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VIA ELECTRONIC FILING AND U.S. MAIL

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Public Utility Commission of Oregon
PO Box 2148
Salem, OR 97308-2148

Re: Docket No. UE 177

Enclosed for filing in Docket UE 177 are an original and five copies of PacifiCorp's Response Brief. A copy of this filing has been served on all parties to this proceeding as indicated on the enclosed service list.

Very truly yours,

A handwritten signature in black ink, appearing to read "Amie Jamieson".

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: April 23, 2009



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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 177

In the Matter of:

PACIFICORP, dba PACIFIC POWER &
LIGHT COMPANY

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

PACIFICORP'S RESPONSE BRIEF

Pursuant to Administrative Law Judge ("ALJ") Michael Grant's Telephone Conference Memorandum on April 2, 2009, PacifiCorp d/b/a Pacific Power ("PacifiCorp" or the "Company") issues this Response Brief to the Industrial Customers of Northwest Utilities' ("ICNU") Opening Brief on Reconsideration.

In its Opening Brief on Reconsideration, ICNU presents all of the same challenges to the validity of OAR 860-022-0041 that ICNU raised in opposition to PacifiCorp's Senate Bill 408 ("SB 408")¹ 2006 Tax Report. ICNU also raised identical challenges to PacifiCorp's 2007 Tax Report and Portland General Electric's ("PGE") 2007 Tax Report. The Public Utility Commission of Oregon ("Commission") rejected ICNU's arguments in each instance. While the Commission has decided to reconsider its procedural rejection of ICNU's challenge to OAR 860-022-0041, ICNU's Opening Brief on Reconsideration presents no basis for the Commission to change its prior rulings rejecting ICNU's arguments on the merits.

I. BACKGROUND

Pursuant to SB 408 and OAR 860-022-0041, PacifiCorp filed its 2006 Tax Report in this proceeding on October 15, 2007. The Commission established a procedural

¹ Codified at ORS 757.267, 757.268, and 757.210.

1 schedule "to provide an opportunity for Staff and intervenors to review and audit." *Re*
2 *Commission Staff Directing PacifiCorp, et al. to File Tariffs*, Docket UE 177, Order No. 08-
3 045 at 2 (Jan. 24, 2008). The Commission defined the scope of this review to include "any
4 information that may assist in determining whether the information contained in
5 PacifiCorp's tax report is accurate," but excluding an audit of PacifiCorp's underlying tax
6 returns or proposed general consolidated tax adjustments. *Re PacifiCorp Filing of Tariffs*
7 *Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, Docket UE 177,
8 Order No. 08-003 at 2 (Jan. 4, 2008).

9 In keeping with the scope of this proceeding, the Commission rejected ICNU's
10 attempts to expand the scope to include a challenge to the validity of OAR 860-022-0041.
11 *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under the*
12 *Terms of SB 408*, Docket UE 177, Order No. 08-201 at 4 (Apr. 11, 2008) ("Final Order");
13 *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under the*
14 *Terms of SB 408*, Docket UE 177, Order No. 08-176 at 3 (Mar. 20, 2008); *Re PacifiCorp*
15 *Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*,
16 Docket UE 177, Ruling at 5 (Mar. 3, 2008). The Commission held that ICNU's arguments
17 constituted a collateral attack on OAR 860-022-0041 and were inappropriate in this
18 docket, the purpose of which is to determine whether PacifiCorp's 2006 Tax Report
19 complies with OAR 860-022-0041. *Re PacifiCorp Filing of Tariffs Establishing Automatic*
20 *Adjustment Clauses Under the Terms of SB 408*, Docket UE 177, Order No. 08-176 at 3
21 (Mar. 20, 2008).

22 Despite this finding, the Commission did in fact consider and reject ICNU's
23 arguments regarding the validity of OAR 860-022-0041, as evidenced by the
24 Commission's finding "the calculation of the surcharge, as well as the surcharge itself, to
25 be consistent with and in compliance with both OAR 860-022-0041 and ORS 757.268."
26 Final Order at 5. In addition, to the extent ICNU raised direct challenges to the Company's

1 2006 Tax Report, the Commission addressed and rejected these challenges in its Final
2 Order. The Commission approved PacifiCorp's 2006 Tax Report and authorized the
3 Company's proposed surcharge. Final Order at 1.

4 ICNU filed a petition for judicial review of the Final Order with the Court of Appeals
5 on May 12, 2008. After ICNU filed its Opening Brief but before PacifiCorp and
6 Commission Staff ("Staff") filed response briefs, the Commission withdrew the Final Order
7 from the court for purposes of reconsideration on March 24, 2009. The Commission
8 withdrew the order to consider the merits of ICNU's argument that OAR 860-022-0041 is
9 inconsistent with SB 408. *Re PacifiCorp Filing of Tariffs Establishing Automatic*
10 *Adjustment Clauses Under the Terms of SB 408*, Docket UE 177, Notice of Telephone
11 Conference (Mar. 26, 2009). The Commission did not stay the Final Order and the Final
12 Order remains in lawful effect. *Id.*

13 ALJ Grant held a telephone conference on April 2, 2009 to discuss procedures
14 applicable to the Commission's reconsideration of the Final Order. ALJ Grant established
15 a briefing schedule for reconsideration. *Re PacifiCorp Filing of Tariffs Establishing*
16 *Automatic Adjustment Clauses Under the Terms of SB 408*, Docket UE 177, Telephone
17 Conference Memorandum (Apr. 2, 2009). ALJ Grant also ruled that the testimony of
18 ICNU's witness Ellen Blumenthal consisting of legal arguments attacking the validity of
19 OAR 860-022-0041 that the Commission previously struck from the record would be
20 entered into the record as commentary. Transcript at 2-3.² PacifiCorp's testimony
21 responding to Ms. Blumenthal's testimony that PacifiCorp withdrew in light of the
22 Commission striking Ms. Blumenthal's testimony was also entered into the record as

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25 ² A transcript of the April 2, 2009 Telephone Conference is attached hereto as Attachment B.
26 The Affidavit of Wendy L. McIndoo authenticating the transcription of the tape of the Telephone
Conference is attached hereto as Attachment A.

1 commentary. Transcript at 4. ICNU did not object to Ms. Blumenthal's or PacifiCorp's
2 testimony being entered into the record as commentary. See Transcript at 2-4.

3 Before ICNU filed its Opening Brief on Reconsideration, the Commission issued its
4 order on PacifiCorp's 2007 Tax Report. *Re PacifiCorp Filing of Tariffs Establishing*
5 *Automatic Adjustment Clauses Under the Terms of SB 408*, Docket UE 177, Order No. 09-
6 127 (Apr. 10, 2009) ("Order No. 09-127"). The Commission also issued its order on PGE's
7 2007 Tax Report. *Re PGE Filing of Tariffs Establishing Automatic Adjustment Clauses*
8 *Under the Terms of SB 408*, Docket UE 178, Order No. 09-126 (Apr. 10, 2009) ("Order
9 No. 09-126"). In both of these orders, the Commission rejected ICNU's argument that
10 OAR 860-022-0041 is invalid because it exceeds the Commission's authority under SB
11 408.

12 II. DISCUSSION

13 A. This Reconsideration Proceeding to Address the Merits of ICNU's Challenge 14 to OAR 860-022-0041 Moots ICNU's Procedural Challenge to the Commission's Final Order.

15 The Commission withdrew the Final Order from the Court of Appeals in order to
16 more clearly consider the merits of ICNU's argument that OAR 860-022-0041 is
17 inconsistent with SB 408. *Re PacifiCorp Filing of Tariffs Establishing Automatic*
18 *Adjustment Clauses Under the Terms of SB 408*, Docket UE 177, Notice of Telephone
19 Conference (Mar. 26, 2009). The Commission acted to resolve ICNU's argument on
20 appeal (contained in its Second Assignment of Error) that the Commission erred in failing
21 to clearly address the merits of ICNU's facial challenge to the Commission's administrative
22 rule. Transcript at 1.

23 A significant portion of ICNU's Opening Brief is dedicated to rearguing whether the
24 Commission should have heard ICNU's challenge to the validity of OAR 860-022-0041.

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1 For all of the reasons the Company has previously argued, the Company does not agree
2 that the Commission erred in rejecting ICNU's argument on procedural grounds.³
3 Nevertheless, because the Commission has elected to reconsider this position and
4 address ICNU's facial challenge to OAR 860-022-0041 on the merits, ICNU's procedural
5 arguments are now moot.

6 **B. In this Reconsideration Proceeding, the Commission Should Follow the**
7 **Substantive Analysis Contained in its Final Order and Its New Orders in the**
8 **PacifiCorp and PGE 2007 Tax Report Dockets Rejecting ICNU's Challenges**
9 **to OAR 860-022-0041**

9 In its Final Order, the Commission addressed and rejected all of ICNU's arguments
10 regarding the calculation of taxes paid under OAR 860-022-0041 in PacifiCorp's 2006 Tax
11 Report. Additionally, in PacifiCorp's and PGE's 2007 Tax Report dockets, the
12 Commission specifically addressed and rejected ICNU's argument that OAR 860-022-
13 0041 unlawfully fails to calculate "actual taxes paid." Between the Final Order in the
14 PacifiCorp's 2006 Tax Report Docket and the new Orders in the 2007 Tax Report dockets,
15 the Commission has already addressed and rejected the merits of all of the arguments
16 raised in ICNU's Opening Brief on Reconsideration. ICNU has presented no basis for the
17 Commission to change its position rejecting these arguments.

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21 _____
22 ³ PacifiCorp does not agree that ICNU was required to challenge OAR 860-022-0041 in this
23 proceeding or that the Commission was required to entertain ICNU's challenge. PacifiCorp has
24 previously responded to ICNU's contentions on these points and will not repeat those arguments
25 here. See *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under the*
26 *Terms of SB 408*, Docket UE 177, PacifiCorp's Reply Brief at 1-4 (Mar. 19, 2008); *Re PacifiCorp*
Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408, Docket UE
177, PacifiCorp's Response to ICNU's Reply to PacifiCorp's Motion in Limine at 6-7 (Feb. 25, 2008);
Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB
408, Docket UE 177, PacifiCorp's Motion in Limine at 2-5 (Feb. 19, 2008).

1 **1. The Commission Did Not Exceed Its Statutory Authority in Adopting**
2 **OAR 860-022-0041.**

3 In its Opening Brief, ICNU argues that OAR 860-022-0041 is invalid because,
4 contrary to the mandate of SB 408, it does not calculate “actual taxes paid” and instead
5 calculates a hypothetical taxes paid amount. The Commission rejected this argument in
6 Orders 09-126 and 09-127. The Commission should apply the same analysis on
7 reconsideration in this case as it applied in these Orders.

8 The Commission found that ICNU’s “actual taxes paid” theory contains two major
9 flaws. First, ICNU takes language from ORS 787.268(6) out of context. Order No. 09-126
10 at 5; Order No. 09-127 at 4. The Commission held that SB 408 requires the Commission
11 to adjust rates based on how much the utility or its affiliated group paid in taxes that are
12 “properly attributed to the regulated operations of the utility,” not on ICNU’s undefined
13 actual taxes paid amount. *Id.*

14 Second, ICNU’s “actual taxes paid” approach is based on a faulty premise that the
15 Commission may only use amounts contained in the utilities’ actual tax returns to adjust
16 rates. *Id.* No utility subject to SB 408 files a separate tax return for its regulated
17 operations that could be used for purposes of adjusting rates. *Id.* As a result, the
18 amounts contained in the tax returns of the utility or consolidated group must be adjusted
19 to reflect amounts “properly attributed to the regulated operations of the utility.” *Id.*

20 Using this reasoning, the Commission recognized that the essential question in
21 determining the validity of the rule is whether it adjusts rates to match taxes actually paid
22 that are “properly attributed” to the regulated operations of the utility. *Id.* at 4-5. The
23 Commission noted that the Attorney General had concluded that “properly attributed” was
24 a delegative term, to be interpreted and applied by the Commission. *Id.* at 5. The
25 Commission defined the term using the apportionment method, a method to which ICNU
26 has never directly objected. *Id.* at 5-6. After examining the operation of the rule in more

1 detail, including how pro forma tax returns are used, the Commission determined that the
2 rule was well within the Commission's discretion under SB 408. *Id.* at 6-7.

3 **2. ICNU's Challenges to the Application of OAR 860-022-0041 to**
4 **PacifiCorp's 2006 Tax Report are Unfounded.**

5 **a. Use of the Interest Synchronization Method is Appropriate.**

6 ICNU argues that OAR 860-022-0041 is deficient because it requires use of the
7 interest synchronization method rather than an actual interest calculation. ICNU
8 previously raised this same issue in its Opening Brief in this proceeding. *Re PacifiCorp*
9 *Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408,*
10 *Docket UE 177, ICNU's Opening Brief at 9-10 (Mar. 14, 2008).* PacifiCorp responded to
11 ICNU's argument on the interest synchronization method in its Post-Hearing and Reply
12 Briefs filed in this proceeding. *Re PacifiCorp Filing of Tariffs Establishing Automatic*
13 *Adjustment Clauses Under the Terms of SB 408, Docket UE 177, PacifiCorp's Reply Brief*
14 *at 5 (Mar. 19, 2008); Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment*
15 *Clauses Under the Terms of SB 408, Docket UE 177, PacifiCorp's Post-Hearing Brief at*
16 *17 (Mar. 14, 2008).* In approving PacifiCorp's 2006 Tax Report, the Commission found
17 that use of the interest synchronization method complies with OAR 860-022-0041 and
18 accepted PacifiCorp's tax report containing the interest synchronization method. Final
19 Order at 6. ICNU has presented no basis for the Commission to depart from this holding.

20 PacifiCorp's 2006 Tax Report originally used the Company's actual interest
21 deduction to calculate interest. PPL/200, Fuller/9, II. 18-23. Staff recommended that
22 PacifiCorp revise its tax report to use the interest synchronization method based on the
23 fact that the current rule provides for use of the interest synchronization method.
24 Staff/200, Owings-Ball/6; PPL/200, Fuller/9, II. 11-23; *Re PacifiCorp Filing of Tariffs*
25 *Establishing Automatic Adjustment Clauses Under the Terms of SB 408, Docket UE 177,*
26 *PacifiCorp's Post-Hearing Brief at 17 (Mar. 14, 2008).* All four utilities filing SB 408 tax

1 reports used the interest synchronization method. PPL/200, Fuller/9; *Re PacifiCorp Filing*
2 *of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, Docket
3 UE 177, PacifiCorp's Reply Brief at 5 (Mar. 19, 2008). As PacifiCorp discussed in prior
4 pleadings in this docket, the Commission cannot selectively waive its rule with respect to
5 PacifiCorp but no other utility.⁴ Therefore, the Commission could not selectively apply the
6 interest synchronization to all utility tax reports except PacifiCorp's. The Commission
7 should again hold that the use of the interest synchronization in PacifiCorp's 2006 Tax
8 Report is appropriate.

9 **b. Customers Already Receive the Benefit of Depreciation Under**
10 **OAR 860-022-0041.**

11 ICNU also argues that OAR 860-022-0041 is deficient because it does not include
12 the tax benefit of tax depreciation on public utility property on a straight-line basis. ICNU
13 previously raised this issue in its Opening Brief in this proceeding. *Re PacifiCorp Filing of*
14 *Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, Docket
15 UE 177, ICNU's Opening Brief at 10-11 (Mar. 14, 2008). PacifiCorp responded to this
16 argument in its Post-Hearing Brief. *Re PacifiCorp Filing of Tariffs Establishing Automatic*
17 *Adjustment Clauses Under the Terms of SB 408*, Docket UE 177, PacifiCorp's Post-
18 Hearing Brief at 17 (Mar. 14, 2008). The Commission considered ICNU's argument that
19 PacifiCorp's 2006 Tax Report did not include depreciation associated with public utility
20 property on a straight-line basis and rejected it—in part because the argument is factually
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22 ⁴ See *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under the*
23 *Terms of SB 408*, Docket UE 177, PacifiCorp's Reply Brief at 2-4 (Mar. 19, 2008); *Re PacifiCorp*
24 *Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, Docket UE
25 177, PacifiCorp's Response to ICNU's Motion for Expedited Certification at 2-4 (Mar. 19, 2008); *Re*
26 *PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*,
Docket UE 177, PacifiCorp's Response to ICNU's Reply to PacifiCorp's Motion in Limine at 5-6 (Feb.
25, 2008); *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under the*
Terms of SB 408, Docket UE 177, PacifiCorp's Motion in Limine at 3-5 (Feb. 19, 2008).

1 incorrect. Final Order at 6. The Commission found that Staff's requested revision
2 adjusting the stand-alone taxable income amount to remove depreciation associated with
3 public property was "fully justified and brings the Pacific Power Tax Report into
4 compliance with our rules." Final Order at 6. ICNU's argument on this issue in its
5 Opening Brief on Reconsideration does nothing to undermine the Commission's holding
6 on this issue.

7 Ms. Blumenthal initially testified that the stand-alone calculation did not include a
8 deduction for depreciation expense on a straight-line basis. ICNU/100, Blumenthal/6. On
9 cross-examination, Ms. Blumenthal acknowledged that she did not know whether the
10 depreciation deduction was added back in the stand-alone calculation. Tr. 72, ll. 10-18.
11 Staff testified that the depreciation benefits related to Oregon utility operations are in fact
12 added back into the calculation on a straight-line basis. Staff/200, Owings-Ball/4; see *Re*
13 *PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of*
14 *SB 408*, Docket UE 177, PacifiCorp's Post-Hearing Brief at 17 (Mar. 14, 2008). The
15 Commission should reiterate its holding that adjusting the stand-alone taxable income
16 amount to remove depreciation associated with public property is consistent with
17 OAR 860-022-0041 and SB 408.

18 **c. SB 408 Does Not Require that the Stand-alone Method Include**
19 **Consolidated Tax Savings.**

20 ICNU argues that, although SB 408 is silent on the issue, the stand-alone method
21 must include consolidated tax savings. ICNU raised this argument in its Opening Brief on
22 PacifiCorp's 2006 Tax Report and in the AR 499 rulemaking implementing OAR 860-022-
23 0041. See *Re Adoption of Permanent Rules to Implement SB 408 Relating to Utility*
24 *Taxes*, Order No. 06-400, Docket AR 499 (July 14, 2006) ("Order No. 06-400") (describing
25 ICNU "book end" and criticizing the method because it would give customers the benefit of
26 losses in other businesses even though they do not bear any burden of the losses and

1 could require auditing of every affiliate in the group which would be impractical to
2 implement).

3 As PacifiCorp discussed in its first response to ICNU's argument on this issue, the
4 Commission adopted the apportionment method in part to avoid the need to audit taxable
5 income and loss data on an affiliate-by-affiliate basis, and to ensure that OAR 860-022-
6 0041 would provide for an automatic adjustment clause that was actually automatic.
7 Order No. 06-400; *See re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment*
8 *Clauses Under the Terms of SB 408*, Docket UE 177, PacifiCorp's Response in
9 Opposition to ICNU's Motion to Compel at 6 (Jan. 2, 2008). The Commission agreed that
10 there was no basis for ICNU to propose general consolidated tax adjustments in this case.
11 *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under the*
12 *Terms of SB 408*, Docket UE 177, Order No. 08-003 at 3 (Jan. 4, 2008).

13 ICNU has presented no basis for the Commission to change its finding that SB 408
14 does not require OAR 860-022-0041 to account for consolidated tax savings in the stand-
15 alone method. The plain text of the statute does not require the Commission to calculate
16 a utility's stand-alone tax liability by including consolidated tax savings. In interpreting a
17 statute, the court must ascertain what is contained in the statute, "not to insert what has
18 been omitted." ORS 174.010. The Commission, therefore, cannot find OAR 860-022-
19 0041 to be invalid by inserting text relating to consolidated tax savings that ICNU is
20 proposing to add to SB 408.

21 **d. The Commission Should Reject ICNU's Improper Attempt to**
22 **Introduce New Evidence in its Opening Brief.**

23 As ICNU did in its Opening Brief, ICNU again presents new evidence in the form of
24 a new calculation created using selective information from PacifiCorp's 2006 10-K. *See*
25 *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under the*
26 *Terms of SB 408*, Docket UE 177, ICNU's Opening Brief at 12-13 (Mar. 14, 2008).

1 PacifiCorp moved to strike that material from Opening Brief and again moves to strike the
2 new evidence contained in Section IV.B.1.e of ICNU's Opening Brief on Reconsideration.
3 *See Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under the*
4 *Terms of SB 408*, Docket UE 177, PacifiCorp's Reply Brief at 5 (Mar. 19, 2008). The new
5 evidence is an interpretation of income and tax data drawn from PacifiCorp's SEC 10-K for
6 the transition period from April 1, 2006 to December 31, 2006. This information was never
7 supplied in discovery or admitted into the record, and is inaccurate and misleading.

8 Under ORS 756.558(1), additional evidence may not be received after the
9 conclusion of taking of evidence except upon order of the Commission and reasonable
10 opportunity to rebut the additional evidence. PacifiCorp reiterates its original objection and
11 motion to strike this new evidence. *See Re PacifiCorp Filing of Tariffs Establishing*
12 *Automatic Adjustment Clauses Under the Terms of SB 408*, Docket UE 177, PacifiCorp's
13 Reply Brief at 5 (Mar. 19, 2008).

14 **e. ICNU's Arguments Against the Apportionment Method and the**
15 **Consolidated Method are Irrelevant to the Validity of OAR 860-**
16 **022-0041.**

17 ICNU argues, as it did previously, that the apportionment method places "too
18 much" emphasis on capital, wages and salaries, and sales because PacifiCorp is more
19 capital intensive than other companies in its affiliated group. Similarly, ICNU argues that
20 the consolidated method will never represent taxes actually paid to governmental
21 authorities in PacifiCorp's case, because PacifiCorp is part of an affiliated group
22 containing hundreds of entities. ICNU made these same arguments in its previously filed
23 Opening Brief. *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses*
24 *Under the Terms of SB 408*, Docket UE 177, ICNU's Opening Brief at 14-16 (Mar. 14,
25 2008).

26 As PacifiCorp discussed in its Post-Hearing Brief, ICNU did not raise these issues
in the extensive rulemaking proceeding on SB 408, Docket AR 499, or in the subsequent

1 AR 518 rulemaking proceeding. *Re PacifiCorp Filing of Tariffs Establishing Automatic*
2 *Adjustment Clauses Under the Terms of SB 408*, Docket UE 177, PacifiCorp's Post-
3 Hearing Brief at 19-20 (Mar. 14, 2008). In fact, ICNU "applauded" the apportionment
4 method when the Commission initially proposed it, commending the Commission for
5 "thoughtfully resolv[ing] a thoroughly debated and complex issue." *Re Adoption of*
6 *Permanent Rules to Implement SB 408 Relating to Utility Taxes*, Docket AR 499, Reply
7 Comments of the Industrial Customers of Northwest Utilities on Proposed Rules at 1 (Aug.
8 14, 2006). Similarly, ICNU failed to object to the use of the consolidated method in the AR
9 499 and AR 518 proceedings. ICNU stated in comments that it found the Commission's
10 rules to be within "both the letter and spirit of SB 408." *Id.* ICNU also supported PGE's
11 \$37.2 million refund based on PGE's 2006 Tax Report calculated using the consolidated
12 method. Tr. 92, l. 24-Tr. 93, l. 2; see *Re PacifiCorp Filing of Tariffs Establishing Automatic*
13 *Adjustment Clauses Under the Terms of SB 408*, Docket UE 177, PacifiCorp's Post-
14 Hearing Brief at 21 (Mar. 14, 2008). ICNU never questioned the validity of the
15 consolidated method in that case.

16 It was not until ICNU faced the first major rate surcharge under SB 408 in this case
17 that ICNU objected to either the apportionment or consolidated method. In raising its
18 objections, ICNU presented no evidence that the consolidated or apportionment method
19 "will always produce the greatest result" as long as PacifiCorp is owned by Berkshire
20 Hathaway. See *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses*
21 *Under the Terms of SB 408*, Docket UE 177, Opening Brief on Reconsideration at 26 (Apr.
22 13, 2009). On the other hand, PacifiCorp presented evidence that these methods will not
23 necessarily produce the greatest result under PacifiCorp's current corporate structure.
24 PPL/200, Fuller/11.

25 If the consolidated or apportionment method does in fact produce the greatest
26 result in a given year, the stand-alone method will be used to calculate the utility's taxes

1 paid under OAR 860-022-0041's "lesser of" approach. As the Commission discussed in
2 Orders 09-126 and 09-127, the stand-alone method in OAR 860-022-0041 reflects the
3 statutory limit that is contained in SB 408 for taxes paid that are properly attributed to the
4 regulated operations of the utility. Order No. 09-127 at 5-6; Order No. 09-126 at 6-7. As a
5 result, even if ICNU's arguments regarding the application of the apportionment method
6 and consolidated method to PacifiCorp's tax situation were correct, OAR 860-022-0041
7 would operate to ensure PacifiCorp's taxes paid that are properly attributed to the
8 regulated operations of the utility are calculated within the Commission's discretion under
9 SB 408.

10 **C. The Commission Has No Authority to Deny PacifiCorp's Surcharge.**

11 ICNU again argues that the Commission should waive operation of OAR 860-022-
12 0041 as applied to PacifiCorp's 2006 surcharge. As PacifiCorp discussed in its pleadings
13 in response to ICNU's previous assertion of this argument, the Commission could not
14 lawfully waive application of the rule.⁵ A Commission decision to apply OAR 860-022-
15 0041 in some contexts but not others would raise constitutional issue under *Duquesne*
16 *Light Co. v. Barasch*, 488 U.S. 299, 311 (1989). *Duquesne* prohibits the Commission from
17 applying SB 408 or its rules in an arbitrary or opportunistic manner. *See id.* at 315.
18 Applying OAR 860-022-0041 in the context of a refund, as in the case of PGE's 2006
19 refund to customers, but not in the context of PacifiCorp's surcharge would be the exact
20 type of arbitrary and opportunistic ratemaking that is prohibited by *Duquesne*.

21 In addition, Oregon law also prohibits the Commission from choosing not to apply
22 OAR 860-022-0041 in the case of PacifiCorp's 2006 Tax Report. *Re PacifiCorp Filing of*
23 *Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, Docket
24 UE 177, PacifiCorp's Response to ICNU's Reply to PacifiCorp's Motion in Limine at 3-4

25 ⁵ See footnote 4, *supra*.
26

1 (Feb. 25, 2008). As discussed in PacifiCorp's Response to ICNU's Reply to PacifiCorp's
2 Motion in Limine, ICNU's reliance on the Commission's decision in UE 170 is baseless.
3 *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under the*
4 *Terms of SB 408*, Docket UE 177, PacifiCorp's Response to ICNU's Reply to PacifiCorp's
5 Motion in Limine at 6 (Feb. 25, 2008). The Commission specifically found that it was
6 addressing the operation of a Commission policy, *not* a rule, so that case is irrelevant to
7 the question of whether the Commission must abide by its own rule. *Id.* ICNU's reliance
8 on Staff's brief in the *Crooked River* case is also groundless. In that case, Staff argued
9 that the Commission should interpret a rule in the spirit of a statute, not that the
10 Commission should waive operation of the rule. *Id.*

11 Finally, ICNU's proposal that the Commission waive operation of OAR 860-022-
12 0041 would violate SB 408. ICNU has presented no alternative calculation or results upon
13 which the Commission could order an automatic adjustment clause to account for the
14 difference between taxes paid and taxes collected and to make the findings required by
15 SB 408. See *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses*
16 *Under the Terms of SB 408*, Docket UE 177, PacifiCorp's Reply Brief at 4 (Mar. 19, 2008).
17 The Commission has made clear that SB 408's automatic adjustment clause is
18 "automatic," limiting the Commission's discretion over its operation. Order No. 09-126 at
19 12. ICNU also fails to address the impact of a decision to waive OAR 860-022-0041 on
20 the utilities' private letter rulings to the Internal Revenue Service, which are predicated on
21 application of OAR 860-022-0041. The Commission should again reject ICNU's proposal
22 to waive application of OAR 860-022-0041.

23 **D. ALJ Grant's Ruling Admitting ICNU's Stricken Testimony and PacifiCorp's**
24 **Responding Testimony into the Record as Comment Was Appropriate.**

25 ICNU argues that ALJ Grant's decision to admit the testimony of Ellen Blumenthal
26 consisting of legal arguments attacking the validity of OAR 860-022-0041 and PacifiCorp's

1 responsive testimony as commentary was flawed on two bases. First, ICNU argues that
2 pursuant to ORS 756.055(2), the Commission may not delegate authority to ALJ Grant to
3 issue an order reopening the record to admit additional evidence. ICNU's argument is
4 misguided. The action actually prohibited in ORS 756.055(2) is delegation of the authority
5 to "[e]nter orders on reconsideration or following rehearing." The statute does not prohibit
6 the Commission from delegating authority to issue procedural rulings of the type ALJ
7 Grant issued with respect to the stricken testimony. ALJ Grant has not entered an order
8 on reconsideration or following rehearing, so the Commission should disregard ICNU's
9 argument.

10 Second, ICNU argues that pursuant to ORS 756.558(1), the Commission may not
11 receive additional evidence except upon a reasonable opportunity to examine any
12 witnesses and otherwise rebut the additional evidence. By its terms, this statute applies to
13 "evidence." In this case, ALJ Grant ruled that ICNU's stricken testimony and PacifiCorp's
14 testimony responding to that testimony would be introduced into the record as
15 "commentary," not evidence. Transcript at 2. ALJ Grant stated:

16 [W] hat I proposed, and would like to hear the Parties thoughts
17 on this, was that although the Commission denied the
18 admission earlier, the Commission now accept the testimony
19 as comment, rather than testimony per se, for a couple of
20 reasons. First, I think this is just a facial challenge to the rule
21 and does not represent a legal issue as to the legality of the
22 rule the Commission formulated. And second of all, I don't
23 believe there are any factual issues that are in dispute so the
24 easiest way to make sure you have a full record developed to
25 its arguments on the issues is just to accept Miss Blumenthal's
26 testimony as commentary.

22 As the transcript shows, ALJ Grant's ruling does not change the Commission's finding that
23 the legal argument, such as that included in Ms. Blumenthal's testimony, is not evidence
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25
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1 and does not belong in the testimony of non-lawyer witnesses.⁶ Order No. 08-176 at 3.
2 As a result, the requirements of ORS 756.558(1) do not apply to the commentary admitted
3 into the record.

4 Finally, ICNU failed to preserve its ability to object to the testimony being admitted
5 into the record as commentary and its ability to request an evidentiary hearing. At the
6 telephone conference on April 2, 2009, in response to ALJ Grant's proposal to admit
7 Ms. Blumenthal's testimony as comment, ICNU's attorney responded, "I do not have any
8 difficulty in accepting Miss Blumenthal's testimony as comment." Transcript at 2. ICNU
9 also failed to preserve its right to request an evidentiary hearing on PacifiCorp's testimony
10 responding to Ms. Blumenthal's stricken testimony. Furthermore, ICNU failed to object
11 when ALJ Grant agreed that the record the parties would be briefing on "is basically the
12 record as established with addition of the Blumenthal testimony and the PacifiCorp's
13 responsive testimony now being received as comment." Transcript at 9. Finally, ICNU's
14 testimony in opposition to the 2006 Tax Report is almost identical to its testimony in
15 opposition to the 2007 Tax Report. In the 2007 Tax Report docket, ICNU "agreed that no
16 hearing was necessary and the matter could be submitted to the Commission based upon
17 the written record." Order No. 09-127 at 2.

18 In any event, Ms. Blumenthal's testimony and PacifiCorp's response to the
19 testimony consist of legal argument to which no fact finding, and therefore no evidentiary
20 hearing, is required.

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⁶ Only relevant evidence, meaning evidence that tends to make any fact at issue in the
23 proceeding more or less probable, is admissible. OAR 860-014-0045(1). Written testimony in
Commission proceedings is subject to the rules of admissibility. See OAR 860-014-0060. Therefore,
24 written testimony must tend to make the existence of any fact at issue in the proceeding more or less
probable than it would without the evidence to be admissible. See OAR 860-014-0045(1)(a). Legal
25 arguments do not cause a fact at issue to be more or less probable, so they are irrelevant as
evidence.

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III. CONCLUSION

For these reasons, PacifiCorp requests that the Commission again reject ICNU's challenges to the validity of OAR 860-022-0041. PacifiCorp also requests that the Commission find that ALJ Grant's ruling admitting ICNU's stricken testimony and PacifiCorp's responsive testimony into the record as commentary was appropriate.

PacifiCorp also requests that the Commission strike Section IV.B.1.e of ICNU's Opening Brief on Reconsideration, because it introduces new evidence in contravention of ORS 756.558(1).

DATED: April 23, 2009

McDOWELL & RACKNER PC



Katherine McDowell
Amie Jamieson

Attorneys for PacifiCorp

UE 177

Attachment A

to

PacifiCorp's Response Brief

Affidavit of Wendy L. McIndoo

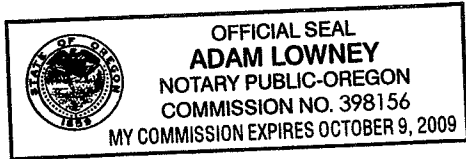
1 I declare under penalty of perjury under the laws of the state of Oregon that the
2 foregoing is true and correct based on my information and belief.

3
4 SIGNED this 23rd day of April 2009, at Portland, Oregon.

5
6 Signed: Wendy L. McIndoo

7
8 SUBSCRIBED AND SWORN to before me this 23rd day of April 2009.

9
10 Adam Lowney
11 Notary Public - Oregon



UE 177

Attachment B

to

PacifiCorp's Response Brief

**Transcript of April 2, 2009, Teleconference
In Docket UE 177**

Transcript of April 2 Teleconference in Docket UE 177

ALJ Grant: [Unintelligible] set for the telephone conference in docket UE 177. This is relating to Pacific Power's tax report filed for the calendar year 2006. My name is Michael Grant, Administrative Law Judge assigned to this proceeding. Appearances on the phone today, representing PacifiCorp is Katherine McDowell, Amie Jamieson and Ryan Flynn; representing Industrial Customers of Northwest Utilities is Melinda Davidson and Jessie Cowell, and representing the Commission Staff is Jason Jones.

As indicated in the Notice of the Conference, the Commission has pulled back its Order No. 08-201 from the Court of Appeals for purposes of reconsideration. The Commission took the action to consider ICNU's argument that the rule used to implement Senate Bill 408 is inconsistent with the statute. The Commission must enter its order on reconsideration by May 25th. The purpose of the conference today is to establish a procedural schedule for that reconsideration.

Given the short time frame for PUC action and kind of the uniqueness of this process I thought I'd begin the conference by outlining my proposed schedule and then open things up for comment. Is that acceptable to folks?

Multiple yeses:

Ms. McCracken: Yes, Your honor this is Catriona McCracken, Citizens' Utility Board. I apologize for coming in late.

ALJ Grant: Okay. Thank you.

I first want to clarify that the reconsideration is aimed at what was identified as assignment of error no. two in ICNU's Appeal of the Order 08-201; that being that the Commission failed to address ICNU's argument that the rule was inconsistent with the statute.

Obviously the issue also implicates assignment of error no. 1 which is that argument that the rule is not inconsistent. Second of all, to point out that this issues has also been raised at least to a certain extent in 2 of the other SB 408 dockets this year, again, in Pacific Power's tax report for 2007, in UE 177 and also with regard to PGE's tax report in UE 178. So fortunately, for these reasons, I get the sense that parties arguments are fairly well presented, especially ICNU who is filed this appellate brief in the UE 177 case. So I proposed that the proceedings be limited to a round of briefing; that the Commission can obviously take official notice of documents filed either at the Court or in other proceedings here at the Commission. To clarify that the issue to be addressed is a legal issue that I think will be resolved by briefing. Also recognize too that the testimony of Ellen Blumenthal that was struck in UE 177 relates to ICNU's argument, and what I proposed, and would like to hear the Parties thoughts on this, was that although the Commission denied the admission earlier, the Commission now accept the testimony as comment, rather than testimony per se, for a couple of reasons. First, I think this is just a facial challenge to the rule and does not represent a legal issue as to the legality of the rule the Commission formulated. And second of all I don't believe there are any factual issues that are in dispute so about the easiest way to make sure ICNU had its full record developed to its arguments on the issues is just to accept Ms. Blumenthal's testimony as commentary.

So those are my initial thoughts and I guess I will turn things over to the parties to see what they have to say. And perhaps Ms. Davidson since ICNU's the one who raised these arguments maybe we'd like to hear from you first.

Ms. Davison: Sure your Honor, I have a couple of questions. I do not have any difficulty in accepting Ms. Blumenthal's testimony as comment, so I guess the first question I would raise then is procedurally would the

Commission then be in effect changing their decision on the motion in limine?

ALJ Grant: Yes.

Ms. Davison: All right. Then the second question I had is, you said that you wanted us to send out one more round of briefing dealing with the assignment of errors 1 and 2, in what we raised before the Court of Appeals, and does that include the issue of ... we raised the challenge to the rule, but there's also the question that we lost on before the Commission, well before the ALJ and then we took it to the Commission, which is the issue of our ability to challenge the legality of the rule in this proceeding. But I assume that this is the point you want briefing on.

ALJ Grant: Are you talking about the safe room issue?

Ms. Davison: No, your Honor, I was referring to the ruling by the ALJ that we were procedurally incorrect in challenging the ruling in this particular docket.

ALJ Grant: Yes, with that clarification, yes you are correct, that's what this briefing would be, would allow you that opportunity.

Ms. Davison: Okay. All right. I'm sorry I think you said it earlier and I didn't write it down, when would you propose that the brief be due?

ALJ Grant: Actually, I didn't give a date. The only date we have is the date that was part of the withdrawal from the Court of Appeals and that the Commission must enter its order on reconsideration by May 25th, which I think is 60 days from the withdrawal.

Ms. Davison: Un huh.

ALJ Grant: So I think the briefing would probably need to be done, we have about 2 months to work with, I think the briefing should take up that first month and then the Commission would have a month to render its decision. That's what I would propose.

Ms. Davison: Okay. All right. And then, do you anticipate that the issue of the safe room procedure would be raised in this round of briefing or not?

ALJ Grant: No.

Ms. Davison: Okay. That's all I have.

ALJ Grant: Okay, Pacific Power, do you have any comments?

Ms. McDowell: Yes, your Honor, just a couple of things. First of all, when the Commission decided not to admit Ms. Blumenthal's testimony, we then did not offer certain responsive testimony, and I can provide numerous citations to you, but I guess my proposal would be that if Ms. Blumenthal's testimony is admitted as comment, then our responsive testimony would be admitted in the same light. That would be the first comment we would have.

ALJ Grant: That works for me.

Ms. McDowell: And the reason I probably need to ... I could read all the lines and pages and line numbers, but there's quite a few of them so it's probably confusing in terms of the record, it would probably be better if I just submitted it to you, or I could cite the portion of our motion in limine where we have all those references.

ALJ Grant: Why don't you give me the cite to the motion in limine.

Ms. McDowell: Okay, it's page 2 of our motion in limine, footnote one.

ALJ Grant: Okay.

Ms. McDowell: So I guess that's really the first issue I have. The second question I had is that I think from our perspective, we would, that we think the record is pretty well developed on these issues and I guess we'd prefer to be in the position of responding to the additional briefing that ICNU provides rather than briefing the simultaneously. I think that would end up having a more, it puts us more in the position that we are in in the Court of Appeals, plus it permits us to directly respond to ICNU's arguments rather than try to anticipate them on this issue. So we are willing to do that kind of responsive briefing in an expedited fashion, but that's how we would prefer to have the briefing schedule set up.

ALJ Grant: Okay.

Ms. Davison: Your Honor, this is Melinda Davidson. If that was the case, we would still believe that we would need a reply brief. We don't think it would be appropriate for PacifiCorp to in effect get the last word on this issue.

ALJ Grant: Any objection from PacifiCorp on that?

Ms. McDowell: Well, I think it's not a different situation then if we filed simultaneous briefs, but I guess, you know, I think that would be the normal course; that we would respond and then ICNU would have a chance to file a rebuttal.

ALJ Grant: Okay.

Ms. McDowell: If that was the Commission's preference.

ALJ Grant: Okay. Anything else from PacifiCorp?

Ms. McDowell: I think those are the two issues that we have.

ALJ Grant: Okay. Staff did you have any comment or questions.

Mr. Jones: Thanks your Honor. Based on what we've heard so far, Staff doesn't have any objection to the inclusion of ICNU's testimony/comments and PacifiCorp's testimony/comments into the record. We would, like PacifiCorp's because we don't know exactly what ICNU's arguments will look like, we would like the ability to respond versus filing a simultaneous brief. I realize we are under a tight time frame for 2 or 3 rounds of briefs, but it's hard to think of everything that we may need to cover.

ALJ Grant: So you would want an opportunity to file a responsive brief at the same time that PacifiCorp does?

Mr. Jones: That's correct your Honor.

ALJ Grant: Okay. Anything else from Staff?

Mr. Jones: No your Honor.

ALJ Grant: Ms. McCracken, anything from Citizens' Utility Board.

Ms. McCracken: Your Honor, CUB is not a party to the Stipulation, but we are in the other docket so we are only in monitoring mode at the moment. We haven't determined whether or not this is something that we would participate in, but we just want to know what is going on in the docket.

ALJ Grant: Okay, thank you. So it looks like we've got three dates that we need to set. One would be the initial brief by ICNU, to be followed by a responsive brief from PacifiCorp and Staff, and to the extent CUB wants to participate, and then the opportunity for ICNU to file a reply brief. One thing I'll throw out to kind of maybe speed things up ... Ms.

Davidson, would ICNU simply like to rely on the section of the brief that it filed with the Court of Appeals as its initial brief?

Ms. Davison: I would say that it would probably look very close to that, but we may want an opportunity to refine it or to shape it in a slightly different fashion, so I think that if we could do something very quickly that would look a lot like the Court of Appeals brief, that I think we would like to do a separate brief in this proceeding.

ALJ Grant: Okay, do you have an idea of how much time you'd need to make that initial filing?

Ms. Davison: Let's see, I'm looking at the calendar. I do have another brief coming up. Today is the 2nd. How about if we get our first brief in two weeks from today on April 16th. Would that be all right?

ALJ Grant: I was hoping to have most of the briefings done, primarily done in the month of April.

Ms. Davison: Okay.

ALJ Grant: Can you move it up to the front of that week?

Ms. Davison: Well, how about April 13th on Monday?

ALJ Grant: Okay. PacifiCorp and Staff, do you have an idea of how much time you need for a response?

Ms. McDowell: Yes. I'm wondering if we could take till, I mean it looks to me like it would probably either be maybe the 24th or the 27th. Does that ... I suppose if we did it maybe by the 22nd or the 23rd, then the reply brief could be done by the 30th if that's your goal to try to get it all done by the end of April. But I'm thinking sometime late in that week of April 20th.

ALJ Grant: Okay. How about the 23rd...

Ms. McDowell: Okay.

ALJ Grant: ... for the responsive brief, and then ICNU you'd have till the 30th to get the reply brief in.

Just to run down those dates: April 13th would be the due date for ICNU's initial brief, the 23rd would be the due date for responsive brief from PacifiCorp and Staff and CUB, if wanted, and then April 30th would be the date for ICNU to file its reply brief. Does that work for folks?

Ms. McDowell: Yes your Honor, thank you.

Mr. Jones: Yes your Honor, thank you.

Ms. Davison: Yes, your Honor, that works for us, this is Melinda, the only caveat is if we, given particularly the tight turn around for the reply brief, if we could have all those dates be in-hand dates or electronic service dates, just so we don't lose a day with the mail.

ALJ Grant: Okay, so for the first two briefs, the initial brief and the response brief, those would be in-hand dates, at least an electronic copy to the other parties by close of business those days.

Mr. Jones: Your Honor, this is Jason Jones for Staff. We would agree to electronic copies on the filing date if that's not objectionable to ICNU versus in-hand.

Ms. Davison: Okay, we appreciate that. Thank you.

Ms. McDowell: That's fine with us.

ALJ Grant: Okay. Anything else we need to discuss today?

Ms. McDowell: So Judge Grant, just to be clear, the record that we're briefing on is basically the record as established with addition of the Blumenthal testimony and the PacifiCorp's responsive testimony now being received as comment.

ALJ Grant: That is correct.

Ms. McDowell: Okay, thank you.

ALJ Grant: Okay if there is nothing else we are adjourned.

Ms. McDowell: Thank you, bye bye.

Ms. Davison: Thank you, bye bye.