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March 13, 2006

**VIA ELECTRONIC FILING**

PUC Filing Center
Public Utility Commission of Oregon
PO 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 (Klamath River Basin Irrigators Rates) Docket No. UE 170**

Enclosed for filing are an original and five copies of PacifiCorp's Reply Brief On Appropriate Rates For Klamath Irrigators. A copy of this filing has been served on all parties to this proceeding.

Very truly yours,

Sarah J. Adams Lien

SJL:knp
cc: Service List

**BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON**

**UE 170**

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| In the Matter of PACIFIC POWER & LIGHT's (d/b/a PacifiCorp) Request for a General Rate Increase in the Company's Oregon Annual Revenues | **PACIFICORP'S REPLY BRIEF ON APPROPRIATE RATES FOR KLAMATH IRRIGATORS** |

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## I. INTRODUCTION

For fifty years, irrigators and pumpers in the Klamath Basin (the "Klamath Customers") have received deeply discounted electric rates as a result of their agreement not to object to the California Oregon Power Company's ("Copco") 1956 hydro license application and anticipated benefits to Copco's hydroelectric project from return flow to the Klamath River above Keno. In these fifty years, circumstances in the Klamath Basin have changed dramatically. In 1956, when the Klamath Customers and Copco negotiated the fixed, discounted rates, Copco's operation of the hydroelectric project was not restricted by Endangered Species Act requirements, Tribal Trust requirements, and U.S. Bureau of Reclamation and U.S. Fish and Wildlife Service water management policies. PPL/1800, Smith/2.

Now, these and other restrictions cause PacifiCorp to operate the Klamath Hydroelectric Project more for compliance than for generation. PPL/1800, Smith/5-6. Return flow from the Klamath Irrigation Project is unpredictable, unmanaged, and often occurs during high-water periods. PPL/1802, Smith/2, 7. The result: at best, PacifiCorp must adjust generation schedules to maintain compliance with ramp rates, reservoir elevation commitments, and downstream minimum flow requirements; at worst, PacifiCorp must spill water throughout its system. PPL/1802, Smith/6-7.

Despite this, the Klamath Customers ask the Commission to approve continuation of their deeply discounted rates on various bases, including the claim that "every single drop" of water that returns to the Klamath River from irrigation and pumping operations in the Klamath Basin results in increased generation, and that the assumed increased generation should be valued at either the cost of replacement power (if the Company were to lose the entire Klamath Hydroelectric Project) or Mid-C firm pricing. On these bases, the Klamath Customers ask the Commission to approve rate discounts (in the form of reduced separate class rates, Senate Bill ("SB 81") rate mitigation, and compensation for value) that would allow them to continue paying less than one-tenth the price that other irrigators in Oregon pay for electric service.

The record in this case lacks substantial evidence of quantified value being provided by the Klamath Customers for which they should be compensated. Accordingly, the Commission should order that beginning April 17, 2006, the electric rates for the Klamath Customers should be those rates established in PacifiCorp's standard tariff schedules generally applicable in Oregon. The Commission should also order rate mitigation for the Klamath Customers under SB 81, which provides rate mitigation for customers moving from historical contract rates to generally applicable cost-based rate schedules. Pursuant to SB 81, the cost of that rate mitigation should be spread among other Oregon customers.

However, if the Commission departs from traditional cost-of-service ratemaking principles, and instead approves discounted rates for the Klamath Customers on the basis of their historical contracts or the Klamath Compact, ORS 542.620, the cost of those special rates should be spread among other Oregon customers.

## II. ARGUMENT

### 1. The Record Demonstrates That the Standard Tariff Rates Under Existing Rate Schedules Are the "Just and Reasonable" Rates for All Agricultural Irrigators and Pumpers, Including the Klamath Customers.

#### a. The Klamath Customers Misapprehend the Burden of Proof with Regard to the Establishment of a Separate Class or Credit-for-Value.

The Klamath Customers misapprehend the burden of proof for establishing a separate customer classification or credit-for-value. *See* Opening Brief of the Klamath Water Users Association ("KWUA Brief") at 3; Opening Brief of the Klamath Off-Project Water Users, Inc. ("KOPWU Brief") at 15 (suggesting that Commission must accept KWUA's methodology absent an alternate recommendation). Although ORS 757.210 requires that PacifiCorp demonstrate the reasonableness of any rate schedule change that PacifiCorp proposes, ORS 757.210 does not require that PacifiCorp *disprove* the reasonableness of rate schedule changes proposed by customer groups. Rather, the Commission must base its determination of whether a customer group is entitled to a discounted rate (via a separate rate classification, credit-for-value or other mechanism) on substantial evidence in the record that supports the proposed discount. ORS 757.230 ("[T]he commission may authorize classifications or schedules of rates applicable to individual customers or groups of customers."); *Re Incentive Rates for Electric Service*, UG 23/UE 50, Order No. 87-402 (OPUC Mar. 31, 1987) ("[T]he Commissioner has broad discretion in allocating costs among customer classes."); *American Can Co. v. Davis*, 28 Or App 207, 225-28, 559 P2d 898 (1977) (upholding Commission decision regarding rate classifications based on substantial evidence in the record). If substantial evidence is lacking, then the Commission has no basis on which to depart from standard tariff rates.

**b. The Record Does Not Contain Substantial and Reasonable Evidence That the Klamath Customers Constitute a Separate and Distinct Class of Irrigation Customers.**

The Commission has discretion to choose between methods of allocating rates among classes of customers. *American Can*, 28 Or App at 228. However, customer classifications must be based on reasonable ratemaking considerations so that customers receiving "like and contemporaneous service under substantially similar circumstances" are placed in the same class. ORS 757.310. Thus, classifications may be justified by pointing to reasonable ratemaking considerations such as differences in cost, value, or conditions of service. *Kliks v. Dalles City*, 216 Or 160, 179 (1959) ("classification must be based upon substantial differences"); *Incentive Rates*, Order No. 87-402 at 5. In establishing classifications, the Commission may take into account "the quantity used, the time when used, the purpose for which used, the existence of price competition or a service alternative, the services being provided, the conditions of service and any other reasonable consideration." ORS 757.230. "[A]ny other reasonable consideration" means "any economic justification—so long as it is a reasonable one." *Portland General Electric Co.'s Customer Choice Pilot Program*, UE101/DR 20, Order No. 97-408 at 6 (OPUC Oct. 17, 1997). Discrimination within a class is not permissible. ORS 757.325; *Portland General Electric*, Order No. 97-408 at 14 ("The law allows discrimination between customer classes, but not within customer classes.").

The Klamath Customers argue that they are entitled to placement in a separate classification from other Oregon irrigators on the following bases: (1) differences in cost-of-service (KWUA Brief at 4-5; KOPWU Brief at 33-34; United States' Bureau of Reclamation and U.S. Fish and Wildlife Service Opening Brief ("USBR Brief") at 18); (2) differences in end-use of power (KWUA Brief at 5-6; KOPWU Brief at 33-34); (3) "unique circumstance" such as the existence of the historical contracts (KWUA Brief at 17; KOPWU Brief at 30; USBR Brief at 10); and (4) the existence of the Klamath Compact (KWUA Brief at 6-7; KOPWU Brief at 31-33; USBR Brief at 7-10).

**(i) The Record Does Not Contain Substantial and Reasonable Evidence of Differences in Cost-of-Service.**

Although rate classifications may be based on differences in cost-of-service and end-use characteristics, the Klamath Customers have not adduced substantial evidence of such differences. ORS 757.230; *Incentive Rates*, Order No. 87-402 at 10. The Klamath Customers' arguments about different cost-of-service and end-use characteristics ultimately boil down to claims of disproportionately higher power demand. *See* KWUA Brief at 5-6 (difference in cost-of-service is largely attributable Klamath Customers using more electric power on average than other Oregon irrigators); KOPWU Brief at 33-34 (same); *see also* Schoenbeck Cross-Examination, Tr. at 206-07 (agreeing that proposal would result in different rates for irrigators in Klamath Basin than irrigators in Medford despite no differences in load characteristics). This is not, however, a basis for the continuation of unreasonably low rates. To the contrary, the slightly lower average cost of serving the Klamath Customers is likely caused in part by unreasonably low prices that provide no incentive to limit electricity consumption. Staff/1502, McNamee/8-9.[1] Quite simply, if the Klamath Customers move to standard tariff rates, in all likelihood, their volume of consumption, and therefore the cost of serving them, will be similar to all other irrigators on standard tariff rates.

Moreover, to the extent the Klamath Customers' demand would remain higher than other irrigators regardless of price, there is still no basis for a separate rate classification. This is because Schedule 41, the agricultural pumping tariff, already accommodates subclasses of customers based on differences in customer load sizes. Under Schedule 41, basic charges and load size charges both vary according to customer load size.

It should also be noted that KWUA, KOPWU and USBR all point to purported differences in average cost-of-service between Schedule 33 and Schedule 41 customers. KWUA Brief at 4-5; KOPWU Brief at 33-34; USBR Brief at 18. However, a comparison of averages is misleading and obscures the wide variance in individual customer usage within both classifications. PPL/1214, Griffith/7 ("Both Schedule 33 and Schedule 41 cover a full range of usage from zero usage (inactive accounts) to usage over 1,000 MWh per year."). An average cost of service differential between Schedule 33 and Schedule 41 customers does not demonstrate that the cost of serving each member within Schedule 33 is lower than the cost of serving each member within Schedule 41. A few disproportionately large Schedule 33 customers can easily raise the average figures for the class as a whole. For this

[1] KWUA erroneously asserts that Staff proposes that the Commission "force" the Klamath Customers to conserve water and electricity by sending a "price signal." KWUA Brief at 7-8. In fact, Staff proposes no such thing. Rather, Staff rebuts KWUA's end-use and cost-of-service arguments by pointing out that a customer that pays a lower price will use more electricity than a customer that pays a higher price. Staff/1502, McNamee/8-9. In any event, even if Staff were recommending that the Commission consider policy directives of the state such as the promotion of energy efficiency and conservation, such a recommendation would be consistent with the Commission's statutory mandate. *See* ORS 757.230 (classifications must be consistent with requirements of ORS 469.010); ORS 469.010 (declaring legislative intent to promote energy conservation).

reason, the Commission should look at more than a simple comparison of average cost differences between users on the two schedules; it should look for any differences in general use characteristics as well. In that respect, Klamath Basin irrigation customers have load characteristics similar to those irrigation customers served under Schedule 41: they take service for agricultural pumping and are seasonal in nature; the majority of their usage occurs in the summer; nearly all of them take service at secondary distribution voltage; and the aggregate annual load factors for both groups are between 12 and 13 percent. PPL/1700, Anderberg/5. There are no service characteristics that differ significantly from other Oregon irrigation customers. *Id.*

**(ii) The Record Does Not Contain Substantial and Reasonable Evidence of Differences in End Use Characteristics.**

KWUA's claim that the Klamath Customers use power for a different end-use purpose is similarly unavailing. KWUA Brief at 6 (claiming Klamath Customers use power for "the operation of the Klamath Irrigation Project"). The Klamath Customers use power for the same purpose as other customers on Schedule 41: irrigation. On-Project Irrigators use power to pump water and operate sprinklers for the purpose of irrigating crops and draining land located in the Klamath Irrigation Project. KWUA/300, Van Camp/3-8. This end use is the same as for other Oregon irrigators, regardless of location. Moreover, rate classifications may not be based on the differences in the locality in which power is used. *See* ORS 757.325.

**(iii) The Existence of the Historical Contracts and the Klamath Compact Is Not Evidence That the Klamath Customers Constitute a Separate and Distinct Class of Irrigation Customers.**

Regardless of the evidence adduced, rate classifications may not be based on the existence of historical contracts or the Klamath Compact.[2] The existence of the historical contracts and the Klamath Compact are not "the quantity used, the time when used, the purpose for which used, the existence of price competition or a service alternative, the services being provided, [or] the conditions of service," and they do not provide an "economic justification" for lower rates. Therefore they do not constitute "any other reasonable consideration" the Commission may consider in establishing a separate rate classification. ORS 757.230; *Portland General Electric Co.*, Order No. 97-408 at 6. In addition, the Commission has previously determined that past usage is not a permissible classification criteria. *Incentive Rates*, Order No. 87-402 at 10. In any event, the legislature has already addressed the "unique circumstances" of the fifty-year discounted rates—not by requiring continuation of the discounted rates, but rather by requiring mitigation of the rate impact once the customers return to standard tariff. ORS 757.227.

If the Commission were to determine that the historical contracts provide a basis for discounted rates for the Klamath Customers, the cost of providing those discounts should be spread among other Oregon customers. *See In re PacifiCorp Request to Initiate an*

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[2] Nor does the existence of the Off-Project contract support KOPWU's claim that the Commission must consider the "public interest" before terminating the contract rate. *See* KOPWU Brief at 45-50 (arguing that *American Can* adopts *Mobile Sierra* doctrine, which requires Commission to consider broader public interest before terminating fixed contract rate). The law in Oregon is clear: the Commission has the power and duty to change rates in a contract between a utility and one of its customers if those rates are not fair, just, and nondiscriminatory. *In re PacifiCorp*, UE 171, Order 05-726 at 4 (OPUC June 6, 2005); *American Can*, 28 Or App at 223 (rejecting argument that *Mobile Sierra* doctrine restricts right of regulatory agency to interfere with contract between utility and customer; holding that *Mobile Sierra* applies to agreements between utilities, not agreements between utilities and their customers); *Incentive Rates*, Order No. 87-402 (Commission may not make rate determinations based on social considerations unrelated to Commission's statutory mandate to protect public from unreasonable rates).

*Investigation of Multi-Jurisdictional Issues and Approve an Inter-Jurisdictional Cost Allocation Protocol*, UM 1050, Order No. 05-021 (OPUC Jan. 12, 2005) (ratifying Revised Protocol allocation methodology, which requires state assignment of excess costs incurred as a result of state policy).

**c. The Record Does Not Contain Substantial and Reasonable Evidence That the Klamath Customers Provide a Compensable Benefit to PacifiCorp's Other Customers.**

It is true, as KWUA claims, that rate credits, or rate discounts, are a common regulatory tool. KWUA Brief at 14. However, rate credits, which shift the cost of serving one set of customers to the utility's other customers, are only appropriate if the customers receiving the credits provide a benefit to the utility's other customers. *Incentive Rates*, Order No. 87-402 at 9 (discounts must be to benefit other customers).[3] Moreover, credits or discounts are only appropriate to the extent that they compensate customers for changing their behavior in a way that benefits other customers—*i.e.,* PacifiCorp should not provide credits or discounts to a group of customers to compensate them for undertaking their normal operations. *See* KWUA Brief at 16 & n 5 (identifying schedules that provide "compensation to customers that add value to [PacifiCorp's] system through curtailing loads, producing excess electricity or by purchasing renewable energy").

Here, the Klamath Customers claim to provide a benefit to PacifiCorp's other customers by purportedly providing increased flows of water at PacifiCorp's hydroelectric facilities on the Klamath River below Keno. KWUA Brief at 13-14; KOPWU Brief at 10-11; USBR Brief at 12-14.

The Klamath Customers admit that increased flows do not provide a benefit to PacifiCorp's other customers unless PacifiCorp can actually use those increased flows to

[3] Although Order No. 87-402 addresses credits for retaining or increasing the load of customers with alternatives, not paying customers for resources, it nevertheless provides policy guidance relevant to rate credit determinations.

generate hydroelectricity. *See* KWUA Brief at 13 ("augmented flows at Keno only benefit PacifiCorp to the extent that [they] can actually be used in generation").[4] Despite this acknowledgment, neither KWUA's nor KOPWU's methodology involves *any* adjustments to account for unusable increases in flow or the diminished or nonexistent value of unpredictable and uncontrolled increases in flow. In other words, neither makes any adjustments for water that is spilled, operational costs of managing unpredictable flow, or decreased value of unplanned increases in flow. *See* Van Camp Cross-Examination, Tr. at 190-93 (methodology makes no adjustment for unusable flow); Schoenbeck Cross-Examination, Tr. at 211 (basing value on "every single drop" of water using Mid-C firm pricing of $62 per MWh); KOPWU/202, Rozaklis/14 (making no adjustment to purported increases to account for spill or other constraints); KOPWU Brief at 10-11 (value calculated based on average power price of $68.86 per MWh).

Additionally, the Klamath Customers' methodologies are flawed in other respects. For example:

1. <u>They claim a compensable benefit for the incidental effects of normal operations</u>. KWUA claims that "the water simply would not end up back in the river on its own." KWUA Brief at 19. However, the water returns to the river via surface and subsurface flows—that is, through drainage ditches and through natural percolation through soil. KOPWU/202, Rozaklis/14.

2. <u>They base the calculation of increased flow on mistaken interpretations of Oregon water law</u>. In support of its methodology, KWUA argues without any citation to authority that "[t]here is nothing in the On-Project Irrigators' water rights that requires them to return to the Klamath River water they have lawfully diverted and appropriated." KWUA Brief at 11. This is not true. Under Oregon law, waters of the state belong to the public, and all waters not

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[4] At best, uncontrolled increases in usable flow cause PacifiCorp to decrease production at one of its low-cost thermal generation facilities in order to account for the unexpected hydroelectric generation; often, increased flow causes PacifiCorp to spill water throughout the system to maintain lake levels and avoid flood conditions. PPL/1800, Smith/7; *see also* PacifiCorp Opening Brief at 23-26 (increased flow typically causes PacifiCorp to adjust generation schedules to maintain compliance with ramp rates, reservoir elevation commitments, and downstream minimum flow requirements); FERC Order ¶¶ 3, 31 (Jan. 20, 2006) (PacifiCorp operates Link River and Keno dams for benefit of irrigators).

put to beneficial use must be returned to the public without waste. ORS 536.310(1); *see also Hennings v. Water Resources Department*, 50 Or App 121, 622 P2d 333 (1981). Thus, water not put to the beneficial use set forth in the irrigators' permits must be released to the public; if they divert or withhold more water than can be beneficially used, they commit waste in violation of their permits and ORS 536.310.[5]

3. They contain computational errors that result in double-counting and other inaccuracies. For example, KWUA states that it does not account for decreases in flow between *adjusted* Upper Klamath Lake ("UKL") inflow and Keno flow because of its senior water right. Van Camp Cross-Examination, Tr. at 180-81. KWUA also claims that it *adjusts* UKL inflow (decreasing UKL inflow by the amount of KWUA's theoretical consumptive use) because of its senior water right. *Id.* at 12. Even assuming KWUA's point about its senior water right is valid (*i.e.,* that it should be compensated for differences between its full theoretical consumptive use and what it actually beneficially uses),[6] KWUA has erroneously double-counted this supposed benefit by both disregarding decreases between adjusted UKL inflow and Keno flow and adjusting UKL inflow.

*See also* PacifiCorp's Opening Brief on Appropriate Rates for Klamath Irrigators ("PacifiCorp Brief") at 8-26 (identifying these and other flaws in Klamath Customers' methodologies).

Accordingly, the record does not contain substantial and reasonable evidence of the amount, if any, of increased flows attributable to the Klamath Customers, or the value, if any, of those purported increased flows. Furthermore, the record does not contain substantial and reasonable evidence that the purported increased flows are attributable to anything other than the Klamath Customers' normal operations, including compliance with the law. *See* PacifiCorp Brief at 20-23. Moreover, because the methodologies are flawed both

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[5] The Klamath Compact, ORS 542.620, also requires the irrigators to return flow to the Klamath River above Keno.

[6] Not accounting for negatives is, on its own, erroneous. *See* PacifiCorp Brief at 11-12. Likewise, subtracting from net UKL inflow the full theoretical consumptive use is also, on its own, erroneous. *Id.* at 13-16. Moreover, Mr. Van Camp's calculation of full theoretical consumptive use contains numerous errors that cause him to overestimate the amount of theoretical consumptive use. *Id.*

conceptually and in application, they do not provide a reasonable basis for calculating a credit or discount in future proceedings.[7]

**d. No Other Basis Exists for Discounting the Klamath Customers' Rates.**

In various manifestations, USBR, KOPWU, and KWUA all assert that the Klamath Compact, ORS 542.620, establishes a basis for discounting the Klamath Customers' rates. USBR Brief at 7-8; KOPWU Brief at 31-33; KWUA Brief at 21-23.

**(i) The Klamath Compact Does Not Require That Revenue Derived from Power Generation on the Klamath River Be Allocated to the Klamath Customers.**

USBR argues that Article IV of the Klamath Compact supports the view that the revenue derived from power generation on the Klamath River is to be allocated to the "specified power users." USBR Brief at 7-8. However, Article IV says nothing about revenues, and there is no evidence in the record regarding such "revenue" derived from the use of Klamath River water. There is simply no support for USBR's argument.

**(ii) The Klamath Compact Does Not Require the Commission to Deviate from the "Just and Reasonable" Rate Standard.**

KOPWU argues that Article IV's "lowest power rates which may be reasonable" language will be rendered meaningless if the Commission does not allow discounted rates. KOPWU Brief at 31-33. That argument ignores the Commission's order, which determined that the phrase "'lowest power rates which may be reasonable' * * * has meaning in the context of the stated objective—that is, providing for the most efficient utilization of power

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[7] Both KWUA and KOPWU argue that, although they have not provided sufficiently reliable evidence of value in this proceeding, they have provided methodologies that the Commission should use to calculate credits in a future proceeding. *See* KWUA Brief at 13, 20; KOPWU Brief at 36. The Klamath Customers are free to present such data and make such arguments as they deem appropriate in future proceedings, but their currently proposed methodologies should not be adopted by the Commission as the basis for any such proceedings.

to assist in achieving the lowest reasonable rates." *In re PacifiCorp*, UE 170, Order No. 05-1202 at 8 (OPUC Nov. 8, 2005).

**(iii) The Klamath Compact Does Not Establish a Rate Objective Specific to the Klamath Customers.**

KOPWU also argues that "[t]he Compact's specific description of the power rates to be charged for irrigation and drainage pumping *in the Klamath River Basin* provides additional support for continuing to treat Klamath irrigation customers as a separate class." KOPWU Brief at 33 (emphasis added); *see also id.* at 32 (Klamath Compact provides rate objective specific to Klamath Basin customers); *id.* at 31 (Klamath Compact "specifically addresses electric rates for irrigation and pumping *in the Klamath River Basin*" (emphasis added)).

KOPWU's argument misstates the terms of the Klamath Compact. The Compact does not refer to power rates of irrigators in the Klamath Basin. Rather, the Compact refers to the "lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells." Klamath Compact, Article IV.[8] The only place in Article IV that the term "Klamath River Basin" is used is with regard to the stated objective regarding the distribution and use of the water in the basin. The drafters of the Klamath Compact did not add the phrase "in the Klamath River Basin" to the end of Article IV, and it

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[8] The Compact provides:

> "It shall be the objective of each state, in the formulation and execution and the granting of authority for the formulation and execution of plans for distribution and use of the waters of the Klamath River Basin, to provide for the most efficient use of available power head and its economic integration with the distribution of water or other beneficial uses in order to secure the most economical distribution and use of water and *lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells.*" *Id.* (emphasis added).

is not the Commission's prerogative to do so, as that would violate the statutory mandate "not to insert what has been omitted." ORS 174.010. The Commission should acknowledge, just as the court did in *PGE v. BOLI*, 317 Or 606, 614 (1993), that "[t]he legislature knows how to include qualifying language in a statute when it wants to do so,"[9] and should not interpret the reference to power rates in Article IV of the Klamath Compact as relating solely to irrigators in the Klamath Basin.

**(iv) The Klamath Compact Does Not Require the Commission to Base the Klamath Customers' Rates on PacifiCorp's Hydroelectric Generation Costs.**

KWUA argues, as an alternative to establishing a separate classification or providing a credit-for-value, that the power component of the On-Project Irrigators' rates should be based on PacifiCorp's hydroelectric generation costs at the Klamath Hydroelectric Project. KWUA Brief at 21. KWUA claims that such an approach is justified by and consistent with the Klamath Compact and that it does not result in a subsidy. *Id.*

KWUA's proposal for unique ratemaking treatment is based on faulty premises and must be rejected. KWUA bases its proposal on the erroneous assumption that if the On-Project Irrigators paid only the cost of power from the Klamath Hydroelectric Project, they would be paying "the full costs of their electric service." *Id.* at 23. Contrary to that assumption, PacifiCorp's retail customer loads are served with the Company's integrated system resources and are not tied to any particular subset of generators. PPL/1703, Anderberg/4. Notably absent from KWUA's proposal is any discussion of how the On-Project Irrigators would be served at times when the Klamath Hydroelectric Project generation is insufficient to meet the load of those irrigators.

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[9] The fact that the drafters of the Compact knew how to distinguish between uses within and outside the Klamath Basin is reflected in Article III.C.1, in which the use of waters within the basin is distinguished from certain uses outside the basin.

The Klamath Hydroelectric Project facilities have been in the Company's rate base for more than fifty years and have been paid for by all of PacifiCorp's customers, not just the On-Project Irrigators. PPL/1703, Anderberg/4. Contrary to KWUA's assertion that other customers would not be subsidizing the On-Project Irrigators under KWUA's proposal, assignment of the low-cost hydroelectric generation to that limited group of customers would deprive the rest of the Company's customers of the cost benefit of that low-cost generation, and would necessarily require that those other customers pay higher costs.

KWUA attempts to find support for its proposal in the Klamath Compact. The first building block in KWUA's argument is speculation that the Compact might be the Oregon legislature's "approval" of a "compromise" between the Company and Interior, whereby Interior would allow the Company to "further develop the Klamath River in exchange for continuing to provide power to the Irrigation Project at the cost of production." KWUA Brief at 22. Aside from the speculation about the Legislature's supposed intent (*i.e.*, "approval"), the fact is that the Company and Interior entered into the On-Project Agreement with a specific, limited term of 50 years. Even assuming the 1956 USBR Contract was the result of a compromise, as suggested by KWUA, the undisputed fact is that the Government, the other party to the contract, got exactly what it bargained for: 50 years of reduced rates. The Company did not agree to "continue" supplying power at reduced rates for so long as it has generation facilities on the Klamath River.

The second faulty building block in KWUA's argument is the unsupportable position that the Klamath Compact "directly ties the Klamath Irrigators' power rates to the hydroelectric development of the Klamath River." *Id.* As discussed above, the Compact does not say what KWUA suggests—that is, it does not say that the low cost of Klamath hydroelectric generation is to be made available only to irrigators and pumpers *in the Klamath Basin*.

**(v) The Cost of Any Rate Subsidy Based on the Klamath Compact Should Be Spread Among Other Oregon Customers**

Notwithstanding the errors in the Klamath Customers' arguments, if the Commission were to determine that the Klamath Compact provides a basis for discounted rates for irrigators and pumpers in the Klamath Basin, the cost of providing those discounts should be spread among other Oregon customers. *See* Order No. 05-021 (ratifying Revised Protocol allocation methodology, which requires state assignment of excess costs incurred as a result of state policy).

**2. The Klamath Customers Should Be Moved to Standard Irrigation Tariff Rates on April 16, 2006, Concurrent with Implementation of SB 81.**

**a. The Provisions of SB 81 Are Applicable to a Move to the Standard Irrigation Tariff Rates Only.**

KOPWU misstates the applicability of SB 81 rate mitigation. *See* ORS 757.227. KOPWU suggests that SB 81 rate mitigation applies even "if the Commission moves Klamath irrigation customers from the current contract rate to a new cost-based rate in this proceeding." KOPWU Brief at 37. By its express terms, SB 81 applies only if the affected customers are moved to a "generally applicable cost-based rate." A separate rate schedule designed only for the Klamath Customers, or only for the Off-Project irrigators, would not be "generally applicable," and if the Klamath Customers are moved to such a rate, the rate mitigation provisions of SB 81 would not be applicable.

**b. KOPWU Assumes Without Support That BPA Credits Are "Special" Credits.**

The irrigators take the position that the BPA credit should be included in the calculation of the charges to which the 50 percent limitation applies. KWUA Brief at 24-26; KOPWU Brief at 36-45. KOPWU argues that rules of statutory construction do not support PacifiCorp's proposed implementation of SB 81. KOPWU bases this argument on the assumption that the BPA credit is a "special" credit as that term is used in ORS 757.227(4).

However, the BPA credit is available to qualifying residential exchange customers throughout the Company's Oregon service territory. That the credit is widely available to irrigators is reflected by the fact that only approximately 2% of Off-Project customers do not qualify for the BPA credit. Thus, KOPWU's assertion that the BPA credit is a "special" credit under ORS 757.227(4) is not supported by the record. On the other hand, charges and credits that could only be available to the Klamath Customers under their special contracts can reasonably be considered within the legislature's intent in the drafting of SB 81.

### c. The Commission Should Adopt PacifiCorp's Proposed SB 81 Implementation.

The unrebutted evidence in this case is that adoption of KWUA's or KOPWU's proposed method of treating the BPA credit would dilute the amount of the BPA credit available to customers that qualify for that credit, contrary to federal law. PPL/1216, Griffith/5; Tr. at 146-47. KOPWU attempts to persuade the Commission to dismiss this point, asserting that the Company could "easily" address the problem by placing qualifying customers on one rate schedule and non-qualifying customers on another. KOPWU Brief at 41. That assertion is without any support in the record. In addition, PacifiCorp witness Mr. William Griffith testified on cross-examination that he does not believe it is possible to design a rate schedule implementing SB 81 in the manner sought by KOPWU without violating federal law. Tr. at 152.

KOPWU also argues that PacifiCorp's proposal is based on a "misunderstanding that the Klamath Contracts would remain in effect during the ORS § 757.227 rate mitigation period," based on Mr. Griffith's use of the term "SB 81 Klamath Contract rates." KOPWU Brief at 39-40. KOPWU misses the point. Mr. Griffith was testifying regarding a billing approach to implementing SB 81 that would be easy for customers to understand. PPL/1214, Griffith/3. There can be no mistake that the Company's position is that the contract rates expire April 16, 2006.[10]

The point is that the Commission should approve a method for implementing SB 81 that is consistent with the statute and results in a reasonable outcome. The Company has outlined such a method for determining transition rates in Exhibit PPL 1217, presented a bill example for these customers in Exhibit PPL 1218, and proposed a rate credit methodology in Exhibit PPL 1216 Griffith/9, lines 3-9. Adoption of KOPWU's rate credit approach, as opposed to the Company's proposed billing rates that *reflect* the SB 81 credit, would lead to the Klamath Customers effectively being paid by the Company to consume energy during the summer months in the first year, when KOPWU's proposed credit (5.71 cents/kWh) is actually *higher* than the effective energy charge of 5.600 cents/kWh. For qualifying customers receiving the BPA credit, KOPWU's proposed cents-per-kWh credit is over 1 cent per kWh higher than the Schedule 41 effective net energy charge. KOPWU Brief at 44; PacifiCorp's approved tariff, PUC OR No. 35.[11] The Company's proposed rate credit methodology eliminates these problems with KOPWU's approach.

Finally, KOPWU improperly attempts to support its position by the introduction of Attachment 1 to its Brief, which purports to show a comparison of PacifiCorp and KOPWU rate proposals. Appending this new evidence to its post-hearing brief does not put that

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[10] Perhaps another label would be more appropriate, as the rates for the Klamath Customers under the Company's proposal will clearly not be "contract" rates, but a different label can certainly be applied.

[11] *See* Schedule 41 (summer energy charge for customer less than 30 kW, 4.377 cents), adjustment Schedule 95 (-0.013 cents), Schedule 198 (+0.019 cents), Schedule 292 (+0.064 cents), Schedule 299 (-2.403 cents), plus Schedule 200 Supply Service (3.556 cents), yields the combined effective rate of 5.600 cents/kWh, before adjustment for the BPA credit (-1.026 cents), Schedule 91 (+0.033 cents), and Schedule 290 (+3%). *See In re Portland General Elec. Co.*, UM 989, Order No. 02-227, 2002 WL 1009970, *6-7 (Mar. 25, 2002) (approved tariffs have the "force of law"); *see also* OAR 860-014-0050 (Commission may take official notice of Commission rules, regulations and orders and documents in Commission files).

evidence in the record of this proceeding. The evidence is proffered after the close of the evidentiary hearing, without the opportunity to conduct discovery or cross-examination, and without authentication.[12] It is therefore improper and the Commission should reject the attachment and strike or disregard references to the attachment in KOPWU's Brief. ORS 756.558(1) (agency may not base determination on evidence proffered after close of record).

The implementation of SB 81 should also be ordered in such a manner as to provide for the recovery of $1.94 million in additional revenue (offset by any revenue resulting from price increases to the Klamath Customers), which accounts for the assignment to Oregon of the unrecovered subsidy. PPL/1603, Wrigley/3-4. No party contests that the cost of SB 81 rate mitigation should be spread among Oregon customers. *See* Staff/1502, McNamee/16 ("For overall ratemaking purposes, PacifiCorp will need to spread the cost of the rate credit equally among its other Oregon customers."); KOPWU/500, Iverson/10 (same); *see also* Order No. 05-021 (ratifying Revised Protocol allocation methodology, which requires state assignment of excess costs incurred as a result of state policy).

### 3. Implications of FERC's Proposal to Decouple Government Dam Use Charges from PacifiCorp's Retail Rates.

In addressing the issue of the FERC decision to decouple Government dam use charges from PacifiCorp's retail rates, KWUA makes assertions regarding PacifiCorp's arguments before FERC and attempts to supplement the record with pleadings filed in the FERC case regarding the proposed readjustment of annual charges for the use of a Government dam. KWUA Brief at 27-28, Exs. A, B. KWUA's post-hearing attempt to

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[12] The inappropriateness of introducing new evidence through a post-hearing brief is demonstrated by the many errors in the attachment, including out of date rates, inaccurate inputs, and miscalculations that flow through to nearly all numbers in the table. For example, the attachment includes out-of-date Schedule 200 rates, uses the wrong kWh to calculate BPA revenues, and incorrectly applies the Public Purpose Charge to base rates.

supplement the record is inappropriate and should be rejected. ORS 756.558(1). In any event, what the Company argues at FERC is certainly not determinative of what FERC will order regarding dam use charges. The evidence that is properly in the record shows that FERC issued an order in which it determined that "the most prudent and practical course at this time is to exercise our reserved authority to readjust PacifiCorp's charges for the use of surplus water from Link River Dam," and stated its "intent to set the annual Government dam use charges for Klamath Project No. 20082 at the graduated fixed rates set forth at 18 CFR § 11.3(b), effective upon expiration of the 1956 Contract (*i.e.,* April 17, 2006)." PPL/1908, Richardson/11-12.

KWUA's response to the FERC decision also includes an argument that the annual dam use charges do not implement the Klamath Compact. KWUA Brief at 30. No one is arguing that the dam use charges will implement the Klamath Compact. KWUA's argument appears to be another attempt to argue that the Compact requires special discounted rates just for the pumpers and irrigators in the Klamath River Basin. As discussed in Section 1.d above, that argument has no merit.

## III. CONCLUSION

For the reasons set forth above, PacifiCorp respectfully requests the Commission order that beginning April 17, 2006, the electric rates for the Klamath Customers will be those rates established in PacifiCorp's standard tariff schedules generally applicable in Oregon. Further, the Commission should order rate mitigation for the Klamath Customers under SB 81, as set forth above and in Exhibit PPL 1217 and Exhibit PPL 1218, and it should determine a rate credit methodology as described in Exhibit PPL 1216 Griffith/9, lines 3-9.

DATED: March 13, 2006.

STOEL RIVES LLP

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# CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document in Docket UE 170 on the following named person(s) on the date indicated below by email and first-class mail addressed to said person(s) at his or her last-known address(es) indicated below.

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