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March 19, 2008

## VIA ELECTRONIC FILING AND U.S. MAIL

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**Re: Docket No. UE 177**

Enclosed for filing in the above-referenced docket are an original and five copies of PacifiCorp's Reply 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 "Amie Jamieson".

Amie Jamieson

Enclosure

cc: Service List

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**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.

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DATED: March 19, 2008

  
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Amie Jamieson

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 REPLY BRIEF**

10 Pursuant to Administrative Law Judge ("ALJ") Allan Arlow's ruling at the hearing in  
11 this docket on March 4, 2008, PacifiCorp submits the following Reply to the Opening Brief of  
12 the Industrial Customers of Northwest Utilities ("ICNU") filed on March 14, 2008.

13       **A. ICNU's Arguments Against OAR 860-022-0041 Do Not Belong in this**  
14       **Case.**

15               **1. Arguments Against OAR 860-022-0041 are Irrelevant.**

16 PacifiCorp moves to strike the following sections of ICNU's Opening Brief on the  
17 basis that they are irrelevant and beyond the scope of this docket: Section III.A, Section  
18 III.A.2, and Section III.B. For the reasons discussed in PacifiCorp's Motion in Limine,<sup>1</sup>  
19 PacifiCorp's Response to ICNU's Reply to PacifiCorp's Motion in Limine,<sup>2</sup> and PacifiCorp's  
20 Response to ICNU's Motion for Expedited Certification<sup>3</sup> filed in this docket and incorporated  
21 into this Reply Brief by reference, arguments relating to the validity of the Commission's  
22 rules and encouraging the Commission to waive its rules may not be brought in this  
23 proceeding and are therefore irrelevant.

24               <sup>1</sup> Dated February 19, 2008.

25               <sup>2</sup> Dated February 25, 2008.

26               <sup>3</sup> Dated March 19, 2008.

1 In his ruling granting PacifiCorp's Motion in Limine, ALJ Arlow ruled that ICNU's  
2 testimony attacking the validity of OAR 860-022-0041 was irrelevant. *Re PacifiCorp Filing of*  
3 *Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, Ruling,  
4 Docket UE 177 (Mar. 3, 2008). In discussing his ruling, ALJ Arlow distinguished between  
5 legal arguments concerning the interpretation of OAR 860-022-0041, which are relevant to  
6 this docket and are admissible, and those that attack the validity of OAR 860-022-0041,  
7 which are not. (Tr. 33, Line 25–Tr. 34, Line 15.) The portions of ICNU's brief referenced  
8 above consist solely of arguments against the validity of OAR 860-022-0041 and are  
9 therefore irrelevant.

10 **2. Failure to Apply OAR 860-022-0041 Would Be Contrary to Law.**

11 Even if its arguments against OAR 860-022-0041 were not irrelevant, ICNU's  
12 recommended course of action for the Commission raises serious legal issues. ICNU would  
13 have the Commission arbitrarily reject the \$34.5 million rate surcharge produced by  
14 application of these rules in PacifiCorp's case, but approve the \$37.2 million refund  
15 produced by the rules in the cases of PGE.

16 To determine whether a ratemaking order meets minimum requirements for  
17 constitutional ratemaking, courts look to the total effect of the order, as opposed to  
18 mandating a specific ratemaking methodology. *Duquesne Light Co. v. Barasch*, 488 U.S.  
19 299, 311 (1989). But the United States Supreme Court and the Oregon Attorney General  
20 have both warned against results-oriented approaches to ratemaking, noting that a state's  
21 "decision to arbitrarily switch back and forth between methodologies in a way which required  
22 investors to bear the risk of bad investments at some times while denying them the benefit  
23 of good investments at others would raise serious constitutional questions." *Id.* at 315; see  
24 also *Re Adoption of Permanent Rules to Implement SB 408 Relating to Utility Taxes*,  
25 Attorney General's Formal Opinion at 16 n.4, Docket AR 499 (Dec. 27, 2005).

26

1 In its post-hearing brief in the UE 170 reconsideration, ICNU dismissed PacifiCorp's  
2 allegation that SB 408's fundamental asymmetry created a constitutional issue under  
3 *Duquesne*, asserting that SB 408 "plainly prohibits arbitrary and punitive action":

4 PacifiCorp refers to the Attorney General's discussion of  
5 principles that the U.S. Supreme Court discussed in *dicta* in  
6 *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989). The Supreme  
7 Court said that "a State's decision to arbitrarily switch back and forth  
8 between methodologies in a way which required investors to bear the  
9 risk of bad investments at sometimes while denying them the benefit  
10 of good investments at others would raise serious constitutional  
11 questions." *Duquesne*, 488 U.S. at 315. The Supreme Court has  
12 subsequently explained the meaning of this *dicta*: "In other words,  
13 there may be a taking challenge distinct from a plain-vanilla objection  
14 to arbitrary or capricious agency action if a rate making body were to  
15 make opportunistic changes in rate setting methodologies just to  
minimize return on capital investment in a utility enterprise." *Verizon  
Communications, Inc. v. FCC*, 535 U.S. 467, 527 (2002) (internal  
footnotes omitted). Hence, the "constitutional questions" referred to in  
*Duquesne* would only arise if the Commission adopted a methodology  
that was "arbitrary, opportunistic, or undertaken with a confiscatory  
purpose." *Id.* at 528. The argument about *Duquesne* violations  
emerged in the fight against SB 408 in the legislature and has  
persisted in this proceeding and others despite the fact that it plainly  
prohibits arbitrary and punitive action.

16 Post Hearing Brief of ICNU at 23, UE 170 (recon) (March 15, 2006).<sup>4</sup>

17 ICNU's argument acknowledges that the constitutional issues referenced in  
18 *Duquesne* would arise if the Commission applied SB 408 in a manner that was "arbitrary" or  
19 "opportunistic," which is precisely the course of action ICNU urges in this case. And, as  
20 ICNU itself concluded in this argument, SB 408 prohibits such an "arbitrary" outcome.

21 Additionally, while ICNU argues that the Commission must comply with SB 408 in  
22 this case, it advocates a course of action that would result in the Commission failing to  
23 follow even the minimum requirements of the law. Under SB 408, the Commission *must*

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25 <sup>4</sup> PacifiCorp requests that the Commission take official notice of this brief, pursuant to OAR  
860-014-0050(1).

26

1 require a utility to establish an automatic adjustment clause ("AAC") to account for the  
2 difference between taxes paid and taxes collected, if the difference between the two was  
3 \$100,000 or more for any of the three preceding years. ORS 757.268(4), (6). SB 408  
4 requires the Commission to determine whether the utility must establish an AAC and the  
5 terms of any AAC required by SB 408.

6 ICNU has not presented alternative calculations or results upon which the  
7 Commission could make the determinations mandated by statute. (PPL/300 at 16; 19.)  
8 ICNU does not address how the Commission could, on the record of this case, reject  
9 PacifiCorp's revised tax report (which now incorporates the results of Staff's audit) and make  
10 the findings required by SB 408 for the 2006 tax year. ICNU also fails to address the impact  
11 of such a decision on the utility private letter rulings, which are predicated on consistent and  
12 literal application of OAR 860-022-0041. Finally, ICNU's argument for rejection of the  
13 results of PacifiCorp's tax report without proposing alternative findings would place the  
14 Commission in clear violation of SB 408 if it accepted ICNU's argument and failed to make  
15 the statutorily mandated findings or made them without adequate evidentiary support.

16 **B. ICNU Cannot Explain Away the Fundamental Inconsistencies in its**  
17 **SB 408 Positions.**

18 ICNU argues that its position in this case is consistent with its past positions on the  
19 SB 408 rules. Specifically, ICNU states that its comments on the proposed rule advocated  
20 for use of the apportionment method on a situs basis. Opening Brief of ICNU at 20. ICNU's  
21 Opening and Reply Comments in Docket AR 499, however, clearly support the  
22 apportionment method without qualification. Additionally, after this rulemaking, ICNU  
23 continued to support the SB 408 rules, including the apportionment method, in the AR 517  
24 rulemaking, with no reservation of concerns. (PPL/306 at 1.)

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1           **C.       Consistent Application of OAR 860-022-0041 Requires Approval of**  
2                           **PacifiCorp's Revised Tax Report, Including Use of the Interest**  
3                           **Synchronization Method.**

4           ICNU objects to the interest synchronization approach, stating that PacifiCorp should  
5 use the actual interest calculation. ICNU Opening Brief at 9. ICNU states that Staff  
6 recommends that OAR 860-022-0041 be amended to use an actual interest calculation.  
7 ICNU Opening Brief at 9. Staff, however, supports the application of the interest  
8 synchronization method in PacifiCorp's 2006 Tax Report, because the current form of  
9 OAR 860-022-0041 requires this method. (Staff/200, Owings-Ball/6.) All four utilities filing  
10 SB 408 tax reports used the interest synchronization method. (PPL/200, Fuller/9.)

11           This is one more instance where ICNU is asking the Commission to waive  
12 application of its rule as applied to PacifiCorp, but no other utility. For the reasons  
13 discussed in PacifiCorp's Response to ICNU's Motion for Expedited Certification and related  
14 briefing, the Commission cannot selectively apply its rules in this manner. The Commission  
15 should apply the interest calculation recommended by Staff and reflected in PacifiCorp's  
16 revised tax report.

17           **D.       The Commission Should Summarily Reject ICNU's Improper Attempt to**  
18                           **Introduce New Evidence in its Post-Trial Brief.**

19           PacifiCorp moves to strike Section III.A.1.e from ICNU's Opening Brief. This section  
20 attempts to introduce new evidence in the form of an entirely new calculation ICNU created  
21 using selective information from PacifiCorp's 2006 10-K. The new evidence is an  
22 interpretation of income and tax data drawn from PacifiCorp's SEC 10-K for the transition  
23 period from April 1, 2006 to December 31, 2006. This selective interpretation was never  
24 supplied in discovery, discussed in ICNU's testimony (direct or cross-examination), or  
25 admitted in the record. The excerpted information provided by ICNU is incomplete, and  
26 ICNU's accompanying explanation is inaccurate, overly simplified, and misleading, including  
ICNU's haphazard application of a 28.5 percent factor to tax expense based solely on retail

1 revenues, not to mention that ICNU's analysis is based on data reported for nine months  
2 ended December 31, 2006, thereby excluding the first quarter of 2006 in its entirety. There  
3 are numerous other inaccuracies in ICNU's interpretation which PacifiCorp would have been  
4 clearly revealed in rebuttal testimony and cross-examination, if the information had been  
5 properly presented in this case.

6 Pursuant to ORS 756.558(1), additional evidence may not be received by the  
7 Commission after the conclusion of taking of evidence except upon the order of the  
8 Commission and after a reasonable opportunity of the parties to rebut the additional  
9 evidence. ICNU unilaterally included this evidence in its brief without requesting that the  
10 record be reopened to receive it. The Commission should not act on its own motion to  
11 reopen the record to receive the evidence, especially when there is no apparent reason why  
12 the evidence was not provided earlier and because the Commission would need to allow  
13 PacifiCorp to respond to and confront the new evidence. The resulting delay in these  
14 proceedings should be avoided for evidence that is clearly of marginal value, given the  
15 multiple inaccuracies on its face. *See Re PacifiCorp Request for a General Rate Increase in*  
16 *the Company's Oregon Annual Revenues*, Order No. 06-172 at 3, Docket UE 170 (Apr. 12,  
17 2006). For these reasons, PacifiCorp requests that the Commission strike Section III.A.1.e  
18 from ICNU's Opening Brief.

19 **E. The Commission Should Not Consider ICNU's Opposition to**  
20 **PacifiCorp's Amortization Proposal, Given Its Failure to Disclose This**  
21 **Position In Discovery and at Hearing; Alternatively, the Commission**  
22 **Should Reject ICNU's Position.**

23 ICNU takes exception to PacifiCorp's amortization proposal and proposes that the  
24 surcharge be amortized over one year. ICNU Opening Brief at 23. ICNU also objects to  
25 PacifiCorp's proposed interest rate of an amount equal to PacifiCorp's authorized rate of  
26 return. ICNU Opening Brief at 24. PacifiCorp requests that the Commission disregard  
ICNU's positions on these issues, because ICNU presented them for the first time in its



1 Post-Hearing Brief, notwithstanding PacifiCorp's dutiful attempts to discover this position in  
2 the case.

3 ICNU initially stated in a letter to the Commission that it would "oppose PacifiCorp's  
4 suggestion that any surcharge over \$27 million be placed in a balancing account and collect  
5 interest." *Re PacifiCorp Filing of Tariffs Establishing Automatic Adjustment Clauses Under*  
6 *the Terms of SB 408*, ICNU Letter to the Commission, Docket UE 177 (Jan. 18, 2008).  
7 When ICNU failed to include this issue in its testimony, PacifiCorp presented a data request  
8 to ICNU asking whether the statement in the January 18, 2008 letter was ICNU's current  
9 position and requested that ICNU explain the basis for this position. (PPL/300 at 29.) ICNU  
10 objected to the request as pertaining to information protected by attorney-client and work  
11 product privilege. (PPL/300 at 29.)

12 At the March 4, 2008, hearing, ICNU's witness stated that she did not know ICNU's  
13 position on PacifiCorp's amortization proposal. (Tr. 60 Lines 9–11.) Upon direct  
14 questioning by ALJ Arlow as to ICNU's position on amortization, counsel for ICNU stated  
15 that "I do not have a position which I can tell you today." (Tr. 101, Lines 15–21.) One day  
16 prior, however, ICNU filed a brief opposing a similar multiple-year amortization proposal in  
17 Portland General Electric Company's ("PGE") SB 408 tax report docket. *Re Portland Gen.*  
18 *Elec. Co. Filing of Tariffs Establishing Automatic Adjustment Clauses Under the Terms of*  
19 *SB 408*, Opening Brief of Industrial Customers of Northwest Utilities, Docket UE 178 (Mar. 3,  
20 2008). In the PGE docket, ICNU argued, as it has in this docket, that the amortization  
21 period should be one year, because the tax amounts were collected by the utility over one  
22 year. *Id.* at 4. It also argued that, if the Commission accepted PGE's amortization proposal,  
23 customers should get the time value of money based upon application of a reasonable  
24 interest rate to PGE's SB 408 balancing account. *Id.*

25 Here, ICNU is asserting that the rate increase related to PacifiCorp's surcharge  
26 should be amortized over one year, even though ICNU's position will have the impact of

1 raising rates in that 12 month period by an additional one percent. While ICNU represents  
2 only certain industrial customers, its position impacts all customers. Representatives of  
3 these other customers, notably the Citizens' Utility Board ("CUB"), might have responded if  
4 ICNU had disclosed its position in a timely manner.

5         If the Commission chooses to consider ICNU's arguments despite ICNU raising this  
6 issue for the first time in its Post-Hearing Brief, the Commission should consider them only  
7 with respect to industrial customers since no other customers have had a chance to respond  
8 to ICNU's position. In other words, all other customer classes other than the industrial  
9 customers should receive the lower 3 percent rate increase for 2008-2009 reflected in  
10 PacifiCorp's amortization proposal, again with the understanding that ICNU represents only  
11 a portion of PacifiCorp's industrial accounts. Notably, Staff has no objection to PacifiCorp's  
12 amortization proposal. See Staff's Opening Brief at 2.

13         No matter what amortization schedule the Commission adopts, it should apply an  
14 interest rate to all amounts in PacifiCorp's SB 408 balancing account set at PacifiCorp's  
15 authorized rate of return ("ROR"). This is the authorized rate of return for deferred accounts.  
16 See OAR 860-022-0041(8)(e); *Re Pub. Util. Comm'n of Oregon Staff Request to Open an*  
17 *Investigation Related to Deferred Accounting*, Order No. 05-1070 at 14, Docket UM 1147  
18 (Oct. 5, 2005).

19         ICNU suggests that the Commission should apply a lower interest rate based on  
20 Commission orders in the UM 1147 dockets. ICNU's Opening Brief at 25. But, in another  
21 failure to support its position with evidence, ICNU has not proposed or supported an  
22 alternative interest rate or submitted alternative interest calculations in the case.

23         ICNU's citations to Docket UM 1147 do not support its position. In that case, the  
24 Commission addressed deferred accounts generically without reference to accounts that  
25 arise under SB 408. It is not clear whether the Commission will apply the same interest rate  
26 to SB 408 balancing accounts that it will to deferred accounts under ORS 757.259. In

1 addition, the Commission's basis for applying a lower interest rate on amounts approved for  
2 amortization—because the risk of recovery is lower on approved amounts—does not apply  
3 in this case. ICNU is attempting to challenge the Commission's rules in this proceeding,  
4 indicating a risk that PacifiCorp may not be able to recover amounts approved for  
5 amortization by the Commission.

6 In any event, the Commission has not yet determined the new authorized interest  
7 rate on deferred accounts during amortization. *Id.*; see *Re Pub. Util. Comm'n of Oregon*  
8 *Staff Request to Open an Investigation Related to Deferred Accounting*, Order No. 06-507 at  
9 5, Docket UM 1147 (Sept. 6, 2006). In addition, ICNU agreed in the Stipulation in Docket  
10 UE 179 that for "all Oregon regulation purposes," PacifiCorp will use its ROR of 8.16 percent  
11 until the Commission issues a general rate order. (ICNU/208.) Therefore, the only rate  
12 currently authorized by the Commission and applicable in this case is PacifiCorp's ROR.

13 **CONCLUSION**

14 PacifiCorp respectfully requests that the Commission strike the following sections in  
15 ICNU's Opening Brief for the reasons described above: Section III.A, Section III.A.2,  
16 Section III.B, and Section III.A.1.e. PacifiCorp also requests that the Commission make the  
17 findings described in PacifiCorp's Post-Hearing Brief filed on March 14, 2008.

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19 DATED: March 19, 2008

MCDOWELL & RACKNER PC

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