

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 178

In the Matter of

OREGON PUBLIC UTILITY
COMMISSION STAFF

Requesting the Commission Direct
PORTLAND GENERAL ELECTRIC
COMPANY

To file tariffs establishing automatic
adjustment clauses under the terms of
SB 408

**PORTLAND GENERAL ELECTRIC
COMPANY'S OPENING BRIEF**

Portland General Electric Company ("PGE") submits this opening brief in support of the stipulation between PGE and Commission Staff (the "Stipulation") and the final tax report for the 2007 calendar year submitted pursuant to the Stipulation (the "Final Tax Report"). No party objected to the Stipulation or the Final Tax Report. Accordingly, the Commission should issue an order (1) approving the Stipulation; (2) finding that the Final Tax Report complies with ORS 757.268 and OAR 860-022-0041; and (3) authorizing PGE to surcharge an amount equal to \$14.9 million, reflecting the difference between taxes collected and taxes paid for calendar year 2007, for federal and state taxes, and refund approximately \$200,000 for local taxes.

I. INTRODUCTION

On October 15, 2008, PGE filed its tax report for calendar years 2005, 2006, and 2007 as required by the applicable statutes and rules. Staff and PGE conducted a series of workshops and settlement conferences on November 18, December 9, December 15, 2008, and January 8, 2009.¹ On December 23, 2008, Staff and the Utility Reform Project each submitted an issues list. As a result of the initial review process, four errors were identified

¹ The Citizens' Utility Board ("CUB") participated in the November 18, 2008, workshop.

in the tax report for calendar year 2007. Joint Stipulating Parties/100, Owings-Ball-Garcia-Tinker/2. On January 8, 2009, PGE submitted a revised tax report for calendar year 2007, which made the following four adjustments: (1) removing an add back to taxes paid for charitable contributions under the stand-alone method; (2) crediting taxes paid for certain tax credits related to research activities; (3) adjusting the treatment of equity allowance for funds used under construction (Equity AFUDC); and (4) adjusting the interest expense related to regulatory liabilities. *Id.*

On January 23, 2009, Staff, CUB and PGE held another settlement conference. As a result of those settlement discussions, Commission Staff and PGE entered into a stipulation which required two further modifications to the tax report for 2007. First, the parties agreed that PGE would remove its adjustment for deferred taxes related to SERP and deferred compensation costs. Joint Stipulating Parties/100, Owings-Ball-Garcia-Tinker/3. Second, the stipulating parties agreed that PGE should correct the reclassification of deferred taxes from nonutility to utility for interest income on regulatory assets in the deferred tax adjustments by taking into account the interest income related to the 2007 SB 408 regulatory asset. *Id.*

With these two modifications, Commission Staff and PGE agree that the tax report for 2007 conforms to the requirements of ORS 757.267 and ORS 757.268, as well as OAR 860-022-0041. *Id.* In addition, Commission Staff and PGE agree that the resulting rates would be fair, just and reasonable. *Id.* at 4. PGE submitted the Final Tax Report consistent with the terms of the Stipulation as Joint Stipulating Parties Exhibit 105.

Administrative Law Judge Hardie established a schedule for parties to submit objections to the Stipulation. Ruling (February 6, 2009). No party filed timely objections to the Stipulation. Accordingly, the Commission should approve the Stipulation and issue an order finding that the Final Tax Report is consistent with the applicable statutes and rules and

authorizing rate adjustments consistent with the terms of the Stipulation and the Final Tax Report.

II. ICNU's LEGAL ARGUMENTS HAVE NO MERIT

Although ICNU raised no timely objections to the Stipulation and Final Tax Report, we expect that ICNU will make legal arguments challenging the SB 408 rules and the protective order in this docket (Order No. 06-033, the "Protective Order"). ICNU's arguments are not new but rather leftovers that the Commission has uniformly rejected in previous tax report dockets. ICNU offers no new testimony or arguments to warrant a change in the Commission's policies and previous orders.

A. ICNU's Challenge to the Commission Rules is Misplaced.

ICNU claims that the Commission rules violate the terms of SB 408. *See* ICNU/100, Blumenthal/2 ("The Industrial Customers of Northwest Utilities ("ICNU") has asked me to discuss the inconsistencies between OAR § 860-022-0041 and the requirements of SB 408".) ICNU's argument is unpersuasive for several reasons.

First, this proceeding concerns PGE's tax report; it is not a rulemaking in which the Commission rules may be challenged or reviewed in the abstract. ICNU's witness admitted that she has never reviewed PGE's tax reports filed in this docket. Hearing Trans. at 15 (March 4, 2009). She therefore has no first-hand knowledge regarding the Final Tax Report or its compliance with either the applicable rules (OAR 860-022-0041) or the governing statutes (ORS 757.267 and ORS 757.268). Her only testimony regarding PGE's tax report is that she *assumed that PGE's tax report complied with the staff template and therefore was inconsistent with SB 408.* Hearing Trans. at 26. She never verified this assumption or provided any independent basis for concluding that the tax report failed to comply with SB 408. *Id.* In fact, ICNU filed Ms. Blumenthal's testimony *before* the Stipulation and Final Tax Report were submitted, and ICNU elected not to file testimony

objecting to or challenging the Final Tax Report.

Second, the Commission has previously rejected ICNU's attempts to collaterally challenge the SB 408 rules. In UE 177 (PacifiCorp's tax report docket), ICNU raised nearly identical arguments and the Commission expressly refused to address them:

Thus ICNU acknowledges that the purpose of the testimony is to support a collateral attack on OAR 860-022-0041. Evidence tending to show the infirmities of the rules expression of the intent of SB 408 is properly offered in support of a petition to amend the existing rule in a separate rulemaking proceeding. If ICNU wishes to challenge the existing rule, a petition to open a separate proceeding is the proper procedure for doing so. We disregard ICNU's arguments with respect to this issue.

Order No. 08-201 at 4 (April 11, 2008). As Commission Staff testified, challenges to the Commission rules "would be best addressed in a rulemaking proceeding if the Commission determines it is appropriate to consider them." Staff/100, Owings-Ball-Garcia/2.

Third, even if the Commission were to reach the merits of ICNU's argument, the objections are either inapplicable to the Final Tax Report or are otherwise ill-founded. ICNU's first objection is that the stand-alone method for calculating taxes paid begins with a proforma tax return, not an actual tax return. ICNU/100, Blumenthal/5. Ms. Blumenthal conceded that this objection applies only to the stand-alone approach, not the consolidated or apportionment approaches for calculating taxes paid. Hearing Trans. at 28. Both the consolidated and the apportionment methods use PGE's actual tax returns. PGE/100, Tamlyn-Tinker/4-5. It is undisputed that the consolidated method, not the stand-alone method, provided the lowest taxes paid figure and therefore was the method used to calculate taxes paid in the Final Tax Report. PGE/100, Tamlyn-Tinker/6.

Ms. Blumenthal also objects to the use of interest synchronization in calculating the stand-alone method under OAR 860-022-0041(2)(p). ICNU/100, Blumenthal/5. Again, Ms. Blumenthal conceded at the hearing that this objection applies only to the stand-alone method, not the consolidated or apportionment method. Hearing

Trans. at 28.

Moreover, ICNU offers no basis for its conclusion that the use of interest synchronization somehow violates SB 408. In UE 177, the Commission expressly found that PacifiCorp's tax report, which included interest synchronization in calculating the stand-alone tax liability, complied with OAR 860-022-0041. Order No. 08-201 at 6. Indeed, the use of interest synchronization to determine the stand-alone taxes paid reflects sound rate making policy:

The stand alone calculation is meant to provide an indication of what taxes paid would be if a utility were a stand alone utility with no greater interest deduction than that allowed through the Commission's standard rate making formula. Since the Commission authorizes rate recovery of interest based on rate base and cost of debt, the interest synchronization adjustment to Taxes Paid under the stand alone method provides for an "apples to apples" comparison between taxes collected (which is inherently based on the interest synchronization method) and taxes paid.

PGE/100, Tamlyn-Tinker/5.²

The Commission rules were adopted after an extensive review process. AR 499, Order Nos. 06-400 and 06-532. They were amended after another extensive notice and comment proceeding. AR 517, Order No. 07-401. The Commission has thoroughly considered the SB 408 rules and should not entertain collateral challenges outside the customary rulemaking process.

B. ICNU has been provided reasonable access to highly confidential material.

ICNU also registers complaints about the Protective Order, claiming that it has "not actively participated in a review of either PGE's or PacifiCorp's 2007 tax reports because of the impossibility of conducting a meaningful tax report analysis under the

² Ms. Blumenthal also claims that taxes paid must "include straight line depreciation." ICNU/100, Blumenthal/7. As the Commission found in UE 177, the Staff template at pages five and six provide that the tax benefit depreciation related to public utility property is deducted from "taxes paid." Order No. 08-201 at 5. Accordingly, customers are provided with the benefit of straight line depreciation and Ms. Blumenthal's objection has no merit.

[protective order's] current safe room requirements." ICNU/100, Blumenthal/6. The Commission has already addressed and rejected ICNU's suggested changes to the Protective Order. UE 177, 08-002 at 6 (Jan. 3, 2008) (denying ICNU's request to modify the Protective Order in UE 177).

As the Commission has recognized, the Legislative Assembly expressly recognized that "the tax information of any business is commercially sensitive and its disclosure could harm the party producing the information." *Id.* at 4. Because of the significant harm that might occur from the disclosure of this information, the Commission concluded that it had no choice but to limit intervenors' review of documents containing highly confidential information to a safe room located in Portland. *Id.* at 5. Nevertheless, the Protective Order contains a number of provisions to ensure that intervenors are able to participate in tax report dockets.

First, only a limited type of information may be designated as "highly confidential" under the Protective Order and intervenors may challenge such designations. Protective Order, §§ 2, 20. Second, all four affected utilities make the highly confidential information available in a single safe room in Portland. Order No. 06-033 at 8. Third, to ensure that the presence of the monitor does not violate attorney-client privilege or work product protected communications, the utilities are required to provide a private conference room adjacent to the safe room to allow discussions between intervenors' counsel and consultants. *Id.* at 5. Finally, the Commission indicated that the Commission would entertain a request for increased intervenor funding to cover additional expenses. *Id.* at 5. For all these reasons, the Commission adopted the Protective Order over ICNU's original objections (*see* Order No. 06-033 at 5) and later denied ICNU's petition to amend the Protective Order in UE 177. Order No. 08-002 at 6.

Furthermore, the Commission has noted that "any party seeking to amend a

protective order must show that it has made a reasonable attempt to work within the protective order procedures before filing its motion." Order No. 08-002 at 6. ICNU's actions in this docket demonstrate that it has not taken reasonable steps to review the tax reports within the terms of the Protective Order and PGE's offer to make special accommodations.

Beginning with last year's (2006) tax report docket, PGE and ICNU entered into an agreement whereby PGE would provide ICNU's expert witness with a copy of the tax report and the associated work papers for review in her office, including material marked as highly confidential under the protective order. PGE/100, Tamlyn-Tinker/2; PGE Exhibits 101-102. ICNU agreed to treat the material consistent with Commission Order No. 06-033 and to return or destroy the material after the end of the proceeding. PGE Exhibit 101. It is undisputed that PGE and ICNU had such an agreement for the review of the 2006 tax report and that as a result ICNU did not seek to amend the Protective Order in last year's UE 178 docket even though it did seek modification of the Protective Order in PacifiCorp's UE 177 docket. ICNU Expedited Motion to Modify the Protective Order, UE 177 (December 14, 2007), at 2 ("ICNU has reached an agreement with Portland General Electric Company ("PGE"), making modification of Order No. 06-033 unnecessary in Docket UE 178"). Based on this understanding, Ms. Blumenthal reviewed PGE's tax report in her Corpus Christi office, and submitted testimony supporting the stipulation in PGE's tax report docket for the calendar year 2006. Hearing Trans. at 19-21.

At the outset of this docket, ICNU requested access to the tax report and work papers on the same terms as previously provided. PGE/100, Tamlyn-Tinker/3; PGE Exhibit 103. Accordingly, in November 2008, PGE sent a copy of the 2007 calendar year tax report and work papers to Ms. Blumenthal in Corpus Christi, Texas, along with a cover letter setting forth the exact same terms that PGE and ICNU had previously reached in Ms. Blumenthal's review of the 2006 tax report. PGE/100, Tamlyn-Tinker/3; PGE Exhibit 104. Counsel for

ICNU was sent a copy of the letter accompanying the tax report. PGE Exhibit 104. At the hearing, Ms. Blumenthal acknowledged that she received a package that she assumed to be PGE's 2007 tax report but that she destroyed the material without opening the package after talking with ICNU's counsel. Hearing Trans. 22, 24. No other highly confidential material was provided to Ms. Blumenthal because ICNU made no further requests for such material. PGE/100, Tamlyn-Tinker/4; Hearing Trans. at 45-46.

Ms. Blumenthal's written testimony in this docket – that she would be required to come to Portland to review the tax report and that she could do so only in the presence of a monitor – is utterly contradicted by her own testimony at the hearing. Ms. Blumenthal had the tax report docket in her possession in her office in Corpus Christi. She could have worked with the tax report and the work papers in private unencumbered by the requirements of the safe room. It was ICNU's choice to litigate rather than participate, not the requirements of the Protective Order, that prevented Ms. Blumenthal from reviewing the tax report.

At the hearing in this docket, ICNU suggested, without any supporting evidence or testimony, that an agreement had not been reached giving ICNU access to highly confidential material in this year's tax report docket. Hearing Trans. at 22. ICNU never explains the reasons for the lack of agreement. However, the record is absolutely clear that PGE made highly confidential material available to ICNU on reasonable terms. PGE sent the tax report to ICNU's expert on the condition that she treat the material in a confidential manner and destroy or return the documents to PGE after the proceeding was concluded. PGE Exhibit 104. These were the same terms to which the parties had previously agreed that permitted Ms. Blumenthal to review PGE's 2006 tax report in her office. ICNU has never explained why those terms were unreasonable or why they were reasonable and acceptable in last year's (2006) tax report docket but not this year's (2007) docket.

When Ms. Blumenthal and ICNU submitted written testimony complaining about the safe room requirements in December, they had the opportunity to explain their position. Instead, they failed to even mention that PGE had sent Ms. Blumenthal a copy of the tax report in November, much less articulate why the terms PGE offered were unreasonable. At the hearing in this proceeding, ICNU and Ms. Blumenthal again offered no evidence or documents explaining why PGE's request that Ms. Blumenthal destroy or return highly confidential information after the proceeding was unacceptable or unreasonable.³ Indeed, her own written testimony compared the safe room requirements with her access to tax information in other jurisdictions where "the confidentiality agreement that I sign requires that I either return the documents to the utility or shred them." ICNU/100, Blumenthal/6. Accordingly, the Commission should find that ICNU and Ms. Blumenthal were provided reasonable access to PGE's tax report and other highly confidential information and that there is no basis to amend or modify the Protective Order.

III. URP'S USE OF AN EARNINGS TEST IS INCONSISTENT WITH THE COMMISSION RULES

We expect that the Utility Reform Project ("URP") will argue that an earnings test should be applied to PGE's tax report for 2007. As support for its position, URP has pointed to the UM 1224 proceeding in which URP applied for (and the Commission approved) a deferred accounting application for taxes collected and rates during the last three months of 2005. In that proceeding, PGE and Staff applied the earnings test required by ORS 757.259 to show that the deferred amount should not be amortized. URP appears to be

³ Ms. Blumenthal expressly disclaimed knowledge regarding ICNU's position stating that "I was not kept up on those discussions [between PGE and ICNU regarding access to highly confidential information]" and relied on advice from counsel in destroying the 2007 tax report ("the attorneys at Davison Van Cleve indicated that I should not open the package, that they may not want to abide by the protective order in this case if it was the same protective order as last year"). Hearing Trans. at 22. However, Ms. Blumenthal did not dispute that PGE sent her a copy of the 2007 tax report and work papers on the same terms under which she reviewed the 2006 tax report.

under the mistaken impression that if an earnings test is applied in a deferred accounting proceeding (UM 1224), one must be applied in a SB 408 automatic adjustment clause proceeding (UE 178).

URP's argument simply ignores the fact that two different sets of rules apply in the two proceedings. In UM 1224, URP filed an application for deferred accounting for taxes collected between October 5, 2005 and December 31, 2005. The deferred accounting statute specifically states that deferred amounts shall only be allowed in rates "upon review of the utilities earnings at the time of application to amortize the deferral." ORS 757.259(5). The Commission expressly recognized this statutory requirement in its Order allowing deferred accounting in that docket, stating that "we agree that PGE's earnings will be reviewed at the time we consider amortization of the deferral. *See* ORS 757.259(5)." UM 1224, Order No. 07-351 at 8. Based on the statute, Commission rules (OAR 860-027-0300), and Commission order authorizing deferred accounting, an earnings test is mandatory in UM 1224.

In contrast, this proceeding implements the automatic adjustment clause that SB 408 requires. That adjustment clause became effective by law starting on January 1, 2006 (after the deferral in UM 1224), and this UE 178 docket concerns PGE's adjustment for the calendar year 2007. *See* SB 408, § 4(2). The Final Tax Report contained no earnings test because the Commission rules neither require nor permit one. Indeed, in AR 499 – the Commission docket issuing the initial SB 408 rules – the Commission expressly rejected the application of an earnings test.

We believe that it [an earnings test] would be contrary to the intent of the legislature to effectively offset the automatic adjustment clause so that it did not "adjust" rates, as it was designed to do. That is, the earnings test offset could net out the automatic adjustment clause. Because this would strike at the heart of the intent behind SB 408 to adjust rates for the difference between taxes collected and taxes paid, we declined to adopt the earnings test proposed by the utilities.

AR 499, Order No. 06-400 at 9. For the reasons discussed above (*see* section II.A), the Commission should not entertain a collateral challenge to the SB 408 rules.

It is noteworthy that URP seeks to selectively apply its proposed earnings test only in years where there is a surcharge. As a result of the tax report for 2006, PGE is refunding to customers approximately \$37.2 million. PGE's regulated return on equity for 2006 was approximately 5.02% well below its authorized ROE for the period of 10.5%. Accordingly, an earnings test for 2006 would have prevented customers from receiving the benefit of some or all of the \$37.2 million refund but URP never argued for an earnings test in that proceeding. The Commission rules provide for no earnings test and none should be applied in this docket.

IV. CONCLUSION

For the reasons stated above, the Commission should approve the Stipulation and the Final Tax Report. The Commission should authorize PGE to file tariffs implementing a surcharge to customers for federal and state taxes consistent with the Final Tax Report and to order a refund for local taxes on the same basis.

DATED this 13th day of March, 2009.

TONKON TORP LLP



David F. White, OSB No. 01138
888 SW Fifth Avenue, Suite 1600
Portland, OR 97204-2099
Direct Dial 503-802-2168
Direct Fax 503-972-3868
E-Mail david.white@tonkon.com

PORTLAND GENERAL ELECTRIC
COMPANY



for Douglas C. Tingey, OSB No. 044366
121 SW Salmon Street, 1WTC1300
Portland, OR 97204
Telephone: 503-464-8926
Fax: 503-464-2200
E-Mail doug.tingey@pgn.com

Of Attorneys for Portland General Electric
Company

CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S OPENING BRIEF** by e-mail and/or mailing a copy thereof, to each party that has not waived paper service, in a sealed, first-class postage prepaid envelope, addressed to each party listed below and depositing in the US mail at Portland, Oregon.

Douglas C. Tingey
Asst. General Counsel
Portland General Electric Company
121 SW Salmon, 1WTC13
Portland, OR 97204
Email: doug.tingey@pgn.com

Linda K. Williams
Kafoury & McDougal
10266 SW Lancaster Road
Portland, OR 97219-6305
Email: linda@lindawilliams.net

Jason W. Jones
Assistant Attorney General
Oregon Department of Justice
Regulated Utility & Business Section
1162 Court St. NE
Salem, OR 97301-4096
Email: jason.w.jones@state.or.us

G. Catriona McCracken
Citizens' Utility Board of Oregon
Legal Counsel/Staff Attorney
610 SW Broadway, Suite 308
Portland, OR 97205
Email: catriona@oregoncub.org

OPUC Dockets
610 SW Broadway, Suite 308
Portland, OR 97205
Email: dockets@oregoncub.org

Melinda J. Davison
Davison Van Cleve, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Email: mail@dvclaw.com

Daniel W. Meek
Attorney at Law
10949 SW Fourth Avenue
Portland, OR 97219
Email: dan@meek.net

Gordon Feighner
Energy Analyst
Citizens' Utility Board of Oregon
610 SW Broadway, Suite 308
Portland, OR 97205
Email: gordon@oregoncub.org

Robert Jenks
Citizen's Utility Board of Oregon
610 SW Broadway, Suite 308
Portland, OR 97205
Email: bob@oregoncub.org

Portland General Electric Company
Rates & Regulatory Affairs
121 SW Salmon Street, 1WTC0702
Portland, OR 97204
Email: pge.opuc.filings@pgn.com

DATED this 13th day of March, 2009.

TONKON TORP LLP

By David White

DAVID F. WHITE, OSB No. 01138
Attorneys for Portland General Electric Company

001991/00252/1497842v2