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March 13, 2008

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 Motion for Expedited
Certification of the Industrial Customers of Northwest Utilities' 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 for Expedited Certification 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 to those parties which have not waived paper service, and service via electronic mail to all parties.

Dated at Portland, Oregon, this 13th day of March, 2008.

/s/ Ruth A. Miller
Ruth A. Miller

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(W) = Paper Service Waived

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 177

In the Matter of)	
)	
OREGON PUBLIC UTILITY STAFF)	MOTION FOR EXPEDITED
)	CERTIFICATION OF THE
Requesting the Commission Direct)	INDUSTRIAL CUSTOMERS OF
)	NORTHWEST UTILITIES
PACIFICORP, dba PACIFIC POWER)	
& LIGHT COMPANY,)	
)	
to File Tariffs Establishing Automatic)	
Adjustment Clauses Under the Terms of)	
<u>SB 408.</u>)	

Pursuant to OAR § 860-014-0091, the Industrial Customers of Northwest Utilities (“ICNU”) respectfully requests that Administrative Law Judge (“ALJ”) Allan Arlow certify his ruling dated March 3, 2008, to the Oregon Public Utility Commission (“OPUC” or “Commission”) for appeal. ALJ Arlow’s ruling incorrectly states the facts and applicable law, resulting in a majority of ICNU witness Ellen Blumenthal’s Testimony being stricken from the record in this proceeding. Without this testimony, the public interest and ICNU’s ability to effectively participate in this Docket is substantially prejudiced. As a result, ICNU’s request for certification should be granted, and the Commission should overrule ALJ Arlow’s Ruling. Due to the requirement that the Commission issue an order in this Docket by April 11, 2008, ICNU requests expedited consideration.

I. BACKGROUND

Pursuant to the Prehearing Conference Memorandum issued on November 7, 2007, ICNU filed the Direct Testimony of Ellen Blumenthal on January 22, 2008. On February 12, 2008, PacifiCorp filed rebuttal testimony, responding to the issues raised in Ms. Blumenthal's Testimony. Staff also submitted rebuttal testimony responding to Ms. Blumenthal's Testimony, along with a Motion for Leave to Submit Rebuttal Testimony.

The hearing in this Docket was originally scheduled for February 22, 2008. Two business days before the hearing on February 19, 2008,^{1/} PacifiCorp submitted a Motion in Limine ("Motion") objecting to Ms. Blumenthal's Testimony and requesting that certain portions be stricken. In the Motion, PacifiCorp primarily asserted that Ms. Blumenthal's Testimony is irrelevant because: 1) the Testimony attacks the validity of OAR § 860-022-0041, which the Commission does not have the authority to waive; and 2) the Testimony attacks the requirements of the Protective Order in this Docket, which the Commission issued in Order No. 06-033, and reaffirmed in Order No. 08-002.

On February 19, 2008, ICNU informed the Commission and other parties of their intent to waive cross-examination. PacifiCorp, however, stated its intent to cross-examine ICNU witness Ellen Blumenthal whether or not its Motion was granted. The day before the hearing on February 21, 2008, Ms. Blumenthal, encountered flight delays

^{1/} ICNU received PacifiCorp's Motion at the end of the day (4:30 p.m.) on Tuesday, February 19, 2008.

due to the weather and was unable to make the scheduled hearing. ICNU, PacifiCorp, and ALJ Arlow conducted a telephone conference to discuss how to proceed. Although Ms. Blumenthal would be unavailable, PacifiCorp insisted on continuing with the scheduled hearing in order to discuss the Motion. OAR § 860-013-0050(3)(d) gives parties 15 days to respond to a motion. ICNU, however, was informed at the telephone conference by ALJ Arlow that it must be ready to respond to the Motion at the hearing the next day (less than 24 hours notice). Accordingly, ICNU prepared a written response to PacifiCorp's Motion and filed it with the Commission the morning of the hearing, February 22, 2008.

In its response, ICNU argued that PacifiCorp's Motion was procedurally improper, as the grounds for PacifiCorp's Motion were apparent at the time Ms. Blumenthal's Testimony was filed. In addition, ICNU argued that Ms. Blumenthal's Testimony is relevant to this Docket, as ICNU may properly challenge the Commission's rules in this proceeding and Ms. Blumenthal's Testimony provides the factual basis for such a challenge. Further, ICNU disputed PacifiCorp's claim that Ms. Blumenthal was relitigating the provisions of the Protective Order, and explained that Ms. Blumenthal was merely giving a reason as to why she did not recommend an alternative calculation.

At the hearing, there was no substantive discussion of the Motion in Limine. Instead, ALJ Arlow allowed PacifiCorp to file a reply by February 25, 2008. ALJ Arlow then issued his ruling granting the Motion on March 3, 2008.

II. ARGUMENT

A. ALJ Arlow's Ruling should be Certified to the Commission

OAR § 860-014-0091(1) allows parties to request that the ALJ certify a ruling to the Commission upon a finding that the ruling: “(a) [m]ay result in substantial detriment to the public interest or undue prejudice to any party; or (b) [d]enies or terminates any person’s participation.” ALJ Arlow’s Ruling should be certified to the Commission because the Ruling results in substantial prejudice to the public interest and unduly prejudices ICNU’s rights in this Docket.

1. The Public Interest is not Served by an Incomplete Record

ALJ Arlow’s ruling strikes a majority of Ms. Blumenthal’s Testimony in this Docket on the basis of relevancy because the testimony attacks the validity of OAR § 860-022-0041, and does not provide evidence regarding whether PacifiCorp’s tax report complied with the Commission’s rules. Ruling at 5. If the Commission’s rules do not implement SB 408 as intended, the public interest is served by having a full record, including testimony regarding why the Commission’s rules do not comply with SB 408. See, e.g., ORS § 756.521 (requiring the Commission to keep a full record); ORS § 183.417(8) (hearing officer “shall ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the presiding officer. . .”).^{2/}

^{2/} Although ORS § 183.417(8) specifically does not apply to the Commission, the stated principle seems equally applicable to Commission proceedings.

Ms. Blumenthal's Testimony is key evidence regarding the question of whether the Commission's rules comply with SB 408. Regardless of whether the Commission ultimately agrees with Ms. Blumenthal's analysis, the public interest is furthered by a complete record, including flaws in the Commission's rules so that all concerns are adequately considered.

2. ICNU is Unduly Prejudiced by ALJ Arlow's Ruling

ICNU's entire case in this Docket is dependent on Ms. Blumenthal's Testimony. Many of ICNU's legal arguments are dependent on the facts presented in Ms. Blumenthal's Testimony that has been stricken by ALJ Arlow's ruling. ALJ Arlow states that ICNU is free to address the legal issues regarding the Commission's rules in briefing, but without Ms. Blumenthal's Testimony regarding the operation of the rules, ICNU's ability to make such arguments is unduly prejudiced.

The prejudice resulting from the striking of a party's testimony is highlighted by the fact that the Commission rarely does so, even in extreme circumstances. See, e.g., Re Crooked River Ranch Water Co., Docket No. UW 120, Order No. 07-527 at 5 (Nov. 29, 2007) (denying motion to strike testimony despite repeated discovery violations); Re Oregon Electric Utility Co., Docket No. UM 1121, Ruling at 1 (Oct. 18, 2004) (denying motion to strike testimony presenting legal arguments on the grounds that the testimony arguably responds to issues raised and that the Commission can make its own legal interpretations); Central Lincoln People's Utility District v. Verizon Northwest, Inc., Docket No. UM 1087, Ruling at 2-3 (Oct. 6, 2004) (denying motion in limine to strike testimony because witness was unavailable for cross-

examination). ICNU is clearly prejudiced by ALJ Arlow's ruling and certification should be granted.

B. ALJ Arlow Erred in Granting PacifiCorp's Motion in Limine

1. PacifiCorp's Motion was Procedurally Improper

ALJ Arlow stated in his ruling that:

The underlying purpose of procedural rules is to *provide fairness* to the litigants. This is accomplished by ensuring that parties have adequate notice and understanding of their opposing party's positions, by giving parties the *opportunity to adequately present their testimony and argument and by preventing surprise or other unfair means to obtain a tactical advantage* or delay the proceedings.

Ruling at 4 (emphasis added). ICNU could not agree with ALJ Arlow's statement any more. When these principles are applied to the situation at hand, however, a result opposite to ALJ Arlow's ruling follows.

a. ICNU is no Longer Able to Present its Case

ICNU is being denied the opportunity to adequately present its testimony and argument. Most of Ms. Blumenthal's Testimony that was stricken consists of the factual basis that PacifiCorp's tax report, based on OAR § 860-022-0041, does not reflect actual taxes paid to governmental authorities. For example, Ms. Blumenthal testifies as to the characteristics of PacifiCorp compared to other companies, and why the Commission's rules allocate too much of the consolidated tax liability to PacifiCorp based on these characteristics. ICNU/100, Blumenthal/9. This is not legal argument. It is not apparent from a facial reading of the Commission's rules that the rules operate in

such a manner. Rather, this is the type of analysis that only an expert witness is able to give.

In addition, Ms. Blumenthal testifies as to how the use of taxable income as the starting point for determining taxes paid to governmental authorities produces an actual taxes paid result. ICNU/100, Blumenthal/10-12. Again, this is not legal argument. These are facts not apparent from an interpretation of the Commission's rules that are necessary to any legal argument challenging the Commission's rules. Ms. Blumenthal's Testimony demonstrates how OAR § 860-022-0041 operates with respect to PacifiCorp, not an interpretation of the rule itself.

ALJ Arlow concludes his ruling by stating that "ICNU is free to address the legal issues raised in the Blumenthal Testimony in its briefs to the Commission." Ruling at 5. Without Ms. Blumenthal's Testimony, however, ICNU has no factual basis for how the operation of OAR § 860-022-0041 fails to comply with SB 408.

b. PacifiCorp now has a Tactical Advantage

The Motion was not filed until two days before the hearing, almost a full month after Ms. Blumenthal's Testimony was filed with the Commission, and two weeks after PacifiCorp filed its response to Ms. Blumenthal's Testimony. ICNU spent the last month preparing its entire case based on Ms. Blumenthal's Testimony and PacifiCorp's rebuttal. Any objection PacifiCorp had to Ms. Blumenthal's Testimony was apparent when the Testimony was filed a month before the hearing. ALJ Arlow's ruling has put ICNU in unfair position tactically, because ICNU no longer has the factual foundation necessary for its case, especially at such a late stage in the proceedings.

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Based on the hardship caused by the striking of pre-filed testimony at such a late stage in the proceedings, the principle that objections to testimony “must be made *as soon as* the ground for such a motion is disclosed” is highly applicable to this case, and Commission proceedings in general. McEwen v. Ortho Pharmaceutical Corp., 270 Or 375, 421 (1974) (emphasis added). This principle is not contrary to the Commission’s evidentiary rules, as ALJ Arlow suggests in his ruling.

ALJ Arlow cites OAR § 860-014-0060(4)(b), and notes that written testimony is subject to the rules of admissibility and cross-examination. Ruling at 4 n17. Whether written, pre-filed testimony is admissible or subject to cross-examination, however, is not indicative of when an objection should be made to such evidence. This rule is entirely consistent with ICNU’s position in this case. Any objection PacifiCorp had to the admissibility of Ms. Blumenthal’s Testimony was apparent when the testimony was filed, and PacifiCorp should have raised its objections at that time. Waiting until two days before the hearing, when the tactical advantage would be at its greatest, should not be encouraged by a favorable ruling.^{3/}

In addition, ALJ Arlow points to OAR § 860-014-0045(2), which requires parties to object to evidence at the time the evidence is offered. As stated previously, however, the Commission’s policy should not be to promote procedures which allow parties to ambush other parties and allow gamesmanship to maximize tactical advantages

^{3/} For example, in Docket No. UM 1121, ICNU filed its Motion to Strike the Sursurrebuttal testimony of Oregon Electric Company on October 12, 2004, *the day after* the testimony was filed. In addition, in Docket No. UW 120, Staff filed its Motion to Strike the testimony of Crooked River Ranch Water Company (“Crooked River”) immediately after Crooked River refused to respond to discovery, and pursuant to the ALJ ruling setting a deadline for the filing of Motions to Strike.

in Commission proceedings. The Commission's evidentiary rules closely track the Oregon Evidence Code ("OEC") applied in civil and criminal proceedings; however, pre-filed written testimony is not typically produced in such proceedings. Therefore, a straightforward application of these rules does not necessarily mesh with the concept of pre-filed testimony.

The procedure adopted by ALJ Patrick Power in Docket No. UW 120 should be the policy generally adopted by the Commission respecting prefiled testimony. In that Docket, ALJ Power set a cutoff date for parties to file motions to strike written testimony. In addition, ALJ Power ruled that oral motions to strike written prefiled testimony would not be considered. Re Crooked River Ranch Water Co., Docket No. UW 120, Memorandum at 1 (Oct. 5, 2007). ALJ Power's procedural ruling recognizes the uniqueness of prefiled testimony and the prejudice that results from the exclusion of prefiled testimony at such a late stage of a proceeding.

2. ALJ Arlow's Conclusion that Ms. Blumenthal's Testimony is Irrelevant is Incorrect

ALJ Arlow states in his ruling that Ms. Blumenthal's Testimony "does not, at any point, assert that PacifiCorp has failed to perform the calculation required by OAR 860-022-0041." Ruling at 5. ALJ Arlow then rules that portions of Ms. Blumenthal's Testimony are irrelevant because they attack the Commission's rules. Id. The legal validity of the Commission's rules and whether the Commission should follow its rules, however, is an issue that may be raised by ICNU in this case, as ALJ Arlow admits. Id. ALJ Arlow's ruling, therefore, is incorrect and inherently inconsistent.

Pursuant to ORS § 183.482(8)(b)(B), the Commission may act inconsistent with its own rules as long as the inconsistency is explained by the agency. Gordon v. Board, 343 Or. 618, 635 (2007). Ms. Blumenthal's Testimony gives the Commission the factual evidence necessary to make a reasoned explanation as to why OAR § 860-022-0041 is inconsistent with SB 408, and why the Commission should act inconsistent with that rule. Thus, the issues in this proceeding are not limited to whether PacifiCorp complied with OAR § 860-022-0041.

Further, ALJ Arlow acknowledges that ICNU may raise legal issues regarding the validity of the Commission's rules in briefing. Ruling at 5. Legal issues necessarily involve facts, and how the law applies to those facts. As ALJ Arlow recognized at the hearing held on March 4, 2008, ICNU "may argue whatever legal arguments there are with respect to the testimony." Transcript at 34, lines 5-6. Without testimony, it is difficult to make legal arguments. For example, whether PacifiCorp's tax report complies with the Commission's rules, an issue that ALJ Arlow acknowledges is relevant, involves legal issues, and requires witnesses to make an interpretation of the Commission's rules. See, e.g., Staff/100, Owings-Ball/5 (interpreting the requirements of OAR § 860-022-0041(3)(b)).

Ms. Blumenthal's Testimony is no different. In order to provide a factual basis for ICNU's legal arguments, Ms. Blumenthal is required to make an interpretation of what the Commission's rules require, and what SB 408 requires. Like other testimony submitted in this Docket, and other Commission dockets, this does not make Ms. Blumenthal's Testimony irrelevant legal argument. Thus, factual evidence as to whether

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the operation of OAR § 860-022-0041 complies with SB 408 and whether the Commission should act inconsistent with its rules are clearly relevant to this Docket.

3. ICNU was Denied Due Process in Responding to the Motion in Limine

ALJ Arlow incorrectly states that ICNU was afforded “a week after the filing of the Motion” to respond. Ruling at 5. As stated previously, ICNU received the Motion at 4:30 p.m. on Tuesday, February 19, 2008, and did not know that it was required to prepare a response to the Motion until Thursday, February 21, 2008, after 5:00 p.m.. This time frame does not amount to “a week,” as ALJ Arlow suggests.

Based on this inaccurate assessment of time, ALJ Arlow concludes that the time provided ICNU to respond to the Motion was reasonable. OAR § 860-013-0050(3)(d) allows parties 15 days to respond to a motion “unless otherwise specified by... the [ALJ].” Even if ALJ Arlow’s notice during the February 21, 2008 conference call can be considered a specification for a shorter response time, giving less than one day’s notice can hardly be considered adequate due process.

Simply because ICNU was able to respond to the issues in depth does not mean the time provided satisfies due process, as ALJ Arlow incorrectly concludes. Ruling at 4-5. To the contrary, requiring ICNU to devote all its resources to responding to PacifiCorp’s Motion in such a short time-frame was unreasonable and deprived ICNU of its due process rights.

4. The Commission has Consistently Allowed Similar Testimony in the Past

There is a fine line between testimony and legal argument, especially before the Commission in which statutes and rules, such as SB 408 and OAR § 860-022-0041, require highly specialized knowledge that only an expert witness is able to provide. Accordingly, testimony regarding whether Commission action would comply with a statute or rule is nothing new. There are numerous examples of when a witness has presented testimony similar to Ms. Blumenthal's, specifically in the SB 408 context, and when such testimony has been allowed.

For example, in UE 170, PacifiCorp witness Doug Larson testified that ICNU and CUB's proposed tax adjustment based on SB 408 "would be inconsistent with the statutory mandate that rates must be based on cost of service, ORS 756.040, the Oregon administrative rule that requires electric utilities in Oregon to calculate and report income taxes on a standalone basis for regulatory and ratemaking purposes, even if those taxes are paid on a consolidated basis, [and] OAR 860-027-0048" Re PacifiCorp, UE 170, PPL/1303, Larson/14 (Exh. 1).^{4/} In addition, PacifiCorp witness Larry Martin testified "how the Commission should apply SB 408 or 'its principles'" Docket No. UE 170, PPL/1700, Martin/1 (Exh. 2). Further, Staff witness Maury Galbraith testified as to the requirements of ORS § 757.603 and ORS § 757.609. Docket No. UE 170, Staff/700, Galbraith/9-10 (Exh. 3).

^{4/} For the Commission's convenience, ICNU has attached the cited testimonies from UE 170 as Exhibits 1-3.

There are countless examples of when such testimony has been allowed, and Ms. Blumenthal's Testimony in this Docket is no different. Ms. Blumenthal is simply providing the factual evidence necessary to explain how the operation of OAR § 860-022-0041 would be inconsistent with SB 408. The Commission has consistently taken such evidence into consideration in the past, and should do the same here.

5. The Commission has the Ability to Give Testimony the Appropriate Weight

The Commission has shown a reluctance to strike testimony in the past on the basis that the testimony would not hinder the ability of the Commission to give the testimony the proper weight it deserves. For example, in Re Crooked River Ranch Water Co., Docket No. UW 120, Order No. 07-527 at 5, despite repeated discovery violations by Crooked River Ranch Water Company ("Crooked River"), the Commission denied Staff's Motion to Strike Crooked River's testimony, stating that the discovery failures would "erode the weight to be given to its testimony."

In addition, in Re Oregon Electric Utility Co., Docket No. UM 1121, Ruling at 1, ALJ Kathryn Logan denied ICNU's Motion to Strike the testimony of an Oregon Electric Utility Company witness as legal argument. Although part of ALJ Logan's ruling was based on the conclusion that the testimony arguably responded to and issue raised in the proceeding, ALJ Logan also stated that "the testimony does not impinge on the Commission's authority to make its own legal interpretations." Id.

The same reasoning is equally applicable in this case. Assuming for the sake of argument that Ms. Blumenthal's Testimony is properly characterized as legal

argument, it does not infringe upon the Commission's ability to make its own interpretations of the law. Striking Ms. Blumenthal's Testimony from the record is an extreme action that the Commission has been hesitant to take in the past, even in the most egregious of circumstances. See Re Crooked River, Docket No. UW 120, Order No. 07-527 at 5.

III. CONCLUSION

Due to the substantial prejudice to ICNU resulting from ALJ Arlow's ruling striking Ms. Blumenthal's Testimony, ALJ Arlow's ruling should be certified to the Commission. Further, because ALJ Arlow erred in granting PacifiCorp's Motion, the Commission should overrule ALJ Arlow's ruling and allow Ms. Blumenthal's Testimony in its entirety into the record as evidence. ALJ Arlow's ruling is legally and factually deficient in the following ways:

1. ALJ Arlow's ruling creates poor procedural policy regarding the timing of motions to strike pre-filed testimony;
2. ALJ Arlow's conclusion that Ms. Blumenthal's Testimony is irrelevant to this Docket is not supported by the law or facts;
3. ALJ Arlow misstates the facts and erroneously concludes that ICNU was not deprived of due process in responding to the Motion;
4. ALJ Arlow's ruling is inconsistent with past Commission policy regarding the substance of pre-filed testimony; and
5. ALJ Arlow's ruling undermines the Commission's ability to give testimony the proper weight.

Dated this 13th day of March, 2008.

Respectfully submitted,

/s/ Melinda J. Davison

Melinda J. Davison

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Of Attorneys for Industrial Customers
of Northwest Utilities

Exhibit 1

Case UE-170
PPL Exhibit 1700
Witness: D. Douglas Larson

BEFORE THE PUBLIC UTILITY COMMISSION
OF THE STATE OF OREGON

PACIFICORP

Rebuttal Testimony of D. Douglas Larson

Policy

June 2005

1 credits earned by PacifiCorp affiliate PPM, Inc. from its operation as an
2 independent power producer of wind generation projects throughout the United
3 States.

4 **Q. What are the key issues facing the Commission in its determination of the**
5 **consolidated tax adjustments?**

6 A. In addressing the tax issue, the Commission is being asked to fundamentally
7 modify its approach to the economic regulation of the regulated and unregulated
8 business activities of public utilities subject to its jurisdiction. Adoption of the
9 consolidated tax adjustments proposed by CUB, ICNU and URP would be
10 inconsistent with the statutory mandate that rates must be based on cost of service,
11 ORS 756.040, the Oregon administrative rule that requires electric utilities in
12 Oregon to calculate and report income taxes on a standalone basis for regulatory
13 and ratemaking purposes, even if those taxes are paid on a consolidated basis,
14 OAR 860-027-0048, and the requirement that the benefits of tax deductions and
15 credits may only be allocated to the entities that bore the burdens of the
16 underlying costs. *Reply to the Utility Reform Project's Comments on Tax*
17 *Treatment in Utility Ratemaking*, Jason W. Jones, Dep't of Justice Memorandum,
18 Mar. 22, 2005.

19 Tax consequences generally relate to the risk and return characteristics of
20 the underlying business activities. This Commission has long enforced policies
21 that strictly separate the financial consequences of regulated and unregulated
22 activities. Such policies protect customers, competitors, and the public generally.
23 The Company has relied on these seemingly fundamental Commission policies

Exhibit 2

UE 170 (RECON)
PPL Exhibit 1303
Witness: Larry O. Martin

BEFORE THE PUBLIC UTILITY COMMISSION
OF THE STATE OF OREGON

PACIFICORP

Direct Testimony of Larry O. Martin on Reconsideration

Tax

February 2006

1 Q. Are you the same Larry Martin who previously filed rebuttal testimony and
2 sursurrebuttal testimony in this proceeding?

3 A. Yes.

4 Q. What are the purposes of your testimony?

5 A. My previous testimony explained why a consolidated tax adjustment based upon
6 PHI's interest deduction was unfounded and inappropriate in this case. My testimony
7 in these reconsideration proceedings demonstrates why this remains true,
8 notwithstanding the enactment of Senate Bill 408 ("SB 408") in the last days of this
9 case. The consolidated tax adjustment is not mandated by SB 408, nor even
10 consistent with key provisions of that legislation.

11 My reconsideration testimony also addresses how the Commission should
12 apply SB 408 or "its principles" in this case if it concludes that the law applies,
13 notwithstanding PacifiCorp's arguments to the contrary. As an alternative to the
14 testimony of Mr. Larson showing that the expected change in PacifiCorp ownership
15 eliminates the basis for the tax adjustment made in Order 05-1050 (the "Rate Order"),
16 I analyze the tax adjustment assuming continued ScottishPower/PHI ownership. I
17 demonstrate that the Commission's disallowance of \$26.63 million did not take into
18 account known and measurable changes for calendar year 2006 (CY06) and was
19 inaccurately calculated. I show that the original adjustment made by the
20 Commission, when calculated with an appropriate allocation factor and using actual
21 CY06 interest rates and offsets for tax liability associated with the interest, would be
22 approximately \$1.6 million on an Oregon-allocated basis, which is approximately
23 \$2.6 million on a grossed-up basis.

Exhibit 3

CASE: UE 170
WITNESS: Maury Galbraith

**PUBLIC UTILITY COMMISSION
OF
OREGON**

STAFF EXHIBIT 700

Surrebuttal Testimony

June 27, 2005

1 IRP by May 23, 2005. ICNU was not among the five parties who submitted
2 comments. Parties will have an opportunity to reply to staff's comments by
3 July 13, 2005, and to staff's final recommendations and proposed order on or
4 before Aug. 1, 2005.

5 **Q. DOES STAFF SUPPORT PACIFICORP'S APPROACH TO ACCOUNTING**
6 **FOR OREGON DIRECT ACCESS PARTICIPATION IN ITS IRP?**

7 A. Yes. Given the low level of direct access participation in PacifiCorp's service
8 territory to date and the ability for customers to return to cost-of-service rates
9 on an annual basis, Staff believes it is reasonable at this time for PacifiCorp to
10 plan to serve the entire forecasted load in its Oregon service territory on a long-
11 term basis.

12 **Q. DOES PACIFICORP ADDRESS THIS ICNU ISSUE IN ITS REBUTTAL**
13 **TESTIMONY?**

14 A. Yes. PacifiCorp witness Widmer concludes:

15 The real issue is whether or not the Company should plan for Direct
16 Access before we have any idea of what the participation level will be.
17 At this time, the Company does not know how many customers will
18 elect Direct Access and leave our system, how long it will be before
19 they return, or if they will ever return, because customers have the sole
20 discretion to return or not return at the end of each annual Direct
21 Access cycle. (PPL/609, Widmer/8-9.)

22 **Q. DOES THE COMBINATION OF A REQUIRED COST-OF-SERVICE RATE**
23 **OPTION (ORS 757.603) AND A REQUIRED ANNUAL ELECTION WINDOW**
24 **(ORS 757.609) DICTATE A SHORT-TERM OPERATIONAL PERSPECTIVE**
25 **WHEN CALCULATING AN ANNUAL TRANSITION ADJUSTMENT?**

1 A. Yes, to a large extent. Longer-term opt-out options would allow for a longer-
2 term perspective. However, Portland General Electric's three- and five-year
3 opt-out options have generated limited customer interest. A binding permanent
4 opt-out has not yet been developed.

5 **Q. DOES ICNU OFFER A "PREFERRED SOLUTION" TO THIS PROBLEM?**

6 A. Yes. ICNU witness Falkenberg states:

7 A much less complex solution is to simply recognize that when the
8 system is appropriately planned, departure of direct access load will
9 result in a net reduction in purchases. Thus the value of freed up
10 resources should simply reflect the cost of a standard market product
11 with additional transmission costs avoided. (ICNU/100, Falkenberg/55,
12 Lines 12-16.)

13 **Q. IS ICNU'S PREFERRED SOLUTION REASONABLE?**

14 A. No. ICNU's "market-plus" solution is predicated on a poorly stated view that
15 PacifiCorp should not plan to serve a portion of its direct access eligible load.
16 PacifiCorp's proposed Transition Adjustment, with the modifications provided
17 by the Partial Stipulation, is fully consistent with the Company's 2004 IRP. At
18 this time, it is reasonable for the Company to plan to serve the entire
19 forecasted load in its Oregon service territory on both an annual and long-term
20 basis. These assumptions may change if PacifiCorp sees more interest in
21 direct access.

22

23 4. Annual Update of NVPC Component of Cost-of-Service Rates.

24 **Q. PLEASE RECAP ICNU'S ARGUMENT RELATED TO THE ANNUAL**
25 **UPDATE OF THE NVPC COMPONENT OF COST-OF-SERVICE RATES.**