

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UE 170**

In the Matter of the Request of	)	UNITED STATES' BUREAU OF
	)	RECLAMTION AND U.S. FISH
PACIFIC POWER & LIGHT	)	AND WILDLIFE SERVICE
(d/b/a PacifiCorp)	)	OPENING BRIEF ON RATE
	)	STANDARD
Klamath Basin Irrigation Rates	)	
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In accordance with the Chief Administrative Law Judge's Prehearing Conference Memorandum, dated June 30, 2005, the United States Bureau of Reclamation (Reclamation) and the U.S. Fish and Wildlife Service (Service) submit their Opening Brief in this docket concerning the appropriate rate standard to apply to "irrigation customers located within the Klamath River Basin." Reclamation and the Service conclude that the appropriate rate standard is dictated by the Klamath River Basin Compact.

**I.Introduction**

The issue of the appropriate "rates PacifiCorp should charge irrigation customers located within the Klamath River Basin" is the subject of this sub-proceeding within Docket UE-170 based on an order of the Commission remanding this issue back to UE-170 from the special docket previously established (UE-171) to address this issue on summary judgment. UE- 171, Order, p. 6 (June 6, 2005). The Commission's order also required that issues be identified and a schedule be established for any further proceedings. As a result, a briefing schedule was set to address the rate standard by the ALJ's Prehearing

Conference Memorandum of June 30, 2005. As part of that schedule, the parties were to submit a joint issues list that could be supplemented. Two separate lists were submitted which resulted in a ruling by the ALJ setting the issues to be used to “organize testimony and briefs in this proceeding.” Ruling, p. 6 (August 17, 2005). Those issues are as follows:

1. What is the statutory standard applicable to the setting of electric rates for irrigators located within the Klamath Basin?
  - a. Is the statutory standard applicable to establishing rates for Klamath Basin irrigation customers the “just and reasonable” standard found in ORS §§ 756.040. 757.210 et seq., the “lowest power rate that may be reasonable” standard found in the Klamath River Basin Compact (the “Compact”), ORS § 542.610 et seq., or some other standard?
  - b. If the Klamath River Basin Compact establishes a different statutory standard than the “just and reasonable” standard for determining the appropriate rates for Klamath irrigation customers, 1) what standard does the Compact establish, and 2) what is the effect and meaning of that standard in terms of setting rates?
  - c. Does SB 81 prescribe, modify or otherwise affect the applicable statutory standard?
2. What are the appropriate rates PacifiCorp should charge the Klamath Basin irrigators for electric service?
  - a. Are the current rates under the On-Project and Off-Project Agreements justifiable according to the “applicable statutory standard to the setting of electric rates for irrigators located within the Klamath Basin?” (i.e., are the current rates “just and reasonable,” consistent with the “lowest power rate which may be reasonable” standard in the Compact, or other applicable standard?).
  - b. Should the Klamath Basin irrigation customers be included in the standard class of irrigation customers, or is there substantial and reasonable basis for establishing a separate and distinct class of irrigation customers in the Klamath Basin for purposes of service and rates (i.e., a separate service classification under ORS § 757.230)?
  - c. If it is determined that Klamath Basin should not be included in the same class as other Oregon irrigation customers and a different rate than the standard irrigation tariff is justified, what is the appropriate rate?

3. If any rate change affecting these customers is implemented, how and when should these customers be transitioned from the rates established in the historical contracts?

a. Are the provisions of SB 81 applicable to such a rate change and, if so, how should this legislation be implemented with respect to these customers?

b. If the provisions of SB 81 are not applicable, do any other rate mitigation policies, rules, or statutes apply and, if so, how should such policies, rules, or statutes be implemented with respect to these customers?

Ruling, Appendix A.

The appropriate rate standard and the appropriate rates were discussed previously in the summary judgment briefs filed in UE-171. Further, Reclamation and the Service assume that the parties, and in particular PacifiCorp, KWUA and KOPWU, will cover these issues in sufficient detail in their opening briefs in this proceeding. Thus, Reclamation and the Service have presented its analysis of the issues in a summary form, and reserve the right to address the issues in more detail in its reply brief.

## **II. Discussion**

### **A. The Commission is required to obtain fair and reasonable rates for the utilities' customers and the public**

The Oregon Public Utilities Commission (Commission) is required to represent customers of utility companies respecting services and rates to protect them from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates. ORS 756.040 (1); American Can Company v. Lobdell, 55 Or. App. 451, 638 P.2d 1152, 1158-1159 (1982); Cascade Natural Gas Corporation v. Davis, 28 Or. App. 621, 560 P.2d 301, 304 (1977); Publishers Paper Co. v. Davis, 28 Or. App. 189, 559 P.2d 891, 895 (1977). In setting such rates, the Commission adopts a classification system and has broad discretion in

selecting policies and methods of allocating rates among the classes of customers. ORS 757.230

(1); American Can Company v. Lobdell, 638 P. 2d at 1159.

As noted by the ALJ in his Ruling adopting the issues list on page 4,

The classification system is intended to ensure that similarly situated customers receive uniform service and rates and prevents utilities from offering rate discounts or special services to “preferred” customers. Indeed, ORS 757.310 specifically prohibits a utility from charging rates higher or lower than the rates charged “any other person for a like and contemporaneous service under substantially similar circumstances.” Similarly, ORS 757.325 prohibits a utility from giving “undue or unreasonable preference or advantage to any particular person or locality” and from subjecting “any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.” (quotations in original).

Thus, the statutory scheme prohibits discrimination among members of the same consumer class, but does not disallow discrimination among classes, unless that discrimination is unjust. American Can Company v. Lobdell, 638 P. 2d at 1159. Thus, “for the Commission to conclude that a different rate is justified for the Klamath Basin Irrigators, it must find that these customers should be treated as a separate class of customers.” Ruling at 4. The Commission has broad authority to establish customer classes. ORS 757.230; Order No. 97-408, OPUC (1997).

**B. The Klamath River Basin Compact establishes a separate class of customers, which is further supported by Senate Bill 81.**

**1. The Compact**

Article IV of the Klamath River Basin Compact (Compact) provides in full as follows:

It shall be the objective of each State, in the formulation and the execution and the granting of authority for the formulation and execution of plans for the distribution and use of the water of the Klamath River Basin, to provide for the most efficient use of the available power head and its economic integration with the distribution of water for other

beneficial uses in order to secure the most economical distribution and use of water and the lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells.

Act of August 30, 1957, Pub. Law 85-222, 71 Stat. 497; ORS 542.620, Article IV- Hydroelectric Power. Article IV establishes that each state is to “provide for the ... lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells” from the use of water from the Klamath River Basin. The Compact, including Article IV, is a state statute and part of the binding body of Oregon law. ORS 542.610(1); see 39 Or. Op. Atty. Gen. 748 (1979). This statute directs the State of Oregon, in the use of Klamath River water, to provide power at the lowest rate for the specified purposes.<sup>1</sup>

This is clear from both the text and context of the statute. See PGE v. Bureau of Labor and Industries, 317 Or. 606, 610-611, 859 P.2d 1143, 1146 (1993) (stating statutory construction methodology); Order No. 05-114, OPUC (2005). In interpreting a statute, the task is to discern the intent of the legislature by first considering the text and the context of the statute. Id. If, but only if, the intent of the legislature is not clear from the text and context is the legislative history considered. Id. Additionally, when two statutes are at issue, such as in this case, the later, more specific legislative intent controls. Bobo v. Kulongoski, 336 Or.111, 119, 107 P.3d 18, 22 (2005). see also State v. Guzek, 322 Or. 245, 268, 906 P.2d 272, 286 (1995) (when two statutes deal with the same subject, one general and the other specific, the two should be harmonized if possible, while giving effect to a consistent legislative policy; if they cannot be harmonized, then the specific statute is considered as an exception to the general one).

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<sup>1</sup> While the primary issue framed for this proceeding is to address the rates PacifiCorp should charge irrigation customers located within the Klamath River Basin, the rates at issue also apply to Reclamation and the Service in their use of power for irrigation and drainage purposes within the Klamath Project.

In Bobo, two statutes were at issue. One statute (ORS 291.349) was of general application that required the Department of Administrative Services to estimate general fund revenues at the beginning of the biennium and then determine the amount of general fund revenues actually received at the end of the biennium. The other statute (SB 963, partially codified at ORS 440.420) was of specific application that required Medicaid funds to be retroactively removed from the general fund, thus, reducing the amount of general fund revenues. The court held that both the text and context of the statute and its legislative history supported the position that the second more specific statute overrode the more general statute as to the treatment of general fund revenues. Id.

In this case, the statute of general application directs the Commission to determine how much revenue the utility is entitled to receive and then to allocate the burden of paying that amount of revenue among the utilities ratepayers. American Can Company v. Lobdell, 638 P. 2d at 1154. The authorized revenues are based on the utilities actual cost of providing the service. Id. This allocation is subject to the statutes “fair and reasonable” standard. As was the case in Bobo, here there is a statute of specific application, the Compact, that directs how the Commission is to determine the revenue the utility is entitled to and how to allocate the burden to the ratepayers that consume power within the Klamath River Basin.

In reviewing the text and context of Article IV of the Compact, it is clear that the Compact identifies the revenue as that derived from the use of Klamath River water to generate power and it is that revenue that is to be allocated to the specified power users. The Compact speaks directly to the use of Klamath River water for the generation of power to provide the “lowest power rates which may be reasonable” through the use of the “available power head” from the waters of Klamath River. The Compact further identifies a specific class of customers

as those using power within the Klamath River Basin for “irrigation and drainage pumping, including pumping of wells.” Thus, the Commission should receive evidence, if not already in the record, to determine the cost of service associated with the Klamath River power generation for irrigation and drainage pumping, including wells.

## **2. Senate Bill 81**

Senate Bill 81 (SB 81) amends ORS 757.310 and adds provisions to ORS 757.205 to 240. ORS 757.310 is the statute that prohibits discrimination within a customer class. Order No. 97-408 (1997). It prevents a public utility from charging different people different amounts “for a like and contemporaneous service under substantially similar circumstances.” Id. (quotation in original). ORS 757.205 to 240 set forth the process for setting rates. In particular, ORS 757.230 authorizes classifications or schedules of rates applicable to groups of customers. Id.

Senates Bill 81 directs the Commission to mitigate a rate increase payable by a defined class of customers. SB 81, section 3 (2)(A). That defined class is composed of those customers that were “eligible for rates that were set under contracts entered into before 1960 and remained unchanged throughout the period of the contract.” Id., section 3 (5). Thus, SB 81 provides further support for establishing a separate class of customers that includes the Klamath Basin “irrigators” as defined in the Compact. SB 81 also provides the method of mitigating any such rate increase for the defined class. In this case, the increased rate to be mitigated is that rate determined based on Article IV of the Compact.

The phase in period of any such rate increase will most likely be affected by the issuance of an annual license to PacifiCorp by the Federal Energy Regulatory Commission (FERC). It is the position of Reclamation and the Service that any increase in rates determined by the OPUC,

and subsequent phase in of those rates, will not take effect until such time as a new license is issued to PacifiCorp. Any annual license issued by FERC continues the existing terms and conditions of the current license. 16 USC § 808(a)(1); See Southern California Edison, 106 FERC P61,212 at 61,712-714 (2004). It is the position of Reclamation and the Service that such terms and conditions include the current power rates under the 1956 contract between the United States and PacifiCorp. That issue will be presented to FERC in advance of the termination of the current license in 2006.

### **III. Conclusion**

The issues to be resolved in this proceeding are intended to address the rates that apply to the Klamath Basin “irrigators.” As discussed above, the Klamath River Basin Compact and Senate Bill 81 provide the basis for establishing a customer class that allows a separate rate to be established for that class. That rate must be based on the parameters described in Article IV of the Compact which restrict any rate increase to that associated with the generation of power by PacifiCorp from its use of the waters of the Klamath River. Further, any phase in of such rates will most likely be delayed by the issuance of an annual license to PacifiCorp by FERC.

Respectfully submitted,

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Dated: August 29, 2005

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