

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UE 177

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| In the Matter of                                | ) |        |
|   | ) |        |
| OREGON PUBLIC UTILITY COMMISSION                | ) |        |
| STAFF   | ) | RULING |
|   | ) |        |
| Requesting the Commission direct PACIFICORP,    | ) |        |
| dba PACIFIC POWER, to file tariffs establishing | ) |        |
| automatic adjustment clauses under the terms of | ) |        |
| SB 408.   | ) |        |

**DISPOSITION: MOTION GRANTED**

On January 22, 2008, the Industrial Customers of Northwest Utilities (ICNU) filed the Direct Testimony of Ellen Blumenthal (ICNU/100, Blumenthal/1-15, and ICNU/101, Blumenthal/1-6). A hearing was scheduled for February 22, 2008, at which time the witness would be available for cross-examination on her testimony.

**The PacifiCorp Motion.** On February 19, 2008, PacifiCorp filed a Motion *in Limine* Objecting to the Admission of the Direct Testimony of Ellen Blumenthal for ICNU (Motion). The Motion requested that the Commission strike the following testimony from ICNU/100, Blumenthal/1—15, on the grounds that they consist of irrelevant arguments that attack the validity of OAR 860-022-0041: p. 3, ll. 3—13; p. 5, ll. 1—16; p. 6, l. 23—p. 7, l. 2; and p. 9, l. 3—p. 12, l. 4.<sup>1</sup> PacifiCorp also requested that the Commission strike ICNU/100, p. 12, l. 5—p. 15, l. 2, on the grounds that the testimony consists of irrelevant arguments that challenge the Protective Order in this proceeding.<sup>2</sup> PacifiCorp asserts that much of the testimony consists of legal argument, not fact or expert opinion, as is required of testimony and that such argument is properly reserved for briefs; and even if it did not consist primarily of legal argument, the testimony does not relate to facts at issue in the proceeding. The ICNU testimony under challenge does not relate to determining whether the information contained in the tax report is accurate, but to the general validity of OAR 860-022-0041 as a proper implementation of SB 408. Thus, it does not make any fact at issue in the proceeding more or less probable. PacifiCorp asserts that an agency must comply with its own rules

<sup>1</sup> Motion, at 1.

<sup>2</sup> *Id.*, at 2.

until it either repeals or amends them or a court declares them to be invalid, so that the Commission is bound to follow OAR 860-022-0041 because it may not wave application of Division 022. The proper procedure for ICNU is not to seek repeal or amendment of OAR 860-022-0041, but to petition the Commission to change the rule pursuant to ORS 183.390(1).<sup>3</sup>

PacifiCorp asserts that much of the remainder of the testimony reargues the case that it lost before the Commission regarding the terms of the Protective Order: the inconvenience imposed by the use of a safe room to view documents balanced against the potential harm of the public release of highly confidential information as provided by the Protective Order. The facts raised by ICNU were evaluated by the Commission at that time and are thus no longer an issue in the proceeding. Finally, PacifiCorp asserts that this portion of the ICNU testimony is likewise legal argument.<sup>4</sup>

**The ICNU Reply.** On February 22, 2008, ICNU filed a Reply to PacifiCorp's Motion *in Limine* Objecting to the Admission of the Direct Testimony of Ellen Blumenthal (Reply). ICNU's first objection is that the Motion is procedurally flawed on several counts. Almost a month had passed since the testimony was filed and PacifiCorp had ample opportunity to object and, by filing rebuttal testimony relative to the testimony to be stricken and by delaying until two days before the hearing to file its Motion, PacifiCorp had by its actions waived its right to do so. ICNU further asserts that a motion *in limine* is not applicable to a nonjury proceeding, because prejudice or confusion of jurors is not an issue with a specialized agency; i.e., the Commission, but with a lay jury. Furthermore, motions *in limine* are not specifically authorized by the Commission's Rules, the ORCP or the Oregon Rules of Evidence. ICNU also notes that under OAR 860-013-0050(d), it has 15 days in which to respond to a motion unless otherwise specified by the Rules or the Administrative Law Judge (ALJ) and comments that PacifiCorp failed to ask the ALJ for expedited consideration in its Motion. ICNU asserts that the short time frame given by the ALJ to respond to the Motion "substantially prejudiced" its right to respond.<sup>5</sup>

Next, ICNU contends that, because no rate change was required for PacifiCorp's tax report for the 2005 tax year because the SB 408 automatic adjustment clause did not apply to taxes collected and paid before January 1, 2006, this docket "presents the first opportunity to test the final rules (i.e., OAR 860-022-0041) passed in AR 517 with actual tax data." ICNU expressly reserved all arguments for future filings when an actual rate adjustment would be at issue.<sup>6</sup>

ICNU also contends that PacifiCorp has mischaracterized the Blumenthal testimony as legal argument and is incorrect with respect to the necessity for the Commission to adhere to its rules in this matter because the Commission "has previously waived its rules in the SB 408 context, and is required to do so if the Commission's rules violate its statutory

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<sup>3</sup> *Id.*, at 3-4.

<sup>4</sup> *Id.*, at 5-6, citing Order 08-002, entered January 3, 2008, at 5.

<sup>5</sup> Reply at 2-5, citing *McEwen v. Ortho Pharmaceutical Corat*, 270 Or. 375, 421 (1974) and *Wallender v. Michas*, 256 Or. 587, 592 (1970) and other cases.

<sup>6</sup> *Id.*, at 6.

authority. “Lastly, with respect to PacifiCorp’s argument regarding the Protective Order, Ms. Blumenthal’s testimony simply identifies the Protective Order as one reason no alternative calculation was given.”<sup>7</sup>

ICNU goes on to state that the testimony addresses the factual question of whether the tax report meets the requirements of SB 408 and that it demonstrates how OAR 860-022-0041 is inconsistent with SB 408, thus allowing counsel to make legal argument that the rule produces a factual “result” that violates the statute. The argument applies equally if the ALJ treats the Motion as a motion to strike.<sup>8</sup> ICNU further asserts that the Commission has not followed rules or historic practice when a new statute is passed ordering the Commission to change and has argued that it is not required to follow its own rules when to do so would violate its statutory authority.<sup>9</sup> ICNU also argues that ORS 183.400(1) requires it to give the Commission an opportunity to first rule on whether to follow its own rules before taking an appeal and therefore must challenge OAR 860-022-0041 in this docket.<sup>10</sup> Finally, ICNU argues that the Blumenthal testimony does not challenge the Protective Order, but merely explains why the witness could not provide an alternative calculation of PacifiCorp’s actual taxes paid and gives further background on her experiences as a tax expert in other jurisdictions.<sup>11</sup>

**The PacifiCorp Response.** On February 26, 2008, PacifiCorp filed a Response to ICNU’s Reply to PacifiCorp’s Motion *in Limine* (Response) addressing each of the points raised by ICNU in its Reply. PacifiCorp argues that the style of its Motion was proper because motions to strike are often directed at pleadings and briefs rather than testimony, while a motion *in limine* is used to challenge the admissibility of evidence, although the Commission rules may be construed liberally to secure a just and speedy determination of the issues.<sup>12</sup> PacifiCorp reiterates its position that the Blumenthal testimony is irrelevant as a collateral attack on OAR 860-022-0041 and contains no facts or opinions relating to PacifiCorp’s tax report.<sup>13</sup> PacifiCorp further states that, since the Commission cannot waive the SB 408 rules, encouraging the Commission to do so constitutes irrelevant legal argument and that this proceeding was neither ICNU’s first nor the most appropriate opportunity to voice concerns about the Commission’s rules implementing SB 408.<sup>14</sup> Finally, PacifiCorp reiterates its assertion that arguments regarding the Protective Order have previously been addressed by the Commission and should not be revisited by the ALJ at this stage of the proceeding.<sup>15</sup>

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<sup>7</sup> *Id.*, at 6-7.

<sup>8</sup> *Id.*, at 7-8.

<sup>9</sup> *Id.*, at 9, citing the Commission’s brief in *Crooked River Ranch Water Co. v. PUC of Oregon*, CA A134177, at 24-25.

<sup>10</sup> *Id.*, at 10.

<sup>11</sup> *Id.*, at 11.

<sup>12</sup> Response, at 2.

<sup>13</sup> *Id.*, at 4-5.

<sup>14</sup> *Id.*, at 6-7.

<sup>15</sup> *Id.*, at 7-8.

**Discussion.** ICNU raises a number of procedural objections to the Motion relating to the appropriateness of the Motion, its timing, the effective waiver of PacifiCorp's rights and prejudice to ICNU's ability to adequately and timely respond. The ability of the ALJ to act upon the Motion is governed by OAR 860-012-0035, which reads in part as follows:

- (1) The Commission delegates to the Administrative Law Judge (ALJ) authority to:
  - (a) Regulate the course of hearings including scheduling, recessing, reconvening, and adjourning;
  - (b) Administer oaths and affirmations;
  - (c) Issue subpoenas;
  - (d) Make evidentiary rulings, with or without objection;
  - (e) Limit, supervise, and control discovery;
  - (f) Hold appropriate conferences before, during or after hearings;
  - (g) Decide procedural matters but not to grant motions to dismiss or other motions which involve final determination of the proceedings;
  - (h) Limit or extend filing periods and grant waivers;
  - (i) Certify a question to the Commission for consideration and disposition;
  - (j) Take any other action consistent with the duties of an ALJ;

The underlying purpose of procedural rules is to provide fairness to the litigants. This is accomplished by ensuring that parties have adequate notice and understanding of their opposing party's positions, by giving parties the opportunity to adequately present their testimony and argument and by preventing surprise or other unfair means to obtain a tactical advantage or delay the proceedings. The latitude given the ALJ by the Commission's rules furthers these goals.

First, whether PacifiCorp's Motion is properly styled as a motion to strike or a motion *in limine* is of no consequence; the requested relief, which is what matters to the parties, is that the testimony to be offered by ICNU be rejected in part.<sup>16</sup> As PacifiCorp points out, the Motion was made close in time to the offering of the testimony into evidence as specified by OAR 860-014-0045(2) and is applicable to prefiled written testimony as well as to testimony first offered at hearing.<sup>17</sup> The Motion was thus timely filed. I further find that PacifiCorp did not waive its objection to the ICNU direct testimony by the filing of its own responsive testimony. That testimony may be withdrawn in whole or in part by PacifiCorp at any time after the Motion has been ruled upon (which PacifiCorp indicated that it would do if the Motion were granted) or can be stricken as being beyond the scope of direct testimony either upon motion of ICNU or *sua sponte* by the ALJ. I also find that ICNU was not prejudiced or disadvantaged in its ability to respond to the Motion. The amount of time in which to respond may be set by the ALJ as noted in the rule cited above. The depth of research on the issues and length of the Response is indicative of the fact that

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<sup>16</sup> ICNU's witness was unable to attend the February 22, 2008, hearing and consequently her testimony was not offered into evidence by ICNU. The hearing was rescheduled for March 4, 2008.

<sup>17</sup> See OAR 860-014-0060(4)(b): "The written testimony is subject to the rules of admissibility and cross-examination."

the time provided to ICNU by the ALJ (a week after the filing of the Motion) was reasonable and ICNU was in no way prejudiced in its ability to fully respond to the Motion.

The testimony of Ms. Blumenthal does not, at any point, assert that PacifiCorp has failed to perform the calculation required by OAR 860-022-0041. Rather, she claims that the calculations required by the rule “are unnecessarily complicated and do not meet the goal of SB 408,” and that “none of the calculation methodologies required by OAR 860-022-0041 are actual tax calculations.”<sup>18</sup> The statement is that the report, because it is based on (and presumably in compliance with) the rule, does not comply with SB 408. The testimony next states that the rule complicates the required calculations and does not accomplish the goal of the statute.<sup>19</sup> The testimony then discusses the alleged infirmities of the rule and how the rules should be changed and concludes that “...it has become evident that the Commission’s rules do not operate as intended and as required by SB 408.”<sup>20</sup>

### **RULING**

PacifiCorp’s argument that the Motion requesting that the Commission strike the following testimony from ICNU/100, Blumenthal/1—15, on the grounds that they consist of irrelevant arguments that attack the validity of OAR 860-022-0041: p. 3, ll. 3—13; p. 5, ll. 1—16; p. 6, l. 23—p. 7, l. 2; and p. 9, l. 3—p. 12, l. 4, is adopted. With respect to those portions of the testimony, the Motion is granted.

The portion of the Motion requesting that the Commission strike ICNU/100, p. 12, l. 5—p. 15, l. 2, on the grounds that the testimony consists of irrelevant arguments that challenge the Protective Order in this proceeding is also granted. The description of the witness’s perceived hardships in complying with the requirements of the Protective Order is of little probative value and is far outweighed “by the danger of...confusion of the issues, or by undue delay” and is therefore excluded pursuant to OAR 860-014-0045(1)(c). ICNU/100, Blumenthal/12, l. 5—15, l. 2, is excluded from the record.

In the event that ICNU takes exception to this ruling, pursuant to OAR 860-014-0045(4), the evidence excluded by this ruling shall be marked and designated as evidence offered, excluded and to which exception has been taken. ICNU is free to address the legal issues raised in the Blumenthal testimony in its briefs to the Commission.

Dated at Salem, Oregon, this 3rd day of March, 2008.

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Allan J. Arlow  
Administrative Law Judge

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<sup>18</sup> ICNU/100, Blumenthal/3.

<sup>19</sup> ICNU/100, Blumenthal/4, 6-7.

<sup>20</sup> ICNU/100, Blumenthal/4, 9-12.