

August 16, 2005

**VIA ELECTRONIC FILING and US MAIL**

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

**Re: Trout Unlimited's Reply to MEHC's and PacifiCorp's Objections to  
Petition to Intervene, Docket UM 1209**

Enclosed for filing please find Trout Unlimited's "Reply to MEHC's and PacifiCorp's Objection to Petition to Intervene" in the above-referenced matter. A copy of this filing has been served on all parties to this proceeding as indicated on the attached certificate of service.

Respectfully submitted,

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**BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON**

UM 1209

In the Matter of  MIDAMERICAN ENERGY HOLDINGS COMPANY's  Application for Authorization to Acquire Pacific Power & Light, dba PacifiCorp.	<b>TROUT UNLIMITED AND AMERICAN RIVERS REPLY TO MEHC'S AND PACIFICORP'S OBJECTION TO PETITIONS TO INTERVENE</b>
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**INTRODUCTION**

Trout Unlimited ("TU") and American Rivers ("AR") (hereinafter "Conservation Groups") respectfully submit this reply to MidAmerican Energy Holdings Company's ("MEHC") and PacifiCorp's "Objections To The Hydro Parties' Petitions To Intervene," dated August 11, 2005. *See* OAR § 860-013-0050(2). TU filed a "Petition to Intervene" in UM 1209 on August 3, 2005. AR filed a "Petition to Intervene" in UM 1209 on August 1, 2005. On August, 5 2005, the Administrative Law Judge conditionally granted both Petitions to Intervene.

Trout Unlimited and American Rivers respectfully request that the Oregon Public Utility Commission ("Commission") deny MEHC's and PacifiCorp's motion to: (1) reject the Petitions to Intervene, or (2) otherwise limit Conservation Groups' participation.

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**ARGUMENT**

Conservation Groups have a sufficient interest in this proceeding, which no other party can adequately represent. That interest extends well beyond the specific Klamath relicensing process to other hydroelectric projects owned and operated presently by PacifiCorp throughout Oregon, and in some cases on tributaries to Oregon waters like the Columbia River. It also includes public interest concerns consistent with ORS § 757.511. Consequently, Conservation Groups’ interest in this proceeding is substantially different than prior, narrowly tailored rate cases concerning PacifiCorp where the Commission limited participation. *See In the Matter of the Request of Pacific Power & Light, dba PacifiCorp, Klamath Basin Irrigation Rates*, UE 171, Ruling (April 5, 2005).

Conservation Groups’ participation will add value to the proceeding and not result in an unreasonable delay, broadening of the issues, or burdening of the record. ORS § 756.525(2) requires the Commission to allow intervention “if the [PUC] determines that such appearance and participation will not unreasonably broaden the issues or burden the record.” Further, a demonstrated “sufficient interest” in the proceeding is cause for intervention. OAR § 860-012-0001(2).

**A. Conservation Groups Have Executed Contracts And Agreements With PacifiCorp, Which Is A Clear and Sufficient Interest.**

Conservation Groups’ interest in UM 1209 is clear and sufficient. TU and AR have executed contracts with PacifiCorp, in the form of settlement agreements, as the basis for the relicensing of the Lewis River Project (FERC Nos. 935, 2071, 2111, 2213), and the Condit Project (FERC No. 2342), and AR has executed a contract with PacifiCorp for the Powerdale Project (FERC No. 2659. These agreements establish rights and duties. Moreover, Conservation Groups and PacifiCorp in the past have entered into funding agreements for joint technical work regarding the Klamath River Project (FERC No. 2082). MEHC is a new corporation without a track record

1 concerning operation of hydroelectric dams in any western state, let alone in Oregon on  
2 waterways with federally-listed endangered species. *See* ORS §§ 757.511(d), (g)  
3 (requiring Application to describe compliance with federal law and experience in  
4 operating public utilities).

5         It is unclear how MEHC would implement these contracts, and comply with  
6 applicable law, or if it would adopt PacifiCorp’s collaborative approach for future  
7 agreements. Indeed, given the possibly different financial circumstances between the  
8 present corporate ownership of PacifiCorp and proposed MEHC ownership, the  
9 implementation of these contracts, over their 30-40 year terms, is unknown. *See*  
10 MEHC & PacifiCorp Application, at 8 (“MEHC plans to operate PacifiCorp *much as it*  
11 *is operated today.*”) (emphasis added). More specifically, the Application states that  
12 “MEHC will also review and extend the commitments that have been previously made  
13 by PacifiCorp as set forth in Exhibit (BEG-1) in the testimony of MEHC witness Gale.  
14 . .[.]” MEHC & PacifiCorp Application, at 9, which Exhibit contains no mention of  
15 hydroelectric projects or existing commitments related to such projects. *See* MEHC &  
16 PacifiCorp Application, Exhibit 301 (“MEHC Adoption of Prior Commitments”). At a  
17 minimum, based on this reason alone, Conservation Groups have a significant stake in  
18 this proceeding and a clear and sufficient interest in the outcome of UM 1209.

19  
20         **B. Conservation Groups Will Raise Relevant Issues Under ORS §  
21 757.511.**

22         Conservation Groups agree with MEHC and PacifiCorp that “[t]his is a  
23 proceeding under ORS 757.511.” MEHC & PacifiCorp Objection, at 2. The primary  
24 issue before the Commission is whether the proposed sale and transfer of ownership of  
25 PacifiCorp to MEHC is in the public interest. The proposed sale and transfer of  
26 PacifiCorp to MEHC must meet the net benefit and public interest standards. *See In*  
27 *the Matter of Oregon Electric Utility Company*, UM 1121, Oregon PUC Order No. 05-  
28 114. To be clear, Conservation Groups do not seek to raise complaints about  
PacifiCorp’s current operations. Nor are Conservation Groups solely concerned here

1 with future licensed operations, which are enforceable by the Federal Energy  
2 Regulatory Commission (“FERC”) and other permitting agencies. Conservation  
3 Groups take no position at this time on the merits of the proposed sale and transfer.

4         However, under the proposed sale and transfer, MEHC would own the  
5 individual hydroelectric projects in PacifiCorp’s system. The licenses issued by FERC  
6 for the individual projects, and other regulatory permits issued by other agencies,  
7 would transfer unconditionally. MEHC would assume PacifiCorp’s existing duties for  
8 the licensed operations of the individual projects, including compliance with all existing  
9 settlement agreements and federal laws such as the Endangered Species Act.

10         A license is a limited control over the actual operation of each of the projects in  
11 this hydro system. Its articles establish certain constraints on operation, such as a  
12 schedule that requires that the licensee release water either from natural inflow or  
13 storage. The physical setting – the capacity of a dam, powerhouse, or other project  
14 work, or the availability of rainfall or snowmelt at any given time – establishes other  
15 constraints. Those constraints do not fully control the actual pattern of storage and  
16 release of water, or the allocation of water between the powerhouse and other beneficial  
17 uses, or the choice whether to generate electricity at any given time. Specifically, the  
18 system operator has and exercises a quantum of discretion uncontrolled by such  
19 constraints, which in turn could have profound implications in the day-to-day operations  
20 of hydropower facilities and the rivers and fish they impact.

21         While Conservation Groups accept at face value MEHC’s representation that the  
22 Application and transaction “proposes to replace MEHC for ScottishPower . . . without  
23 other material changes in PacifiCorp’s current structure, operations or assets,” MEHC  
24 & PacifiCorp Objection, at 3, MEHC would still be a new owner with no proven track  
25 record regarding hydroelectric projects. These hydroelectric dams use the state’s most  
26 valuable and limited resource: water. This fact necessarily raises an evaluation to  
27 determine whether the potential harms of the proposed transaction outweigh the  
28 potential benefits. *See In re Oregon Electric Utility Company*, Order 05-114, at 20.

1 Absent such a “net benefits analysis” and finding, ORS § 757.511 will not be satisfied.  
2 Conservation Groups raise the exact public interest question relevant to this proceeding;  
3 namely, will the proposed sale and transfer result in no harm to the public interest and a  
4 net benefit to Oregonians.

5 Irrespective of PacifiCorp remaining the license holder under the proposed sale  
6 and transfer structure, sufficient discretion may exist to change present operations of  
7 this hydroelectric system to increase or modify energy generation, and such a change  
8 may have adverse environmental effects on rivers and their fish and wildlife  
9 populations, which are public property under State law. Similarly, none of the FERC  
10 licenses regulates project operation for water supply, a beneficial use that is outside of  
11 FERC’s jurisdiction. *See Sayles Hydro Associates v. Maughn*, 985 F.2d 451, 455 (9th  
12 Cir. 1993). Thus, under the proposed sale and transfer, regardless whether MEHC or  
13 PacifiCorp holds the actual licenses, new ownership could alter a water supply  
14 arrangement. New ownership could also result in a reduction in staff or other  
15 resources presently dedicated to safe and sound management of used and useful  
16 hydroelectric facilities, which has been an issue in prior corporate restructurings. *See*  
17 *e.g., In the Matter of Oregon Electric Utility Company*, UM 1121, Opening Testimony  
18 of Citizens’ Utility Board of Oregon, at 11.<sup>1</sup> Indeed, solely from MEHC’s perspective,  
19 more aggressive system operation may be a rational business decision that would  
20 contribute to realizing expected corporate benefits from the proposed sale and transfer,  
21 possibly at a loss to the public interest of Oregonians.

22 Conservation Groups do not claim that MEHC ownership would definitely cause  
23 adverse impacts on environmental quality as a result of changes. An affirmative  
24 showing that such adverse impact will occur is not necessary for intervention. ORS §  
25 757.511, however, requires an affirmative showing that the proposed sale, transfer, and  
26 acquisition of PacifiCorp by MEHC is in the public interest and provides a net benefit

27 <sup>1</sup> Although marked as confidential in CUB’s opening testimony, Applicants in that proceeding  
28 subsequently waived the protective order regarding this information. *See* Letter From Lisa F. Rackner,  
Counsel for Applicants, to Administrative Law Judges, *In the Matter of Oregon Electric Utility Company*,  
UM 1121, (Jan. 10, 2005) (waiving confidentiality provisions for CUB 105, Jenks-Brown/1-13).

1 to ratepayers.

2 Conservation Groups' intervention is substantially related to these relevant  
3 public interest issues, including a determination whether the transfer of this  
4 hydroelectric generating system may have adverse impacts on the environmental quality  
5 of the controlled rivers. It is this foreseeable risk that is a major basis for TU's and  
6 AR's interventions. Such interventions are entirely consistent with the proper scope of  
7 UM 1209 under ORS § 757.511 to find that the proposed transaction "provides a net  
8 benefit to the utility's customers and does not impose a detriment on Oregon citizens as  
9 a whole." MEHC & PacifiCorp Objection, at 2. Exclusion of public interest  
10 participation defeats that very public interest review.

11  
12 **C. Conservation Groups' Participation Will Not Cause Unreasonable**  
13 **Delay, Burden The Record, Or Unreasonably Broaden The Scope of**  
14 **UM 1209.**

15 Conservation Groups have special knowledge and expertise in the operation of  
16 PacifiCorp's hydroelectric facilities. Conservation Groups have special knowledge and  
17 expertise in the complex and arcane body of law of the Federal Power Act and FERC's  
18 implementing regulations regarding hydropower facilities. Conservation Groups also  
19 have special knowledge and expertise in similar Public Utility Commission proceedings  
20 involving proposed corporate ownership changes of PUC-regulated utilities, FERC  
21 hydropower facilities, and natural resources and environmental issues. This knowledge  
22 and expertise will not cause unreasonable delay. Instead, this knowledge and expertise  
23 relates to issues within the scope of the proceeding and therefore would assist resolution  
24 of these issues. *See* OAR § 860-012-0001(f) (highlighting consideration of "[a]ny  
25 special knowledge or expertise of the petition that would assist the Commission in  
26 resolving the issues in the proceeding."). Conservation Groups file this Joint Reply to  
27 promote administrative review efficiency and economy. Conservation Groups will  
28 continue to coordinate throughout this proceeding for that effect.

As described above, Conservation Groups' Petitions to Intervene raise issues

1 fully within the scope of this proceeding, contrary to MEHC’s and PacifiCorp’s  
2 objections. *See* MEHC & PacifiCorp Objection, at 3-4 (Para. 3). It is not relevant that  
3 FERC has “an open proceeding” on Klamath relicensing issues. *Id.* at 4. Conservation  
4 Groups are presently participating in settlement negotiations with PacifiCorp in a  
5 relicensing proceeding for its Klamath Hydroelectric Project. MEHC’s ability and  
6 willingness to continue and conclude such negotiations, and specifically, whether it  
7 would follow PacifiCorp’s existing cooperative approach, are uncertain.<sup>2</sup> Both the  
8 outcome of the Klamath relicensing and implementation of settlement agreements are  
9 significant to PacifiCorp customers and ratepayers, as well as to the beneficial uses,  
10 including fish, wildlife, and recreation, of an Oregon waterway. Clearly, a change in  
11 approach to settlement or implementation could result in protracted, expensive, and  
12 ultimately unsuccessful litigation to the detriment of the ratepayers, which will  
13 influence the net benefit analysis. Thus, current approaches to settlement in the  
14 Klamath and implementation on other Projects are the “exact base case or comparator”  
15 the Commission should use to judge whether PacifiCorp today or PacifiCorp under the  
16 proposed transfer, sale and acquisition by MEHC is in the public interest. *See* MEHC  
17 & PacifiCorp Objection, at 2; *see also In re Oregon Electric Utility Company*, Order  
18 05-114, at 18.

19 “Deference to FERC’s authority over the Klamath relicensing process[.]” does  
20 not require rejection of Conservation Groups’ Petitions to Intervene. MEHC &  
21 PacifiCorp Objection, at 4. The Commission may review the proposed Application  
22 under a state PUC-public interest standard and still avoid entangling itself in the federal  
23 hydropower domain. This public interest review, which the proposed Application  
24 triggers, is a consideration far removed from any holding that the State should impose  
25 its own requirement for information in a license application, veto a license, or require a  
26 permit or condition which duplicates the license or otherwise functions as a condition

27 \_\_\_\_\_  
28 <sup>2</sup> Conservation Groups individually or collectively also are engaged in ongoing negotiations with  
PacifiCorp to fully implement settlement agreements and licenses on the Lewis, Condit, and Powerdale  
Projects.



1 precedent to the effectiveness of the license. *See First Iowa Hydroelectric Cooperative*  
2 *v. Federal Power Commission*, 328 U.S. 152, 164 (1946); *California v. FERC*, 495  
3 U.S. 490, 499 (1990); *Sayles Hydro Associates v. Maughn*, 985 F.2d 451, 455 (9th  
4 Cir. 1993). The fact is that FERC and the State do not “share in the final decision of  
5 the same issue.” *First Iowa*, 328 U.S. at 168. The Federal Power Act “establishes a  
6 dual system of control. The duality of control consists merely of the division of the  
7 common enterprise between two cooperating agencies of government, each with final  
8 authority in its own jurisdiction.” *Id.* at 167. The net benefit and public interest  
9 review standards under ORS § 757.511 do not interfere with federal interests or  
10 authority regarding the Klamath Project, or any other PacifiCorp operated FERC-  
11 project, even if issues related to those Projects are involved in Commission analysis of  
12 the proposed Application and transfer and sale.

13 Conservation Groups do not seek to “relitigate” any existing FERC obligations.  
14 *See MEHC & PacifiCorp Objection*, at 5. Conservation Groups’ Petitions to Intervene  
15 do not seek to broaden the issues or scope of UM 1209. The issues Conservation  
16 Groups seek to raise are well within the scope of ORS § 757.511 and therefore will not  
17 burden the record. These issues are the very nature of public interest considerations.  
18 Conservation Groups, in contrast, raise discrete issues, all of which fall four-square  
19 within the scope of ORS § 757.511 and the Commission’s review of the Application.  
20 *See e.g.*, *Trout Unlimited Petition to Intervene*, at 3-4 (filed Aug. 3, 2005). Unlike  
21 other instances where a court has excluded interveners, here, there is absolutely no  
22 other state forum to address whether this proposed sale and transfer are in the public  
23 interest and will produce a net benefit to ratepayers. *See The Steamboaters v. Water*  
24 *Resources Comm’n*, 85 Or. App. 34, 37, 735 P.2d 649 (1987) (limiting participation  
25 because other forums existed).

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**CONCLUSION**

For the foregoing reasons, Trout Unlimited and American Rivers respectfully request that the Commission deny MEHC’s and PacifiCorp’s motion opposing intervention, or otherwise advocating for a limitation on their participation. Trout Unlimited and American Rivers further request that the Commission grant without condition their respective Petitions to Intervene in UM 1209.

Dated: August 16, 2005

Respectfully submitted,

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2 **CERTIFICATE OF SERVICE**

3  
4 I hereby certify that I served TROUT UNLIMITED and AMERICAN RIVERS Joint  
5 Reply to MidAmerican Energy Holding Company's and PacifiCorp's Objection to Petition to  
6 Intervene in docket UM 1209 on the following named person(s) via email and/or regular prepaid  
7 postage mail in a sealed envelope, addressed to said person(s) at his or her address as indicated  
8 on the Service List for UM 1209 on the date indicated below.  
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16 DATED: August 16, 2005

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