

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 177

In the Matter of:)	
)	
PACIFICORP, dba PACIFIC POWER & LIGHT)	RULING
)	
Filing of tariffs establishing automatic adjustment clauses under the terms of SB 408.)	
)	

DISPOSITION: MOTION FOR SERVICE OF COMPLETE
RECORD DENIED

The Industrial Customers of Northwest Utilities (ICNU) seeks a copy of the full and complete record in the appeal of docket UE 177 to the Oregon Court of Appeals, including information that has been designated as “highly confidential” pursuant to the terms of the protective order adopted in Order No. 06-033. PacifiCorp opposes ICNU request as untimely and unwarranted. For the reasons that follow, ICNU’s motion is denied.

Background

ORS 757.268 requires PacifiCorp and certain other utilities to file an annual tax report with the Commission that identifies the amount of income taxes authorized to be collected in rates and the amount of income taxes paid by the utility or its consolidated tax group in a given year. The purpose of the filing is to determine whether rates need to be “trued up” to account for differences in amounts collected and amounts paid.

Given the sensitivity of the tax information included in the annual reports, the legislature placed restrictions on the access to the reports. Among other things, the legislature expressly limited access to the tax information to parties “upon signing a protective order prepared by the commission.” ORS 757.268(11).

In Order No. 06-033, the Commission issued a protective order to govern the use of the highly confidential tax information. In that order, the Commission noted the sensitivity of the information contained in the tax reports and the harm presented by its public release. In addition to the legislative restrictions noted above, the Commission and the Oregon Department of Justice (DOJ) had earlier concluded that the confidential information contained in the tax reports was privileged under state law and protected from disclosure under ORS 192.502(9). Letter Opinion at 1 (OPUC Nov. 18, 2005)

(denying public records request for disclosure of SB 408 tax reports) aff'd Letter Opinion (DOJ Jan. 4, 2006). The Commission also noted that other state laws criminally punish the public disclosure of income tax information. *See* ORS 314.835 and 314.991(2).

The Commission also acknowledged the reality that the agency's general protective order does not guarantee the protection of confidential information. The Commission cited the illegal disclosure of hundreds of pages of confidential documents in another docket. After the leaked information was subsequently published in print media and broadcast by television and radio stations, we predicted the unlawful actions might impair Commission proceedings, "as utilities may be reluctant to provide essential information to intervening parties for fear of leaks that may harm their competitive standing." *In the Matter of Oregon Electric Utility Co. LLC, et al's Application to Acquire Portland General Electric Co.*, docket UM 1121, Order No. 05-114 at 10.

Against that backdrop, the Commission concluded that it had no choice but to adopt a safe-room discovery mechanism to govern the use of the confidential information contained in the tax reports. Under the adopted mechanism, intervenors would be only allowed to review documents containing highly confidential information at limited times in "safe rooms" located in Portland. Intervenors would be allowed to take limited notes, but could not make copies. *See* Order No. 06-033 at 2.

ICNU opposed the safe-room discovery mechanism when it was initially proposed by PacifiCorp and other utilities. ICNU later challenged the protective order by filing a Motion to Modify Protective Order No. 06-033. The Commission denied ICNU's request, concluding, among other things, that the inclusion of hundreds of unregulated companies in PacifiCorp's consolidated tax group (Berkshire Hathaway), increased the need for heightened protection of the tax information. *See* Order No. 08-002 at 5.

After an investigation in docket UE 177, the Commission approved PacifiCorp's 2006 tax report, which authorized the utility to surcharge customers, under the provisions of ORS 757.268, \$34.5 million for additional federal, state, and local income tax liability. *See* Order No. 08-201. ICNU later appealed the decision to the Court of Appeals.

On July 30, 2008, the Commission transmitted the entire record of docket UE 177 to the court of appeals for its review. *See* Oregon Rules of Appellate Procedure (ORAP) 4.20. The Commission designated the sensitive tax information as "confidential" and filed the information under seal. The Commission also provided copies of the unsealed portions of the record to all parties, including ICNU.

Motion and Response

On October 20, 2008, ICNU filed a motion for a complete copy of the UE 177 appellate record, including the "highly confidential" tax report filed by PacifiCorp, as well as all work papers and testimony containing the confidential information. ICNU contends that ORAP 4.20 requires an agency to provide the appellate

parties a complete copy of the record below, and that the rule makes no exceptions for confidential information. Without access to the complete evidentiary record, ICNU states, it may be precluded from raising all the assignments of error, or from effectively supporting its arguments. ICNU also request expedited consideration of its motion, noting that its opening brief in the court of appeals is due on November 5, 2008.

PacifiCorp contends that the Commission properly sealed the highly confidential portions of the appellate record and that ICNU's motion should be denied on numerous grounds. PacifiCorp contends that the motion is untimely, because it was filed almost three months after the Commission transmitted the record to the Court of Appeals. PacifiCorp also contends that ICNU's request improperly attempts to relitigate the provisions of the protective order. Finally, PacifiCorp contends that ICNU has access to the confidential material under the terms of the protective order.

Ruling

ICNU's motion is untimely. As PacifiCorp notes, a motion to correct the record must be filed within 15 days after the agency transmits the record to the Court of Appeals. *See* ORAP 4.22(1)(b). Here, ICNU waited 82 days to file its motion, and requested expedited consideration of its request.

ICNU's motion also fails on its merits. Contrary to ICNU's assertion, the ORAP do provide exceptions for confidential information. ORAP 3.07(1) expressly allows certain information to be designated as confidential and sealed from review by any party. That provision, governing the transmittal of a record by a trial court, is applicable to the review of an order in a contested case. *See* ORAP 4.05. To preserve the integrity of the protective order, the Commission properly filed the highly confidential material as "sealed" when it transmitted the UE 177 record to the Court of Appeals.

Moreover, ICNU's claim that it will be prejudiced by not having access to the "complete evidentiary record" ignores the fact that it has access to review the information in the Portland safe room under the terms of the protective order. As a signatory to the protective order, ICNU has continuing access to the highly confidential tax materials in the safe room throughout the pendency of the appeal.

ICNU's Motion for Service of the Complete Record in the appeal of docket UE 177 is denied.

Dated in Salem, Oregon, this 27th day of October, 2008.

Michael Grant
Chief Administrative Law Judge