

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 170

In the Matter of)	
)	
PACIFIC POWER & LIGHT)	OREGON NATURAL RESOURCES
(dba PACIFICORP))	COUNCIL, WATERWATCH OF
)	OREGON, AND PACIFIC COAST
)	FEDERATION OF FISHERMEN'S
Request for a General Rate Increase in the)	ASSOCIATIONS' JOINT RESPONSE
Company's Oregon Annual Revenues)	TO THE KLAMATH OFF-PROJECT
(Klamath River Basin Irrigator Rates))	WATER USERS, INC.'S MOTION TO
_____)	STRIKE

INTRODUCTION

On March 21st, 2006, the Klamath Off-Project Water Users, Inc. ("KOPWU") filed a motion to strike Exhibit 1 of the joint reply brief filed by Oregon Natural Resources Council, WaterWatch of Oregon and the Pacific Coast Federation of Fishermen's Association ("ONRC et al.") ("Exhibit 1"). Exhibit 1 is the complete response of ONRC et al. to KOPWU's second set of data requests to ONRC et al. (dated February 14, 2006). At the February 17, 2006 evidentiary hearing, KOPWU moved into evidence only a few select portions of this response.

WaterWatch responded to KOPWU's partial submission, consistent with the evidentiary rules of completion (OAR 860-014-0060(2)(b) and ORS 40.040, Oregon Evidence Code 106), by offering the entire data request response, which prompted strenuous objections from KOPWU. Rather than consume additional time at the hearing arguing about the exhibit, and not appreciating KOPWU's apparent intent to distort the matter through selective use of the data responses, WaterWatch agreed to admission of KOPWU's partial exhibit. WaterWatch did not understand the basis of KOPWU's

strenuous objection to admission of the remainder of the exhibit at the time of the hearing but does now – KOPWU wished to play a game of evidentiary “Gotcha” by deliberately ignoring specific hydrological analyses in the data request responses and presenting a partial and selective record on certain points to the Commission that supported KOPWU’s efforts to impeach ONRC et al’s expert – Balance Hydrologics, Inc. KOPWU then proceeded to make arguments in its opening brief that it should have known were inaccurate and distorted based on the responses in ONRC et al’s data request response that KOPWU had specifically objected to when offered at the hearing.

ONRC et al. did not attach Exhibit 1 to its reply brief for the purpose of presenting new theories or to correct or change any testimony, but rather to ensure that the Commission is not misled by KOPWU’s deliberate distortions of ONRC et al.’s analyses and the information previously provided to KOPWU in data request responses. ONRC et al. urges the ALJ to deny KOPWU’s motion to strike and allow Exhibit 1 remain in the record.

ARGUMENT

ONRC et al. supplied Exhibit 1 to its reply brief not to correct testimony filed by its expert, Balance Hydrologics, Inc., as KOPWU asserts, but in answer to a distortion by KOPWU regarding Balance’s testimony. KOPWU’s strenuous objection to inclusion of the data request responses that refute its distortions – first at the evidentiary hearing (see Transcript of Evidentiary Hearing (Feb. 17, 2006) (“Transcript”) at p. 292, ln.12– 24) and again with this motion to strike – underscore the selective and distorted nature of KOPWU’s hydrological presentation in the matter. KOPWU’s assertion that ONRC et al. “would have KOPWU make ONRC et al.’s arguments that are not in the record” and

that ONRC et al. had some duty to clarify on the record the ways in which KOPWU had misunderstood the basis of its testimony as evidenced in a string of data request questions (Motion to Strike at 4) are incorrect.

ONRC et al. was not asking KOPWU to make any arguments, but had assumed that KOPWU would not misrepresent Balance's analysis when it had already received detailed explanations regarding that analysis through the data request responses that KOPWU subsequently sought to exclude from the record. Balance was hardly incorrect in its testimony on this issue, as KOPWU asserts, but rather KOPWU simply attempted to bury those portions of the analysis as reflected in the data request responses that refuted KOPWU's view of the hydrology related to Upper Klamath Lake and the effects of groundwater pumping in the Swan, Yonna and Langell Valleys.

KOPWU asserts in its motion to strike that "KOPWU's objection to including those data responses in the record was based on KOPWU's right to control the evidence that it submits in its [sic] proceeding" At 6. However, what KOPWU objected to was WaterWatch's offering of the remainder of the response into evidence, not some proposal to have KOPWU submit it.

WaterWatch's offer of the complete response was made consistent with the Public Utility Commission's evidentiary rule of completion, which provides parties the opportunity to examine exhibits offered by other parties and to offer into evidence other portions of the exhibit found to be relevant. OAR 860-014-0060 (2)(b). See also ORS 40.040, Oregon Evidence Code 106 (" . . . when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing which is necessary to make it understood may at that time also be given in evidence.").

Especially given KOPWU's statement at the hearing that it had submitted the portions of the response that it "thought were relevant for purposes of the hearing" (Transcript at p. 292, ln. 14), WaterWatch should not be punished for failing, at the hearing, to anticipate and fully appreciate KOPWU's evidentiary gamesmanship and apparent intention to distort the issue in its brief.

KOPWU's motion to strike also attempts to debate Balance's interpretation of the two central groundwater studies for the Off-Project areas. At 5-6. A motion to strike seems an inappropriate place to argue about scientific studies, however, since KOPWU began such an argument ONRC et al. is compelled to provide a very brief response here.

KOPWU incorrectly cites the general southward flow of groundwater in the Swan Lake and Yonna Valleys as evidence that groundwater pumping in these areas cannot deplete Upper Klamath Lake, which lies to the west. KOPWU fails to understand Balance's explanation which is this: pumping in the Swan Lake and Yonna Valleys and Pine Flat, draws some groundwater away from areas (in the north) from which groundwater would otherwise flow into Upper Klamath Lake. See Exhibit 1, Responses to DRs 2.6 to 2.12. Also, pumping in Swan Lake and Yonna Valleys diverts recharge to groundwater flowing into Upper Klamath Lake from beneath Hogback Mountain. See Exhibit 1, Response to DR 2.8. In other words, where the groundwater moves after leaving Swan Lake and Yonna Valleys and Pine Flat (generally southward) is plainly not relevant to how groundwater pumping in these areas depletes Upper Klamath Lake inflow, as KOPWU asserts.¹

In sum, groundwater pumping in these Off-Project areas has the effect of pulling groundwater to these areas that is otherwise destined for Upper Klamath Lake. This is

consistent with the general southward groundwater flow that KOPWU cites from the Leonard and Harris report and with the Grondin Report's finding that groundwater from these areas discharges to the Lost River. The impact is to reduce inflow into Upper Klamath Lake.

CONCLUSION

In conclusion, ONRC et al. believe that KOPWU's feigned ignorance in its opening brief regarding Balance's analysis of how Off-Project water use can deplete Upper Klamath Lake is not conducive to meaningful resolution of the issues in this proceeding. KOPWU's evidentiary gamesmanship and repeated efforts to keep the detailed explanations of the basis for Balance's analysis of these issues from the Commission is not helpful to the Commission. KOPWU's motion to strike should be denied. Further, KOPWU's interpretation of Leonard and Harris and the Grondin Report as being inconsistent with Balance's explanation of these impacts seems misplaced in a motion to strike and, moreover, is simply wrong.

For these reasons, ONRC et al. urge the ALJ to deny KOPWU's motion to strike Exhibit 1 to ONRC et al.'s reply brief and to allow ONRC et al.'s complete response to KOPWU's second set of data requests to remain in the record to counteract KOPWU's distortion and selective presentation of hydrological issues and Balance's analysis of those issues.


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¹ It is relevant to how this pumping depletes surface water flows but that is a separate analysis.

Respectfully submitted this 31st day of March, 2006,


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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing response upon each person listed below by email where an email address has been provided, and by postage prepaid US Postal mail at the addresses indicated.

Dated: March 31, 2006



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