

ORDER NO. 11 026

ENTERED JAN 20 2011

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 177(4)

In the Matter of

PACIFICORP, dba PACIFIC POWER,

Annual Tax Filing under ORS 757.268.

ORDER

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

On November 2, 2010, the Industrial Customers of Northwest Utilities (ICNU) filed a motion to modify the protective order in this docket. ICNU asserts that it has made a reasonable effort to work within the procedures set forth in the protective order governing this docket but has found them to be unworkable. On November 17, 2010, PacifiCorp, dba Pacific Power (Pacific Power) filed a response in opposition to ICNU's motion. On November 29, 2010, Pacific Power filed a supplemental exhibit in support of its response. On December 6, 2010, ICNU filed a reply to Pacific Power's supplemental exhibit. We deny ICNU's motion.

I. INTRODUCTION

Senate Bill 408, codified primarily as ORS 757.268, requires Pacific Power and three other utilities to file annual tax reports with the Commission that identify both the amount of income taxes the utility is authorized to collect in rates in any given year and the amount of income taxes paid by the utility or its consolidated tax group in that 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.

In Order No. 06-033 we adopted a protective order (Protective Order) that grants heightened protection to the tax information filed by utilities in connection with SB 408. In doing so, we recognized that this tax information is highly confidential and could damage the utilities if released.¹ We concluded that the confidential information

¹ This conclusion was supported by the Legislative Assembly's recognition in enacting SB 408 that the tax information of any business is commercially sensitive and that its disclosure could harm the party producing the information.

contained in the tax reports is privileged under state law and protected from public disclosure under ORS 192.502(9).²

The Protective Order establishes a safe room in Portland and requires authorized parties to review any documents designated as “highly confidential” within the safe room itself.³ The Portland safe room is open Monday through Friday between the hours of 9 am and noon, and 1 pm and 5 pm, and may be accessed by authorized parties with 24 hours’ notice. The Protective Order allows parties to take limited notes from highly confidential documents, though they may not copy sensitive documents verbatim, and requires the utilities to provide a conference room adjacent to the safe room so that authorized parties reviewing highly confidential documents may engage in private discussions.

In its motion, ICNU seeks to modify the Protective Order to allow its consultant, Ms. Ellen Blumenthal, to receive a copy of Pacific Power’s highly confidential documents outside the safe room, at her office in Corpus Christi, Texas. ICNU argues that it has tried in good faith to work under the requirements of the Protective Order, but has found it too burdensome and costly to be workable. ICNU states that it has attempted without success to resolve the matter informally with Pacific Power’s legal counsel.

We consider ICNU’s request to be a request to amend an order under ORS 756.568.⁴

II. DISCUSSION

A. Parties’ Positions

1. ICNU

This is not the first time ICNU has moved to amend the Protective Order. ICNU acknowledges that its 2007 motion to amend the Protective Order was denied in part because ICNU failed to make a reasonable effort to work within the terms of the Protective Order before seeking to modify it.⁵ According to ICNU, it has now made such an effort and has concluded that the terms of the Protective Order are simply unworkable. ICNU argues that the restrictive provisions of the Protective Order prevent ICNU from effectively auditing and verifying Pacific Power’s tax reports.⁶

² See Order No. 06-033 at 3-4 (citing 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)).

³ There is also a safe room in Salem, Oregon used by Commission Staff.

⁴ See *Industrial Customers of Northwest Utilities v. PUC*, ___ Or App ___ (Dec 30, 2010).

⁵ See Order No. 08-002 at 6.

⁶ In addition to arguing that the safe room procedures prevent Ms. Blumenthal from effectively reviewing Pacific Power’s tax documents, ICNU also argues that the procedures prevent ICNU from effectively reviewing Staff’s and Pacific Power’s written testimony and limits ICNU’s participation in workshops.

According to ICNU, Ms. Blumenthal has spent “multiple days” reviewing Pacific Power’s tax filing in the Portland safe room, and she has concluded that she would need at least two to three weeks to conduct a complete analysis of the filing. Pacific Power’s tax filings are particularly complex because they include Berkshire Hathaway’s consolidated group.⁷ ICNU asserts that Ms. Blumenthal’s analysis must be spread out over time so that she can review and analyze specific issues away from the safe room, then return to the tax report to verify her analyses with the documents.

According to ICNU, the need for repeated access makes the safe room procedures especially costly and burdensome for ICNU because Ms. Blumenthal lives in Corpus Christi, Texas, and must travel to Portland to access the documents. Because Ms. Blumenthal must review highly confidential documents in the safe room, she lacks access to documents and materials in her business office that would assist her review. With respect to costs, ICNU acknowledges that it can seek intervenor funding to cover a portion of the costs for the increased travel, but it argues that both its budget and the intervenor funds are limited resource pools. Any additional costs imposed because of the restrictive Protective Order reduce the funds available for ICNU to participate in other proceedings.

ICNU also complains about Pacific Power’s conduct in the safe room. According to ICNU, Pacific Power’s monitor is able to see what Ms. Blumenthal is reviewing, which may allow Pacific Power to gain insight into the scope and depth of ICNU’s review. Moreover, ICNU complains that its attorneys and consultant cannot take highly confidential documents into the private room adjacent to the safe room, which limits their ability to analyze the issues. ICNU also complains that Pacific Power has been “critical” of the time Ms. Blumenthal has spent in the safe room. Finally, Ms. Blumenthal states in her affidavit that she believes Pacific Power has overdesignated information as “highly confidential,” including apportionment calculations and deferred tax schedules that should not be considered highly confidential.

ICNU acknowledges that the Commission’s Protective Order was adopted in part because highly sensitive documents were inappropriately released in another Commission docket, but argues that ICNU should not be punished for the transgressions of others. ICNU asserts that it was not responsible for the troublesome release of documents in the past, and asserts that it has a good track record maintaining the confidentiality of tax documents. Specifically, ICNU states that it received copies of Portland General Electric Company’s (PGE) tax reports via voluntary agreement with PGE in other SB 408 dockets and has appropriately maintained the confidentiality of those documents.

2. *Pacific Power*

Given the Commission’s repeated findings that the Protective Order is appropriate and that “the potential harm of the public release of the highly confidential

⁷ ICNU states that the tax report is supported by a voluminous set of highly confidential workpapers that are 4-5 inches thick.

information outweigh[s] the inconvenience to parties,”⁸ Pacific Power argues, ICNU bears a substantial burden in showing that the Commission should modify the Protective Order.

Pacific Power also asserts that the alleged infirmities of the safe room process are related more to the fact that ICNU has a Texas-based consultant than to the safe room procedures themselves. It argues that protection of Pacific Power’s and its affiliates’ tax information should not be compromised because of ICNU’s decision to hire an out-of-state consultant.

Pacific Power also disputes that ICNU has made a reasonable attempt to work within the procedures of the Protective Order itself. Since 2009, Pacific Power argues, ICNU has made no effort to use the safe room in a meaningful way. In this docket, Pacific Power offered to take “all reasonable steps” to facilitate Ms. Blumenthal’s access to the safe room consistent with the Protective Order, but ICNU did not respond to this offer, let alone propose steps to mitigate the alleged infirmities of the safe-room process. ICNU filed its motion to modify the Protective Order the very same day Ms. Blumenthal visited the safe room for the first time to view Pacific Power’s 2009 tax report.

Pacific Power also disputes that ICNU has a good track record of working with confidential documents in PGE’s SB 408 tax report dockets. Specifically, Pacific Power points out that PGE agreed in its 2008-2009 tax docket to send Ms. Blumenthal a copy of PGE’s highly confidential tax report. Ms. Blumenthal deliberately destroyed that tax report. ICNU then argued before the Commission that the safe room requirements prevented ICNU from meaningfully reviewing the very tax report that ICNU had just destroyed.⁹ Pacific Power also asserts that Ms. Blumenthal also gave inconsistent statements in her testimony about how and where she destroyed PGE’s tax report. Pacific Power asserts that ICNU’s behavior creates a “reasonable concern” that Pacific Power’s highly confidential information may be disclosed or mishandled if ICNU’s motion is granted.¹⁰ Pacific Power adds that disclosure of its highly confidential documents would be especially troubling because its tax reports, unlike PGE’s, contain sensitive tax information from hundreds of unregulated companies.

Finally, Pacific Power argues, the fact that ICNU has not actually disclosed PGE’s highly confidential documents should not exempt ICNU from the Commission’s Protective Order. A Protective Order should be enforced based on the potential harm and risks posed by the disclosure of confidential documents. Thus, Pacific Power’s sensitive information should be protected by the Commission whether ICNU has actually disclosed confidential documents in the past or not.

⁸ Citing Order No. 08-002 at 5.

⁹ See Order No. 09-126 at 8-10.

¹⁰ Pacific Power also submitted, as a supplemental exhibit, a letter from PGE’s counsel asserting that ICNU’s invocation of ICNU’s agreement with PGE in this effort to amend the Protective Order constitutes a violation of that very agreement. ICNU disputes this interpretation of PGE’s and ICNU’s agreement.

B. Resolution

ICNU has moved to amend the Protective Order a number of times in the past. Each time, we have denied ICNU's motion.¹¹ We deny the current motion as well.

ICNU renews many of the arguments it has raised in prior attempts to modify the Protective Order. To the extent ICNU complains that Ms. Blumenthal lacks sufficient time to spend in the safe room and that ICNU lacks the funds to pay for her travel, we rejected these same assertions in Order Nos. 08-002 and 06-033.¹² We decline to revisit those decisions, except to note that ICNU has chosen to retain a Texas consultant whose ability to review the documents in the safe room appears to be limited primarily by geography. We recognize ICNU's right to hire a consultant of its choice, and appreciate the logistical difficulties involved with flying Ms. Blumenthal to Portland, but we do not believe ICNU's choice of a tax consultant drives the legality of our Protective Order.¹³

With respect to intervenor funding, we have noted our willingness to entertain an increase in intervenor funding to assist ICNU with appropriate costs of complying with the Protective Order.¹⁴ ICNU now complains that the pool of intervenor funds is limited, and that its use of increased intervenor funding in this proceeding may limit its participation in other proceedings. While we acknowledge that the pool for intervenor funding is finite, we note that any certified intervenor may apply for funds from the pool. To the extent we approve an increase in intervenor funding for ICNU, ICNU may well receive a larger portion of the intervenor funding pool than it would otherwise enjoy.

With respect to Ms. Blumenthal's assertions that Pacific Power may be inappropriately designating documents as highly confidential,¹⁵ we point out that the Protective Order itself contains provisions for challenging the designation of information as highly confidential.¹⁶ ICNU's avenue for relief for any abuse of the "highly confidential" designation is through use of the procedures specified within the Protective Order, rather than through modification of the Protective Order itself.

To the extent ICNU complains about the presence of Pacific Power's monitor or restrictions on Ms. Blumenthal's note-taking in the safe room, we note that the Protective Order makes limited reference to these issues. The Protective Order allows a utility to require the presence of a monitor, but does not specify how closely the monitor

¹¹ The Oregon Court of Appeals rejected one of ICNU's challenges to the Protective Order at *Industrial Customers of Northwest Utilities v. PUC*, ___ Or App ___ (Dec 30, 2010).

¹² See Order No. 08-002 at 5-6; Order No. 06-033 at 3-5.

¹³ In the past, ICNU has stated that it could not find a local tax consultant, but we note that ICNU has had four years to find a tax consultant with more convenient access to the safe room.

¹⁴ We previously approved a request from ICNU for increased intervenor funding based, in part, on its stated need to cover additional expenses resulting from the Protective Order. See, e.g., ICNU Proposed Budget for Issue Fund Grant (Dec. 5, 2007); Order No. 07-576.

¹⁵ Affidavit of Ellen Blumenthal at ¶ 9.

¹⁶ See Protective Order ¶ 20.

may oversee the work of a consultant like Ms. Blumenthal. The Protective Order also states that qualified persons, such as Ms. Blumenthal, may make “limited notes” from highly confidential documents,¹⁷ but it is not clear why Ms. Blumenthal cannot make “calculations” from notes meeting this description. If ICNU believes that Pacific Power is interpreting these safe-room provisions unreasonably, ICNU may wish to seek clarification of these provisions or assert that Pacific Power is violating them. We do not believe, however, that ICNU’s assertions on these points justify amendment of the Protective Order itself.

Finally, we are not convinced that ICNU has made a reasonable effort to work with the procedures of the Protective Order before seeking to modify it. The last time ICNU challenged the Protective Order, it failed to visit the safe room until December to review the tax report and declined to participate in informal workshops conducted by Staff that might have assisted with its review. We concluded on the basis of this and other information that ICNU had failed to make a reasonable attempt to work within the Protective Order procedures.

In this case, ICNU visited the safe room earlier than it did in the prior docket—here, on November 2 and 3, 2010, for a total of two visits—but has appeared to make no serious additional effort to work within the terms of the Protective Order. ICNU was informed by Pacific Power in October 2010, that Pacific Power was “willing to take all reasonable steps to facilitate Ms. Blumenthal’s access to the Portland and Salem safe rooms,” so long as ICNU’s proposals did not involve modifications to the Protective Order.¹⁸ There is no suggestion that ICNU made any attempt to follow up with Pacific Power with any such proposal. At a minimum, we would expect ICNU to engage with Pacific Power on a number of issues ICNU complains about, such as alleged overdesignation of documents as “highly confidential,” the conduct of the monitor in the safe room, and ICNU’s need to visit the safe room for a sufficient period of time. There is no assertion that ICNU has taken any of these steps.

In Order No. 06-033, we acknowledged the difficulty of protecting the confidentiality of highly sensitive tax documents while making provisions for parties to review that information. Due to the significant harm that might occur from the disclosure of this tax information, as well as the regrettable risk of disclosure this Commission has encountered, we concluded that we had no choice but to adopt the provisions of the Protective Order.¹⁹ We believe the Protective Order continues to balance those interests appropriately.

¹⁷ The Protective Order states, “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.” Protective Order ¶ 14.

¹⁸ See Attachment A to ICNU’s Motion to Modify the Protective Order, email from Katherine McDowell to Melinda J. Davison dated October 28, 2010.

¹⁹ As we noted in Order No. 06-033, the heightened restrictions in the Protective Order were adopted in part as a response to a leak of highly confidential documents. We noted that absent heightened protections, “utilities may be reluctant to provide essential information to intervening parties for fear of leaks that may harm their competitive standing.” Order No. 06-033 at 4 (citing *In the Matter of Texas Pacific Group’s*

We recognize that Pacific Power's filing is complex due to the utility's inclusion in Berkshire Hathaway's consolidated tax group. As we have noted in the past, however, this fact increases the need for heightened protection, as Pacific Power's tax report contains sensitive tax information from the hundreds of unregulated companies that are included in Berkshire Hathaway's consolidated filing.


III. CONCLUSION

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

IV. ORDER

IT IS ORDERED that the Industrial Customers of Northwest Utilities' Motion to Modify Protective Order is denied.

Made, entered, and effective JAN 20 2011



John Savage
 Commissioner



Susan K. Ackerman
 Commissioner



A party may request rehearing or reconsideration of this order under 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 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.

Application to Acquire Portland General Electric, Docket No. UM 1121, Order No. 05-114 at 9). We adopted numerous provisions, however, to ensure intervenors would be able to meaningfully participate in the proceedings. See Order No. 08-002 at 5; Order No. 06-033 at 4-5.

