

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UE 177**

In the Matter	)	
	)	
OREGON PUBLIC UTILITY STAFF	)	INDUSTRIAL CUSTOMERS OF
	)	NORTHWEST UTILITIES'
Requesting the Commission Direct	)	EXPEDITED MOTION TO MODIFY
	)	THE PROTECTIVE ORDER
PACIFICORP, dba PACIFIC POWER	)	
& LIGHT COMPANY,	)	
	)	
to File Tariffs Establishing Automatic	)	
Adjustment Clauses Under the Terms of	)	
SB 408.	)	

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Pursuant to OAR § 860-013-0031, the Industrial Customers of Northwest Utilities (“ICNU”) submits this Expedited Motion to the Public Utility Commission of Oregon (“OPUC” or the “Commission”) requesting that the Protective Order issued in these proceedings be modified with respect to PacifiCorp in Docket UE 177. ICNU requests expedited consideration to its Motion given the current schedule in this proceeding. The Commission’s Protective Order precludes ICNU and its out-of-state consultant (the “Consultant”) from viewing or possessing documents designated as “highly confidential” (namely, PacifiCorp’s tax report, workpapers, and discovery materials) outside of the Portland Safe Room. Re PacifiCorp, Docket Nos. UE 177 and 178, UG 170 and 171, Order No. 06-033 at 4-5 (“Order No. 06-033”).

ICNU requests that the Consultant be allowed to have a copy of the tax report, workpapers, and discovery materials in her possession under strict confidentiality

or to have the documents be kept in a Safe Room in Houston, Texas. Order No. 06-033 has made it impossible for ICNU to effectively participate in these proceedings. This is particularly the case in this Docket, as the corporate structure that PacifiCorp is a part of is extremely complex, and a thorough examination of PacifiCorp's tax report and workpapers will involve a significantly greater amount of time compared to other utilities subject to the requirements of Senate Bill 408 ("SB 408"). In addition, it is simply cost prohibitive to have the Consultant be located in Portland, Oregon while preparing her testimony.

As a result, ICNU is requesting that Order No. 06-033 be amended in this Docket to allow the Consultant to possess a copy of highly confidential materials at her place of business, subject to all other terms of Order No. 06-033, or require the establishment of a Safe Room in Houston, Texas, closer to the Consultant's place of business, reducing the burden imposed by traveling to the Portland Safe Room. ICNU has reached an agreement with Portland General Electric Company ("PGE"), making modification of Order No. 06-033 unnecessary in Docket UE 178.

## **I. BACKGROUND**

In 2005, the Oregon Legislature passed SB 408, requiring public utilities to file tax reports with the Commission. SB 408 requires the establishment of an automatic adjustment clause if the Commission finds that the amount of taxes collected in rates differs from the amount of taxes paid to units of government by more than \$100,000. ORS § 757.268(4). Having found that the \$100,000 threshold was exceeded,

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the Commission opened this Docket on November 22, 2005, to establish an automatic adjustment clause for PacifiCorp.

On January 25, 2006, over the objections of ICNU and the Northwest Industrial Gas Users, the Commission issued a Modified Protective Order in this proceeding establishing a Safe-Room procedure for the review of each utility's tax report, workpapers, and discovery materials designated as highly confidential. Order No. 06-033 at 1. The Safe-Room procedures require the designation of a single Portland Safe Room where signatories to the Protective Order may examine the highly confidential documents. No copies are allowed, only limited notes are allowed, and the utilities may have a monitor present at all times in the Safe Room. In addition, access to the Safe Room is available by appointment only from 9 a.m. to noon, and 1 p.m. to 5 p.m., Monday through Friday. Order No. 06-033 at 4-5; Appendix A at 3.

## **II. ICNU'S TAX CONSULTANT**

ICNU has hired Ellen Blumenthal as its tax consultant for this Docket. Ms. Blumenthal is a Certified Public Accountant employed by GDS Associates, Inc., and is based in Corpus Christi, Texas. Ms. Blumenthal has over 30 years' experience in regulatory proceedings involving utilities. She has been involved in regulatory proceedings in numerous states, including Connecticut, Texas, Nebraska, Kansas, Oklahoma, and Michigan.

Ms. Blumenthal visited Portland the week of December 2 to December 7, 2007, and spent three separate days in the Portland Safe Room examining PacifiCorp's tax report, work papers, and discovery. Despite this time spent in the Safe Room, she

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was unable to make significant progress in preparing a case due to the complexity of PacifiCorp's consolidated filing. The Safe-Room procedures set forth in Order No. 06-033 have never been encountered by Ms. Blumenthal in the countless proceedings she has been involved with concerning tax data. Other states have allowed Ms. Blumenthal a copy of all relevant documents, with the understanding that the documents are confidential and not to be disclosed, and that the documents will either be returned or destroyed at the conclusion of the proceedings.

In fact, in an earlier proceeding, PacifiCorp took the confidential tax documents to ICNU's previous consultant in St. Louis, Missouri. Such an accommodation has been rejected by PacifiCorp in this proceeding. Due to the impending date for Opening Testimony, Order No. 06-033 has made it infeasible for Ms. Blumenthal to produce effective testimony.

### **III. ARGUMENT**

The Safe-Room procedures adopted by the Commission in Order No. 06-033 have proven unworkable in this Docket. The Consultant is limited to examining PacifiCorp's tax report, workpapers, and discovery materials in the Portland Safe Room under the constant watch of a utility monitor. ICNU conducted a vigorous search for a local consultant; however, this Docket involves unique expertise that is not readily ascertainable, and ICNU was unable to obtain a qualified local consultant who represents customer interests. Accordingly, ICNU had no choice but to retain a highly qualified and experienced consultant who resides in Corpus Christi, Texas. Opportunities for the Consultant to travel to Portland to access the Safe Room will be limited, and opening

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testimony is currently due on January 22, 2008. Not only does it impose an undue burden on the Consultant to be forced to spend significant time in Portland, but it is simply cost prohibitive for ICNU's members. Without frequent access to the Safe Room between now and the due date for opening testimony, which will involve substantial hardship, it will be virtually impossible for ICNU to meaningfully participate in this Docket.

As a result, ICNU requests that Order No. 06-033 be amended to allow the Consultant possession of copies of PacifiCorp's highly confidential documents, or to require PacifiCorp to establish a Safe Room closer to the Consultant's place of business, such as Houston, Texas. The Commission stated in Order No. 06-033 that utilities are encouraged to "work with ICNU to determine whether special arrangements may be made to accommodate the needs" of an out-of-state consultant. Order No. 06-033 at 5. While PacifiCorp has expressed its willingness to entertain requests for documents that do not contain the data of "unregulated companies" on a document-by-document basis, due to the time constraints involved, it will be unduly burdensome for ICNU to attempt to identify selected documents that do not contain this data, and, in any event, to wait for a determination by PacifiCorp to that effect. Further, the tax data of "unregulated companies" are essential to the proper resolution of this Docket due to the corporate structure that PacifiCorp is a part of. ICNU has already spent numerous days attempting to reach a reasonable accommodation with PacifiCorp's legal counsel on this issue.

**A. The Safe-Room Procedures Will Prevent ICNU From Preparing Effective Testimony**

The Safe-Room procedures essentially require all work by ICNU in this Docket to be completed in the Safe Room. Frequent access to PacifiCorp's highly confidential documents will be necessary for the drafting of testimony, as ICNU and the Consultant will need to analyze, reference, and verify the pertinent pages and data. Requiring ICNU to prepare its case out of the Portland Safe Room is simply impractical.

First, the constant presence of a monitor makes it impossible for ICNU's counsel and the Consultant to have frank and candid conversations regarding the highly confidential documents. If the monitor is requested to leave the room to allow for a private discussion, the monitor is required to remove the highly confidential documents from the room. No private discussions may take place in the presence of the documents. As a result, the Consultant cannot explain issues with PacifiCorp's filing to ICNU's counsel using the documents as reference for fear of revealing sensitive attorney-client and work product privileged information. ICNU's counsel is not a tax expert. Thorough explanation of these highly complex documents will be necessary for an understanding of this case. This cannot be accomplished, however, under the Safe-Room procedures. The Safe-Room procedures do not ensure that privileged communications are protected, as they purport to do. See Order No. 06-033 at 5.

Second, it is unclear whether the possession of testimony outside the Safe Room is a violation of the protective order in and of itself. The testimony will no doubt contain "tax data and analyses" subject to the provisions of the Safe-Room procedures. See Order No. 06-033 at 1. ICNU and the Consultant have no choice but to detail highly confidential information regarding the tax reports, as effective testimony requires no less.

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It is unclear how ICNU's testimony can be filed with the Commission given the strict and onerous terms of Order No. 06-033. ICNU may be unable to litigate this case from a practical perspective while complying with the Safe-Room provisions.

Finally, the time limitations on when ICNU and its consultant may access the Safe Room present a significant hardship. This Docket is not the only business that ICNU and the Consultant have to attend to. Being able to access the highly confidential documents only during limited, normal business hours and business days leaves little time during the standard work week for ICNU's counsel and consultant to attend to other matters.

**B. The Complexity of PacifiCorp's Tax Report Makes the Safe-Room Procedures Unworkable**

PacifiCorp's tax report is extremely complex. Analysis of the taxes PacifiCorp paid to governmental entities is affected by the operations of the hundreds of other companies owned by ScottishPower and Berkshire Hathaway. Unlike the relatively simple structure of PGE, which is, for the most part, a publicly-traded, stand-alone company, a significant amount of time will be necessary simply to understand the corporate structure that PacifiCorp is a part of and to determine how all the parts of the consolidated group fit together.

PacifiCorp has expressed the necessity of protecting the confidential information of third-party companies in the corporate structure. ICNU, however, is not interested in this information outside of determining the proper amount of taxes that PacifiCorp should be able to recover from customers. If ICNU's requested relief is

granted, as with any other confidential or highly confidential documents, ICNU and the consultant have agreed not to disclose any confidential or highly confidential information and to destroy or return any documents after these proceedings are finished. Moreover, all the sensitive third-party information that concerns PacifiCorp has been redacted from the highly confidential documents.<sup>1/</sup> See Exhibit A, PacifiCorp's Response to ICNU DR 1.1.

**C. The Short Time Period for the Resolution of this Docket Makes the Requirements of Order No. 06-033 Unduly Burdensome**

The Commission stated in Order No. 06-033 that it would “ensure that additional time is provided in the procedural schedule to help compensate for the additional time necessary to make multiple trips to the safe rooms to review discovery.” Order No. 06-033 at 5. By rule, however, the Commission has 180 days from the date of PacifiCorp's tax report filing, or April 15, 2008, to issue an order. OAR § 860-022-041(7)(b). The Commission's ability to provide additional time is limited.

In order for ICNU to effectively participate in this Docket and allow for the Commission to issue a timely order, ICNU's requested relief must be granted. The short time period for the Commission to issue an order, combined with the upcoming holiday season, make the provisions of Order No. 06-033 completely unworkable in this Docket.

**IV. CONCLUSION**

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<sup>1/</sup> ICNU is attempting to work with PacifiCorp's legal counsel to receive copies of the unredacted documents. If these documents are not produced, ICNU maybe forced to file a Motion to Compel.



For the foregoing reasons, ICNU respectfully requests that the Commission modify Order No. 06-033 to allow the Consultant possession of a copy of PacifiCorp's tax report, workpapers, and discovery materials, or to require PacifiCorp to establish a Safe Room in closer proximity to the Consultant's place of business. Without such accommodations, ICNU will be unable to effectively participate in this Docket.

Dated this 14th day of December, 2007.

Respectfully submitted,

/s/ Allen C. Chan

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Of Attorneys for Industrial Customers  
of Northwest Utilities

# Exhibit A

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### **ICNU Data Request 1.1**

Two columns on FED-11 are redacted. Please provide an exact copy of this page as it was filed with the Internal Revenue Service.

### **Response to ICNU Data Request 1.1**

In completing its tax report, PacifiCorp sought to provide documentation that was transparent and complete to enable a thorough examination of PacifiCorp's compliance filing, while protecting the confidential information of unregulated third parties to the greatest extent possible.

Workpapers FED-10 through FED-14 comprise a five page consolidated schedule that reports taxable income and deductions on a company-by-company basis, including eliminations and other adjustments, to arrive at the consolidated amounts reported on page 1 of the federal Form 1120 (FED-2).

PacifiCorp did not redact any information related to PacifiCorp or its regulated subsidiaries. PacifiCorp did redact all unregulated third-party separate company information on these workpapers with the exception of Line 30, Taxable Income. Separate company taxable income or loss is necessary to support the calculation of the apportionment method federal tax floor pursuant to rule (3)(b) (TP31, TR2). No other unregulated third party information from workpapers FED-10 through FED-14 is necessary for this compliance filing.

To the extent that ICNU demonstrates that specific redacted information is required for its review of PacifiCorp's compliance filing, PacifiCorp will supplement this response as appropriate.

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December 14, 2007

***Via Electronic and US Mail***

Public Utility Commission  
Attn: Filing Center  
550 Capitol St. NE #215  
P.O. Box 2148  
Salem OR 97308-2148

Re: In the Matter of OREGON PUBLIC UTILITY STAFF Requesting the  
Commission direct PACIFICORP, dba PACIFIC POWER & LIGHT  
COMPANY, to file tariffs establishing automatic adjustment clauses under the  
terms of SB 408  
**Docket No. UE 177**

Dear Filing Center:

Enclosed please find the original and one (1) copy of the Industrial Customers of  
Northwest Utilities' Motion to Modify the Protective Order in the above-referenced matter.

Thank you for your assistance.

Sincerely yours,

/s/ Ruth A. Miller  
Ruth A. Miller

Enclosure

cc: Service List

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served the foregoing Motion to Modify the Protective Order on behalf of the Industrial Customers of Northwest Utilities upon the parties, shown below, on the official service list by causing the foregoing document to be deposited, postage-prepaid, in the U.S. Mail, and service via electronic mail.

Dated at Portland, Oregon, this 14th day of December, 2007.

/s/ Ruth A. Miller  
Ruth A. Miller

<b>CITIZENS' UTILITY BOARD OF OREGON</b> LOWREY R BROWN JASON EISDORFER 610 SW BROADWAY STE 308 PORTLAND OR 97205 lowrey@oregoncub.org jason@oregoncub.org	DANIEL W MEEK 10949 SW 4TH AVE PORTLAND OR 97219 dan@meek.net
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