

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the Oregon Natural Resources Council's Opposition to Applications for Case Certification of KWUA and KOPWU in the Oregon Public Utility Commission's docket number UE-170 upon each person designated on the attached official service list by regular mail and email, and upon the Oregon Public Utility Commission by regular mail and email.

Dated: January 30th, 2005

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

Docket No. UE 170

In the Matter of the Request of)	
)	ONRC’S OPPOSITION TO
PACIFIC POWER & LIGHT)	APPLICATIONS FOR CASE
(dba PacifiCorp))	CERTIFICATION OF KWUA
)	AND KOPWU
Request for a General Rate Increase in the)	
Company’s Oregon Annual Revenues)	

Oregon Natural Resources Council Fund (“ONRC”) hereby submits its opposition to Klamath Water Users Association’s (“KWUA”) and Klamath Off-Project Water Users’ (“KOPWU”) applications for case certification under the Intervenor Funding Agreement (“IFA”) in UE 170. As set forth below, the Commission should deny KWUA and KOPWU case certification under the IFA because: (1) neither KWUA nor KOPWU has demonstrated that it “represents the interests of a broad group or class of customers.” IFA, Art. 5.3(a); (2) neither organization has demonstrated an ability to “effectively represent the particular class of customers it seeks to represent.” IFA, Art. 5.3(b); (3) neither organization has demonstrated in its applications, nor in past Commission proceedings, “the ability to substantively contribute to the record on behalf of customer interests related to rates and terms and conditions of service.” IFA, Art. 5.3(d); (4) through its narrowly-focused and highly contentious filings to date, KOPWU has demonstrated it can be reasonably expected to “unduly delay the schedule of the proceeding” in contravention of IFA, Art 5.3(f); and (5) it would be inappropriate and unfair to charge all irrigators

currently on the standard PacifiCorp irrigation tariff to fund KOPWU's stated intention to pursue discounted rates through an Intervenor Funding Grant. KOPWU Response, p. 3.

1. NEITHER KWUA NOR KOPWU HAS DEMONSTRATED THAT IT REPRESENTS THE INTERESTS OF A BROAD GROUP OR CLASS OF CUSTOMERS

As their Applications for Case Certification and Responses to Request for Additional Information make clear, the membership and organizational interests of both KWUA and KOPWU are limited to a small subset of the PacifiCorp service area confined exclusively to the Oregon portion of the Klamath River Basin. Although the Klamath Basin does contain a portion of the irrigated acreage in Oregon, it encompasses only a fraction of the irrigated acres in Oregon served by PacifiCorp. Such a geographically narrow area of focus does not support claims to representation of a broad group or class of customers.

Moreover, since the irrigators in the Klamath River Basin have enjoyed discounted rates which discriminate against all other irrigation customers (and all other PacifiCorp ratepayers) since at least 1956, it is clear that the interests of KWUA and KOPWU members have been divergent from (or even in opposition to) the interests of all other irrigation customers who have participated in any rate case before the Commission since at least 1956. Given this unique history, KWUA and KOPWU cannot now claim to represent the interests of a broad group or class of irrigation customers.

KWUA has stated that it has "reached out for support and participation in UE170 from other irrigators and irrigation districts across the state." KWUA Application, p. 3. However, KWUA provides no evidence that these actions were successful or that any other irrigators and/or irrigation districts in the state support KWUA's claims to represent their

interests in UE170. Indeed, as KOPWU's filings have made clear, KWUA cannot claim to represent the interests of nearby KOPWU's irrigator members within the Klamath Basin. ("KWUA does not and cannot adequately represent KOPWU's interests.") KOPWU Reply to KWUA, p. 4. Adding further confusion to the situation, it appears KWUA and KOPWU are either unwilling or unable to definitely state how many PacifiCorp users each organization claims to represent. Declaration of Edward Bartell, p. 2, *and* KOPWU Reply, p. 6, *and* KWUA Application, *and* KWUA Response.

In addition, KWUA and KOPWU have never paid into the funds made available under the Intervenor Funding Agreement to the irrigation customer class, because KWUA and KOPWU members have not paid standard tariffs since at least 1956. PacifiCorp Response, p. 1-2. Because KWUA and KOPWU have not borne the financial burden of supporting participation in any proceeding related to the interests of the irrigation customer class they now claim to represent, and without proven support from some broad group or class of irrigators existing outside the Klamath Basin which have legitimate claim to funds under the IFA, it would be inappropriate for either KWUA or KOPWU to lay claim to any portion of funds provided exclusively by irrigators not represented by these applicants.

Finally, KOPWU has acknowledged that it does not represent the general interests of most irrigators, and in fact represents a "particular" subgroup of irrigation customers: "KOPWU does not represent 'general' irrigation interests... KOPWU represents the irrigation interests of a broad, but particular, group of irrigators." (Emphasis added.) KOPWU Reply to KWUA, p. 3. KOPWU cannot represent a broad group or class if in reality it represents a "particular" subgroup with interests that have been declared by KOPWU to be divergent from the "general" interests of other irrigators within its class.

KOPWU Reply to KWUA, p. 3-4. Such a narrow definition of representation fails to fulfill the requirement for case-certification.

2. NEITHER ORGANIZATION HAS DEMONSTRATED AN ABILITY TO EFFECTIVELY REPRESENT THE PARTICULAR CLASS OF CUSTOMERS IT SEEKS TO REPRESENT

As noted above, because of the discriminatory tariffs which the memberships of both organizations have enjoyed since at least 1956, both KWUA and KOPWU have had interests divergent from and/or opposite to the rate case-related interests of all other irrigation customers of PacifiCorp who have appeared before the Commission since at least 1956. Therefore, neither group may credibly claim to have any record of action to prove effective representation of any irrigation interest beyond the narrow scope of each organization's membership. In fact, the filings of both KOPWU and KWUA undermine the claims of the other in this regard, with KOPWU stating that KWUA "cannot" represent its interests, and KWUA stating that it is "better qualified than KOPWU to represent irrigators." KOPWU Reply to KWUA, p. 4, *and* KWUA Response, p. 1.

To support their claims of an organizational ability to represent a class of customers, both KWUA and KOPWU have offered little or no proof other than to state that they have both hired experienced legal counsel to represent them before the Commission. KOPWU Application, p. 3 *and* KWUA Application, p. 3. However, the IFA clearly requires that "[t]he organization demonstrates it is able to effectively represent the particular class of customers it seeks to represent." (Emphasis added.) IFA, Art. 5.3(b). Remarkably, in an attempt to suggest a history of effective representation of the broad class of irrigation customers, KWUA cites its history of advocating *against* the interests of all irrigation customers served by PacifiCorp outside of the Klamath Basin by successfully

negotiating contracts in 1956 which perpetuated discriminatory rates for the exclusive benefit of a narrow group of Klamath Basin irrigators. KWUA Response, p. 2. If an organization such as KOPWU, with no substantive record of effective ability to represent the class of customers it claims to represent, or an organization such as KWUA, with only a substantive record of effectively advocating *against* the interests of the class of customers it now claims to represent, may meet the requirement of IFA Art. 5.3(b) simply by hiring competent counsel for a rate proceeding, then the requirement will have been rendered meaningless, and the standards of the IFA will be substantially weakened.

3. NEITHER ORGANIZATION HAS DEMONSTRATED THE ABILITY TO SUBSTANTIVELY CONTRIBUTE TO THE RECORD ON BEHALF OF CUSTOMER INTERESTS RELATED TO RATES AND TERMS AND CONDITIONS OF SERVICE

Because KWUA and KOPWU have not heretofore participated in any activity related to rates and terms and conditions of service before the Commission, they cannot claim to have substantively contributed to any Commission proceeding.

In its Application, KOPWU offers little or no proof of its ability to substantively contribute to the record in this proceeding. Formed only four months ago, KOPWU has little or no record of activity as an organization, either before the Commission or in any other forum. Declaration of Edward Bartell, p. 1 *and* KWUA Response, p. 4. Given its brief organizational history, lack of experience, and lack of any substantive record whatsoever, it would be inappropriate to grant public funds to KOPWU under the IFA.

In a manner similar to its inadequate claim to meet the requirements of IFA Art. 5.3(b) noted above, KWAU purports to meet the requirements of IFA Art. 5.3(d) by offering little or no proof other than citing its choice of legal counsel for the Commission proceeding. KWUA Application, p. 4. However, IFA Art 5.3(d) clearly requires

demonstrable proof of a record of substantive contribution by the petitioning *organization*, not a citation of its counsel's experience. It should be noted that retention of competent counsel alone provides no guarantee of substantive contribution by any petitioner, since no counsel can legally compel a client to make substantive contributions to any proceeding. If the Commission finds proof of retention of experienced counsel alone fulfills the requirements of IFA Art. 5.3(d) for KWUA, instead of demonstrable proof of a record of substantive contribution by the petitioner, it would render the requirement under IFA Art. 5.3(d) meaningless as written and greatly weaken the standards of the IFA.

At a minimum, the Commission should refrain from making a determination whether KWUA and/or KOPWU meet the requirements of IFA Art. 5.3(d), and whether the petitioners are therefore eligible for case certification, until this proceeding has been completed, or at least progressed far enough to allow KWUA and/or KOPWU to generate a demonstrable record of substantive contributions to the proceeding. Regardless of whether KWUA and/or KOPWU will eventually be able to meet the requirements of IFA Art. 5.3(d), ONRC believes that KWUA and KOPWU cannot meet other requirements under IFA Art. 5.3, and therefore will not be eligible for case-certification, until their memberships begin to pay the same irrigation tariffs as all other irrigation customers of PacifiCorp, and both KWUA and KOPWU cease advocating for discriminatory rates for their members under any continuations of the 1956 contracts (or any other similar arrangement), since such activity is plainly in opposition to the interests of all other PacifiCorp irrigation class customers.

4. KOPWU HAS DEMONSTRATED IT CAN BE REASONABLY EXPECTED TO UNDULY DELAY THE SCHEDULE OF THE PROCEEDING

KOPWU has already unduly burdened the record of this proceeding through narrowly focused and highly contentious filings, both in opposition to an organization ostensibly within its own class of customers (KWUA) and in opposition to other intervenors. KOPWU Reply to KWUA *and* KOPWU's Opposition to ONRC and WaterWatch. In particular, ONRC believes that KOPWU's Opposition to ONRC's and WaterWatch's Interventions raised no new issues and provided no basis for reconsideration. Granted the additional resources afforded by case certification, KOPWU has demonstrated it can be reasonably expected to maintain or increase such activity and "unduly delay the schedule of the proceeding" in contravention of IFA, Art 5.3(f).

5. IT WOULD BE INAPPROPRIATE AND UNFAIR TO CHARGE ALL IRRIGATORS CURRENTLY ON THE STANDARD PACIFICORP IRRIGATION TARIFF TO FUND KOPWU'S STATED INTENTION TO PURSUE DISCOUNTED RATES THROUGH AN INTERVENOR FUNDING GRANT

KOPWU has clearly stated that it intends to press the Commission for a continuation of the highly discounted, discriminatory rates currently enjoyed by its members. "Through its participation in this proceeding, KOPWU intends to enforce the terms of the Off-Project Agreement, which does not provide PacifiCorp the right to unilaterally transfer KOPWU's members to standard tariffs." KOPWU, Response to Request, p. 3. Such activity is plainly in opposition to the interests of all other PacifiCorp irrigation class customers.

As PacifiCorp appropriately notes, "Intervenor funding for the contract-specific issues raised by KWUA and KOPWU would be inappropriate in the light of the requirement that the cost of intervenor funding be allocated to represent class. *See*

Intervenor Funding Agreement, Art. 7.7(b) ('Intervenor expenditures pursuant to an Intervenor Funding Grant and made on behalf of a particular customer class will be charged to and paid for by that customer class.')

It would be unfair for irrigators currently on the standard tariff to fund their competitors' pursuit of discounted rates." PacifiCorp Response, p. 4-5.

CONCLUSION

KWUA and KOPWU have failed to demonstrate eligibility for case certification under the IFA, and have in fact demonstrated convincingly that it would be highly inappropriate for the Commission to make intervenor funding available to either group. Moreover, ONRC believes that if the Commission grants either KWUA or KOPWU case-certification as a result of the arguments contained in their Applications and subsequent Responses to Request for Additional Information, it would greatly weaken the standards of the IFA, and harm the public interest.

At a minimum, ONRC believes the Commission should refrain from making a determination whether KWUA or KOPWU meet the requirements of the IFA, and whether the petitioners are therefore eligible for case-certification, until this proceeding has been completed, or at least progressed far enough to allow either KWUA and/or KOPWU to generate a demonstrable record. Regardless of whether KWUA and/or KOPWU will eventually produce a demonstrable record in this proceeding or any other, ONRC believes that KWUA and KOPWU cannot meet the requirements under the IFA, and therefore should not be eligible for case certification, until two events come to pass: (1) KOPWU and KWUA memberships acquiesce to irrigation tariff normalization in the Klamath Basin, and begin to pay the same standard irrigation tariffs as all other irrigation customers of

PacifiCorp. In this way, the memberships of KWUA and KOPWU can be considered appropriately aligned with (and not in opposition to) the interests of the vast majority of customers in PacifiCorp's irrigation rate class, and will also have opportunity to contribute to the funds provided by and available to the standard irrigation customer class under the IFA; and (2) KWUA and KOPWU cease advocating for discriminatory rates for their members under any continuation of the 1956 contracts (or any other similar arrangement), since this activity is in opposition to the interests of all other PacifiCorp irrigation class customers, as well as in opposition to the vast majority of all PacifiCorp customers.

Dated this 30th day of January 2005.

Respectfully submitted,

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