

UE 177

# Davison Van Cleve PC

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May 12, 2008

RECEIVED

MAY 13 2008

Public Utility Commission of Oregon  
Administrative Hearing Division

*Via US Certified Mail*

State Court Administrator  
Appellate Courts Records Section  
1163 State Street  
Salem, Oregon 97301-2563

Re: Oregon Public Utility Commission of Oregon No. UE 177  
Docket No. CA A \_\_\_\_\_

Dear State Court Administrator:

Enclosed please find the Industrial Customers of Northwest Utilities Petition for Judicial Review in the above-referenced docket. Also enclosed, please find check number 5836 in the amount \$212, which will cover the cost of the filing fee. Service copies have been provided to all parties included on the subsequent service list.

Thank you for your assistance.

Sincerely yours,



Ruth A. Miller

Enclosures

cc: Service List

DOCKETED

IN THE COURT OF APPEALS OF THE STATE OF OREGON

THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES, an Oregon non- profit corporation,	)	Public Utility Commission of Oregon.
	)	No. UE 177
	)	
	)	CA A _____
Petitioner,	)	
	)	
vs.	)	
	)	
PUBLIC UTILITY COMMISSION OF OREGON,	)	
	)	
Respondent.	)	
	)	

**RECEIVED**  
**MAY 13 2008**  
 Public Utility Commission of Oregon  
 Administrative Hearing Division

**PETITION FOR JUDICIAL REVIEW**

Petitioner, the Industrial Customers of Northwest Utilities ("ICNU"), seeks judicial review of the final order of the Oregon Public Utility Commission ("OPUC"), in Case No. UE 177, dated April 11, 2008.

The Parties to this review are:

Melinda J. Davison  
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 Allen C. Chan  
 OSB No. 042597  
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 Attorney for Respondent OPUC

**DOCKETED**

A. Attached to this petition is a true and correct copy of the Order for which judicial review is sought.

B. Petitioner was a party to the administrative proceedings, which resulted in the order for which review is sought.

C. Petitioner is not willing to stipulate that the agency record may be shortened.

DATED this 12th day of May, 2008.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

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Of Attorneys for the Industrial Customers of  
Northwest Utilities

# ATTACHMENT

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**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UE 177

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

**DISPOSITION: TAX REPORT ACCEPTED; DECISION  
RENDERED ON TARIFF ISSUES**

In this order, we approve the 2006 Tax Report for PacifiCorp, dba Pacific Power (Pacific Power), and authorize the utility to surcharge customers, under the provisions of Senate Bill 408 (SB 408), \$34.5 million for additional federal, state and local income tax liability. We also adopt Pacific Power's proposed amortization schedule, under which the utility will collect the surcharge over a two-year period.

**INTRODUCTION**

Senate Bill 408, passed by the 2005 Legislative Assembly, establishes a new method for the rate treatment of utility income taxes. Generally, SB 408, which is codified at ORS 757.268, requires a utility to true-up any differences between the amounts of income taxes authorized to be collected in rates from customers and amounts of taxes actually paid that are "properly attributed" to the utility's regulated operations. See ORS 757.268(4). The utilities must make annual tax filings reporting these amounts on October 15 of each year. If amounts collected and amounts paid differ by more than \$100,000, the Commission must order the utility to establish an automatic adjustment clause to account for the difference, with a rate adjustment to be effective June 1 of each year. See ORS 757.268(4), (6)(a); OAR 860-022-0041(8).

On October 15, 2007, pursuant to Protective Order No. 06-033, Pacific Power filed its annual tax report for Calendar Year 2006 (Tax Report) and tariff revision sheets filed as Advice No. 07-019.<sup>1</sup> Pacific Power reported that its regulated Oregon operations for the 2006 tax period showed \$87.0 million in taxes paid and properly

<sup>1</sup> Official notice is taken of the highly confidential information contained in Pacific Power's 2006 Tax Report.

attributed and \$54.4 million in taxes authorized to be collected in rates. The surcharge resulting from the difference between taxes paid and collected was \$32.6 million. The procedural schedules for this case and those of other filing utilities were adopted at a consolidated prehearing conference on November 5, 2007.

Through established procedures, the Commission Staff (Staff) and Industrial Customers of Northwest Utilities (ICNU) reviewed the report for compliance with ORS 757.268 and Commission rules codified in OAR 860-022-0041. On December 19, 2007, Staff issued its Initial Findings for Pacific Power (Findings) in this docket, structuring its report in a generic manner in order to avoid the possibility of disclosing confidential or sensitive information.<sup>2</sup>

On December 14, 2007, ICNU filed an expedited motion to modify the existing protective order, and on December 24, 2007, ICNU filed a Motion to Compel Pacific Power to supplement its responses to ICNU's first set of data requests. The Commission denied both motions by Order Nos. 08-002 and 08-003, entered January 3 and 4, 2008, respectively.

The Commission approved Advice No. 07-019 during its January 22, 2008, Public Meeting. Although review of the tax reports was still pending, the Commission adopted Staff's recommendation to adopt the tariffs, subject to later revision to incorporate any changes deemed necessary by the Commission. *See* Order No. 08-045. In this Order, we direct Pacific Power to make such tariff revisions.

Staff and ICNU filed Direct Testimony on January 22, 2008. Pacific Power submitted Rebuttal Testimony on February 12, 2008. A Pacific Power motion seeking to strike portions of the ICNU testimony was filed on February 19, 2008, and hearings were held on February 22, 2008, and March 4, 2008. The Pacific Power motion was granted, and portions of the testimony offered at the March 4, 2008, hearing were marked as excluded from the record. On March 13, 2008, ICNU filed a Motion for Expedited Certification seeking to get the stricken portions of its testimony entered into the record. Upon certification by the Administrative Law Judge (ALJ), the Commission upheld the ALJ's Ruling excluding portions of the ICNU testimony.<sup>3</sup> PGE, ICNU and Staff filed Opening Briefs on March 14, 2008.

### **Staff Adjustments**

Staff sought several adjustments to the Pacific Power Tax Report relating to the March 21, 2006, acquisition of Pacific Power by MidAmerican Energy Holdings Company, a subsidiary of Berkshire Hathaway (BH), from Scottish Power (SP), its former owner. The first adjustment related to the apportionment methodology used by Pacific Power between the tax returns of the buying and selling entities. For purposes of the tax filing, Pacific Power had assigned a 25 percent weighting factor to the SP tax

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<sup>2</sup> Staff's Initial Findings, at 1.

<sup>3</sup> *See* Order No. 08-176, entered March 20, 2008.

filing and a 75 percent weighting factor to the BH tax filing. Staff analyzed the federal tax liabilities using apportioned, consolidated and stand-alone tests for each tax period. Staff asserts that, to calculate the per-period liability, the rules contemplated that the “greater of” total federal income taxes paid should not be less than the stand-alone, rather than the “greater of” the federal income tax liability considered separately for each tax period. In Staff’s view, the outcome of Pacific Power’s federal tax liability complied with this concept.<sup>4</sup>

Second, Staff asked Pacific Power to recalculate its apportionment factors for the state stand-alone tax liability with adjustments to remove the depreciation associated with public utility property, and to revise the calculation of interest expense used to derive the stand-alone tax liability.<sup>5</sup> Pacific Power agreed to all of the aforementioned adjustments and incorporated them into the revised Tax Report.<sup>6</sup>

The net result of the adjustments, necessary to bring the tax report into compliance with Commission rules, increased Pacific Power’s SB 408 surcharge from \$32.6 million to \$34.5 million. If the proposed amortization schedule, discussed below, is adopted, Pacific Power would address the adjustments by raising the credit in Pacific Power’s SB 408 balancing account from \$5.6 million, plus interest, to \$7.5 million, plus interest.<sup>7</sup>

#### **Pacific Power’s Proposed Amortization Surcharge Schedule**

The amount of the identified surcharge relates, in part, to a SB 408–related tax adjustment the Commission earlier made in docket UE 170. In that rate case proceeding, the Commission lowered Pacific Power’s tax expense by approximately \$24 million.

Staff estimates that the difference between Taxes Paid and Collected Surcharge, after all of the above adjustments, is \$34.5 million.<sup>8</sup> Pacific Power proposes to amortize \$27 million of the surcharge through Schedule 102 in 2008-2009, and, as noted above, deferring the rest of the surcharge to Pacific Power’s SB 408 balancing account. OAR 860-022-0041(8)(c) gives the Commission discretion to set the amortization period for the surcharge.<sup>9</sup>

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<sup>4</sup> Staff/100, Owings-Ball/4-5.

<sup>5</sup> *Id.*, at 6. In its original filing, Pacific Power used the amount of actual interest deduction rather than the interest synchronization method described in OAR 860-022-0041(2)(p); *i.e.*, the manner used by the Commission in establishing rates.

<sup>6</sup> See PPL/203, PPL/200, Fuller/4, line 6 – Fuller/5, line 8; Staff/200, Owings-Ball/7, line 17 – Owings-Ball/8, line 3.

<sup>7</sup> PPL/100, Larson/4.

<sup>8</sup> Staff/100, Owings-Ball/7.

<sup>9</sup> PPL/100, Larson/3.

### CONTESTED ISSUES

ICNU opposes Pacific Power's Tax Report and the implementing tariff revisions on four grounds. First and foremost, ICNU contends that OAR 860-022-0041, on which the Tax Report is based, does not comply with SB 408. As a consequence, ICNU contends that "the Commission has no basis on which to order a rate change based on PacifiCorp's tax report."<sup>10</sup> Second, ICNU asserts that the Commission has the authority to disallow the Pacific Power surcharge and recommends that the Commission so exercise its authority. Third, ICNU urges the Commission to reject Staff's recommendations, which resulted in the \$2.4 million surcharge increase. Finally, ICNU makes several arguments regarding the appropriateness of the procedural paths it has followed in presenting its positions on these matters. We address each separately, followed by our resolution.

#### **Alleged Infirmities of OAR 860-022-0041**

ICNU contends that the tax calculation methods utilized by Pacific Power and analyzed by Staff and found to be compliant with the rule are not "actual tax calculations as required by statute."<sup>11</sup> ICNU then discusses the shortcomings of the rule and their effect upon tax calculations.<sup>12</sup>

We addressed ICNU's challenge to the validity of our rules earlier in this proceeding when we affirmed the ALJ's decision to strike certain testimony. In our Order No. 08-176, issued March 20, 2008, we stated at page 3:

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 rule's 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. Such evidence is not appropriate for this docket, whose purpose is to determine whether Pacific Power's 2006 tax report complies with OAR 860-022-0041.

Regardless of whether or not this proceeding has provided ICNU with its first opportunity to challenge the rule,<sup>13</sup> the arguments in ICNU's brief with respect to the infirmities of OAR 860-022-0041, are just as inappropriate in this proceeding as was offering the supporting testimony which it sought to have admitted into the record. If ICNU wishes to challenge or change the existing rule, a petition to open a separate

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<sup>10</sup> ICNU Opening Brief, at 5.

<sup>11</sup> *Id.*, at 7.

<sup>12</sup> *Id.*, at 8-16.

<sup>13</sup> *Id.*, at 21-22.



proceeding is the proper procedure for doing so. We disregard ICNU's arguments with respect to this issue.

### **Commission Disallowance of the Surcharge**

ICNU recommends that the Commission disallow the surcharge, arguing that the Commission has no authority to issue an order (allowing the surcharge) if, in adhering to OAR 860-022-0041, it would violate the terms of SB 408. ICNU claims that ORS 183.482(8)(b)(B) permits an agency to act in a manner inconsistent with its rules if the inconsistency is explained by the agency.<sup>14</sup> ICNU also argues that it is required to give the Commission an opportunity to rule on whether to follow its own rules before it can appeal the validity of the rule.<sup>15</sup> ICNU thus asked the Commission to waive the operation of OAR 860-022-0041<sup>16</sup> in order to avoid violating SB 408.<sup>16</sup>

We reject ICNU's recommendation. The proceedings in docket AR 499 and AR 517 leading up to the adoption of OAR 860-022-0041 in its present form involved the participation of numerous parties and constituted a careful evaluation of alternatives and the crafting of implementing language faithful to the letter and intent of SB 408. We find the calculation of the surcharge, as well as the surcharge itself, to be consistent with and in compliance with both OAR 860-022-0041 and ORS 757.268.

### **Staff-Recommended Revisions to the Pacific Power Tax Report**

As noted above, Staff recommended revisions to the Pacific Power 2006 Tax Report relating to depreciation expense and interest synchronization.

At Staff's request, Pacific Power recalculated its apportionment factors for the state stand-alone tax liability using the stand-alone taxable income with an adjustment to remove the depreciation associated with public utility property.<sup>17</sup> ICNU acknowledges that removal of the accelerated tax depreciation expense for public utility property from the calculation is required to avoid a normalization violation. However, ICNU contends that depreciation expense should be added back on a straight line basis in order to produce an actual tax result. There is no evidence on the record that this step occurred.<sup>18</sup> In response, Staff notes that on the Staff Template at pages 5 and 6 "the tax benefit depreciation related to public utility property is deducted from the tax liability once the stand-alone tax liability has been calculated. Therefore, customers are given the benefit of depreciation"<sup>19</sup>

<sup>14</sup> *Id.*, at 16-17, citing *Gordon v. Board*, 343 Or 618, 635 (2007).

<sup>15</sup> *Id.*, at 17-18, citing ORS 183.400(1).

<sup>16</sup> *Id.*, at 19.

<sup>17</sup> Staff/100, Owings-Ball/6.

<sup>18</sup> ICNU Opening Brief, at 9-10, citing Staff/200, Owings-Ball/4.

<sup>19</sup> Staff's Response Brief, at 2.

ICNU also takes issue with Staff's view that the Commission must follow OAR 860-022-0041(2)(p) which states that the stand-alone tax liability is arrived at by "calculating interest in the manner used by the Commission in establishing rates," the interest synchronization method. ICNU notes that utilities do not use the interest synchronization method to calculate the interest deduction on their actual tax returns and that the use of that method "veers the stand-alone method even farther from a determination of an actual taxes paid result." Although not objecting at the time the Staff revision was proposed, "ICNU however objects to the Commission's rules regarding the stand-alone method as a whole."<sup>20</sup> Staff agrees with ICNU regarding the rule's infirmity. "In order to more accurately approximate the tax liability, Staff believes that on a going-forward basis, changes to the rule should be considered to more closely resemble the interest deduction available to the Company on a pro forma tax return."<sup>21</sup>

### Discussion and Ruling

The SB 408 legislative process resulting in the enactment of ORS 757.268 was extensive, open and deliberate, as was the Commission's rulemaking proceeding resulting in OAR 860-022-0041. We find that the Staff-requested revision relative to depreciation expense has been fully justified and brings the Pacific Power Tax Report into compliance with our rules.

We also adopt Staff's view that the Pacific Power Tax Report is compliant with OAR 860-022-0041(2)(p), which requires that the stand-alone tax liability be arrived at by using the interest synchronization method. We therefore accept the Pacific Power Tax Report as modified.

Nevertheless, we are mindful that, as we gain experience with the application of our rules to a variety of factual situations, issues may arise which, while not rising to the extraordinary level that would justify actions inconsistent with our rules, warrant further consideration or revision of some of the rule's language for application to future tax filings. Therefore, we adopt the Staff's view that the Pacific Power Tax Report complies with OAR 860-022-0041(2)(p) and should be accepted, but recognize that further rulemaking proceedings may be in order.

Finally, ICNU asserts that its substantive positions in this case are consistent with those positions it has taken in other SB 408 rulemaking dockets,<sup>22</sup> that this proceeding is the first opportunity which it has had to challenge OAR 860-022-0041<sup>23</sup> and any positions that it has taken in UE 178 for the purposes of settlement are irrelevant.<sup>24</sup>

<sup>20</sup> ICNU Opening Brief, at 9-10, citing Staff/200, Owings-Ball/6, ll. 17-20.

<sup>21</sup> Staff/200, Owings-Ball/6. See also Staff's Response Brief, at 2. "Staff's requested change was based upon the requirement of the rules and was not bottom line result oriented....[T]he proper forum for changes to the rule is in a rulemaking proceeding."

<sup>22</sup> ICNU Opening Brief, at 20-21.

<sup>23</sup> *Id.*, at 21-22.

<sup>24</sup> *Id.*, at 22-23.

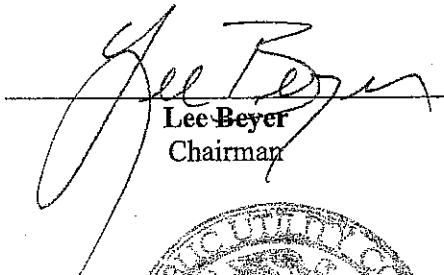
We have addressed each of the substantive issues and need not reach any conclusions with respect to the consistency of positions ICNU has taken in other proceedings or, as noted above, whether this case was or was not ICNU's first opportunity to challenge OAR 860-022-0041.

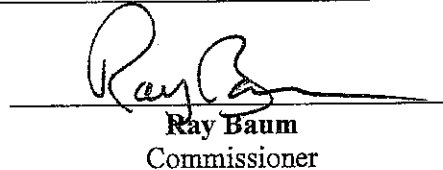
**ORDER**

IT IS ORDERED that:

1. The PacifiCorp 2006 Tax Report, as revised herein, is adopted.
2. A surcharge in the amount not to exceed Twenty Seven Million Dollars (\$27,000,000) shall be amortized through Schedule 102 in 2008-2009. Any remaining surcharge shall be deferred to PacifiCorp's SB 408 balancing account. Interest shall accrue on the unamortized balance and in the deferred account at Pacific Power's authorized rate of return, subject to revision based upon the outcome of proceedings currently underway in docket UM 1147.
3. Tariff revision sheets filed as Advice No. 07-019, shall be amended as described herein and shall go into effect June 1, 2008.

Made, entered and effective APR 11 2008

  
**Lee Beyer**  
Chairman

  
**Ray Baum**  
Commissioner

  
**John Savage**  
Commissioner



A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.

**CERTIFICATE OF SERVICE**

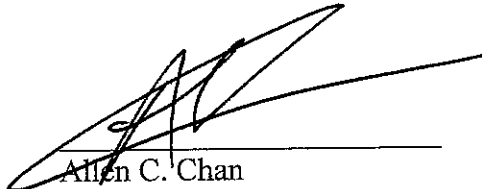
I certify that on May 12, 2008, I served a true copy of this petition for judicial review on:

Rick Willis  
Executive Director  
Public Utility Commission of Oregon  
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by:

- United States Postal Service, ordinary first class mail
- United States Postal Service, certified or registered mail, return receipt requested
- hand delivery
- other



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Of Attorneys for the Industrial Customers of  
Northwest Utilities

**CERTIFICATE OF FILING**

I certify that May 12, 2008, I filed the original of this petition for judicial

review with the State Court Administrator at this address:

State Court Administrator

1163 State Street

Salem, Oregon 97301-2563

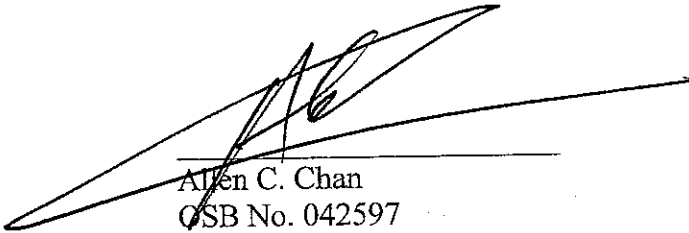
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United States Postal Service, ordinary first class mail

United States Postal Service, certified or registered mail, return receipt requested

hand delivery

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