

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 177

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

**DISPOSITION: PETITION TO AMEND PROTECTIVE ORDER
DENIED**

On December 14, 2007, the Industrial Customers of Northwest Utilities (ICNU) filed an expedited motion to modify Protective Order No. 06-033 with respect to PacifiCorp in docket UE 177. That order requires 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. Because the Protective Order precludes its out-of-state consultant from viewing or possessing PacifiCorp’s tax report, work papers, and discovery information outside the Portland safe-room, ICNU claims it is unable to effectively participate in this proceeding.

On December 21, 2007, PacifiCorp filed a response in opposition to ICNU’s motion. PacifiCorp contends that ICNU’s motion simply reiterates the earlier arguments made in opposition to the Protective Order and provides no new justification to amend the measures adopted to protect highly confidential tax information. PacifiCorp adds that any obstacles to ICNU’s participation in this proceeding have largely been the result of ICNU’s own failure to engage in timely discovery. For these reasons, PacifiCorp contends that ICNU’s motion should be denied.

We treat ICNU’s request as a petition to amend an order pursuant to ORS 756.568 and, for the reasons set forth below, deny it.

INTRODUCTION

ICNU Motion

ICNU seeks an amendment to the Protective Order with respect to its review of PacifiCorp's tax report and supporting documents. ICNU claims that the safe-room procedures are unworkable and, absent modification, will prevent it from meaningfully participating in this docket.

ICNU identifies three primary factors it claims will preclude it from producing effective testimony. First, because it was unable to obtain a qualified local tax consultant, ICNU hired a consultant based in Corpus Christi, Texas. ICNU contends that the safe-room procedures, which prohibit any party from viewing or possessing the highly confidential information outside a safe room located in Portland, Oregon, impose an undue burden on its out-of-state consultant. ICNU adds that requiring its consultant to frequently travel to and spend time in Portland is cost prohibitive for its members.

Second, ICNU contends that the constant presence of a monitor makes it impossible for ICNU's counsel and its consultant to have frank and candid conversations regarding the highly confidential documents. While the monitor may be asked to leave the room for private discussions, ICNU explains that the monitor is required to remove the highly confidential documents as well. Consequently, ICNU states the consultant cannot explain PacifiCorp's tax filing to ICNU's counsel using the documents as reference for fear of revealing sensitive attorney-client and work product privileged information.

Third, ICNU claims that these logistical difficulties are exacerbated by the complexity of PacifiCorp's tax report and the time constraints involved. Although its consultant spent three separate days in the Portland safe room examining PacifiCorp's tax report in early December, ICNU contends that the consultant was unable to make significant progress in preparing a case due to PacifiCorp's corporate structure and the hundreds of other companies owned by ScottishPower and Berkshire Hathaway. Without frequent access to the highly confidential documents, ICNU argues that its consultant will not be able to fully review and understand PacifiCorp's consolidated tax filing in time to prepare opening testimony currently due on January 22, 2008.¹

Because it has been unable to reach an informal agreement with PacifiCorp on this matter, ICNU filed this motion to amend Order No. 06-033. It asks that the Protective Order be amended to allow its consultant possession of copies of all PacifiCorp's highly confidential documents or, alternatively, to require PacifiCorp to establish a safe room closer to its consultant's place of business, such as Houston, Texas.

¹ ICNU also questions whether the safe-room restrictions will effectively prevent any party from filing testimony in this docket, as the possession of testimony outside the safe room is, by itself, a violation of the Protective Order. ICNU raises the valid question as to how parties will be able to reference the highly sensitive tax information in a manner that also provides for its protection. We ask the utilities to discuss this issue with the other parties and propose an appropriate means of referencing the highly sensitive information in testimony.

PacifiCorp Response

PacifiCorp responds that the safe-room discovery procedures are necessary and justified in these dockets, particularly with respect to its consolidated filing that contains tax information from hundreds of unregulated third parties that are part of the Berkshire Hathaway consolidated tax group. It emphasizes that the Commission must provide reasonable assurances that the utilities' tax data will be protected from disclosure and contends that the Commission cannot meet that mandate without safe-room protection.

PacifiCorp views ICNU's motion as an untimely request for reconsideration of Order No. 06-033, and notes that the Commission has already considered the inconveniences cited by ICNU when it adopted the challenged Protective Order. PacifiCorp states that, in that decision, the Commission weighed the limitations imposed by the safe room against the risk and harm of disclosure and concluded that the heightened protection was necessary to protect the highly sensitive information.

PacifiCorp adds that any infeasibility claimed by ICNU in producing effective testimony is the result of ICNU's delay in engaging this case, not the requirements of the Protective Order. PacifiCorp states that, while Staff immediately commenced its review, ICNU failed to review the tax report until December 3, 2007, more than six weeks after the report and supporting documents were made available for review in the Portland safe room. Moreover, PacifiCorp adds that ICNU failed to attend either of the two November workshops scheduled by the Commission Staff. PacifiCorp explains that, at those workshops, it discussed the tax report with Staff and other parties and reviewed the utility's responses to Staff's data requests.

PacifiCorp also states that it has made reasonable efforts to accommodate ICNU's discovery requests. It explains that, while PacifiCorp made its tax expert available on December 4, 2007, to discuss the tax report with the out-of-state consultant, ICNU concluded the meeting early and did not request an overview or general explanation of the tax report. Furthermore, on December 5, 2007, ICNU asked if its consultant could be allowed to take copies of "requested pages from the tax report and work papers" to Texas, but failed to identify what pages it was requesting. PacifiCorp adds that it agreed to provide ICNU copies of documents that did not contain tax data of unregulated third parties, such as PacifiCorp's regulated tax data, information related to the stand-alone calculations in the tax report, and information related to the taxes collected calculation. According to PacifiCorp, however, ICNU was unwilling to identify a list of specific pages and, instead, requested copies of all safe-room documents.

ICNU Reply

ICNU filed a motion for leave to reply to PacifiCorp's response. Although our procedural rules do not allow for the filing of such a reply, we grant ICNU's request to provide additional information as to the intervenor's conduct in this proceeding.

ICNU disputes the claim that it has not made a good-faith effort to participate in this case. First, ICNU explains that it had scheduling conflicts with the two November workshops held by Staff. Due to this fact, ICNU states it decided to schedule its own workshop with PacifiCorp when its consultant was available on December 4, 2007.

Second, ICNU contends that its efforts cannot be fairly compared to that of Staff's, which has on-site access to PacifiCorp's tax report in a Salem safe room. ICNU states that the Protective Order simply does not afford ICNU the same access that Staff has to PacifiCorp's tax information.

Finally, ICNU claims that it made every attempt to locate a qualified local consultant, and made every attempt to access PacifiCorp's tax report as soon as possible. ICNU adds that the timing of its consultant's visit to the Portland safe room is irrelevant to the issue of cost, and explains that the same prohibitive costs would exist had its consultant been hired in October as opposed to November.

DISCUSSION

Senate Bill 408, codified primarily as ORS 757.268, requires PacifiCorp and three 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. If the amounts of collection and payment differ by at least \$100,000, the Commission must order the utility to establish an automatic adjustment clause to account for the difference.

Access to this tax information has been frequently addressed by this Commission. In enacting SB 408, 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, we have concluded that the confidential information contained in the tax reports is privileged under state law and protected from public 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).

In Order No. 06-033, we addressed how to make this information available to allow the auditing and verification of the utility tax reports. Over the objection of ICNU and another intervenor, we adopted a heightened Protective Order to govern the use of and access to tax information designated as “highly confidential.” Due to the significant harm that might occur from the disclosure of this tax information, as well as the regrettable risk of disclosure, we concluded that we had no choice but to limit intervenors’ review of documents containing highly confidential information to a safe room located in Portland.

In our decision, we acknowledged the inconvenience imposed by the use of a safe room. We concluded, however, that the potential harm of the public release of the highly confidential information outweighed the inconvenience to parties. We did, however, add to the Protective Order other provisions to ensure the intervenors’ ability to participate and contribute in the review and auditing of the tax reports. First, we restricted the type of information that the utilities may designate as “highly confidential.” Second, we required the four affected utilities to make all the confidential information available for review in a single safe room in Portland. Third, we required the utilities to designate one person to coordinate all scheduling matters, and encouraged the utilities to facilitate access if requested on less than 24-hour notice. Fourth, to ensure that the presence of a monitor does not violate attorney-client privilege or work product protected communications, we required the utilities to provide a private conference room adjacent to the safe room to allow discussions among or between intervenor’s counsel and consultants. Finally, we recognized the difficulties presented by the use of an out-of-state consultant, encouraged the utilities to make special arrangements to address such situations, and indicated that we would entertain a request for increased intervenor funding to cover additional expenses. *See* Order No. 06-033 at 4-5.

ICNU now renews many of its arguments raised earlier in its objection to the Protective Order adopted in Order No. 06-033. We find no need to readdress them here, except to note we have already approved ICNU’s request for increased intervenor funding based, in part, on its stated need to cover additional expenses resulting from the Protective Order. *See* ICNU Proposed Budget for Issue Fund Grant (Dec. 5, 2007); Order No. 07-576. Under the terms of the intervenor funding agreement, ICNU may file an amendment of its approved budget and request additional funding for good cause shown. *See* Order No. 07-564, Attachment A, Article 6.7.

We are not persuaded that the other arguments raised by ICNU warrant an amendment to the Protective Order. Granted, PacifiCorp’s filing is complex due to the utility’s inclusion in Berkshire Hathaway’s consolidated tax group. This fact, however, actually increases the need for heightened protection. The harm resulting from any disclosure—whether intentional or inadvertent—has increased, as PacifiCorp’s tax report now contains sensitive tax information from the hundreds of unregulated companies that are included in Berkshire Hathaway’s consolidated filing.

Furthermore, 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. We find that ICNU has failed to make this showing. ICNU was aware that PacifiCorp would make its tax filing on October 15, 2007, and that the terms of the Protective Order required review of that report in the Portland safe room. ICNU was also aware that SB 408 provides the parties and the Commission with a relatively short amount of time in which to review the tax reports, and agreed to a procedural schedule requiring intervenors to file opening testimony on January 22, 2008. Despite this knowledge, ICNU did not retain a consultant—local or otherwise—until after the tax report was filed. ICNU also failed to participate in two informal workshops conducted by Staff, and did not visit the Portland safe room to review the tax report until December. Furthermore, based on PacifiCorp’s un rebutted assertions, ICNU also cut short a December 4, 2007, meeting between its consultant and PacifiCorp, did not request an overview or general explanation of PacifiCorp’s tax report, and failed to take advantage of PacifiCorp’s offer to provide copies of documents that did not contain tax data of unregulated third parties.

Based on these actions, we find that ICNU’s claim that it does not have sufficient time to review PacifiCorp’s tax report and prepare effective testimony is not persuasive. Given ICNU’s awareness of the safe-room restrictions, the complexity of PacifiCorp’s corporate structure, and the SB 408 time constraints, ICNU could have acted earlier in hiring a consultant and commenced discovery immediately after PacifiCorp filed its report. We agree with PacifiCorp that the protections afforded the highly confidential tax information should not be compromised because ICNU waited so long to become fully engaged in this docket.

We reach this decision without comparison to Staff’s own discovery efforts. We note, however, that given that ICNU was subject to additional restrictions not applicable to Staff, ICNU arguably should have been more aggressive than Staff—not less—in making necessary arrangements to ensure its ability to timely review PacifiCorp’s filing.

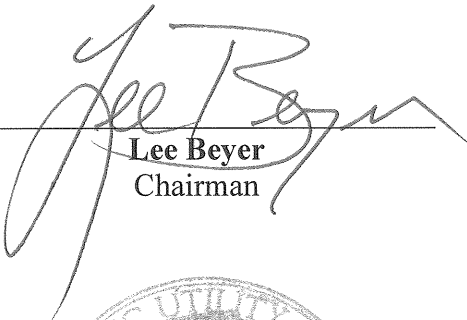
CONCLUSION

We adhere to our prior conclusion that the safe-room discovery mechanism is required to protect the highly confidential tax information contained in PacifiCorp’s tax report and supporting information. ICNU has failed to provide an adequate basis to amend or eliminate those safeguards. Accordingly, ICNU’s petition to amend Order No. 06-033 is denied.

ORDER

IT IS ORDERED that the petition to amend Order No. 06-033, filed by the Industrial Customers of Northwest Utilities, is denied.

Made, entered, and effective JAN 03 2008.



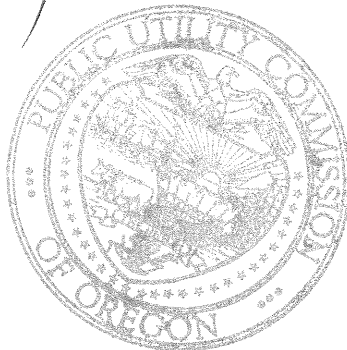
Lee Beyer
Chairman



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.