

**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)	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.)	

I. INTRODUCTION

Pursuant to OAR § 860-013-0031, the Industrial Customers of Northwest Utilities (“ICNU”) submits this motion requesting that the Oregon Public Utility Commission (“OPUC” or the “Commission”) modify the Highly Confidential protective order in this proceeding to allow ICNU’s tax consultant (Ellen Blumenthal) to receive a copy of PacifiCorp’s tax report, as well as other documents that PacifiCorp has designated highly confidential. The Commission’s protective order in this docket prevents ICNU’s consultant from viewing, possessing or accessing any document designated as “highly confidential” outside of the Portland safe room. In addition, she cannot review the material outside of the supervision of a PacifiCorp employee. ICNU has in good faith endeavored to work under the requirements of the Commission’s protective order, but the protective order has proven too burdensome and costly, and it has effectively prevented ICNU from conducting a thorough and comprehensive review of

PAGE 1 – ICNU’S MOTION TO MODIFY THE PROTECTIVE ORDER

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

PacifiCorp's tax filings. ICNU's legal counsel has, without success, attempted to resolve this matter informally with PacifiCorp's legal counsel. See Attachment A.

Ms. Blumenthal is a well respected tax consultant who has over thirty years experience in utility regulatory proceedings, and she has reviewed the tax reports of both PacifiCorp and Portland General Electric Company ("PGE") for the last three years. Ms. Blumenthal has been provided a copy of the PGE tax report as well as other highly confidential information at her place of business in Corpus Christi, Texas, which has allowed her an opportunity to adequately review PGE's taxes for purposes of determining compliance with Senate Bill 408. There has been no wrongful or inadvertent release of PGE's highly confidential information by Ms. Blumenthal. The last three years of experience with both the PGE and PacifiCorp's tax reports demonstrate that the current protective order does not allow ICNU the ability to effectively audit and verify the PacifiCorp tax reports, and that the current restrictions are not necessary to protect this confidential material. The primary result of the current protective order has been to prevent ICNU from reviewing the reasonableness of the PacifiCorp tax reports.

II. BACKGROUND

The Commission adopted the current protective order over the opposition of ICNU. Re PacifiCorp et al., Docket Nos. UE 177 and 178, UG 170 and 171, Order No. 06-033 (Jan. 25, 2006) ("Order No. 06-033"). The Commission issued the extremely restrictive provisions of the protective order because of concerns about the Commission's general protective order, the potential harm that might occur from disclosure of the tax information, and

PAGE 2 – ICNU'S MOTION TO MODIFY THE PROTECTIVE ORDER

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

a factual conclusion that, absent the safe room protection, the Commission could not “provide reasonable assurance that the utilities’ highly sensitive information will be protected.” Id. at 4.

The Commission’s unprecedented and highly restrictive provisions allow the utilities to designate the most relevant tax information as highly confidential. Absent an agreement with the utility, intervenors like ICNU are only allowed limited access to the highly confidential material in a safe room in Portland. Id. at 2. ICNU must provide 24-hour advance notice to enter the safe room, which is only open Monday through Friday, between the hours of 9 am and noon, and 1 pm and 5 pm. Id. ICNU can only take limited notes, and ICNU’s attorneys and consultant cannot simultaneously review and discuss the documents outside of the presence of a PacifiCorp employee. Id. at 2, 5. Staff, in contrast, has full access to all the tax report documents in a safe room located at their offices in Salem. Id. at 2.

ICNU retained Ms. Blumenthal to review the utilities’ tax reports in 2007. ICNU is the only intervenor which has retained an outside consultant or made an effort to conduct a thorough and comprehensive review of PacifiCorp’s and PGE’s tax reports. ICNU reached an agreement with PGE that has allowed Ms. Blumenthal access to and the ability to review PGE’s highly confidential documents at her offices in Corpus Christi, Texas. No other party complained about Ms. Blumenthal’s access to the PGE documents. Ms. Blumenthal has carefully reviewed the PGE tax reports for three years, without inappropriately releasing or revealing any highly confidential material. As a result, ICNU has been able to enter into settlements on the SB 408 issues each year with PGE.

PAGE 3 – ICNU’S MOTION TO MODIFY THE PROTECTIVE ORDER

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

In contrast, Ms. Blumenthal has been unable to effectively review PacifiCorp's tax report information under the terms of the protective order. In December 2007, ICNU filed a motion to amend the highly confidential protective order to allow ICNU with access to the documents outside of the Portland safe room. The Commission denied ICNU's motion. Re PacifiCorp, Docket No. UE 177, Order No. 08-002 (Jan. 3, 2008) ("Order No. 08-002"). The Commission reaffirmed its conclusion that it had "no choice but to limit intervenors' review of documents containing highly confidential information to a safe room located in Portland." Id. at 5. The Commission agreed that PacifiCorp's tax filing was complex because of the inclusion of Berkshire Hathaway's consolidated group, which increased the need for protection. Id. at 5. The Commission also stated that a party must make a reasonable attempt to work within the protective order procedures before seeking to modify the protective order, and that ICNU had not made such a showing. Id. at 6. ICNU can now show that the current process is unworkable, and the experience with PGE shows that providing Ms. Blumenthal with a copy of the highly confidential material will not create a risk of disclosure. Ms. Blumenthal has worked closely with staff and has created a track record demonstrating her professionalism and integrity.

III. ARGUMENT

ICNU is simply asking that the Commission make an exception to the protective order allowing Ms. Blumenthal access to PacifiCorp's tax report and the other highly confidential documents at her office in Texas. ICNU is not seeking a Commission order broadly changing the terms of the protective order. In fact, ICNU is not asking for access for its attorneys, only Ms. Blumenthal given her unique circumstances. The highly confidential

PAGE 4 – ICNU'S MOTION TO MODIFY THE PROTECTIVE ORDER

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

restrictions have proven to be both unnecessary and unworkable, and the Commission should modify its highly confidential protective order to allow ICNU's consultant to have access to PacifiCorp's tax report. ICNU has a demonstrated track record of attempting to conduct a complete review of PacifiCorp's tax filings, has worked under the current protective order, and has a history of protecting all highly confidential material. The fact that PacifiCorp is owned by Berkshire Hathaway should not mean that ICNU is precluded from conducting a reasonable review of PacifiCorp's tax reports.

1. ICNU Has Made a Reasonable Effort to Work Within the Protective Order Procedures

ICNU has worked under the current version of the protective order for three PacifiCorp tax filings, and ICNU has not been able to fully audit and verify PacifiCorp's tax reports. As the Commission has recognized, PacifiCorp's tax report is extremely complex. For example, the report is supported by a voluminous amount of highly confidential workpapers that are about 4 to 5 inches thick. Blumenthal Affidavit at ¶8. The tax report, workpapers, and source documents are detailed and complex, and require a significant amount of time to understand and analyze. Id.

ICNU's utility tax consultant has visited the Portland safe room to review each of the last three PacifiCorp tax filings, and is now in Portland to review the current PacifiCorp tax filing. Ms. Blumenthal has spent multiple days reviewing the PacifiCorp tax reports, and has concluded that she would need at least two to three weeks to conduct a proper analysis of PacifiCorp's tax filing. Id. at ¶10. An analysis of the tax report cannot be conducted over a brief period of time, but must be spread out over a longer period of time with repeated access to

PAGE 5 – ICNU'S MOTION TO MODIFY THE PROTECTIVE ORDER

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

the documents. Id. For each portion of the tax report, Ms. Blumenthal needs to be able to review the documents, conduct her analysis on the specific issue, and then return to the tax report to verify her analysis with the documents. Id. at ¶12. Being able to review the documents for only a few days effectively prevents Ms. Blumenthal from reviewing many aspects of the tax report and limits the depth of her analysis of those portions of the tax report that are reviewed. Id. at ¶11. This is in stark contrast to the access Staff has to the tax report. Also, the presence of a PacifiCorp monitor has had a chilling and harmful impact on the ability of ICNU to review the confidential documents. Id. at ¶15.

Reviewing the documents only in the Portland safe room imposes other practical hurdles which makes ICNU's analysis more cumbersome and expensive. Ms. Blumenthal does not have access to her other documents and items in her regular place of business that would assist her review of the tax report. Id. at ¶13. Ms. Blumenthal is unable to perform calculations in completing her testimony. The cost to ICNU is increased as Ms. Blumenthal must travel to Portland. Id. at ¶17. While ICNU can seek intervenor funding to cover a portion of the costs of reviewing the PacifiCorp tax report, both ICNU's budget and the intervenor funds are very limited resource pools. Any additional costs imposed because of the restrictive protective order reduce the funds available for ICNU to participate in other proceedings. This only benefits PacifiCorp who seem to come up with a tax surcharge every year despite its annual rate cases.

ICNU's reviews of PacifiCorp's past tax filings have not been thorough and have focused on only the main highlights and obvious areas of concern. From a practical perspective, ICNU has been forced to accept many of the conclusions and analysis in the tax filings because

PAGE 6 – ICNU'S MOTION TO MODIFY THE PROTECTIVE ORDER

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

of insufficient opportunity to review the documents. *Id.* at ¶11. Essentially, there are major aspects of PacifiCorp’s tax filing that have not been reviewed by ICNU. *Id.* This limited review may have resulted in ICNU not identifying errors, mistakes or other concerns with PacifiCorp’s filing that may have been uncovered if ICNU had access to the confidential documents. *Id.* at ¶12. ICNU is also unable to effectively review the testimony of Staff or PacifiCorp’s rebuttal testimony without access to the tax report, which would require a subsequent trip to the Portland safe room. *Id.* ICNU’s participation in the workshops is also limited as both PacifiCorp and Staff have the tax report but not ICNU.

2. Disclosure of Highly Confidential Information to Ms. Blumenthal Will Not Compromise Confidentiality

The Commission adopted the highly confidential provisions in this docket in Order No. 06-033, soon after the release of confidential documents related to Texas Pacific Group’s attempt to acquire PGE. The Commission was concerned about the fact that SB 408 required the utilities “to produce this sensitive information at a time when uncertainty exists as to the effectiveness of the Commission’s general protective order, particularly in highly politicized and publicized cases.” Order No. 06-033 at 4. ICNU was not responsible for the leaked confidential documents and should not continue to be punished for the wrongful and illegal release of information by a different party. ICNU’s attorneys and consultants have a long history of carefully protecting confidential material.

The Commission concluded that it had “no choice but to adopt a safe-room discovery mechanism” and that the highly confidential protective order was required because of “the fact that, absent the safe-room protection, we cannot provide reasonable assurance that the

PAGE 7 – ICNU’S MOTION TO MODIFY THE PROTECTIVE ORDER

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

utilities' highly sensitive tax information will be protected." *Id.* The facts have changed. The utilities tax filings are now routine, rather than "highly political and publicized cases." In addition, these cases attract limited intervenors. Finally, experience shows that disclosing tax information to ICNU's consultant provides reasonable assurance that the information will be protected. ICNU's consultant has reviewed PGE's highly confidential documents in her Texas office for each of the past three years, and there has been no inappropriate release or leak of any PGE confidential tax information. Blumenthal Affidavit at ¶16. This demonstrates that less onerous restrictions can be adopted that will provide ICNU's consultant access to tax information, and also reasonably prevent against the risk of disclosure. ICNU believes that the safe room procedures are unnecessary. However, in recognition of the potentially sensitive nature of PacifiCorp's tax documents, ICNU is limiting its request in this motion to allowing its consultant to receive one copy of the highly confidential information, which she will maintain in a secure location at her place of business.

IV. CONCLUSION

The Commission should modify the highly confidential protective order in this proceeding to allow ICNU's consultant to receive a copy of the documents which have been designated highly confidential by PacifiCorp. The current protective order has effectively prevented ICNU from being able to conduct an adequate review of PacifiCorp's tax reports. The unusually restrictive procedures of the current protective order have proven to be unreasonable and unnecessary to protect against wrongful disclosure. The protective order should be modified to make a specific exception for ICNU's tax consultant (Ellen Blumenthal) to be able to review

PAGE 8 – ICNU'S MOTION TO MODIFY THE PROTECTIVE ORDER

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333 S.W. Taylor, Suite 400
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Telephone: (503) 241-7242

and posses PacifiCorp's tax report, workpapers and data responses outside of the Portland safe room.

Dated this 2nd day of November, 2010.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Melinda J. Davison

Melinda J. Davison
Irion A. Sanger
333 S.W. Taylor, Suite 400
Portland, Oregon 97204
(503) 241-7242 phone
(503) 241-8160 facsimile
mjd@dvclaw.com
ias@dvclaw.com
Of Attorneys for Industrial Customers
of Northwest Utilities

PAGE 9 – ICNU'S MOTION TO MODIFY THE PROTECTIVE ORDER

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

ATTACHMENT A

Melinda J. Davison

From: Katherine McDowell [katherine@mcd-law.com]

Sent: Thursday, October 28, 2010 4:58 PM

To: Melinda J. Davison

Subject: RE: SB 408

Melinda, Thanks for your email.

PacifiCorp is not willing to provide its 2009 tax report and workpapers to Ms. Blumenthal outside of the Portland and Salem saferooms established in Order No. 06-033. The Commission has addressed and re-addressed this issue, and the current order provides a fair balance between providing access to the supporting information for PacifiCorp's SB 408 compliance filing and protecting the sensitive commercial information of Berkshire Hathaway companies. As you know, PGE's tax report and workpapers reflect tax information of a stand-alone utility. In contrast, PacifiCorp's tax report and workpapers contain tax information from hundreds of unregulated affiliates which, as the Commission has previously recognized, makes them much more sensitive. *See In re PacifiCorp*, UE 177, Order No. 08-002 at 5. Many of IGNU's members may do business with, compete with, or would benefit from the market information that is contained within this tax information. The Commission recognized this and we will continue to stand behind that determination.

If you have some proposals you would like to offer that do not involve modifications to Order No. 06-033, we are willing to take all reasonable steps to facilitate Ms. Blumenthal's access to the Portland and Salem saferooms, consistent with our prior practices under the protective order.

Best regards,

Katherine

Katherine McDowell
McDowell Rackner & Gibson PC
419 SW 11th Ave, Suite 400
Portland, OR 97205

Direct: (503) 595-3924

Cell: (503) 423-7272

katherine@mcd-law.com

From: Melinda J. Davison [mailto:MJD@dvclaw.com]

Sent: Monday, October 25, 2010 3:29 PM

To: Katherine McDowell

Subject: SB 408

Dear Katherine-

We have retained Ellen Blumenthal to be our expert for the SB 408 cases. She has been our expert now for many years. As you know PGE has entrusted her with the tax report for 2 or 3 years now without any problem. We would like PacifiCorp to extend the same courtesies. If you are not willing to give her a copy of the tax report and work papers, would you consider a saferoom in Houston. We hope that we can work this out with the Company if not we plan to raise this issue again with the Commission. Thanks Melinda

Melinda J. Davison
Attorney

Davison Van Cleve, PC
333 SW Taylor St., Suite 400
Portland, OR 97204
Tel: 503.241.7242
Fax: 503.241.8160
mjd@dvclaw.com

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 177

In the Matter)
OREGON PUBLIC UTILITY STAFF) ELLEN BLUMENTHAL AFFIDAVIT
Requesting the Commission Direct)
PACIFICORP, dba PACIFIC POWER)
& LIGHT COMPANY,)
to File Tariffs Establishing Automatic)
Adjustment Clauses Under the Terms of)
SB 408.)

I, Ellen Blumenthal, being duly sworn on oath, depose and say:

1. My name is Ellen Blumenthal. My business address is 13517 Queen Johanna Court, 3 Corpus Christi, Texas 78418. I am a Principal with GDS Associates, Inc. ("GDS"). I am reviewing PacifiCorp's tax report on behalf of the Industrial Customers of Northwest Utilities ("ICNU").
2. I have over thirty years of experience working as an accountant in utility proceedings. I received the degree of Bachelor of Arts in Journalism from the University of Texas at Austin in 1974, but remained at the University to do additional course work in accounting and business. I became a Certified Public Accountant in Texas in 1977.
3. From 1975 to 1977, I worked in public accounting. My public accounting experience included the preparation of financial statements, tax work, and auditing. In May 1977, I became a regulatory accountant with the Public Utility Commission of Texas. I left the Public Utility Commission of Texas in November 1980, to open an

office in Austin for C.H. Guernsey & Company, Consulting Architects and Engineers. I became an independent consultant in 1982 and joined the firm of GDS in 2002.

4. GDS is an engineering and consulting firm that provides rate and regulatory consulting services in the electric, natural gas, water, and telephone utility industries. GDS also provides a variety of other services in the electric utility industry, including power supply planning, generation support services, financial analysis, load forecasting, and statistical services. Our clients are primarily publicly-owned utilities, customers of privately owned utilities, and government agencies. I am a principal in the firm.

5. I have reviewed, am familiar with and have carefully complied with the protective order in this proceeding. The protective order in this proceeding is unique, and I have never participated in a proceeding with similar restrictions. In all other utility tax proceedings, I am able to obtain a complete copy of the tax report information, and I am able to review and discuss the confidential material with counsel outside of a safe room. In other proceedings, I am given copies of the relevant documents, and in many cases, I have in my possession a copy of the utility's current tax return as well as tax returns for each of the preceding fifteen years. In some cases, I have the full and complete tax return for each and every entity included in the consolidated tax return for each of the last fifteen years.

6. I have reviewed PacifiCorp and PGE's tax filings in each of the past three years. PGE has agreed to allow me access to its highly confidential tax reports in my offices. Although I am likely to identify new concerns in future PGE tax reports, access to the PGE tax report has allowed me to conduct a thorough and comprehensive analysis of the PGE tax filings. I have carefully adhered to both the spirit and the specific terms of the

protective order and other agreements reached with PGE, which includes completely destroying or returning all highly confidential material at the end of each phase of the proceeding. No highly confidential material that has been provided to me has been inadvertently or wrongfully released.

7. PacifiCorp has not agreed to allow me to access its tax reports in my offices. I have been required to travel to Portland to view the relevant documents in a safe room, under the supervision of a PacifiCorp representative. Since PacifiCorp also designates data responses as highly confidential, I also have to travel to Portland to review responses to discovery requests for information. Not only is this costly for my clients, it does not allow for thorough and thoughtful consideration of the data.

8. PacifiCorp's tax report is highly complex. The workpapers are voluminous, and comprise approximately 4 to 5 inches of paper. The workpapers include the source documents and supporting calculations for the amounts included on the eight pages of the tax report form. For example, the workpapers include the computation of the taxes collected through rates, details of the depreciation expense deduction claimed on the company's state, federal and local tax returns, the apportionment calculations, deferred taxes, and much more.

9. PacifiCorp appears to over designate information as highly confidential information. For example, virtually all of the information in the tax report is designated as highly confidential, including even the apportionment calculation and the deferred tax schedule. I am not aware of any competitive or sensitive data contained in these schedules. The deferred tax information is never confidential, much less highly confidential, in any other jurisdiction of which I am aware.

10. I believe it would take at least two to three weeks to conduct a minimally adequate review of the PacifiCorp tax report. It is impossible to complete a review of the tax report over a few days. A few days is insufficient time to assimilate the information, draft data requests, prepare alternative calculations for settlement discussions, or prepare testimony.

11. Due to the safe room restrictions, I have only been able to conduct limited reviews of the past PacifiCorp tax reports. This requires me to accept many of the conclusions and calculations in the tax report because there is insufficient time to verify the filing. There are major aspects of the past tax reports that I have been unable to fully review. In addition, I have been required to limit the depth of my review of some of those aspects of the tax report that I have reviewed.

12. It is possible that there are errors, mistakes and problems with PacifiCorp's past tax reports that I have not identified because of the limited opportunity to review the tax report. For example, a problem was identified with the 2008 PGE tax report. ICNU was able to support Staff's proposed change because I had a copy of the tax report. If there was a similar problem with the PacifiCorp tax report, then I likely would not have time to identify it. Similarly, if a similar problem in the PacifiCorp tax report was identified by another party, I would not be able to verify its accuracy without a second visit to the Portland safe room. Also, I may not be able to effectively review and analyze any PacifiCorp testimony responding to my testimony without another trip to the Portland saferoom.

13. Reviewing the documents in the safe room creates other difficulties and makes my review of the tax report more difficult and burdensome. For example, I do not have

access to the files in my office, which is essential for a thorough and complete evaluation of the PacifiCorp tax report. The complicated and complex information included in the tax report and the workpapers is the Company's own data and it is presented in the Company's format. There is a learning curve involved just to become familiar with the presentation and nature of the data in the tax report and workpapers. Having such limited access to the information results in severely limiting my participation in this docket.

14. PacifiCorp has been critical of me in the past regarding the amount of time I have spent in the saferoom. Frankly, given my limited opportunity to review and work with the data, the review comes down to a few hours to see what is there. Otherwise, I need several weeks. There is not this middle ground as PacifiCorp alleges.

15. The presence of a PacifiCorp employee in the safe room has a chilling effect on my ability to review the tax report. I cannot have the tax report available when I have any discussions with counsel regarding the tax report. The PacifiCorp employee is also able to monitor what aspects of the tax report I am reviewing at any time, and potentially gain insights into the scope and depth of ICNU's review.

16. The safe room restrictions prevent me from drafting testimony regarding the PacifiCorp tax report. It is absolutely impossible to prepare testimony addressing the specifics of the numerous technical issues involved in these proceedings without having the documents on hand. I need to be able to review the highly confidential tax report, conduct my analysis of the issues, and repeatedly return to tax report and workpapers.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE
BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS
MADE FOR USE AS EVIDENCE AND IS SUBJECT TO PENALTY FOR PERJURY.

SIGNED THIS 2nd day of November, 2010, at Portland, Oregon.

Ellen Blumenthal

Ellen Blumenthal

SUBSCRIBED AND SWORN to before me this 2nd day of November,
2010.

Kellie L Chuncey-Lance
NOTARY PUBLIC FOR OREGON
My Commission Expires: 3/14/2014



Davison Van Cleve PC

Attorneys at Law

TEL (503) 241-7242 • FAX (503) 241-8160 • mail@dvc.com
Suite 400
333 SW Taylor
Portland, OR 97204

November 2, 2010

Via Electronic and U.S. 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 (4)

Dear Filing Center:

The Industrial Customers of Northwest Utilities hereby files this Motion to
Modify the Protective Order and Affidavit of Ellen Blumenthal, in the above referenced matter.

Thank you for your assistance, and please do not hesitate to contact our office if
you have any additional questions.

Sincerely yours,

/s/ Jacqueline E. Smith
Jacqueline E. Smith

Enclosures

cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Motion to Modify the Protective Order and Affidavit of Ellen Blumenthal on behalf of the Industrial Customers of Northwest Utilities upon the parties, on the service list, by causing the same to be deposited in the U.S. Mail, postage-prepaid, where paper service has not been waived.

Dated at Portland, Oregon, this 2nd day of November, 2010.

/s/ Jacqueline E. Smith
Jacqueline E. Smith

**PUBLIC UTILITY COMMISSION OF
OREGON**
DEBORAH GARCIA
PO BOX 2148
SALEM OR 97308-2148

**CITIZENS' UTILITY BOARD OF
OREGON**
OPUC DOCKETS
GORDON FEIGHNER
ROBERT JENKS
G. CATRIONA MCCRACKEN
610 SW BROADWAY, STE 400
PORTLAND OR 97205

DANIEL W MEEK ATTORNEY AT LAW
10949 SW 4TH AVE
PORTLAND OR 97219

DEPARTMENT OF JUSTICE
JASON W JONES
BUSINESS ACTIVITIES SECTION
1162 COURT ST NE
SALEM OR 97301-4096

KAFOURY & MCDOUGAL
LINDA K WILLIAMS
10266 SW LANCASTER RD
PORTLAND OR 97219-6305

MCDOWELL RACKNER & GIBSON PC
PORTLAND SAFE ROOM
KATHERINE A MCDOWELL
AMIE JAMIESON
419 SW 11TH AVE STE 400
PORTLAND OR 97205

**OREGON PUBLIC UTILITY
COMMISSION**
CARLA BIRD
PO BOX 2148
SALEM OR 97308-2148

PACIFICORP, DBA PACIFIC POWER
OREGON DOCKETS
825 NE MULTNOMAH ST, STE 2000
PORTLAND OR 97232

PACIFIC POWER & LIGHT
JOELLE STEWARD
825 NE MULTNOMAH STE 2000
PORTLAND OR 97232