

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 UE 171

4 In the Matter of PACIFIC POWER & LIGHT
5 (dba PACIFICORP)
6 Klamath Basin Irrigation Rates
7

STAFF'S REPLY TO PARTIES' RESPONSES
TO PACIFICORP'S MOTION FOR SUMMARY
DISPOSITION

8 **I. INTRODUCTION**

9 The issue before the Public Utility Commission of Oregon (“PUC” or “Commission”) in
10 this proceeding is whether PacifiCorp’s Klamath Basin irrigation customers should be served in
11 accordance with historical contracts, or whether they should be served under PacifiCorp’s
12 standard tariffs. *See In re Pacific Power & Light*, UE 170, Revised Joint Ruling and Prehearing
13 Conference Notice at 2 (OPUC Feb. 24, 2005) (slip op).

14 On April 28, 2005, eight parties to this proceeding filed responses to PacifiCorp’s Motion
15 for Summary Disposition (“PacifiCorp Motion”). Five of the eight parties filing responses
16 support the termination of the historic contracts: The Hoopa Valley Tribe, Oregon Natural
17 Resources Defense Council, Waterwatch of Oregon, Pacific Coast Federation of Fisherman’s
18 Association, and PUC Staff (“Staff”). The United States Bureau of Reclamation (“USBR”) and
19 Fish and Wildlife Service (“USF&W”) response does not take a position, but rather requests the
20 proceeding be held in abeyance pending the outcome of the Federal Energy Regulatory
21 Commission (“FERC”) relicensing proceeding. The only parties that filed responses directly
22 opposed to PacifiCorp’s Motion are the Klamath Off-Project Water Users (“KOPWU”) and the
23 Klamath Water Users Association (“KWUA”) – the two parties that are currently benefiting
24 from the highly subsidized, extremely low irrigation rates pursuant to the historic contracts.

25 As discussed in Staff’s response to PacifiCorp’s Motion, there are two separate historical
26 contracts at issue – the “On-Project” contract, which contains an express termination date of

1 April 16, 2006, and the “Off-Project” contract, which does not contain an express termination
2 date. Both historical contracts provide PacifiCorp’s Klamath irrigation customers with
3 extraordinarily low electric irrigation rates, which are currently being subsidized by other
4 PacifiCorp’s other customers.

5 PacifiCorp’s Motion demonstrates why the historic contracts should be terminated on
6 April 16, 2006. PacifiCorp’s Motion establishes that the rates in the historic contracts, which are
7 approximately one-tenth the standard tariff rates paid by PacifiCorp’s other Oregon customers,
8 are no longer just and reasonable and that continuance of the rates beyond April 16, 2006, would
9 be discriminatory. Staff’s Response to PacifiCorp’s Motion for Summary Disposition (“Staff’s
10 Response”) likewise concludes that the historic contracts are no longer just and reasonable, are
11 discriminatory, and should be terminated. As a result, the Commission should issue an order
12 terminating the historic contracts, effective April 16, 2006.

13 **1. THE COMMISSION HAS CONTINUING JURISDICTION TO REGULATE**
14 **RETAIL ELECTRIC RATES IN OREGON, INCLUDING THE ON-PROJECT**
15 **AND OFF-PROJECT CONTRACTS AT ISSUE IN THIS PROCEEDING.**

16 **A. The Commission has jurisdiction over the historic contracts because the**
17 **On-Project and Off-Project contracts are tariffs subject to Commission review.**

18 As outlined in Staff’s Response, the historic contracts at issue are tariffs subject to the
19 Commission’s continuing review. The Commission indisputably has the authority to change the
20 rates established in a written contact between a utility and one of its customers if the rates
21 become unjust and unreasonable. *See American Can Co. v. Davis*, 28 Or App 207, 224, 559 P2d
22 898 (1977).

23 Although both the KOPWU and the KWUA oppose termination of the rates listed in the
24 historic contracts, neither party directly challenges the Commission’s continuing authority over
25 filed tariffs. Indeed, the KWUA Response to PacifiCorp’s Motion for Summary Disposition
26 (“KWUA Response”) avoids the relevant legal authority – the *American Can* case – until nearly
the end of its response. *See* Response at 17. When it finally mentions the *American Can* case, it

1 does so only in the context of asserting that the case is distinguishable because the largest rate
2 increase any customer faced in that case was only a 100% rate increase, whereas this case
3 involves dramatically higher rate increases. *Id.* KWUA’s argument ignores the holding of
4 *American Can* and is counterintuitive to its position that the contract rates should remain in
5 effect. KWUA’s point – that the potential increase for KWUA’s customers will be dramatically
6 higher than the rate increase in *American Can* – only supports the position that the historic
7 contract rates are dramatically lower than just and reasonable rates. As such, the Commission
8 not only has the authority, but also the duty to consider and, upon a proper showing, to change
9 the tariff rates that are no longer just and reasonable. *See American Can Co. v. Davis*, 28 Or App
10 at 224.

11 KOPWU’s Response to PacifiCorp’s Motion for Summary Disposition (“KOPWU
12 Response”) also attempts to distinguish *American Can* near the end of its response. *See*
13 KOPWU Response at 45. Like KWUA, KOPWU does not directly challenge *American Can*.
14 Instead, it argues *American Can* is distinguishable because the Commission has adopted a more
15 “stringent” standard for revisions of fixed rate contracts and that there are other considerations
16 besides whether the rates are just and reasonable. *Id.* at 41. KOPWU’s argument seems
17 duplicitous considering it spends the previous portion of its response arguing that the agreement
18 should not be evaluated according to the standards of conventional special contracts and then
19 argues that the Commission should follow a more “stringent” standard for revisions of special
20 contracts. *See Id.* 36-37. Regardless, the historic contracts are Oregon tariffs and are subject to
21 review for justness and reasonableness. Of course, the Commission has considered relevant
22 “factors,” such as whether contracts were voluntarily negotiated, to “assist” in determining
23 whether a rate is just and reasonable. However, the fact remains that the only applicable legal
24 standard is whether the rates are just and reasonable. In this proceeding, the rates are so
25 extremely low as compared to cost of service as to make the determination that they are unjust
26 and unreasonable is an obvious conclusion.

1 The Commission has the power and duty, upon a proper showing, to change the rates
2 established in a written contract between a utility and one of its customers. *See American Can* at
3 221-23. PacifiCorp’s Motion demonstrates that the historic contract rates no longer meet the just
4 and reasonable standard. As a result, the Commission should exercise its authority and terminate
5 the historic contracts.

6 **B. KWUA’s and KOPWU’s arguments for continuing to receive unjust and**
7 **unreasonable rates under the historic contracts are unpersuasive and**
8 **inconsistent with the Commission’s duty to establish just and reasonable rates.**

9 In support of the continuation of the historic contract rates, KWUA and KOPWA assert
10 numerous arguments to claim that the Commission is restrained from terminating the unjust and
11 unreasonable historic contract rates. Their arguments are incorrect and unpersuasive.

12 **1. The appropriate termination date for the Off-Project contract is an issue for the**
13 **Commission, not the courts.**

14 KOPWU spends much of its responsive brief arguing that: the contract is unambiguous
15 and must be enforced according to its terms; given Oregon laws on the proper interpretation of a
16 contract, a court should determine the contract rights; and the contract is a perpetual contract.
17 *See generally* KOPWU Response 21-35. Each of these arguments, however, fails because the
18 issue before the Commission is the review of a Commission-approved tariff for electricity
19 service, not contract interpretation. Because the Off-Project rates are tariffs, the Commission has
20 the continuing authority, delegated to it by the Oregon Legislature, to establish rates that are just
21 and reasonable. *See* ORS 756.040.

22 If KOPWA was correct, the Commission would be forced to accept the contract terms
23 negotiated between private parties and public utilities. Taken further, the Commission would be
24 forced to accept perpetual contract rates and would never have an opportunity to review or
25 change tariffed rates. The Commission’s regulatory role is to review public utility tariffs for
26 consistency with its statutory authority to set rates that are just and reasonable. The Commission
should not be misled by KOPWU’s pages of contract interpretation arguments. The

1 Commission’s authority to prescribe revisions of tariffs is a legislative function and not one for
2 the courts. *See Fields v. Davis*, 31 Or App 607, 613, 571 P2d 511 (Or App 1977).

3 **2. The Commission has the authority to set just and reasonable retail electricity**
4 **rates and should not defer that authority to FERC.**

5 KWUA, USBR, and USF&W all argue that the On-Project contract is a condition of the
6 current FERC operating license for PacifiCorp’s Klamath Hydro project and, therefore, FERC is
7 the proper forum for addressing the Klamath irrigation rate issue. Again, these arguments simply
8 ignore the Commission duty to consider and, upon a proper showing, change tariffed rates,
9 including special contracts. In addition, Staff notes that in its Response to Additional Study
10 Requests (“ASR”) of participants in the Klamath Hydro project relicensing process, FERC
11 responded to a Department of Interior request to study the impacts of the expiration of the
12 discount rates for the Klamath irrigators by stating that: “We do not consider the rates that
13 PacifiCorp charges its customers to be an appropriate issue for analysis in this proceeding.” *See*
14 *PacifiCorp Motion, Exhibit 14, ASR at 16.* There is no reason that the Commission should defer
15 its rate authority by allowing the FERC process to drive the retail electric rates in Oregon.

16 **3. The Klamath Basin Compact is not relevant to this docket.**

17 KWUA and KOPWU both claim that the Klamath Basin Compact (“Compact”) governs
18 the electric rates charged to the Klamath irrigators. However, the issue in this docket is whether
19 the historical contracts should be terminated. If the historical contracts are terminated, the
20 residual issues – such as the just and reasonable rate for the Klamath irrigators – will be
21 determined in Docket No. UE 170. For example, KWUA and KOPWU argue that the language
22 “lowest power rate which may be reasonable” is a rationale for treating Klamath irrigator rates
23 differently from other Oregon irrigators’ rates. However, this proceeding involves a legal issue
24 and not a factual inquiry into the appropriate future rate treatment for the Klamath irrigators.
25 The Commission should terminate the rates the historical contracts and then – in the appropriate
26

1 UE 170 general rate proceeding and in a timely manner – the Commission can consider the
2 appropriate post April 16, 2006, cost-of-service rate for the Klamath irrigators.

3 **4. If the Commission considers the Compact in this proceeding, it does not entitle**
4 **the Klamath River Basin Irrigators to a different rate standard.**

5 Article IV of the Compact describes general objectives. It states:

6 It shall be the objective of each state, in the formulation and execution and
7 granting of authority for the formulation and execution of plans for
8 distribution and use of the waters of the Klamath River Basin, to provide
9 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 irrigations and drainage
pumping, including pumping from wells.

10 The plain, unambiguous language of the Compact does not support KWUA's and
11 KOPWU's argument that Article IV of the Compact creates a special, preferential rate standard
12 for the Klamath River Basin irrigators. *See PGE v. Bureau of Labor and Industries*, 317 Or 606.
13 Article IV of the Compact is not a rate standard, but rather a general objective for formulating
14 and executing plans for distribution and use of water to achieve certain results, including the
15 lowest power rates which may be reasonable. The general objectives of the Compact do not
16 trump the specific rate standard or the Commission's authority found in ORS 756.040.

17 Both KWUA and KOPWU argue that the Compact does create a different standard than
18 the just and reasonable standard because Oregon law presumes that statutes having different
19 wording also have different meanings. *See KWUA Response at 11; KOPWU Response at 48.*
20 While the first level of statutory interpretation does involve consideration of context, the context
21 includes other provisions of the same statute and other related statutes. Here, the statutes are
22 simply not related statutes.

23 While KWUA and KOPWU claim that the words create different meanings, they do not
24 explain how "just and reasonable" rates are different than the "lowest rates which may be
25 reasonable." In fact, both use the word reasonable. It is impossible to imagine how a rate that is
26 one-tenth the rate paid by other customers and which does not even come close to the utility's

1 cost-of service is “reasonable.” The plain language of the Compact simply does not create a
2 different standard. The statutes do employ different words, but they are not related statutes and
3 there is nothing in the Compact to suggest that it is intended to replace the Commission’s
4 authority to establish Oregon retail rates based upon the just and reasonable standard.

5 **CONCLUSION**

6 For the foregoing reasons, the Commission should issue an order terminating the electric
7 rates specified in the On-Project and Off-Project contracts, effective April 16, 2006.

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9 DATED this 12th day of May 2005.

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Respectfully submitted,

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HARDY MYERS
Attorney General

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s/ Jason W. Jones
Jason W. Jones, #00059
Assistant Attorney General
Of Attorneys for Staff of the Public Utility
Commission of Oregon

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May 2005, I served the foregoing

upon the parties, hereto by the method/s indicated below:

U.S. BUREAU OF RECLAMATION
6600 WASHBURN WAY
KLAMATH FALLS OR 97603
dsabo@mp.usbr.gov

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

EDWARD BARTELL
KLAMATH OFF-PROJECT WATER USERS
30474 SPRAGUE RIVER ROAD
SPRAGUE RIVER OR 97639

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

LISA BROWN
WATERWATCH OF OREGON
213 SW ASH ST STE 208
PORTLAND OR 97204
lisa@waterwatch.org

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

LOWREY R BROWN
CITIZENS' UTILITY BOARD OF OREGON
610 SW BROADWAY, SUITE 308
PORTLAND OR 97205
lowrey@oregoncub.org

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

JOHN CORBETT
YUOK TRIBE
PO BOX 1027
KLAMATH CA 95548
jcorbett@yuroktribe.nsn.us

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

JOHN DEVOE
WATERWATCH OF OREGON
213 SW ASH STREET, SUITE 208
PORTLAND OR 97204
john@waterwatch.org

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

JASON EISDORFER
CITIZENS' UTILITY BOARD OF OREGON
610 SW BROADWAY STE 308
PORTLAND OR 97205
jason@oregoncub.org

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

EDWARD A FINKLEA
CABLE HUSTON BENEDICT ET AL
1001 SW 5TH, SUITE 2000
PORTLAND OR 97204
efinklea@chbh.com

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

DAN KEPPEN
KLAMATH WATER USERS ASSOCIATION
2455 PATTERSON STREET, SUITE 3
KLAMATH FALLS OR 97603

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

JIM MCCARTHY
OREGON NATURAL RESOURCES COUNCIL
PO BOX 151
ASHLAND OR 97520
jm@onrc.org

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

KATHERINE A MCDOWELL
STOEL RIVES LLP
900 SW FIFTH AVE STE 1600
PORTLAND OR 97204-1268
kamcdowell@stoel.com

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

BILL MCNAMEE
PUBLIC UTILITY COMMISSION
PO BOX 2148
SALEM OR 97308-2148
bill.mcnamee@state.or.us

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

MICHAEL W ORCUTT
HOOPA VALLEY TRIBE FISHERIES DEPT
PO BOX 417
HOOPA CA 95546

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

STEPHEN R PALMER
OFFICE OF THE REGIONAL SOLICITOR
2800 COTTAGE WAY, RM E-1712
SACRAMENTO CA 95825

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

STEVE PEDERY
OREGON NATURAL RESOURCES COUNCIL
sp@onrc.org

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

MATTHEW W PERKINS - **CONFIDENTIAL**
DAVISON VAN CLEVE PC
333 SW TAYLOR, STE 400
PORTLAND OR 97204
mwp@dvclaw.com

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

THOMAS P SCHLOSSER
MORISSET, SCHLOSSER, JOZWIAK & MCGAW
t.schlosser@msaj.com

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

GLEN H SPAIN
PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOC
PO BOX 11170
EUGENE OR 97440-3370
fish1ifr@aol.com

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

ROBERT VALDEZ
PO BOX 2148
SALEM OR 97308-2148
bob.valdez@state.or.us

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

PAUL M WRIGLEY
PACIFIC POWER & LIGHT
825 NE MULTNOMAH STE 800
PORTLAND OR 97232
paul.wrigley@pacificcorp.com

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

Neoma A. Lane
Neoma A. Lane
Legal Secretary
Department of Justice
General Counsel
1162 Court Street NE
Salem, Oregon 97301-4096