

Davison Van Cleve PC

Attorneys at Law

TEL (503) 241-7242 • FAX (503) 241-8160 • mail@dvclaw.com
Suite 400
333 SW Taylor
Portland, OR 97204

May 12, 2005

Via Electronically and US Mail

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

Re: In the Matter of PACIFIC POWER & LIGHT Klamath Basin Irrigation Rates
Docket No. UE 171

Dear Filing Center:

Enclosed please find an original and six copies of Klamath Off-Project Water Users' Reply to Responses to Motion for Summary Disposition in the above-captioned docket.

Please return one file-stamped copy of the document in the self-addressed, stamped envelope provided. Thank you for your assistance.

Sincerely,

/s/ Ruth A. Miller
Ruth A. Miller

Enclosures
cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Klamath Off-Project Water Users' Reply to Responses to Motion for Summary Disposition, upon the parties on the service list, shown below, by causing the same to sent by electronic mail to all parties who have an email address, as well as mailed, postage-prepaid, through the U.S. Mail.

Dated at Portland, Oregon, this 12th day of May, 2005.

/s/ Ruth A. Miller

Ruth A. Miller

U.S. BUREAU OF RECLAMATION 6600 WASHBURN WAY KLAMATH FALLS OR 97603 dsabo@mp.usbr.gov	EDWARD BARTELL KLAMATH OFF-PROJECT WATER USERS INC 30474 SPRAGUE RIVER ROAD SPRAGUE RIVER OR 97639
LISA BROWN WATERWATCH OF OREGON 213 SW ASH ST STE 208 PORTLAND OR 97204 lisa@waterwatch.org	LOWREY R BROWN CITIZENS' UTILITY BOARD OF OREGON 610 SW BROADWAY, SUITE 308 PORTLAND OR 97205 lowrey@oregoncub.org
JOHN CORBETT YUROK TRIBE PO BOX 1027 KLAMATH CA 95548 jcorbett@yuroktribe.nsn.us	JOHN DEVOE WATERWATCH OF OREGON 213 SW ASH STREET, SUITE 208 PORTLAND OR 97204 john@waterwatch.org
JASON EISDORFER CITIZENS' UTILITY BOARD OF OREGON 610 SW BROADWAY STE 308 PORTLAND OR 97205 jason@oregoncub.org	EDWARD A FINKLEA CABLE HUSTON BENEDICT HAAGENSEN & LLOYD LLP 1001 SW 5TH, SUITE 2000 PORTLAND OR 97204 efinklea@chbh.com
JASON W JONES DEPARTMENT OF JUSTICE REGULATED UTILITY & BUSINESS SECTION 1162 COURT ST NE SALEM OR 97301-4096 jason.w.jones@state.or.us	DAN KEPPE KLAMATH WATER USERS ASSOCIATION 2455 PATTERSON STREET, SUITE 3 KLAMATH FALLS OR 97603
JIM MCCARTHY OREGON NATURAL RESOURCES COUNCIL PO BOX 151 ASHLAND OR 97520 jm@onrc.org	KATHERINE A MCDOWELL STOEL RIVES LLP 900 SW FIFTH AVE STE 1600 PORTLAND OR 97204-1268 kamcdowell@stoel.com

<p>BILL MCNAMEE PUBLIC UTILITY COMMISSION PO BOX 2148 SALEM OR 97308-2148 bill.mcnamee@state.or.us</p>	<p>MICHAEL W ORCUTT HOOPA VALLEY TRIBE FISHERIES DEPT PO BOX 417 HOOPA CA 95546</p>
<p>STEPHEN R PALMER OFFICE OF THE REGIONAL SOLICITOR 2800 COTTAGE WAY, RM E-1712 SACRAMENTO CA 95825</p>	<p>STEVE PEDERY OREGON NATURAL RESOURCES COUNCIL sp@onrc.org</p>
<p>MATTHEW W PERKINS DAVISON VAN CLEVE PC 333 SW TAYLOR, STE 400 PORTLAND OR 97204 mwp@dvclaw.com</p>	<p>THOMAS P SCHLOSSER MORISSET, SCHLOSSER, JOZWIAK & MCGAW t.schlosser@msaj.com</p>
<p>GLEN H SPAIN PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOC PO BOX 11170 EUGENE OR 97440-3370 fish1ifr@aol.com</p>	<p>ROBERT VALDEZ PO BOX 2148 SALEM OR 97308-2148 bob.valdez@state.or.us</p>
<p>PAUL M WRIGLEY PACIFIC POWER & LIGHT 825 NE MULTNOMAH STE 800 PORTLAND OR 97232 paul.wrigley@pacificorp.com</p>	

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 171

In the Matter of)	
)	KLAMATH OFF-PROJECT WATER
PACIFIC POWER & LIGHT)	USERS' REPLY TO RESPONSES TO
(dba PACIFICORP))	MOTION FOR SUMMARY
)	DISPOSITION
Klamath Basin Irrigation Rates.)	
_____)	

Pursuant to the prehearing conference memorandum issued in Public Utility Commission of Oregon (“OPUC” or the “Commission”) Docket No. UE 171, the Klamath Off-Project Water Users, Inc. (“KOPWU”) submits this Reply regarding the Responses to PacifiCorp’s (or the “Company”) Motion for Summary Disposition (the “Motion”). As KOPWU described in its Response to PacifiCorp’s Motion, the Company’s request to terminate the agreements under which PacifiCorp has provided electric service to Klamath Basin irrigation customers for the last fifty years is an important matter that requires thoughtful analysis of the legal and policy implications, and the Company’s Motion failed to address many significant aspects of the requested relief. The responses to the Motion submitted by Oregon Natural Resources Council (“ONRC”), WaterWatch of Oregon (“WaterWatch”), Commission Staff (“Staff”), the Pacific Coast Federation of Fishermen’s Associations (“PCFFA”), and the Hoopa Valley Tribe provide no additional analysis of the issues raised by PacifiCorp’s request, nor do those parties address how the Commission can lawfully terminate the Klamath Basin contract rates on summary disposition.

Instead, these parties merely adopt PacifiCorp's analysis and support the Company's request to raise Klamath irrigation customers' rates by 1176%.^{1/}

The Commission should deny PacifiCorp's Motion as it relates to the Off-Project Agreement because the Agreement is unambiguous in that it does not terminate in 2006. Nevertheless, if the Commission intends to consider PacifiCorp's request to terminate the Agreement, it should postpone any decision regarding a change in the Klamath Basin irrigation rates at least until the Federal Energy Regulatory Commission ("FERC") has issued a decision regarding PacifiCorp's pending license application for Project No. 2082. The Klamath Water Users Association (the "Water Users Association"), convincingly argued in its response that the Commission should not alter the On-Project rate while PacifiCorp operates Project No. 2082 pursuant to its current license or an annual license issued by FERC, and that any decision regarding the appropriate On-Project rate should wait at least until the terms of any new license are known. The U.S. Bureau of Reclamation and the U.S. Fish and Wildlife Service (collectively, the "Federal Agencies") submitted a similar request, urging the Commission to delay its decision regarding the Klamath Basin contracts until FERC had addressed the issue.

KOPWU agrees with the reasoning behind the Water Users Association's and the Federal Agencies' position and submits that the arguments for delay apply to Off-Project Customers with equal force. The outcome of the FERC proceeding may have an impact on the rate for Off-Project Customers as well. Furthermore, KOPWU demonstrated in its Response that the contractual interpretation issues raised by PacifiCorp cannot be resolved on summary disposition and, in any event, should likely be resolved by a court. KOPWU also demonstrated

^{1/} This increase does not reflect the application of the Bonneville Power Administration Energy Discount and other adjustments. Re PacifiCorp, OPUC Docket No. UE 171, Affidavit of Matthew W. Perkins, Exhibit No. 19 (Apr. 28, 2005). The actual proposed increase for Off-Project Customers is greater than this amount.

that PacifiCorp had not proven as a matter of law that termination of the Off-Project Agreement is warranted according to the OPUC's standards and policies regarding alteration of negotiated agreements. As a result, unless the Commission finds that the Off-Project Agreement is unambiguous and denies PacifiCorp's Motion, additional proceedings will almost certainly be necessary to resolve the factual issues regarding the Off-Project rate and the parties' contractual rights. Although the Commission may be able to resolve the issues regarding the Off-Project rate, those issues are necessarily entwined with interpreting the Off-Project Agreement and determining the parties' contractual rights, both of which are tasks more properly performed by a court.

Sound legal and policy principles support postponing a decision regarding the rates for Klamath Basin irrigation customers so that the Commission has all possible information under these circumstances. The contract rates for Klamath Basin irrigation customers have been in effect for fifty years and there is no urgency for the Commission to resolve this issue prior to having a complete understanding of all the factors involved. Postponing the decision regarding the issues in this proceeding will provide certainty to all parties, including the Commission, regarding the conditions in any new PacifiCorp license and any necessary determination regarding the Off-Project Agreement made by a court. The serious legal and policy implications of these issues demand the most complete record possible prior to any Commission decision.

ARGUMENT

1. The Commission's Decision Must Be Supported by Substantial Evidence Rather Than a Statement That it "Agrees" with PacifiCorp

Commission Staff's response to PacifiCorp's Motion adds little to the analysis of the issues in this proceeding or the record upon which the Commission must base its decision. Staff states its wholesale agreement with PacifiCorp without applying the facts to the relevant legal

standards in any meaningful manner and without drawing any independent conclusions. Staff neglects to mention the standard for summary disposition, does not address the OPUC's policy of upholding negotiated agreements, and takes no position on the meaning of the Klamath River Basin Compact (ORS § 542.610 et seq.), which is binding on the Commission and directly relevant to its decision. In short, Staff merely parrots PacifiCorp's statements, which is of little value with respect to the complicated issues in this proceeding.

a. The Fact That “Staff Agrees” With PacifiCorp Does Not Justify Terminating the Off-Project Agreement

PacifiCorp requests to terminate the Off-Project Agreement on April 16, 2006, despite the fact that the Agreement bears no such expiration date on its face. Staff's analysis of this request is little more than a recitation of PacifiCorp's position regarding the Agreement followed by Staff's agreement: “In its Motion, PacifiCorp maintains that April 16, 2006 is a reasonable expiration date for the Off-Project Contract. Staff agrees.”^{2/} Staff also states that “[t]he Off-Project Agreement does not contain an express termination term, but it is reasonable to terminate both contracts at the same time because the historical context demonstrates that the contracts were related and should be considered together.”^{3/}

As an initial matter, the “historical context” demonstrates that the On-Project and Off-Project Agreements both were related to Copco's ultimate ability to obtain PacifiCorp's current license for Project No. 2082. It does not follow, however, that the two agreements can simply be “considered together” for the purposes of the contractual interpretation. In fact, it is

^{2/} Staff Response at 1-3. KOPWU described in its Response to PacifiCorp's Motion that PacifiCorp was incorrect in its claim that courts will imply a “reasonable” termination date for contracts that lack an explicit termination provision. Re PacifiCorp, OPUC Docket No. UE 171, KOPWU Response to PacifiCorp Motion for Summary Disposition at 26-28 (Apr. 28, 2004). Despite Staff's acceptance of PacifiCorp's statement, this is not how courts address such contracts.

^{3/} Staff Response at 6.

unreasonable and unlawful to do so. KOPWU described in its Response to the Motion both the process that courts follow for contractual interpretation and how that process fits in with the Commission's responsibilities in ruling on a motion for summary disposition. Although Staff agrees with PacifiCorp in its response, Staff is silent as to these fundamental issues.

In addition, although Staff includes a summary of certain statutes that govern the Commission's authority and operation, Staff never applies these statutes or any other Commission standards or policies to the Off-Project Agreement in any meaningful manner. Unlike Staff, the Commission cannot simply state that it "agrees" with PacifiCorp and not analyze the facts in a meaningful way. The Commission's factual findings must be supported by evidence in the record and its conclusions must be rationally related to that evidence. The evidence demonstrates that the Off-Project Agreement contains terms that are separate and distinct from the On-Project Agreement and that the law in Oregon is not that the Commission is allowed to imply a "reasonable term" for the Agreement.^{4/} This record simply does not support a decision to terminate the Off-Project Agreement on April 16, 2006.

Finally, Staff alleges that the Klamath Basin irrigation rates are no longer cost-based and nondiscriminatory, but Staff altogether ignores the historical basis for these agreements. The Klamath Basin contract rates have always been justified based on the mutual benefit that was realized by Copco and customers at the time Copco sought to develop its hydroelectric facilities on the Klamath River. In recognition of this mutually beneficial arrangement, the Commission, PacifiCorp's rate schedules, and the Klamath Basin River Compact have designated Klamath basin irrigation customers as a customer class that is distinct from both irrigation customers on

^{4/} See KOPWU Response at 26-28.

PacifiCorp’s standard irrigation tariffs and the Company’s special contract customers on Schedule 400. Staff claims that Klamath Basin irrigation customers are “similarly situated” to all other PacifiCorp irrigation customers for the purposes of ORS § 757.325, but Staff does not discuss any of the factors that have justified the Commission distinguishing Klamath irrigation customers as a separate customer class and including the Klamath contracts in rates for the past fifty years.

b. Staff’s Description of a Special Contract Conflicts With Staff’s Conclusion That the Off-Project Agreement Is Governed by Special Contract Standards

Staff also states in its response that “[a]s detailed above, the On-Project and Off-Project Contracts are special contracts under the Commission’s regulatory scheme.”^{5/} The first flaw in Staff’s statement is that Staff never “detailed” in its response why the Off-Project Agreement is properly treated as a special contract. Again, Staff recites the Commission’s generally applicable standards for new special contracts, but Staff never actually applies those standards to the Off-Project Agreement. Instead, Staff merely puts forth a conclusory statement that “the On-Project and Off-Project Contracts are special contracts under the Commission’s regulatory scheme.”^{6/}

The second flaw is that Staff’s classification of the Off-Project Agreement as a special contract is inconsistent with Staff’s description of a special contract. Staff describes a special contract as follows:

Prior to the passage of [Senate Bill] 1149 by the 2001 Oregon Legislature, the [Commission] allowed special rate discounts for utility customers who could demonstrate a viable alternative to utility service. These were generally large industrial customers who could build on-site self-generation plants. The utility would negotiate

^{5/} Staff Response at 5.

^{6/} Id.

a special contract with the customer and then file that special contract with the Commission for review and approval.^{7/}

The Off-Project Agreement does not fit Staff's description. The Off-Project Agreement was not executed because Klamath Basin irrigation customers had "a viable alternative to utility service[,]" Off-Project Customers are neither large, nor industrial customers, and there is no evidence that Off-Project Customers could build on-site self-generation plants. In short, Staff's classification of the Off-Project Agreement as a special contract is unreasonable according to Staff's own terms.

KOPWU's Response to PacifiCorp's Motion described: 1) why the Off-Project Agreement is not considered a special contract such as those listed in PacifiCorp's specific Special Contract tariff (Schedule 400); 2) that the Commission has never evaluated the Agreement according to conventional standards for new special contracts in the past; and 3) that it is arbitrary and unreasonable to subject the Off-Project Agreement to those criteria now. Since KOPWU filed its Response, PacifiCorp has acknowledged that the reason why the On-Project and Off-Project Agreements have never been listed in Schedule 400 (Special Contracts) is because the agreements "do not meet the Purpose and Applicable conditions in Schedule 400."^{8/} The "Purpose" and "Applicable conditions" in Schedule 400 are the same special contract standards and criteria that Staff and PacifiCorp now ask the Commission to apply to terminate the Off-Project Agreement. It is wholly unreasonable to apply those standards to terminate the Off-Project Agreement now, when the Agreement was not based on those criteria in the first place and has never been evaluated according to those standards in the past. The Commission should not rely on the fact that "Staff agrees" with PacifiCorp as a legitimate basis to terminate the Off-Project Agreement, especially given the internal inconsistency in Staff's position.

^{7/} Id. at 4.

^{8/} Exhibit 1 (PacifiCorp's response to KOPWU data request No. 5.5).

c. Any Decision to Alter the Off-Project Agreement Must Be Rationally Related to Evidence in the Record

The Commission cannot rely on the superficial analysis put forth by Staff and the other parties supporting PacifiCorp's request if the Commission intends to alter the Off-Project rate. The Commission's decision must be based on evidence in the record that justifies terminating the Off-Project Agreement and must include an explanation of how its decision rationally relates to that evidence.^{9/} The Commission must articulate why altering the Off-Project rate is justified at this particular point in time when the evidence demonstrates that: 1) the Commission has included the Off-Project Agreement in PacifiCorp's rates since 1956; and 2) the Agreement's plain language does not provide that the Agreement terminates in 2006. The record includes no evidence that justifies distinguishing this particular point in the duration of the Off-Project Agreement from all other points at which the Commission has discussed the Agreement and included it in PacifiCorp's rates.^{10/}

Despite PacifiCorp's and Staff's claims to the contrary, the On-Project Agreement's nominal termination date of April 16, 2006, is not a reasonable basis upon which to terminate the Off-Project Agreement. The Off-Project Agreement is entirely separate and distinct from the On-Project Agreement, and basic principles of contractual interpretation dictate that it would be unlawful to simply impose the terms of one agreement on the other. The Commission must follow

^{9/} Mkt. Transp., Ltd. v. Maudlin, 301 Or. 727, 734 (1986) ("Commissioner's order must disclose a rational relationship between the findings of fact and legal conclusions sufficient to demonstrate that the action was not arbitrary.").

^{10/} Re PacifiCorp, OPUC Docket No. UE 94, Order No. 96-175 at 16-17 (July 10, 1996); Re PacifiCorp, OPUC Docket No. UE 94, Order No. 98-191 at 20-22 (May 5, 1998); OPUC Docket No. UE 171, Affidavit of Matthew W. Perkins, Exhibit No. 15 at 44-45 (describing OPUC approval of the Off-Project Agreement).

the three-step process for contractual analysis described by KOPWU in its Response if the Commission intends to interpret the provisions of the Off-Project Agreement.^{11/}

Terminating or altering the Off-Project Agreement based on application of the Commission's standards for new special contracts also would be arbitrary and unreasonable. The foundation of the standards themselves (i.e., service alternatives), the definition of "special contract" in OAR § 860-038-0005(60), PacifiCorp's rate schedules, and Staff's description of special contracts in this Docket all demonstrate that conventional special contract standards do not apply to the Off-Project Agreement. Moreover, the Commission has never subjected the Agreement to those standards in the past. If the Commission intends to alter or terminate the Off-Project Agreement based on standards that, by definition, apply in a different context and have never been applied to the Agreement in the past, it must provide some rational basis for doing so. In short, the Off-Project Agreement has been included as part of a PacifiCorp rate structure that has been deemed just, reasonable, and nondiscriminatory for the last fifty years, and Staff's analysis does not reflect thoughtful consideration of the serious and complicated legal issues in this proceeding.

2. ONRC, WaterWatch, and PCFFA Obscure the Record and Raise Irrelevant Factual Issues That Are Otherwise Inappropriate for Summary Disposition

The responses of ONRC, WaterWatch, and PCFFA also do not reflect thoughtful analysis of the issues in this proceeding. Instead, these parties state their wholesale acceptance of PacifiCorp's representations and urge the Commission to adopt the Company's conclusions. The problem with these responses, however, is that the parties also misstate certain facts, misapprehend

^{11/} KOPWU Response at 26-28.

the fundamental focus of rate shock, and raise factual issues that are irrelevant and, in any event, cannot be resolved on summary disposition.

a. The Off-Project Agreement Was Executed in 1956 and Does Not Expire in 2006

WaterWatch, ONRC, and PCFFA's responses include certain inaccurate statements regarding the Off-Project Agreement that do nothing but confuse the record in this proceeding.

The primary inaccuracy is a result of these parties' failure to acknowledge that the Off-Project and On-Project Agreements are distinct, and that the terms from one contract cannot be imposed on the other. For example, these parties fail to recognize that the Off-Project and On-Project Agreements differ with respect to duration. ONRC refers to "two 50-year contracts" while WaterWatch comments on "two now expiring 50-year contracts."^{12/} Each of these statements is incorrect. The plain language of the Off-Project Agreement demonstrates that the Agreement does not have a term of fifty years, nor does it expire in 2006.

In addition, WaterWatch and PCFFA claim that the prices in the Agreements were set in 1917.^{13/} This statement also is incorrect. The Off-Project Agreement was executed in 1956, and there was no contract rate for Off-Project Customers until that time.

b. Determining the Most "Environmentally Appropriate" Rate is Irrelevant to this Proceeding and Otherwise Inappropriate on Summary Disposition

WaterWatch, ONRC, and PCFFA also argue that termination of the Klamath Basin contract rates is justified because PacifiCorp's standard irrigation tariff includes the rates that are the most "[e]nvironmentally [a]ppropriate."^{14/} WaterWatch summarizes this issue as follows:

^{12/} ONRC Response at 1; WaterWatch Response at 1; PCFFA Response at 4 (arguing that Klamath Basin irrigators have been on notice of the expiration of the contract rates "for 50 years").

^{13/} WaterWatch Response at 1; PCFFA Response at 2, 5.

^{14/} WaterWatch Response at 7; ONRC Response at 2; PCFFA Response at 1-2.

The incredibly low 1917 electrical rates paid by Klamath irrigators leads to excessive use of power and water in the arid and overappropriated Klamath Basin. The rates create excessive demand for power because at such low prices there is simply no incentive to minimize the use of power. At standard tariff rates, a reduction in power use can be expected. Also as a result of the expiring contract power rates, water is used simply because it is so cheap to pump it.^{15/}

The parties supporting this argument generally claim that the Klamath Basin irrigation rates are a “subsidy” paid for by other PacifiCorp customers.^{16/}

First, environmental and water allocation concerns are irrelevant to the Commission’s decision regarding the contract rates for Klamath Basin irrigation customers. Second, despite these parties’ unsupported allegations, there is no evidence in this proceeding of any “subsidy” or any environmental harm caused by the Klamath Basin contract rates.^{17/} Finally, to the extent that these parties actually request that the Commission consider that: 1) a “subsidy” exists with respect to the Klamath Basin contract rates; 2) Klamath Basin contract rates are “incredibly low;” and 3) placing Klamath Basin irrigation customers on standard tariffs will decrease water consumption, these are all issues of fact that cannot be resolved on summary disposition. As such, despite these parties’ support for PacifiCorp’s request to terminate the Off-Project Rates, their arguments actually justify denying PacifiCorp’s Motion. WaterWatch, ONRC, and PCFFA do not address how the Commission can resolve their arguments regarding the most

^{15/} WaterWatch Response at 7-8 (internal citations omitted).

^{16/} Id. at 9; ONRC Response at 5; PCFFA Response at 3.

^{17/} WaterWatch, ONRC, and PCFFA provide no evidence to support the claims regarding this alleged “subsidy.” If the Commission intends to consider whether a “subsidy” exists, however, it should take into account that PacifiCorp estimates it will collect an additional \$4 million per year from Off-Project Customers after moving those customers to Schedule 41. In contrast, PacifiCorp values the power from the Klamath Hydroelectric Project at approximately \$48.0 million. Copco (PacifiCorp’s predecessor) constructed the Klamath Hydroelectric Project only after receiving the 1956 license that was granted only after the Klamath Basin contracts were signed and the Water Users Association withdrew its opposition to Copco’s license. All PacifiCorp customers have benefited, and still are benefiting, from PacifiCorp’s operation of the Klamath Hydroelectric Project.

“environmentally appropriate” rate in the context of a motion for summary disposition. If the Commission intends to consider these factual issues, it must deny PacifiCorp’s Motion.

c. The Magnitude of the Proposed Rate Increase Constitutes Rate Shock Under Any Circumstances

WaterWatch and ONRC also argue that it is “questionable” whether rate shock principles apply to PacifiCorp’s request to impose an 1176% rate increase on Off-Project Customers because these customers have been on notice of the proposed price increase for fifty years.^{18/} This argument fundamentally misapprehends both the rate shock doctrine and the facts in this case. As described above, the Off-Project Agreement bears no expiration date. As such, Off-Project Customers have not been on notice since 1956 that PacifiCorp would request to terminate the Agreement. Regardless of that inaccuracy, however, the focus of the rate shock doctrine is not the sufficiency of the notice of the proposed rate increase. Rather, rate shock principles apply to any proposed rate increases that will have too severe an impact on particular customers, regardless of the notice to customers.^{19/} In this case, Klamath Basin irrigators are facing a rate increase of almost 1200%. KOPWU’s research has not revealed a decision by any regulatory body that has imposed a rate increase of this magnitude. The severity of the impact of a rate increase of this magnitude on Klamath Basin irrigators could not be cured by any amount of notice.

d. Terminating the Off-Project Rate on an Arbitrary, Unspecified Date Would be Unlawful

WaterWatch and ONRC also ask the Commission to terminate the Off-Project Rates “at the earliest appropriate time in this rate setting proceeding,” rather than waiting for the

^{18/} WaterWatch Response at 6; ONRC Response at 4.

^{19/} See Leonard Saul Goodman, The Process of Ratemaking 898-99 (1998). As a practical matter, WaterWatch’s arguments would eliminate the rate shock doctrine in Oregon, because the Commission’s statutes and rules governing general rate cases will generally provide at least nine months notice prior to any general rate increase taking effect.

April 16, 2006 termination date proposed by PacifiCorp.^{20/} The parties supporting termination of the Off-Project Agreement all argue that the Commission has the ultimate authority over the Agreement.^{21/} Regardless of whether those parties are correct, the Commission cannot exercise its authority arbitrarily, and simply “picking” a date to terminate the Off-Project Agreement that has been included in rates since 1956 is inherently arbitrary. Any decision by the Commission to alter the Off-Project Agreement must be supported by evidence that demonstrates that it is reasonable to alter the Agreement at this particular point in time as opposed to the other times the Commission has authorized PacifiCorp to include the Agreement in rates.^{22/} In addition, the Commission must describe how any decision to alter the Off-Project Agreement is rationally related to the evidence that justifies altering the Agreement at this point in time.^{23/} The Commission’s policies and precedent demonstrate that alteration of contract rates is an issue that the Commission does not take lightly.^{24/} Adopting WaterWatch’s suggestion to terminate the Off-Project Agreement on an arbitrary and unspecified date would be unlawful.

3. Unless the Commission Finds That the Off-Project Agreement Is Unambiguous, the Commission Should Delay Its Decision in this Docket

As described below, unless the Commission denies PacifiCorp’s Motion outright, a delay in the Commission’s decision regarding the Klamath Basin irrigation rates would provide the best result at this point for Klamath Basin irrigation customers, PacifiCorp, and the Commission.

^{20/} WaterWatch Response at 5-6; ONRC Response at 3.

^{21/} Staff Response at 6; WaterWatch Response at 4; ONRC Response at 2.

^{22/} See Mkt. Transp., 301 Or. at 734.

^{23/} See id.

^{24/} Wah Chang v. PacifiCorp, OPUC Docket No. UM 1002, Order No. 01-873 at 6-8 (Oct. 15, 2001); Re Pacific Power & Light Co., OPUC Docket No. UF 3074, Order No. 74-658 at 30-32 (Sept. 30, 1974); KOPWU Response at 41-45.

a. Sound Legal and Policy Principles Justify Waiting for a Decision in the FERC Licensing Proceeding

The Water Users Association, the Federal Agencies, and KOPWU all pointed out in their responses that the On-Project Contract rate is an express condition of PacifiCorp's current license for Project No. 2082.^{25/} Although PacifiCorp has applied for a new license for Project No. 2082, the proceedings related to that application will not be completed for some time. The Federal Power Act and the regulations governing such licensing proceedings provide that FERC will issue an annual license with the same terms as the current license until FERC issues a decision on PacifiCorp's new license application.^{26/} The Federal Agencies describe the issuance of an annual license with same terms as the existing license as "a ministerial and non-discretionary act that [FERC] must perform."^{27/}

i. The Commission Should Permit PacifiCorp to Abide by the Conditions in the Company's Current License and Any Annual License

KOPWU urges the Commission to adopt the argument of the Water Users Association and the Federal Agencies to delay a decision regarding the Klamath Basin irrigation rates pending the outcome of the FERC licensing proceeding. Waiting for the outcome of the FERC proceeding is a good decision from a legal and policy perspective for a number of reasons. First, as described above, FERC will automatically issue PacifiCorp an annual license under the same terms and conditions of the existing license during the period that FERC is reviewing PacifiCorp's application. By waiting to make a decision until PacifiCorp is no longer operating under its current license or an annual license, the Commission will not put PacifiCorp in the position of violating an express condition of the Company's current license or an annual license

^{25/} Water Users Association Response at 6; Federal Agencies Response at 2-3; KOPWU Response at 10-11

^{26/} 16 U.S.C § 808(a)(1); 18 C.F.R. § 16.18.

^{27/} Federal Agencies Response at 2.

that likely will be in effect for the short-term. There is no urgency in this proceeding that justifies ordering PacifiCorp to charge a rate that directly conflicts with a condition of the Company's license.

Second, once the licensing proceeding is complete, the Commission will know the conditions of any new license issued to PacifiCorp and can, at that point, make a more informed decision regarding the appropriate rates for Klamath Basin irrigation customers. At this time, it is uncertain if FERC will issue a new license to PacifiCorp or what conditions may be included in any new license that is issued. By waiting to determine any conditions included in any new license issued to PacifiCorp, the Commission will avoid currently putting in place a rate that could:

1) conflict with the condition in PacifiCorp's current license that undoubtedly will also be included in any annual license; and 2) conflict with any condition that may be included in a long-term license issued to PacifiCorp in the future.

ii. The Reasoning Behind Waiting Until the Terms of Any New License Are Known Applies with Equal Force to Off-Project Customers

Although the Water Users Association and the Federal Agencies request that the Commission postpone its decision regarding the On-Project Contract rate pending the outcome of the FERC proceeding, the reasoning behind this request applies with equal force to the Off-Project rate. KOPWU has intervened in the FERC proceeding related to PacifiCorp's new license application and is participating in the discussions regarding the terms and conditions of any new license. KOPWU has argued in the FERC proceeding that the terms of the Off-Project Agreement should remain in effect under any new long-term license issued to PacifiCorp.^{28/} In addition, KOPWU is free to argue that an Off-Project Contract rate should be included as a condition of the

^{28/} Re PacifiCorp, FERC Project No. 2082, Intervention and Protest of KOPWU (Oct. 15, 2004).

license as well. It is possible under these circumstances that any new long-term license issued to PacifiCorp will include a condition that requires a contract rate for both On-Project Customers and Off-Project Customers.

In addition, although the Off-Project and On-Project Agreements were negotiated separately and have distinct legal terms, the evidence demonstrates that both agreements are related to the issuance of PacifiCorp's current license for Project No. 2082. Under no circumstances should the Klamath Basin irrigation rates be altered while PacifiCorp holds its current license or an annual license for Project No. 2082.

Because the plain language of the Off-Project Agreement does not provide that the Agreement expires in 2006, the Agreement will remain in effect while FERC reviews PacifiCorp's new license application and beyond. Under these circumstances, if the Commission accepts the Water Users Association's and Federal Agencies' arguments to delay a decision regarding the On-Project rate, it also should delay any decision on the Off-Project rate. Just as it would be unlawful and unreasonable to terminate the On-Project rate while PacifiCorp's current license or an annual license with the same terms is in effect, the historic circumstances and express language of the Off-Project Agreement dictate that it would be unreasonable to terminate the Off-Project rate during that period as well.

b. Delaying a Decision on the Off-Project Rates Will Allow a Court to Make Any Necessary Decision Regarding the Rights in the Off-Project Agreement

Delaying a decision regarding the Klamath Basin irrigation rates also would be beneficial in terms of providing time for a court to make any determination that is necessary regarding PacifiCorp's and KOPWU's contractual rights under the Off-Project Agreement. As KOPWU described in its Response, the Commission should deny PacifiCorp's Motion because the

Off-Project Agreement is unambiguous that it does not terminate in 2006. Nevertheless, even if the Commission does not agree that the Off-Project Agreement is unambiguous, it still must deny PacifiCorp's Motion because: 1) the contractual interpretation issues raised by the Company cannot be resolved on summary disposition; and 2) contractual interpretation issues and determination of the parties' rights are, in any event, more appropriately decided by a court.^{29/} Under these circumstances, additional proceedings will likely be necessary to resolve the issues regarding the Off-Project Agreement unless the Commission finds the Off-Project Agreement unambiguous.

The argument to delay any decision regarding the Klamath Basin irrigation rates pending FERC's review of PacifiCorp's license application is consistent with the potential need to provide time for a court to decide any issues that may be necessary to be resolved regarding the parties' contractual rights. In the absence of a court decision regarding the parties' contractual rights, the Commission will again be left with only a portion of the information necessary to decide the important issues in this proceeding. The Commission should not expose PacifiCorp and Off-Project Customers to potentially conflicting orders regarding the terms and rights under the Off-Project Agreement when it is unnecessary to do so. Unless the Commission denies PacifiCorp's Motion outright, it should postpone its decision regarding the Klamath Basin irrigation rates in order to allow for resolution of related issues to be decided in other forums. The Klamath Basin Contracts have been in effect for fifty years and there is no urgency at present that justifies creating additional uncertainty for customers, PacifiCorp, and the Commission.

^{29/} It also would be inappropriate for the Commission to alter the Off-Project rate on summary disposition even if the Commission does not address the contractual interpretation issues. As KOPWU demonstrated in its Response, genuine issues of material fact exist with respect to the proper standard to apply to evaluate the Off-Project rate and whether application of the appropriate standard justifies altering the contract rate.

CONCLUSION

Despite the important and complicated issues pending before the Commission in this proceeding, the parties supporting PacifiCorp's request to terminate the Off-Project Agreement have provided no legal analysis that supports a Commission imposed termination date for the Off-Project Contract. Basic principles of contract law, the Commission's standards and policies regarding contract rates, and the standards governing summary disposition require thorough consideration of all the facts and circumstances surrounding the Agreement and PacifiCorp's request. The Off-Project Agreement has been included in PacifiCorp's rates since 1956 and lacks an express termination date, and there is no rational basis for terminating the Agreement at this point in time. The Commission should deny PacifiCorp's Motion or, in the alternative, delay its decision on the issues in this proceeding until the FERC licensing proceeding has been resolved and a court has been permitted to make any necessary determination regarding the parties' contractual rights.

Dated this 12th day of May, 2005.

Respectfully submitted,

/s/ Melinda J. Davison

Melinda J. Davison
Matthew W. Perkins
Davison Van Cleve, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
(503) 241-7242 phone
(503) 241-8160 facsimile
mail@dvclaw.com
Of Attorneys for Klamath
Off-Project Water Users, Inc.

Exhibit 1

UE-171/PacifiCorp
April 28, 2005
KOPWU 5th Set Data Request 5.5

KOPWU Data Request 5.5

Please explain why the Off-Project Agreement and the On-Project Agreement do not appear among the contracts listed in PacifiCorp's Schedule 400, Special Contracts. Please provide all documents that refer or relate to the response to this request.

Response to KOPWU Data Request 5.5

The Off-Project Agreement and the On-Project Agreement do not meet the Purpose and Applicable conditions in Schedule 400 and are not shown in that schedule.

The Off-Project Agreement and the On-Project Agreement are referenced under Schedule 33.

Schedule 33 and Schedule 400 can be found on the Company's website.