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March 19, 2008

Via Electronic and US 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 Industrial Customers of Northwest Utilities' Reply Brief in the above-referenced matter.

Thank you for your assistance.

Sincerely yours,

/s/ Ruth A. Miller
Ruth A. Miller

Enclosure

cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Reply Brief on behalf of the Industrial Customers of Northwest Utilities upon the parties, shown below, on the official service list by causing the foregoing document to be deposited, postage-prepaid, in the U.S. Mail to those parties which have not waived paper service, and service via electronic mail to all parties.

Dated at Portland, Oregon, this 19th day of March, 2008.

/s/ Ruth A. Miller
Ruth A. Miller

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(W) = Paper Service Waived

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 177

In the Matter of)	
)	
OREGON PUBLIC UTILITY STAFF)	REPLY BRIEF OF THE
)	INDUSTRIAL CUSTOMERS OF
Requesting the Commission Direct)	NORTHWEST UTILITIES'
)	
PACIFICORP, dba PACIFIC POWER)	
& LIGHT COMPANY,)	
)	
to File Tariffs Establishing Automatic)	
Adjustment Clauses Under the Terms of)	
<u>SB 408.</u>)	

Pursuant to ALJ Arlow’s ruling at the March 4, 2008 hearing, the Industrial Customers of Northwest Utilities (“ICNU”) submits this Reply Brief to the Oregon Public Utility Commission (“OPUC” or “Commission”). PacifiCorp’s Post-Hearing Brief (“PacifiCorp’s Brief”) mischaracterizes ICNU’s position in this Docket and distorts the evidentiary record. Moreover, PacifiCorp never once disputes ICNU’s main contention that the Commission’s rules do not comply with SB 408. As detailed in ICNU’s Opening Brief, the Commission does not have the legal authority to act contrary to its statutory authority. As a result, the Commission should reject PacifiCorp’s requested surcharge in this Docket.

ARGUMENT

I. PacifiCorp's Contentions Regarding ICNU's Position in Past Proceedings are False and Misleading, and, in any event, Irrelevant

PacifiCorp deceptively chooses selective quotes from past proceedings in order to paint a false and misleading picture of ICNU's past position in the SB 408 rulemaking dockets. The Commission should disregard these portions of PacifiCorp's brief. Not only are these arguments misleading, but they are irrelevant to the question of whether OAR § 860-022-0041 complies with SB 408.

A. ICNU's Position in AR 499 is Consistent with its Current Position

ICNU's position in this Docket is that the Commission's rules do not produce an actual taxes paid result, and that the use of taxable income is "the most appropriate 'allocator' of the consolidated total tax expense." ICNU/100, Blumenthal/8, lines 11-12. PacifiCorp claims that ICNU's position in this Docket is inconsistent with its past position, and begins its unfounded assault with ICNU's Opening Comments submitted on July 31, 2006. PacifiCorp Brief at 5-6. PacifiCorp, however, chooses to ignore ICNU's comments prior to that time.

In Docket No. AR 498, the Commission passed a temporary rule defining "properly attributed" as the multiplication of two values:

(A) The total amount of taxes paid by the public utility or affiliated group to units of government; and

(B) The ratio of the tax liability of Oregon regulated operations of the public utility to the total tax liability from all affiliates of the public utility or the affiliated group with a positive tax liability.

Re Adoption of Temporary Rules to Implement SB 408 Relating to Annual Tax Reports and Automatic Adjustment Clauses Relating to Public Utility Taxes, Docket No. AR 498, Order No. 05-991, Appendix A at 1 (Sep. 15, 2005). In Opening Comments jointly sponsored by ICNU and the Northwest Industrial Gas Users (“NWIGU”) in AR 499, ICNU supported the temporary rule, stating:

[T]he Commission’s temporary rule reflects the legally correct interpretation of “properly attributed” by allocating to the utility and each affiliate its proportionate share of “taxes paid” in a consistent manner and that this rule is supported by sound policy.

Re Adoption of Permanent Rules Implementing SB 408 Relating to Utility Taxes, Docket No. AR 499, Opening Comments of ICNU and NWIGU at 3 (May 3, 2006) (emphasis in original).

In addition, ICNU encouraged the Commission to adhere to six principles, one of which required the Commission to allocate some portion of the tax losses of unregulated businesses within the affiliate group to the Oregon utility. Id. at 7. ICNU stated:

[T]he OPUC *must* consider these tax losses, not just when the consolidated tax payment is zero or less than the “stand-alone” utility amount, *but even when the consolidated tax payment is greater than the stand-alone amount*. Prior to SB 408, the Commission did not look beyond the utility. SB 408 now requires the Commission to look at the reality of the corporate structure. *Nothing in SB 408 suggests, nor does any policy support, that the Commission should ignore the entire corporate structure if the consolidated tax payment exceeds the stand-alone amount.*

Id. (emphasis added). Thus, ICNU argued exactly what it argues in this Docket; the corporate structure, including all consolidated tax losses, must be considered. The Commission's rules simply ignore any consolidated tax savings, and thus, do not produce an actual taxes paid result. ICNU/100, Blumenthal/6, lines 21-22; Blumenthal/7, lines 13-19.

B. This Docket Presents the First Test of the Apportionment Method

PacifiCorp criticizes ICNU for not commenting or objecting to the Commission's rules prior to this Docket. PacifiCorp Brief at 7-8, 19. As stated in ICNU's Opening Brief, however, this is the first opportunity for parties to use actual tax data to put the Commission's rules to the test. ICNU Opening Brief at 21-22.

The Commission rejected ICNU's initial proposals supporting the temporary rule, and instead adopted the Apportionment Method to determine the amount of taxes properly attributed to the regulated operations of a utility. Docket No. AR 499, Order No. 06-400 at 5 (July 14, 2006). Since the Commission's adoption of the Apportionment Method, this is the first Docket in which an actual rate adjustment is at issue.

Docket No. AR 517 was merely a proceeding to implement housekeeping changes to the Commission's rules. PacifiCorp is correct that ICNU did not raise objections to the Commission's rules at that time, but did criticize PacifiCorp and Portland General Electric Company ("PGE") for attempting to go beyond the scope of the Docket. PacifiCorp Brief at 8. AR 517 was clearly limited in scope, and was not the

appropriate forum to raise broad objections to the Commission's rules. In any event, AR 517 did not involve the application of the Commission's rules to actual tax data.

PacifiCorp claims that ICNU "cannot credibly claim that the capital intensive nature of utilities is a fact that ICNU discovered for the first time in this docket." PacifiCorp Brief at 20. ICNU does not make such an assertion. Rather, ICNU is arguing that it was unclear how the capital intensive nature of PacifiCorp would affect the calculations of taxes paid under the Commission's rules until parties had the opportunity to apply the Commission's rules to actual tax data.

While it is true that PacifiCorp filed its 2005 tax report in October of 2006, no rate adjustment was at issue. PacifiCorp has all the data in its hands, and SB 408 requires PacifiCorp to file the tax report, not customers. As is evident in this Docket, reviewing PacifiCorp's tax report is a very time-consuming task, especially under the safe room procedures adopted by the Commission. With no rate adjustment at issue before this Docket, it is very difficult for customers to expend limited resources on a proceeding that was designed not to result in any rate change.

C. ICNU's Position in Past Rulemakings is Immaterial

Regardless of any position ICNU advocated in the past, if the Commission's rules do not comply with SB 408, then the Commission lacks statutory authority to act consistently with its rules. ICNU was willing to try the Apportionment Method, which at the time appeared to be a compromise approach. However, now that ICNU finally has actual tax data to test the method, it became abundantly clear that the Apportionment Method is not a compromise approach. The result in PacifiCorp's case is

equivalent to the stand alone methodology, a result that would be similar without the existence of SB 408. This outcome could not have been known until this proceeding. PacifiCorp's arguments regarding ICNU's past position in the SB 408 rulemaking proceedings are a red herring, and should be completely ignored by the Commission.

II. PacifiCorp Mischaracterizes ICNU's Position and Provides no Argument Regarding Whether the Commission's Rules Comply with SB 408

PacifiCorp mischaracterizes ICNU's position in this case, presents a misleading view of the evidence, and improperly uses a stipulation reached in Docket No. UE 178 to attack ICNU in this Docket. Moreover, PacifiCorp presented no argument in opposition to ICNU's legal arguments regarding whether the Commission's rules comply with SB 408. PacifiCorp incorrectly asserts that ALJ Arlow's Ruling on PacifiCorp's Motion in Limine held that challenges to the validity of the Commission's rules are beyond the scope of this Docket. PacifiCorp Brief at 13. To the contrary, ALJ Arlow's Ruling held that Ms. Blumenthal's testimony was legal argument, and that "ICNU is free to address the legal issues raised in the Blumenthal testimony in its briefs to the Commission." Re Staff Request to the Commission to Direct PacifiCorp to File Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408, Docket No. UE 177, Ruling at 5 (Mar. 3, 2008) ("Ruling").^{1/}

^{1/} ICNU does not agree with ALJ Arlow's ruling that Ms. Blumenthal's stricken testimony consists of legal argument, and has filed a Motion for Expedited Certification of ALJ Arlow's Ruling.

A. ICNU’s Unrebutted Evidence Proves that the Commission’s Rules do not Comply with SB 408

PacifiCorp asserts that its tax report satisfies the methodologies in OAR § 860-022-0041, and that “[n]o other party in this case has taken a contrary position.” PacifiCorp Brief at 11. At no point does ICNU agree that PacifiCorp’s tax report complies with the Commission’s rules.

1. PacifiCorp Fails to Rebut ICNU’s Evidence

Ms. Blumenthal could not determine whether PacifiCorp’s tax report complied with the Commission’s rules due to the limited access to the documents. Transcript at 88, line 25; 89, lines 1-8. PacifiCorp’s assertion that ICNU did not present evidence in opposition to PacifiCorp’s, however, is simply false. PacifiCorp Brief at 15.

ICNU’s evidence in opposition to PacifiCorp’s tax report is that the tax report does not comply with SB 408, a legal issue that ALJ Arlow acknowledges may be raised in this case. Ruling at 5. Despite ALJ Arlow’s ruling, Ms. Blumenthal’s testimony still contains evidence that the Commission’s rules do not comply with SB 408. See, e.g., ICNU/100, Blumenthal/7, lines 16-19 (stand-alone calculation is “hypothetical” and does not meet the requirements of SB 408). In addition, as stated by Ms. Blumenthal on the record at the hearing:

My concern is that none of the three methods by themselves results in any reflection of the taxes that were paid that relate to regulated utility operations. There’s a little bit here and a little bit there, but it never really gets to the goal of Senate Bill 408.

And I don’t care what the result of, you know, how much taxes that are paid on a consolidated basis by the parent of

PacifiCorp. What I'm concerned with is that this method that's called the consolidated method really doesn't reflect anything about the taxes paid.

Transcript at 74, lines 24-25; 75, lines 1-10.

Moreover, the plain language of SB 408 requires rates to contain no more than the taxes paid to units of government by the affiliated group that is properly attributable to the regulated operations of PacifiCorp. ORS § 757.268(6)(b). This requires a determination of the taxes actually paid to governmental authorities, including all consolidated benefits. ORS §§ 757.267(1)(b)-(d). Ms. Blumenthal's testimony provides evidence that the Commission's rules do not produce a result that represents the taxes paid to governmental authorities that are properly attributable to PacifiCorp's Oregon regulated operations. ICNU/100, Blumenthal/7, lines 3-26; Blumenthal/8, lines 1-22; Blumenthal/9, lines 1-2.

It is PacifiCorp, not ICNU, that fails to produce evidence. ICNU's evidence demonstrates that the Commission's rules, and thus, PacifiCorp's tax report, fails to comply with SB 408. Not only does PacifiCorp fail to present any evidence that the Commission's rules produce an actual taxes paid result as required by SB 408, but PacifiCorp's Brief fails to present any legal arguments in opposition to ICNU's position. As a result, PacifiCorp has failed to meet its burden of proof in this Docket.

2. The Commission Need not Follow its Own Rules When the Outcome Conflicts with its Statutory Authority

As explained in ICNU's Opening Brief, the Commission has the authority to pass on the validity of its own rules. ICNU Opening Brief at 16-19. PacifiCorp asserts

that ICNU may not collaterally attack the Commission's rules in this proceeding.

PacifiCorp Brief at 16. ALJ Arlow specifically ruled that ICNU could raise its arguments in briefing. Ruling at 5. In addition, the case PacifiCorp cites in support of its argument does not assist PacifiCorp's position.

PacifiCorp cites Alto v. State Fire Marshall, 319 Or. 382, 391 (1994) for the proposition that a collateral attack outside of ORS § 183.400 is not permissible. PacifiCorp Brief at 16. PacifiCorp's reading of Alto is simply incorrect. The question presented in Alto is whether a circuit court has subject matter jurisdiction to decide a challenge to administrative rules under the Uniform Declaratory Judgment Act. 319 Or. at 385. Alto did not decide the question of whether an agency could rule on the validity of its own rules. Further, PacifiCorp's argument ignores the provision of ORS § 183.400(1) that requires parties to a contested case to allow the agency to first "pass upon the validity of the rule in question[.]" Thus, according to PacifiCorp's own argument, ICNU's position in this case *is* a proper collateral attack on the Commission's rules pursuant to ORS § 183.400, the only statute that PacifiCorp argues a collateral attack may be raised under.

B. ICNU is Concerned about Complying with SB 408, not Results

PacifiCorp asserts that ICNU's position is "results driven." PacifiCorp Brief at 18. PacifiCorp improperly uses the fact that ICNU entered into a settlement with PGE to insinuate inappropriate and incorrect conclusions about ICNU's intent. As a matter of policy, the Commission should disregard PacifiCorp's reckless tactics, as to not

discourage parties from entering into settlements in the future. See ICNU Opening Brief at 22-23.

PacifiCorp also incorrectly states that the UE 178 Stipulation was “predicated on an agreement that PGE’s tax report satisfies the methodologies as currently written in OAR 860-022-0041.” PacifiCorp Brief at 20. There are substantial differences between UE 178 and UE 177. These dockets are completely separate and involve a completely different set of facts. One major difference between the two dockets is that PGE was highly cooperative with ICNU’s requests for information, and PacifiCorp was not. In this case, Ms. Blumenthal could not make a determination as to whether PacifiCorp’s tax report complied with OAR § 860-022-0041, as Ms. Blumenthal had limited access to PacifiCorp’s tax report. As stated at the hearing in response to ALJ Arlow’s question of whether PacifiCorp’s tax report complies with OAR § 860-022-0041:

I wish I could give you a yes or no answer, but because I had such limited time with the tax report, I was unable – I cannot say that one way or the other.

And in PGE, they were gracious enough to give me a copy of the tax report to have in my possession, and I could make that judgment.

Transcript at 89, lines 2-9. As a result, the Commission should disregard any attempts by PacifiCorp to compare this Docket to UE 178.

C. PacifiCorp’s Arguments Underscore the Inequity of the Protective Order

PacifiCorp describes Staff’s audit of PacifiCorp’s tax report as “in-depth... checking every calculation and data point PacifiCorp provided.” PacifiCorp Brief at 2. In addition, PacifiCorp points out that Staff held workshops, served data requests, and prepared preliminary findings. Id. In contrast, PacifiCorp describes ICNU’s review as “cursory.” Id. PacifiCorp’s view of the facts underscores the significant disadvantage that intervenors are at under the Commission’s Protective Order.

Unlike Staff, ICNU did not have access to the documents and could not examine the documents without a PacifiCorp representative present. Staff did not need to make an appointment 24 hours in advance, and was not required to travel most of a day to review PacifiCorp’s tax report, as Ms. Blumenthal was required to do. Staff had as much access as it needed with the tax reports; in fact, Staff and PacifiCorp attended these workshops and settlement meetings with the tax report in hand, while intervenors did not have the tax report for these meetings.

III. PacifiCorp’s Attacks on Ms. Blumenthal’s Credibility are Unfounded

PacifiCorp makes a number of attacks on Ms. Blumenthal’s credibility in its Brief. PacifiCorp states that Ms. Blumenthal’s arguments are “due to a lack of understanding of the rules or unfamiliarity with PacifiCorp’s filing, applicable Commission orders, and Oregon tax law and policy.” PacifiCorp Brief at 16-17. PacifiCorp’s assertions regarding Ms. Blumenthal’s arguments, however, are false.

A. PacifiCorp’s Criticisms of Ms. Blumenthal’s Testimony are Baseless

First, PacifiCorp asserts that Ms. Blumenthal did not know whether the depreciation expense for public utility property was added back or not. PacifiCorp Brief at 17. As stated by Ms. Blumenthal, it is clear from the Commission’s rules and Staff’s template that depreciation expense is removed from the calculation of PacifiCorp’s stand-alone tax liability. What is not specifically stated in the Commission’s rules or Staff’s template is whether the depreciation expense is added back. Although PacifiCorp and Staff maintains that depreciation is added back, Ms. Blumenthal was simply unable to determine whether or not that was the case because of the limited access to PacifiCorp’s tax report under the Protective Order. Transcript at 70, lines 21-25; 71, lines 1-25; 72, lines 1-22. In fact, based on her review, it did not appear as though the depreciation was added back in.

Second, PacifiCorp states that Ms. Blumenthal criticized PacifiCorp’s “original tax report” as using the interest synchronization method and that ICNU never objected to Staff’s recommendation that such a method be used. PacifiCorp Brief at 17. As PacifiCorp recognizes, Ms. Blumenthal does not attack PacifiCorp’s tax report, as Ms. Blumenthal had only limited access to the documents. Rather, Ms. Blumenthal’s arguments are directed at the Commission’s rules, which as Staff testifies, require the use of the interest synchronization method. Staff/200, Owings-Ball/5, lines 17-19. In addition, PacifiCorp’s *own* exhibit demonstrates that ICNU *did* object to the use of the interest synchronization method. PPL/300 at 21. In response to PacifiCorp Data Request No. 1.18, in which PacifiCorp specifically asked whether ICNU objected to the use of the

interest synchronization method, ICNU responded in the affirmative. Id. This is simply an example of PacifiCorp's attempts to manipulate the record in this Docket. In any event, ICNU objects to the entire stand-alone method as a whole, which includes the use of the interest synchronization method.

Third, PacifiCorp asserts that the Commission specifically held that there was no basis for consolidated tax adjustments in this case in Order No. 08-003, and that Ms. Blumenthal disregarded that Order. PacifiCorp Brief at 18. Order No. 08-003, however, is based on the Commission's rules to which Ms. Blumenthal objects to in the first place. Thus, it is unclear to ICNU what significance Order No. 08-003 has to Ms. Blumenthal's arguments.

Fourth, PacifiCorp points to Ms. Blumenthal's testimony that the "taxes collected" calculation under SB 408 does not require an actual tax calculation, and attempts to argue that Ms. Blumenthal's testimony is inconsistent. PacifiCorp Brief at 21. To the contrary, Ms. Blumenthal's testimony is entirely consistent with her position that the Commission's rules must comply with SB 408. As Ms. Blumenthal testified:

I have an objection with how the rule was written in that it doesn't reflect what Senate Bill 408 requires. This portion that we're talking about [taxes collected] is specified in the law. My first reaction was this is probably not the best way, but since it is established in Senate Bill 408, it's law, and we have to work with that.

On the other hand, the taxes paid is also defined in the law, and we should be working with that as well.

Transcript at 67, lines 6-15.

B. The Commission should give Significant Weight to Ms. Blumenthal's Experience with Utility Taxes

PacifiCorp asserts that Ms. Blumenthal's testimony was based upon her experience in Texas, "without regard to Oregon tax policies, statutes, and rules."

PacifiCorp Brief at 19. PacifiCorp points to Ms. Blumenthal's response to a data request in support of its argument. PPL/301 at 7. PacifiCorp, however, takes Ms. Blumenthal's response out of context.

Ms. Blumenthal's entire testimony is based on the requirements of SB 408. SB 408 plainly requires a determination of the actual amount of taxes paid to governmental authorities that are properly attributed to PacifiCorp's Oregon regulated operations. ORS § 757.268(6)(b). Ms. Blumenthal's reference to her testimony from Texas that she provided to PacifiCorp simply illustrates her experience in another jurisdiction regarding how to compute an actual taxes paid result. Ms. Blumenthal is not basing her opinion in this case on Texas law. In her prior testimony, Ms. Blumenthal testified that the federal income tax expense involved in that case "overstates the *actual tax liability* [the utility] would pay to the Internal Revenue Service" PPL/300 at 37 (emphasis added). This is a principle specifically embodied in SB 408 that the Commission's rules fail to implement.

Moreover, Ms. Blumenthal has over 20 years experience involving utility tax issues. See ICNU/101, Blumenthal/1. PacifiCorp's attempts to undermine her experience with assertions that she has never before been involved with SB 408 should be disregarded. SB 408 is a new law that requires the Commission to determine the actual

tax expense of Oregon regulated utilities, which is a sharp departure from prior practice. In fact, the only ones with prior SB 408 experience are the utilities. Ms. Blumenthal has a demonstrated record of experience in utility tax issues, including experience with methods in determining a utility's actual tax expense. See ICNU/101, Blumenthal/1-6; PPL/300 at 33-89.

IV. Testimony Regarding PacifiCorp's Amortization Proposal is not Required

PacifiCorp complains that ICNU did not submit testimony in opposition of its amortization proposal, and asks the Commission to preclude any argument on the issue. PacifiCorp Brief at 15-16. PacifiCorp's amortization proposal, however, is not a factual issue. Rather, it is a policy issue and a legal issue that is properly addressed in briefing.

For example, in ICNU's Opening Brief, ICNU opposes PacifiCorp's proposed application of its authorized rate of return ("ROR") to the amount to be amortized. ICNU Opening Brief at 25. ICNU's position was based entirely on Commission orders specifically prohibiting the use of a utility's ROR to deferred accounts in amortization. Id. The interpretation of Commission orders is a legal issue, and testimony is typically not necessary for such an argument. Indeed, if Ms. Blumenthal had testified as to the interpretation of a Commission order, PacifiCorp likely would have moved to have such testimony stricken as legal argument.

Moreover, instead of defending its amortization proposal, PacifiCorp asks the Commission to throw out the issue that was the sole reason why PacifiCorp asked for

and ALJ Arlow allowed the parties to submit reply briefs. Transcript at 101, lines 18-25; 102, line 1.

CONCLUSION

PacifiCorp does not present any evidence or legal argument rebutting ICNU's position that OAR § 860-022-0041 does not comply with SB 408. Moreover, PacifiCorp attempts to manipulate the record by misstating facts and mischaracterizing ICNU's position in this Docket. As a result, the Commission should disregard PacifiCorp's view of the evidence and reject PacifiCorp's requested surcharge in this Docket.

Dated this 19th day of March, 2008.

Respectfully submitted,

/s/ Allen C. Chan

Melinda J. Davison

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Of Attorneys for Industrial Customers

of Northwest Utilities