

Davison Van Cleve PC

Attorneys at Law

TEL (503) 241-7242 • FAX (503) 241-8160 • mail@dvclaw.com
Suite 400
333 SW Taylor
Portland, OR 97204

March 21, 2006

Via Electronic and U.S. Mail

Public Utility Commission
Attn: Filing Center
550 Capitol St. NE #215
P.O. Box 2148
Salem OR 97308-2148

Re: In the Matter of PACIFIC POWER & LIGHT Request for a
General Rate Increase in the Company's Oregon Annual Revenues
Docket No. UE 170

Dear Filing Center:

Enclosed please find the original and two copies of the Motion to Strike of the
Klamath Off-Project Water Users in Docket No. UE 170.

Please return one file-stamped copy of this document in the enclosed stamped
envelope.

Thank you for your assistance.

Sincerely yours,

/s/ Ruth A. Miller
Ruth A. Miller

Enclosures

cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Motion to Strike of the Klamath Off-Project Water Users, Inc., upon the parties on the service list, shown below, by causing the same to be served by U.S. Mail, postage-prepaid, through the U.S. Mail, and/or via email to those parties with an email address.

Dated at Portland, Oregon, this 21st day of March, 2006.

/s/ Ruth A. Miller

Ruth A. Miller

PORTLAND GENERAL ELECTRIC
RATES & REGULATORY AFFAIRS
RATES & REGULATORY AFFAIRS
121 SW SALMON ST 1WTC0702
PORTLAND OR 97204
pge.opuc.filings@pgn.com

COMMUNITY ACTION DIRECTORS OF OREGON
JIM ABRAHAMSON
PO BOX 7964
SALEM OR 97303-0208
jim@cado-oregon.org

KLAMATH WATER USERS ASSOCIATION
GREG ADDINGTON
2455 PATTERSON ST - STE 3
KLAMATH FALLS OR 97603
greg@cvcwireless.net

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

**ALEXANDER, BERKEY, WILLIAMS &
WEATHERS, LLP**
CURTIS G BERKEY
2030 ADDISON STREET, SUITE 410
BERKELEY, CA 94704

BOEHM KURTZ & LOWRY
KURT J BOEHM
36 E SEVENTH ST - STE 1510
CINCINNATI OH 45202
kboehm@bkllawfirm.com

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

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

OREGON DEPARTMENT OF ENERGY
PHIL CARVER
625 MARION ST NE STE 1
SALEM OR 97301-3742
philip.h.carver@state.or.us

OREGON ENERGY COORDINATORS ASSOCIATION
JOAN COTE
2585 STATE ST NE
SALEM OR 97301
cotej@mwvcaa.org

WATERWATCH OF OREGON
JOHN DEVOE
213 SW ASH ST - STE 208
PORTLAND OR 97204
john@waterwatch.org

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

STOEL RIVES LLP

JOHN M ERIKSSON
201 SOUTH MAIN ST
SALT LAKE CITY UT 84111
jmeriksson@stoel.com

RFI CONSULTING INC

RANDALL J FALKENBERG
PMB 362
8351 ROSWELL RD
ATLANTA GA 30350
consultrfi@aol.com

CABLE HUSTON BENEDICT HAAGENSEN & LLOYD LLP

EDWARD A FINKLEA
1001 SW 5TH - STE 2000
PORTLAND OR 97204
efinklea@chbh.com

DEPARTMENT OF JUSTICE

DAVID HATTON
REGULATED UTILITY & BUSINESS SECTION
1162 COURT ST NE
SALEM OR 97301-4096
david.hatton@state.or.us

PUBLIC UTILITY COMMISSION

JUDY JOHNSON
PO BOX 2148
SALEM OR 97308-2148
judy.johnson@state.or.us

DEPARTMENT OF JUSTICE

JASON W JONES
REGULATED UTILITY & BUSINESS SECTION
1162 COURT ST NE
SALEM OR 97301-4096
jason.w.jones@state.or.us

BOEHM, KURTZ & LOWRY

MICHAEL L KURTZ
36 E 7TH ST STE 1510
CINCINNATI OH 45202-4454
mkurtz@bklawfirm.com

OREGON NATURAL RESOURCES COUNCIL

JIM MCCARTHY
PO BOX 151
ASHLAND OR 97520
jm@onrc.org

STOEL RIVES LLP

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

PUBLIC UTILITY COMMISSION

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

DANIEL W MEEK ATTORNEY AT LAW

DANIEL W MEEK
10949 SW 4TH AVE
PORTLAND OR 97219
dan@meek.net

NANCY NEWELL
3917 NE SKIDMORE ST
PORTLAND OR 97211
ogec2@hotmail.com

HOOPA VALLEY TRIBE FISHERIES DEPT

MICHAEL W ORCUTT
PO BOX 417
HOOPA CA 95546
director@pcweb.net

OFFICE OF THE REGIONAL SOLICITOR

STEPHEN R PALMER
2800 COTTAGE WAY - RM E-1712
SACRAMENTO CA 95825

OREGON NATURAL RESOURCES COUNCIL

STEVE PEDERY
5825 NORTH GREELEY AVENUE
PORTLAND OR 97214
sp@onrc.org

DEPARTMENT OF JUSTICE

JANET L PREWITT
1162 COURT ST NE
SALEM OR 97301-4096
janet.prewitt@doj.state.or.us

MORISSET, SCHLOSSER, JOZWIAK & MCGAW

THOMAS P SCHLOSSER
801 SECOND AVE - STE 1115
SEATTLE WA 98104-1509
t.schlosser@msaj.com

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOC

GLEN H SPAIN
PO BOX 11170
EUGENE OR 97440-3370
fish1ifr@aol.com

PORTLAND GENERAL ELECTRIC

DOUGLAS C TINGEY
121 SW SALMON 1WTC13
PORTLAND OR 97204
doug.tingey@pgn.com

ALEXANDER, BERKEY, WILLIAMS & WEATHERS LLP

SCOTT W WILLIAMS
2030 ADDISON STREET, SUITE 410
BERKELEY, CA 94704

PACIFIC POWER & LIGHT

PAUL M WRIGLEY
825 NE MULTNOMAH STE 800
PORTLAND OR 97232
paul.wrigley@pacificorp.com

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 170

In the Matter of)

PACIFIC POWER & LIGHT)
(dba PACIFICORP))

Request for a General Rate Increase in the)
Company's Oregon Annual Revenues)
(Klamath River Basin Irrigator Rates).)

KLAMATH OFF-PROJECT WATER
USERS, INC.'s MOTION TO STRIKE

Pursuant to OAR § 860-013-0031, the Klamath Off-Project Water Users, Inc. (“KOPWU”) submits this Motion to Strike (“Motion”) Exhibit 1 to the reply brief submitted by Oregon Natural Resources Council et al. (“ONRC et al.”) in this proceeding. Exhibit 1 to ONRC et al.’s reply brief includes evidence that was not in the record at the time the record closed at the hearing. Furthermore, ONRC et al. uses Exhibit 1 to assert arguments that ONRC et al. has not previously asserted, and the evidence in the record demonstrates that these arguments are flawed. Given that the time for hearing and briefing has passed, KOPWU is prejudiced by including Exhibit 1 in the record because KOPWU has no formal opportunity to respond. For all of these reasons, KOPWU requests that Chief Administrative Law Judge Grant strike Exhibit 1 from ONRC et al.’s reply brief.

ARGUMENT

ONRC et al. wrongly accuses KOPWU of attempting to “mislead” the Commission, and the parties claim that they have submitted Exhibit 1 to “correct” KOPWU’s actions. ONRC et al. Reply Brief at 13-14. KOPWU has not misled the Commission, and

PAGE 1 – KOPWU’S MOTION TO STRIKE

ONRC et al.'s after-the-fact attempt to rehabilitate its incorrect testimony provides no basis to accept additional evidence after the record has closed.

A. KOPWU Is Not Bound to Put Forth ONRC et al.'s After-the-Fact Rationalizations of Incorrect Statements

ONRC et al.'s claims appear to center on KOPWU's arguments about two specific passages in ONRC et al.'s testimony. In written testimony for ONRC et al., Balance Hydrologics ("Balance") stated:

Mr. Bartell overemphasizes water 'added' by agriculture, but does not recognize water diverted from Upper Klamath Lake to Yonna and Swan [Lake] Valleys ("Pine Flat") and other de-facto off-Project areas. He claims return flows from the Lost River system as beneficial because they are 'avoided losses,' but does not acknowledge the substantial diversions for summer irrigation from the Klamath watershed to the Lost River watershed by the Klamath Project.

ONRC et al./200, Balance/3. Balance also stated:

Mr. Bartell's statement claims additional summer water in the form of water whose diversion from the Klamath watershed is **avoided**; in fact, no additional water is created. Neither Mr. Bartell nor Mr. Rozaklis account for the fact that irrigated agriculture in the Klamath Project and off-Project areas **removes many tens of thousands of acre feet each year** from the Klamath River for summer irrigation for use in the Lost River, Yonna and Swan [Lake] Valley and other adjacent watersheds.

ONRC et al./204, Balance/2. It is physically impossible to divert water to Swan Lake, Yonna Valley, or Pine Flat from Upper Klamath Lake or the Klamath River using existing canals and diversions in the Project. When KOPWU asked ONRC et al. about this fact in KOPWU's second set of data requests ("DR"), ONRC et al. responded with a "clarification" that redefined "diverted" to mean not only surface water diversions, but also any depletion from an aquifer that is in any way connected to Upper Klamath Lake. See ONRC et al. Reply Brief at Exhibit 1

PAGE 2 – KOPWU'S MOTION TO STRIKE

(Responses to DR Nos. 2.6, 2.9, 2.12, 2.15). KOPWU viewed this “clarification” for what it was—an after-the-fact rationalization of one of the many factually incorrect statements in Balance’s testimony. ONRC et al. now seeks to include this “clarification” of its incorrect statement in the record, purportedly to demonstrate that KOPWU has misled the Commission. The numerous problems with ONRC et al.’s claims and attempt to supplement the record are discussed below.

1. ONRC et al.’s Data Responses Demonstrate That the Parties Maintained That Direct Diversions to Off-Project Areas May Exist

ONRC et al.’s responses to KOPWU’s data requests demonstrate that ONRC et al. was searching for whatever rationale they could muster with respect to the claim of water “diverted” from Upper Klamath Lake to Off-Project lands. First, ONRC et al. states in its reply brief that its data responses “clarified that the water in question moved in underground aquifers and not the *non-existent diversion canals* inferred by KOPWU.” ONRC et al. Reply Brief at 13 (emphasis added). KOPWU’s data requests specifically asked ONRC et al. to admit or deny whether water is diverted from Upper Klamath Lake to Yonna Valley, Swan Lake Valley, Pine Flat, or the Lost River Drainage, and the responses demonstrate that those parties continued to claim that “direct diversions . . . may or may not exist.” Id. at Exhibit 1 (Responses to DR Nos. 2.6, 2.9, 2.12, 2.15). Thus, ONRC et al.’s current claims that it was not arguing about “non-existent diversion canals” is inconsistent with the “arguments” that it allegedly made in the data responses and that it now seeks to admit into the record.

Second, ONRC et al.’s response to DR No. 2.8 states:

[W]e note that Mr. Bartell’s testimony includes a diagram that appear[s] to us to indicate water is coming out of Upper Klamath Lake. It is not clear to us what nature of diversion, if any, this

figure portrays. It seems reasonable that whatever diversions occur or would occur will deplete Upper Klamath Lake.

Exhibit 1 (Response to DR No. 2.8; see also Responses to DR Nos. 2.9, 2.12, 2.15) (internal citation omitted). The “diagram” that ONRC et al. refers to is a map provided in KOPWU/102, Bartell/3. Mr. Bartell’s testimony specifically identified the documents in KOPWU/102 as documents filed by the Bureau of Reclamation to develop additional lands using surface water from the Klamath Project prior to execution of the Off-Project Agreement, and Mr. Bartell provided these documents to demonstrate that plans such as these were *abandoned* in favor of ground water well use once the Off-Project Agreement was executed. KOPWU/100, Bartell/5-6. In other words, any reasonable reading of Mr. Bartell’s testimony would have demonstrated that this diversion canal did not exist, yet ONRC et al. argued that it supported its claims about diversion to Off-Project lands.

2. ONRC et al. Never “Clarified” Its Alleged Argument on the Record

ONRC et al. claims that KOPWU has misrepresented ONRC et al.’s arguments, but ONRC et al. has never asserted its “clarified” argument regarding the impact of “diversions” from Upper Klamath Lake anywhere in the record. Balance made a number of corrections and clarifications to its testimony at hearing but did not mention this point. ONRC et al. also did not discuss this in its opening brief. ONRC et al. apparently would have KOPWU make ONRC et al.’s arguments that are not in the record and then respond to those arguments as well. KOPWU is not responsible for the failings of ONRC et al.’s evidence or ONRC et al.’s failure to assert its arguments on the record.

3. The Evidence That Balance Cited Does Not Support Its Claims

Another fundamental problem with ONRC et al.'s claim is that the evidence that ONRC et al. referenced as supporting Balance's new definition of "diversion" of Upper Klamath Lake Water actually directly contradicts Balance's assertion. ONRC et al.'s response to DR No. 2.3 cites Leonard and Harris (1974) for the proposition that wells in Swan Lake and Yonna Valley divert subsurface water that would otherwise flow into Upper Klamath Lake.^{1/} This report states that ground water in the Swan Lake and Yonna Valleys flows southward. KOPWU/610 at 7 ("In Swan Lake and Yonna Valleys, ground water in the main confined aquifer moves generally southward. The regional pattern of movement also seems generally southward . . ."). Upper Klamath Lake is west of Swan Lake and Yonna Valley, not south. Reclamation/Service/21, Lesley/1. The Lost River is south of these areas. In other words, ONRC et al.'s "clarification" that the "diversions" occur subsurface is not even correct according to the very evidence that ONRC et al. now seeks to rely upon. With respect to the Yonna Valley, Leonard and Harris discuss waters moving from Yonna Valley into Poe Valley, which is part of the Lost River Drainage. KOPWU/610 at 50 ("Water levels are slightly higher in Yonna than in Poe Valley, and some ground water almost certainly moves out of Yonna Valley through the ridge at the south end toward Poe Valley.").

Finally, ONRC et al. also cites the Oregon Water Resources Department website containing the Grondin Report as support for the alleged connection between ground water in Swan Lake, Pine Flat or Yonna Valley and Upper Klamath Lake. This report, like Leonard and

^{1/} ONRC et al. cites both the 104-page Leonard and Harris report and the 167-page Grondin Report generally in these data responses without reference to specific pages. See ONRC et al. Reply Brief at Exhibit 1 (Responses to DR Nos. 2.3, 2.4).

Harris, supports the notion that, to the extent that there is any connection between ground and surface water in Swan Lake, Pine Flat or Yonna Valley, that ground water is connected to the Lost River, not Upper Klamath Lake. KOPWU/609 at 16, 18. In other words, in attempting to rehabilitate the flawed statement in Balance's testimony, ONRC et al. has cited authority that does not even support its claim.

B. ONRC et al. Acknowledges That the Record is Closed

ONRC et al. argues that KOPWU's exclusion of these data responses from an exhibit that KOPWU included in the record was part of a scheme to prevent the Commission from understanding ONRC et al.'s position. ONRC et al. Reply Brief at 13-14. 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 proceeding and is in no way related to concerns that the Commission would be persuaded by ONRC et al.'s data responses.

At the conclusion of ONRC et al.'s claims about KOPWU's allegedly "misleading" arguments, ONRC et al. states that "[t]o correct and complete the record, our full response to the original KOPWU questions on this issue is attached as Exhibit 1." ONRC et al. Reply Brief at 14. ORS § 756.558 provides that once the record is closed, "no additional evidence shall be received except upon the order of the commission and a reasonable opportunity of the parties to examine any witnesses with reference to the additional evidence and otherwise rebut and meet such additional evidence." The record closed at the end of the hearing in this case, and ONRC et al. has not moved that the record be reopened to admit a late-filed exhibit. The Commission has previously stricken references in a post-hearing brief to data requests that are not in the record, and ONRC et al.'s attempt to submit such information with its Reply Brief

is improper. Re PacifiCorp, OPUC Docket No. UM 564, Order No. 95-800 at 2 (July 28, 1995) (“References in briefs to discovery requests which are not in the record are improper.”). Finally, as the discussion above demonstrates, adding ONRC et al.’s new evidence to the record would only further ONRC et al.’s incorrect arguments, rather than serving to “correct and complete” the record. ONRC et al.’s reply brief acknowledges on its face that Exhibit 1 is outside the record. As a result, Exhibit 1 to ONRC et al.’s reply brief should be stricken.

CONCLUSION

For the reasons stated above, KOPWU requests that the ALJ grant this Motion to Strike Exhibit 1 to ONRC et al.’s reply brief.

Dated this 21st day of March, 2006.

Respectfully submitted,

/s/ Matthew Perkins

Melinda J. Davison

Matthew Perkins

Davison Van Cleve, P.C.

333 S.W. Taylor, Suite 400

Portland, OR 97204

(503) 241-7242 phone

(503) 241-8160 facsimile

mail@dvclaw.com

Attorneys for Klamath

Off-Project Water Users, Inc.