

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UE 177

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

ORDER

DISPOSITION: CERTIFICATION GRANTED; RULING AFFIRMED

In this order, we review an evidentiary ruling made by the presiding Administrative Law Judge (the ALJ) to strike testimony as irrelevant to this proceeding. For the reasons stated below, we affirm the ALJ’s ruling in its entirety.

**Background**

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). On February 19, 2008, PacifiCorp, dba Pacific Power (Pacific Power) 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 several portions of (ICNU/100, Blumenthal/1—15), on the grounds that the testimony consists of irrelevant arguments that attack the validity of OAR 860-022-0041.<sup>1</sup> PacifiCorp also requested that the Commission strike other portions of (ICNU/100, Blumenthal/1—15), on the grounds that the testimony consists of irrelevant arguments that challenge the Protective Order in this proceeding.

By Ruling of March 3, 2008, the ALJ granted the PacifiCorp Motion in its entirety, noting:

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

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

SB 408,’ and that ‘none of the calculation methodologies required by OAR 860-022-0041 are actual tax calculations.’<sup>2</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>3</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>4</sup>

... 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.

On March 13, 2008, ICNU filed a Motion of Expedited Certification (Cert. Motion) asking the ALJ to certify his Ruling to the Commission. OAR 860-014-0091 provides that a ruling of the ALJ may not be appealed during the proceeding except where the ALJ certifies the question to the Commission upon a finding that the challenged ruling “(a) May result in substantial detriment to the public interest or undue prejudice to any party; or (b) Denies or terminates any person’s participation.” Although the ALJ did not make such a finding in this instance, due to the statutorily-mandated time constraints of this proceeding and in order to truncate the litigation process to avoid further delay, the Commission has nevertheless agreed to review the ICNU Cert. Motion so that the issue need not be reargued in the parties’ briefs.

ICNU claims that the Ruling striking portions of the Blumenthal Testimony is in error because it deprives the Commission of a complete record and

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<sup>2</sup> ICNU/100, Blumenthal/3.

<sup>3</sup> ICNU/100, Blumenthal/4, 6-7.

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

makes it impossible for ICNU to present its case.<sup>5</sup> ICNU further claims that the ALJ erred in ruling that the stricken portions of the testimony were irrelevant.<sup>6</sup> ICNU also claims that it was denied due process because it lacked sufficient time to respond to the Motion.<sup>7</sup> Finally, ICNU argues that the Commission has allowed similar testimony, saying “there is a fine line between testimony and legal argument.”<sup>8</sup>

## Discussion

We have reviewed the Ruling, the Briefs on the PacifiCorp Motion, the Blumenthal Testimony and the Cert. Motion and affirm the ALJ’s March 3, 2008, Ruling in its entirety.

The first portion of the stricken Blumenthal Testimony constitutes a collateral attack upon the decisions reached in the rulemaking proceedings leading up to the adoption of the language now contained in OAR 860-022-0041. ICNU argues that the testimony should be admitted because “These are facts not apparent from an interpretation of the Commission’s rules *that are necessary to any legal argument challenging the Commission’s rules.*”<sup>9</sup> 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.

In striking the testimony, the ALJ noted that legal argument related to the Commission’s interpretation of SB 408 could properly be made in briefs. Obviously, the ALJ was referring to the well-established principle that legal argument *per se*, belongs in briefs and not in the testimony of non-lawyer witnesses. The record in the proceeding is not enhanced nor is the public interest served by having a non-lawyer witness opine about the alleged failings of a rule’s interpretation of a statute in a prior proceeding. The ALJ properly struck this testimony.

Although ICNU asks that the stricken Blumenthal Testimony be received into the Record in its entirety, ICNU makes no argument in support of ICNU/100, Blumenthal p. 12, l. 5—p. 15, l. 2 which challenged the terms of the Protective Order. We have reviewed the record with respect to that testimony, and affirm the ALJ’s Ruling.

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<sup>5</sup> Cert. Motion, pp. 4-6.

<sup>6</sup> *Id.*, pp. 9-10.

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

<sup>8</sup> *Id.*, p. 12.

<sup>9</sup> *Id.*, p. 7, emphasis added.

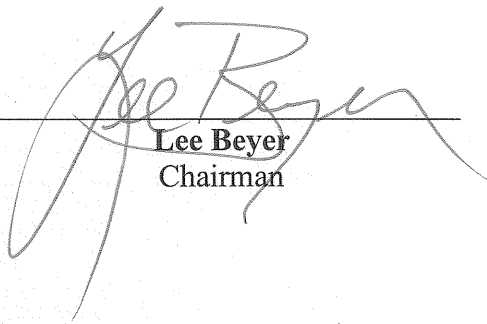
We also find that ICNU was not denied due process in responding to Pacific Power's motion to strike. Stating that it did not know it was required to respond to the Motion until two days after it received the Motion, ICNU asserts that the ALJ's statement that ICNU had a week to respond was an "inaccurate assessment of time." ICNU avoids the obvious: as soon as a party has a motion served upon it, it is aware that it has the opportunity to answer. Given the time constraints of the proceeding, the ALJ had little choice but to require the parties to be prompt and diligent in filing their responses. Furthermore, ICNU filed a response that was lengthy and citation-filled, a fact noted by the ALJ as indicative of adequate time in which to respond.


**ORDER**

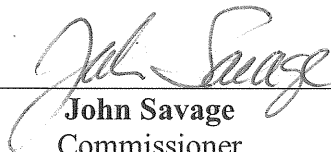
The ALJ's Ruling of March 3, 2008, is **AFFIRMED** in all respects.

Prefiled Testimony offered by the Industrial Customers of Northwest Utilities identified as (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; p. 9, l. 3—p. 12, l. 4., and p. 12, l. 5—p. 15, l. 2, is **STRICKEN FROM THE RECORD**.

Made, entered and effective MAR 20 2008.

  
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**Lee Beyer**  
Chairman

  
\_\_\_\_\_  
**Ray Baum**  
Commissioner

  
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**John Savage**  
Commissioner

