STOEL RIVES LLP
ATTORNEYS AT LAW

900 S.W. Fifth Avenue, Suite 2600
Portland, Oregon 97204
main 503.224.3380
fax 503.220.2480
www.stoel.com

KATHERINE A. MCDOWELL
*Direct (503) 294-9602*
kamcdowell@stoel.com

May 12, 2005

**VIA ELECTRONIC FILING**

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Public Utility Commission of Oregon
PO Box 2148
Salem, OR 97308-2148

**Re: PacifiCorp's Reply to Parties' Responses to its Motion for Summary Disposition Docket UE 171**

Enclosed for filing is PacifiCorp's Reply to Parties' Responses to its Motion for Summary Disposition in the above-referenced docket. A hard copy was served on all parties to this proceeding as indicated on the attached service list.

Very truly yours,

Katherine A. McDowell

KAM:knp
Enclosure
cc: Service List

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UE 171

In the Matter of PACIFIC POWER & LIGHT (d/b/a PacifiCorp) Klamath Basin Irrigation Rates

**PACIFICORP'S REPLY TO PARTIES' RESPONSES TO ITS MOTION FOR SUMMARY DISPOSITION**

**STOEL RIVES LLP**
900 SW Fifth Avenue, Suite 2600, Portland, OR 97204
*Main (503) 224-3380 Fax (503) 220-2480*

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## I. INTRODUCTION

Eight parties filed Responses to PacifiCorp's Motion for Summary Disposition. Five of the Responses were filed on behalf of parties representing broad customer, fishing, tribal and environmental interests—Commission Staff, Pacific Coast Federation of Fisherman's Associations (PCFFA), Hoopa Valley Tribe, WaterWatch of Oregon and Oregon Natural Resources Council (ONRC). These Responses all support PacifiCorp's request that the Commission terminate the deeply discounted rates provided under the Klamath contracts.

Not surprisingly, the Responses in opposition to PacifiCorp's motion came only from those parties actually receiving discounted rates under the Klamath contracts—KWUA, the United States Bureau of Reclamation and the Fish and Wildlife Service (collectively "the Bureau"),[1] and KOPWU. This validates the premise of PacifiCorp's Motion that the orderly termination of the Klamath contract rates serves the public interest, as distinguished from the specific interests benefited by indefinite continuation of the rates.

The Responses to PacifiCorp's Motion also demonstrate the significant differences between the On-Project Agreement (or the USBR Contract) and the Off-Project Agreement (or the UKRB Contract) in terms of legal posture. With respect to the former agreement, the major argument raised by KWUA in opposition to PacifiCorp's motion relies on KWUA's assertion that the Federal Energy Regulatory Commission ("FERC") will order a continuation of the USBR Contract after its April 16, 2006, termination date as a part of issuing an interim annual license. KWUA argues that if FERC so orders, a Commission decision terminating the USBR Contract would force PacifiCorp to violate the terms of its

[1] The Bureau of Reclamation's request for intervention in this case, and its Response, are made on the basis of it being a party to the On-Project Agreement and it receiving the benefits of the discounted rates thereunder. The Fish and Wildlife Service requested intervention because its cost of power will increase upon termination of the USBR Contract. The Bureau does not assert that it is somehow seeking to protect, in its role as a governmental agency, some larger public interest.



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FERC license, thus jeopardizing the continued availability of power from the Klamath project.

The Bureau makes a variation of this argument in support of its request that the Commission abate this case pending a FERC decision on any annual license for the Klamath hydro project. The scope of the Bureau's argument is very narrow, however, and is limited in its applicability to the Bureau, such that the fix it proposes—a full stop to these proceedings—is completely inappropriate.

KOPWU, on the other hand, appropriately does not argue that continuation of the UKRB Contract involves any action by FERC, and instead makes a series of common-law contract arguments based on the lack of an express termination date in the agreement. KOPWU's theory is that the Commission should find as a matter of law that the UKRB Contract is a perpetual contract, even though such contracts are disfavored under Oregon law and appear to be unheard of in the ratemaking context. At the same time, KOPWU contends that any ruling to the contrary is precluded due to material factual issues.

KWUA and KOPWU do find common ground in asserting that the Klamath Compact gives them special rights to discounted rates under Oregon law. Each also makes half-hearted attempts to distinguish *American Can*, 28 Or App 207, 559 P2d 989 (1977)—the case that clearly establishes the Commission's right (and duty) to determine whether it is just and reasonable to continue the USBR and the UKRB Contracts—on the basis that the Klamath agreements are not "special contracts." Each brief deals with this issue only cursorily, however, suggesting a strategy of ignoring the case rather than addressing its central holding.

The number and complexity of the arguments raised in the Responses should not deter the Commission from concluding that summary disposition for PacifiCorp is appropriate. The correct analysis of PacifiCorp's Motion begins and ends with *American Can* and the Commission's continuing duty to review all rates under a just and reasonable standard. The essential issue in this case—the reasonableness of continuing discounted

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Klamath rates—is straightforward, free from factual dispute and ripe for decision. The Commission should grant Summary Disposition for PacifiCorp and terminate the special contract rates for customers in the Klamath Basin effective April 16, 2006.

## II. ARGUMENT

### A. The Commission Should Not Defer to FERC on the Post-April 16, 2006 Viability of the USBR Contract.

KWUA and the Bureau both oppose PacifiCorp's Motion on the basis that FERC may at some point temporarily extend the USBR Contract past its explicit April 16, 2006 termination date. This argument is based on Section 15(a)(1) of the Federal Power Act ("FPA"), which allows FERC to issue annual licenses to bridge the period between the lapse of the original license and the issuance of a new license. *See* 16 USC § 808(a)(1) ("[T]he commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid.").

Citing different provisions of the Klamath hydro project's original license, KWUA and the Bureau argue that the USBR Contract is a condition of the license that FERC will automatically extend as a part of any annual license. However cogent this argument may appear on its face, as set forth below, the various building blocks of the annual license argument collapse upon critical review.

Contrary to arguments by KWUA and the Bureau, extension of the USBR Contract in an annual FERC license is not a fait accompli. In fact, these arguments before FERC, which has no authority to set retail electric power rates in Oregon, cannot relieve the Commission of its duty to review the USBR Contract under the *American Can* standard. Put another way, the continuation of the USBR Contract rates is a retail ratemaking issue exclusively within this Commission's jurisdiction, not a hydro relicensing issue within that of FERC.

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The Commission should reject the proposals of KWUA and the Bureau that it assume a passive, wait-and-see role with respect to deciding the legal issues raised in this case.[2] This is especially true given the fact that the issues here are not even before FERC at this point and, as discussed below, there is little certainty as to when or how FERC will address them.

### 1. The USBR Contract is a Satisfied Condition of the Klamath Hydro License, not an Ongoing One.

The fundamental problem with the annual license argument is that, contrary to the suggestions of KWUA and the Bureau, the original license does not mandate discounted electric rates for Klamath irrigators in perpetuity, irrespective of changes in facts or circumstances. It mandates only that the USBR Contract be executed and filed. That agreement by its terms expires in 2006. Nor is the USBR Contract a fixed and non-modifiable term of the license: the USBR Contract was in fact amended in the late 1990's to address various obligations of the federal government in the Klamath basin, over the objections of the irrigators. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F3d 1206 (9th Cir 2000).

In support of its annual licensing argument, KWUA relies on Ordering Paragraph A of the license:

> "*Provided, further,* that with and as part of the acceptance of this license, the Licensee hereunder shall file conformed copies (in quadruplicate) of the existing agreement between the Licensee and the United States (by the Secretary of the Interior), dated February 24, 1917, as amended, which has been further amended or renewed to cover a time period at least equivalent to the time period of this license, or a new agreement, covering a time period at least equivalent to the time period of this license between the Licensee and the United States, which provides for the storage in and release of water from Upper Klamath Lake in Oregon, and the use thereof

[2] KWUA argues that the Commission need not decide the rate issue in this case, asserting, "The answer may be resolved through the FERC licensing process." KWUA Response at 18. The Bureau specifically requests that the Commission "hold in abeyance and refrain from deciding the issue regarding the 'historic contracts' until this issue is properly addressed by FERC." Bureau Response at 3.



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> by the Licensee for the generation of electric energy under terms and conditions substantially similar to those terms and conditions contained in the existing February 24, 1917 agreement, as amended." *Cal. Or. Power Co.,* 13 FPC 1, 9-10 (1954) (Ordering Paragraph (A)).

In contrast, the Bureau relies on Article 35, which addresses remuneration to the United States for use of surplus water from the project:

> "Article 35. The Licensee shall pay to the United States the following charges: * * *
>
> (d) The annual benefits to the United States under the Link Dam Agreement dated January 31, 1956, are reasonable and adequate for the purpose of recompensing the United States for the use of surplus water from the Link Dam." *Cal. Or. Power Co.*, 18 FPC 364, 368 (1957).

Neither of these provisions supports the position that the rates set under the USBR Contract are an express and continuing condition of the Klamath hydro license subject to extension in the annual license context.[3]

The proviso cited by KWUA required the Company to enter into a particularly described amendment or agreement and file that with its acceptance of the license. The amendment or agreement was to "cover a time period at least equivalent to the time period of this license," which it does. *Cal. Or. Power Co.*, 13 FPC 1, 9-10.[4] The proviso does not state that the licensee must provide service to the On-Project irrigators at the discounted rates set forth in the USBR Contract regardless of a state-mandated termination or revision of those rates, or that the license will be in effect only so long as discounted rates are provided

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[3] The Bureau incorrectly asserts in its Response, as well as in its Petition to Intervene, that the USBR Contract is incorporated into the current license. *See* Petition at 1, Response at 1. While the USBR Contract and particular aspects of it are discussed in the FPC's Supplemental Opinion and Order, *nowhere* is the Contract "made a part of" or incorporated into the license.

[4] The Company's license will expire February 28, 2006, approximately six weeks prior to the expiration of the USBR Contract. *Cal. Or. Power Co.*, 15 FPC 14, 21 (1956).

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to On-Project customers. Nor does the USBR Contract contain any language providing for its extension through an annual license or new license.

The requirement of Ordering Paragraph (A) under the original license has been satisfied, as recognized by the FPC. *See* Supplemental Opinion and Order, 15 FPC 14, 15 (Feb 28, 1956) ("Upon its becoming effective, the new Link Dam agreement will satisfy the requirements of the second proviso of paragraph (A) of the order * * *"). Since the term or condition has already been satisfied, it is not one that would or should be "continued" under an annual license.

The Bureau's arguments are similarly unavailing. The provision cited by the Bureau applies only to the United States agencies receiving annual benefits under the USBR Contract, and then only in the context of whether adequate compensation has been paid for use of "surplus water" from the Link River Dam. This license provision is irrelevant to the issue in this case with respect to rates for all customers other than the Bureau. The remaining On-Project customers cannot rely on Section 35 for asserting that the rates under the USBR Contract must continue under an annual license.[5] *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F3d 1206 (9th Cir 2000) (holding that irrigators were not third-party beneficiaries to the USBR Contract and therefore lacked legal standing to enforce its terms).

Thus, the Bureau's request that the Commission abate these proceedings pending a FERC decision on continuation of Section 35 in an annual license is overbroad. Such a FERC decision would at most address only the rates of the Bureau, leaving the status of all other Schedule 33 customers undetermined. In any event, as discussed in the next section, continuation of the Bureau's USBR Contract rate through an annual license would not be the

[5] The Off-Project customers likewise have no claim. Indeed, since the UKRB Contract is not even referenced in the license, KOPWU has no arguments for continuation of rates under an annual license theory.

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most appropriate means of addressing the proper compensation to the Bureau for any benefits provided by the project.

**2. Contrary to the Assertions of KWUA and the Bureau, An Annual License Does Not Automatically Include the Same Terms and Conditions as the Original License.**

KWUA and the Bureau both suggest that the incorporation of existing licensing conditions without modification is automatic in an annual license. But the law gives FERC much more discretion. First, under 18 CFR § 16.18(d), in issuing an annual license, FERC "may incorporate additional or revised interim conditions if necessary and practical to limit adverse impacts on the environment." Some parties associate significant environmental concerns with the discounted rates under the USBR Contract and will undoubtedly raise these issues at FERC. *See, e.g.,* Waterwatch's Response to PacifiCorp's Motion for Summary Disposition at 7-8 ("The incredibly low 1917 electrical rates paid by the Klamath irrigators leads to excessive use of power and water in the arid and overappropriated Klamath Basin."). Thus, even if FERC agreed that the discounted electric rates set by the USBR Contract were a condition that could be extended in the annual license, FERC has the discretion to remove this condition under 18 CFR § 16.18(d) and/or modify the annual benefits (reduced electric rates) to the United States set in Article 35.

Similarly, FERC has broad discretion to simply choose not to enforce a license term, effectively removing it from the annual license. *Friends of the Cowlitz v. Federal Energy Regulatory Comm'n*, 253 F3d 1161, 1162 (9th Cir 2001) ("FERC has virtually unreviewable discretion to enforce (or, in this case, to not enforce) any alleged license violations."), *modified on review*, 282 F3d 609 (9th Cir 2001). FERC also has authority to modify a license provision with PacifiCorp's agreement as provided for under Section 6 of the FPA, 16 USC § 799. FERC could use this authority, for example, to modify Article 35(d) to eliminate the reference to the USBR Contract and replace it with a reasonable annual charge provision, and also to modify Ordering Paragraph (A) by deleting the second proviso

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regarding the USBR Contract. Similarly, FERC has the authority to readjust, from time to time in the event such charges become unreasonable, the annual charges payable to the United States referenced in Article 35(d) of the license. 16 USC § 803(e); *Cal. Or. Power Co.*, 15 FPC 14, 20 (1956) ("[T]he annual benefits to the United States under the 1917 agreement and under the new Link Dam agreement constitute reasonable annual charges *under present conditions*. However, in the event such charges become unreasonable they may be readjusted from time to time as provided by section 10(e) of the [Federal Power] Act.") (emphasis added).[6]

In summary, FERC has significant discretion in shaping the terms of an annual license. It is therefore important that the Commission send FERC the message that the Commission alone has the authority and obligation to determine the reasonableness of retail rates so that FERC appropriately limits its scope of inquiry to protections of legitimate federal interests such as consideration of what payments, if any, may be appropriate under Section 10(f) of the FPA. There is no question that the rates for retail service provided by PacifiCorp in Oregon are subject to the Commission's jurisdiction, as already acknowledged by FERC Staff in the Klamath relicensing proceeding.[7] For all of these reasons, the

[6] There have been fundamental changes in circumstances between the time of the original license issuance and the present relicensing, including the following: (a) to the extent that a hydroelectric project utilizes a government dam, FERC's regulations now provide a specific formula for calculating the Section 10(e) annual charge (*see* 18 CFR § 11.3); and (b) to the extent that a licensed hydroelectric project utilizes "surplus water" from a government dam, such charges are no longer assessed pursuant to Section 10(e), but rather as "headwater benefit" charges under Section 10(f) of the FPA and FERC's implementing regulations (*see* 18 USC § 803(f); 18 CFR § 11.10-11.17).

[7] See Affidavit of Laura Beane, Exhibit 14 (FERC Staff Responses to Additional Study Requests at 16 (rejecting study request regarding impacts associated with the expiration of electrical service contract because "We do not consider the rates that PacifiCorp charges its customers to be an appropriate issue for analysis in this proceeding."). Like KWUA, the Bureau appears to struggle with a way to put the retail rate issue before FERC without running head-on into the fact that it is this Commission that has jurisdiction over the matter. On one hand, Interior states that "Reclamation and Service are not suggesting that FERC has jurisdiction over [retail] sale of electric energy." Bureau Response at 3, fn. 4. Yet, the Bureau's requested relief is that the Commission "hold in abeyance and refrain from



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pendency of the Klamath relicensing proceedings at FERC and the upcoming expiration of the USBR Contract militate in favor of a prompt ruling on PacifiCorp's Motion for Summary Disposition and against the delay urged by KWUA and the Bureau.

**B. The Commission Should Evaluate and Terminate the USBR and UKRB Contract Rates Under *American Can*.**

The Commission has a continuing duty to examine, and change if necessary, rates for electric service in contracts between end-use customers and regulated utilities. *Multnomah County v. Davis*, 35 Or App 521, 526, 581 P2d 968 (1978); *American Can Co. v. Davis*, 28 Or App 207, 224, 559 P2d 898 (1977). In an effort to evade an *American Can* review of the USBR and UKRB Contracts, KWUA and KOPWU raise a myriad of contract arguments, including:

(1) "[T]he authority to determine KOPWU's and PacifiCorp's rights under the Off-Project Agreement lies with the courts." KOPWU Response at 21 and n.73 (citing Order No. 74-658 at 30).

(2) "The approved contract rate in the Off-Project Agreement should remain in effect until the Agreement terminates by itself or a court terminates the Agreement." *Id.* at 36.

(3) "[A]pplication of the Commission's policies and standards [for termination of a contract rate] involves genuine issues of material fact that cannot be resolved on summary disposition." *Id.*

(4) PacifiCorp's analysis of whether the current Klamath rates meet the "just and reasonable" standard is "beyond the scope of this proceeding." KWUA Response at 15.

These arguments misstate the Commission's fundamental authority to evaluate and terminate rates if "they are no longer consistent with the Commission's statutory obligations to set cost-based, nondiscriminatory rates." *See* Staff's Response at 5.

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deciding *the issue before it in this docket* until such time as *the issue* has been addressed by the Federal Energy Regulatory Commission." Bureau Response at 1 (emphasis added).)

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**1. The Commission—Not the Courts—Has the Right and Duty to Determine the Reasonableness of the UKBR and USBR Rates.**

Contrary to KOPWU's assertion that the Commission should defer to the courts to resolve the issues presented in this case, the continuing legality of a contract rate for retail electric service is an issue reserved for exclusive Commission review. The determination of whether a rate continues to satisfy the standards established in the Public Utility Act is a legislative or administrative function of the Commission, which cannot be exercised by a court. *McPherson v. Pacific Power & Light Co.*, 207 Or 433, 454, 296 P2d 932 (Or 1956) (affirming dismissal of complaint; holding that a court "may not consider the unreasonableness or unjust discrimination of rates, since this demands the exercise of a quasi-legislative or administrative function of the Commissioner"); *Fields v. Davis*, 31 Or App 607, 613, 571 P2d 511 (Or App 1977) ("The Commission's authority to prescribe revisions of tariffs is a legislative function." (citation to *American Can* omitted)). *See also Ore-Ida Foods Co. v. Idaho Power Co.*, 317 Idaho 220, 221, 46 P3d 516 (Id 2002) (affirming dismissal of complaint against utility by customer; holding that rate issue should be heard by Commission first).[8]

Ironically, the case KOPWU cites for the proposition that "the authority to determine KOPWU's and PacifiCorp's rights under the Off-Project Agreement lies with the courts," is Order No. 74-658, the 1974 rate order that increased the CrownZellerbach contract rates at

[8] Ore-Ida alleged that Idaho Power fraudulently induced Ore-Ida into a special contract and then breached that contract. The dispute involved a published tariff (the contract had been approved by the Commission), which was approved and regulated by the Commission. *Id.* Ore-Ida, like KOPWU, argued that the case should be heard by a court of general jurisdiction and resolved by resorting to contract law. Dismissing Ore-Ida's complaint, the court held that judicial relief is only available to those who have exhausted their administrative remedies. *Id.* The court noted several bases for this rule: (1) the court is "ill-equipped to determine the authority exercised by the OPUC and scope of remedies the OPUC may employ"; (2) the dispute implicates not only Ore-Ida and Idaho Power but all similarly-situated customers and "private litigation could have the effect of undermining the rate structure contemplated by the OPUC . . . thereby defeating the policy that all similarly situated customers be treated the same." *Id.*



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issue in *American Can*. *See Re Pacific Power & Light Co.*, Docket No. UF 3074, Order No. 74-658 at 32 (Or Pub Util Comm'n Sept. 30, 1974) ("The contract rates will be increased as proposed by Pacific.").[9] Rather than supporting KOPWU's position, Order No. 74-658 holds that the Commission has the authority to change contract rates when such an increase is necessitated by costs and is fair, just and reasonable. *Id.*; *see also* KOPWU at 21 and n.73 (citing Order No. 74-658 at 30).

KOPWU attempts to distinguish *American Can* on the basis that the agreement at issue in that case stated that it was subject to change in accordance with Commission orders. KOPWU Response at 45. This argument misses the point. Oregon law presumes that the right of the Commission to review and revise contract rates is written by law into the contract:

> "[T]he law wrote into [the contract] a stipulation by the [contracting party] that the state could, at any time, exercise its police power and change the rates; and therefore, when the state does exercise its police power it does not work an impairment of any obligation of the contract. The immediate parties to the franchise must contract with reference to the right of the government to exercise its inherent authority. The governed cannot, by contract, forestall the resuscitation of a dormant police power by the government; and therefore, unless the state actually divested itself of the right to exercise its police power, the agreement by which the city and company specified the rates was made subject to the right of the state to change them." *City of Woodburn v. Pub. Serv. Comm'n*, 82 Or 114, 121-22, 161 P 391 (Or 1916) (in banc).[10]

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[9] The Commissioner recognized expressly its authority to review and revise the contract rates in the CrownZellerbach order. Rejecting CrownZellerbach's arguments that the question presented was one for a court of general jurisdiction, the Commissioner responded "the Commissioner is not bound by the contract between Pacific and Crown." *Id.* at 30.

[10] KOPWU also argues that "Crown Zellerbach was accustomed to changes in its contract due to repeated renewals over the years. . . . [This] circumstance[] dictate[s] a different result for the Off-Project Users than for Crown Zellerbach." KOPWU Response at 46. This too misses the point. The holding in *American Can* rested on the Commission's sovereign authority and statutory duty to review the justness and reasonableness of rates, irrespective of the term of the contract.

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In approving the USBR and UKRB Contracts, the Commission did not and could not permanently relinquish to the courts or to the contracting parties its right to regulate the Klamath irrigators' rates. *American Can*, 28 Or App at 221-223 (Commission's duty to set just and reasonable rates cannot be constrained by private contracts between a utility and its customers); s*ee also Woodburn*, 82 Or at 123 (stating that "the right to regulate rates by changing them from time to time as the welfare of the public may require is essentially a police power" and "the delegation of the sovereign right to regulate rates must be clear and express").

**2. The Commission Has a Continuing Duty to Review and Revise the Rates Set in Any Agreement That Establishes Rates for the Provision of Electric Service by a Regulated Utility to an End-Use Customer, Including the USBR and UKRB Contracts.**

Both KWUA and KOPWU attempt to avoid *American Can* by asserting that the USBR and UKRB Contracts are not special contracts. Under Oregon law, however, all public utility customers must be served under tariffs, either in the form of general rate schedules or special contracts. ORS 757.205; 757.230. Thus, to the extent that the Klamath parties assert that the USBR and UKRB Contracts fail to meet special contract criteria under Oregon law, they are simply providing one more reason why the Commission should terminate the rates under these contracts as unlawful and discriminatory.

In any event, the law is clear that the Commission's duty to review the reasonableness of electric rates does not depend on whether the agreement satisfies the conditions of a special contract under OAR 860-038-0005(60). *See Fields*, 31 Or App at 613, quoting ORS 756.040(1) (the Commission has a "statutory duty" to represent customers "'of any public utility . . . and the public generally in *all controversies respecting rates . . .*'" (emphasis added)). Rather, any agreement that establishes rates for the provision of electric service by a utility to an end-use customer triggers the Commission's and the public's interest in the legality and reasonableness of the rates. *Fields*, 31 Or App at 614; *see also Cedars Park, Inc.*

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*v. Salmon Valley Water Co.*, UC 252, Order No. 95-1117, 1995 WL 769884, at *5 (Or Pub Util Comm'n Oct 17, 1995).

*Cedars* involved a settlement agreement between customers and a telecommunications utility that was reached through "arm's length negotiation" between competent persons represented by legal counsel. 1995 WL 769884, at *5. The Commission ordered that the rate established by the settlement agreement was lawful until the Commission established different rates, at which point the utility was "prohibited by ORS 757.225 from collecting any charge not consistent with those rates, including rates previously established by agreement of the parties." *Id.* (citing *American Can*).

Here, the Klamath contracts set rates for end-use customers. Neither KOPWU nor KWUA introduced evidence creating a genuine dispute as to this issue. Thus, the contracts are subject to the Commission's continuing authority and duty to review and revise electric rates.

### 3. Under *American Can*, the Commission Should Terminate the USBR and UKRB Rates Because They Are No Longer Just and Reasonable.

The Public Utility Act defines the standard by which the Commission determines the lawfulness of rates. ORS 756.040(1); 757.230: 757.310; 757.325. *See also Woodburn*, 82 Or at 117-21 (Act prohibits unjust, unreasonable and unjustly discriminatory charges); *McPherson*, 207 Or 433, 454 (Commission has authority to consider the unreasonableness or unjust discrimination of rates); *American Can*, 28 Or App at 222 (citing *Midland*, 300 US at 113 (Commission has duty to disapprove contract rate that fails to cover relevant cost of service)). The power to regulate includes "the right to adjust rates to changing conditions, so that no person may be discriminated against and all may receive adequate service at reasonable rates, and at the same time affording sufficient returns to the public utility." *Woodburn*, 82 Or at 126.

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In attempting to evade an *American Can* review, KOPWU wrongly relies upon the heightened *Mobile-Sierra* standard, where a special contract is upheld unless it is adverse to the public interest. *See* KOPWU Response at 42, citing *FPC v. Sierra Pacific Power Co.*, 350 US 348, 76 S Ct 368, 100 L Ed 388 (1956). *American Can* expressly held that the *Mobile-Sierra* standard does not apply to a contract between a utility and its end-use customer, rejecting CrownZellerbach's argument that *Mobile-Sierra* restricted the right of the regulatory agency to interfere with the contract. 28 Or App at 223.

On the merits of the key issue in the case, whether the USBR and UKRB Contract rates can be sustained in an *American Can* review, KOPWU and KWUA do not even argue—let alone counter PacifiCorp's evidence with contrary evidence—that the USBR and UKRB Contract rates are just and reasonable and nondiscriminatory. Instead, each generally suggests that the deeply discounted rates are not unfair because they "provide a benefit to PacifiCorp under the Agreement based on increased water flows in the Klamath River for use in PacifiCorp's hydroelectric facilities." KOPWU Response at 46; *see also* KWUA Response at 16. Neither produces any evidence on this point, however—nor can they produce evidence on this point as they previously objected to the production of information related to the value of the contribution of water by irrigators as irrelevant. *See* ALJ Ruling (April 14, 2005) (supporting KWUA position that irrigators' contribution of water is not relevant to interpretation of USBR and UKRB Contracts; noting that ALJ will therefore strike as irrelevant any information presented by KOPWU and KWUA on this point).

In contrast, the Responses of the customer and public interest groups filed in this case all assert that the USBR and UKRB Contracts, which reflect rates that date back to the early 20th century, are below cost and comprise only a fraction of what all other irrigators in Oregon pay and therefore may not be sustained under *American Can*. *See, e.g.,* Staff Response at 5-6 (tremendous discount accorded to Klamath users is inconsistent with Commission's statutory obligation to ensure that rates are cost-based and non-

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discriminatory); WaterWatch Response at 7 (it is not just and reasonable to maintain heavily subsidized rates for Klamath waters users at levels that are 1/10 to 1/12 of what is paid by similarly situated customers); ONRC Response at 5 (fairness to other customers requires termination of Klamath contract rates).

The UKRB Contract rates are four times below both the Company's currently approved avoided costs and its embedded costs of generation, and represent less than one-fifth of the Company's delivery cost. PacifiCorp's Motion at 11-13. The USBR Contract rates are even lower. *Id.* The rates are not cost-based or non-discriminatory. Neither KOPWU nor KWUA introduced evidence creating a genuine dispute as to these issues. While *American Can* would permit the Commission to terminate the USBR and UKRB Contracts immediately on this record (and the Responses of WaterWatch at 5-6 and ONRC at 3 request this relief), PacifiCorp believes the Commission can and should permit the agreements to run their intended course through April 16, 2006.

**4. Contract Law Requires that an Unambiguous Contract that Is Indefinite as to its Duration, Such as the UKRB Contract, Expires After a Reasonable Term and Is Terminable at Any Time Upon Reasonable Notice.**

KOPWU relies heavily upon common law contract principles to argue against termination of the UKRB Contract. While contracts for utility rates are subject to Commission review, revision and termination at any time under *American Can* notwithstanding common law contract rules, application of these rules here supports a decision to terminate the UKRB Contract concurrently with the USBR Contract on April 16, 2006.

**a. The Duration Term of the UKRB Contract is Non-Ambiguous, Such that Its Meaning and Significance Is a Question of Law.**

KOPWU notes correctly that the question of whether a contract is ambiguous is a question of law. *See* KOPWU Response at 22-23, citing *Yogman v. Parrott*, 325 Or. 358,

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937 P.2d 1019 (1997). KOPWU also correctly recognizes that the duration term of the UKRB Contract is unambiguous as a matter of law because the contract does not contain a duration term that is reasonably susceptible to more than one meaning. The contract does not expressly provide a duration and does not entail performances that involve a definite duration. Instead, on its face, the contract provides for continuing performance by Copco at fixed flat rates without any reference to duration. *See* KOPWU Response at 26 ("The Off-Project Agreement is unambiguous in that it contains no termination date. The Agreement states the date upon which it became effective, and it recites the parties' promises and the consideration.")

A missing duration term does not create an ambiguity that would preclude summary judgment. *See Andersen v. Waco Scaffold & Equip.*, 259 Or 100, 105, 485 P2d 1091 (1971) (granting summary judgment that contract silent as to duration was indefinite and therefore terminable upon reasonable notice); *Lund v. Arbonne Intern., Inc.*, 132 Or App 87, 90-92, 887 P2d 817 (1997) (same); *Bancard Servs. v. E*Trade Access, Inc.*, 292 F Supp 2d 1235, 1250 (D Or 2003) (same).

**b. The UKRB Contract is One of Indefinite Duration, Not Perpetual Duration.**

When a contract is unambiguously silent as to its duration, courts ask whether the agreement is indefinite or perpetual by looking to the agreement and surrounding circumstances. Courts will conclude that an agreement is perpetual only if the agreement and surrounding circumstances "clearly establish" that the parties' intended the agreement to be perpetual. *Paul Gabrilis, Inc. v. Dahl*, 154 Or App 388, 394, 961 P2d 865, 868 (Or Ct App 1998) (concluding that agreements were perpetual because contracts contained numerous express provisions consistent only with a perpetual term); *Portland Section of Council of Jewish Women v. Sisters of Charity*, 266 Or 448, 456, 513 P2d 1183, 1187 (1973) (concluding that agreement was perpetual because contract stated expressly that it was

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perpetual). This determination is appropriate on summary judgment. *See Bancard Servs.*, 292 F Supp 2d at 1250 (granting summary judgment that agreement is not perpetual "based on the requirements that the perpetual nature of the agreement be expressed in clear and unambiguous language").

KOPWU's argument that the UKRB Contract is unambiguously perpetual fails to recognize that Oregon law disfavors perpetual agreements. *See Sisters of Charity*, 266 Or at 456 (reiterating general principle that "perpetual agreements are disfavored"); *Bancard Servs.*, 292 F Supp 2d at 1248 ("perpetual agreements are disfavored").

KOPWU argues that the UKRB Contract is like the perpetual country club membership contracts in *Paul Gabrilis*. First, KOPWU asserts that the Off-Project Contract "resulted from extensive negotiations that revealed how crucial the terms of the Agreement were to each party" and therefore that "[i]t is unreasonable to conclude that such negotiations would result in a contract that could be unilaterally terminated at any time." KOPWU Response at 29. The length or depth of negotiations leading up to the contracts in *Paul Gabrilis*, however, did not factor into the court's determination that the contracts were perpetual agreements. 154 Or App 388.

Second, KOPWU asserts that the UKRB Contract "contemplated that Off-Project Customers and Copco would make significant investments based on the Agreement." KOPWU Response at 29. Thus, KOPWU argues, "[j]ust as the agreements in *Gabrilis* continued as long as the members fulfilled certain *duties*, the Off-Project Agreement continues as long as the Off-Project Customers use Off-Project land for agricultural purposes, providing water the [sic] PacifiCorp's hydro facilities, and the Company uses its 'dam improvements on the Klamath River below Keno' . . . to generate hydroelectric power." *Id.* at 30 (emphasis added). However, by its express terms, the UKRB Contract does not obligate the irrigators to fulfill any "duties"—it does not contain a promise by the irrigators to invest in anything, to use land for agricultural purposes or to return water to PacifiCorp's

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hydro facilities. *See* UKRB Contract, Affidavit of Laura Beane, Exhibit 2.[11] In any event, investment made in reliance on a contract does not by itself clearly establish that the contract is perpetual. *See Lund*, 132 Or App at 91 (rejecting plaintiff's argument that termination would deprive plaintiff of "all the benefits of her hard work and investment").

Likewise, the omission of a duration term in the April 1956 Agreement does not clearly establish that the agreement is perpetual. *See Sisters of Charity*, 266 Or at 456; *Bancard Servs.*, 292 F Supp 2d at 1248. Silence is not a clear and unambiguous term describing the agreement's perpetual nature.

The present case is not like *Sisters of Charity*, in which the court determined that clear evidence existed that the parties intended the contract to be perpetual because the contract stated expressly: "first party hereby agrees to furnish ward accommodation in perpetuity." 266 Or 448 at 456 n1. Nor is the present case like *Paul Gabrilis*, in which the court determined that clear evidence existed that the parties intended the contracts to be perpetual because the contracts contained numerous express provisions that were inconsistent with any other interpretation. *See* 154 Or App at 394-95; Affidavit of Laura Beane, Exhibit 2 (April 1956 Agreement omitting any mention of duration, initiation fees, grounds for termination or suspension, or other terms consistent with a perpetual agreement). The

[11] KOPWU repeatedly misstates the extent of the bargain as defined in the document, which they claim constitutes the entire unambiguous Off-Project Agreement. *See* KOPWU Response at 11 (arguing that Off-Project Agreement consists of nothing more than the document entitled "Agreement," dated April 30, 1956); Affidavit of Matthew W. Perkins, Exhibit 1. KOPWU claims that "[t]he bargain reflected in the Off-Project Agreement is straightforward: in exchange for the power rate contained in the Agreement, Off-Project irrigators agreed to support Copco's application to construct Project No. 2082 and to provide water for Copco's downstream hydroelectric facilities." KOPWU Response at 4. Contrary to KOPWU's assertion, the Agreement's statement, "In consideration for an increased flow of water . . . ." contains no promise and does not establish an obligation on the Association. Indeed, KOPWU itself acknowledges that it is not obligated to return flow to the river. KOPWU Response at 11 ("power rates allowed Districts and persons having contracts with the Bureau should also be allowed those having State water rights as long as the return flow from their lands, *if any*, would return to the Klamath River above Keno") (quoting Association) (emphasis added).

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language of the agreement and the surrounding circumstances show that the parties did not intend the agreement to be perpetual. *Id.*; PacifiCorp's Motion at 17-18.

On this record, the Commission should conclude as a matter of law that the UKRB Contract is indefinite as to duration and not perpetual. *See Jones v. Gen. Motors Corp.*, 325 Or 404, 413 (1997) (summary judgment is appropriate when no "genuine" factual issue exists).

**c. Because the UKRB Contract Is Indefinite as to Its Duration, It Expires After a Reasonable Term and Is Terminable at Any Time Upon Reasonable Notice.**

The general rule in Oregon is that a contract that is indefinite as to its duration is terminable upon reasonable notice. *Andersen*, 259 Or at 105 (granting summary judgment against breach of contract claim because contract was of indefinite duration and therefore terminable at will); *Lund*, 132 Or App at 90-91 ("generally, the rule in Oregon is that a contract for an indefinite period may be terminated at will when reasonable notice is given"). Similarly, "when a continuing performance is expected, absent a specific time provision, the contract contemplates performance for a reasonable time. . . . but is terminable at any time by either party." Richard A. Lord, 1 Williston on Contracts, § 4:19 (4th ed) ((citations omitted)); *see also* ORS 72.3090(2) (identical to UCC § 2-309(2), which provides "Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.").

The general rule is not, as KOPWU suggests, limited to certain types of contracts. *Fleming v. Kids and Kin Head Start*, 71 Or App 718, 722, 693 P2d 1363 (Or App 1985) (stating that rule is not limited to employment contracts, but rather "[t]his principle is simply an application of the *general rule* that a contract of indefinite duration will be construed to be terminable on notice by any party" (emphasis added)). *Cf.* KOPWU Response at 26 (suggesting that rule typically applies to employment contracts and expired contracts under which parties have continued performance). *See also Lund*, 132 Or App at 90-92 (applying

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an application of the *general rule* that a contract of indefinite duration will be construed to be terminable on notice by any party" (emphasis added)). *Cf.* KOPWU Response at 26 (suggesting that rule typically applies to employment contracts and expired contracts under which parties have continued performance). *See also Lund*, 132 Or App at 90-92 (applying rule to independent contractor contract); *Estey & Associates, Inc. v. McCulloch Corp.*, 663 F Supp 167, 169 (D Or 1986) (applying rule in context of expired manufacturer-distributor contract); *Bancard Servs.*, 292 F Supp 2d 1235 (applying rule to personal property lease and service agreement).

The "reasonable term" gap filler comes into play when two conditions are met, such as they are in this case: (1) the contract provides for successive performances and (2) the contract is indefinite in duration. *See Weilersbacher v. Pittsburgh Brewing Co.*, 421 Pa 118, 121, 218 A2d 806 (Pa 1966) (contract for sale of beer at fixed price with no duration or quantity specified constituted contract for successive performances); *Panhandle Agri-Service, Inc. v. Becker*, 644 P2d 413 (1982) (agreement to deliver 10,000 tons of hay was not agreement for successive performances). The rule does not require, as KOPWU argues, that the parties failed to agree on an essential term of the contract. *See* KOPWU Response at 28.

**d. The Undisputed Facts Demonstrate that a Reasonable Termination Date Is April 16, 2006 and, as Conceded by KOPWU's Allegations of Breach by PacifiCorp, KOPWU Has Received Actual Notice of the Termination of the UKRB Agreement on April 16, 2006.**

The undisputed facts demonstrate that April 16, 2006 is a reasonable termination date for the UKRB Contract. *See* PacifiCorp Motion at 17-18; Affidavit of Laura Beane, Exhibit 5 (letter from KWUA to Copco stating that "after power rates have been established for off-project pumpers and applications have been approved by the Public Utilities Commissions of Oregon and California, no change in power rates for the term of the contract between the Bureau of Reclamation and Copco shall be submitted to the Commissions unless filed jointly by Copco and this Association"); Affidavit of Laura Beane, Exhibit 15 (letter

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the term of the Reclamation Bureau contract"); Affidavit of Katherine A. McDowell, Exhibit 16 (Water Users Board of Directors minutes, stating that Off-Project Contract was entered into to achieve closer parity in rates with the On-Project users in return for the Off-Project users' support of the On-Project Contract).

These facts, which KOPWU does not dispute, show that the parties to the UKRB Contract agreed to the terms of the contract with a duration term that mirrored the USBR Contract. KOPWU argues it is reasonable to infer from the absence of a duration term in the April 1956 Agreement that the parties changed their position between November 1955 and April 30, 1956. KOPWU Response at 32-34. At the very least, however, the undisputed facts show that, in November 1955 and April 1956, the parties agreed on the 50-year duration term. *See* Affidavit of Laura Beane, Exhibit 5 (November 1955 letter) ("after power rates have been established for off-project pumpers and applications have been approved by the Public Utilities Commissions of Oregon and California, no change in power rates for the term of the contract between the Bureau of Reclamation and Copco shall be submitted to the Commissions unless filed jointly by Copco and this Association"); Affidavit of Laura Beane, Exhibit 6 (CPUC Application filed April 10, 1956) (requesting approval of November 1955 letter "agreement").

Contrary to KOPWU's suggestion, it is not plausible that in late April 1956, after the Off-Project users withdrew their objection to the USBR Contract, Copco agreed to extend the duration of the UKRB Agreement from 50 years to an indefinite term (or, in perpetuity as KOPWU argues) for no additional consideration. *See Van v. Fox*, 278 Or 439, 445-46, 564 P2d 695 (1977) ("Courts should be ready to give those reasonable interpretations that ordinary businessmen are willing to give" (citations omitted)). Given this, it would be unreasonable to construe the UKRB Contract as having a longer length than that agreed to by the parties before the Water Users withdrew their objection to the USBR Contract. Furthermore, given the emphasis placed by the Water Users on parity between the On- and

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Off-Project pumping rates, it would be unreasonable to construe the UKRB Contract as having a different and more favorable contract length for the irrigators than the USBR Contract. No reasonable factfinder could find otherwise.

In any event, as conceded in KOPWU's allegation that PacifiCorp has breached the UKRB Contract by attempting to terminate it as of April 16, 2006, KOPWU has received reasonable notice of PacifiCorp's intent to terminate the UKRB Contract on April 16, 2006. This is all that Oregon law requires to end a contract of indefinite duration. *See Estey & Associates*, 663 F Supp at 171 (two months' notice of termination of a distributorship contract five months after the contract began was reasonable and effective to terminate the contract and did not constitute breach).

In support of its claim of breach (a claim which cannot be sustained under *American Can*), KOPWU notes that PacifiCorp has requested a Commission order in this docket terminating the rates under the UKRB Contract on April 16, 2006, and has filed revised tariffs and testimony in UE 170, proposing to serve UKRB customers under Schedule 41, PacifiCorp's standard irrigation tariffs. Based upon KOPWU's own statements, it is clear that it has had actual notice since at least the filing date of UE 170, November 12, 2004, of PacifiCorp's intent to terminate the UKRB Contract. KOPWU Response at 35-36. Indeed, it was in response to this actual notice that KOPWU decided to intervene in PacifiCorp's general rate case, UE 170, as well as in this docket. *See In re PacifiCorp*, UE 170, KOPWU Amended Petition to Intervene.

Because reasonable notice is all that is required to end a contract of indefinite duration and KOPWU concedes that it has received such notice, summary disposition terminating the rates under the UKRB Contract on April 16, 2006 is appropriate under state law contract principles, as well as under *American Can*.

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## C. The Klamath River Basin Compact Does Not Require The Commission To Allow Unfair and Discriminatory Rates For Klamath River Basin Irrigators.

### 1. Article IV of the Compact Sets General Objectives Regarding the Distribution and Use of Klamath Waters, as Distinguished from a Statutory Entitlement to a Particular Rate.

Perhaps hoping that no one will check the actual language of the Klamath Compact, KOPWU and KWUA argue that the Compact requires preferential rates for its members.[12] Article IV of the Compact sets a general objective regarding the distribution and use of waters in the Klamath River Basin; it does not impose a requirement for preferential electric rates:

> "It shall be the objective of each state, in the formulation and execution and the granting of authority for the formulation and execution of plans for distribution and use of the waters of the Klamath River Basin, to provide for the most efficient use of available power head and its economic integration with the distribution of water or other beneficial uses in order to secure the most economical distribution and use of water and lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells." Compact, Article IV.

Because the language of the Compact itself does not support a preferential rate theory, KWUA asserts that the ratification of the Compact by the Oregon Legislature in ORS 542.610(1) somehow upgraded the legal significance and meaning of its provisions. The fact is that, other than confirming the ratification of the Compact, the codification of the Compact did not change the terms of the Compact in any manner, nor did it add to its legal significance or meaning.

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[12] KWUA Response at 10 (citing the Compact and stating "Oregon law *requires* that electricity be provided to the Klamath Irrigators . . . under the preferential 'lowest power rates which may be reasonable' standard."; KOPWU Response at 46 ("[T]he Klamath River Basin Compact, ORS § 542.610 et seq., specifies that [Klamath Basin irrigation customers] *are to* receive the 'lowest power rates which may be reasonable' for irrigation and pumping uses." (emphasis added).); KOPWU Response at 47 ("Section IV of the Compact describes the rates *to be charged* to Klamath irrigation customers." (emphasis added).)

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**2. The Compact Does Not Override the Commission's Statutory Mandate to Ensure that Rates are Both Just and Reasonable and Non-Discriminatory.**

Applying various rules of statutory construction, both KWUA and KOPWU argue that the phrase "lowest power rates which may be reasonable" in Article IV establishes a ratesetting standard, which the Commission must apply and which differs from the "just and reasonable" or "fair and reasonable" standard applicable to utility rate regulation by the Commission. KWUA Response at 11; KOPWU Response at 48 (citing ORS §§ 756.040, 757.210).[13]

These arguments fail to give any recognition to the "cardinal" rule of construction that requires courts to construe statutes according to their terms. *Connecticut Nat'l Bank*, 503 US at 253-54; *see also PGE v. Bureau of Labor & Indus.*, 317 Or 606, 611 (1993). Here, the Compact provides expressly that the obligation it creates is that the states shall have an "objective." Compact, Article IV. Further, and perhaps most significantly, that objective applies "in the formulation and execution and the granting of authority for the formulation and execution of plans for distribution and use of the waters of the Klamath River Basin." *Id.* The Compact does not state that the objective applies to ratemaking or other legislative or administrative functions of the Commission. *Id.* Thus, the Compact dictates what an objective of the state must be when it is formulating and executing, or granting authority to formulate or execute, plans for the distribution and use of waters of the Klamath River Basin.

[13] KWUA notes that federal courts interpret Congressionally approved interstate compacts as if they were interpreting a federal statute. KWUA Response at 11, n.6. Regardless of whether federal or Oregon state rules of construction are applied, the result is the same: the wording of Article IV of the Compact is clear and unambiguous and means just what is says, which is a statement of objective, not a requirement, relevant to the distribution and use of waters in the Klamath River Basin. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 US 249, 253-54 ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there" and "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'").

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This interpretation of the plain language of the Compact is also consistent with common sense and the rule that courts should strive for consistency when construing statutes. *See, e.g., US v. 103 Electronic Gambling Devices*, 223 F3d 1091, 1102 (9th Cir 2000); *Circuit Court v. AFSCME*, 295 Or 542, 669 P2d 314, 316 (1983), *Welliver Welding Works v. Farmen*, 133 Or App 203, 890 P2d 429 (1995).

Both KWUA and KOPWU ignore the plain language of the Compact. Their arguments, although different in approach, transform the language "[i]t shall be the objective of each state ..." into "each state shall be required to ...." Both arguments then disregard utterly the phrase "in the formulation and execution and the granting of authority for the formulation and execution of plans for distribution and use of the waters of the Klamath River Basin." Only by misconstruing and disregarding the plain language of the Compact are KWUA and KOPWU then able to argue that the Compact creates a preferential rate standard that conflicts with and ultimately trumps the standard in the Public Utility Act.

Having so disregarded and misconstrued the plain language of the Compact, KWUA argues that the meaning of "reasonable" in Article IV and "just and reasonable" in the Public Utility Act must be different. KWUA Response at 11 ( stating that Oregon law "presumes that statutes having different words also have different meanings" and citing and quoting *Premier West Bank v. GSA Wholesale, LLC*, 196 Or App 640, 651, 103 P3d 1169, 1176 (2004) ("Ordinarily, when the legislature has used different terms in related statutes, we infer that it intended different meanings.")). Not only does KWUA's argument fail because the Compact by its terms does not establish a utility ratesetting standard, KWUA also misapplies *Premier West*. The rule in Premier West applies to *related* statutes only, such as the statutes at issue in *Premier West* that the court pointed out were enacted as part of the same bill. 196 Or App at 651. The Compact, the stated purposes of which do not include anything directed at utility ratesetting, cannot reasonably be considered to be related to the statutes requiring just and reasonable rates.

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KOPWU argues that the plain language of the Compact indicates that the "lowest rate" phrase is a different "statutory standard" than the "fair and reasonable" standard in ORS § 746.040. *See* KOPWU Response at 48. KOPWU then suggests that the "fair and reasonable" standard might not result in the lowest rates because a utility might agree to rates in a particular instance which do not provide recovery of a reasonable rate of return. *See* KOPWU Response at 49 (arguing that PacifiCorp "'agree[d] by contract to a rate affording less than a fair return'").

Not only does KOPWU lack any basis for its factual assertion that PacifiCorp "'agree[d] by contract to a rate affording less than a fair return,'" since a fair return can be achieved through other customers making up for the underrecovery, the fact that a utility might voluntarily agree to rates lower than those required by the "just and reasonable" standard, and which do not provide an opportunity to earn a reasonable rate of return, certainly does not mean that the Legislature or the Commission can *require* such rates. Rates ordered by the Commission under the "just and reasonable" standard are the lowest rates reasonable.

KOPWU also argues that the Compact is a "particular" statute and the statutes governing ratesetting by the Commission are "general," and that under ORS § 174.020(2), the "lowest rate" phrase in the Compact is inconsistent with and must control over the "just and reasonable" standard. KOPWU Response at 49-51. Again, KOPWU's argument misses the mark, being entirely based on the premise that the Compact expresses the intent that the Klamath Basin irrigators must receive rates lower than the just and reasonable rates the Commission is charged to set for all customers. As discussed above, that position is wrong, and like other arguments by KOPWU and KWUA, it fails to construe the Compact according to its plain language and to give any recognition to the rule of statutory construction that

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*Main (503) 224-3380 Fax (503) 220-2480*

whenever possible, courts strive to construe statutes so as to bring about consistency. *Circuit Court*, 295 Or 542.[14]

Finally, both KOPWU and KWUA argue that the "lowest rate" statement in Article IV would be rendered of no effect and superfluous if the Commission construed it as not referring to something different than the "just and reasonable" standard. KOPWU Response at 49; KWUA Response at 12. Such is not the case. Stating the desired results in Article IV—"to secure the most economical distribution and use of water and lowest power rates which may be reasonable"—helps provide direction for implementing the stated objective of Article IV: "to provide for the most efficient use of available power head and its economic integration with the distribution of water for other beneficial uses." Thus, the "lowest rates" phrase has meaning in the context of the stated objective. Efficient maximization of power head helps achieve the lowest reasonable rates.

[14] The Attorney General opinion relied upon by KOPWU, addressing the Compact and another statute directed specifically at the use and control of water resources of the State, does not support KOPWU's premise that the Compact is a "particular" statute and the statutes using the "just and reasonable" or "fair and reasonable" terms are "general." The Compact cannot reasonably be considered to be the particular provision dealing with establishing rates for irrigators, especially considering that Oregon's representation in the drafting of the Compact was the Oregon Klamath River Commission, whose function was "to cooperate with a similar commission representing the State of California in formulating and submitting to the legislatures of both states for their approval an interstate compact relative to the distribution and use of the waters of the Klamath River." Oregon Law 1953, Chapter 431, Section 8. The Oregon Klamath River Commission was not created to establish utility rate standards; rather, it was created to establish a compact "relative to the distribution and use of the waters of the Klamath River," which it did. Further, in making its argument, KOPWU again ignores the "well settled principal" stated in the opinion that statutes should be harmonized if possible. 39 Op. Atty. Gen. Or. 748, 751 (1979).

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*Main (503) 224-3380 Fax (503) 220-2480*

## III. CONCLUSION

For all of the reasons stated in PacifiCorp's Motion for Summary Disposition and in this Reply, PacifiCorp respectfully requests that the Commission terminate the rates provided under the USBR and UKRB contracts effective April 16, 2006.

DATED: May 12, 2005.

STOEL RIVES LLP

Katherine A. McDowell
Sarah Adams Lien

Attorneys for PacifiCorp

STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600, Portland, OR 97204
Main (503) 224-3380 Fax (503) 220-2480

## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document in docket UE 171 on the following named person(s) on the date indicated below by e-mail where available, and by first-class mail, to said person(s) a true copy thereof, addressed to said person(s) at his or her last-known address(es) indicated below.

Edward Bartell
Klamath Off-Project Water Users, Inc.
30474 Sprague River Road
Sprague River, OR 97639

Lisa Brown
Waterwatch of Oregon
213 SW Ash Street, Suite 208
Portland, OR 97204
lisa@waterwatch.org

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, Suite 308
Portland, OR 97205
jason@oregoncub.org

Edward A. Finklea
Cable Huston Benedict Haagensen & Lloyd LLP
1001 SW Fifth Avenue, Suite 2000
Portland, OR 97204
efinklea@chbh.com

Dan Keppen
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

Bill McNamee
Public Utility Commission
PO Box 2148
Salem, OR 97308-2148
bill.mcnamee@state.or.us

Steve Pedery
Oregon Natural Resources Council
PO Box 151
Ashland, OR 97520
sp@onrc.org

Matthew W. Perkins
Davison Van Cleve PC
333 SW Taylor, Suite 400
Portland, OR 97204
mwp@dvclaw.com

Robert Valdez
PO Box 2148
Salem, OR 97308-2148
bob.valdez@state.or.us

Lowrey R. Brown
Citizens' Utility Board of Oregon
610 SW Broadway, Suite 308
Portland, OR 97205
lowrey@oregoncub.org

**STOEL RIVES** LLP
900 SW Fifth Avenue, Suite 2600, Portland, OR 97204
*Main (503) 224-3380 Fax (503) 220-2480*

John Corbett
Yurok Tribe
PO Box 1027
Klamath, CA 95548
jcorbett@yuroktribe.nsn.us

Michael W. Orcutt
Hoopa Valley Tribe Fisheries Dept.
PO Box 417
Hoopa, CA 95546

Thomas P Schlosser
Morisset, Schlosser, Jozwiak & McGaw
t.schlosser@msaj.com

Glen H. Spain
PCFFA
PO Box 11170
Eugene, OR 97440-3370
fish1ifr@aol.com

Jason W. Jones
Department of Justice
1162 Court St NE
Salem OR 97301-4096
jason.jones@state.or.us

US Bureau of Reclamation
6600 Washburn Way
Klamath Falls, OR 97603

Stephen R. Palmer
Office of the Regional Solicitor
2800 Cottage Way, Rm. E-1712
Sacramento, CA 95825

DATED: May 12, 2005.

Katherine A. McDowell

**STOEL RIVES LLP**
900 SW Fifth Avenue, Suite 2600, Portland, OR 97204
*Main (503) 224-3380 Fax (503) 220-2480*