

# McDowell & Rackner PC



KATHERINE A. McDOWELL  
Direct (503) 595-39247  
katherine@mcd-law.com

March 14, 2008

## VIA ELECTRONIC FILING AND U.S. MAIL

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

**Re: Docket No. UE 177**

Enclosed for filing in the above-referenced docket are an original and five copies of PacifiCorp's Post-Hearing Brief. A copy of this filing has been served on all parties to this proceeding as indicated on the attached service list.

Very truly yours,

A handwritten signature in black ink, appearing to read 'K McDowell', written over a horizontal line.

Katherine McDowell

Enclosure

cc: Service List

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**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.

Lowrey R. Brown  
Citizens' Utility Board of Oregon  
610 SW Broadway, Suite 308  
Portland, OR 97205  
lowrey@oregoncub.org

Melinda J. Davison  
Davison Van Cleve, PC  
333 SW Taylor, Suite 400  
Portland, OR 97204  
mail@dvclaw.com

Jason Eisdorfer  
Citizens' Utility Board  
610 SW Broadway, Suite 308  
Portland, OR 97205  
jason@oregoncub.org

Jason W. Jones  
Department of Justice  
Regulated & Utility Business Section  
1162 Court Street NE  
Salem, OR 97301-4096  
jason.w.jones@state.or.us


Daniel W. Meek  
Daniel W. Meek Attorney at Law  
10949 SW 4th Ave  
Portland OR 97219  
dan@meek.net

Allen C. Chan  
Davison Van Cleve PC  
333 SW Taylor, Suite 400  
Portland, OR 97204  
mail@dvclaw.com

Linda K. Williams  
Kafoury & McDougal  
10266 SW Lancaster Rd.  
Portland, OR 97219-6305  
Linda@lindawilliams.net

Robert Jenks  
Citizens' Utility Board  
610 SW Broadway  
Suite 308  
Portland, OR 97205  
bob@oregoncub.org

DATED: March 14, 2008



---

Katherine McDowell  
Of Attorneys for PacifiCorp

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

3 **UE 177**

4 In the Matter of:

5 PACIFICORP, dba PACIFIC POWER &  
6 LIGHT COMPANY

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

**PACIFICORP'S POST-HEARING BRIEF**

10 **I. INTRODUCTION**

11 Pursuant to Senate Bill 408 ("SB 408") and OAR 860-022-0041, this is a case to  
12 review PacifiCorp's 2006 Tax Report and the rate surcharge it reflects. In PacifiCorp's  
13 UE 170 general rate case, the Public Utility Commission of Oregon ("Commission") applied  
14 SB 408 to reduce PacifiCorp's tax expense in rates in 2006 by approximately \$24 million.  
15 *Re PacifiCorp Request for a General Rate Increase in the Company's Oregon Annual*  
16 *Revenues*, Order No. 05-1050 at 14, Docket UE 170 (Sept. 28, 2005).<sup>1</sup> PacifiCorp paid  
17 taxes at a much higher level in 2006 than the Commission forecast in the UE 170 decision.  
18 As a result, PacifiCorp's 2006 Tax Report reflects a large surcharge from the undercollection  
19 of taxes in rates in 2006.

20

21

22 <sup>1</sup> The Commission has taken official notice of the filings and orders cited in PacifiCorp's Post-  
23 Hearing Brief with the exception of the following: *Re PacifiCorp Request for a General Rate Increase*  
24 *in the Company's Oregon Annual Revenues*, Order No. 06-379, Docket UE 170 (July 10, 2006); *Re*  
25 *PacifiCorp Request for a General Rate Increase; in the Company's Oregon Annual Revenues*, Order  
26 No. 05-1254, Docket UE 170 (Dec. 19, 2005); *Re PacifiCorp Request for a General Rate Increase in*  
*the Company's Oregon Annual Revenues*, Order No. 05-1050, Docket UE 170 (Sept. 28, 2005); and  
*Re Adoption of Permanent Rules to Implement SB 408 Relating to Utility Taxes*, Attorney General's  
Formal Opinion, Docket AR 499 (Dec. 27, 2005). PacifiCorp respectfully requests that the  
Commission take official notice of these filings and orders under OAR 860-014-0050(1).

1 Two parties filed testimony in this case: Staff of the Public Utility Commission of  
2 Oregon ("Staff") and the Industrial Customers of Northwest Utilities ("ICNU"). The approach  
3 each party took to this case and the positions they ultimately submitted are in contrast to  
4 one another. Staff conducted an in-depth audit of PacifiCorp's tax report, checking every  
5 calculation and data point PacifiCorp provided. Staff's process was interactive, with Staff  
6 convening workshops, serving data requests, and preparing preliminary findings. At the end  
7 of the process, Staff proposed two numeric adjustments to PacifiCorp's tax report. Upon the  
8 acceptance of these adjustments, Staff testified that PacifiCorp's tax report in all respects  
9 satisfied OAR 860-022-0041, the Commission's rule governing SB 408 tax report filings.

10 ICNU's review of PacifiCorp's tax report was much more cursory. ICNU's discovery  
11 sought data on affiliate losses that the Commission deemed irrelevant. ICNU never  
12 proposed a single, specific adjustment to PacifiCorp's tax report, or proposed alternative  
13 calculations or alternative results. Instead, ICNU ultimately opposed PacifiCorp's tax report  
14 because it was filed pursuant to OAR 860-022-0041, a rule which ICNU attempted to  
15 collaterally challenge in this proceeding, notwithstanding ICNU's prior record of support for  
16 the rule.

17 The applicable law and the record in this case support PacifiCorp's request that the  
18 Commission approve PacifiCorp's revised 2006 Tax Report under SB 408 and OAR 860-  
19 022-0041; approve the rates proposed in Schedule 102, which amortize \$27 million of the  
20 surcharge reflected in the tax report over a one-year period, beginning June 1, 2008; permit  
21 PacifiCorp to credit the balance of the surcharge, approximately \$13.3 million including  
22 interest, to its SB 408 balancing account; and allow PacifiCorp to accrue interest on this  
23 balance at PacifiCorp's authorized rate of return.

24

25

26

1 **II. BACKGROUND**

2 **A. General Background on SB 408-Related Proceedings**

3 **1. Early Implementation of SB 408 in PacifiCorp's UE 170 Rate Case**

4 SB 408 became effective upon the Governor's signing on September 2, 2005. *Re*  
5 *PacifiCorp Request for a General Rate Increase in the Company's Oregon Annual*  
6 *Revenues*, Order No. 05-1050 at 14, Docket UE 170 (Sept. 28, 2005). By its express terms,  
7 SB 408's automatic adjustment clause ("AAC") applied only to taxes paid and collected after  
8 January 1, 2006. *Id.* The Commission has summarized SB 408's basic operation as  
9 follows:

10 Senate Bill SB 408, passed by the 2005 Legislative Assembly,  
11 establishes a new method for rate treatment of utility income taxes.  
12 Generally, SB 408 requires a utility to true-up any difference between  
13 the amounts of income taxes collected in rates from customers and  
14 amounts of taxes paid to the government that are "properly attributed"  
15 to the utility's regulated operation. See ORS 757.268(4). The utilities  
16 must make annual tax filings on October 15 of each year. If amounts  
17 collected and amounts paid differ by more than \$100,000, the utility  
18 must adjust rates accordingly through an automatic adjustment  
19 clause. See ORS 757.268(4), (6)(a).

20 *In re Commission Staff directing PacifiCorp, et al to file Tariffs*, Order No. 08-045  
21 at 1-2, Dockets UE 177, UE 178, UG 170, & UG 171 (2008).

22 Less than four weeks after SB 408's enactment, on September 28, 2005, the  
23 Commission applied SB 408 to reduce PacifiCorp's tax expense by \$26.6 million in its  
24 UE 170 general rate case. *Re PacifiCorp Request for a General Rate Increase in the*  
25 *Company's Oregon Annual Revenues*, Order No. 05-1050 at 19, Docket UE 170 (Sept. 28,  
26 2005). PacifiCorp was the only utility that experienced a general rate case income tax  
27 disallowance based on a forecast of SB 408's impact in 2006. (PPL/101 at 2.)

28 As the Commission has explained, the UE 170 adjustment "was based on  
29 PacifiCorp's ... assumed continued ownership by ScottishPower." *Re PacifiCorp Request*  
30 *for a General Rate Increase in the Company's Oregon Annual Revenues*, Order No. 06-379

1 at 13, Docket UE 170 (July 10, 2006). The Commission lowered PacifiCorp's tax expense to  
2 align taxes collected in rates with the expectation that, under ScottishPower ownership,  
3 PacifiCorp's consolidated tax group would pay reduced income taxes in 2006, lowering  
4 PacifiCorp's taxes paid.

5 PacifiCorp sought and was granted reconsideration of the UE 170 Order. *Re*  
6 *PacifiCorp Request for a General Rate Increase in the Company's Oregon Annual*  
7 *Revenues*, Order No. 05-1254 at 2, Docket UE 170 (Dec. 19, 2005). While the  
8 reconsideration application was pending, MidAmerican Energy Holdings Company ("MEHC")  
9 acquired PacifiCorp on March 21, 2006. (PPL/101 at 2.) MEHC's parent company is  
10 Berkshire Hathaway Inc. Berkshire Hathaway's consolidated tax group, of which both  
11 MEHC and PacifiCorp are members, paid approximately \$4.4 billion in income taxes in  
12 2006. (PPL/100, Larson/6.)

13 In the UE 170 reconsideration order, the Commission "recognize[d] that [the]  
14 subsequent change in PacifiCorp's ownership eliminated the basis for the future tax  
15 adjustment." Order No. 06-379 at 13. The Commission lowered the tax adjustment to  
16 \$20.5 million. It did not eliminate the tax adjustment, however, noting that "through [SB  
17 408's] true-up mechanism, PacifiCorp will have an opportunity to recover tax payments  
18 made after [January 1, 2006] that exceed the allowable expense in rates." *Id.* at 16. In  
19 total, the UE 170 adjustment lowered PacifiCorp's taxes collected in rates by \$24 million in  
20 2006. (PPL/100, Larson/6.)

21 **2. AR 499: The Commission's Major SB 408 Rulemaking**

22 Even prior to the signing of SB 408, the Commission convened docket AR 499 on  
23 August 16, 2005 to establish permanent rules to implement SB 408. As a part of that  
24 rulemaking, the Commission requested a formal opinion from the Attorney General on  
25 various issues related to the Commission's implementation of SB 408. *Re Adoption of*  
26 *Permanent Rules to Implement SB 408 Relating to Utility Taxes*, Attorney General's Formal

1 Opinion, Docket AR 499 (Dec. 27, 2005). The Attorney General opined that the  
2 Commission had discretion to define what taxes paid were properly attributed to the utility,  
3 subject to the general policy and specific limits of SB 408. The opinion identified the general  
4 policy of SB 408 as “more closely align[ing] taxes collected by a regulated utility from its  
5 ratepayers with taxes received by units of government.” *Id.* at 2.

6 In the first six months of 2006, the busy AR 499 schedule included workshops, straw  
7 proposals, comments, and public meetings with the Commissioners. This process resulted  
8 in an Interim Order from the Commission on July 14, 2006. *Re Adoption of Permanent*  
9 *Rules to Implement SB 408 Relating to Utility Taxes*, Order No. 06-400 at 2, Docket AR 499  
10 (July 14, 2006) [hereinafter “Interim Order”].

11 In the Interim Order, the Commission rejected straw proposals from all major parties  
12 on the definition of properly attributed. *Id.* at 7. Noting that the issue had been “difficult and  
13 controversial,” the Commission sought an approach that would balance the interests of  
14 ratepayers and the utilities. *Id.* at 5. The Commission proposed the apportionment method,  
15 which calculates the proportion of a total affiliated group’s gross plant, payroll, and sales that  
16 is attributed to the Oregon regulated utility and applies this proportion to the group’s taxes  
17 paid. *Id.* at 5–6. The resulting amount is the amount of taxes paid that are properly  
18 attributed to the regulated utility. *Id.* at 5.

19 In response to the Interim Order, ICNU was unequivocal in its support of the  
20 apportionment method:

21 ICNU supports the adoption of the draft rules \* \* \* as accurately  
22 implementing the letter and spirit of SB 408. ICNU applauds the  
23 Commission’s decision in Order No. 06-400, which resolved the  
24 implementation of SB 408’s “properly attributed” language by  
providing thoughtful, straightforward and balanced guidance regarding  
a controversial issue.

25 \* \* \* \* \*

26 ICNU supports the Commission’s adoption of the Apportionment  
method to implement SB 408’s “properly attributed” language. As the

1 Commission described in Order No. 06-400, the Apportionment  
2 Method is well established, widely accepted, and has a lengthy history  
3 of application in Oregon. Furthermore, the Apportionment Method is  
4 easy for customers to understand and will allow the Commission and  
5 other parties to look to existing Oregon tax policies, statutes and rules  
for guidance regarding attribution issues that arise in the future. The  
Commission's resolution of this important issue establishes an  
equitable and workable means of addressing the problems that  
SB 408 was enacted to correct.

6 Opening Comments of the Industrial Customers of Northwest Utilities on Proposed Rules at  
7 1-2, Docket AR 499 (July 31, 2006). Similarly, in its Reply Comments, ICNU stated that it  
8 "supports the application of the Apportionment Method and believes that the Commission  
9 has thoughtfully resolved a thoroughly debated and complex issue." Reply Comments of  
10 the Industrial Customers of Northwest Utilities on Proposed Rules at 1, Docket AR 499 (Aug.  
11 14, 2006). ICNU found the Commission's rules to be within "both the letter and spirit of  
12 SB 408." *Id.*

13 The Commission formally adopted OAR 860-022-0041, the permanent rules  
14 implementing SB 408, on September 14, 2006. *Re Adoption of Permanent Rules to*  
15 *Implement SB 408 Relating to Utility Taxes*, Order No. 06-532, Docket AR 499 (Sept. 14,  
16 2006). OAR 860-022-0041 requires the utility to perform three alternative calculations of its  
17 taxes paid: the stand-alone method, the apportionment method, and the consolidated  
18 method. OAR 860-022-0041(4)(a)-(c). The utility's taxes paid for purposes of SB 408 will  
19 be the lowest number resulting from these three calculations. OAR 860-022-0041(4)(d).  
20 The calculation methodologies for these approaches in the current rules are materially  
21 unchanged from what the Commission adopted in Order No. 06-532.

### 22 **3. Implementation of AR 499 Rules in 2005 Tax Reports**

23 Approximately one month after adoption of OAR 860-022-0041, PacifiCorp filed its  
24 2005 Tax Report. The contents of the tax report were dictated by the rule. *Re PacifiCorp*  
25 *Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*,  
26 Order No. 07-138 at 2, Docket UE 177 (Apr. 11, 2007). The report contained calculations



1 for determining taxes paid under stand-alone, consolidated, and apportionment methods.  
2 *PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of*  
3 *SB 408*, PacifiCorp's Tax Report, Docket UE 177 (Oct. 16, 2006).

4 Staff audited the 2005 tax report and concluded that it was "very detailed" and  
5 "adequately documents the procedures and methodologies in compliance with the adopted  
6 rules." *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under the*  
7 *Terms of SB 408*, Order No. 07-138 at 2, Docket UE 177 (Apr. 11, 2007). Staff found that  
8 PacifiCorp paid approximately \$5.3 million less in federal and state income taxes than it  
9 collected in rates. *Id.* Although ICNU was an active participant in the Commission's SB 408  
10 rulemakings and was a party to UE 177 when PacifiCorp filed its 2005 tax report, ICNU did  
11 not comment on or raise any objections to the tax report or refund calculation.

12 The Commission issued an order making the findings on the tax report  
13 recommended by Staff. *Id.* The only procedural difference between the 2005 and 2006 tax  
14 reports was that the 2005 tax report did not result in a rate change. *Re PacifiCorp Filing of*  
15 *Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, Order  
16 No. 07-138 at 2, Docket UE 177 (Apr. 11, 2007). Staff conducted an audit of the 2005 tax  
17 report based upon OAR 860-022-0041 and the Commission issued the findings required by  
18 SB 408. *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under*  
19 *the Terms of SB 408*, Order No. 07-138 at 2, Docket UE 177 (Apr. 11, 2007).

20 **4. First Private Letter Ruling Requests to the Internal Revenue Service**

21 A chief concern of the parties during the AR 499 rulemaking was the potential for  
22 violation of normalization requirements of federal tax law. *See Re Adoption of Permanent*  
23 *Rules to Implement SB 408 Relating to Utility Taxes*, Order No. 06-532 at 3, Docket AR 499  
24 (Sept. 14, 2006). To mitigate this concern, OAR 860-022-0041(8)(g) required the utilities to  
25 seek a Private Letter Ruling ("PLR") from the Internal Revenue Service ("IRS") on whether  
26 SB 408 or the Commission's rule would cause the utility to violate federal tax law. OAR 860-

1 022-0041(8)(g); *Re Adoption of Permanent Rules to Implement SB 408 Relating to Utility*  
2 *Taxes*, Order Adopting Permanent Rules, Order No. 06-532 at 4, Docket AR 499 (Sept. 14,  
3 2006).

4 PacifiCorp submitted its draft PLR request to the Commission and participants in  
5 SB 408 rulemakings on December 20, 2006, before it sent the PLR request to the IRS.  
6 PacifiCorp's Revised Draft Private Letter Ruling Request, Docket AR 499 (Dec. 20, 2006).  
7 The PLR request explained the taxes paid calculations required under the rule and provided  
8 detailed, numerical examples. *Id.*

9 **5. Revisions to Permanent Rules: Docket AR 517**

10 On June 11, 2007, the Commission convened Docket AR 517 to clarify OAR 860-  
11 022-0041. The participants in AR 499 had identified the need to make "housekeeping"  
12 amendments to OAR 860-022-0041. *Re Housekeeping and Clarification Changes to*  
13 *OAR 860-022-0041*, Order Amending Rule, Order No. 07-401 at 1, Docket AR 517  
14 (Sept. 18, 2007). In AR 517, the Commission addressed five issues it and rulemaking  
15 participants identified, none of which fundamentally changed the calculation of taxes paid.  
16 *See id.*

17 This rulemaking presented ICNU an additional opportunity to object to the  
18 Commission's rules implementing SB 408. ICNU, however, supported the rules proposed  
19 by Staff in AR 517. *Re Housekeeping and Clarification Changes to OAR 860-022-0041*,  
20 Reply Comments of the Industrial Customers of Northwest Utilities at 1, Docket AR 517  
21 (Aug. 10, 2007). In its comments, ICNU did not raise general or significant objections to the  
22 SB 408 rules established in AR 499, such as those as it has raised in this docket. *Id.* In  
23 fact, ICNU criticized PacifiCorp and Portland General Electric Company for "urg[ing] the  
24 Commission to go beyond [the] limited scope" of addressing housekeeping matters. *Id.*

25

26

1           **6. Amended PLR Requests**

2           After PacifiCorp filed its PLR request in December of 2006 but before the IRS issued  
3 its PLR, the Commission amended OAR 860-022-0041 in Docket AR 517. The Commission  
4 ordered the utilities to file an amended PLR request to the IRS based on the changes to the  
5 rules. *Re Housekeeping and Clarification Changes to OAR 860-022-0041, Order Amending*  
6 *Rule, Order No. 07-401 at 10, Docket AR 517 (Sept. 18, 2007).* The Commission required  
7 the utilities to submit draft amended PLR requests to the Commission and all participants by  
8 November 1, 2007, and allowed participants to comment on the amended requests. *Id.*  
9 ICNU filed no comments on or objections to PacifiCorp's draft, amended PLR request.

10           PacifiCorp received a positive response on its PLR from the IRS on January 9, 2008.  
11 (PPL/204.) The IRS stated in its PLR that it did not believe the current form of OAR 860-  
12 022-0041 violates normalization requirements or other federal tax laws. *Id.*

13           **B. The Record in PacifiCorp's 2006 Tax Report Docket**

14           **1. PacifiCorp's 2006 Tax Report**

15           PacifiCorp filed its tax report for the tax year 2006 on October 15, 2007. *Re*  
16 *PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of*  
17 *SB 408, Docket UE 177 (Oct. 15, 2007).* PacifiCorp's tax report uses the 12-page template  
18 that Staff created for SB 408 tax report filings. (PPL/200, Fuller/2.) Staff's template is  
19 annotated with citations to OAR 860-022-0041 to ensure that the template adheres to the  
20 requirements of the rules. (PPL/200, Fuller/2.) PacifiCorp filed the tax report, relevant work  
21 papers, and back-up documentation in the Salem and Portland safe rooms as provided for  
22 in Protective Order No. 06-033 in this docket. (PacifiCorp/200, Fuller/2-3.) PacifiCorp's  
23 work papers include notes that tie every number in the tax report to the relevant work paper,  
24 calculation, or other documentation. (PPL/200, Fuller/2-3.)

25           PacifiCorp's original 2006 Tax Report calculated taxes paid for 2006 in the amount of  
26 \$87 million and taxes collected in the amount of \$54.4 million. (Staff/100, Owings-Ball/2;

1 PPL/200, Fuller/5; PPL/202.) PacifiCorp's taxes paid amount was based on the stand-alone  
2 calculation, because it was lower than the consolidated and apportionment calculations.  
3 (PPL/100, Larson/5.)

## 4           **2. Staff's Audit and Recommended Changes to Tax Report**

5           Staff conducted a comprehensive audit of PacifiCorp's tax report to ensure that it  
6 complied with OAR 860-022-0041. (PacifiCorp/200, Fuller/3.) Staff conducted two informal  
7 workshops to discuss the tax report. *Re PacifiCorp Filing of Tariffs Establishing Automatic*  
8 *Adjustment Clauses Under the Terms of SB 408, Order Denying Petition to Amend*  
9 *Protective Order, Order No. 08-002 at 6, Docket UE 177 (Jan. 3, 2008).* Staff also issued  
10 data requests to PacifiCorp and communicated informally with PacifiCorp on a number of  
11 issues. (Staff/100, Owings-Ball/5; PacifiCorp/200, Fuller/4.)

12           PacifiCorp updated its tax report in response to two recommendations of Staff and  
13 filed a revised tax report. (Staff/100, Owings-Ball/7; PPL/100, Larson/4; PPL/200, Fuller/3.)  
14 First, PacifiCorp recalculated the state apportionment factors it used to allocate state stand-  
15 alone tax liability by removing depreciation associated with public utility property. (Staff/100,  
16 Owings-Ball/6; PacifiCorp/200, Fuller/4.) This adjustment decreased PacifiCorp's taxes paid  
17 by approximately \$0.5 million. (PacifiCorp/200, Fuller/4.)

18           Second, PacifiCorp recalculated the interest expense used to derive the stand-alone  
19 tax liability using the interest synchronization method rather than using the amount of actual  
20 interest deduction. (Staff/100, Owings-Ball/6; PacifiCorp/200, Fuller/4.) This adjustment  
21 increased PacifiCorp's taxes paid by approximately \$2.4 million. (PacifiCorp/200, Fuller/4.)

22           Staff's two adjustments resulted in a net increase in PacifiCorp's taxes paid of  
23 \$1.9 million—from \$87 million to \$88.9 million. (Staff/100, Owings-Ball/2, 7; PPL/100,  
24 Larson/5; PPL/200, Fuller/4–5; PPL/202.) This increase in taxes paid resulted in an  
25

26

1 increase to PacifiCorp's surcharge of \$1.9 million—from \$32.6 million to \$34.5 million.  
2 (Staff/100, Owings-Ball/2, 7; PPL/100, Larson/4; PPL/200, Fuller/5.)

3 Staff concluded that PacifiCorp's tax revised report produced a surcharge of  
4 \$34.5 million. (Staff/100, Owings-Ball/7) Staff also specifically concluded that PacifiCorp's  
5 revised filing adheres to OAR 860-022-0041. (Staff/100, Owings-Ball/7; Staff/200, Owings-  
6 Ball/7). No other party in this case has taken a contrary position.

7 **3. PacifiCorp's Automatic Adjustment Clause**

8 **a. Schedule 102**

9 Concurrently with its 2006 Tax Report, PacifiCorp filed Advice Filing 07-019 with  
10 Schedule 102, PacifiCorp's AAC tariff for income taxes. (PPL/100, Larson/2; PPL/101).  
11 Schedule 102 establishes the rates applicable to the AAC, effective June 1, 2008.  
12 (PPL/101.) It also creates a balancing account into which amounts that will be amortized in  
13 the future will be deposited and accrue interest at the Commission-approved rate.  
14 (PPL/101.)

15 **b. PacifiCorp's Amortization Proposal**

16 The Commission has authority to determine the period over which a SB 408  
17 surcharge will be amortized. ORS 757.259(2); OAR 860-022-0041(8)(c). In order to  
18 moderate the impact of the surcharge on customer rates, PacifiCorp proposes a multi-year  
19 amortization of the surcharge. (PPL/100, Larson/3, 5.) PacifiCorp proposes to amortize  
20 \$27 million of the surcharge in 2008–2009. (PPL/100, Larson/3.) PacifiCorp would place  
21 the remaining surcharge of \$7.5 million, plus \$5.8 million in accrued interest, in its SB 408  
22 balancing account. (PPL/100, Larson/4.) The total amount recorded in the balancing  
23 account, \$13.3 million, will continue to accrue interest pursuant to OAR 860-022-0041(8)(e)  
24 until it is fully amortized. (PPL/100, Larson/4.) PacifiCorp plans to propose amortization for  
25 the balance of the 2006 SB 408 surcharge when it files its 2007 tax report on October 15,  
26 2008. (PPL/100, Larson/4.)

1 PacifiCorp's amortization proposal will limit the rate increase from the SB 408  
2 surcharge to approximately three percent in 2008–2009. (PPL/100, Larson, 5.) The rate  
3 impact of collecting the entire SB 408 surcharge and interest in one year would be  
4 four percent. (PPL/100, Larson 5.) PacifiCorp weighed the impact of the 4 percent increase  
5 against the accrual of additional interest on the unamortized portion of the surcharge, which  
6 would be approximately \$1 million from June 1, 2008 to May 31, 2009, and concluded that  
7 its amortization proposal most appropriately balanced the benefits and drawbacks of each  
8 approach. (PPL/100, Larson/5.)

9 **III. ARGUMENT**

10 **A. The Nature and Scope of this Case.**

11 On January 24, 2008, the Commission established AACs for all SB 408 utilities,  
12 determining that the 2006 tax reports showed that “for each utility, the amounts collected  
13 and paid differed by more than \$100,000 in one or more years under the framework  
14 established by SB 408 and OAR 860-022-0041.” *In re Commission Staff Directing*  
15 *PacifiCorp, et al. to File Tariffs*, Order No. 08-045 at 1–2, UE 177, UE 178, UG 170, & UG  
16 171 (2008). As a result of this Order, PacifiCorp now has an approved SB 408 AAC,  
17 Schedule 102, with a rate effective date of June 1, 2008. What is left for the Commission to  
18 resolve in this case is the final structure and terms of the AAC. *Id.* at 2.

19 The Commission established a procedural schedule in this case “to provide an  
20 opportunity for Staff and intervenors to review and audit the utilities’ tax reports.” *Id.* The  
21 Commission has defined the scope of this review as including “any information that may  
22 assist in determining whether the information contained in PacifiCorp’s tax report is  
23 accurate,” but excluding an audit of PacifiCorp’s underlying tax returns or proposed general  
24 consolidated tax adjustments. *Re PacifiCorp Filing of Tariffs Establishing Automatic*  
25 *Adjustment Clauses Under the Terms of SB 408*, Order No. 08-003 at 2, Docket UE 177  
26 (Jan. 4, 2008).

1 The Commission has also ruled that challenges to the validity of OAR 860-022-0041  
2 and Protective Order No. 06-033 are beyond the proper scope of this docket. *Re PacifiCorp*  
3 *Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408,*  
4 *Ruling Granting Motion in Limine at 1, 5, Docket UE 177 (Mar. 3, 2008). See also Staff/200,*  
5 *Owings-Ball/3* (“Based upon two extensive rulemakings, the Commission has determined  
6 that the current rule \* \* \* meets the requirements of SB 408. Whether potential revisions to  
7 the rule are appropriate is a question for a subsequent rulemaking; the issue in UE 177 is  
8 whether PPL has calculated its ‘taxes paid’ amount in a manner consistent with the existing  
9 administrative rules.”)

10 **B. The Results of PacifiCorp’s Tax Report Are Unchallenged in Terms of**  
11 **Accuracy and Compliance with OAR 860-022-0041.**

12 All of the evidence in the record supports approval of PacifiCorp’s revised tax report  
13 on the basis that the tax report is accurate and in compliance with OAR 860-022-0041.  
14 PacifiCorp’s goals in preparing the tax report were to ensure that the tax report: (1) was as  
15 accurate, complete, and well documented as possible; and (2) complied with OAR 860-022-  
16 0041 in all respects. (PPL/200, Fuller/2.) As with PacifiCorp’s 2005 Tax Report which the  
17 Commission found to be in compliance with the rules—and as with the tax reports filed by  
18 the other utilities this year—PacifiCorp’s 2006 Tax Report uses Staff’s tax report template.  
19 (PPL/200, Fuller/2; PPL/201.) This template is designed to implement OAR 860-022-0041,  
20 with annotations to the rule for every cell in the template. *Id.*

21 After a thorough audit, Staff has recommended approval of PacifiCorp’s revised 2006  
22 Tax Report as fully compliant with OAR 860-022-0041:

23 Staff believes that PPL’s SB 408 tax filing adheres to OAR 860-022-  
24 0041 as currently written. Staff believes that the outcome of PPL’s  
25 filing reflects the intent of SB 408 without fear of a normalization  
26 violation and including the sharing of Consolidated Tax Savings. Staff  
recommends that the Commission issue an order approving the PPL  
filing as a reasonable outcome consistent with the requirements  
outlined in ORS 757.268 and OAR 860-022-0041 as stated below:

Taxes Paid and Properly Attributed to the Regulated Operations	Taxes Authorized to be Collected in Rates	Difference between Taxes Paid and Collected Surcharge or (Refund)
<b>\$88.9 million</b>	<b>\$54.4 million</b>	<b>\$34.5 million</b>

5 (Staff/200, Owings-Ball/8.)

6 The results of PacifiCorp's tax report are also corroborated by PacifiCorp's actual  
 7 financial and regulatory circumstances in 2006. For most of 2006, PacifiCorp was a part of  
 8 a consolidated tax group that paid approximately \$4.4 billion in income taxes in 2006.  
 9 (PPL/100, Larson/6.) Insofar as SB 408 was designed to provide rate refunds when a utility  
 10 or its parent pays little or nothing in taxes (to fix the so-called "Enron problem"), Berkshire  
 11 Hathaway's huge consolidated tax payments in 2006, which include 2006 taxes owed by  
 12 PacifiCorp, rendered this policy goal inapplicable to PacifiCorp. *Id.*

13 Second, because PacifiCorp's taxes collected in rates were artificially depressed by  
 14 the \$24 million total tax adjustment imposed in UE 170, PacifiCorp collected only  
 15 \$54.4 million in taxes in rates. This is considerably less than PacifiCorp's usual level of tax  
 16 expense in rates. *Id.*

17 Third, PacifiCorp's Oregon unadjusted results of operations for calendar year 2006  
 18 reflect an actual tax expense of \$79 million, or \$87.5 million adjusted for the iterative effect  
 19 of the UE 170 adjustment. *Id.*; see PPL/102. This number closely approximates the taxes  
 20 paid result in PacifiCorp's 2006 Tax Report, as does the delta between this number and the  
 21 2006 taxes collected result (\$33.1 million). *Id.*

22 In summary, the record demonstrates that PacifiCorp significantly undercollected tax  
 23 expense in rates in 2006, consistent with the results of PacifiCorp's 2006 Tax Report.

24 ICNU's testimony "does not, at any point, assert that PacifiCorp has failed to perform  
 25 the calculation required by OAR 860-022-0041." *Re PacifiCorp Filing of Tariffs Establishing*  
 26 *Automatic Adjustment Clauses Under the Terms of SB 408, Ruling Granting Motion in*



1 Limine at 5, Docket UE 177 (Mar. 3, 2008). Nor does ICNU's testimony allege that  
2 PacifiCorp's tax report is inaccurate with respect to any specific number, calculation, or data  
3 point. At hearing, ICNU's expert Ms. Ellen Blumenthal could not say "one way or another"  
4 whether PacifiCorp's tax report followed OAR 860-022-0041. (Tr. 88, Line 25 – Tr. 89,  
5 Line 5.)

6       Once a utility has presented evidence in support of a proposed rate or tariff, the  
7 burden of going forward with evidence that the filing is unreasonable shifts to parties who  
8 oppose the filing. *Re NW Natural*, Order No. 99-697, Docket UG 132 (Nov. 12, 1999); see  
9 also *Re Idaho Power*, Order No. 05-871 at 7, Docket UE 167 (July 28, 2005) (after the utility  
10 has submitted evidence to prove its case, "then the burden of production shifts to parties  
11 that oppose the utility's proposal."). In other words, once PacifiCorp presented persuasive  
12 evidence in support of its tax report, ICNU was required to present persuasive evidence in  
13 opposition to the tax report to prevail. See *Re Portland Gen. Elec. Co.*, Order No. 01-777 at  
14 6, Docket UE 115 (Aug. 31, 2001); *Re Or. Elec. Util. Co., LLC*, Order No. 05-114 at 17 n.12,  
15 Docket UM 1121 (Mar. 10, 2005).

16       Testimony that ICNU does not know "one way or another" whether PacifiCorp's tax  
17 report is accurate and in compliance with the Commission's rules does not constitute  
18 persuasive, substantial evidence upon which the results of the tax report may be rejected.  
19 See ORS 183.482(8)(c) ("substantial evidence exists to support a finding of fact when the  
20 record, viewed as a whole, would permit a reasonable person to make that finding.")

21       ICNU's position on PacifiCorp's amortization proposal is even weaker. Not only did  
22 ICNU fail to produce any evidence objecting to this proposal, it refused to disclose its  
23 position on the issue both in discovery and at hearing. (ICNU Response to DR 1.26,  
24 PPL/300 at 29; Tr. 101, Lines 20–21.) For these reasons, the Commission should preclude  
25 ICNU from taking a position in this case opposing PacifiCorp's amortization proposal.

26

1 Without any objection on the record to PacifiCorp's amortization proposal, and because the  
2 proposal fairly balances the interests implicated, the Commission should approve it as filed.

3 **C. The Commission Should Reject ICNU's General Challenges to PacifiCorp's Tax**  
4 **Report.**

5 The Commission correctly struck ICNU's testimony challenging OAR 860-022-0041  
6 as an improper collateral attack on the Commission's rules. *Alto v. State Fire Marshal*, 319  
7 Or. 382, 391 (1994) (a collateral attack on the validity of a rule in a proceeding outside of  
8 ORS 183.400 is not permissible). This ruling reduced ICNU's testimony in this case to  
9 general complaints about the application of the Commission's rules to PacifiCorp. To the  
10 extent that these arguments are an indirect collateral attack on OAR 860-022-0041, they  
11 should also be rejected. In any event, these complaints are unfounded and unpersuasive.

12 **1. ICNU's Complaints About the Application of the Rules to PacifiCorp are**  
13 **Poorly Informed.**

14 ICNU's witness Ms. Blumenthal has not previously worked on utility tax issues in  
15 Oregon; her experience is in Texas, Kansas, and at the Federal Energy Regulatory  
16 Commission. (Tr. 41, Lines 10–12.) Ms. Blumenthal indicated that her "frame of reference"  
17 for her testimony in this case is the tax methodology employed by the Texas Public Utility  
18 Commission based upon Texas law. (ICNU Responses to DR 2.4(a)–(b); Exhibit PPL/301  
19 at 7; Tr. 42, Lines 15–21.)

20 Ms. Blumenthal acknowledged, however, that SB 408 is a law unique to Oregon.  
21 (ICNU/100, Blumenthal/3.) Prior to being retained in this case in the fall of 2007,  
22 Ms. Blumenthal had never read SB 408 or its rules. (Tr. 43, Lines 1–7). Ms. Blumenthal's  
23 testimony in this case is not supported by any "work papers, documentation or research or  
24 analysis." (ICNU Response to DR 1, PPL/300 at 4.)

25 As outlined below, Ms. Blumenthal's complaints about the application of OAR 860-  
26 022-0041 to PacifiCorp are in most instances due to a lack of understanding of the rules or

1 unfamiliarity with PacifiCorp's filing, applicable Commission orders, and Oregon tax law and  
2 policy.

- 3       • Ms. Blumenthal initially testified that the stand-alone calculation improperly  
4       excluded a deduction for depreciation expense on a straight-line basis.  
5       (INCNU/100, Blumenthal/6.) On cross-examination, Ms. Blumenthal  
6       acknowledged that she did not know whether the depreciation deduction was  
7       added back in the stand-alone calculation. (Tr. 72, Lines 10–18.) In fact, as  
8       Staff explained in its rebuttal testimony, "in the second phase of the  
9       calculation, those depreciation benefits related only to Oregon utility  
10      operations—based on straight-line deduction as Ms. Blumenthal suggests—  
11      are added back." (Staff/200, Owings-Ball/4.)
- 12      • Ms. Blumenthal's testimony criticized PacifiCorp's original tax report as  
13      calculating the interest deduction using the interest synchronization method.  
14      (ICNU/100, Blumenthal/6.) PacifiCorp's original tax filing, however, did not  
15      use the interest synchronization method. (PPL/200, Fuller/9.)
- 16      • PacifiCorp ultimately revised its tax report in its rebuttal testimony to use the  
17      interest synchronization method in response to Staff's position and based on  
18      the fact that all other utilities, including PGE, used this method. *Id.* This  
19      recommendation was in Staff's Initial Findings filed in UE 177 in mid-  
20      December 2007. ICNU never objected to Staff's recommendation that  
21      PacifiCorp use the interest synchronization method. ICNU never objected to  
22      PGE's use of the interest synchronization method. *Id.* ICNU's only objection  
23      to the interest synchronization method came in response to PacifiCorp's  
24      original tax report filing—which, as noted above, did not use the interest  
25      synchronization method.

26

- 1           • Ms. Blumenthal testified that consolidated tax savings should be included in  
2           the stand-alone calculation. (ICNU/100, Blumenthal/6.) Before she filed this  
3           testimony, however, the Commission issued an order specifically stating that  
4           there was no basis for ICNU to propose general consolidated tax adjustments  
5           in this case. See *Re PacifiCorp Filing of Tariffs Establishing Automatic*  
6           *Adjustment Clauses Under the Terms of SB 408*, Order Denying Petition to  
7           Compel, Order No. 08-003 at 3, Docket UE 177 (Jan. 4, 2008).  
8           Ms. Blumenthal admitted on cross-examination that she had seen this order  
9           but that it “was not on her mind when she prepared her testimony.” (Tr. 74,  
10          Lines 8–11.)
- 11          • Ms. Blumenthal criticizes PacifiCorp’s tax report for using pre-tax book  
12          income for Oregon regulated operations rather than a tax return as the  
13          starting point for its stand-alone calculation. (ICNU/100, Blumenthal/6–7.)  
14          She alleges that an actual tax return exists for PacifiCorp. (ICNU/100,  
15          Blumenthal/6.) While a tax return does exist for PacifiCorp, a tax return does  
16          not exist for PacifiCorp’s *Oregon regulated operations*, which is the entity  
17          covered by SB 408. (PPL/200, Fuller/8.) This fact necessitated PacifiCorp’s  
18          approach, which as Mr. Fuller testified, used the results of PacifiCorp’s actual  
19          tax return to the greatest extent possible. (*Id.*)

20          **2. ICNU’s Positions Are Inconsistent and Appear Results Driven.**

21          Ms. Blumenthal testified in cross-examination that consistency with ICNU’s past  
22          positions was not important to her. (Tr. 78, Lines 10–12.) This is apparent from ICNU’s  
23          testimony in this case, which is difficult to reconcile with ICNU positions in other dockets.  
24          The inconsistencies appear to be due to the fact that application of OAR 860-022-0041 in  
25          this case produces a significant rate surcharge, rather than a rate refund.

26

- 1           • In this case, ICNU claims that the apportionment method will “almost always”  
2 allocate too much consolidated tax liability to PacifiCorp. (ICNU/100,  
3 Blumenthal/8.) But ICNU “applauded” the apportionment method upon its  
4 announcement, commending the Commission for “thoughtfully resolv[ing] a  
5 thoroughly debated and complex issue.” Opening Comments of the Industrial  
6 Customers of Northwest Utilities on Proposed Rules at 1, Docket AR 499  
7 (July 31, 2006); Reply Comments of the Industrial Customers of Northwest  
8 Utilities on Proposed Rules at 1, Docket AR 499 (Aug. 14, 2006).
- 9           • ICNU supported the apportionment method in part because it would “allow  
10 the Commission and other parties to look to existing Oregon tax policies,  
11 statutes and rules for guidance regarding attribution issues that arise in the  
12 future.” Opening Comments of the Industrial Customers of Northwest Utilities  
13 on Proposed Rules at 1, Docket AR 499 (July 31, 2006). In this case,  
14 however, ICNU’s expert has testified against application of the apportionment  
15 method based upon her Texas “frame of reference,” without regard to Oregon  
16 tax policies, statutes, and rules.
- 17           • More than one year and one-half passed between the time that ICNU  
18 applauded the apportionment method in AR 499 until ICNU filed testimony in  
19 this case. During this time, there were numerous milestones in the SB 408  
20 implementation schedule which involved application or interpretation of the  
21 apportionment method, including PacifiCorp’s 2005 tax report, the PLR  
22 applications and the AR 517 rulemaking. (PPL/307.) It was not until ICNU  
23 faced the first major rate surcharge under SB 408 in this case that ICNU  
24 decided to abandon its prior support of the apportionment method.
- 25           • ICNU may claim that it was impossible to understand the apportionment  
26 method prior to this case. This is inconsistent with ICNU’s position in

1 AR 499, however, where ICNU praised the apportionment method because it  
2 was “easy for customers to understand.” Opening Comments of the  
3 Industrial Customers of Northwest Utilities on Proposed Rules at 1, Docket  
4 AR 499 (July 31, 2006).

- 5 • ICNU’s concern about the apportionment method is that it allocates “too  
6 much” tax liability to utilities because they are capital intensive. (Tr. 76,  
7 Lines 4–11.) ICNU cannot credibly claim that the capital intensive nature of  
8 utilities is a fact that ICNU discovered for the first time in this docket.
- 9 • Both the PGE tax report and the PacifiCorp tax report were filed under  
10 OAR 860-022-0041 using the Staff tax template. (Tr. 44, Lines 13–19).  
11 Shortly after Ms. Blumenthal filed testimony challenging the application of  
12 OAR 860-022-0041 in UE 177 (where the rules produced a surcharge), she  
13 filed testimony supporting a Stipulation in UE 178 (where the rules produced  
14 a refund). *Re Portland Gen. Elec. Filing of Tariffs Establishing Automatic*  
15 *Adjustment Clauses Under the Terms of SB 408*, Joint Testimony in Support  
16 of Stipulation at 2, Docket UE 178 (Feb. 1, 2008). The Stipulation was  
17 predicated on an agreement that PGE’s tax report satisfies the  
18 methodologies as currently written in OAR 860-022-0041. (Tr. 57–58.) But,  
19 the Stipulation reserved the rights of parties to challenge the methodologies  
20 of OAR 860-022-0041 in another proceeding. ICNU has relied upon this to  
21 inconsistently accept the UE 178 refund as compliant with the rules while  
22 challenging the UE 177 surcharge precisely because it adheres to those  
23 same rules.
- 24 • In cross-examination, Ms. Blumenthal claimed that the consolidated method  
25 could never produce an actual tax result consistent with the goal of SB 408.  
26 (Tr. 75, Lines 3–14.) But Ms. Blumenthal admitted that the consolidated

1 method is what produced the PGE tax refund of \$37.2 million in Docket  
2 UE 178. (Tr. 92, Line 24 – Tr. 93, Line 2.)

3 • Ms. Blumenthal acknowledged that an “actual taxes” formula under SB 408  
4 has two parts: taxes paid and taxes collected. (Tr. 65, Lines 17–20.) She  
5 also acknowledged that SB 408’s formula was “not the best way” to calculate  
6 taxes collected, because this formula did not derive an actual taxes collected  
7 number. (Tr. 67, Lines 10–25.) ICNU asserts in this case that SB 408  
8 requires an “actual taxes” approach. But ICNU was involved in proposing the  
9 current taxes collected formula in SB 408, which Ms. Blumenthal admits does  
10 not produce an actual taxes collected amount. (Tr. 68, Lines 3–8.)

11 In summary, the many inaccuracies and inconsistencies in ICNU’s testimony require  
12 the Commission to diminish the weight accorded to this testimony. ICNU’s testimony  
13 appears to distill to a simple position: because PacifiCorp’s 2006 Tax Report produces a  
14 large surcharge, ICNU opposes it. But SB 408 was enacted with a symmetrical automatic  
15 adjustment clause, designed to cover undercollections of taxes in rates as well as  
16 overcollections. Therefore, the fact that PacifiCorp’s tax report produces a rate surcharge is  
17 not a legitimate basis on which to oppose it.

#### 18 IV. CONCLUSION

19 The Commission is required to issue an order that contains specific findings  
20 prescribed in OAR 860-022-0041(7) within 180 days of PacifiCorp’s tax report filing. The  
21 Commission previously made the findings in this case necessary to establish an automatic  
22 adjustment clause. PacifiCorp requests that the Commission make the following additional  
23 determinations in its final order in this case:

24 • For the 2006 tax year, the amount of federal and state income taxes paid to units of  
25 government by PacifiCorp that is properly attributed to the regulated operations is  
26

1 approximately \$34,473,938 more than the amount authorized to be collected in  
2 PacifiCorp's rates. See OAR 860-022-0041(7)(b)(B).

- 3 • For the 2006 tax year, the amount of local income taxes paid to units of government  
4 by PacifiCorp that is properly attributed to the regulated operations is approximately  
5 \$64,066 more than the amount authorized to be collected in PacifiCorp's rates. See  
6 OAR 860-022-0041(7)(b)(C).
- 7 • PacifiCorp's revised 2006 Tax Report complies with OAR 860-022-0041.
- 8 • PacifiCorp's revised 2006 Tax Report produces a rate surcharge of \$34.5 million.
- 9 • PacifiCorp shall amortize \$27 million of the total surcharge over the course of one  
10 year at the rates proposed in Schedule 102.
- 11 • PacifiCorp shall credit the remaining surcharge amount of \$7.5 million plus  
12 \$5.8 million of interest to the Company's SB 408 balancing account.
- 13 • The amount in the balancing account shall accrue interest at the Company's then-  
14 current authorized cost of capital.
- 15 • PacifiCorp shall propose an amortization schedule for any amount remaining in the  
16 balancing account when it files its 2007 tax report.

17  
18  
19  
20  
21  
22  
23  
24  
25  
26

DATED: March 14, 2008

MCDOWELL & RACKNER PC



Katherine McDowell  
Amie Jamieson

Attorneys for PacifiCorp