

# Davison Van Cleve PC

Attorneys at Law

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

April 30, 2009

*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**

Dear Filing Center:

Enclosed please find the original and five (5) copies of the Reply Brief on  
Reconsideration on behalf of the Industrial Customers of Northwest Utilities 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/ Allison M. Wils  
Allison M. Wils

Enclosures

cc: Service List

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served the foregoing Reply Brief on Reconsideration on behalf of the Industrial Customers of Northwest Utilities upon all parties identified on the service list via electronic mail, as agreed upon by all parties on April 2, 2009.

Dated at Portland, Oregon, this 30th day of April, 2009.

/s/ Allison M. Wils

Allison M. Wils

<b>CITIZENS' UTILITY BOARD OF OREGON (W)</b> ROBERT JENKS G. CATRIONA MCCrackEN GORDON FEIGHNER OPUC DOCKETS 610 SW BROADWAY STE 308 PORTLAND OR 97205 catriona@oregoncub.org Gordon@oregoncub.org bob@oregoncub.org dockets@oregoncub.org	DANIEL W MEEK 10949 SW 4TH AVE PORTLAND OR 97219 dan@meek.net
<b>DEPARTMENT OF JUSTICE</b> JASON W JONES REGULATED UTILITY & BUSINESS SECTION 1162 COURT ST NE SALEM OR 97301-4096 jason.w.jones@state.or.us	<b>KAFOURY &amp; MCDUGAL</b> LINDA K WILLIAMS 10266 SW LANCASTER RD PORTLAND OR 97219-6305 linda@lindawilliams.net
<b>MCDOWELL &amp; ASSOCIATES PC (W)</b> AMIE JAMIESON KATHERINE A MCDOWELL 520 SW SIXTH AVE STE 830 PORTLAND OR 97204 amie@mcd-law.com katherine@mcd-law.com	<b>PACIFICORP OREGON DOCKETS (W)</b> OREGON DOCKETS 825 NE MULTNOMAH ST STE 2000 PORTLAND OR 97232 oregondockets@pacificorp.com

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UE 177**

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. )  

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**REPLY BRIEF ON RECONSIDERATION OF THE  
INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES**

**April 30, 2009**

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## **I. INTRODUCTION**

Pursuant to the schedule set by ALJ Grant on April 2, 2009, the Industrial Customers of Northwest Utilities (“ICNU”) submits this Reply Brief to the Public Utility Commission of Oregon (“OPUC” or the “Commission”). In this Reply Brief, ICNU addresses issues raised by PacifiCorp and Staff in their respective Response Briefs, filed on April 23, 2009.

The Commission is reconsidering whether ICNU properly challenged the validity of OAR § 860-022-0041 and, depending upon the conclusion reached by the Commission, whether the rule complies with the requirements of Senate Bill (“SB”) 408. ICNU adopts the background and general standard of review recited in its Opening Brief on Reconsideration and in its Opening Brief in the Court of Appeals, supplemented further by background statements following and by references to relevant law contained in the Argument section below.

## **II. BACKGROUND**

Staff and PacifiCorp argue that ICNU has waived its procedural rights by agreeing that ICNU witness Ellen Blumenthal’s testimony should be admitted as comment. The argument advanced by Staff and PacifiCorp suggests that Ms. Blumenthal’s testimony is not evidence, and thus, should effectively be disregarded. Such a “gotcha” approach should not be encouraged or tolerated by this Commission, as the administrative process is best served by a complete and full record of the evidence, including Ms. Blumenthal’s testimony. ICNU has made the same, consistent objections

to the Commission's rulings throughout these proceedings, thus, ICNU has not waived any of its procedural arguments.

Since the Commission's original decision in this case, the Commission has addressed ICNU's substantive arguments with respect to the validity of OAR § 860-022-0041 in final orders approving PacifiCorp's and PGE's 2007 tax reports. PacifiCorp and Staff seize on these decisions to argue that there is actually nothing to reconsider in this case. To the contrary, the Commission should reconsider all of ICNU's substantive challenges to OAR § 860-022-0041, which are discussed in detail in ICNU's Opening Brief. In reconsidering these issues, the Commission should take into account Ms. Blumenthal's testimony.

### **III. ARGUMENT**

#### **A. ICNU's Procedural Arguments Are Consistent with the Commission's Decision to Reconsider its Final Order**

##### **1. ICNU's Procedural Arguments Have Not Been Waived, Nor are they Moot**

PacifiCorp and Staff each proclaim that ICNU's procedural arguments are moot. PacifiCorp's Response Brief at 4, 5; Staff Response Brief at 2. PacifiCorp further confuses its position by maintaining throughout its brief that the issues on reconsideration have already been decided by the Commission. Similarly, Staff alleges in conclusory fashion that the Commission's reconsideration of Order No. 08-201 "moot ICNU's procedural arguments." Staff Response Brief at 2. Staff also concludes that ICNU's substantive arguments "that OAR 860-022-0041 is inconsistent with SB 408" have

already been rejected by the Commission, such that ICNU's entire Opening Brief "can easily be disposed of here by" mere reference to past Commission orders. Id.

Under the approach of Staff and PacifiCorp, all of the issues in this case are either moot or have previously been decided. While this reasoning might have superficial logic, it leaves ICNU in the ultimate position of having no actual issues to brief on reconsideration because both its procedural and substantive arguments have, allegedly, already been conclusively decided. Either both Staff and PacifiCorp are completely off the mark, or the Commission is engaging in a perverse exercise—requiring ICNU to go through the charade of brief writing while actually having already pre-ordained its conclusions. ICNU elects not to infer such cynical, hidden motives to the Commission's actions and, therefore, submits further arguments on both the procedural and substantive arguments identified by the ALJ as relevant to this reconsideration.

ICNU raises the procedural arguments in its Opening Brief to illustrate the confusion that has been created in this case by the process used for reconsideration. PacifiCorp cites to the ALJ's Notice of Telephone Conference, issued on March 26, 2009. In that notice, the ALJ stated that the Commission withdrew its final order to consider ICNU's arguments that its rule "is inconsistent with ORS 757.268." Notice of Telephone Conference at 1. The ALJ also clarified in the Teleconference that the Commission intended to address ICNU's procedural arguments. PacifiCorp Response Brief, Attachment B, Transcript of April 2, 2009, Teleconference in Docket UE 177 ("Transcript") at 1. Moreover, in response to a query from counsel for ICNU of whether

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briefing included “the issue of our *ability to challenge* the legality of the rule in this proceeding” and whether ICNU was “*procedurally* incorrect in challenging the ruling,” the ALJ answered that “yes you are correct, *that’s what this briefing would be.*” *Id.* at 3 (emphasis added). Unless the Commission is to be understood as directing briefing, while simultaneously disallowing any actual subjects to be briefed by ICNU, ICNU’s interpretation of the ALJ’s statements must prevail.

Early in the Teleconference between the parties on April 2, 2009, the ALJ stated: “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 statute.” Transcript at 1 (emphasis added). ICNU’s second assignment of error in its Opening Brief before the Oregon Court of Appeals is as follows: “[t]he Commission erred *in refusing to consider* ICNU’s arguments challenging the validity of OAR 860-022-0041.” Industrial Customers of Northwest Utilities v. Public Utility Commission of Oregon, CA A138879, Petitioner’s Opening Brief at 22 (Dec. 12, 2008) (“Appellate Opening Brief”) (emphasis added).

Completely distinct from ICNU’s second assignment of error, ICNU’s first assignment of error before the Oregon Court of Appeals addressed the substantive validity of the rule, in light of statutory requirements. Specifically, ICNU stated that “[t]he OPUC’s Rule, OAR 860-022-0041, fails to properly implement the legislative mandates of SB 408.” Appellate Opening Brief at 8. Obviously, there is a distinction between ICNU’s procedural arguments and substantive arguments. After stating that at

issue on reconsideration is ICNU's second, procedural assignment of error, the ALJ explained: "[o]bviously the issue *also implicates* assignment of error no. 1 which is that argument that the rule is not consistent." Transcript at 2 (emphasis added). Thus, avoiding a torturous interpretation of the ALJ's phrasing, the main point of the reconsideration must be to address ICNU's procedural and substantive arguments regarding the OPUC's SB 408 rule.<sup>1/</sup>

**2. The Commission Has Changed Its Prior Decision to Strike Ms. Blumenthal's Testimony, which Effectively Reverses the Prior ALJ's Findings**

During the Teleconference on April 2, 2009, counsel for ICNU posed an initial, straightforward question to ALJ Grant: "procedurally would the Commission then be in effect changing their decision on the motion in limine?" Transcript at 2-3. ALJ Grant responded with a simple "Yes." *Id.* at 3. In affirming the prior ALJ's ruling which granted PacifiCorp's motion in limine, the Commission had very explicitly stated that it affirmed the ALJ's ruling "in its entirety." Order No. 08-176 at 1. The Commission also very explicitly acknowledged that the prior ALJ had granted PacifiCorp's motion in limine "in its entirety." *Id.* Logically, if the Commission had originally affirmed both the prior ALJ's ruling and PacifiCorp's motion in limine "in its entirety," the present ALJ's confirmation on April 2, 2009, that the Commission has changed its original decision, necessarily means that the Commission *now rejects* the prior ALJ's ruling and

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<sup>1/</sup> Admittedly, this confusion might have been avoided if the OPUC had issued an order clearly explaining the issues to be addressed on reconsideration.

PacifiCorp’s motion “in its entirety.” Moreover, a rejection of an “entire” ruling includes each discrete finding contained within that ruling.

PacifiCorp’s continued reliance, therefore, upon the Commission’s order, the prior ALJ’s ruling, or any finding contained within those decisions is unfounded. PacifiCorp cites to Order No. 08-176 as alleged confirmation that the Commission found (and continues to maintain) that Ms. Blumenthal’s stricken testimony was “legal argument” and, thus, is still inadmissible as evidence. PacifiCorp’s Response Brief at 15. Yet, the Commission’s “finding” that Ms. Blumenthal’s testimony was inadmissible legal argument was nothing more than a simple affirmation of the prior ALJ’s *now rejected* “finding” to the same effect. Order No. 08-176 at 3.

PacifiCorp also cites OAR § 860-014-0045(1) for the definition of admissible relevant evidence, as “evidence that tends to make *any fact at issue* in the proceeding more or less probable.” PacifiCorp’s Response Brief at 16 n 6 (emphasis added). PacifiCorp’s argument, however, actually undermines its own position and supports ICNU’s. If the distinction between relevant evidence and Ms. Blumenthal’s testimony was founded upon the prior ALJ’s ruling, which characterized that testimony as legal argument, then the Commission’s present decision to change that ruling *now overturns* that characterization and eliminates any continued distinction between relevant, admissible evidence and Ms. Blumenthal’s testimony.

Indeed, ICNU opposed the prior ALJ’s characterization of Ms. Blumenthal’s testimony as irrelevant, inadmissible “legal argument” in a motion before the Commission. ICNU stated that the testimony stricken by the ALJ “gives the

Commission *the factual evidence* necessary to make a reasoned explanation as to why OAR § 860-022-0041 is inconsistent with SB 408.” Motion for Expedited Consideration of ICNU at 10 (Mar. 13, 2008) (emphasis added). In affirming the prior ALJ’s ruling “in its entirety,” the Commission thus rejected ICNU’s characterization of Ms. Blumenthal’s testimony as “factual evidence.” Order No. 08-176 at 3. Yet, in changing its decision on reconsideration, the OPUC has now rejected the prior ALJ’s findings. Absent an arbitrary exercise of its power to withhold from ICNU the favorable benefits of its changed position, the OPUC has logically adopted ICNU’s characterization that Ms. Blumenthal’s testimony is, in fact, “factual evidence necessary” to challenge the validity of OAR § 860-022-0041. According to the very rule cited and relied upon by PacifiCorp, OAR § 860-014-0045(1), such testimony—making facts at issue more or less probable—is *relevant and admissible evidence*. See PacifiCorp’s Response Brief at 16 n 6.

**3. Ms. Blumenthal Testimony is Relevant, Factual Evidence; However, Procedurally the Commission’s Actions Are Legally Flawed**

There are only two possibilities concerning Ms. Blumenthal’s once stricken, but now admitted testimony: either the testimony is now relevant evidence or it is not. If the current ALJ’s confirmation is taken at face value, that the OPUC has now changed its decision on PacifiCorp’s motion in limine to strike Ms. Blumenthal’s testimony, then the testimony can no longer be characterized as “legal argument”—else there is really no change in the Commission’s decision. As such, the procedural arguments stated by ICNU in its Opening Brief are relevant, pointing to statutory prohibitions against: 1) an ALJ entering an order to re-open the record and admit factual

evidence on reconsideration; and 2) re-opening the record to admit further evidence without providing parties the opportunity to cross-examine witnesses. ICNU's Opening Brief at 29–30 (citing ORS §§ 756.055 and 756.558, respectively).

Conversely, if the Commission's present decisional change operates so as to admit Ms. Blumenthal's stricken testimony *while still failing to classify that testimony as factually relevant evidence*, other procedural issues arise. For instance, in changing its decision and the findings of the prior ALJ "in its entirety," failure to admit the testimony as evidence would be arbitrary and capricious. Moreover, such arbitrary and capricious action would implicate federal due process concerns, as the OPUC would be effectively denying ICNU an opportunity to be heard by not properly admitting relevant factual evidence for proper consideration *as factual evidence*.

Admission of Ms. Blumenthal's testimony as evidence, not merely commentary, is vital to the Commission's proper consideration and is the position that ICNU has continually urged throughout this case. As stated in the original proceedings, Ms. Blumenthal's testimony "gives the Commission the factual evidence necessary" to determine the validity of OAR § 860-022-0041. Motion for Expedited Consideration of ICNU at 10. Conversely, consideration of the testimony simply as commentary necessary implicates a lack of factual probity and "undermines the Commission's ability to give testimony the proper weight." Id. at 14.

Ultimately, the ALJ suggested that "the easiest way to make sure you have a full record developed . . . is just to accept Miss (sic) Blumenthal's testimony as commentary." Transcript at 2. No party questions that the ALJ has, in fact, added

testimony to the record in UE 177.<sup>2/</sup> The procedural issue that remains in question, though, is how the testimony of Ms. Blumenthal is treated. While “the easiest way” to handle Ms. Blumenthal’s testimony may be to treat it as commentary, the legally proper way is to now accept Ms. Blumenthal’s testimony as factual evidence regardless of the label attached.<sup>3/</sup>

ICNU’s counsel believed Judge Grant’s suggestion was intended to eliminate the need for a hearing and was not intended to foreclose ICNU’s procedural rights. Given Judge Grant’s views that reconsideration should focus on legal issues, such an interpretation is reasonable. If the intent, however, was to foreclose ICNU’s procedural rights, then ICNU’s counsel did not understand that to be the case and consequently does not agree that the testimony should be treated as comment.

**B. The Arguments Advanced by Staff and PacifiCorp do not Cure the Legal Defects in OAR § 860-022-0041**

In addressing the validity of OAR § 860-022-0041 for the first time in final orders approving PacifiCorp’s and PGE’s 2007 Tax Reports, the Commission founded its entire argument upon a single, flawed cornerstone. In essence, the OPUC has decided to now interpret terminology in SB 408 referring to “properly attributed” taxes as a carte blanche, effectively allowing OAR § 860-022-0041 to override statutory requirements that utility taxes be squared with actual taxes paid to units of government.

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<sup>2/</sup> See PacifiCorp’s Response Brief at 15 (explaining that the ALJ ruled that stricken testimony “would be introduced into the record”); Staff Response Brief at 1 (stating that the ALJ ruled that testimony “was entered into the record”).

<sup>3/</sup> A review of the Commission’s rules does not show that there is any basis to convert Ms. Blumenthal’s to non-evidentiary comment.

Cf. ICNU/100, Blumenthal/11, at lines 7–11 (stating that OAR § 860-022-0041 fails to calculate actual taxes paid to units of government, as required by SB 408).

PacifiCorp and Staff echo the Commission’s logic, arguing that “properly attributed” is a “delegative term” that permits the Commission to interpret the statute in a manner that effectively rewrites the text of SB 408. PacifiCorp’s Response Brief at 6; Staff Response Brief at 2. This construction violates established rules of statutory interpretation as well as common sense.

Further, PacifiCorp’s contentions that the rule must be upheld (regardless of its validity), owing to arguments of convenience and fair treatment, also cannot sustain a continued reliance upon an illegal rule. Lastly, ICNU clarifies its positions and responds to certain arguments raised by PacifiCorp and Staff on the substantive merits of OAR § 860-022-0041.

**1. The Commission Cannot Use a “Delegative Term” to Rewrite Statutory Text**

In two final orders issued on April 10, 2009, each adopting the 2007 Tax Reports of PacifiCorp and PGE, respectively, the Commission finally addressed the substantive validity of OAR § 860-022-0041. In brief, the Commission keyed upon the term “properly attributed” taxes to justify the rule’s reliance upon pro-forma tax returns and hypothetical tax liabilities. Order No. 09-127 at 4–7; See also Re PGE, UE 178, Order No. 09-126 at 5–8 (April 10, 2009). In its Opening Brief on Reconsideration, ICNU exposed the flawed statutory construction employed by the OPUC in those orders. ICNU’s Opening Brief at 11–13. Specifically, ICNU pointed out that the Commission

ignored the conjunctive requirements of ORS § 757.268(6) in each instance in which the “properly attributed” tax clause appeared. Id. at 12. Instead of correctly reading “properly attributed” taxes as a conjunctive *modifier* or *limiter* upon actual taxes, the OPUC adopted an expansive and contextually improper interpretation of “properly attributed” taxes that *negated* SB 408’s foundational mandate—that actual taxes paid must be trued-up to taxes collected in rates. Id. at 12–13.

Neither Staff nor PacifiCorp offered any counterargument to support the Commission’s apparent violation of established rules of statutory construction.<sup>4/</sup> ICNU does not, therefore, offer any further restatement of the arguments contained in its Opening Brief. While not addressing the flaws in the Commission’s statutory construction directly, however, PacifiCorp and Staff did elaborate upon the Commission’s “delegative term” argument, which does implicate additional statutory construction problems.

Citing a conclusion of the Attorney General, the Commission explains that “properly attributed” is “a delegative term that must be interpreted and applied by the Commission, consistent with the limits imposed by ORS 757.268(12).” Order No. 09-127 at 5. Referencing this “delegative term” argument, Staff concluded that the “process contained in OAR 860-022-0041 is consistent [with] SB 408’s delegation to the Commission to determine the amount of taxes paid to units of government that are properly attributed.” Staff Response Brief at 2.

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<sup>4/</sup> See Portland General Electric Company v. Bureau of Labor and Industries, 317 Or 606, 610 (1993) (explaining that when “interpreting a statute, the court’s task is to discern the intent of the legislature,” which is accomplished by first examining “the text and context of the statute”).



In effect, Staff is contending that actual taxes paid by utilities are irrelevant because the OPUC has been given a “delegation” from the legislature to determine what “taxes paid” means in the light of proper attribution. Just as the Commission negates the first clauses of ORS § 757.268(6)(a) and (b) through its expansive interpretation of the second, “properly attributed” clauses in those paragraphs, so too does Staff essentially rewrite SB 408 to eliminate all requirements that utilities must square actual taxes paid with rates collected.<sup>5/</sup> Such a result violates common sense and established statutory construction principles—attributing a legislative intent in SB 408 to allow the OPUC to *rewrite statutory text*, by means of a delegation to interpret a particular term.

Like ICNU, PacifiCorp appears to believe that the whole foundation of OAR § 860-022-0041’s validity rests upon a single pillar: the Commission’s interpretation of “properly attributed” taxes. As explained by PacifiCorp, in addressing the substantive merits of OAR § 860-022-0041, “the Commission recognized that *the essential question* in determining the validity of the rule is whether it adjusts rates to match taxes actually paid that are ‘properly attributed’ to the regulated operations of the utility.” PacifiCorp’s Response Brief at 6 (emphasis added). As understood by both ICNU and PacifiCorp, then, the entire edifice of OAR § 860-022-0041 stands or falls according to the propriety of the OPUC’s construction of “properly attributed” taxes.

PacifiCorp, like Staff, referenced the OPUC’s argument that “properly attributed” was a delegative term “to be interpreted and applied by the Commission.” Id.

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<sup>5/</sup> See, e.g., ICNU’s Opening Brief at 10–16; Appellate Opening Brief at 9–22.

Like Staff again, PacifiCorp justifies the Commission’s rule based on its alleged interpretive authority over this delegative term. Id.

The expansive delegation of authority argued by Staff and PacifiCorp should be rejected because no agency is empowered to rewrite the text of a statute, to insert what the legislature omitted, under the auspices of its interpretive authority over a term. ORS § 174.010. Indeed, PacifiCorp itself affirms that the Commission cannot simply “insert text” that the legislature has omitted in order to make OAR § 860-022-0041 invalid. PacifiCorp’s Response Brief at 10. The converse applies just as well—the Commission cannot insert text into the statute to make the rule *valid*, which it has essentially done by effectively rewriting the conjunctive requirements of ORS § 756.268(6)(a) and (b) so as to negate the actual taxes standard of SB 408. Under PacifiCorp’s own rubric, the answer to “the essential question” determining the validity of OAR § 860-022-0041 is that the Commission has violated the established law of statutory construction in its erroneous interpretation and application of the term “properly attributed.”

**2. Failure to Discard OAR § 860-022-0041 Would Be Arbitrary**

While Staff offers no counterargument to ICNU’s contention that the OPUC can and must disallow the stipulation surcharge in this case, PacifiCorp alleges that the Commission lacks authority for such action. PacifiCorp bases its argument on a contention that “the Commission cannot selectively waive its rule with respect to PacifiCorp but no other utility.” PacifiCorp’s Response Brief at 10. ICNU does not advocate, however, for such selective waiver of OAR § 860-022-0041, which, as

PacifiCorp argues, would be an arbitrary action favoring one utility over another without a legitimate basis. See Duquesne Light Co. v. Barasch, 488 U.S. 299, 311 (1989).

Instead, ICNU believes that the entire rule should be discarded, *i.e.*, waived in every case that it has been applied *to produce a result inconsistent with SB 408*. Nevertheless, as the present reconsideration concerns only PacifiCorp's 2006 Tax Report and the associated surcharge resulting from Commission Order No. 08-201, the relevant question in this particular proceeding is the surcharge in this case.

PacifiCorp further alleges that the OPUC cannot "waive operation of OAR § 860-022-0041" because such an action would itself violate SB 408. PacifiCorp cites to the OPUC's recent conclusion "that SB 408's automatic adjustment clause is 'automatic,' limiting the Commission's discretion over its operation." PacifiCorp's Response Brief at 14 (*citing* Order No. 09-126 at 12). In other words, even if OAR § 860-022-0041 violates SB 408, PacifiCorp argues that its application cannot be waived because such a waiver would also violate SB 408. This argument, in essence, justifies open violation of statute in the name of conformity to a statute. Quite apparently, this sort of logic is nonsense and should be given no credence.

Finally, PacifiCorp complains that ICNU "has presented no alternative calculation or results" to replace the invalid requirements of OAR § 860-022-0041. PacifiCorp's Response Brief at 14. Similarly, PacifiCorp argues for continued reliance upon OAR § 860-022-0041 because ICNU "fails to address the impact of a decision to waive OAR 860-022-0041 on the utilities' private letter rulings to the Internal Revenue Service." *Id.* Unsurprisingly, PacifiCorp cites no authority to support these arguments,

as they are manifest complaints based on convenience and not upon law. Neither ICNU nor any other party is under any requirement to refrain from challenging the validity of an administrative rule unless a comprehensive and mutually agreeable alternative is presently forthcoming. If OAR § 860-022-0041 produces results that are inconsistent with SB 408 then the rule is invalid, must be discarded, and the Commission's orders based upon it are also subject to challenge. Mere convenience will not support continued application of an illegal rule, nor decisions based upon it.

### **3. Staff's Analysis of Actual Tax Calculations Misses the Mark**

Staff raises a new argument in its discussion of proper attribution for actual taxes paid by a utility within a consolidated group. Staff Response Brief at 4. Staff states that "a utility only pays actual taxes on one basis," which it explains as the consolidated filing of the utility's parent company. Id. According to Staff, "there is no 'actual' figure for the actual amount of taxes paid . . . by PacifiCorp's Oregon regulated operations." Id.

The problem with Staff's logic is that, by construing actual taxes paid to mean *only* taxes paid by a parent company, Staff would necessarily construe subsidiaries as paying no "actual" taxes at all. Subsidiaries certainly pay actual taxes, they just do so through their parent company. In fact, Oregon ratepayers are charged a sum of money in their rates for PacifiCorp's income taxes. As each and every subsidiary corporation prepares an actual tax return in order for a parent company to prepare and file a consolidated return, the actual taxes paid by a subsidiary utility can be computed by

multiplying its taxable income by the statutory tax rate, including recognition of consolidated tax savings, if any.

Staff also claims that actual tax data is unobtainable for PacifiCorp because PacifiCorp operates in several states. Id. at 4–5. In rate case proceedings, however, PacifiCorp and other utilities can and do allocate their operations among the several jurisdictions in which they operate. But the “taxable income” Staff establishes under OAR § 860-022-0041 is not the taxable income that PacifiCorp would report to the IRS for its Oregon regulated operations. Staff’s tax computation is more akin to the “hypothetical” income tax calculation that is used for rate setting purposes than to SB 408’s required calculation of actual taxes paid to governmental units. For example, the interest deduction on the tax return is the interest *actually paid*, not interest synchronization as applied under OAR § 860-022-0041.<sup>6/</sup> Using the interest synchronization calculation is inconsistent with the fidelity to actual taxes required by SB 408.

#### IV. CONCLUSION

Procedurally and substantively, ICNU’s arguments are not moot but worthy of careful consideration by the Commission, unless the entire reconsideration is a sham exercise. ICNU requests that the Commission admit Ms. Blumenthal’s testimony as factually relevant evidence, in light of the ALJ’s affirmation that the Commission is

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<sup>6/</sup> Regarding actual interest deductions, PacifiCorp tellingly acknowledges that it originally used its actual interest deductions to calculate interest. PacifiCorp’s Response Brief at 7. PacifiCorp initially interpreted SB 408 as requiring actual interest deductions (in conformance with ICNU’s approach), and only revised its report to apply the interest synchronization method upon Staff’s recommendation.

changing its decision on PacifiCorp's motion in limine. Substantively, ICNU urges the Commission to diligently analyze the textual construction of SB 408 and reverse its erroneously expansive interpretation of "properly attributed" taxes. In correctly interpreting SB 408, ICNU asks the Commission to invalidate OAR § 860-022-0041 and disallow PacifiCorp's surcharge in this case, which was based upon calculations inconsistent with the statute.

Dated this 30th day of April, 2009.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Jesse E. Cowell

Melinda J. Davison

Jesse E. Cowell

333 S.W. Taylor, Suite 400

Portland, Oregon 97204

(503) 241-7242 phone

(503) 241-8160 facsimile

mjd@dvclaw.com

jec@dvclaw.com

Of Attorneys for the Industrial Customers of  
Northwest Utilities