

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UE 178

In the Matter of

PORTLAND GENERAL ELECTRIC  
COMPANY,

Filing of tariffs establishing automatic  
adjustment clauses under the terms of SB 408.

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RULING

**DISPOSITION: MOTION TO STRIKE DENIED**

On February 2, 2009, Portland General Electric Company (PGE) filed a motion to strike portions of the direct testimony of Industrial Customers of Northwest Utilities (ICNU) witness Ellen Blumenthal. On February 10, 2009, ICNU filed a timely response.<sup>1</sup>

**PGE’s Motion**

In its motion, PGE argues that certain portions of ICNU’s testimony are irrelevant and should be excluded from the record. PGE states that ICNU submitted nearly identical testimony last year in docket UE 177, which involved PacifiCorp, dba Pacific Power’s (Pacific Power) tax filing under Senate Bill (SB) 408. In that docket, Pacific Power successfully moved to strike similar portions of ICNU’s testimony.<sup>2</sup> PGE explains that Ms. Blumenthal’s testimony in both that docket and in this one address the same issues: the validity of the Commission’s rules implementing SB 408, and the validity of the protective order applicable to SB 408 proceedings. PGE asserts that the testimony was irrelevant in docket UE 177 and is irrelevant here for the same reasons.

PGE seeks to strike the following portions of Ms. Blumenthal’s testimony (labeled ICNU/100) addressing the validity of the Commission’s rules: Blumenthal/4, lines 8-21 (addressing whether OAR 860-022-0041 accomplishes the goals of SB 408); Blumenthal/5, lines 23-25 (stating that none of the calculation methodologies required by OAR 860-022-0041 are “actual” tax calculations, and that PGE’s tax report therefore fails to meet the requirements of

<sup>1</sup> Due to the compressed schedule in this docket, the deadline for ICNU’s response was shortened to February 10, 2009.

<sup>2</sup> *In re PacifiCorp, dba Pacific Power*, ALJ Ruling, docket UE 177 (March 3, 2008). The administrative law judge’s decision to strike the testimony was later affirmed by the Public Utility Commission of Oregon (Commission). *In Re PacifiCorp, dba Pacific Power*, Order No. 08-176, docket UE 177. ICNU has appealed the Commission’s ruling on this issue, and that challenge is currently pending in Docket No. CA A138879 in the Oregon Court of Appeals.

SB 408); and Blumenthal/7, lines 7-20 (recommending that the Commission take specific actions with respect to PGE's tax report).<sup>3</sup>

### ICNU's Response

ICNU argues that rulings from docket UE 177 do not necessarily apply in this docket.<sup>4</sup> Moreover, ICNU argues, the Commission erred in docket UE 177 when it struck Ms. Blumenthal's testimony addressing the Commission's rules. According to ICNU, a party may raise even purely legal challenges to agency rules in a contested-case proceeding, and Ms. Blumenthal's testimony on the validity of the Commission's rules is therefore appropriate here.<sup>5</sup>

ICNU also contends that the Commission can depart from its own rules or prior practice when necessary to comply with a statute, and therefore Ms. Blumenthal's testimony challenging the rules is appropriate.<sup>6</sup> Finally, ICNU argues that it is "doing nothing improper" by attempting to preserve error on the "fundamental factual question" of whether PGE's 2007 tax report reflects the calculation required by SB 408.

### RULING

Portland General Electric's motion is denied. A ruling on a motion to strike is within the Commission's sound discretion. PGE's assertion that similar testimony was excluded from the record in docket UE 177 is well taken. However, the Commission's conclusion in that docket—that ICNU's testimony challenging the Commission's rules was irrelevant—is pending on appeal. In addition, unchallenged portions of Ms. Blumenthal's testimony in this docket address the validity of the Commission's rules.<sup>7</sup> The testimony will not be struck at this time, but PGE remains free to reurge its motion at a later date. The parties also remain free to address the weight that ICNU's testimony should be afforded in light of the Commission's prior determinations.

Dated at Salem, Oregon, this 13<sup>th</sup> day of February.

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Lisa D. Hardie  
Administrative Law Judge

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<sup>3</sup> PGE does not seek to strike all of the testimony that was excluded in docket UE 177. Unlike Pacific Power's motion to strike in docket UE 177, in this case PGE does not seek to strike ICNU's testimony challenging the protective order. It seeks only to strike testimony addressing the validity of SB 408. PGE explains that it intends to rebut that testimony addressing the validity of the Commission's protective order.

<sup>4</sup> In any case, ICNU argues, although portions of Ms. Blumenthal's prefiled testimony were excluded in that docket, the substance of Ms. Blumenthal's excluded prefiled testimony was actually admitted into the record orally at the hearing.

<sup>5</sup> Citing *Wheaton v. Kulongoski*, 209 Or App 355, 364 n.3, 147 P3d 1163 (2006).

<sup>6</sup> Citing *In re PacifiCorp*, docket UE 170, Order No. 05-1050 at 18 (Sept 28, 2005); *Advanced TV & Video v. Qwest Corp.*, docket UC 454, Order No. 00-572 at 5 (Sept 19, 2000).

<sup>7</sup> See, e.g., ICNU/100, Blumenthal/5, lines 17-22.