

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 177(4)

In the Matter of:

PACIFICORP, dba PACIFIC POWER &
LIGHT COMPANY

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

**CLOSING BRIEF
OF THE CITIZENS' UTILITY BOARD OF OREGON**

March 21, 2011

1 **I. INTRODUCTION**

2 The Citizens' Utility Board of Oregon files this Closing Brief pursuant to the docketing
3 schedule set by ALJ Hardie's and ALJ Wallace's Joint Prehearing Conference Memorandum
4 entered on February 15, 2011. CUB respectfully requests that the Oregon Public Utility
5 Commission (OPUC) adopt Part 1 of the Stipulation entered by the Joint Parties in this matter
6 and reject Part 2 of that same Stipulation.

7 **II. ARGUMENT – The Stipulation Part 1**

8 **A. ICNU agrees OAR 860-022-0041(4)(d), as amended, is in compliance with SB 408.**

9 As noted in the Opening Brief of ICNU at 5, "Ms. Blumenthal first agreed with the Settling
10 Parties that the (4)(d) limitation in the current rule is not necessary to comply with the
11 normalization requirements. ICNU/100, Blumenthal/7-8." The Opening Brief of ICNU also
12 states at 7 that, "all parties agree that ratepayers should not benefit from accelerated tax
13 depreciation as required by the normalization requirements, and that the (4)(d) limitation
14 improperly imposed a deferred tax floor that exceeded the IRC normalization requirements and
15 artificially inflated the Company's surcharge." Thus, none of the parties in this docket has stated
16 that it disagrees with the adoption of the temporary rule provision.

17 Where ICNU and the other parties differ is in ICNU's determination that this docket is an
18 appropriate place for further rule revisions. But it is not the purpose of this docket to determine
19 whether the temporary rule provision, or the rest of the rule, is in compliance with SB 408.
20 Rather, it is the purpose of this docket to determine whether the Stipulation (Part 1) supported by
21 CUB, Staff and the Company, is in compliance with the OAR 860-022-0041 as a whole. The
22 Standard of Review for this docket requires only a determination as to whether PacifiCorp's
23 2009 tax report complies with all of the provisions of the current OAR 860-022-0041.

1 **B. Rather than discussing the compliance of the 2009 Report with the entire rule, as**
2 **amended, ICNU proposes an alternative methodology for calculation of taxes.**
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4 As noted in the Opening Brief of ICNU at 6, “Ms. Blumenthal did not propose a specific
5 tax calculation, but instead recommended an overall approach that will require PacifiCorp to file
6 a revised tax report” In other words ICNU proposes a new methodology and does not
7 discuss whether the current methodology complies with the rule.

8 ICNU may well be correct that Berkshire Hathaway wins whether PacifiCorp
9 experiences gains or losses but fixing that problem requires a statutory change and not a
10 rulemaking change - a statutory change that is hopefully coming soon. In the meantime we
11 have to determine whether the Stipulation complies with the rule implementing the current
12 statute. CUB, Staff and PacifiCorp have shown in their testimony and Opening Briefs that it
13 does. Ms. Blumenthal has put forward no viable alternative.

14 **C. Notwithstanding that CUB generally agrees with the Company’s Opening Brief in**
15 **Regard to Stipulation Part 1, CUB must note its objection to the Company’s**
16 **description of the burden of proof in this docket.**
17

18 In PacifiCorp’s Opening Brief the Company makes an argument at 11 lines 9 to 13 that,
19 “[o]nce a utility has presented evidence in support of a proposed rate or tariff, the burden of
20 going forward with evidence that the filing is unreasonable shifts to the parties who oppose the
21 filing.” CUB does not agree with this statement of the burden of proof and wants to make sure
22 the Company cannot use this docket to perpetuate this incorrect interpretation of the standard.
23 The burden of persuasion is always on the Company. The Commission has previously explained
24 the utility’s burden of proof as follows:

25 [A]n applicant is initially responsible for both the burden of persuasion
26 and the burden of production in support of a deferred accounting request.
27 The burden of production shifts to other parties to present evidence that
28 rebutts what an applicant presented. However, the burden of persuasion
29 always rests with the applicant, regardless of opposition to the filing.
30 Thus, for example, an applicant does not necessarily meet its burden

1 merely by presenting un rebutted evidence. The evidence must be
2 persuasive enough to satisfy all requirement required by statute.^{1, 2}

3 Indeed, PacifiCorp’s final citation – second citation contained in footnote 65 of
4 PacifiCorp’s Opening Brief - is directly on point with CUB’s rather than PacifiCorp’s
5 argument. Given PacifiCorp’s second citation in footnote 65, CUB is willing to posit the
6 possibility that PacifiCorp’s argument went awry in the final editing but, given the
7 magnitude of the possible unintended consequences should the Commission adopt this
8 standard of proof, CUB feels the need to bring this discrepancy to the Commission’s
9 attention.

10 Notwithstanding the above, CUB agrees with PacifiCorp and Staff that the
11 Stipulation Part 1 should be adopted in its entirety by the Commission.

12 III. ARGUMENT – The Stipulation Part 2

13 A. CUB continues to object to the Stipulation Part 2 because the change proposed, and 14 already made, to OAR 860-022-0041(4)(d) will not cause a normalization violation 15 and obtaining a PLR is unnecessary.

16 As stated in CUB’s Opening Brief, CUB voiced opposition to Part 2 of the Stipulation
17 because the change proposed, and subsequently made, to OAR 860-022-0041(4)(d) will not
18 cause a normalization violation.³ Given that there is no possibility of the change to the rule
19 causing a normalization violation there is no reason to file for the additional deferral and no
20 reason to apply to the IRS for a PLR. Such actions are simply unnecessary and a waste of
21 taxpayer and ratepayer money - they will unnecessarily spawn additional and costly litigation
22 with the creation of additional unnecessary dockets.

23
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¹ OPUC Docket No. UM 1147, Order No. 05-1070 at 5-6.

² See also, UE 196 Order No. 09-046 at 7. “[W]e clarify that ICNU and CUB are correct that PGE bears the burden of proof in this docket. There are two aspects to the burden of proof: the burden of persuasion and the burden of production. The burden of persuasion in a deferral amortization case is always with the utility. The ultimate burden of producing enough evidence to support its claims is also with the utility. Other parties in the case, however, have the burden of producing evidence to support their argument in opposition to the utility’s position.”

³ Joint Testimony/100 Bird-Fuller-Feighner/10 lines 21 – 24.

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B. The facts at hand are not facts under which the Commission should utilize its discretion pursuant to ORS 757.268(8)(b) to include an additional deferral.

In the Opening Brief of PacifiCorp the Company argues that Part 2 of the Stipulation should be approved because Staff’s and PacifiCorp’s position is consistent with SB 408, OAR 860-022-0041 and Commission precedent, and because ORS 757.268(8)(b) says the Commission “may” authorize a utility to include tax requirements and benefits that lead to compliance with the normalization requirements of federal law.⁴ The Company completely misses the point. Yes the Commission “may”, in appropriate circumstances, authorize inclusion of things that lead to compliance with the normalization requirements of federal law but seeking a PLR does nothing to improve the changes of the amendment being in compliance with the law today, and including a deferral to which the Company is not entitled does nothing to improve compliance with the federal normalization requirements. These are not facts under which the Commission should utilize its discretion to include an additional deferral.

C. OAR 860-022-0041(8)(g) does not speak to the present day and does not, therefore, require application for a new PLR.

The Company next argues that because the Commission required it to file for a PLR under OAR 860-022-0041(8)(g) in 2006 that it is required to do the same today.⁵ This is not correct. OAR 860-022-0041(8)(g) does not speak to the present it speaks only to the period “[o]n or before December 31, 2006”⁶ While an initial read from the IRS was a good idea in 2006, when Oregon was instituting an entirely new law, such a reading is unnecessary today when all of the parties are familiar with the position of the IRS in this regard and it is clear that the amendment made to the rule will not change the IRS’ position on the compliance of the rule with the IRS’ normalization regulations. CUB reiterates that given there is no possibility of the change to the rule causing a normalization violation there is no reason to file for the additional deferral and no reason to apply to the IRS for a PLR. Such actions are simply unnecessary and a

⁴ PacifiCorp’s Opening Brief at 21 lines 1-8.
⁵ PacifiCorp’s Opening Brief at 21 lines 9-15.
⁶ OAR 860-022-0041(8)(g).
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1 waste of taxpayer and ratepayer money - they will unnecessarily spawn additional and costly
2 litigation with the creation of additional unnecessary dockets. CUB respectfully requests that the
3 Commission not adopt Stipulation Part 2.

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5 **D. The Ruling in AR 517 was made in different factual circumstances and does not**
6 **provide precedent for a PLR filing today.**

7 In response to PacifiCorp’s third argument concerning past Amended PLR requests
8 related to the original PLR filing,⁷ CUB points out that at the time of the Amended PLR request
9 the original PLR request was still pending – there had been no ruling by the IRS.⁸ When there
10 had been no ruling on the original PLR request it made sense to amend the original request so as
11 to cover the newly minted statute, and now newly amended rule. Here, with several years under
12 our collective belts and a broader understanding of what is, and is not, a normalization violation,
13 it makes no sense. Given the foregoing, there is no possibility of the change to the rule causing a
14 normalization violation, there is no reason to file for the additional deferral, and there is no
15 reason to apply to the IRS for a PLR. Such actions are simply unnecessary and a waste of
16 taxpayer and ratepayer money - they will unnecessarily spawn additional and costly litigation
17 with the creation of additional unnecessary dockets. CUB respectfully requests that the
18 Commission not adopt the Stipulation Part 2.

19
20 **E. Application for the deferral and PLR will cause harm to ratepayers.**

21 PacifiCorp continues to claim that there is no harm to ratepayers caused by the filing of
22 their deferral for the difference between the surcharge produced by the deferred tax floor –
23 deferral Stipulation Part 2, and the surcharge agreed to in Stipulation Part 1. This is not correct.

24 First, PacifiCorp is simply not entitled to the additional deferral sought in Stipulation Part
25 2 pursuant to OAR 860-022-0041(4) as amended. Allowing PacifiCorp to file for a deferral,
26 when the law clearly states that it is not entitled to such a deferral, is bad policy and sets a
27 terrible precedent.

⁷ PacifiCorp’s Opening Brief at 21 lines 16-21 and at 22 lines 1-2.

⁸ PacifiCorp’s Opening Brief at 19 lines 1-14.

1 Second, rate payer monies must be expended for Staff to track and process this deferral.
2 Rate payer monies must also be expended for CUB to track and oppose this inappropriate
3 deferral and PLR request. And, of course, rate payer monies will also be expended by ICNU to
4 track and oppose this inappropriate deferral and PLR request. Thus rate payer monies will have
5 to be expended causing harm to ratepayers.

6 There is a moral and financial cost to rate payers for this proposed inappropriate deferral
7 whether or not it actually comes to pass. The OPUC should not adopt this inappropriate deferral
8 process and should not require the unnecessary work to obtain an unnecessary PLR – both are
9 unjustified and unjustifiable expenses.

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11 **F. The procedures under Part 2 of the Stipulation do not increase protection against an**
12 **IRS finding of a normalization violation.**

13 As stated in CUB’s Opening Brief, judging from past experience it will likely take
14 upwards of a year to get a PLR from the IRS which gives the IRS plenty of time to research and
15 make a finding, if it so chooses, that there is a normalization violation. Applying to the IRS for a
16 letter stating that the rule change does not violate the IRC does nothing to hinder or expedite the
17 IRS coming out with either a positive or negative finding. Since CUB does not believe the
18 newly amended rule will cause a normalization violation CUB sees no value – no protection,
19 resulting a new PLR application.

20
21 **G. Application of the Blended Treasury Rate constitutes a hollow gesture at best.**

22 As noted in CUB’s Opening Brief, PacifiCorp is not doing anything wonderful by
23 agreeing to apply only the blended treasury rate to the deferral sought in the Stipulation Part 2.
24 PacifiCorp is not entitled to the deferral sought in the Stipulation Part 2 so agreeing to apply only
25 the blended treasury rate to the deferral to which it is not entitled is a hollow gesture at best.

26
27 **IV. CONCLUSION**

28 For all of the reasons discussed above, CUB recommends that the OPUC
29 find that Part 1 of the Stipulation is in the public interest and would produce rates that are

1 fair, just, and reasonable. Accordingly, CUB recommends that the OPUC adopt Part 1 of the
2 Stipulation in its entirety.

3 As for Part 2 of the Stipulation, CUB recommends that the OPUC not adopt the
4 Stipulation Part 2 in any form. The Stipulation Part 2 lays the groundwork for potential
5 provision to PacifiCorp of a windfall to which it is not entitled. CUB respectfully requests
6 that the OPUC not encourage such overreaching on the part of any utility. Thus CUB
7 recommends that the OPUC not adopt Part 2 of the Stipulation.

8 Dated: March 21, 2011.

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Respectfully submitted,



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UE 177(4) – CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of March, 2011, I served the foregoing **CLOSING BRIEF OF THE CITIZENS' UTILITY BOARD OF OREGON** in docket UE 177(4) upon each party listed in the UE 177(4) PUC Service List by email and, where paper service is not waived, by U.S. mail, postage prepaid, and upon the Commission by email and by sending five (5) copies and one (1) original by U.S. mail, postage prepaid, to the Commission's Salem offices.

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