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March 13, 2006

VIA ELECTRONIC FILING
& FIRST CLASS MAIL

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

Re: UE 170 – Pacific Power & Light (dba PacifiCorp) Request for a General Rate Increase in the Company's Oregon Annual Revenues

Dear Filing Center:

Please find enclosed the original and five (5) copies of KLAMATH WATER USERS ASSOCIATION'S REPLY BRIEF in the above-referenced docket.

Thank you for your assistance. Should you have any questions regarding this matter, please feel free to contact me.

Very truly yours,

Richard G. Lorenz

cc: UE-170 Service List (via email & first class mail)

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

In the Matter of the Request of	)	
	)	
PACIFIC POWER & LIGHT	)	**UE 170**
(dba PacifiCorp)	)	
	)	
Request for a General Rate Increase in the	)	
Company's Oregon Annual Revenues	)	

REPLY BRIEF

OF THE

KLAMATH WATER USERS ASSOCIATION

(Klamath Irrigator Rates)

March 13, 2006

The Klamath Water Users Association (KWUA) hereby files its Reply Brief in UE 170 to address the rates to be charged to On-Project Irrigators.[1]

I. There is Substantial Evidence In The Record That Supports Keeping the On-Project Irrigators In A Separate Rate Class.

PacifiCorp proposes to increase the On-Project Irrigators' power rates from those specified in the 1956 Contract to those applicable under Schedule 41. PacifiCorp bears the burden of proving that such a rate increase is just and reasonable. *See generally* ORS 757.210 ("[T]he *utility* shall bear the burden of showing that the rate or schedule of rates proposed to be established or increased or changed is just and reasonable.") (Emphasis added). Merely showing that the old rate is no longer just and reasonable does not compel the conclusion that the proposed new rate is just and reasonable.

In its opening brief, however, PacifiCorp apparently presumes that the On-Project irrigators are already subject to Schedule 41 rates and must prove why they merit a separate rate class. Based on this presumption, PacifiCorp argues that the On-Project Irrigators "have not provided substantial evidence to justify a different rate than the standard irrigation tariff." PacifiCorp Opening Brief p. 5. In other words, PacifiCorp seeks to reverse the applicable burden of proof and turn ORS 757.210 on its head.

Even if PacifiCorp's approach were valid, its conclusion is wrong. There *is* substantial evidence in the Record to support the conclusion that the On-Project Irrigators should not be merged with Schedule 41 customers. For example, the Record includes a cost of service analysis performed by Mr. Donald W. Schoenbeck showing that a 1.6 cents per kwh cost differential exists in delivery-related costs between the On-Project Irrigators and PacifiCorp's Schedule 41

[1] For purposes of this brief, the term "On-Project Irrigators" refers specifically to PacifiCorp's Schedule 33 irrigation customers. The term "Off-Project Irrigators" refers specifically to PacifiCorp's Schedule 35 irrigation customers. Many of the arguments applicable to On-Project Irrigators also are applicable to the Off-Project Irrigators.

customers. *See* UE 170, Direct Testimony of D. Schoenbeck, KWUA 102, p. 2. Although PacifiCorp dismisses this cost-difference as "slight,"[2] the Record also reflects that the delivery-related cost differential identified by Mr. Schoenbeck is at least as large as the cost differences separating PacifiCorp's current rate Schedules 28, 30 and 48T. *See* UE 170, Cross Examination Exhibit of Anderberg, KWUA/400, p. 1.

ORS 757.230(1) also specifically authorizes the Commission, when making rate classifications, to consider "the quantity [of power] used, the time when used, [and] the purpose for which [it is] used * * *." (Emphasis added); *See also In re Incentive Rates for Electric Service*, 82 P.U.R. 4th 624 (1987). The Record reflects that "the average Schedule 33 customer is *2.7 times larger* than the average Schedule 41 customer based upon energy usage. Similarly, the average Schedule 41 customer has a peak load of less than 20 kilowatts (kW) while the average Schedule 33 customer has a peak load greater than 45 kW." *See* UE 170, Direct Testimony of D. Schoenbeck, KWUA 102, p. 6. (Emphasis added). There is a significant difference between a customer class that uses, on average, nearly three times more electric energy than another customer class.[3]

PacifiCorp's attempted rebuttal of the cost and usage differences between the On-Project Irrigators and Schedule 41 customers fails. PacifiCorp asserts that a hypothetical large irrigation customer near Medford could end up paying more than a hypothetical smaller On-Project Irrigator. *See* PacifiCorp Opening Brief, p. 5. Such a result, concludes PacifiCorp, contradicts Mr. Schoenbeck's proposition that a class of customers with a higher usage of energy, they

[2] PacifiCorp Opening Brief p. 4.

[3] The Record shows that PacifiCorp relies heavily on energy charges to recover its fixed investment in distribution facilities, with 73% of delivery costs recovered through energy charges. *See* UE 170, Cross Examination Exhibit of Anderberg, KWUA/402, line 20. If On-Project Irrigators are merged with PacifiCorp's current Schedule 41 customer class, the On-Project Irrigators will pay, as a class, 1.6 cents per kwh more for delivery service than can be cost justified if they remain a separate class. PacifiCorp offers no rationale for how pricing service to On-Project Irrigators can be just and reasonable when a 1.6 cent cross-subsidy results from its proposal.

should have a lower per-unit cost of electricity. *See id. But PacifiCorp's comparison between hypothetical the Medford irrigator and the smaller On-Project Irrigator can be made about customers in every rate class of PacifiCorp or any other regulated utility.* For example, a large commercial customer on Schedule 23 could theoretically use more energy in a given month with a similar usage pattern to a secondary customer taking service from PacifiCorp under Schedules 28 and 30. That does not call into question, however, the validity of PacifiCorp's current rate classes. Customers should not be on the same rate schedule where there are statistically valid differences in their average usage and the cost of service. If PacifiCorp's argument is taken to its logical conclusion, there would be just one rate class and every customer would be in it.

The Record also indicates that there is a statute specifically relevant to the On-Project Irrigators' rates, but not to the Schedule 41 customers' rates. ORS 542.620 provides that it is the objective of the State of Oregon that the waters of the Klamath River shall be used, in part, to provide to the On-Project Irrigators the lowest power rates that may be reasonable. Although the Commission has said that this does not supplant the fair, just and reasonable rate standard, two of the three Commissioners have acknowledged that this statute is at least relevant to what is "just and reasonable" to the On-Project Irrigators. The relevance of ORS 542.620 to the On-Project Irrigators' power rates, but not to the Schedule 41 power rates, is yet another basis for maintaining them in their current respective customer classes.

II. Neither Staff Nor PacifiCorp Have Taken Into Account The Unique Circumstances Surrounding PacifiCorp's Electric Service To The On-Project Irrigators.

In Order 05-1202, two of the three Commissioners explained that what is "just and reasonable" in the case of the On-Project Irrigators must account for the unique circumstances of this case. Commissioner Baum, for example, stated that "what is ultimately determined to be 'just and reasonable' rates for Klamath River Basin irrigators will be dictated by the unique

circumstances of this case. These unique circumstances include, but are not limited to, the terms of the compact, including the 'lowest power rates which may be reasonable' language." Order No. 05-1202, p. 10.

In addition to the Compact, Commissioner Baum explained that another one of the unique circumstances of this case is the historical relationship between the Klamath Irrigation Project and the Klamath Hydroelectric Project. In 1917, the Bureau was induced by PacifiCorp to forgo hydroelectric development in favor of PacifiCorp. *See* UE 170, Direct Testimony of S. Kandra, KWUA 200, p. 16. Although PacifiCorp now disputes this characterization, it is supported by PacifiCorp's own contemporaneous account. On November 15, 1920, PacifiCorp sent a letter to the Klamath County Chamber of Commerce in which PacifiCorp acknowledged that "electric power was a *necessity* in the plan for irrigation, as *water must be pumped from the lower levels to the higher levels*. The construction of government power plants lower down on the Klamath River to supply this power was therefore made a part of the Government's plan of reclamation." UE 170, Direct Testimony of S. Kandra, KWUA/210, pp. 1-2. With full knowledge of the Irrigation Project's need and plans for power development, PacifiCorp proposed that it undertake the hydroelectric development of the Klamath River in lieu of Interior doing so. In exchange, PacifiCorp agreed to fulfill Interior's intention to provide hydroelectric power to the Irrigation Project at or below the cost of production. The same letter then goes on to explain how "*the Company, as the agent of the United States and under the control of the Government, obligates itself at its own expense, to do those things which the United States had planned to do itself for the benefit of the Klamath Project* * * *." *Id.* (Emphasis added).

The 1917 Agreement was extended for another 50 years in 1956 when Interior protested PacifiCorp's proposed additional hydroelectric development on the grounds that it would use

water over which the Irrigation Project has priority. *See Protest of the United States to the Application For License of the California-Oregon Power Company, Project No. 180, June 1, 1951.* Interior protested because further development by PacifiCorp would preclude Interior from executing its own plans for hydroelectric development. *See id.* As a compromise, Interior agreed to withdraw its protest and allow PacifiCorp to receive a federal license for its hydroelectric project in exchange for a license condition requiring PacifiCorp to renew the 1917 Agreement for the term of such license. *See* UE 170, Direct Testimony of S. Kandra, KWUA 200, pp. 9-11. Once again, PacifiCorp was permitted to develop hydroelectric resources, in lieu of Interior, but subject to the promise to continue providing power to the Irrigation Project at the cost of production. If PacifiCorp had not been willing to make this compromise, it would not have been able to construct its hydroelectric facilities on the Klamath River in the first place.

Finally, Commissioners Baum and Beyer also both stated that the application of the "just and reasonable" standard in this case should account for any system benefits that PacifiCorp derives from the On-Project Irrigators' operation of the Irrigation Project. As discussed above, the primary benefit PacifiCorp receives is the right to develop and operate its Hydroelectric Project in the first place. As discussed below, PacifiCorp also benefits by the facilities and operation of the Irrigation Project, which increase the productivity of PacifiCorp's hydroelectric development. In other words, the Klamath Irrigation Project and the Klamath Hydroelectric Project are parties to a long-standing and mutually beneficial relationship that is unique to this case. What PacifiCorp seeks through this proceeding, however, is to continue to receive the system benefits it derives from this long-standing relationship without continuing to provide any consideration. While one cannot blame PacifiCorp for trying, such a one-sided result certainly cannot be said to be fair, just and reasonable to the Irrigation Project.

KWUA can discern *nothing* in the opening briefs submitted by Staff and PacifiCorp that addresses how the unique circumstances of this case affect what is "fair, just and reasonable" for the On-Project Irrigators. In fact, PacifiCorp and Staff have advocated for the rate or methodology that would yield the *highest* rate for the On-Project Irrigators at every possible opportunity. *See* UE 170 Cross Examination of W. McNamee by E. Finklea, p. 354-355 (Feb. 17, 2006). Suffice it to say that choosing the outcome that yields the highest rate at every possible opportunity does not take into account the Compact's call for the lowest rates that may be reasonable. If anything, PacifiCorp and Staff simply contradict Commissioners Baum and Beyer by arguing that the "just and reasonable" standard compels the Commission to *ignore* the unique circumstances of this case including the Compact, the history and the system benefits.

III. Neither PacifiCorp Nor Staff Disputes The Basic Contention That PacifiCorp Generates More Power When The On-Project Irrigators Return Their Water To The Klamath River

KWUA has presented testimony that the facilities and operation of the Klamath Irrigation Project confer substantial system benefits in terms of augmentation of flows in the Klamath River. *See generally* Direct Testimony of M. Van Camp, KWUA/300, pp. 5-8 (describing the physical operation of the Irrigation project). Mr. Van Camp has identified three specific sources of augmented flows at Keno that are attributable to the On-Project Irrigators:

- One benefit is water storage. Water is collected for storage in Upper Klamath Lake at the Link River Dam and Tule Lake. *See id.* pp. 11-12. There have been occasions when the net inflow to Upper Klamath Lake was zero, yet there was flow at Keno. This is predominantly due to storage releases. *See id.* pp. 14-15.

- Another source of benefit is the return of diverted water. The On-Project Irrigators undertake significant affirmative steps, and even though they have no legal obligation to do so, to operate the Irrigation Project as efficiently as possible and to return as much water as possible to the Klamath River. *See* Direct Testimony of M. Van Camp, KWUA/300, pp. 8-10.

- The last source of benefit is the introduction of Lost River water, which can come in either by Lost River Diversion Channel ("LRDC") or less directly via Tule Lake Sump, D Plant and Straits Drain.

Although the language may be technical, the basic proposition is simple: When Keno flows are greater than the adjusted net Upper Klamath Lake inflow, PacifiCorp is able to generate more power than it would otherwise. Neither PacifiCorp nor Staff seriously rebut the basic proposition that if there is more water at Keno, then PacifiCorp can generate more power. In fact, PacifiCorp's own witness acknowledges that PacifiCorp receives a benefit whenever Keno inflow exceeds the adjusted net Upper Klamath Lake in-flow. *See* UE 170, Rebuttal Testimony of L. Karpack, PPL/ 2100, p. 14. Furthermore, neither Staff nor PacifiCorp rebut the basic proposition that increased hydroelectric generation has a direct monetary benefit to PacifiCorp's ratepayers and shareholders. PacifiCorp offers no answer whatsoever regarding two of the three sources of benefit identified by KWUA.

The Klamath Irrigation Project brings water from the Lost River Basin to the Klamath River. *See* UE 170, Direct Testimony of M. Van Camp, KWUA/300, p. 16. It does not require an engineer to explain that the addition of water to the Klamath River Basin upstream of Keno increases the amount of water available for power generation. No party suggests otherwise.[4]

PacifiCorp also concedes, as it must, that it benefits from the operation of storage reservoirs, most particularly Upper Klamath Lake. *See* UE 170, Cross Examination of Smith, p. 8. It is notable that legislation adopted in 1905 conferred authority on the Bureau of Reclamation exclusively to utilize the bed of Upper Klamath Lake for water storage. *See* Chapter 5, General Laws of Oregon 1905. Only through allowance of the Irrigation Project

[4] Indeed, PacifiCorp indicates only that the Lost River Diversion Channel (LRDC), one of the means by which Lost River water is added to the Klamath, was first constructed in 1912. This is in fact five years before the 1917 contract. PacifiCorp's Opening Brief at p. 23, n.10. It is also two years after PacifiCorp undertook its own initial development of the Klamath River. The LRDC was also subsequently expanded, and inarguably provides benefit.

could operable storage have been developed such as to benefit irrigation and hydropower. *See* Direct Testimony of M. Van Camp, KWUA/300, p. 15. Untold millions of dollars of system benefits have been, and will continue to be, realized by PacifiCorp. This is not realistically in dispute.

PacifiCorp does, however, advance the argument that the addition of return flow and other waters to the Klamath River should not "count." In other words, lifting and adding water to the river, something the Klamath Irrigation Project has no legal obligation to do, should apparently be ignored. KWUA addresses this contention immediately below.

IV. The On-Project Irrigators' Return Of Their Water To The River Is Neither Required By Law Nor Merely Incidental To Their Farming Operations.

Instead of arguing that there is no system benefit from increased flows at Keno, Staff and PacifiCorp argue that the On-Project Irrigators are not entitled to compensation with respect to such system benefits. The reason that they are not entitled to compensation according to PacifiCorp and Staff is because: (1) the On-Project Irrigators have a legal obligation under the Compact and Oregon water law to return the diverted water to the Klamath River; and (2) the On-Project Irrigators would return the water to the river anyway as an incidental part of their farming operations. Neither of these arguments has any merit.

A. The Compact Does Not Obligate The On-Project Irrigators To Return Prior-Appropriated Water To The Klamath River.

In its opening brief, PacifiCorp argues that the On-Project Irrigators are not entitled to a power rate credit, in part, because the Compact obligates them to return the water to the river after they have used it. *See* PacifiCorp Opening Brief, p. 22. PacifiCorp's reliance on the Compact in this manner is ironic, to say the least. PacifiCorp has strenuously objected to KWUA's argument that the Compact is relevant to the power rates charged to the On-Project Irrigators. *See* PacifiCorp's Opening Brief on the Statutory Standard for Ratesetting, Aug. 29,

2005, p. 7 ("By its terms, the Compact's objectives do not apply to ratemaking or other legislative or administrative functions of the Commission.") PacifiCorp cannot have it both ways. If the Compact is relevant to the On-Project Irrigators' rate credits, then the Commission also must apply the "lowest rates which may be reasonable" language in Article IV.

KWUA submits that the entire Compact *is* relevant and that PacifiCorp baldly misconstrues these provisions it cites in its Opening Brief. The Compact provides that, up to a certain acreage, all water rights for irrigation with a priority date *after 1957* will have preference and priority over water rights for hydropower, even hydropower rights with an earlier priority date, if the return flow from these *post-1957* irrigation rights are returned above Keno. The "obligations" (or more accurately, conditions) *do not apply*, however, to the pre-1957 water rights for the Klamath Irrigation Project.

It is undisputed that the water rights for the Irrigation Project pre-date the Compact. Article III.A of the Compact provides:

> There are hereby recognized vested rights to the use of waters originating in the Upper Klamath River Basin validly established and subsisting as of the effective date of this compact under the laws of the state in which the use or diversion is made, including rights to the use of waters for domestic and irrigation uses within the Klamath Project. There are also hereby recognized rights to the use of all waters reasonably required for domestic and irrigation uses which may hereafter be made within the Klamath Project.

ORS 542.620.

With the existing water rights of the Klamath Project thus recognized, the Compact goes on to provide terms related to water rights under appropriations "*after* the effective date of this Compact" (*i.e.*, after 1957). *Id.* (Emphasis added).[5] Thus, Article III.B provides that any new

[5] Although the above discussion flows from a reading of the plain terms of the Compact, some context is useful as well. The water rights for the Klamath Irrigation Project included vested rights with 1905, developed under

rights acquired after 1957 would be subject to priority of right based on use. Post-1957 irrigation rights (up to 300,000 acres) would have a preference and priority over hydropower rights, subject to the condition that such irrigation return waters be returned above Keno. *Id.* Conveniently, PacifiCorp fails to inform the Commission that the Compact provision it cites pertains to the use of water pursuant to Article III.B, and *not* to Article III.A.

Ultimately, PacifiCorp's failure to appreciate how the distinction between Articles III.A and B of the Compact reinforces KWUA's position. Under the Compact, there is a distinct form of compensation or reward for post-1957 irrigation water right holders who return water above Keno. Such persons are entitled to a priority in use of water as compared to hydroelectric development. The Klamath Irrigation Project does not rely on or need the Compact for its priority in the use of water; such priority has always existed. Yet the Klamath Irrigation Project does return the water, which does benefit PacifiCorp. The notion that the On-Project Irrigators are entitled to nothing is inconsistent with the internal logic of the Compact itself.

B. Oregon Water Law Does Not Obligate The On-Project Irrigators To Return To The River Water That They Divert And Use For Irrigation

In addition to the Compact, PacifiCorp also misconstrues the applicability of "Oregon water law." *See* PacifiCorp Opening Brief, p. 14. PacifiCorp rehearses various hornbook water law principles to argue that the Commission should not recognize the benefits provided by the On-Project Irrigators. PacifiCorp states that water in the streams and reservoirs is owned by the public, and that a "water right," a real property right, is a usufructuary right to use water.[6] In

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legislation enacted in 1905. By the 1950s, around 210,000 acres were under agricultural irrigation in the Klamath Irrigation Project. That number is substantially the same today. At that time, however, the Bureau of Reclamation took the position that it could develop vastly larger areas outside of what is known today as the Klamath Project, under that same 1905 appropriation. While some debate exists on details irrelevant to this case, it is certain that the Compact provided a sort of compromise between then-future irrigation rights and hydropower rights.

[6] Presumably, PacifiCorp continues to believe that its shareholders and its ratepayers in Utah and Idaho should continue to realize the benefits of PacifiCorp's use of the public's water for low-cost power generation.

short, if one diverts water, one is obligated to put that water to beneficial use and not "waste" it. PacifiCorp's recitation of these principles has no bearing on this proceeding. There is no evidence in the Record suggesting that the On-Project Irrigators are not putting the water they divert to beneficial use. To the contrary, the Record indicates that the water diverted is used not once but multiple times as it is moved through the Irrigation Project.

The gaping hole in PacifiCorp's "analysis" of Oregon water law is that it fails to identify any legal obligation to return water to the river after it has been lawfully diverted and put to a beneficial use. KWUA would add to PacifiCorp's hornbook discussion the basic principle that when water has been reduced to possession, it becomes personal property subject to exclusive ownership and control by the appropriator. *See, e.g., Barker v. Sonner*, 135 Or. 75, 294 P. 1053, 1056 (1931). Furthermore, Oregon courts have directly held that a water user may recapture and reuse diverted water and has no obligation to allow such water to flow off of his or her property for the benefit of downstream users. *See Cleaver v. Judd*, 238 Or. 266, 271, 393 P.2d 193, 195 (1964) ("[O]ne who diverts water from a stream is entitled to exclusive control of that water, including the wastage incident to irrigation so long as he uses it for beneficial purposes.") It follows that if one need not even allow water in a natural water course to flow off of his or her property, one certainly does not have an affirmative legal obligation to pump the water back into the water course using artificial means.[7]

PacifiCorp also asserts that the On-Project Irrigators are not entitled to compensation with respect to water they have "abandoned." *See* PacifiCorp Opening Brief, p. 15. Apparently, PacifiCorp continues to labor under the delusion that the Klamath Irrigation Project is little more than a passive conduit through which water meanders on its own accord until it trickles back into

[7] The irony, of course, is that it is these steps that the On-Project Irrigators take to return the water to the river that largely drives their increased consumption of electric energy.

the river. Once it trickles back into the river, says PacifiCorp, the water is deemed "abandoned" under Oregon law and is thereafter public property. An interesting philosophical debate might occur over who, if anyone, owns the water at any point as it is applied to fields, returns in drains, or if it were not pumped back to the river intentionally. But the Commission need not indulge such a debate in order to resolve this case. In the Klamath Irrigation Project, the return of water to the Klamath River does not occur automatically or by accident.

The On-Project Irrigators do not seek a rate credit for water that simply trickles back into the river on its own accord. The On-Project Irrigators seek a credit for the affirmative steps that they take to introduce water into the river at Keno, an action that is taken deliberately and requires water be lifted. In other words, it is neither the senior water rights nor the water itself that justifies rate credits, it is the affirmative, voluntary steps undertaken by the On-Project Irrigators to get the water back into the river at a location that increases PacifiCorp's hydroelectric production.[8]

C. The Commission Need Not Turn This Rate Case Into A "Water Rights" Investigation.

Intervenors such as the Hoopa Valley Tribe have requested that the Commission "avoid unnecessary statements" regarding water rights. *See* Hoopa Valley Tribe Opening Brief, p. 7. KWUA agrees. The Tribe's principle concern appears to be that it does not want to jeopardize its own claims for water rights. In order to grant rate credits to the On-Project Irrigators, however, the Commission would not be making any findings or conclusions that would or could be prejudicial to the putative rights of the Hoopa, Yurok or any other tribe.

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[8] PacifiCorp's "water law argument" makes assertions regarding KWUA's position that are simply not true. For example, KWUA has not asserted that "the KIP's water rights create a compensable benefit in unused or excess water." *See* PacifiCorp's Opening Brief at p. 14:15-16. Nor has KWUA disputed that the public owns the water in the river. *See id.* at p. 15:14-18. KWUA does assert that PacifiCorp benefits economically from actions taken by the On-Project Irrigators to put water in the river.

Some "environmental advocacy" groups also have argued that the On-Project Irrigators' continued enjoyment of their valid water rights are, or perhaps should be, somehow impaired by the Endangered Species Act. The Commission is no doubt aware that such groups regard irrigation in the Klamath Basin as especially disdainful, more so than the development of their own urban headquarters. The 2004 Report of the National Academy of Sciences dispels much of the propaganda espoused by such groups.[9] Ultimately, these advocacy groups have not provided substantial evidence in the Record regarding how the calculation of benefits should be changed.

D. The On-Project Irrigators' Return of Their Water To The Klamath River Is Not Merely Incidental To Farming.

Staff and PacifiCorp also assert that the On-Project Irrigators are not entitled to credits for the system benefits realized by PacifiCorp because they would undertake such actions anyway as an incidental part of their farming operations. *See* PacifiCorp Opening Brief, p. 21 ("Increased flow that is merely incidental to the Klamath Customers' normal course of business does not provide a reasonable basis for" rate credits."). The Commission must recognize that this argument rest entirely on the opinion of individuals who have little or no knowledge about how the Irrigation Project actually works. There is no legitimate evidence in the Record to support PacifiCorp's conclusion that the On-Project Irrigators return the water to the river for no "purpose other than meeting their own irrigation, drainage or other needs." *Id.*

To the contrary, the Record contains substantial evidence indicating that the Irrigation Project takes special steps, above what would be required merely to meet its own operational needs, to ensure that the Project is operated efficiently and that as much water is returned to the river as is possible. *See generally* Direct Testimony of M. Van Camp, KWUA/300, pp. 8-11 (describing some of the efforts undertaken to increase the efficiency of the Irrigation Project.)

[9] Endangered and Threatened Species in the Klamath River Basin; Causes of Decline and Strategies for Recovery (National Academies Press 2004).

Mr. Van Camp, who is actually knowledgeable about the operation of the Irrigation Project, testified:

> In the operation of the Project, diverted water is recaptured and reused. As I discussed previously, return flows and operational spills from one area become the source of supply to other areas. Water is also pumped from drains and sumps to the canal system as well as pumped directly out of drains. Finally, unused water is ultimately returned to the Klamath River through the Straits Drain. All of these factors contribute to efficiencies of the Klamath Project. This has been reported by engineers other than me. This provides benefits in terms of increased flow at Keno. The Klamath project required significant engineering to accomplish this return to the Klamath River.

Id. at 16-17. The On-Project Irrigators have no legal obligation to reuse return flows. They have no obligation to pump water from drains and sumps back to the canal system. They have no legal obligation to build and maintain the Straights Drain or operate D Plant in order to pump the water back into the river. In many respects, the operation of the Irrigation Project would be easier and cheaper (although it would certainly consume more water) if the On-Project Irrigators did not undertake such actions. The fact that they do these things, however, is directly beneficial to PacifiCorp and, moreover, arises out of their historic relationship with PacifiCorp.

The Record also contains substantial evidence indicating that critical project efficiencies were incorporated into the Irrigation Project after PacifiCorp complained of inefficiencies. Mr. Van Camp has testified:

> I do not believe the Klamath Project has always operated at this level of efficiency. I have reviewed document in which a Copco engineer in the 1930s expressed concern regarding inefficient use. Subsequent to that time, both D Plant (around 1940) and the Straits Drain were constructed and these structured are major components of the Project efficiency.

See Direct Testimony of M. Van Camp, KWUA/300, p. 17. The fact that D Plant and the Straits Drain both address PacifiCorp's concerns about inefficient water use further supports the concept

of providing a rate credit to the On-Project Irrigators. Finally, it can be no coincidence that the 1956 Contract provides substantially lower rates for pumping at those two facilities than for other pumping within the Irrigation Project. *See* Exhibit "B" to the 1956 Contract. PacifiCorp knew then, as it does now, that it derives a considerable benefit from the return of water to the river by means of these and other Irrigation Project facilities.

If anything, PacifiCorp and Staff have it backwards. Any benefit that the Irrigation Project receives from the steps that it takes to deliver as much water as possible to PacifiCorp for hydroelectric production is merely incidental to the system benefits enjoyed by PacifiCorp. The bottom line is that substantially higher electric rates will impede the ability, and erode the incentive, of the Irrigation Project to continue to take the steps needed to return as much water as possible to the Klamath River.

V. PacifiCorp Repeatedly Mischaracterizes The On-Project Irrigators' Benefit Quantification Methodology.

In its opening brief, PacifiCorp argues that even if the On-Project Irrigators were entitled to rate credits for system benefits, KWUA's quantification of such system benefits is "flawed." Whether by design or by error, PacifiCorp misstates and misrepresents the benefit methodology. KWUA does not dispute that there are refinements that will result in *both* upward and downward adjustment as compared to the representative estimates presented at hearing. As discussed in KWUA's Opening Brief, the Commission should determine that the KWUA methodology is the appropriate means to establish a rate credit.

A. Increased Water Flow At Keno Resulting From Klamath Irrigation Project Facilities And Operations, As Compared To The Alternative, Is A System Benefit.

In framing its arguments, PacifiCorp begins by muddling the benefit methodology described by Mr. Van Camp. For example, PacifiCorp states that KWUA's methodology

"counts as a benefit any water that KWUA could have used (i.e., estimated consumptive demand) but which they did not use or which they returned to the Klamath River." PacifiCorp Opening Brief, p. 12. PacifiCorp later, to the same effect, states that Mr. Van Camp "effectively credits KWUA for any water it could have used." *Id.* at p. 14. These statements are deliberately misleading. The methodology does *not* ascribe a benefit for water the Irrigation Project "could" have used. It assigns a benefit or potential benefit to the acts that are necessary to return water to the river.

Rather than PacifiCorp's false-start, the Commission should begin its analysis with the facts and propositions that are not in dispute. First, to the extent the Irrigation Project influences Klamath River stream flow, "all of the effects of Klamath Project facilities are experienced between Upper Klamath Lake and Keno." *See* UE 170, Direct Testimony of M. Van Camp, KWUA/300, p. 18. Thus, comparison of water volumes between these two locations is absolutely the appropriate means to quantify the benefits. *See* UE 170, Rebuttal Testimony of L. Karpack, PPL/2100, p. 14 (comparison of Upper Klamath Lake net inflow with flows at Keno would provide upper end estimate of benefit). Second, the Klamath Irrigation Project delivers water for irrigation; that is what it is for. Third, irrigation consumes water.

Given that the Irrigation Project lies between Upper Klamath Lake and Keno, and that it diverts and consumes water, one would expect that the flows at Keno to be less than the net inflow[10] to Upper Klamath Lake every single day and every single month of the irrigation season. But, given the way the Irrigation Project is operated, it is undisputed that Keno flow is *not* always lower than net Upper Klamath Lake inflow. Mr. Van Camp has demonstrated increases in the flow at Keno as compared to net Upper Klamath Lake inflow (without any

[10] The "net" inflow to Upper Klamath Lake takes into consideration that the actual inflow can be changed by, for example, the evaporation of water from the surface of Upper Klamath Lake as it moves through the lake. *See* UE 170, Direct Testimony of M. Van Camp, KWUA/300, p. 18.

adjustment related to water rights, water consumption, or anything else). *See* UE 170, Direct Testimony of M. Van Camp, KWUA/304. The problem is that PacifiCorp would apparently use this starting-point as the total measure of "benefit." *See* UE 170, Rebuttal Testimony of L. Karpack, PPL/2100, p. 14.

This simple comparison does not, however, reflect all the system benefits that result from the three factors (introduction of Lost River Basin water, return of water to the river, and storage and withdrawal) that benefit PacifiCorp. *See* UE 170, Direct Testimony of M. Van Camp, KWUA/300, pp. 3, 18. In other words, without these three benefits, Keno flow would be considerably *lower* than it actually is in any given year. Here, Mr. Van Camp recognizes that the consumption or depletion of water is something the Klamath Project has a right to do without any objection by PacifiCorp (a matter also not disputed by PacifiCorp). *See id.* PacifiCorp simply does not have a legal right to access to this water. *Net* Upper Klamath Lake inflow, so adjusted, thus is the proper baseline for comparison used to measure benefits completely. *See id.* In short, the proper methodology compares the flow that would likely exist at Keno without these sources of benefit to the flow that does in fact occur at Keno.

When the methodology is properly presented, PacifiCorp's criticisms ring hollow. For example, PacifiCorp complains that the methodology assigns no "detriment" when Keno flow is less than adjusted Upper Klamath Lake inflow; *i.e.*, that it "disregards" decreases. *See* PacifiCorp Opening Brief, p. 12. Once again, PacifiCorp has no basis to expect anything other than a perpetual decrease in flow at Keno, and to a greater degree than what actually occurs. In other words, the fact that flows may from time to time "decrease" is not relevant, what *is* relevant is that such decrease is substantially less than it would be otherwise. The methodology provided

the means to calculate when, and to what extent, PacifiCorp has access to more water for generation as a result of the facilities and operation of the Klamath Irrigation Project.

B. PacifiCorp's "Technical" Objections To The Methodology Are Either Insignificant or Unsubstantiated or Both.

Beyond describing the appropriate methodology to quantify system benefits, Mr. Van Camp used the methodology to estimate quantities "representative in magnitude" of the benefits resulting from Irrigation Project facilities and operations in recent years. *See* UE 170, Direct Testimony of M. Van Camp, KWUA/300, p. 21. He further explained that benefits would vary between years and that it would be necessary to determine the actual additional power production resulting from the improved water quantities and timing at Keno, considering "other flow conditions and PacifiCorp operations." *Id.* at 17. PacifiCorp chooses to ignore Mr. Van Camp's acknowledgment that further refinements, including some identified by PacifiCorp, would be appropriate in making a very precise quantification of benefits using the methodology. *See* UE 170, Cross Examination of M. Van Camp, p. 177. KWUA emphasizes that the basic methodology and recognition of real benefit is what is important at this stage. Nonetheless, KWUA addresses PacifiCorp's various "technical" arguments briefly below.

First, PacifiCorp argues that there is inflow between Upper Klamath Lake and Keno from non-Project lands that should not properly be regarded as a system benefit of the Klamath Irrigation Project. *See* PacifiCorp Opening Brief, p. 10. PacifiCorp supports this position with a very gross calculation related to total runoff from non-Project lands. *See* UE 170, Cross Examination of L. Karpack, pp. 77-79. KWUA agrees that, in the implementation of rate credits, any water that is not fairly attributable to the Irrigation Project would not be a potential basis for credit. KWUA also points out that, although this is one of PacifiCorp's primary objections, it is, in fact, a relatively small detail of ultimate refinement.

PacifiCorp also suggests that Mr. Van Camp's methodology "recounts" benefits that may be attributable to Off-Project Irrigators. *See* PacifiCorp Opening Brief, p. 11. PacifiCorp is wrong. The Off-Project Irrigators' arguments focus on increases in the Upper Klamath Lake inflow. The methodology advanced by Mr. Van Camp, however, is indifferent to changes or variability in net Upper Klamath Lake inflow. *See* UE 170, Rebuttal Testimony of M. Van Camp, KWUA/307, p. 7. Whether Off-Project Irrigators increase or decrease Upper Klamath Lake inflow is irrelevant to the benefits provided by the On-Project Irrigators.[11]

Mr. Van Camp identified the need to determine consumptive use of water (or net depletion) within the Irrigation Project in order to perform calculations under the methodology. He identified two possible methods, and selected a method based on reported crop acreages for 1997-2000, and then calculated consumptive use of the particular crops on the particular number of acres. He identified two major reasons these "example only" calculations would be considered conservative. UE 170, Direct Testimony of M. Van Camp, KWUA/300, pp. 19-21. Indeed, the environmental opponents of the Irrigation Project would regard Mr. Van Camp's calculations of water consumption by the Irrigation Project as extremely conservative. *See, e.g.,* ONRC Opening Brief, p. 20.

PacifiCorp contends that the representative calculations of consumption did not account for rainfall that may meet crop needs. *See* PacifiCorp Opening Brief, p. 15. Again, Mr. Van Camp volunteered that some degree of adjustment/refinement should occur related to

[11] KWUA does not suggest that benefits calculated by the United States' witness Mr. Lesley and those calculated by Mr. Van Camp should be added. KWUA does acknowledge a suggestion made by ONRC et al. Specifically, the Klamath Irrigation Project brings Lost River Basin water to the Klamath River. The Off-Project Irrigators provided testimony indicating that they add a certain amount of flow to the Lost River. To the extent that any of that water becomes flow that makes it to the Klamath River, the Off-Project volume would be within the total Lost River flow made available to the Klamath River from the Klamath Project. None of the Off-Project influence on flow to Upper Klamath Lake is even potentially "counted" as an On-Project benefit in KWUA's methodology.

this issue as well, although not to the degree suggested by Mr. Karpack (who had no opinion on the proper magnitude of adjustment). UE 170, Cross Examination of M. Van Camp, p. 185.

PacifiCorp also surmises that infrastructure or legal limitations may affect amounts of water diverted. *See* PacifiCorp Opening Brief, 15. PacifiCorp apparently is saying that Mr. Van Camp did not confirm that every single acre that was reported to have been farmed and irrigated in the Irrigation Project was actually farmed and irrigated. This argument is misplaced for two reasons. First, it is hardly unreasonable to assume that the On-Project Irrigators in fact irrigated the land and grew the crops that they reported. Second, KWUA does not suggest that in the actual implementation of crediting, one would assume water was diverted and used if in fact it was not.

PacifiCorp's remaining technical contention is that methodology "counts all assumed increases in flow without regard to whether they actually provide a benefit to PacifiCorp's hydroelectric system." PacifiCorp Opening Brief, p. 12. Mr. Van Camp's methodology relates exclusively to the flow of water at Keno. He makes no assumption that all of the water would result in increased generation. Indeed, he stated exactly the opposite, on multiple occasions. *See* UE 170, Direct Testimony of M. Van Camp, pp. 16, 21. To the extent that PacifiCorp can demonstrate that the increased flows attributable to the On-Project Irrigators are not used or useable for increased hydroelectric generation, then the quantification of benefits using the methodology may be so refined. But PacifiCorp's unsubstantiated platitudes regarding actual generation benefits are unhelpful to the calculations to be made by the Commission.[12]

[12] PacifiCorp ultimately engages in no more than arm-waiving on the subject of whether there is benefit to generation from increased flow. Apparently, PacifiCorp expects the Commission to believe that the Company somehow separates the flow from Keno into two parts, and does not generate power with some of it. In his rebuttal testimony, Mr. Van Camp responded to oblique PacifiCorp testimony that suggested that all of the water made available from the Klamath Irrigation Project is merely "spilled." He demonstrated that there are objective means to assess such contentions:

C. That It May Be Difficult To Quantify The Precise Benefits To PacifiCorp Does Not Mean That The On-Project Irrigators Are Not Entitled To Compensation.

As described above, one of PacifiCorp's primary objections is that the methodology for calculating system benefits is "flawed." PacifiCorp's apparent strategy is to obfuscate the technical issues in order to deter the Commission from even attempting to quantify the system benefits that PacifiCorp acknowledges to exist. KWUA agrees that the quantification of system benefits in this case is not easy. But that does not support PacifiCorp's conclusion that the Commission should deny rate credits altogether. The Commission has vast experience in handling matters that are far more complex, technical and controversial than the calculation of system benefits and corresponding rate credits in this case. *See, e.g.,* AR 499 (commission rulemaking regarding the adoption of permanent rules to implement SB 408, relating to matching utility taxes paid with taxes collected); AR 380 (electric restructuring rulemaking). Notwithstanding PacifiCorp's deliberate obfuscation, KWUA has no reservations about the Commission's ability to calculate system benefits in this case.

To that end, KWUA has recommended that the Commission initiate a collaborative process to refine the implementation of the methodology articulated by Mr. Van Camp in order

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> In my direct testimony, I noted that a complete evaluation of flow benefits to PacifiCorp's power generation would include consideration of whether the flow is usable. This concept seems to underlie Mr. Smith's statement. However, Mr. Smith's statement is general and there are no data furnished to evaluate its accuracy.
> I have independently examined data to allow a more objective evaluation, which is discussed below. I conducted the evaluation in reference to the J.C. Boyle facility, which is the first generation facility downstream of Keno. According to PacifiCorp's FERC relicensing application, the flow capacity and licensed rate of the J.C. Boyle Powerhouse is 2500 cfs. Other relicensing application materials show higher values. Exhibit 308 to this rebuttal testimony are plots of various flow data for each of the years 1997-2004. The line in blue shows the 2500 cfs capacity of J.C. Boyle Powerhouse. The green line shows inflow from Straits Drain to the Klamath River. This data is available from Reclamation and is measured at the F and FF Pumping Plants. The red line shows the flows below the J.C. Boyle Diversion Dam. This data is from the U.S. Geological Survey water supply papers, Gage Number 11510700. Based on these graphs, when there is a spill at J.C. Boyle (i.e. flows in excess of generation capacity), the spill predominantly occurs in winter or early spring, and does not occur in all years. For example, in 2001-2005 spill occurred very infrequently and not at all in 2001, and only on one day in 2004.

UE 170, Rebuttal Testimony of M. Van Camp, KWUA/307, pp. 4-5.

to ascertain the system benefits conferred by the On-Project Irrigators. Details of quantification can be addressed in the context of the collaborative process. KWUA also notes that, in light of SB 81, the Commission has nearly two years in which to workout the alleged flows in the methodology.

VI. Nothing In The Text, Context or Legislative History of SB 81 Indicates That A Rate Increase May Be Higher Than 50% Under Any Rationalization.

The Commission should rely on a plain reading of the text and context of the statute. The Commission has held that it will follow the three-step process articulated in *Portland General Electric v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (1993) ("*PGE v. BOLI*"):

> We now turn to the application of the principles of statutory construction. As NW Natural notes, the Oregon Supreme Court has set out the process for statutory construction in [PGE v. BOLI]. To determine legislative intent, the court first looks at the text of the statute, using rules of construction which bear directly on how to read the text. At this first level, the court also considers the context of the statute, including the total statute itself and related statutes, using rules of construction which relate to context. If the intent is clear from the text and context, the analysis goes no further. If the court's review of the text and context does not resolve the matter, however, the court will consider legislative history, along with the text and context, to determine legislative intent. If the legislative intent is still unclear, the court will refer to general maxims of construction to make its decision on legislative intent.

OPUC Order No. 01-719 (Aug. 9, 2001). In looking at the text and context of a statute, ORS 174.010 further commands that when interpreting a statute one shall not insert what has been omitted or omit what has been inserted.

In this case, the text and context of SB-81 reveal that the legislature had one overriding intent: That the net rates charged to the On-Project Irrigators shall not increase by more than 50% in any one year. The operative rate limiter provides that "[t]he rate credits provided by an electric company under the schedule shall automatically decrease each year to the lowest credit

necessary to avoid a rate increase that is greater than 50 percent in any subsequent year." Furthermore, this 50% limiter applies to "the total charges for electricity service, including all special charges and credits other than the rate credit provided under this section." In other words, SB-81 applies to the "net" rates. *See* UE 170, Direct Testimony of D. Schoenbeck, KWUA 102, p. 13. If the net rate increase is greater than 50% in any subsequent year, then credits must be applied. *See id.* There is no other permissible way to read the text of SB-81.

Nevertheless, PacifiCorp has proposed a methodology for implementing SB 81 that would result in a greater than 50% increase for many On-Project Irrigators. Many On-Project Irrigators are entitled to receive, as part of their power rates, a credit from the Bonneville Power Administration ("BPA"). PacifiCorp proposes to add this credit back into the affected rates before applying a 50% increase. The net result, of course, would be a rate increase that is more than 50%. The Record indicates that, if PacifiCorp's methodology were adopted, the hypothetical On-Project Irrigator referenced in PacifiCorp's Exhibit 1218 would experience a rate increase of 136%. *See* UE 170 KWUA Cross-Examination Exhibit for W. Griffith, KWUA/403 (revised). It is self-evident that a rate increase of 136% is inconsistent with a law that provides that rates shall not be increased by more that 50%.

There is simply no language in SB 81 that directs PacifiCorp to add items back into the rates, whether it be the BPA rate credit or otherwise, before applying the rate limiter. Nor is there any other exception that would permit PacifiCorp to raise any On-Project Irrigator's net rates by more than 50% in one year. PacifiCorp's proposed implementation would, if adopted, be a textbook case of inserting what has been omitted in violation of ORS 174.010.

VII. Conclusion

PacifiCorp has not met its burden of proving that the Schedule 41 rates are just and reasonable when applied to the unique circumstances of the On-Project Irrigators. The Record reflects that the cost-of-service is different and that the average On-Project Irrigator uses nearly three times as much power as a Schedule 41 Irrigator. Additionally, merging the On-Project Irrigators onto Schedule 41 does not account for the applicable language of the Compact or the historical relationship between the Irrigation Project and PacifiCorp. Most important, charging the On-Project Irrigators the same rates as Schedule 41 customers does not reflect the value of the system benefits conferred upon PacifiCorp by the On-Project Irrigators' operation of the Irrigation Project. A rate credit is appropriate to compensate the On-Project Irrigators for affirmative actions that provide system benefits in terms of increased water flows at Keno--which translates directly into increased hydroelectric production for PacifiCorp. Finally, the text and context of SB 81 indicate that the net rates paid by the On-Project Irrigators shall not increase by more than 50% in any year.

DATED this 13th day of March, 2006.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of March, 2006, I served the foregoing **REPLY BRIEF OF THE KLAMATH WATER USERS ASSOCIATION** on the attached Service List obtained on this date from the Oregon Public Utility Commission's Website:

[XX] by **MAILING** a full, true and correct copy thereof in a sealed, postage-paid envelope, addressed as shown on the attached Service List, and deposited with the U.S. Postal Service at Portland, Oregon, on the date set forth below;

[XX] **and** by **electronic mail** ("e-mail") to those parties on the Oregon Public Utility Commission's Website Service List who listed an e-mail address.

DATED: March 13, 2006.

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