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March 13, 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

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 the original and five (5) copies of the Industrial Customers  
of Northwest Utilities' Opening Brief in the above-referenced matter.

Thank you for your assistance.

Sincerely yours,

/s/ Brendan E. Levenick  
Brendan E. Levenick

Enclosures

cc: Service List

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served the foregoing Opening Brief on behalf of the 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 13th day of March, 2009.

/s/ Brendan E. Levenick  
Brendan E. Levenick

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**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UE 178**

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. )  

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**OPENING BRIEF OF THE  
INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES**

**March 13, 2009**

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## I. INTRODUCTION

Pursuant to the ALJ's Ruling issued on February 6, 2009, the Industrial Customers of Northwest Utilities ("ICNU") submits this Opening Brief to the Public Utility Commission of Oregon ("OPUC" or the "Commission"). The Commission's rule implementing Senate Bill 408 ("SB 408"), OAR § 860-022-0041, does not result in the calculation of a utility's *actual* tax expense. Rather, the methodologies required by OAR § 860-022-0041 produce only hypothetical numbers that do not accurately reflect taxes paid to units of government, as required by SB 408. Thus, the Commission should not rely on OAR § 860-022-0041 to impose an SB 408 surcharge given that the rule produces a result that is inconsistent with the statute. Accordingly, the Commission should reject Portland General Electric Company's ("PGE") and OPUC Staff's ("Staff") Stipulation, which is based on calculations prescribed by OAR § 860-022-0041.

In addition, the safe room requirements of this Docket do not allow ICNU to meaningfully participate in a full review of PGE's tax report. SB 408 permits intervenors to "obtain and use the information obtained by the commission" in its review of utility tax reports. ORS § 757.268(11). However, under the terms of the protective order governing UE 178, ICNU is prohibited from: 1) possessing "highly confidential" documents; 2) viewing highly confidential information except within a designated safe room, in the presence of a PGE employee; or 3) making any copies of highly confidential documents or even taking more than "limited notes." Order No. 06-033 at 2, 4 (Jan. 25, 2006). Though PGE agreed to provide ICNU's expert with copies of some confidential documents, PGE expressly declined to guarantee ICNU with provision of all documents

in this case. PGE, therefore, gave no guarantee that it would not subject ICNU to the unworkable safe room requirements of the protective order at any time. The OPUC should not approve PGE and Staff's Stipulation in light of the inability of intervenors to review PGE's 2007 tax report with any guarantee of full participation.

## **II. BACKGROUND**

Pursuant to ORS § 757.268(1), PGE filed its tax report for the 2007 tax year with the Commission on October 15, 2008. A prehearing conference was held on November 3, 2008, setting the procedural schedule for this Docket. On January 8, 2009, PGE submitted a revised tax report correcting four errors uncovered in its initial report.

Pursuant to the amended schedule, ICNU filed the Direct Testimony of Ellen Blumenthal on its behalf on January 28, 2009. Ms. Blumenthal's testimony focused on the inconsistent results between SB 408 and the calculations produced from OAR § 860-022-0041, as well as the impossibility of conducting a meaningful tax report review under the present safe room requirements. Ms. Blumenthal testified that PGE's 2007 tax report should be rejected, due to the failings of the rule and impossible conditions of the protective order. ICNU/100, Blumenthal/7, lines 7-23.

On February 2, 2009, PGE filed a motion to strike portions of Ms. Blumenthal's testimony as irrelevant, citing a decision in UE 177 for authority. Acknowledging that an appeal is pending on the legality of OAR § 860-022-0041, the ALJ ultimately denied PGE's motion to strike. Ruling at 2 (Feb. 13, 2009).

On February 5, 2009, PGE and Staff filed a Stipulation and supporting testimony which calls for a net surcharge to PGE of \$14.7 million, or about \$17.3 million

including interest accrued. This represents an increase from the approximately \$14.6 million surcharge originally requested on October 15, 2008. PGE also filed Response Testimony on February 25, 2009, contending that OAR § 860-022-0041 fairly implements SB 408 and that ICNU had a meaningful opportunity to review PGE's tax reports, notwithstanding the protective order.

A hearing was held on March 4, 2009, in which ICNU and PGE cross-examined each other's witnesses. PGE established that ICNU's expert did not actually review PGE's 2007 tax report. Hearing Transcript ("Tr.") at 26, lines 5–7. Ms. Blumenthal did state, however, that all calculations under the current rules are inconsistent with SB 408. Id. at 27, lines 4–25; id. at 28, line 1. PGE's witness, Jay Tinker, had no answer as to why PGE was unwilling to modify the protective order to guarantee ICNU continuing access to confidential tax report information. Id. at 44, line 25; id. at 45, lines 1–4. All testimony was admitted into the record at the hearing.

Presently, an appeal is pending before the Oregon Court of Appeals challenging the validity of OAR § 860-022-0041 and the protective order in this Docket. CA A138879. Although the appeal is from OPUC Docket No. UE 177, the issues are identical; the same rule and protective order govern both Dockets. A decision by the appellate court invalidating OAR § 860-022-0041 and/or Protective Order No. 06-033 could render a decision to adopt the Stipulation void.

### **III. STANDARD OF REVIEW**

PGE has the burden of proof to establish that its proposed rates are fair, just and reasonable. ORS § 757.210(1)(a). The fact that this Docket involves an



automatic adjustment clause does not absolve PGE of its burden of proof, as the Commission may only authorize a rate that is shown to be fair, just and reasonable. Id. In order to meet its burden of proof, PGE must establish that its rates will “reflect the taxes that are paid to units of government . . . .” ORS § 757.267(1)(f). The burden of proof is borne by PGE “throughout the proceeding and does not shift to any other party.” Re PGE, OPUC Docket No. UE 116, Order No. 01-787 at 6 (Sept. 7, 2001). When other parties dispute the proposed rates, PGE retains the burden to show that all its suggested changes are just and reasonable. Id.

#### IV. ARGUMENT

##### A. OAR § 860-022-0041 Does not Comply with SB 408

Whether PGE’s tax report complies with OAR § 860-022-0041 is not the key issue in this case. If the rule does not comply with SB 408, the Commission has no basis on which to order a rate change based on PGE’s tax report. As stated in ICNU’s Direct Testimony and by Ms. Blumenthal in cross-examination, OAR § 860-022-0041 does not produce a result that complies with SB 408, *regardless* of the calculation methodology used. See ICNU/100, Blumenthal/5, lines 23–25 (none of the three methods specified in the Commission’s rules produces an actual tax calculation as required by SB 408); Tr. at 27, lines 4–25; Tr. at 28, line 1.

“SB 408 requires this Commission to track the amount of taxes *actually paid* and determine what portion of those amounts are properly attributed to the regulated operations of the utility.” Re Adoption of Permanent Rules to Implement SB 408 Relating to Utility Taxes, OPUC Docket No. AR 499, Order No. 06-532 at 1 (Sep. 14,

2006) (emphasis added). The automatic adjustment clause under SB 408, by its terms, applies only to the difference between: 1) actual taxes paid to governmental authorities that are properly attributed to regulated operations of the utility; and 2) taxes collected in rates. ORS § 757.268(6).

If OAR § 860-022-0041 does not produce an actual taxes paid result, operation of the automatic adjustment clause would be illegal and rates established would not be “fair, just and reasonable.” ORS § 757.267(1)(f); see also Re SB 408, Order No. 06-400 at 3, 8 (July 14, 2006) (Commission’s method must ensure rates are fair and reasonable). The current methodologies prescribed by OAR § 860-022-0041 do not produce an actual taxes paid result and, therefore, do not ensure “fair, just, and reasonable” rates. ORS § 757.267(1)(f).

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.

(Emphasis added.)

Thus, the amount of taxes paid that are properly attributed to the regulated operations of the utility (the Apportionment Method) cannot be more than the utility’s actual taxes paid attributable to its regulated operations (subsection (a)) or the total

amount of consolidated taxes paid by the taxpaying entity (subsection (b)). These calculations plainly require a calculation of “taxes paid,” an actual amount and not a hypothetical calculation or liability. None of the methodologies in OAR§ 860-022-0041, however, are actual tax calculations as required by statute. See ICNU/100, Blumenthal/5, lines 23–25; Tr. at 27, lines 4–25; Tr. at 28, line 1.

In this case, according to PGE, the consolidated method produced the lowest figure, and is used by Staff and PGE in determining the difference between taxes paid and taxes collected. PGE 100/Tamlyn-Tinker/6, lines 6–7. Ms. Blumenthal has stated specifically in this Docket that there are problems with the consolidated method used by PGE. Tr. at 29, lines 2–6. Ms. Blumenthal has also provided more extensive testimony before the Commission, highlighting specific faults with the consolidated methodology that render its results inconsistent with SB 408. See Re PacifiCorp, OPUC Docket No. UE 177, ICNU/100, Blumenthal 7–10 (Jan. 22, 2008). In light of the inconsistencies between an actual taxes paid result under SB 408 and *any* calculations derived under the methodologies of OAR § 860-022-0041, including the consolidated method, it will not be fair, just or reasonable for the Commission to approve the Stipulation.

**B. The Commission has the Authority to Disallow the Stipulation Surcharge in this Case**

ICNU recommends that the Commission deny recovery to PGE of the surcharge agreed upon in the Stipulation because, based on OAR § 860-022-0041, the surcharge does not reflect the amount of taxes paid to governmental authorities and

properly attributed to the regulated operations of the utility. If adherence to OAR § 860-022-0041 would violate the terms of SB 408, the Commission has no authority to issue such an order.

ICNU is aware of no cases that stand for the proposition that an agency cannot reject its own rules if it finds those rules violate the agency's statutory authority. In fact, in the exercise of its discretion, an agency is specifically authorized to act inconsistently with a rule, position, or prior practice if the inconsistency is explained by the agency. ORS § 183.482(8)(b)(B). If an agency adequately explains its reasoning for departing from its rule, position, or practice, a reviewing court has no basis for overturning the agency's decision. Gordon v. Board, 343 Or 618, 634–35 (2007).

Indeed, in Docket No. UE 170, the Commission recognized that it must follow the law. In that Docket, the Commission ordered an immediate reduction in the amount of taxes included in PGE's rates based on the passage of SB 408. Re PacifiCorp, OPUC Docket No. UE 170, Order No. 05-1050 at 17–19 (Sep. 28, 2005). Despite long-standing Commission practice of setting the amount of taxes includable in rates on a stand-alone basis, the Commission recognized it no longer had the statutory authority to set rates on that basis due to the passage of SB 408. Id. at 18.

In addition, the Commission recently argued to the Oregon Court of Appeals that it is not required to follow its own rules when to do so would violate its statutory authority. Brief of Respondent at 24-25, Crooked River Ranch Water Co. v. Pub. Util. Comm'n of Oregon, 224 Or App 485 (2008) (CA A134177). One question presented in Crooked River was whether OAR § 860-036-0412 required the telephone

number of each member of Crooked River Ranch Water Company petitioning the OPUC for regulation to be listed on the member's petition. The Commission's rule states that "[p]etitions *must*... include the member's . . . telephone number . . . ." OAR § 860-036-0412(3) (emphasis added). Yet, despite the requirements of this rule, the Commission argued that enforcement of this requirement "would itself be invalid, and would exceed any rulemaking authority granted by ORS 757.063 . . . which requires PUC to count any and every petition that is filed by an association's members." Brief of Respondent at 24, Crooked River, 24 Or App 485 (CA A13477) (internal quotation marks omitted).

Although the Commission characterized its argument as an interpretation of its own rules rather than a waiver, it is clear the Commission recognizes that it cannot act contrary to its statutory authority, regardless of what its rules may provide.

Finally, 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 (2006). If purely legal challenges may be raised in contested agency cases such as UE 178, factual testimony such as that offered by Ms. Blumenthal is all the more proper, especially if implicating the shortcomings of a rule. The Commission can and should consider even direct challenges to its rules.

ICNU requests that the Commission waive the operation of OAR § 860-022-0041 in this Docket in order to avoid violating SB 408. After all, the Commission "is a legislative agency and has only those powers granted it by the legislature." Advanced TV & Video v. Qwest Corp., OPUC Docket No. UC 454, Order No. 00-572 at 5 (Sep. 19, 2000). Moreover, the validity of OAR § 860-022-0041 is the subject of an

appeal currently pending before the Oregon Court of Appeals. CA A138879. Granting PGE the surcharge agreed upon in the Stipulation based on OAR § 860-022-0041 would not reflect the difference between taxes paid and taxes collected, as required by SB 408. As a result, the Commission has adequate reason to act contrary to OAR § 860-022-0041.

**C. The Protective Order does not Allow ICNU to Participate Meaningfully in Review of PGE’s Tax Report, which Should Invalidate the Stipulation**

SB 408 allows intervenors to “obtain and use the information obtained by the commission” in its review of utility tax reports. ORS § 757.268(11). However, under the terms of the protective order governing this Docket, ICNU cannot: 1) possess “highly confidential” documents; 2) view highly confidential information except within a designated safe room, in the presence of a PGE employee; or 3) make any copies of highly confidential documents or even take more than “limited notes.” Order 06-033 at 2, 4 (January 25, 2006). As testified by ICNU’s expert, a meaningful review under such strictures is impossible. ICNU/100, Blumenthal/6, lines 3–5.

In Rebuttal Testimony, PGE contends that “Ms. Blumenthal’s claims that she must travel to view documents, write testimony in the presence of a company employee, or is not trusted to protect highly confidential information are simply not true.” PGE/100, Tamlyn-Tinker/3, lines 19–21. However, this unequivocal claim is belied by PGE’s own exhibits and by the testimony of its witness on cross-examination. Although PGE provided some confidential information to Ms. Blumenthal in the past, PGE has always maintained the right to discontinue further disclosure and subject ICNU to the impossible requirements of the protective order at any time.

First, PGE filed Exhibits 101, 102, and 104, three letters specifying the unilateral conditions imposed by PGE on three separate instances of confidential disclosure. An identical caveat is present in each of these letters: “PGE’s decision to make a special arrangement in this instance should not be viewed as a precedent for how it will respond to future similar requests *in this proceeding or in future tax report proceedings.*” PGE Exhibits/101, 102, 104, Tamlyn-Tinker/1 (emphasis added). Thus, in every instance that PGE electively provided confidential information beyond the requirements of the protective order, PGE expressly maintained its right to withhold further disclosure.

Second, on cross examination, PGE witness Jay Tinker agreed that PGE was making only “a limited exception to the protective order” by attempting to supply Ms. Blumenthal with certain confidential information in this Docket. Tr. at 44, lines 13–16. When asked why PGE wouldn’t propose an amendment to the protective order if PGE were truly willing to continue its special arrangements for Ms. Blumenthal, Mr. Tinker could only answer “I don’t really have a response for that.” *Id.* at 44, line 25; *id.* at 45, lines 1–4. Indeed, Mr. Tinker was unaware of the protracted negotiations between counsel for ICNU and PGE, in which PGE’s counsel had initially maintained that Ms. Blumenthal *would not be provided* with all of the confidential material pertaining to PGE’s 2007 tax report. Tr. at 40–41. An agreement was never reached in which PGE agreed to provide all documents in this Docket to Ms. Blumenthal in Texas.

In sum, in its letters setting forth limited exceptions to protective order requirements, PGE expressly declined to guarantee full provision of all confidential

documents that might be provided in this Docket. Moreover, ICNU had good reason not to rely on PGE to continue to provide confidential material, based on the demonstrated willingness of PGE to invoke its right to offer only partial disclosures. ICNU, therefore, 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.

In fact, this "agreement" with PGE is such that the company could simply decide to no longer provide the documents to ICNU if it believed ICNU was getting too aggressive in the proceeding or unwilling to settle. On every occasion in which confidential documents were sent to ICNU, an identical statement provided that "PGE does not waive any of the terms of the Protective Order." PGE Exhibits/101, 102, 104, Tamlyn-Tinker/1. If 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.

## **V. CONCLUSION**

The surcharge agreed upon in the Stipulation should be rejected because the surcharge violates SB 408. The OPUC cannot rely upon OAR § 860-22-0041 to impose this requested surcharge since the rule does not produce an actual taxes paid result. Further, the inability of ICNU or any other intervenor to participate in this proceeding without guarantee that they could fully review PGE's 2007 tax report should render the Stipulation invalid.



Dated this 13th day of March, 2009.

Respectfully submitted,

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