

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 UE 177

4 In the Matter of

5 PACIFICORP, dba PACIFIC POWER,
6 (UE 177)

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

STAFF RESPONSE BRIEF

9 **INTRODUCTION**

10 On October 15, 2007, PacifiCorp filed its 2006 Tax Report. On April 11, 2008, in Order
11 No. 08-201, the Public Utility Commission of Oregon (“Commission”) approved PacifiCorp’s
12 revised Tax Report. On May 12, 2008, the Industrial Customers of the Northwest Utilities
13 (“ICNU”) filed a petition for review with the Oregon Court of Appeals. On March 24, 2009,
14 before PacifiCorp and the Commission filed response briefs on the appeal, the Commission
15 withdrew Order No. 08-201 from the court for the purpose of reconsideration. While Order No.
16 08-201 was withdrawn from the Court for reconsideration, it was not stayed at the Commission
17 and remains in lawful effect.

18 On April 2, 2009, Chief Administrative Law Judge, Michael Grant, issued a conference
19 memorandum establishing the procedures for the Commission’s reconsideration of Order No. 08-
20 201. In addition to establishing a briefing schedule, ALJ Grant ruled that the testimony of ICNU
21 and responsive testimony of PacifiCorp was entered into the record as comments. On April 10,
22 2009, the Commission entered Order No. 09-127 on PacifiCorp’s 2007 Tax Report. In this
23 recent order, the Commission rejected ICNU’s arguments that OAR 860-022-0041 exceeded the
24 Commission’s authority under SB 408.

25 On April 13, 2009, ICNU filed its opening brief in this reconsideration proceeding.
26 ICNU’s opening brief has two broad arguments. First, ICNU reasserts its procedural challenges

1 to Order No. 08-201. Second, ICNU reasserts arguments that OAR 860-022-0041 is inconsistent
2 with SB 408.

3 The Commission’s reconsideration of Order No. 08-201, including the consideration of
4 legal challenges to OAR 860-022-0041, moot ICNU’s procedural arguments. The Commission’s
5 Order 09-127 rejects ICNU’s similar arguments in this reconsideration proceeding that OAR
6 860-022-0041 is inconsistent with SB 408. As a result, the arguments in ICNU’s opening brief
7 can easily be disposed of here by reference to the Commission’s Order No. 09-127. Instead of a
8 point-by-point refutation of ICNU’s previously rejected assertions, the Commission Staff relies
9 on the Commission’s Order No. 09-127 and takes this opportunity to discuss in more detail a few
10 of the ICNU’s arguments, mainly related to whether OAR 860-022-0041 is inconsistent with
11 SB 408.

12 DISCUSSION

13 1. OAR 860-022-0041 is compliant with SB 408.

14 OAR 860-022-0041 is consistent with SB 408 because it requires a calculation of the
15 amount of taxes paid to units of government that are properly attributed to the utility’s regulated
16 operations. As noted in Order No. 09-127 at 5, “properly attributed” is a delegative term that
17 must be interpreted and applied by the Commission, consistent with the limits imposed by ORS
18 757.268(12). As required by ORS 757.268(12), that amount is then compared to, and if
19 necessary reduced to, the lower of the taxes paid attributable to income generated by the
20 regulated operations (the stand-alone calculation) or the total amount paid to units of
21 government. The Commission’s rules correctly require a comparison of the amounts under the
22 three methods, or stated differently, limit the properly attributed amount that is calculated to two
23 caps. This process contained in OAR 860-022-0041 is consistent SB 408’s delegation to the
24 Commission to determine the amount of taxes paid to units of government that are properly
25 attributed to the utility’s regulated operations.

26

1 Staff's template required PacifiCorp to calculate its properly attributed amount beginning
2 with actual taxes paid. Beginning with the actual federal taxes paid on a consolidated basis,
3 adjustments are made to isolate the effects of depreciation in order to avoid the possibility of a
4 normalization violation. Adjustments are also made to the actual taxes paid in order to reflect
5 PacifiCorp's charitable contributions and to assign the benefit of these contributions to
6 PacifiCorp. The result is an "adjusted" tax liability which is then "properly attributed" using the
7 three-factor formula.

8 The next step in Staff's template is to require PacifiCorp to determine its federal "stand-
9 alone" tax liability – the first of the two caps under ORS 757.268(12) – using steps Staff has
10 outlined pursuant to the rules. These steps mimic a tax return beginning with actual revenues
11 and expenses as reported in PacifiCorp's results of operations report and deducts interest based
12 upon PacifiCorp's actual debt structure averaged over the twelve month tax period.

13 In other words, if a utility's authorized capital structure is 50 percent debt, Staff applies
14 the utility's average actual cost of debt to the debt portion of rate base to determine the
15 deductible interest expense. Staff refers to this method as interest synchronization. Because no
16 utility subject to the requirements of SB 408 actually files as a "stand-alone" utility for either
17 federal or state reporting, Staff relies upon the utility's annual regulated results of operations
18 report to determine the regulated revenues and expenses for the utility's Oregon operations.

19 The Commission adopted a floor for the properly attributed amount calculated under the
20 Apportionment Formula to avoid a potential result in which customers could receive more than
21 100 percent of the tax benefits from losses in the taxpaying group. This floor is calculated as the
22 utility's stand-alone tax liability reduced by a share of any losses from the group. This
23 establishes the first cap for the Apportionment Formula-calculated tax liability.

24 The second cap is the total amount of taxes paid to units of government by the utility or,
25 in the case of PacifiCorp, the affiliated group. As explained above, this amount is the beginning
26 point for the Apportionment Method.

1 The state tax liability is determined in the same manner and then the results are combined
2 with the federal tax liabilities into a final page on the Staff’s reporting template, still separated
3 into the three methods that have been described above. Each method then receives additional
4 adjustments in order to apply tax credits, add-back depreciation, isolate deferred taxes and
5 determine a final combined tax liability. The outcome of each method is compared to determine
6 the lesser tax liability. The final outcome is used to compare to what is collected in rates to
7 determine whether there is more than a \$100,000 difference between what is paid to units of
8 government and what is collected in rates.

9 ICNU’s asserts that the calculations “do not produce the actual taxes PacifiCorp paid to
10 governmental authorities that are attributable to regulated utility operations. *See* ICNU Opening
11 Brief at 16. In reality, however, a utility only pays actual taxes on one basis, which means that
12 once a utility has determined it will file as a consolidated entity with its parent company, then
13 that basis becomes the only actual taxes paid. Because of this is fact, there will always be only
14 one true existing basis of actual taxes paid. There is no “actual” figure for the actual amount of
15 taxes paid to units of government by PacifiCorp’s Oregon regulated operations.

16 However, Staff’s template considers three methods in order to ascertain the “lesser of”
17 the three potential tax liabilities. Only the total taxes paid by PacifiCorp’s parent company
18 represent “actual taxes paid.” This requires that the other two methods must be measured on a
19 pro-forma basis. It is impossible for ratepayers to receive the benefits of accelerated
20 depreciation and, therefore, it is impossible that the “actual taxes paid” to units of government to
21 be the final determination. Any adjustment to what the utility “actually pays” to units of
22 government can be referred to as proforma.

23 2. The use of a proforma tax return in the stand alone method to determine actual taxes
24 paid for Oregon regulated operations is necessary and consistent with SB 408.

25 Importantly, ICNU’s assertion that Staff should rely upon the tax data sent to the parent
26 company would still provide a result no closer to actual taxes. The reason is because the tax data

1 sent to the parent company is from PacifiCorp, which operates in several states. Even attempting
2 to isolate the Oregon operations is inaccurate, because the tax data sent includes activities of
3 regulated and nonregulated entities operating in Oregon.

4 In Staff's calculation of stand-alone tax liability, Staff establishes "taxable income" based
5 solely upon the "regulated" operations in Oregon. Because all but one utility subject to SB 408
6 operate in more than one state, when the utility creates debt that is attributable to its rate base, it
7 does not do so based on what portion of its rate base is operating within a specific state.
8 Therefore, actual interest would be estimated subject to allocating and apportionment factors as
9 well. The interest synchronization method is an adequate proxy to represent the deductible
10 interest attributable to a utility's rate base.

11 3. Customers are given the benefit of depreciation.

12 ICNU argues that it is unclear from Staff's template whether the tax benefit of
13 depreciation on public utility property is added back. See ICNU Opening Brief at 19-20. The
14 Staff template clearly implements the provisions of OAR 860-022-0041(4)(d)(B), which
15 properly accounts for "the current tax benefit related to tax depreciation of public utility property
16 for regulated operations of the utility."

17 4. ICNU should not be able to rely on new evidence, PacifiCorp's 2006 10-K.

18 The Commission should not allow ICNU to rely on new evidence at this late stage in the
19 proceedings. In any event, comparing PacifiCorp's 10-K by apportioning the financials using a
20 certain percentage (ICNU used 28.5%) still represents a proforma tax filing, which ICNU
21 complains is inaccurate.

22 An obvious problem with ICNU's 10-K analysis is that it has potentially considered
23 revenues and expenses not attributable to the utility operations, or potentially, revenues and
24 expenses not even attributable to the State of Oregon. In addition, embedded in those financials
25 are charitable contributions, accelerated tax depreciation, credits properly attributable to the
26 utility solely and deferred taxes not attributable to the utility operations. ICNU does not propose

1 a method to determine the proper way to isolate these adjustments. Rather, it suggests a generic
2 approach that will violate normalization and result in a ruling from the Internal Revenue Service
3 to remove the benefits of depreciation.

4 5. The UE 177 reconsideration process is not flawed by the inclusion of previously
5 excluded testimony as commentary.

6 ICNU argues that the entire UE 177 process is flawed because additional evidence has been
7 improperly admitted into the record. *See* ICNU Opening Brief at 29-30. ICNU's argument is
8 without merit.

9 Without even considering that ICNU waived this argument by not raising it at the April 2,
10 2009, telephone conference, it fails for two simple reasons. First, the ALJ did not issue an order
11 on reconsideration under ORS 756.055(2). Instead, the ALJ simply made a procedural ruling
12 and the Commission, consistent with ORS 756.055(2), will eventually enter an order on
13 reconsideration. Second, ICNU ignores the fact that the testimony was entered into the record as
14 commentary – with the agreement of ICNU – and not as evidence.

15 **CONCLUSION**

16 For the foregoing reasons, Staff respectfully requests that the Commission enter an order
17 on reconsideration that rejects the ICNU's arguments and approve PacifiCorp's revised tax
18 report.

19 DATED this 23rd day of April 2009.

20 Respectfully submitted,

21 **JOHN R. KROGER**
22 Attorney General

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25 Assistant Attorney General
26 Of Attorneys for Staff of the Public Utility
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1 **CERTIFICATE OF SERVICE**

2 I certify that on April 23, 2009, I served the foregoing Staff Responsive Brief upon all
3 parties of record in this proceeding by delivering a copy by electronic mail and by mailing a
4 copy by postage prepaid first class mail or by hand delivery/shuttle mail to the parties accepting
5 paper service.

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