

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 177, UE 178, UG 170 & UG 171

In the Matters of:)	
)	
PACIFIC POWER & LIGHT, dba)	
PACIFICORP, (UE 177))	
)	
PORTLAND GENERAL ELECTRIC)	
COMPANY, (UE 178))	ORDER
)	
NORTHWEST NATURAL GAS COMPANY,)	
(UG 170))	
)	
and)	
)	
AVISTA UTILITIES, (UG 171))	
)	
Filing of tariffs establishing automatic)	
adjustment clauses under the terms of SB 408.)	

**DISPOSITION: MOTION FOR AMENDED PROTECTIVE
ORDER GRANTED IN PART**

On December 13, 2005, Avista Corporation, Northwest Natural Gas Company, PacifiCorp and Portland General Electric Company (collectively referred to as the “utilities”) filed a joint motion seeking issuance of an amended protective order to include heightened protection of confidential tax and commercially sensitive financial information. On December 28, 2005, the Industrial Customers of Northwest Utilities (ICNU) and the Northwest Industrial Gas Users (NWIGU) filed separate responses in opposition to the motion. On January 9, 2006, the utilities filed a joint reply in response to ICNU’s and NWIGU’s opposition.

In this order, we grant the utilities’ joint motion with certain modifications. We amend our general protective order to require a safe-room discovery mechanism for the review of confidential portions of the Senate Bill 408 tax reports and other documents containing tax data and analyses.

INTRODUCTION

Senate Bill 408 requires each of these four 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. If the amounts of collection and payment differ by at least \$100,000, the Commission must adopt an automatic adjustment clause to account for the difference.

Senate Bill 408 restricts the use of information submitted in the tax reports. Finding that the tax information of any business is commercially sensitive, the Oregon Legislative Assembly prohibited the Commission's use of tax reports for any purpose not related to Senate Bill 408. *See* Sections 2(g) and 3(11). Moreover, the legislature clarified that intervenors in a Commission proceeding to review the tax report or make rate adjustments may have access to the information only "upon signing a protective order prepared by the Commission." Section 3(11).

On October 15, 2005, the four utilities filed the tax reports and designated almost all of the information provided as confidential. The Commission staff (Staff) examined the reports and concluded that, for each utility, the amounts collected and paid differed by more than \$100,000 in one or more years. At its November 22, 2005 public meeting, the Commission ordered each utility to make an automatic adjustment clause filing and opened these dockets under ORS 757.210.

PROTECTIVE ORDER

At this juncture, the Commission must determine the form of the protective order that, upon signing, will give intervenors access to the tax reports pursuant to Section 3(11) cited above. Citing the sensitivity of the information contained in the tax reports and the risk of its public disclosure, the utilities seek a protective order that would impose additional protection for information designated as "highly confidential." The utilities explain that this information is limited to that contained in the tax reports and supporting information containing tax data and analyses.

Under the utilities' proposal, intervenors would review documents containing highly confidential information in "safe rooms" provided at offices in Portland. Access to the safe rooms would require 24-hour advance notice and the utilities may require the presence of a monitor. The safe rooms would be available Monday through Friday, between the hours of 9 a.m. and noon and 1 p.m. and 5 p.m., excluding holidays. Moreover, intervenors would be allowed to take limited notes, but not make copies.

The utilities further proposed that a separate safe room be established in Salem for the Commission staff (Staff). Documents in the Salem safe room would be secured in a locked cabinet in a designated room at the Commission, and one person designated by Staff would control the key to the cabinet and record Staff's review of the documents, including the time, date, and nature of the review.

ICNU and NWIGU oppose the utilities' request. Both contend that the proposed safe room discovery procedures are unduly burdensome and would significantly impair the intervenors' ability to participate and contribute in these proceedings. ICNU adds that the restrictions are unworkable for consultants who reside outside Portland, noting that it intends to hire a consultant based in St. Louis, Missouri, who appeared on behalf of ICNU in PacifiCorp's recently completed rate case. ICNU also claims that the presence of a monitor to oversee review of the documents may violate the attorney-client privilege and/or work product doctrines.

ICNU and NWIGU contend that the Commission's standard protective order is sufficient to protect against unauthorized disclosure of the tax reports and supporting data. ICNU even proposes two amendments to the general protective order to address some of the utilities' concerns: (1) adopt the utilities' suggestion to apply the protective order in docket AR 499, as well as these cases; and (2) limit access under the order to only those entities granted party status in the automatic adjustment proceedings at the December 9, 2005 prehearing conference (ICNU, NWIGU, and the Citizens' Utility Board.)

If additional protection is required, ICNU proposes—and NWIGU supports—the use of a modified protective order modeled after an agreement used to govern access to highly confidential information in Docket No. UM 1209, *In the Matter of Mid-American Energy Holding Company's Application to Acquire PacifiCorp*. This modified protective order would limit access to the highly confidential information to no more than two counsel and one consultant designated by the intervenor. Designated counsel would be provided one copy of the documents containing the highly confidential information and may make only one copy for the designated consultant. Finally, all copies of the documents would be returned at the end of the proceeding on written request by the disclosing party.

In response, the utilities contend that the additional protection is necessary, given the sensitivity of information contained in the tax reports and the failure of the standard protective order to protect confidential information from unauthorized public disclosure. They maintain that the safe room procedures, while presenting minor inconveniences, are not unduly burdensome. The utilities also explain that they will make efforts to facilitate access to the safe rooms on less than 24-hour notice and intervenors may protect attorney-client communications simply by stepping outside the safe room to discuss privileged matters. Moreover, in response to concerns raised by ICNU regarding use of the information in testimony, the utilities agree to include Bates numbers on all documents so that intervenors may easily reference any page they want to use as an exhibit. Once referenced, the utilities will then file, under seal, copies of the designated information with the Commission.

DISCUSSION

No party questions the sensitivity of the information contained in the SB 408 tax reports or the harm presented by its public release. Indeed, as noted above, the Legislative Assembly expressly recognized that the tax information of any business is commercially sensitive and that its disclosure could harm the party producing the information. Based on this finding and other provisions of SB 408, the Commission has concluded that the confidential information contained in the tax reports is 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). Another state law, ORS 314.835, criminally punishes the public disclosure of income tax information.

The utilities are asked to produce this sensitive information at a time when uncertainty exists as to the effectiveness of the Commission's general protective order, particularly in highly politicized and publicized cases. Approximately one year ago, hundreds of pages of confidential documents covered by a protective order in a Commission proceeding were illegally provided to a Portland newspaper. The leaked information was subsequently published in print media and broadcast by television and radio stations. At the time of the disclosure, we predicted the unlawful actions might impair the work of the Commission, "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 Texas Pacific Group's Application to Acquire PacifiCorp*, Docket No. UM 1121, Order No. 05-114 at 9. Although the Attorney General is investigating the violation of that protective order, we have not, as yet, been able to identify the party that violated our order.

Given the significant harm that might occur from the disclosure of the tax information and the regrettable risk of disclosure that now exists, we have no choice but to adopt a safe-room discovery mechanism to govern the use of highly confidential information in these dockets. This decision does not reflect on the integrity of any attorney or other person involved in these proceedings, but simply results from the fact that, absent the safe-room protection, we cannot provide reasonable assurance that the utilities' highly sensitive tax information will be protected.

We acknowledge the inconvenience imposed by the use of a safe room, and make several modifications to the utilities' proposal to address the concerns raised by ICNU and NWIGU concerning the ability to participate and contribute in these proceedings. First, the utilities may only designate the protected portions of the SB 408 tax reports and documents that contain the tax data and analysis as "Highly Confidential Information." While the utilities have explained the need for additional protection is limited to these documents, their proposal is overly broad by allowing the designation of any information requested in discovery as highly confidential. Moreover, we note that any party may challenge such a heightened designation, at which time the designating utility will bear the burden of establishing that the information is properly subject to additional protection.

Second, the utilities must make all the designated "Highly Confidential Information" available for review in a single safe room in Portland, rather than four separate locations identified by each utility. The utilities must designate the location of this safe room and, within five business days of the date of this order, notify the Commission and all intervenors of the location.

Third, the utilities shall designate one person to receive notice regarding appointments to view the "Highly Confidential Information" in the Portland safe room, and to coordinate all necessary activities among the utilities, including the scheduling of any required monitors. Due to this consolidation, we will not reduce the need for 24 hour

advance notice to access the safe rooms, but encourage the utilities to facilitate access on even shorter notice when safe room monitors can be made available more quickly.

Fourth, to ensure that the presence of a monitor does not violate attorney-client privilege or work product protected communications, the utilities must provide a private conference room adjacent to the safe room to allow discussions among or between intervenor's counsel and consultants.

While these modifications will reduce the inconvenience imposed by the safe room discovery procedures, we recognize that they do not fully address the concern raised by ICNU relating to its use of an out-of-state consultant. We encourage the utilities to work with ICNU to determine whether special arrangements may be made to accommodate the needs of the consultant based in St. Louis, Missouri. Because of the consultant's familiarity with the many issues related to the tax issue in Oregon, we also would entertain a request for increased intervenor funding to cover additional expenses resulting from the requirements imposed by the modified protective order.

We acknowledge that the safe room discovery procedures may extend the time needed by the intervenors to review and obtain information required for them to contribute to the record in these proceedings. Accordingly, we will ensure that additional time is provided in the procedural schedule to help compensate for the additional time necessary to make multiple trips to the safe rooms to review discovery.

Finally, we clarify that the protective order issued here only governs access to the tax reports and related information in dockets UE 177, UE 178, UG 170 and UG 171. While the utilities and intervenors believe this protective order should also be used in docket AR 499—the pending proceeding to adopt rules required to implement SB 408—they fail to recognize inherent differences between rulemaking and contested case proceedings that preclude the use of a single protective order. Most obviously, a rulemaking proceeding, by definition, has no intervenors and no formal discovery. It is a legislative proceeding, not a judicial one. The applicability of a protective order in such a proceeding will, if necessary, be separately addressed in that docket.

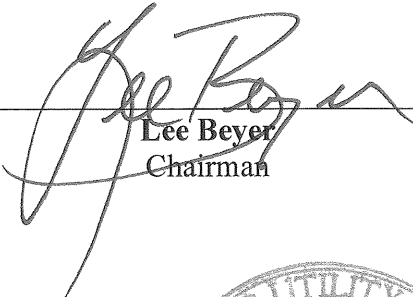
CONCLUSION

There is no dispute that the public disclosure of the tax information required by SB 408 could seriously harm the producing utility. Furthermore, the risk of such disclosure is, unfortunately, uncontrollable by this Commission without the use of a safe room discovery mechanism. Accordingly, we grant the utilities' request for heightened protection of "Highly Confidential" information, but make modifications to their proposal to reduce inconvenience to intervenors and to ensure their ability to participate and contribute in these proceedings. However, we emphasize that the circumstances surrounding this request are unique, and that this order should not be used as general precedent in support of the use of a safe-room discovery mechanism.

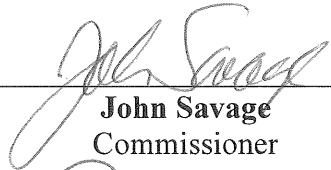
ORDER

IT IS ORDERED that the joint motion for a modified protective order, filed by Avista Corporation, Northwest Natural Gas Company, PacifiCorp and Portland General Electric Company, is granted in part. The protective order, attached as Appendix A, shall govern the disclosure of confidential and highly confidential information in these four dockets.

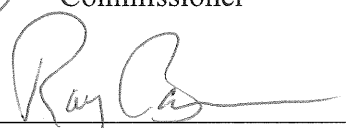
Made, entered, and effective JAN 25 2006.



Lee Beyer
Chairman



John Savage
Commissioner



Ray Baum
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.

PROTECTIVE ORDER

DOCKETS NO. UE 177, UE 178, UG 170 & UG 171

Scope of this Order-

1. This order governs the acquisition and use of “Confidential Information” and “Highly Confidential Information” in these proceedings.

Definitions-

2. “Confidential Information” is information that falls within the scope of ORCP 36(C)(7) (“a trade secret or other confidential research, development, or commercial information”). “Highly Confidential Information” is information contained in the Senate Bill 408 tax reports and other documents containing tax data or analysis that has been designated as such by the providing utility.

3. A “qualified person” is an individual who is:
- a. An author(s), addressee(s), or originator(s) of the Confidential Information;
 - b. A Commissioner or Commission staff;
 - c. Counsel of record for a party;
 - d. A person employed directly by counsel of record; or
 - e. A person qualified pursuant to paragraph 10. This includes parties and their employees.

Designation of Confidential Information-

4. A party providing Confidential Information shall inform other parties that the material has been designated confidential by placing the following legend on the information:

CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER

To the extent practicable, the party shall designate as confidential only those portions of the document that fall within ORCP 36(C)(7).

5. A party may designate as confidential any information previously provided by giving written notice to the other parties. Parties in possession of newly designated Confidential Information shall, when feasible, ensure that all copies of the information bear the above legend to the extent requested by the party desiring confidentiality.

Confidential Information Given to the Commission-

6. Confidential Information that is: (a) filed with the Commission or its staff; (b) made an exhibit; (c) incorporated into a transcript; or (d) incorporated into a pleading, brief, or other document, shall be printed on yellow paper, separately bound and placed in a sealed envelope or other appropriate container. An original and five copies each separately sealed shall be provided to the Commission. Only the portions of a document that fall within ORCP 36(C)(7) shall be placed in the envelope/container. The envelope/container shall bear the legend:

THIS ENVELOPE IS SEALED PURSUANT TO ORDER
NO. _____ AND CONTAINS CONFIDENTIAL
INFORMATION. THE INFORMATION MAY BE SHOWN
ONLY TO QUALIFIED PERSONS AS DEFINED IN THE
ORDER.

7. The Administrative Hearings Division shall store the Confidential Information in a locked cabinet dedicated to the storage of Confidential Information.

Disclosure of Confidential Information-

8. Parties desiring receipt of Confidential Information shall sign the Consent to be Bound Form attached as Appendix B. This requirement does not apply to the Commission staff. Confidential Information shall not be disclosed to any person other than a "qualified person," as defined in paragraph 3. Confidential Information shall be delivered to counsel.

9. Qualified persons may disclose confidential information to any other qualified person, unless the party desiring confidentiality protests as provided in Section 11.

10. To become a qualified person under paragraph 3(e), a person must:

- a. Read a copy of this Protective Order;
- b. Execute a statement acknowledging that the order has been read and agreeing to be bound by the terms of the order;
- c. Date the statement;
- d. Provide a name, address, employer, and job title; and
- e. If the person is a consultant or advisor for a party, provide a description of the nature of the person's consulting or advising practice, including the identity of his/her current, past, and expected clients.

Counsel shall deliver a copy of the signed statement including the information in (d) and (e) above to the party desiring confidentiality and to all parties of record. Such notification may be made via e-mail or facsimile. A person qualified under paragraph 3(e) shall not have access to Confidential Information sooner than five (5) business days after receipt of a copy of the signed statement including the information in (d) and (e) above by the party desiring confidentiality.

11. All qualified persons shall have access to Confidential Information, unless the party desiring confidentiality protests as provided in this paragraph. The party desiring to restrict the qualified person(s) from accessing specific Confidential Information must provide written notice to the qualified person(s) and counsel for the party associated with the qualified person(s) as soon as the party becomes aware of reasons to restrict access. The parties must promptly confer and attempt to resolve any dispute over access to Confidential Information on an informal basis before filing a motion with the Administrative Law Judge. If the dispute cannot be resolved informally, either party may file a motion with the Administrative Law Judge for resolution. Either party may also file a motion if the other party does not respond within five days to a request to resolve the dispute. A motion must describe in detail the intermediate measures, including selected redaction, explored by the parties and explain why such measures do not resolve the dispute. After receipt of the written notice as required in this paragraph, the specific Confidential Information shall not be disclosed to the qualified person(s) until the issue is resolved.

Designation of Highly Confidential Information-

12. The utilities have the right, at their option, to designate documents as containing "Highly Confidential Information" and to refuse to provide copies to the requesting party. These documents shall be printed on green paper and placed in a sealed envelope or other appropriate container. All documents designated as containing Highly Confidential Information shall be made available for inspection and review by qualified persons at a location in Portland ("Portland safe room"). The utilities shall designate the location of the Portland safe room within (5) five business days of the date of this order.

Access to the Portland safe room requires an appointment. A qualified person may make an appointment to review Highly Confidential Information during the following office hours: Monday through Friday, between the hours of 9 a.m. and noon and 1 p.m. and 5 p.m., excluding holidays. Notice of an appointment must be in writing, and received by mail, e-mail or facsimile, by the primary person designated by utilities, at least 24 hours in advance of the requested safe room appointment. The utilities will notify all parties to contact a secondary person if the primary person is unavailable to receive notice. A utility whose information is requested may require the presence of a monitor. The utilities shall designate a primary and a secondary person to receive notice within (5) five business days of the date of this order.

13. Each utility shall deliver a copy of all documents designated as containing Highly Confidential Information to the Commission. These documents shall be printed on green paper and placed in a sealed envelope or other appropriate container. These documents

will be available for inspection and review by the Commission Staff only at a safe room located in the offices of the Commission ("Salem safe room"). The documents in the Salem safe room will be secured in a locked cabinet in a specially designated area at the Commission. One person designated by Staff will control the key to the locked cabinet and maintain a log stating the names of Staff persons reviewing documents located in the Salem safe room, the time and date of such review, and listing the documents reviewed. A second person will also be designated by Staff in the event the primary person is unavailable.

14. Qualified persons are not authorized to, and shall not make, copies of any document designated as containing Highly Confidential Information. Qualified persons reviewing the highly confidential documents may make limited notes regarding the documents for reference purposes only. Such notes shall not constitute a verbatim or substantive transcript of the documents, and shall be considered Confidential Information subject to the terms of this protective order.

15. Disputes between the parties regarding the proper designation of documents containing Highly Confidential Information shall be resolved pursuant to paragraph 20 of this protective order.

16. Each utility shall Bates number all documents designated as containing Highly Confidential Information so that any party may reference any page it wants to use as an exhibit to testimony. Once referenced, the applicable utility will file a copy of the document with the Commission's Administrative Hearings Division. All such copies must be printed on green paper, sealed in an envelope or other appropriate container, and contain the following legend:

THIS ENVELOPE IS SEALED PURSUANT TO
ORDER NO. _____ AND CONTAINS HIGHLY
CONFIDENTIAL INFORMATION REFERENCED IN
_____(Party)____ TESTIMONY AT (Applicable Cite) .

Preservation of Confidentiality-

17. All persons who are given access to any Confidential or Highly Confidential Information by reason of this order shall not use or disclose such information for any purpose other than the purposes of preparation for and conduct of these proceedings, and shall take all reasonable precautions to keep all Confidential or Highly Confidential Information secure. Unauthorized disclosure of Confidential or Highly Confidential Information is strictly prohibited.

Qualified persons may copy, microfilm, microfiche, or otherwise reproduce Confidential Information to the extent necessary for the preparation and conduct of these proceedings. Qualified persons may disclose Confidential Information only to other qualified persons associated with the same party. No party may make copies of Highly Confidential Information without written permission from the designating utility.

Duration of Protection-

18. The Commission shall preserve the confidentiality of Confidential Information and Highly Confidential Information for a period of five years from the date of the final order in this docket, unless extended by the Commission at the request of the party desiring confidentiality. The Commission shall notify the party desiring confidentiality at least two weeks prior to the release of information.

Destruction After Proceeding-

19. Counsel of record may retain memoranda, pleadings, testimony, discovery, or other documents containing Confidential Information to the extent reasonably necessary to maintain a file of this proceeding or to comply with requirements imposed by another governmental agency or court order. The information retained may not be disclosed to any person. Any other person retaining Confidential Information or documents containing such Confidential Information must destroy or return it to the party desiring confidentiality within 90 days after final resolution of this proceeding unless the party desiring confidentiality consents, in writing, to retention of the Confidential Information or documents containing such Confidential Information. This paragraph does not apply to the Commission or its Staff.

Appeal to the Presiding Officer-

20. If a party disagrees with the designation of information as confidential or highly confidential, the party shall contact the designating party and attempt to resolve the dispute on an informal basis. If the parties are unable to resolve the dispute, the party desiring to use the information may move for exclusion of the information from the protection conferred by this order. The motion shall:

- a. Specifically identify the contested information (with reference to Bates number, if applicable), and
- b. The reasons why the information does not:
 - A. Fall within ORCP 36(C)(7) (for Confidential Information); or
 - B. Qualify for additional protection (for Highly Confidential Information).

The designating party has the burden of showing that the challenged information falls within ORCP 36(C)(7) or the scope of this order. If the party resisting disclosure does not respond to the motion within ten (10) calendar days, the challenged information shall be removed from the protection of this order.

The information shall not be disclosed pending a ruling by the Administrative Law Judge on the motion.

Additional Protection-

21. Any party may request additional protection for any Confidential Information by filing a motion for any of the remedies set forth in ORCP 36(C). The motion shall state:

- a. The parties and persons involved;
- b. The exact nature of the information involved;
- c. The exact nature of the relief requested;
- d. The specific reasons the requested relief is necessary;
and
- e. A detailed description of the intermediate measures, including selected redaction, explored by the parties and why such measures do not resolve the dispute.

The information need not be released and, if released, shall not be disclosed pending the Commission's ruling on the motion.

SIGNATORY PAGE

DOCKETS NO. UE 177, UE 178, UG 170 & UG 171

I. Consent to be Bound-

This Protective Order governs the use of "Confidential" and "Highly Confidential" information in these proceedings.

_____ (Party) agrees to be bound by its terms of this Protective Order.

By: _____
Signature & Printed Date

II. Persons Qualified pursuant to Paragraphs 3(a) through 3 (d)

_____ (Party) identifies the following person(s) automatically qualified under paragraph 3(a) through (d).

_____	_____
Printed	Date
_____	_____
Printed	Date
_____	_____
Printed	Date
_____	_____
Printed	Date
_____	_____
Printed	Date
_____	_____
Printed	Date

SIGNATORY PAGE

DOCKETS NO. UE 177, UE 178, UG 170 & UG 171

III. Persons Qualified pursuant to Paragraph 3(e) and Paragraph 10.

I have read the Protective Order, agree to be bound by the terms of the order, and will provide the information identified in paragraph 10.

By: _____

Signature & Printed

Date

By: _____

Signature & Printed

Date

By: _____

Signature & Printed

Date

By: _____

Signature & Printed

Date