Utility Commission of Oregon (Commission) in opposition to the
11 Industrial Customers of Northwest Utilities' (ICNU) Motion to Modify the Protective Order
12 (Motion) filed on November 2, 2010. ICNU proposes to modify the protective order in this
13 proceeding (Protective Order) to allow ICNU's consultant to receive a copy of PacifiCorp's
14 Highly Confidential tax information at her home office in Texas.

15 This is the seventh time that ICNU has raised a challenge to the Protective Order in
16 one form or another. ICNU has provided no basis for the Commission to revisit the issue.
17 ICNU has failed to make a reasonable effort to operate under the terms of the Protective
18 Order. In addition, the troubling circumstances around ICNU's handling of Portland General
19 Electric Company's (PGE) Highly Confidential tax information provide new evidence that the
20 Protective Order is necessary to protect the Highly Confidential tax information of PacifiCorp
21 and its unregulated affiliates.

22 PacifiCorp requests that the Commission again reject ICNU's proposal to lessen the
23 protection afforded PacifiCorp's Highly Confidential tax information.

24 **I. BACKGROUND**

25 The Commission issued the Protective Order in this docket on January 25, 2006. *Re*
26 *PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses under the Terms of SB*

1 408, Docket UE 177, Order No. 06-033 (Jan. 25, 2006). The Commission did so pursuant to
2 SB 408, which states that an intervenor may have access to the tax information only “upon
3 signing a protective order prepared by the commission.” ORS 757.268(11). The Protective
4 Order effectuates the Legislature’s express finding in ORS 757.267(1)(g) that “Tax information
5 of a business is commercially sensitive. Public disclosure of tax information could provide a
6 commercial advantage to other businesses.”

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

13 ICNU has objected to the requirements established in the Protective Order on multiple
14 occasions. In all cases, the Commission has affirmed the validity of the Protective Order. In
15 addition to rejecting ICNU’s objections to implementing the Protective Order in the first
16 instance, the Commission rejected ICNU’s Petition to Amend the Protective Order in 2008.
17 *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses under the Terms of*
18 *SB 408*, Docket UE 177, Order No. 08-002 (Jan. 3, 2008) [hereinafter “Order No. 08-002”]. In
19 2009, the Commission again rejected ICNU’s arguments against the safe room procedure in
20 both PacifiCorp’s¹ and PGE’s² tax report dockets. Administrative Law Judge Michael Grant
21 also rejected ICNU’s request that it be provided a complete record, including Highly
22 Confidential tax information, in the appeal of this docket to the Oregon Court of Appeals. *Re*

23 _____

24 ¹ *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses under the Terms of*
25 *SB 408*, Docket UE 177, Order No. 09-127 at 9 (Apr. 10, 2009) [hereinafter “Order No. 09-127”].

26 ² *Re Portland Gen. Elec. Co. SB 408 Tax Report for Calendar Year 2007*, Docket UE 178(1),
Order No. 09-126 at 8-11 (Apr. 10, 2009) [hereinafter “PGE Order”].

1 *PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses under the Terms of SB*
2 *408*, Docket UE 177, Ruling (Oct. 27, 2008). The express basis of this order was the need to
3 “preserve the integrity of the protective order.” *Id.* Finally, the Commission has defended its
4 denial of ICNU’s Petition to Amend the Protective Order before the Oregon Court of Appeals.
5 *Indus. Cust. of NW Util. v. Pub. Util. Comm’n of Oregon and PacifiCorp*, Or. App. CA
6 A138879, Respondent Public Utility Commission’s Answering Brief (Sept. 18, 2009).

7 In rejecting ICNU’s Protective Order arguments, the Commission has twice found that
8 ICNU had not made a reasonable attempt to work within the Protective Order procedures in
9 PacifiCorp’s tax report cases. The Commission found that ICNU failed to show that it made
10 such an attempt with respect to the 2006 Tax Report, and that “the protections afforded the
11 highly confidential tax information should not be compromised because ICNU waited so long
12 to become fully engaged in the docket.” Order No. 08-002 at 6. The next year, the
13 Commission found that “[b]y failing to make any reasonable effort to work within the terms of
14 the Protective Order, ICNU cannot claim that the terms of that Protective Order prevented it
15 from meaningful participation in this proceeding.” Order No. 09-127 at 9.

16 ICNU has retained Ellen Blumenthal as its tax consultant for PacifiCorp’s tax report
17 dockets. Ms. Blumenthal’s place of business is in Corpus Christi, Texas. PGE Order at 8.
18 PacifiCorp understands that Ms. Blumenthal’s business address is her residence.³

19 Ms. Blumenthal has also acted as ICNU’s tax consultant in PGE’s SB 408
20 proceedings. PGE Order at 8. In PGE’s tax report docket during 2008-2009, Ms. Blumenthal
21 filed testimony stating that it was “impossible to write testimony . . . without having the
22 documents on hand,” and that it is “equally impossible to draft testimony in the safe room with
23

24 ³ The address that Ms. Blumenthal provides as her business address is not an office of GDS
25 Associates, Inc., of which Ms. Blumenthal is a principal. *Re Portland Gen. Elec. Co. SB 408 Tax Report*
26 *for Calendar Year 2007*, Docket UE 178, Direct Testimony of Ellen Blumenthal; ICNU/100, Blumenthal/1,
lines 19-20 (Jan. 28, 2009).

1 a company representative present.” PGE Order at 8. Ms. Blumenthal’s direct testimony in
2 that case omitted the fact that PGE sent her a copy of its Highly Confidential tax report. *Re*
3 *Portland Gen. Elec. SB 408 Tax Report for Calendar Year 2007*, Docket UE 178(1), Direct
4 Testimony of Ellen Blumenthal; ICNU/100, Blumenthal/6 (Jan. 28, 2009).

5 Ms. Blumenthal admitted on cross-examination that she destroyed the Highly
6 Confidential documents without reviewing them upon advice from ICNU’s counsel. PGE
7 Order at 9. Ms. Blumenthal stated first that she shredded the documents in her office paper
8 shredder; she then stated that she provided the documents to an outside shredding company
9 for destruction. Docket UE 178, Tr. at 24-25 (Mar. 4, 2009).

10 The Commission rejected ICNU’s arguments in that case, citing the Commission’s
11 denial of ICNU’s motion to amend the Protective Order in this docket and finding that
12 “[b]ecause ICNU deliberately destroyed the materials it now complains it could not review, we
13 find ICNU’s arguments to be unconvincing.” PGE Order at 11.

14 PacifiCorp filed its tax report in this docket as required by SB 408 on October 15,
15 2010. Pursuant to the terms of the Protective Order, PacifiCorp sent a copy of the tax report
16 and workpapers to the safe rooms in Portland and Salem. ICNU’s consultant visited the
17 Portland safe room for the first time in reference to the 2009 Tax Report on the morning of
18 November 2, 2010. ICNU filed this Motion on the afternoon of that same date.

19 II. ARGUMENT

20 A. The Commission Has Repeatedly Rejected ICNU’s Attempts to Challenge the 21 Protective Order.

22 The Commission’s position on the Protective Order is clear. The Commission has
23 consistently found that the Protective Order sets forth “an appropriate mechanism to govern
24 the review and use of highly confidential tax information” filed in SB 408 dockets. PGE Order
25 at 11. The Commission has also found that “the potential harm of the public release of the
26 highly confidential information outweighed the inconvenience to parties.” Order No. 08-002 at

1 5. The Commission implemented, upheld, or defended the Protective Order in response to
2 ICNU's arguments on six previous occasions.⁴ Given the Commission's repeated and
3 consistent finding that the Protective Order is necessary to protect Highly Confidential tax
4 information, ICNU bears a substantial burden in showing that the Commission should now
5 modify the Protective Order.

6 **B. ICNU Presents No Basis for Changing the Commission's Long-Standing Policy**
7 **that the Protective Order is Necessary to Protect the Tax Information of**
8 **PacifiCorp and its Affiliates.**

8 ICNU makes two arguments for changing the Commission's established course on
9 protecting the Highly Confidential tax information of PacifiCorp and its affiliates. First, ICNU
10 claims that it can now show that the current process is unworkable, in spite of the
11 Commission's previous findings that ICNU did not make a good faith effort to operate under
12 the Protective Order. Second, ICNU claims that Ms. Blumenthal's experience with PGE's tax
13 report shows that providing her with Highly Confidential material does not create a risk of
14 disclosure. ICNU's arguments are without merit.

15 **1. ICNU Has Not Made a Reasonable Attempt to Work within the Protective**
16 **Order Procedures.**

17 ICNU repeats its past arguments that the safe room process limits its ability to
18 effectively review PacifiCorp's tax report. The Commission has previously "acknowledged the
19 inconvenience imposed by the use of a safe room," but refused to modify the protective order
20 on this basis. Instead, the Commission agreed to consider additional intervenor funding for
21 ICNU to mitigate this issue. Order No. 08-002 at 5. ICNU has alleged no new circumstances
22 that support reconsideration of this finding.

23 ICNU argues that it has made a good faith effort to work under the Protective Order
24 and has been unable to do so. However, the Commission has explicitly found that ICNU did

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26 ⁴ See page 2, line 16 through page 3, line 9 above.

1 not make a reasonable effort to work within the terms of the Protective Order in PacifiCorp's
2 tax report dockets during 2007-2008 and 2008-2009. Since that time, ICNU has not tried to
3 use the safe room in any meaningful way.⁵ For example, ICNU filed this Motion on the same
4 day that Ms. Blumenthal visited the safe room for the first time to view PacifiCorp's 2009 tax
5 report.

6 ICNU relies primarily on its conduct in relation to PGE's tax reports as evidence that it
7 has operated in good faith under the Protective Order. As discussed below, however, ICNU's
8 problematic behavior with respect to PGE's tax report docket in 2008-2009 directly
9 undermines ICNU's contention.

10 Finally, as shown in the attachment to ICNU's Motion, PacifiCorp has offered to take
11 "all reasonable steps" to facilitate Ms. Blumenthal's access to the safe rooms, consistent with
12 the Protective Order. ICNU did not respond to PacifiCorp's offer. Therefore, the Commission
13 should discount ICNU's arguments against the safe room requirements, as ICNU has not
14 attempted to propose reasonable steps to mitigate the alleged infirmities of the safe room
15 process. Additionally, ICNU's arguments as to the safe room inconveniences relate primarily
16 to the fact that ICNU has retained a Texas-based consultant. Protection of PacifiCorp's and
17 its affiliates' tax information should not be compromised as a result of ICNU's choice to hire an
18 out-of-state consultant.

19 **2. Providing a Copy of Highly Confidential Materials to ICNU's Consultant**
20 **Presents an Unreasonable Risk of Disclosure.**

21 ICNU claims that "the experience with PGE shows that providing Ms. Blumenthal with
22 a copy of the highly confidential material will not create a risk of disclosure." To the contrary,

23 ⁵ ICNU visited the Portland safe room on November 10 and 11, 2009 to review the Company's
24 2008 tax report. ICNU did not file substantive testimony addressing the Company's 2008 tax report, but
25 filed testimony objecting to the Protective Order. *See re PacifiCorp Filing of Tariffs Establishing*
26 *Automatic Adjustment Clauses under the Terms of SB 408*, Docket UE 177(3), ICNU/100, Early/3 (Jan.
14, 2010). ICNU visited the Portland safe room on the mornings of November 2 and 3, 2010 to review
the Company's 2009 tax report.

1 ICNU's conduct with respect to PGE's tax report docket during 2008-2009 validates
2 PacifiCorp's concerns regarding the protection of its Highly Confidential tax information under
3 ICNU's proposal.

4 In that proceeding, PGE sent Ms. Blumenthal a copy of the tax report, which she
5 deliberately destroyed on the advice of ICNU counsel. PGE Order at 8-10. Even after she
6 received and destroyed PGE's 2007 tax report, Ms. Blumenthal testified that ICNU had not
7 actively participated in PGE's or PacifiCorp's "2007 tax reports because of the impossibility of
8 conducting a meaningful tax report analysis under the current safe room requirements." *Re*
9 *Portland Gen. Elec. SB 408 Tax Report for Calendar Year 2007*, Docket UE 178(1), Direct
10 Testimony of Ellen Blumenthal; ICNU/100, Blumenthal/6 (Jan. 28, 2009). It was not until the
11 hearing that Ms. Blumenthal admitted on cross-examination that she shredded the documents
12 on advice of counsel without reviewing them. PGE Order at 9. Ms. Blumenthal did not inform
13 PGE that she received and destroyed the tax report. Nor did she ask PGE whether she
14 should return the tax report to PGE after ICNU's counsel directed her not to review it.

15 Moreover, Ms. Blumenthal provided two contradictory explanations for how she
16 destroyed the tax report. First she stated that she shredded the document in her office
17 without opening it. Docket UE 178, Tr. at 24 (Mar. 4, 2009). Upon further questioning from
18 PGE on the size of the document, which would potentially call into question whether the
19 unopened document could be shredded in an office shredder, Ms. Blumenthal stated that she
20 does not recall the size of the package because she provides boxes of documents to be
21 destroyed to a shredding company, which shreds the documents in a truck in her driveway.
22 Docket UE 178, Tr. at 25 (Mar. 4, 2009).

23 The circumstances around ICNU's handling of PGE's Highly Confidential tax report—
24 including ICNU's obfuscation about its actual possession of PGE's tax report, the
25 unauthorized destruction PGE's tax report, Ms. Blumenthal's contradictory explanations for
26 the destruction of PGE's tax report, and the concerns raised by providing the documents to a

1 third party for destruction—show that PacifiCorp has a reasonable concern that its Highly
2 Confidential information may be disclosed or mishandled if the Protective Order is modified as
3 ICNU requests.

4 In addition, ICNU's Motion makes repeated reference to providing Highly Confidential
5 documents to Ms. Blumenthal's "office in Texas." PacifiCorp understands based on the
6 business address Ms. Blumenthal has provided to the Commission that ICNU is requesting
7 that PacifiCorp provide the Highly Confidential information to Ms. Blumenthal's home.
8 Providing sensitive tax information to a private residence increases concerns related to an
9 inadvertent release of information.

10 These circumstances aside, ICNU's experience with PGE's tax report does not provide
11 a basis for modifying the protective order with respect to PacifiCorp. The Commission has
12 previously found that the nature of PacifiCorp's tax filing increases the need for heightened
13 protection. Order No. 08-002 at 5. PacifiCorp's tax report "contains sensitive tax information
14 from the hundreds of unregulated companies that are included in Berkshire Hathaway's
15 consolidated filing." *Id.* PGE's tax report contains no such information related to multiple
16 unregulated entities. The inclusion of sensitive tax information related to hundreds of
17 unregulated companies increases the harm that could result from a disclosure of PacifiCorp's
18 tax information.

19 Finally, even if Ms. Blumenthal's treatment of PGE's tax report engendered confidence
20 and PacifiCorp's tax report did not require heightened protection, ICNU's reliance on the
21 apparent lack of improper release of PGE's tax information as a basis for amending the
22 Protective Order is misplaced. The Commission does not require a party to show that
23 disclosure has actually occurred before implementing appropriate protections. The
24 Commission considers the harm that could result from disclosure and the risk of such
25 disclosure in establishing protections for commercially sensitive information. Protective Order
26 at 5. The Commission has found that "significant harm . . . might occur from the disclosure of

1 the tax information and [a] regrettable risk of disclosure . . . now exists.” Protective Order at 4.
2 To require a utility to show that tax information has been improperly disclosed before providing
3 adequate protections would undermine the legislature’s intent in requiring the Commission to
4 allow access to the tax information only pursuant to a protective order.

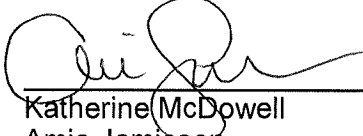
5 **III. CONCLUSION**

6 The Company requests that the Commission again reaffirm that the safe room
7 discovery mechanism is required to protect PacifiCorp’s Highly Confidential tax information
8 filed in this proceeding. ICNU has presented no basis for undermining the protection of
9 PacifiCorp’s tax information. ICNU’s conduct with respect to PGE’s tax report docket in 2008-
10 2009 gives the Commission further evidence for affirming the Protective Order. Therefore, the
11 Company respectfully requests that the Commission deny ICNU’s Motion.

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DATED: November 17, 2010.

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