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February 10, 2009

*Via Electronic and US Mail*

Public Utility Commission  
Attn: Filing Center  
550 Capitol St. NE #215  
P.O. Box 2148  
Salem OR 97308-2148

RECEIVED

FEB 11 2009

Public Utility Commission of Oregon  
Administrative Hearing Division

Re: In the Matter of OREGON PUBLIC UTILITY STAFF Requesting the  
Commission direct PORTLAND GENERAL ELECTRIC COMPANY to file  
tariffs establishing automatic adjustment clauses under the terms of SB 408.  
**Docket No. UE 178**

Dear Filing Center:

Enclosed please find an original and one (1) copy of the Response to PGE's  
Motion to Strike on behalf of Industrial Customers of Northwest Utilities ("ICNU") in the above-  
referenced docket.

Thank you for your assistance.

Sincerely yours,



Allison M. Wils

Enclosures

cc: Service List

BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON

UE 178

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FEB 11 2009

Public Utility Commission of Oregon  
Administrative Hearing Division

In the Matter of )  
)  
OREGON PUBLIC UTILITY )  
STAFF )  
Requesting the Commission Direct )  
PORTLAND GENERAL )  
ELECTRIC COMPANY )  
)  
to File Tariffs Establishing )  
Automatic Adjustment Clauses )  
Under the Terms of SB 408. )

RESPONSE OF INDUSTRIAL  
CUSTOMERS OF NORTHWEST  
UTILITIES TO PORTLAND  
GENERAL ELECTRIC  
COMPANY'S MOTION TO  
STRIKE

Pursuant to OAR § 860-013-0050(3)(d), the Industrial Customers of Northwest Utilities ("ICNU") submits this Response in opposition to Portland General Electric Company's ("PGE") Motion to Strike Portions of the Direct Testimony of Ellen Blumenthal for ICNU ("Motion"). All portions of Ms. Blumenthal's Direct Testimony are relevant to the Public Utility Commission of Oregon's ("Commission" or "OPUC") consideration of PGE's 2007 Tax Report, as well as the Commission's ultimate application of Senate Bill ("SB") 408 in establishing an automatic adjustment for the purpose of aligning PGE's rates with its actual taxes paid. Further, the Direct Testimony is necessary and permissible in order for ICNU to preserve its arguments if future judicial review is necessary.

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## I. BACKGROUND

Pursuant to the Ruling that ALJ Hardie issued on January 14, 2009, ICNU filed the Direct Testimony of Ellen Blumenthal on January 28, 2009. On February 2, 2009, PGE filed its Motion requesting that portions of Ms. Blumenthal's Direct Testimony be excluded. Specifically, PGE asked the Commission to strike those portions of the testimony that relate to Ms. Blumenthal's testimony on the SB 408 rules. On February 3, 2009, ALJ Hardie ruled that ICNU has until February 10, 2009, to file its response to the Motion.

## II. ARGUMENT

The Direct Testimony of Ms. Blumenthal is highly relevant to the Commission's consideration of PGE's 2007 Tax Report. ORS § 757.268(6) succinctly states the purpose of SB 408: "so that ratepayers are not charged for more tax than . . . [t]he utility pays to units of government." Ms. Blumenthal has testified that the application of OAR § 860-022-0041 produces a result contrary to the purpose of SB 408, as the calculation from the rule does not produce an actual taxes paid amount.

Administrative processes before the OPUC should be fair and complete. To that end, OAR § 860-014-0045(1)(b) provides that relevant evidence from an expert like Ms. Blumenthal is admissible. Relevant evidence is defined as "evidence tending to make the existence of any fact at issue in the proceeding more or less probable than it would be without the evidence." OAR § 860-014-0045(1)(a). The Direct Testimony of Ms. Blumenthal addresses the factual issue of whether or not the methods used by PGE to calculate its 2007 Tax Report have produced a result equivalent to actual taxes paid (as

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required by SB 408). Coming from an expert like Ms. Blumenthal, this testimony manifestly qualifies as evidence; the OPUC's approval of PGE's Tax Report will be more or less probable with *any* credible expert analysis than without it. The extent to which the Commission chooses to rely on Ms. Blumenthal's testimony goes to weight of the evidence, not to its admissibility.

PGE's argument that portions of Ms. Blumenthal's testimony should be stricken based on UE 177 proceedings is without merit. First, UE 177 is a separate Docket and the application of determinations there has no validity regarding this Docket.

Second, PGE's exclusive reliance upon the proceedings of UE 177 is unfounded in that most portions of testimony that PGE now requests the Commission to strike were admitted into evidence in UE 177. On March 4, 2008, Ms. Blumenthal testified orally in UE 177 that the Commission's rules produced results inconsistent with the requirements of SB 408. Not only did opposing counsel in UE 177 fail to object or move the ALJ to strike such testimony from the record, but opposing counsel actively elicited this testimony and caused it to be admitted into evidence. Thus, the record in UE 177 actually contains several portions of admitted testimony from Ms. Blumenthal that is virtually equivalent to what PGE now urges the Commission to strike in UE 178.

Third, to the extent that the Commission has determined similar testimony by Ms. Blumenthal to be irrelevant in the past, the Commission erred. An agency's "contested cases are appropriate proceedings in which to raise even purely legal challenges" to rules. Wheaton v. Kulongoski, 209 Or App 355, 364 n 3, 147 P3d 1163 (2006). If purely legal challenges may be raised in contested agency cases such as

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UE 178, factual testimony such as that offered by Ms. Blumenthal is all the more proper, especially if implicating the shortcomings of a rule. Though PGE argues to the contrary, the OPUC should not perpetuate its error by relying on orders in UE 177 that fail to acknowledge established Oregon law, as stated in Wheaton.

Moreover, the Commission can also depart from its own rules or prior practice, when necessary, in order to comply with a statute. Determinations in UE 177 should not control the Commission in this Docket, when to rely on such determinations would contravene the directives of SB 408. “The legislative intent behind SB 408 is clear—we are to depart from historic practice and consider taxes paid by a utility or its parent when setting rates.” Re PacifiCorp, Docket No. UE 170, Order No. 05-1050 at 18 (Sept. 28, 2005). Further, the OPUC acknowledges that it “is a legislative agency and has only those powers granted it by the legislature.” Advanced TV & Video v. Qwest Corp., Docket No. UC 454, Order No. 00-572 at 5 (Sep.19, 2000). If the OPUC believes that it would exceed its legislatively granted powers by applying certain UE 177 determinations to this Docket, the Commission need not rely on UE 177.

Additionally, ICNU is doing nothing improper by entering testimony by Ms. Blumenthal in order to preserve claims of error for possible later judicial review. Ms. Blumenthal’s testimony addresses the fundamental factual question of whether PGE’s 2007 Tax Report reflects actual taxes paid, as required by SB 408. Thus, by explaining how OAR § 860-022-0041 produces a result that violates SB 408, Ms. Blumenthal’s testimony may support a petition for review to the appellate court if the rule is wrongly relied upon by the Commission.

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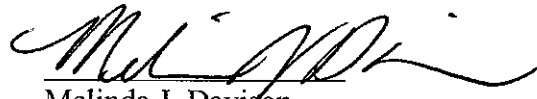
Oregon law holds that established “rules of preservation apply on judicial review of administrative agency orders.” Baker v. Driver and Motor Vehicle Servs. Div., 201 Or App 310, 313, 118 P3d 852 (2005). Moreover, ORAP 5.45(1) provides in part that “[n]o matter claimed as error will be considered on appeal unless the claimed error was preserved in the lower court . . . .” The Oregon Court of Appeals applies this procedural rule to agency review. See Lake County v. Teamsters Local Union #223, 208 Or App 271, 277, 145 P3d 187 (2006).

### III. CONCLUSION

For the foregoing reasons, PGE’s Motion to Strike should be denied.

Dated this 10th day of February, 2009.

Respectfully submitted,

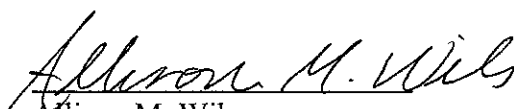


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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Response to PGE's Motion to Strike on behalf of Industrial Customers of Northwest Utilities upon the parties, shown below, on the official service list by causing the foregoing document to be deposited, postage-prepaid, in the U.S. Mail, or by service via electronic mail to those parties who waived paper service.

Dated at Portland, Oregon, this 10th day of February, 2009.

  
Allison M. Wils

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