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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 Motion in Limine Objecting to the Admission of the Direct Testimony of Ellen Blumenthal for ICNU and PacifiCorp's Cross Examination Statement. A copy of these filings have 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 be "Katherine McDowell", written over a horizontal line.

Katherine McDowell

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: February 19, 2008


Katherine McDowell
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 &
6 LIGHT COMPANY

7 Filing of tariffs establishing automatic
8 adjustment clauses under the terms of
SB 408

**PACIFICORP'S MOTION IN LIMINE
OBJECTING TO THE ADMISSION OF
THE DIRECT TESTIMONY OF ELLEN
BLUMENTHAL FOR ICNU**

9 Pursuant to OAR 860-013-0031, PacifiCorp submits this Motion In Limine ("Motion")
10 to the Public Utility Commission of Oregon ("Commission"). PacifiCorp requests that the
11 Commission exclude certain portions of the testimony of Industrial Customers of Northwest
12 Utilities ("ICNU") witness Ellen Blumenthal from the record in this case. These parts of the
13 testimony consist of irrelevant evidence in the form of: (1) arguments that attack the validity
14 of Commission's rule OAR 860-022-0041 and encourage the Commission to waive
15 application of the rule, which is impermissible under Oregon law; and (2) arguments
16 supporting modification of the protective order governing this docket ("Protective Order"),
17 Order No. 06-033, that the Commission expressly rejected six weeks ago. *See In re Pacific*
18 *Power & Light, dba PacifiCorp, Petition to Amend Protective Order Denied, Order No. 08-*
19 *002, Docket UE 177 (2008).* Irrelevant evidence is inadmissible, and ICNU's testimony
20 should be excluded on this basis.

21 PacifiCorp requests that the Commission exclude the following portions of ICNU's
22 testimony as consisting of irrelevant arguments that attack the validity of OAR 860-022-
23 0041: ICNU/100, Blumenthal/3 Line 3 through Line 13; ICNU/100, Blumenthal/5 Line 1
24 through Line 16; ICNU/100, Blumenthal/6 Line 23 through ICNU/100, Blumenthal/7 Line 2;
25 ICNU/100, Blumenthal/9 Line 3 through ICNU/100, Blumenthal/12 Line 4.

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1 PacifiCorp requests that the Commission exclude the following portions of ICNU's
2 testimony as consisting of irrelevant arguments that challenge the Protective Order in this
3 proceeding: ICNU/100, Blumenthal/12 Line 5 through ICNU/100 Blumenthal/15 Line 12.¹

4 If the Commission grants this Motion, the following portions of ICNU's testimony will
5 remain: ICNU/100, Blumenthal/1 Line 1 through ICNU/100, Blumenthal/3 Line 2; ICNU/100,
6 Blumenthal/3 Line 14 through ICNU/100, Blumenthal/4 Line 24; ICNU/100, Blumenthal/5
7 Line 17 through ICNU/100, Blumenthal/6 Line 22; ICNU/100, Blumenthal/7 Line 3 through
8 ICNU/100, Blumenthal/9 Line 2; ICNU/100, Blumenthal/15 Lines 13–14; and Exhibit
9 ICNU/101.

10 I. DISCUSSION

11 A. ICNU's Testimony Arguing Against the Validity of OAR 860-022-0041 and 12 Encouraging the Commission to Waive Application of OAR 860-022-0041 Should Be Stricken as Irrelevant and Beyond the Scope of This Docket.

13 Pursuant to Commission rules, only relevant evidence, meaning evidence that tends
14 to make any fact at issue in the proceeding more or less probable, is admissible. OAR 860-
15 014-0045(1). Written testimony in Commission proceedings is subject to the rules of
16 admissibility. See OAR 860-014-0060. Therefore, written testimony must tend to make the
17 existence of any fact at issue in the proceeding more or less probable than it would without
18 the evidence to be admissible. OAR 860-014-0045(1)(a). The Commission has properly
19 refused to consider irrelevant evidence in past proceedings. See, e.g., *Am. Can Co. v.*

20 _____
21 ¹ If the Commission grants all or part of this Motion, PacifiCorp would not seek to admit the
22 portions of its rebuttal testimony that respond to the excluded portions of ICNU's testimony. If the
23 Commission excludes ICNU's testimony consisting of irrelevant arguments attacking the validity of
24 OAR 860-022-0041, PacifiCorp will not seek to admit PPL/100, Larson/7 Line 1 through Line 13;
PPL/100, Larson/7 Line 17 through PPL/100, Larson/9 Line 12; Exhibit PPL/103; Exhibit PPL/104;
PPL/200 Fuller/5 Line 10 through PPL/200 Fuller/7 Line 14; PPL/200, Fuller/8 Line 15 through
PPL/200 Fuller/9 Line 10; Exhibit PPL/204; and Exhibit PPL/205.

25 If the Commission excludes ICNU's testimony consisting of irrelevant arguments attacking
the Protective Order, PacifiCorp will not seek to admit PPL/100, Larson/7 Lines 14–16; PPL/100,
Larson/9 Line 13 through PPL/100, Larson/12 Line 3; and Exhibit PPL/105.

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1 *Lobdell*, 55 Or. App. 451, 466 (1982) (upholding Commission's exclusion of irrelevant
2 evidence and citing OAR 860-014-0045(1) for support).

3 As a threshold matter, much of ICNU's testimony consists of legal arguments
4 concerning the viability of OAR 860-022-0041. Such arguments do not provide evidence
5 such as facts or expert opinions that would cause a fact at issue in the proceeding to be
6 more or less probable, so they are irrelevant by their very nature. See OAR 860-014-
7 0045(1). ICNU will have the opportunity to present legal arguments in briefs in this
8 proceeding, but such arguments are not admissible testimony.

9 In addition, even if ICNU's testimony did not consist primarily of legal arguments,
10 much of the testimony does not relate to facts at issue in this proceeding and is beyond the
11 scope of the proceeding. The facts at issue in this case relate to the calculations in
12 PacifiCorp's tax report and the application of OAR 860-022-0041 to PacifiCorp's tax report.
13 See *In re Pacific Power & Light dba PacifiCorp*, Petition to Compel Denied, Order
14 No. 08-003 (2008) (defining scope of discovery in this case as "any information that may
15 assist in determining whether the information contained in the tax report is accurate."). The
16 majority of ICNU's testimony, however, relates not to PacifiCorp's tax report, but to the
17 general validity of OAR 860-022-0041. ICNU argues that OAR 860-022-0041 is not in
18 compliance with SB 408 and that the Commission should waive applicability of the rule in
19 PacifiCorp's case. See, e.g., ICNU/100, Blumenthal/11 Lines 7-14. This testimony is
20 inadmissible because it relates to issues beyond the scope of Docket UE 177 and does not
21 make any fact at issue in the proceeding more or less probable. The Commission has no
22 authority to waive application of OAR 860-022-0041 in this proceeding. The proper forum
23 for ICNU to challenge the validity of OAR 860-022-0041 is under the Oregon Administrative
24 Procedure Act ("APA"), not in this docket.

25 An agency must comply with its own rules until the agency repeals or amends the
26 rule pursuant to the APA or until a court declares the rule to be invalid. *Burke v. Children's*

1 *Serv. Div.*, 288 Or. 533, 538 (1980) (“It is true that a rule may be declared by a court to be
2 invalid if it was adopted without the proper procedures. See ORS 183.400. In the absence
3 of such a declaration, however, it remains an effective statement of existing practice or
4 policy, binding on the agency, until repealed according to procedures required by the
5 Administrative Procedures Act.”). When an agency has the authority to adopt rules and
6 does so, it must follow those rules. *Harsh Inv. Corp. v. State Housing Div.*, 88 Or. App. 151,
7 157 (1987). Rules that are adopted within the statutory authority delegated to the agency
8 are as binding on the agency “as if the legislature itself had acted.” *Id.*

9 The Commission enacted OAR 860-022-0041 to implement SB 408 as contemplated
10 by the Oregon Legislature. See ORS 757.268(1) (“The tax report shall contain the
11 information required by the commission”) and ORS 757.268(2) (“Every public utility shall be
12 required to obtain and provide to the commission any other information that the commission
13 requires to review the tax report and to implement and administer this section”). The
14 Commission did not enact a rule that permits it to waive application of OAR 860-022-0041.
15 Commission rules permit the Commission to waive application of other specific rules or
16 divisions of rules, but do not permit the Commission to waive application of rules in
17 Division 022 or OAR 860-022-0041. See, e.g., OAR 860-011-0000(6) (allowing the
18 Commission to deviate from the rules in Divisions 011 through 014). OAR 860-022-0041
19 has not been repealed by the Commission or invalidated by a court, so it remains binding on
20 the Commission. See *Burke*, 288 Or. at 538.

21 The proper channel for ICNU’s request to the Commission to amend or repeal
22 OAR 860-022-0041 is not in this docket, but rather under ORS 183.390(1). That provision
23 of the APA allows an interested person to petition an agency for amendment or repeal of a
24 rule. The agency is required to either deny the petition in writing or to initiate rulemaking
25 proceedings within 90 days after filing of such a petition. Until the Commission conducts
26 such rulemaking proceedings and either amends or repeals the rule, however, OAR 860-

1 022-0041 is binding on the Commission. Any changes to the rule would apply on a
2 prospective basis only, because the rules are binding on the agency until they are modified
3 pursuant to the APA. See *Burke*, 288 Or. at 538; *In re Pacific Power & Light Co. dba*
4 *PacifiCorp*, Order No. 06-379 at 9, Dockets UE 170 and UM 1229 (July 10, 2006) (citing
5 *Burke*). The portions of ICNU's testimony relating to the validity of OAR 860-022-0041 are
6 irrelevant to this proceeding and are therefore inadmissible.

7 **B. ICNU's Testimony Objecting to the Terms of the Protective Order Is Irrelevant,**
8 **Because the Commission Has Already Ruled on ICNU's Objections.**

9 Much of ICNU's testimony objects to the terms of the Protective Order. This issue
10 has already been litigated twice in this docket—once when PacifiCorp and the other utilities
11 filing SB 408 tax reports filed a Joint Motion for Protective Order and again when ICNU filed
12 a Petition to Amend the Protective Order (“Petition”).² ICNU's testimony simply reiterates
13 the arguments it made in its Petition on December 14, 2007. In the Protective Order and in
14 the order denying ICNU's Petition, the Commission evaluated ICNU's arguments regarding
15 the inconvenience imposed by the use of a safe room and found that the inconveniences
16 were outweighed by the potential harm of the public release of highly confidential
17 information. *In re PacifiCorp*, Petition to Amend Protective Order Denied, Order No. 08-002,
18 Docket UE 177 at 5 (Jan. 3, 2008); *In re PacifiCorp*, Motion for Amended Protective Order
19 Granted in Part, Order No. 06-033, Docket UE 177 at 5 (Jan. 25, 2006). In Order No. 08-
20 002, the Commission also found that ICNU failed to show that it made a reasonable attempt
21 to work within the Protective Order.

22 ICNU's testimony presents no new facts or circumstances that warrant relitigating an
23 issue that the Commission decided only six weeks ago. The facts ICNU raises in its
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25 ² The Commission interpreted ICNU's Motion to Modify the Protective Order as a Petition to
26 Amend the Protective Order, which is how it is referenced in this Motion.

1 testimony have been evaluated by the Commission and are no longer at issue in this
2 proceeding. In addition, ICNU's testimony presents legal arguments disputing the terms of
3 the Protective Order that, as described in the previous section, are by definition irrelevant.
4 Therefore, the portions of ICNU's testimony relating to the safe room and the Protective
5 Order describe facts and present legal arguments that are irrelevant and inadmissible.

6 **II. CONCLUSION**

7 For all of the foregoing reasons, PacifiCorp requests that the Commission grant this
8 Motion and exclude the portions of Ms. Blumenthal's direct testimony described above.

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DATED: February 19, 2008

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Attorneys for PacifiCorp