ORDER NO. 09-126

ENTERED 04/10/2009

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 178(1)

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY, SB 408 Tax Report for Calendar Year 2007.	ORDER

DISPOSITION: STIPULATION ADOPTED; AUTOMATIC ADJUSTMENT CLAUSE ESTABLISHED

I. INTRODUCTION

In this order, the Public Utility Commission of Oregon (Commission) approves a stipulation that resolves all issues relating to the tax report for calendar year 2007 filed by Portland General Electric Company (PGE) in compliance with Senate Bill 408 (SB 408). The stipulation authorizes PGE to implement a surcharge of $14.9 million for state and federal taxes, plus interest, and requires PGE to refund $200,000 in local taxes.

SB 408, primarily codified at ORS 757.268, requires utilities to true up any differences between income taxes authorized to be collected in rates from customers and income taxes actually paid to units of government that are "properly attributed" to utilities' regulated operations.[1] Utilities must make annual tax filings reporting these amounts on October 15 of each year. If amounts collected and amounts paid differ by $100,000 or more, then the Commission must order the utility to establish an automatic adjustment clause to account for the difference, with a rate adjustment effective June 1 of each year.[2]

II. PROCEDURAL HISTORY

On October 15, 2008, PGE filed its annual tax report for calendar year 2007 (2007 Tax Report). In the 2007 Tax Report, PGE stated that the amount of state, federal, and local taxes paid and properly attributed to its regulated Oregon operations was approximately $14.6 million more than the amount of taxes PGE collected in rates. PGE sought to collect this difference, plus interest, as a surcharge to customers through an automatic adjustment clause under ORS 757.268(6).

[1] ORS 757.268(4).
[2] *See* ORS 757.268(4), (6); OAR 860-022-0041(8).

Through established procedures, the Commission Staff (Staff) reviewed PGE's 2007 Tax Report for compliance with ORS 757.268 and OAR 860-022-0041. Following workshops and settlement conferences to which all parties were invited, four errors were identified in PGE's tax report.[3] On January 8, 2009, PGE submitted a revised tax report correcting the four identified errors. On January 23, 2009, Staff, the Citizens' Utility Board (CUB), and PGE held another settlement conference.

On January 28, 2009, the Industrial Customers of Northwest Utilities (ICNU) filed testimony challenging OAR 860-022-0041, the Commission's rule governing annual tax reports and automatic adjustment clauses. ICNU also challenged the protective order governing the treatment of confidential information in this docket. PGE moved to strike ICNU's testimony. That motion was denied on February 13, 2009. PGE filed responsive testimony on February 25, 2009.

Following their January 23, 2009, settlement conference, Staff and PGE reached a comprehensive settlement of the issues in this case. On February 5, 2009, Staff and PGE (jointly referred to as Stipulating Parties) filed a Stipulation and supporting testimony. A copy of the Stipulation, which is incorporated by reference, is attached as Appendix A. In addition, PGE filed a revised tax report containing the revisions agreed to in the Stipulation (Revised 2007 Tax Report). A deadline of February 18, 2009, was set for parties to object to the Stipulation, and a hearing was set for March 4, 2009, to address the issues raised by ICNU's witness and any objections that might be filed challenging the Stipulation. No party filed timely objections to the terms of the Stipulation or the calculation of the 2007 SB 408 surcharge contained therein.

On February 27, 2009, parties filed cross-examination statements identifying the subjects on which they intended to examine witnesses during the hearing. ICNU and PGE sought to cross-examine each others' witnesses on their prefiled testimony addressing the validity of the Commission's rules and the Commission's protective order. The Utility Reform Project and Ken Lewis (collectively, URP) sought to cross-examine Staff's and PGE's witnesses about the use of an earnings test in calculating the tax report amounts included in the Stipulation. URP's request was denied on the grounds that: (1) URP's proposed cross-examination addressed legal issues, not factual issues, and therefore raised no issue appropriate for hearing; (2) URP failed to raise timely objections to the Stipulation; and (3) the issues raised by URP were outside the scope of this phase of the proceeding.[4]

A hearing was held on March 4, 2009. Staff, PGE, ICNU, and URP filed post-hearing briefs on March 13, 2009.

[3] URP and Staff also circulated issue lists to the parties on December 23, 2008.

[4] *See* March 3, 2009, Ruling Defining Scope of Hearing. The day before the hearing, URP filed a document purporting to be a stipulation between URP and Ken Lewis. The presiding Administrative Law Judge (ALJ) rejected the filing on the grounds that it did not represent a compromise between parties with adverse interests, and thus was not a valid stipulation. The ALJ also held that the filing addressed no factual issues within the scope of the hearing, and that, to the extent the filing was intended to operate as an objection to PGE and Staff's Stipulation, it was untimely.

III. DISCUSSION

The Stipulating Parties have agreed to a number of revisions to PGE's 2007 Tax Report. First, in response to discovery requests, PGE agreed to make four corrections to its initial Tax Report: PGE (1) removed an add-back to taxes paid for charitable contributions under the stand-alone method; (2) credited taxes paid for certain tax credits related to research activities; (3) adjusted the treatment of equity allowance for funds used during construction; and (4) adjusted the interest expense related to regulatory liabilities. On January 8, 2009, PGE submitted a Revised 2007 Tax Report implementing these four corrections.

After additional settlement discussions, the Stipulating Parties agreed that PGE should revise its 2007 Tax Report to provide for two additional corrections. First, PGE removed its adjustment for deferred taxes related to its Supplemental Executive Retirement Plan and deferred compensation costs, which reduced the total calculation of taxes paid. PGE also corrected the reclassification of deferred taxes from non-utility to utility for interest income on regulatory assets in the deferred tax adjustments by taking into account the interest income related to PGE's 2007 SB 408 regulatory asset.

With these revisions, the Stipulating Parties conclude that the amount of state and federal taxes paid and properly attributed to PGE's regulated Oregon operations was $14.9 million more than the amount of taxes PGE collected in rates. The Stipulating Parties conclude that this amount, combined with estimated accumulated interest through May 2009, produces a 2007 SB 408 tax surcharge amount for state and federal taxes of approximately $17.3 million, plus interest that will accrue during amortization. PGE will also refund $200,000 in local taxes, plus interest.

In PGE's SB 408 docket last year, we ordered PGE to refund to customers approximately $37.2 million, amortized over a two-year period. The estimated remaining balance (including interest) of that two-year amortization as of June 1, 2009, is approximately $22.4 million. The surcharge ordered in this docket will reduce that remaining balance, and the remaining refund will be amortized over the remaining 12-month period through PGE's Schedule 140 Income Tax Adjustment Tariff, effective June 1, 2009.[5]

As noted above, no party filed objections to the terms of the Stipulation or to the calculation of PGE's Revised 2007 Tax Report. In this order, we address ICNU's contentions that our rules implementing SB 408 fail to comply with the statute, and that the protective order in this docket prevented ICNU from participating meaningfully in this proceeding. We also address URP's argument that an earnings test should have been performed as part of the analysis of PGE's tax report. Finally, we address the reasonableness of the Stipulation.

[5] *See* Order No. 08-204 (requiring PGE to refund to customers approximately $37.2 million for excess income taxes collected in PGE's SB 408 proceeding for the 2006 calendar year).

A. OAR 860-022-0041

1. Positions of the Parties

ICNU complains that OAR 860-022-0041, our rule governing annual tax reports, circumvents SB 408's requirement that a utility may collect in rates only amounts for taxes "actually paid" to units of government. ICNU explains that SB 408 requires that ratepayers be charged only for the amount of taxes that the "utility pays to units of government," and defines "taxes paid" as "amounts received by units of government from the utility."[6] Despite these provisions, ICNU argues, our rule aligns rates with *hypothetical* amounts of taxes paid instead of *actual* taxes paid.[7] ICNU points to several sections of the rule it claims requires the use of "hypothetical" rather than "actual" taxes paid, such as the rule's use of a pro forma tax return with its treatment of interest synchronization and depreciation.[8] Because the rule does not comply with SB 408, ICNU argues, PGE's tax report based on that rule provides no basis for ordering a surcharge to customers.

In response, PGE asserts that the Commission should conclude, as it has in other tax dockets, that ICNU's facial challenge to OAR 860-022-0041 is outside the scope of the proceeding and better addressed in a separate rulemaking proceeding. In any case, PGE argues, ICNU's witness has not reviewed PGE's 2007 Tax Report and, consequently, has no first-hand knowledge as to its compliance with the applicable rules or governing statutes. PGE argues that ICNU's arguments are either inapplicable to PGE's 2007 Tax Report or simply ill-founded. PGE also points out that ICNU's witness conceded during the hearing that ICNU's specific objections to the rule do not apply to the methodology used by PGE in calculating taxes in the 2007 Tax Report, and are thus irrelevant.[9]

Staff does not address the substance of ICNU's argument directly, but points to Order No. 08-201, relating to the tax report filed by PacifiCorp, dba Pacific Power (Pacific Power), for calendar year 2006. In that order, the Commission rejected similar arguments raised by ICNU on the basis that they were outside the scope of the proceeding. The Commission also concluded that the calculation of the utility's surcharge complied with both OAR 860-022-0041 and SB 408.[10]

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[6] ORS 757.268(6).
[7] OAR 860-022-0041(3).
[8] *See, e.g.*, ICNU/100, Blumenthal/5, 7.
[9] The consolidated method provided the lowest taxes paid figure and therefore was the method used to calculate taxes paid in PGE's Revised 2007 Tax Report. PGE also argues that the use of interest synchronization reflects sound ratemaking policy, and that customers are provided with the benefit of straight-line depreciation, so ICNU's objections on those issues are misplaced. *See* Order No. 08-201 at 5.
[10] *See* Order No. 08-201.

2. Commission Resolution

In resolving ICNU's challenge, our task is to determine whether we exceeded our statutory authority in adopting OAR 860-022-0041. For the purposes of that inquiry, we examine the wording of the rule itself and the statutory provisions authorizing the rule.[11]

ICNU's challenge to OAR 860-022-0041 is premised on the theory that SB 408 requires rates to be adjusted using amounts of "actual taxes paid." ICNU primarily relies on language contained in ORS 757.268(6), which requires an adjustment to rates "so that ratepayers are not charged for more tax than: (a) the utility pays to units of government* * *." ICNU appears to believe that this language mandates the Commission to use amounts actually contained in the utilities' tax returns to calculate "taxes paid."

There are at least two problems with ICNU's theory. First, ICNU relies on language from ORS 757.268(6) that is taken out of context. A full reading of the statute makes clear that SB 408 requires the Commission to adjust rates based not on the total amounts the utility "actually paid" in taxes, but rather how much the utility or its affiliated group paid in taxes that are "properly attributed to the regulated operations of the utility." ORS 757.268(6) provides, in its entirety:

> The automatic adjustment clause shall account for all taxes paid to units of government by the public utility that are properly attributed to the regulated operations of the utility, or by the affiliated group that are properly attributed to the regulated operations of the utility, and all taxes that are authorized to be collected through rates, *so that ratepayers are not charged for more tax than*:
>
> (a) The utility pays to units of government and *that is properly attributed to the regulated operations of the utility*; or
>
> (b) In the case of an affiliated group, the affiliated group pays to units of government and that is *properly attributed to the regulated operations of the utility*. (Emphasis added.)

Second, ICNU's apparent belief that the Commission may only use amounts contained in the utilities' actual tax returns to adjust rates ignores the reality that utilities generally pay taxes as part of an affiliated group. These affiliated groups include unregulated affiliates of a parent company that files taxes on a consolidated basis. Consequently, none of the utilities subject to SB 408 files a separate tax return reflecting its regulated operations that could be used for purposes of adjusting rates. Thus, as expressly recognized by the Legislative Assembly, the amounts contained in the tax returns must be adjusted to reflect only those amounts that are "properly attributed" to the regulated operations of the utility.

[11] *See Wolf v. Oregon Lottery Commission*, 344 Or 345, 355, 182 P3d 180 (2008). We consider our role to be similar to that of the Court of Appeals in determining the validity of a rule under ORS 183.400.

Read correctly, SB 408 requires the Commission to adjust rates to match amounts of taxes actually paid, by either the utility or the affiliated group, that are "properly attributed" to the regulated operations of the utility. The question presented, therefore, is whether OAR 860-022-0041 is consistent with this mandate.

The Legislative Assembly did not define the term "properly attributed." The Assembly did, however, limit the amount of taxes paid that could be properly attributed to the regulated operations of the utility. ORS 757.268(12) provides:

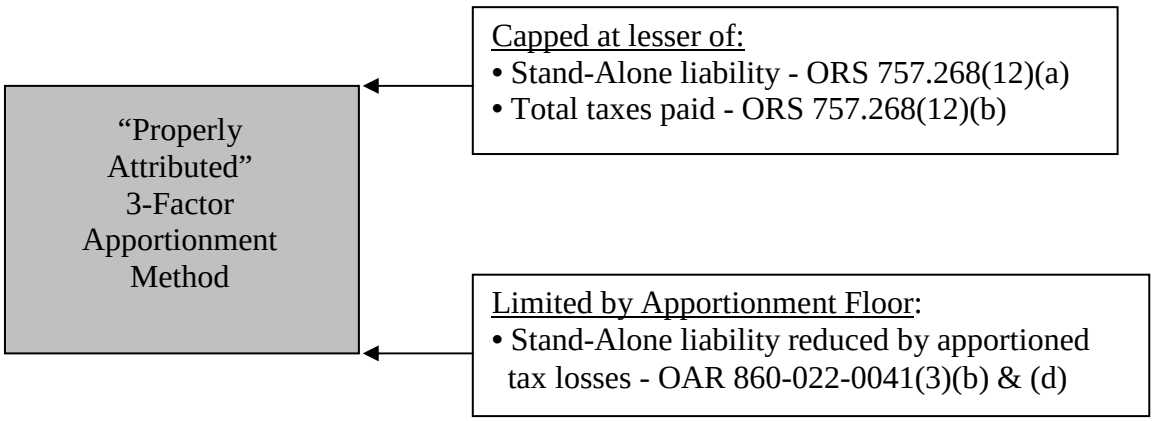
> For purposes of this section, taxes paid that are properly attributed to the regulated operations of the public utility may not exceed the lesser of:
>
> (a) That portion of the total taxes paid that is incurred as a result of income generated by the regulated operations of the utility; or
>
> (b) The total amount of taxes paid to units of government by the utility or by the affiliated group, whichever applies.

The Attorney General concluded that "properly attributed" was a delegative term that must be interpreted and applied by the Commission, consistent with the limits imposed by ORS 757.268(12).[12] In OAR 860-022-0041, the Commission defined "properly attributed" by requiring that the amount of "taxes paid" and "properly attributed" to the utility be calculated by using the three-factor Apportionment Method used by Oregon and other states to determine the state tax liability for multistate corporations.[13] In a nutshell, the Apportionment Method starts with the amount of taxes actually paid by the utility or its affiliated group, as required by statute, and apportions those tax payments by calculating the utility's amounts of payroll, property, and sales compared to the consolidated group's amounts for the same items. A combination of the three ratios is multiplied by the amount of taxes paid by the affiliated group to units of government, yielding the utility's attributed portion.[14]

The Commission established both a floor and ceiling to the results calculated under the Apportionment Method in order to fairly allocate tax benefits and to comply with limits imposed by SB 408. First, OAR 860-022-0041(3)(b) and (d) impose a floor on the results derived from the Apportionment Method to ensure that ratepayers do not receive more than 100 percent of the tax benefits from losses within the taxpaying group.[15] Second, OAR 860-022-0041(4)(d) requires the amount calculated under the Apportionment Method be capped at the lesser of the utility's stand-alone tax liability or the total amount paid by the consolidated group—limitations found in SB 408 itself.[16] Thus, the range of amounts

[12] Letter of Advice dated Dec. 27, 2005, to Chairman Lee Beyer.
[13] *See* Orders No. 06-532, 06-400.
[14] Order No. 06-532 at 2.
[15] *See* Order No. 06-532 at 8-9; OAR 860-022-0041(3).
[16] *See* ORS 757.268(12)(b), (a); OAR 860-022-0041(4).

"properly attributed" under OAR 860-022-0041, bound by a statutorily imposed ceiling and a pragmatic floor, is limited as follows:



ICNU does not appear to attack our use of the Apportionment Method directly, nor does it appear to challenge the inclusion of a floor or ceiling to limit the results derived thereunder. Rather, ICNU contends that the rule impermissibly uses hypothetical amounts by requiring the use of a pro forma tax return, and objects to the treatment of interest synchronization and depreciation that is part of that pro forma return. ICNU asserts that "[a] pro forma tax return is unnecessary since the period in question [in these SB 408 proceedings] is a historical period. An actual tax return already exists for the utility even if the utility is included in a consolidated tax return."[17] Based on that assertion, ICNU argues that this "actual tax return" should be used, rather than the pro forma return.

Again, ICNU misunderstands how utilities file taxes. As noted, the utilities subject to SB 408 file taxes as part of an affiliated group. The actual tax returns, therefore, will contain tax information for the affiliated groups as a whole, but will not include separate tax returns reflecting only the utilities' regulated operations. Due to this fact, OAR 860-022-0041(2)(p) requires a utility to report its "stand-alone" tax liability, defined as:

> the amount of income tax liability calculated using a pro forma tax return and revenues and expenses in the utility's results of operations report for the year, except using zero depreciation expense for public utility property, excluding any tax effects from investment tax credits, and calculating interest expense in the manner used by the Commission in establishing rates.

The pro forma return is used for two calculations under the rule. First, it is directly used to establish the cap of taxes paid and properly attributed under ORS 757.268(12)(a). Second, it is used as the starting point to calculate the Apportionment Method floor under OAR 860-022-0041(3)(b) and (d).

[17] ICNU/100, Blumenthal/5.

Contrary to ICNU's assertions, then, the use of a pro forma return is not improperly used as a proxy for the amount of taxes "actually paid to units of government." The amount of taxes paid that is properly attributed to the regulated operations is first determined using the Apportionment Method (with a floor, if appropriate). This amount is then compared to the amounts calculated under the two statutory caps (the stand-alone liability and the total amount paid by the affiliated group to units of government). The rule requires the use of the *lowest* of those three amounts for the utility's tax report.[18] Consequently, the resulting number will always be equal to or less than the maximum amounts established by the Legislative Assembly for taxes paid that are properly attributed to regulated operations of the utility. The use of the pro forma tax return is well within the Commission's discretion in implementing SB 408.

ICNU has failed to demonstrate that the provisions of OAR 860-022-0041 yield amounts "properly attributed" to the regulated operations of the utility that exceed the scope of our discretion under SB 408. Accordingly, we conclude that we acted within the authority delegated to us by the Legislative Assembly and that OAR 860-022-0041 is valid.[19]

B. Safe Room Procedures

1. Parties' Positions

ICNU objects to the "safe room" discovery protocol we established for the review and use of highly confidential tax information contained in PGE's 2007 Tax Report. Under the terms of Protective Order No. 06-033, to which ICNU was a signatory, a party may review the highly confidential tax data contained in PGE's annual tax report in a safe room in Portland. A party may also take limited, non-verbatim notes on the highly confidential materials, but may not make or remove copies of the documents. The utility may provide a monitor on-site in the safe room during review, but is required to provide an adjacent private conference room for discussions among counsel and consultants. *See* Order No. 06-033.

ICNU contends that the safe room protocol precluded it from undertaking a meaningful review of PGE's 2007 Tax Report. ICNU introduced testimony from its expert consultant, Ellen Blumenthal, whose office is in Corpus Christi, Texas. Ms. Blumenthal opined that "it is impossible to write testimony addressing the specifics of the case without having the documents on hand," and that it is "equally impossible to draft testimony in the safe room with a company representative present."[20] Ms. Blumenthal added that very few consultants with expertise on income tax matters reside in Portland, requiring expert witnesses to travel to Portland to review the highly confidential portions of the tax reports and responses to requests for information. She concludes that the safe room requirements are extreme and unusual, and explains that she is routinely allowed to possess copies of highly confidential tax information in utility proceedings held in other jurisdictions.

[18] OAR 860-022-0041(4)(d).
[19] ICNU has not challenged any specific calculations included in PGE's Revised 2007 Tax Report.
[20] ICNU/100, Blumenthal/6-7.

PGE responds that the Commission has already addressed ICNU's arguments regarding the protective order in docket UE 177, when it found the terms of the protective order to be appropriate and denied ICNU's request to modify the protective order.[21] In any case, PGE argues, ICNU's arguments about the restrictions of the protective order are inapplicable here because PGE actually provided Ms. Blumenthal with a copy of its highly confidential tax report. PGE states that it reached an agreement with ICNU regarding access to the documents and sent a copy of its tax report to Ms. Blumenthal for her review in her office in Corpus Christi. Ms. Blumenthal admitted on cross-examination that, on advice of ICNU's counsel, she shredded the documents from PGE without actually reviewing them.

PGE asserts that ICNU requested access to the tax report and workpapers on the terms that PGE and ICNU had agreed to during last year's SB 408 proceeding.[22] PGE states that it agreed to those terms, and in November 2008, it sent a copy of PGE's 2007 calendar year tax report and workpapers to Ms. Blumenthal in Corpus Christi, along with a cover letter setting out the terms of the agreement. Ms. Blumenthal then shredded the documents. PGE states that the only highly confidential information requested by ICNU was PGE's initial tax report.[23]

PGE argues that Ms. Blumenthal's written testimony in this docket—that she would be required to come to Portland to review the tax report and that she could do so only in the presence of a monitor—is contradicted by her testimony acknowledging that she destroyed the materials sent to her office. Because Ms. Blumenthal had the tax report materials in her possession in her office in Corpus Christi, PGE argues, she could have worked with the tax report and workpapers in private.

ICNU responds that PGE's delivery of the tax documents to Ms. Blumenthal is irrelevant, as PGE has always maintained the right to discontinue further disclosure and subject ICNU to the terms of the protective order at any time. According to ICNU, PGE has always expressly maintained its right to withhold further disclosure of such documents at will. In any case, ICNU argues, PGE sent its tax documents to ICNU only after protracted negotiations, with no guarantee that it would provide all of the confidential documents requested. ICNU had "no guarantee that the substantial amount of time and money necessary to review PGE's 2007 Tax Report would not all be wasted once PGE elected to exercise its right to discontinue any special arrangements." ICNU concludes, "[i]f and when PGE elected to cease any special arrangement, ICNU would be forced to participate under the impossible safe room requirements of the protective order in this docket."[24]

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[21] *See* Order No. 08-002.

[22] PGE explains that in PGE's SB 408 docket last year, UE 178, PGE and ICNU entered into an agreement whereby PGE would provide ICNU's witness with a copy of the tax report and the associated workpapers for review in her office, including materials marked as highly confidential under the protective order, and ICNU would return or destroy the material at the end of the proceeding. Under this arrangement, ICNU's expert was able to review PGE's tax report in her Corpus Christi office and submitted testimony supporting the stipulation in that docket.

[23] PGE/100, Tamlyn-Tinker/4.

[24] ICNU's Opening Brief at 11 (March 13, 2009).

Staff simply notes that the Commission has previously rejected ICNU's arguments related to the safe room procedures adopted in the protective order and asserts that we should do the same here.[25]

2. Resolution

We conclude the procedures adopted in our protective order are both necessary and appropriate, and uphold them. We also find that ICNU's objections to the protective order are particularly unpersuasive in light of the fact that ICNU received copies of relevant documents from PGE and deliberately destroyed them.

This Commission has frequently addressed the issue of access to the highly confidential information contained in the SB 408 tax reports. In enacting SB 408, the Legislative Assembly expressly recognized the sensitivity of the information contained in the utilities' tax reports.[26] Consequently, the legislature allowed intervenors access to the tax information only upon signing a protective order:

> An intervenor in a commission proceeding to review the tax report or make rate adjustments described in this section may, upon signing a protective order prepared by the commission, obtain and use the information obtained by the commission that is not otherwise required to be made publicly available under this section, according to the terms of the protective order.[27]

Over the objection of ICNU and another intervenor, we adopted Protective Order No. 06-033, which imposed heightened restrictions governing the use of and access to tax information designated as "highly confidential." Given the sensitivity of the information, as well as a recent leak of confidential information in another docket that cast doubt on the efficacy of our standard protective order, we concluded that we had no choice but to limit intervenors' review of documents containing highly confidential information to a safe room.

In Protective Order No. 06-033, 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 incorporated other provisions to ensure the intervenors' ability to participate and contribute in the review and auditing of the tax reports. Among other things, we recognized the difficulties presented by the use of an out-of-state consultant, and indicated that we would entertain a request for increased intervenor funding to cover additional travel expenses.[28]

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[25] *See* Order No. 06-033.
[26] "Tax information of a business is commercially sensitive. Public disclosure of tax information could provide a commercial advantage to other businesses." ORS 757.267(1)(g).
[27] ORS 757.268(11)
[28] Order No. 06-033 at 5.

In Pacific Power's docket last year, ICNU filed a motion to amend Protective Order No. 06-033, renewing many of its arguments raised earlier in its objection to the safe room discovery protocol. We denied ICNU's motion in Order No. 08-002. In this case, we find no need to readdress the arguments previously raised by ICNU. We reject ICNU's complaints about procedures contained in the protective order and incorporate by reference our decisions in Protective Order No. 06-033 and Order No. 08-002.

Moreover, we find ICNU's arguments to be particularly unpersuasive given that PGE delivered to ICNU's tax expert copies of PGE's highly confidential tax report. In Protective Order No. 06-033, we encouraged utilities to work with ICNU to determine whether special arrangements could be made to accommodate the needs of ICNU's out-of-state consultants.[29] In this case, PGE appears to have made precisely such an arrangement.[30] ICNU concedes that its witness, Ms. Blumenthal, shredded the materials without reviewing them.[31] Because ICNU deliberately destroyed the materials it now complains it could not review, we find ICNU's arguments to be unconvincing.

We uphold the safe room procedures as an appropriate mechanism to govern the review and use of highly confidential tax information contained in PGE's 2007 Tax Report. Consequently, we reaffirm our decisions in Protective Order No. 06-033 and Order No. 08-002.

C. Earnings Test

1. Parties' Positions

URP argues that PGE should be prohibited from collecting a surcharge from ratepayers in this docket without first applying an earnings test. URP points out that the Commission is currently applying an earnings test in PGE's 2005 tax report (docket UM 1224), which may serve to limit ratepayer refunds in that docket, so the Commission should likewise use an earnings test here. According to URP, PGE earned far in excess of its authorized rate of return on investment in 2007, which should prevent it from collecting a surcharge for excess taxes paid for the 2007 calendar year.[32] URP argues that the Commission's inconsistent use of an earnings test in the two dockets creates a "heads the utility wins, tails the ratepayers lose" scenario.

PGE points out that the two proceedings URP is comparing are legally distinct. UM 1224 is a deferred accounting proceeding, while UE 178 is an automatic adjustment clause proceeding. PGE points out that the legislation implementing SB 408's

[29] Order No. 06-033 at 5.
[30] The fact that the arrangement may have been difficult to negotiate or of temporary duration is beside the point—PGE clearly made arrangements to allow Ms. Blumenthal to review highly confidential documents in her office in Texas, a fact that undermines ICNU's objections to its lack of access to such documents.
[31] Hearing Transcript, at 22-23 (March 4, 2009).
[32] URP points to PGE's 2007 Results of Operations Report filed with the Commission, which shows that PGE earned an 11.58 percent return on equity in 2007. URP notes that this is higher than PGE's 10.1 percent authorized rate of return for 2007, established in Order No. 07-015. URP contends that PGE collected almost $37 million more than it would have under its authorized rate of return.

automatic adjustment clause mechanism became effective starting January 1, 2006. Docket UM 1224 preceded that effective date and was thus initiated as a deferred accounting proceeding, rather than an SB 408 proceeding. PGE points out that the deferral statute requires the use of an earnings test, but that SB 408 does not.

In addition, PGE argues, URP seeks to selectively apply a SB 408 earnings test only in years where there is a surcharge on customers. PGE points out that, as a result of its 2006 tax report, PGE is refunding approximately $37.2 million to customers, despite the fact that PGE was earning well below its authorized return on equity during the period at issue. Thus, PGE argues, although application of an earnings test might in some cases limit surcharges on customers, as URP seeks to limit them here, it would also limit potential refunds to customers during other years.

Staff agrees with PGE that use of an earnings test would be inappropriate in this docket. According to Staff, docket UM 1224 is irrelevant here because the Commission's decision in that docket was issued before the effect of SB 408 and before the Commission adopted related rules in docket AR 499. In fact, Staff argues, the Commission explicitly concluded in AR 499 that an earnings test would be contrary to the legislative intent of SB 408.[33] In short, Staff argues, SB 408, which governs the proceedings here, does not require an earnings review.

2. Resolution

We find that URP's arguments relating to an earnings test are inapplicable to this stage of these SB 408 proceedings. SB 408 makes clear that the purpose of this order is to determine whether the amount of taxes assumed in rates or otherwise collected from ratepayers during the 2006 calendar year differed by $100,000 or more from the amount of taxes paid to units of government by the utility or by the affiliated group and properly attributed to the regulated operations of the utility.[34] If we find that such a difference exists, we are required to establish an automatic adjustment clause.[35] The implementation of an automatic adjustment clause, as the statute makes clear, is "automatic." SB 408 provides no room for discretion at this phase of the proceedings, and thus no place for the application of an earnings test.

Although the issues raised by URP are not relevant here, we note that URP may seek to raise its arguments in a subsequent phase of this proceeding. If a party believes that the automatic adjustment clause will have a material adverse effect on customers, a party may raise that issue within 30 days of the issuance of this order.[36] If and when such an assertion is raised, the Commission must conduct a hearing under ORS 757.210 to determine whether the automatic adjustment clause should be terminated.[37] URP remains free to raise its arguments in such a filing after this order is issued. We note that the Commission has not

[33] *See* Order No. 06-532 at 10 (citing Order No. 06-400 at 8-9). Staff also notes that URP filed no objections to the Stipulation.
[34] ORS 757.268(4).
[35] *Id.*
[36] ORS 757.268(9); OAR 860-022-0041(9).
[37] ORS 757.268(10).

yet been called upon to define the term "material adverse effect," and it is unclear how an earnings test might fit into such an analysis. URP remains free to argue that the application of an earnings test would be appropriate in the context of an inquiry into whether the automatic adjustment clause has a "material adverse effect" on customers.[38]

In sum, URP's assertion that an earnings review should have been applied to the calculation of PGE's tax report here is premature. URP may argue after this order is issued that the automatic adjustment clause would have a material adverse effect on customers and seek termination of the automatic adjustment clause on that basis.

D. Stipulation

The Stipulating Parties assert that the Stipulation resolves all issues in this proceeding and request that the Commission issue an order adopting the Stipulation in its entirety. The Commission encourages parties to resolve issues and narrow the scope of the proceedings to the extent that such actions further the public interest.

Based on our conclusions above and review of the Stipulation and supporting documents, we agree with the Stipulating Parties that PGE's Revised 2007 Tax Report is consistent with ORS 757.268 and OAR 860-022-0041. We conclude that the Stipulation should be adopted in its entirety.

[38] We previously rejected an assertion that an earnings test should be applied during SB 408 proceedings. During the rulemaking proceedings adopting OAR 860-022-0041, the utilities urged the Commission to adopt an earnings test as part of the automatic adjustment clause proceedings in order to avoid the "double whammy" effect of SB 408. *See* Order No. 06-400 at 8. We rejected the utilities' argument, finding that the application of an earnings test would undermine the "automatic" effect of the automatic adjustment clause, thereby undermining the purpose of SB 408. We did not specifically address in that order whether an earnings test might play a role in a second phase of SB 408 proceedings to determine whether the automatic adjustment clause may have a "material adverse effect" on customers.

IV. ORDER

IT IS ORDERED that:

1. The Stipulation filed by Portland General Electric Company and Staff, attached as Exhibit A, is adopted.

2. Portland General Electric Company must file compliance tariffs effective June 1, 2009, consistent with the terms of this order.

Made, entered and effective APR 10 2009.

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.

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 178

In the Matter of OREGON PUBLIC UTILITY COMMISSION STAFF Requesting the Commission Direct PORTLAND GENERAL ELECTRIC COMPANY To file tariffs establishing automatic adjustment clauses under the terms of SB 408	**STIPULATION**

This Stipulation is among Portland General Electric Company ("PGE"), and Staff of the Public Utility Commission of Oregon ("Staff").

I. INTRODUCTION

Pursuant to ORS 757.268 and OAR 860-022-0041, on October 15, 2008, PGE filed its tax report for calendar-years 2005, 2006 and 2007 (the "Tax Report"). Staff and PGE conducted a series of workshops and settlement conferences on November 18, December 9, December 15, 2008, and January 8, 2009.[1] On December 23, 2008, Staff and the Utility Reform Project each submitted an issues list. As a result of the initial review process, four errors were identified in the tax report for calendar year 2007. On January 8, 2009, PGE submitted a revised tax report for calendar year 2007 which corrected those four errors. On January 23, 2009, Staff, CUB and PGE held another settlement conference.

As a result of the settlement discussions, the Stipulating Parties have agreed to the terms of this Stipulation and to submit the Stipulation to the Commission. The

[1] CUB participated in the November 18, 2008, workshop.

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Stipulating Parties request that the Commission issue an order approving the Stipulation and implementing its terms.

II. SPECIFIC TERMS

A. The Stipulating Parties agree for the purpose of settlement that PGE will file a revised tax report for calendar year 2007 that amends its January 8 version of the tax report for calendar year 2007 by reducing the add back for deferred taxes by approximately $1.8 million. This reduction in the deferred taxes add back (shown on page 6, lines 4, 13, and 22, and page 7, lines 10, 18 and 26) eliminates (i) PGE's adjustment that served to remove deferred taxes attributable to SERP and deferred compensation from the add back and (ii) deferred taxes associated with carrying charges on the SB 408 accrual for 2007. A revised copy of the tax report for calendar year 2007 making these adjustments is being filed in this docket as Joint Stipulation Exhibit 105 (the "Amended 2007 Tax Report").

B. The Stipulating Parties agree that the difference between the amounts paid in federal, state and local taxes and the amount collected in rates result in a net 2007 SB408 surcharge amount of $14.7 million plus an interest accrual of approximately $2.6 million for a total collection of approximately $17.3 million as of June 1, 2009. The Parties further agree that the 2006 tax period resulted in a refund of approximately $37.4 million for federal and state taxes which were ordered by the Commission to be amortized over a two-year period (*See* Commission Order No. 08-204). The estimated remaining balance (including interest) of the two-year amortization as of June 1, 2009 is a refund of approximately $22.4 million.

C. The Stipulating Parties agree that the net surcharge amount of $14.9 million for federal and state taxes and a refund for local taxes of approximately $200,000 [or $14.7 million for federal, state and local taxes] reflected in the Amended 2007 Tax Report is consistent with the applicable statutes and rules. The Stipulating Parties

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further agree that rates reflecting such a surcharge are just, reasonable and fair.

D. The federal and state tax adjustment reflected in the Amended 2007 Tax Report will be implemented through Schedule 140. The local tax adjustment reflected in the Amended 2007 Tax Report will be implemented through PGE's existing Multnomah County Business Income Tax Schedule 106.

E. The Stipulating Parties acknowledge that PGE agreement to eliminate its adjustment for deferred taxes related to SERP and deferred compensation is for settlement purposes only and that PGE does not waive its right to seek Commission approval in future Commission proceedings to adjust the deferred taxes add back to remove deferred taxes related to SERP and deferred compensation.

F. The Stipulating Parties acknowledge that the method used to calculate interest expense for the Stand-alone section of the Amended 2007 Tax Report is for settlement purposes only and Staff may raise this issue in future Commission proceedings, as appropriate. The Stipulating Parties agree that this Stipulation resolves all outstanding issues in this docket.

III. GENERAL TERMS

A. The Stipulating Parties agree that the Stipulation represents a compromise of the positions of the parties for the purpose of this docket. As such, conduct, statements and documents disclosed in the negotiation of this Stipulation shall not be admissible as evidence in this or any other proceeding.

B. If this Stipulation is challenged by any other party to this proceeding, or any other party seeks a refund amount for PGE that departs from the terms of this Stipulation, the Stipulating Parties reserve the right to cross-examine witnesses and put in such evidence as they deem appropriate to respond fully to the issues presented. Notwithstanding this reservation of rights, the Stipulating Parties agree they will continue to

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support the Commission's adoption of the terms of this Stipulation.

C. If the Commission rejects all or any material part of this Stipulation, or adds any material condition to any final order that is not consistent with this Stipulation, each Stipulating Party reserves the right to withdraw from this Stipulation upon written notice to the Commission and the other Stipulating Parties within five (5) business days of service of the final order that rejects this Stipulation or adds such material condition.

D. This Stipulation will be offered into the record in this proceeding as evidence pursuant to OAR 860-014-0085. The Stipulating Parties agree to support this Stipulation throughout this proceeding and in any appeal, provide witnesses to support the Stipulation at the hearing, and recommend that the Commission issue an order implementing the terms of the Stipulation.

E. By entering into this Stipulation, no Party shall be deemed to have approved, admitted or consented to the facts, principles, methods or theories employed by any other Party in arriving at the terms of this Stipulation. Except as provided in this Stipulation, no Party shall be deemed to have agreed to any provision of this Stipulation is appropriate for resolving issues in any other proceeding.

F. This Stipulation may be signed in any number of counterparts, each of which will be deemed an original for all purposes, but all of which taken together will constitute one and the same agreement.

DATED this 5th day of February, 2009.

PORTLAND GENERAL ELECTRIC COMPANY	STAFF OF THE PUBLIC UTILITY COMMISSION OF OREGON
By _____	By _____
Its Manager, Pricing & Tariffs	Its _____

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F. This Stipulation may be signed in any number of counterparts, each of which will be deemed an original for all purposes, but all of which taken together will constitute one and the same agreement.

DATED this ___ day of February, 2009.

PORTLAND GENERAL ELECTRIC COMPANY	STAFF OF THE PUBLIC UTILITY COMMISSION OF OREGON
By _____	By _____
Its _____	Its Attorney

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