

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

Docket No. UE 170

In the Matter of)	
PACIFIC POWER & LIGHT (dba PacifiCorp))	WATERWATCH OF
)	OREGON, OREGON
Request for a General Rate Increase in the)	NATURAL RESOURCES
Company's Oregon Annual Revenues)	COUNCIL AND PACIFIC
)	COAST FEDERATION OF
)	FISHERMEN'S
)	ASSOCIATIONS
)	OPENING BRIEF ON
)	RATE STANDARD
)	
(Klamath River Basin Irrigator Rates))	
)	

In accordance with the Commission's June 30, 2005 Prehearing Conference Memorandum, and August 17, 2005 Ruling Adopting Issues List, WaterWatch of Oregon, Oregon Natural Resources Council and the Pacific Coast Federation of Fishermen's Associations submit this opening brief on issues of the appropriate standard for the setting of electricity rates for irrigators located within the Klamath Basin.

1. What is the Statutory Standard Applicable to the Setting of Electric Rates for Irrigators Located within the Klamath Basin?

For the reasons discussed below, we believe that the statutory standard applicable to rate setting for the Klamath Basin irrigators is the "just and reasonable" standard found in ORS 756.040, 757.210 *et seq.*

- 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?**

The Oregon Public Utility Commission (“Commission” or “PUC”) has the duty to apply the “just and reasonable” standard found in ORS 756.040, 757.210 *et seq.* to all tariffs. The Klamath River Basin Compact does not contain any other applicable rate standard, and there is not “some other standard” for the Commission to apply. For these reasons and the reasons discussed below, the “just and reasonable” standard from ORS 756.040, 757.210 *et seq.* is the statutory standard applicable to rate setting for the Klamath Basin irrigators.

- i. **The Commission has the duty to apply the “just and reasonable” standard to all tariffs, including those that apply to the Klamath Basin irrigators.**

The “just and reasonable” standard, found in ORS 756.040 is the applicable standard for the Commission to use in setting rates for the Klamath Basin irrigation customers. The Commission has the continuing authority and duty to review tariffs, such as the one containing the Klamath Basin irrigators’ rates, and ensure that the rates are just and reasonable. ORS 756.040; *see also American Can Co. v. Davis*, 28 Or App 207, 224, *rev. den.* 278 Or 393 (1977).

Even rates found in special contracts (OAR 860-022-0035 (special contracts are “in legal effect tariffs and are subject to supervision, regulation and control as such”) and alternative forms of regulation plans (ORS 757.210(b)) are reviewed under the “just and reasonable” standard. Further, ORS 756.515(1) provides that the Commission may

investigate “[w]henever [it] believes that *any rate* may be unreasonable or unjustly discriminatory . . .” (emphasis added). There is simply nothing about the Klamath Basin irrigation rates that dictates entirely different treatment for those customers than every other similarly situated irrigator throughout the State of Oregon.

ii. The Klamath Basin Compact does not mandate a specific rate standard, and is not capable of trumping Oregon’s statutory rate standard.

Article IV of the Klamath Basin Compact states only a *general objective* for each state party to the Compact, Oregon and California, relating to its plans for the distribution and use of Klamath Basin waters. Article IV states, in its entirety:

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.

The Compact was codified by the Oregon Legislature (ORS 542.620). Article IV’s objective applies just “in the formulation and execution and the granting of authority for the formulation and execution of plans for distribution of the water of the Klamath River Basin.” It simply does not apply to or supplant the Oregon (or California) PUC rate setting authorities.

In earlier briefs, Klamath irrigators have claimed that the Article IV clause “the lowest power rates which may be reasonable” somehow prescribes a rate standard that the Commission must apply (Klamath Water Users’ Association Response at 10; Klamath Off-Project Water Users Response at 46). Even if the Article’s objective was somehow relevant beyond the “granting of authority for the formulation and execution of

plans for distribution of the water,” nothing in the statement of this general objective provides any specific rate standard or any requirement that the Commission apply any rate.

Article IV simply does not mandate any rate standard. Article IV merely provides the states with the water management *objective* of providing for efficient use of available hydropower head and providing for its economic integration with the distribution of water, or other beneficial uses. The stated goals of this objective are to: (1) secure the most economical distribution and use of water; and (2) secure the lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells. These clauses simply represent goals of a water distribution objective, not a requirement to apply a certain rate.

Importantly, the stated purposes of the Compact are all aimed at water resource management, not electric rate setting. Article 1 outlines the major purposes of the Compact and they all relate to management and sharing of the basin’s water resources. Notably, the Compact Commission in charge of administering the Compact is composed of one representative from the California Department of Water Resources, one from the Oregon Water Resources Department, and one federal representative. There is no procedural process specified for any type of rate-setting in the Compact, the majority of the Commissioners do not even represent the State of Oregon, there is no authority for this Commission to serve as a quasi-judicial body, and in every way the Compact Commission was clearly intended to be a policy coordination body between states, not an alternative way to preempt authority traditionally given only to the Oregon PUC.

This Compact is simply not a rate-related agreement that should be interpreted to preempt or override specific statutory rate standards and a well worked out mechanism for setting such rates that fall under the jurisdiction of the Public Utility Commissions of either state. As Staff points out in its UE-171 Reply Comments to PacifiCorp’s Motion for Summary Disposition “[w]hile the first level of statutory interpretation does involve consideration of context, the context includes other provisions of the *same* statute and other *related* statutes. Here the statutes are simply not related statutes.” At 6. *See also* UE-171 PacifiCorp’s Reply to Parties’ Responses to Its Motion for Summary Disposition at 25 (“The rule in *Premier West* (relied on by the irrigators in arguing that the Compact provides a different standard than “just and reasonable”) applies to *related* statutes only, such as the statutes at issue in *Premier West* . . . The Compact, the stated purposes of which do not include anything directed at utility ratesetting, cannot reasonably be considered to be related to the statutes requiring just and reasonable rates”).

For these reasons, the Compact does not supply the statutory standard applicable to establishing rates for Klamath Basin irrigation customers.

iii. There is not “some other standard” for the Commission to properly apply.

We know of no basis for the Commission to apply “some other standard” to the Klamath Basin irrigation customers or source for such a standard. We are unaware of any precedent for the Public Utilities Commission to devise and use a standard other than its “just and reasonable” standard under ORS 756.040. Even special contracts, to the extent that they are permitted by current law, must meet the “just and reasonable” 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?**

As discussed above, the applicable standard in this case should clearly be the “just and reasonable” standard found in Oregon law at ORS 756.040. However, if the Commission nevertheless finds that the Compact provides some sort of separate rate standard, the Commission must give meaning to *all* of Article IV, including consideration of how that rate helps or hinders achievement of its other stated goal – “securing the most economical distribution and use of water.” It is a fundamental rule of interpreting statutes that all provisions within a statute must be given meaning and effect.¹ Here, the two goal-containing clauses must be considered and balanced together within the context of Article IV, not in isolation from one another.

In earlier briefs, Klamath irrigators have highlighted just one clause from Article IV: “the lowest power rates which may be reasonable.” (Klamath Water Users’ Association Response at 10; Klamath Off-Project Water Users Response at 46.) However, there are *two clearly stated goals* (not just one) of the Article’s general water distribution objective: (1) securing the most economical distribution and use of water; and (2) securing the lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells. To say that if the Compact contains a

¹ ORS 174.010, Oregon’s general rule for construction of statutes states that “[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”

rate standard, that standard is simply “lowest power rates which may be reasonable” under-reads and distorts the clear meaning and purposes of the Compact as a whole.

“[S]ecuring the lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells.”

The second goal, “securing the lowest power rates which may be reasonable,” even if applied as the rate standard, likely leads to the same rate as does the Commission’s existing “just and reasonable” standard. In determining “just and reasonable” rates, the Commission is charged with “protect[ing] such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates.” ORS 757.040(1). The Commission also “balances the interests of the utility investor and the consumer in establishing fair and reasonable rates.” *Id.*

The Compact’s Article IV requires a balancing between low rates for rate payers and reasonableness of those rates to those providing the service *in the very same way* that the Commission’s existing standard does. The Commission’s statutory duty to protect rate payers from “unjust and unreasonable exactions” and to “obtain for them . . . fair and reasonable rates” is closely akin to the Compact’s “lower power rates” goal. The Compact’s reference to “reasonable” rates clearly requires consideration of a party or parties other than the customers paying the rates; the obvious party being that which is supplying the power. This is akin to the Commission’s charge to “balance[] the interests of the utility investor and the consumer in establishing fair and reasonable rates.” *Id.* Another consideration is whether it is reasonable to ask other PacifiCorp rate payers to pay extra to subsidize unusually low rates charged to these irrigators.

In conclusion, “securing the lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells,” if applied as a rate standard - which it should not be - likely leads to the same rate the Commission’s “just and reasonable” standard.

“[S]ecuring the most economical distribution and use of water.”

The American Heritage Dictionary defines economical as “[n]ot wasteful; prudent; sparing.” Power rates influence achievement of this first goal because irrigation electric rates affect the distribution, conservation and use of water (*see e.g.*, UE-171 WaterWatch’s Response to PacifiCorp’s Motion for Summary Disposition, Exhibit 1: Energy Pricing and Irrigated Agriculture in the Upper Klamath Basin, Brief #3. Oregon State University, Extension Service, W.K. Jaeger. July, 2004).

Thus if the Compact’s Article IV is found to provide a rate standard, one thing the Commission (or some other state officials) would need to evaluate is whether the current, very low 1917 power rates rate, or some other rate selected by the Commission, would better secure economical and prudent use of the basin’s extremely limited water resources. While such environmental externalities are arguably proper for the Commission to consider in carrying out its statutory rate setting duties, the Compact would clearly mandate an analysis of whether any particular rate would lead to the “most economical distribution and use of water.”

The analysis under Article IV would also need to look carefully at whether agricultural uses are the “most economical distribution and use of water” available. While some might assume that to be the case, in fact, there are at least two recent economic studies that dispute that assumption and demonstrate how water now used for

irrigation may be *much more valuable to society as a whole* if simply left in the Klamath River to support recreational and commercial fisheries. For instance, *Coping with Competition for Water: Irrigation, Economic Growth, and the Ecosystem in the Upper Klamath Basin*, ECONorthwest (September 2001) concluded that current agricultural practices in the Upper Klamath Basin are economically marginal, very water wasteful, and typically produce low-valued but high water-usage crops with water that is often far more economically beneficial to society as a whole when left in the river to support many other beneficial uses.²

Another study in 2003 by the U.S. Geological Service (“USGS”) by Douglas and Sleeper, *Making Unbiased TCM Benefits Estimates with Klamath River Basin TCM and Contingent Use Data*,³ also concluded that sufficient water left in the Klamath River to support fisheries economies provided between \$2.03 to \$7.33 billion per annum in economic benefits to the region, far more in net economic benefits to society than provided by irrigating crops with that same water. The USGS study also concluded that the net economic value of these other beneficial uses could be increased by another \$9.64 billion per annum by simply transferring a large portion of the water currently wastefully used by the Klamath Irrigation Project to in-stream beneficial uses which, on average, generate far more net economic value to society as a whole.

These two studies and the additional Oregon State University, Extension Service, W.K. Jaeger study (July, 2004) cited above and supplied in the record are offered only as examples of just some of the economic information that would need to be evaluated if the Compact’s Article IV were to become the standard for setting rates instead of ORS

² Available from the Internet at: www.klamathbasin.info/ECONorthwest-KlamathBasinRpt.pdf

³ Available in Pre-publication version dated Dec. 2003 at: www.klamathbasin.info/USGSReport.pdf

756.040. The likely “effect and meaning” of the analysis on rate setting would be that the current below cost, 1917 rates would have to move up to (or to perhaps greater than) the current standard irrigation tariff, simply because the current rates are so far below current market rates that they sanction and encourage wasteful and uneconomical use of the Klamath Basin’s very limited water supply.

In summary, though we believe that ORS 756.040 is clearly the standard that should be applied in this proceeding, the effect and meaning of any rate standard derived solely from the Klamath River Basin Compact’s Article IV on electric rates for the Klamath Basin irrigators would likely be roughly the same, i.e., to raise those rates up to those found in PacifiCorp’s standard irrigation tariff. Indeed, applying Article IV’s goal of “securing the most economical distribution and use of water” could arguably give rise to higher rates as a mechanism to control current water waste and any uneconomic agricultural uses. The most likely result, however, is that application of any standard derived from the Compact would lead directly to the standard irrigation rate, but certainly no lower.

c) Does SB 81 prescribe, modify or otherwise affect the applicable statutory standard?

SB 81 does not prescribe, modify or otherwise affect the applicable statutory standard. What SB 81 would do is provide a gradual, approximately seven-year ramp up to standard tariff for the Klamath Basin irrigators, if the Commission selects that rate. Indeed, a ramp up is provided if the Commission establishes any rate for the Klamath irrigators that results in a 50% rate increase during the first year. Thus SB 81 does not prescribe, modify or otherwise affect the applicable statutory standard, but rather

provides for a transition period to such higher rates that addresses other issues raised in the proceeding, such as rate shock.

SUMMARY

In conclusion, the applicable statutory standard is “just and reasonable” found in ORS 756.040. There is nothing in the Klamath Compact to indicate that it should override the Commission’s statutory duty under ORS 756.040 and 757.210, *et seq.* to ensure that rates are “just and reasonable” and non-discriminatory. Further, there is no “other standard” for the Commission to apply here. The Commission should simply review the Klamath Basin irrigation rates like all other rates in order to ensure that they are “just and reasonable” and in accordance with ORS 756.040 and 757.210 *et seq.*

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served WaterWatch of Oregon, Oregon Natural Resources Council and Pacific Coast Federation of Fishermen's Association Opening Brief on the Rate Standard Brief in UE-170 by postage prepaid mail upon each person listed below at the address indicated (where postal address provided) and by email to those listed on the email service list.

Dated: August 29th, 2005,

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