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March 6, 2006

Via Electronically and U.S. Mail

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

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

Dear Filing Center:

Enclosed please find the original and six copies of the Opening Brief of the Klamath Off-Project Water Users ("KOPWU") in the above-referenced docket.

Please return one file-stamped copy of the document in the self-addressed, stamped envelope provided. Thank you for your assistance.

Sincerely yours,

/s/ Anna E. Studenny
Anna E. Studenny

Enclosures
cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Opening Brief of the of the Klamath Off-Project Water Users upon the parties on the service list by causing the same to be electronically emailed to those parties with an email address and by U.S. Mail, postage-prepaid, to those parties without an email address.

Dated at Portland, Oregon, this 6th day of March, 2006.

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 170

In the Matter of	)
PACIFIC POWER & LIGHT (dba PACIFICORP)	)
Request for a General Rate Increase in the Company's Oregon Annual Revenues (Klamath River Basin Irrigator Rates).	)

OPENING BRIEF OF

KLAMATH OFF-PROJECT WATER USERS, INC.

March 6, 2006

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INTRODUCTION

The Klamath Off-Project Water Users, Inc. ("KOPWU") respectfully requests that the Oregon Public Utility Commission ("OPUC" or the "Commission") reject PacifiCorp's (or the "Company") proposal to prematurely terminate the April 30, 1956 contract (the "Off-Project Agreement" or "Agreement") under which the Company has provided electric service to "Off-Project" irrigation customers in the Upper Klamath River Basin for 50 years. Approving PacifiCorp's proposal would bring an end to an arrangement that benefits both the Company and its customers, and that has provided a foundation for the development of Off-Project agricultural lands since 1956. Furthermore, approving PacifiCorp's proposal would impose on Off-Project customers a series of significant rate increases that, as a whole, will substantially exceed 1200%. The extensive evidence that KOPWU has submitted in response to PacifiCorp's proposal demonstrates that the request to terminate the Off-Project Agreement is unlawful, unsupported, and would represent poor public policy. KOPWU urges the Commission to reauthorize the current Off-Project rate for the following reasons:

- The Commission has approved the Off-Project Agreement under the just and reasonable standard repeatedly since 1956, the Agreement bears no expiration date, and no party in this proceeding has demonstrated that changed circumstances justify terminating the Agreement prematurely or without a court order.

- KOPWU has demonstrated that irrigation and drainage pumping on Off-Project lands provides approximately $5.6 million in value to the PacifiCorp system in terms of increased water supplies for hydroelectric generation and that this amount exceeds Off-Project customers' cost of service by at least $2.0 million. No party has presented reliable and compelling evidence to rebut KOPWU's evidence regarding return flows from Off-Project pumping and the value to PacifiCorp.

- Off-Project Irrigation customers should continue to be included in a separate customer class from PacifiCorp's irrigation customers on Schedule 41. The Off-

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> Project agreement, the Klamath Basin River Compact, the relationship between electric service and irrigation and drainage pumping in Off-Project areas, the return flows from Off-Project lands, and Off-Project customers' distinct electric service characteristics all provide a substantial and reasonable basis to distinguish Off-Project irrigators.

No party in the proceeding has provided evidence demonstrating that Off-Project irrigation and drainage does not provide substantial value to the PacifiCorp system. The parties that have criticized KOPWU's testimony have failed to demonstrate that the Off-Project Agreement is not cost-justified, and have provided no basis to terminate the Off-Project Agreement or eliminate the Klamath Basin irrigation customer class.

If the Commission disagrees with KOPWU and prematurely terminates the Off-Project Agreement despite the evidence in the record, KOPWU recommends that the Commission establish a new cost-based rate for Klamath irrigation customers. PacifiCorp's marginal cost of service study demonstrates that Klamath irrigation customers are less costly to serve than other irrigation customers, and no party disputes the results of that study. Any new cost of service rate for Klamath irrigation customers should reflect the actual cost reflected in PacifiCorp's studies to be consistent with the Commission's basic ratemaking policies. Furthermore, that rate should take into account the return flow value that Off-Project pumping provides.

Finally, the Commission must implement any rate increase that results from moving Off-Project irrigators to a new cost of service rate according to the rate mitigation provisions of Senate Bill 81, as codified in ORS § 757.227. The statute calls for a seven-year "phase in" of any rate increase that results from moving Klamath irrigation customers to cost of service rates and provides that those customers should receive annual rate increases of no greater

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than 50% based on the "total charges for electricity service, including all special charges and credits," during that period. If the Commission orders a rate increase for Off-Project Customers, ORS § 757.227 must be implemented in a manner that gives full effect to the plain meaning and intent of the law.

BACKGROUND

KOPWU described the background and history of the Off-Project Agreement in its Response to PacifiCorp's Motion for Summary Disposition in UE 171 and incorporates that discussion herein by reference. The record in this proceeding includes certain undisputed facts regarding the Off-Project Agreement: 1) the Commission approved the Agreement; 2) the Agreement does not bear an expiration date and does not expire in April 2006; and 3) Off-Project customers have paid the rates in the Off-Project Agreement since 1956. Order No. 05-726 at 3-4. The plain language of the Off-Project Agreement provides that:

> In consideration for an increased flow of water caused by the development of lands for agricultural purposes within the Upper Klamath River Basin, which increased flow will be used for the generation of electric power in Copco's proposed dam improvements on the Klamath River below Keno, Copco agrees to provide power rates for agricultural pumping for all off-project users in the Upper Klamath River Basin [in the specified amounts].

KOPWU/202, Rozaklis/28.

The customers that PacifiCorp serves under the Off-Project Agreement are located on lands that generally include the west side of the Klamath River (Lake Ewauna), the area around Upper Klamath Lake, and areas in the Sprague, Williamson, Lost, and Wood River basins. The greatest concentration of Off-Project customers is in the Sprague River Valley. The Sprague River is a tributary of the Williamson River. The Sprague River Off-Project lands

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include 17,040 acres of drained irrigated lands and nearly one-half the deep water well use of Off-Project customers. KOPWU/202, Rozaklis/9, 18.

The second largest concentration of Off-Project customers is in the Lost River drainage, which includes Yonna Valley (Hildebrand), Langell Valley, and Poe Valley. Lost River Off-Project lands primarily, if not exclusively, use deep water wells. The Lost River Basin does not naturally drain into the Klamath River. See KOPWU/400, Bartell/5. The Lost River diversion dam and Lost River diversion channel divert a mix of water from Off- and On-Project lands into the Klamath System. Id.

The Sprague River, Williamson River, and Wood River drain into Upper Klamath Lake. There are about 32,000 acres of drained Off-Project lands around Upper Klamath Lake, about 9,625 drained Off-Project Land in the Wood River Valley, and about 5,000 acres of drained lands on the west side of Klamath River (Lake Ewauna). KOPWU/202, Rozaklis/18.

ARGUMENT

Chairman Beyer and Commissioner Baum recognized in Order No. 05-1202 that the determination of what constitutes "'just and reasonable rates' for Klamath River Basin Irrigators will be dictated by the unique circumstances of this case." Order No. 05-1202 at 10-11. KOPWU has provided a broad array of evidence to address these unique circumstances, including evidence that demonstrates the value that Off-Project irrigation and drainage pumping provides to PacifiCorp's system, the historical factors and legal issues surrounding the Off-Project Agreement, the terms and meaning of the Klamath River Basin Compact (the "Compact"), and costs and benefits related to all of these issues. KOPWU has conclusively demonstrated that Off-Project irrigation customers should continue to be included in a separate

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customer class based on their unique circumstances. Moreover, KOPWU has demonstrated that the rate in the Off-Project Agreement continues to be justified according to the standards under which the Commission approved the Agreement in 1956.

If the Commission disagrees with KOPWU and decides to terminate the Off-Project Agreement and impose an unparalleled rate increase on Off-Project customers, then the Commission must establish a cost of service rate that reflects the fact that Klamath irrigation customers are less costly to serve and apply the rate mitigation provisions of ORS § 757.227. As described below, KOPWU's interpretation of ORS § 757.227 will result in Off-Project customers receiving the full benefit of seven years of rate mitigation. PacifiCorp's interpretation, on the other hand, will result in annual rate increases that exceed 50% contrary to the law and will result in rate mitigation for only five years.

KOPWU has organized the sections below according to the issues identified in Chief Administrative Law Judge ("ALJ") Grant's February 22, 2006 ruling. KOPWU discusses the proposal to decouple Government dam use charges in Section IV of this Opening Brief.

I. The Appropriate Rate for Electric Service Provided to Off-Project Irrigation Customers is the Rate in the Off-Project Agreement

A. The Rates in the Off-Project Contract Are Justified According to the Just and Reasonable Standard

Both the Off-Project Agreement and the evidence presented in this proceeding demonstrate that the basis for the Off-Project rate is, and always has been, the return flow of water from irrigation and pumping on Off-Project lands. J.C. Boyle, who signed the Off-Project Agreement for the California Oregon Power Company, testified to the California Public Utility Commission in 1956 that return flow that results from water pumped to Off-Project lands was

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"one of the fundamental reasons for making the request of these lower rates." KOPWU/106, Bartell/3. Circumstances since 1956 have not changed in a manner that justifies terminating the Agreement prematurely.

1. KOPWU Has Presented the Most Comprehensive and Well-Developed Evidence in the Record Regarding Return Flows

The testimony and exhibits of Louis Rozaklis (KOPWU/200-202) and Edward Bartell (KOPWU/100-108 and KOPWU/400-407) demonstrate that irrigation, drainage pumping, and other agricultural practices on Off-Project lands provide a benefit to the PacifiCorp system in the form of return flows for power generation in the Company's Klamath hydroelectric facilities. Mr. Rozaklis is a consultant and engineer in the fields of water resource management, water quality analysis, and water rights engineering who has over twenty-five years of experience in these fields. KOPWU/200, Rozaklis/1. Mr. Rozaklis began work on his study of Off-Project return flows in the Spring 2005, and traveled to the Klamath River Basin to conduct field inspections of Off-Project areas on April 13-15, 2005. KOPWU/202, Rozaklis/4. Mr. Rozaklis spent substantial time throughout the rest of 2005 and early 2006 continuing to study Off-Project return flows, refining his assumptions and conclusions, and addressing additional issues that were subsequently identified for resolution in this proceeding. Mr. Rozaklis' report is the most well-developed and comprehensive analysis in the record regarding Off-Project return flows.

Mr. Bartell is a cattle rancher who is the KOPWU President, serves on the Boards of Directors of the Klamath-Lake County Farm Bureau and Water for Life, and has previously served as a delegate to the Oregon Farm Bureau and as President of the Sprague River Water Resource Foundation. KOPWU/100, Bartell/3. Mr. Bartell has done exhaustive research regarding the Klamath irrigation project and the history and development of irrigated agriculture

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on Off-Project lands, and has participated extensively in the Klamath water rights adjudication proceeding, in which over 30,000 pages of documents have been exchanged regarding such issues. Id. at Bartell/3-4. Mr. Bartell possesses comprehensive background knowledge of the history and development of irrigated agriculture on Off-Project lands as well as a first-hand understanding of the Upper Klamath River Basin and Off-Project agricultural practices.

KOPWU's evidence regarding return flows in this proceeding reflects the technical expertise and first-hand knowledge of KOPWU's witnesses, and is the most well-developed evidence on the subject in this proceeding. Even if the Commission were to arbitrarily assume a 25% error in KOPWU's conclusions regarding both the energy generated from Off-Project return flows and average power prices, the evidence would continue to cost-justify the current rate in the Off-Project Agreement.

a. Off-Project Irrigation and Drainage Pumping Provides at Least 131,000 Acre-Feet of Return Flow to the Klamath River

Mr. Rozaklis concluded that "[p]umping of water for agricultural irrigation and drainage purposes by KOPWU's members provides PacifiCorp with an average of at least 131,000 acre-feet per year of increased supply for hydro power generation in the Klamath River near Keno." KOPWU/202, Rozaklis/6. Mr. Rozaklis concluded:

- At least 73,000 acre-feet derives from return flows associated with pumping groundwater to irrigate approximately 71,000 acres of Off-Project lands; and
- Approximately 58,000 acre-feet results from pumped drainage of approximately 66,000 Off-Project acres that previously were marshlands or open water areas.

Id. Mr. Rozaklis described his overall return flow estimate as "conservative" for a number of reasons and stated that the total amount of increased supply is probably greater than 200,000

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acre-feet per year if sources that are not readily quantifiable are considered.[1/] Id. at Rozaklis/6, 8. Furthermore, both Mr. Rozaklis and Mr. Bartell noted that the proposed removal of Chiloquin Dam on the Sprague River and replacement with a pump station would further increase return flows from Off-Project lands. Id. at Rozaklis/6; KOPWU/100, Bartell/6.

In reaching these conclusions, Mr. Rozaklis specifically focused on return flows from Off-Project lands occupied by customers that use electricity to pump groundwater for irrigation and drainage purposes. KOPWU/202, Rozaklis/7. It is a fundamental assumption underlying the Off-Project Agreement that only those customers that use electricity for pumping purposes receive electric service under the Agreement. As Mr. Bartell noted, irrigators that supply water to lands via gravity diversions are not beneficiaries of the Off-Project rate and are not KOPWU members. KOPWU/400, Bartell/2. Mr. Rozaklis' study excludes water withdrawals and return flows associated with those irrigators.

During the course of the eleven months over which Mr. Rozaklis prepared his report, he spent substantial time formulating and refining his assumptions with respect to issues such as the Upper Klamath River Basin geology, consumptive use and evapotranspiration ("ET") on Off-Project agricultural lands, rangeland development, irrigation efficiencies, and weather. Assumptions are a necessary part of any study, and Mr. Rozaklis explained his assumptions in detail in KOPWU/202.

Mr. Bartell's first-hand knowledge regarding Off-Project agricultural practices and return flows from Off-Project lands complemented and confirmed Mr. Rozaklis'

[1/] Mr. Rozaklis identified the "other sources" as: 1) use of groundwater supplies in place of surface water supplies, particularly during the late irrigation season; 2) rangeland creation and associated grazing activities; 3) conversion of Off-Project lands from flood to sprinkler irrigation; and 4) participation of Off-Project groundwater users in the Klamath Basin Water Bank. KOPWU/202, Rozaklis/6.

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conclusions. Mr. Bartell testified that he has personally witnessed return flows from groundwater-irrigated Off-Project lands entering the Sprague River. KOPWU/100, Bartell/12-13. Furthermore, Mr. Bartell described that certain Off-Project irrigators in the Lost River drainage near Hildebrand use perforated pipes buried beneath the soil surface to help drain and prevent excess water in the root zones. Id. at Bartell/13. These "drain tiles" help direct to the river system excess water that otherwise might pool and evaporate. Id. Finally, Mr. Bartell testified that certain Off-Project Customers actively pump water out of closed basins such as Pine Flat into the Lost River, which contributes to flows in the Klamath River in the winter and is used by the Klamath Irrigation Project in the summer. Id. No party has provided evidence that is sufficient to rebut Mr. Bartell's personal knowledge of return flows such as those that Mr. Rozaklis quantified in KOPWU/202.

Mr. Bartell also presented independent studies from the U.S. Geological Survey ("USGS") and the Oregon Department of Environmental Quality ("ODEQ") as KOPWU/107 and KOPWU/108, and these studies confirm the increase in return flows as a result of agricultural development and irrigation of Off-Project lands. Id. at Bartell/14. The ODEQ report utilized data from the USGS report to identify a "statistically significant shifts in annual runoff" in the Williamson and Sprague River basins since 1950, and the ODEQ report attributes this increase to agricultural development and irrigation:

> The bulk of the irrigated acreage in the Williamson and Sprague drainages were developed between 1950 and 1980. While irrigated acreage cannot explain the increase in water yields, other associated landscape modifications that accompany irrigated crop cultivation and livestock grazing may offer an explanation: decreased summertime evapotranspiration, increased runoff rates, reduced infiltration and reduced riparian, floodplain and wetland water storage. Timber harvest can accelerate the snowmelt and

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> decrease evapotransipration, causing increased water yields. However, [data in the report] indicates a decrease in the timber harvest in the post-1950's period. Therefore, it is more likely that the combined effects of hydrologic disturbance that have increased water yields in the Williamson and Sprague River subbasins are related to agricultural activities in the drainage.

KOPWU/108, Bartell/4. The conclusions in these reports confirm Mr. Rozaklis' statements. KOPWU/202, Rozaklis/6.

b. The 131,000 Acre-Feet of Return Flow is Available to Generate 81,000 MWh in PacifiCorp's Hydroelectric Facilities

Mr. Rozaklis concluded that the 131,000 acre-feet of return flow results in an additional approximately 81,000 MWh of generation per year at PacifiCorp's Klamath hydroelectric facilities. KOPWU/202, Rozaklis/6. Mr. Rozaklis relied on information taken from PacifiCorp's pending license application for the Klamath Hydroelectric facilities and formulas and values provided by PacifiCorp in discovery to determine this amount of energy. Id. at Rozaklis/25-27. No party has disputed Mr. Rozaklis' calculation that the 131,000 acre-feet of Off-Project return flow results in 81,000 MWh of generation in PacifiCorp's Klamath hydroelectric facilities.

c. The Off-Project Return Flows Provide Approximately $5.6 Million in Value to the PacifiCorp System

KOPWU witness Kathryn Iverson determined that the additional 81,000 MWh generated by Off-Project return flows is worth approximately $5.6 million to the PacifiCorp system, which exceeds the cost to serve Off-Project customers by over $2.0 million. KOPWU/300, Iverson 7. Ms. Iverson calculated the $5.6 million using PacifiCorp's 30-year average power price of $68.86/MWh, which the Company claimed in its FERC license application was the cost of replacement power of hydroelectric generation from the Company's

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Klamath facilities. Id. Furthermore, using PacifiCorp data regarding the Off-Project customers' usage and the Off-Project customers' cost of service information from the Company's marginal cost of service study, Ms. Iverson determined that the cost to serve Off-Project customers is approximately $3.5 million.[2/] Id. In other words, KOPWU's evidence demonstrates that the $5.6 million value of the Off-Project return flows quantified by Mr. Rozaklis exceeds the cost to serve Off-Project customers by over $2.0 million, even excluding the $0.6 million per year in revenues that PacifiCorp collects from Off-Project customers under the current Off-Project Agreement.

2. The Other Parties' Criticisms of KOPWU's Evidence Regarding Return Flows Are Unsupported and Unfounded

KOPWU demonstrated at the hearing that the efforts of Oregon Natural Resources Council et al. ("ONRC et al."), PacifiCorp, and OPUC Staff to rebut KOPWU's return flow evidence consisted of a series of hastily-formulated opinions that were solely focused on criticizing KOPWU's conclusions, rather than providing any independent analysis. The other parties' opinions generally reflect a lack of practical knowledge of Off-Project agricultural practices, inadequate research, and oversimplification of the issues. Mr. Rozaklis' conclusions, on the other hand, represent the culmination of months of work by a professional engineer with over 25 years of experience who has testified on water resources issues in numerous proceedings. Mr. Rozaklis is in a unique position in this proceeding as the only expert witness that drew any independent conclusions based on his own quantitative analysis.

[2/] This calculation was based on PacifiCorp information that indicated that the Company's revenue requirement would increase $7.7 million following resolution of the Klamath issues. KOPWU/300, Iverson/5 n.1. PacifiCorp has since stated that it is not seeking an additional $7.7 million. Thus, the actual cost of service for Klamath irrigation customers results in total revenues of $3.4 million.

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Even assuming for the sake of argument that the opposing parties' criticisms are correct, these claims do not demonstrate that no return flows from Off-Project irrigation and drainage pumping reach PacifiCorp's hydroelectric facilities. Staff witness Bill McNamee testifies that "it is accurate that, for most agricultural projects, a portion of the irrigation water withdrawals will eventually return to the watershed's natural flow of surface and ground waters." Staff/1502, McNamee/10. In this case, Off-Project irrigators in the Upper Klamath Basin significantly supplement the natural return flow process by actively pumping drainage water back to the river system, pumping water out of closed basins, and draining otherwise submerged lands. These facts are not in dispute and there is no reasonable basis to claim that return flows do not occur—the question is one of degree.

Finally, certain parties indicated that they lacked time to fully study the return flow issues. See, e.g., ONRC et al./204, Balance/1. Any "surprise" expressed by these parties is unfounded given that KOPWU's counsel announced at the UE 171 oral argument in May 2005 that KOPWU was preparing a report to quantity the value of return flows from Off-Project lands. Oral Argument, Transcript at 77 (May 19, 2005). Other parties had ample time to conduct independent analysis and prepare evidence regarding the existence and value of Off-Project return flows. Rather than doing so, however, those parties have put forth flawed opinions that were formed based on about two weeks' worth of work on the issue.

a. The Balance Opinions Are Based on Conflicting Assumptions and Unsupported Criticisms Formulated in Two Weeks

Balance Hydrologics' opinions submitted on behalf of ONRC et al. provide the best example of why the Commission should not rely upon the hurried attempts to criticize KOPWU's evidence. KOPWU addresses the technical flaws in Balance's opinions below, but

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two general observations demonstrate why the Commission should assign no weight to this information regardless of the numerous specific flaws. First, Balance testified at hearing that their opinions were formulated by three separate authors over a period of two weeks. Hearing Transcript ("TR.") 298:15-21 (Balance). Balance's contradictory assumptions reflect the work of multiple individuals who are assigned the task of criticizing a particular piece of evidence in a short amount of time. Balance's brief review of these issues contrasts sharply with Mr. Rozaklis' authoritative study and Mr. Bartell's extensive background research and familiarity with Off-Project agricultural operations.

Second, Balance includes in its opinions a lengthy disclaimer-type statement that it had inadequate time to sufficiently review the Opening Testimony and that Balance did not complete "numerical review and quantitative analysis," in part, because KOPWU failed to provide backup information. ONRC et al./204, Balance/1. ONRC et al. agreed to the schedule in this proceeding, and Balance never requested from KOPWU any workpapers or "backup" computations supporting KOPWU's evidence. The failure to request such basic information does not justify Balance's inaccurate conclusions.

Finally, in a 1996 report, Balance recommended that ground water pumping in the Klamath Basin be increased in dry years in order to augment Klamath River flows. ONRC et al./205, Balance/35-37. Balance specifically recommended to develop additional ground water resources and to pump ground water directly into the Upper Klamath River Basin streams. Id. at Balance/36. Balance concluded: 1) "Pumped water would be naturally replenished during subsequent normal or wet years;" 2) "Pumped water released to the Klamath River is likely to generate electricity . . . during passage through the various reservoirs;" and 3) "Allowing for

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generation and transmission losses, it still seems that more power will be generated than will be used for supplemental pumpage." Id. at Balance/36-37. In other words, Balance previously agreed with the concepts that KOPWU has presented to justify the Off-Project rate. Balance's current opinions, which reflect a shift from previous recommendations, deserve no weight.

b. PacifiCorp's Witness Also Spent Two Weeks Formulating Criticisms of Mr. Rozaklis' Report

The opinions of PacifiCorp witness Steven Deverel also are based on his quick review of Mr. Rozaklis' report. Mr. Deverel was retained solely to rebut Mr. Rozaklis' report, he did not perform any quantitative analysis or conduct an independent study regarding return flows from Off-Project lands, and he spent two weeks drawing conclusions and preparing his written opinions. TR. 46:3-5, 57:25 – 58:1, 61:18-20, 64:9-11 (Deverel). Furthermore, Mr. Deverel's opinions are not based on any personal or first-hand knowledge of Off-Project areas—he has not visited the Lost, Sprague, Williamson, or Wood River basins. KOPWU/605 at 1-5. Again, such evidence simply does not stack up to the methodical and thorough study of this issue by KOPWU's witness based on extensive research and first-hand knowledge.

c. Disagreeing with KOPWU's Assumptions Is Insufficient to Demonstrate that Off-Project Return Flows Do Not Occur

No party has demonstrated that return flows from irrigation and drainage pumping on Off-Project lands are not occurring. Described below are the reasons why the criticisms of KOPWU's evidence are unfounded.

i. Mr. Rozaklis Correctly Assumed that Ground Water Pumping Does Not Directly Impact Stream Flows

Both Balance and Mr. Deverel criticized Mr. Rozaklis' assumption about the general lack of a direct and immediate connection between the Upper Klamath Basin deep

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aquifer and surface water. These criticisms are overstated given the disagreement among various authorities on this subject. Even assuming for argument's sake that the basis for their disagreement is sound, however, neither witness quantifies or even provides an estimate of what the impact is, if any, of their criticisms on Mr. Rozaklis' overall conclusion regarding Off-Project return flows. Instead, these witnesses disagree and leave it at that. Generalized criticisms assembled in a matter of days and unsupported by any alternative recommendation provide no basis to discredit Mr. Rozaklis' calculations.

Mr. Rozaklis explained his assumptions regarding the subsurface geology in the Upper Klamath Basin as follows:

> Previous groundwater studies have characterized this lower basalt layer as a partially confined regional aquifer with principal recharge zones within the upland areas located around the perimeter of the basin . . . . This lower basalt layer is extensively overlain by a zone of stratified deposits of tuff, agglomerate, shale, diatomite, sandstone and volcanic ash, which primarily confine groundwater in the aquifer.

KOPWU/202, Rozaklis/15 (internal citation omitted). Some of the reports in the record in this proceeding have identified this "zone of stratified deposits" described by Mr. Rozaklis as the "shallow" or "upper" aquifer. KOPWU/610 at 22.

With respect to ground water pumping by Off-Project irrigators under this hydrogeologic regime, Mr. Rozaklis concluded:

> Based upon inspections of well logs, I determined that most of the irrigation wells serving off-Project agricultural lands pump from a deep, highly permeable basalt layer that serves as the principal aquifer in the Upper Klamath basin.
>
> * * *
>
> While the hydrogeology of the Upper Klamath Basin is complex and not completely understood, it is reasonable to conclude that the

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> amounts of irrigation well pumping from this aquifer . . . generally do not affect surface stream flows *in a direct and immediate manner* . . . . Well hydrographs for typical off-Project irrigation wells . . . indicate that well pumping generally does not directly deplete stream flows; instead it reduces aquifer storage, which is in turn partially replenished during periods of unusually high precipitation, when stream flows are substantially above average. Therefore the return flows from groundwater supplied KOPWU lands are net gains to the stream system from the perspective of PacifiCorp's hydropower generation capacity.

KOPWU/202, Rozaklis/15 (internal citation omitted) (emphasis added). The record includes substantial disparity of evidence regarding whether the deep aquifer, the upper aquifer, and surface waters are hydraulically connected, and the various authorities that have studied the subject over the years have disagreed. See, e.g., KOPWU/609; KOPWU/610; TR. 284:24 – 285:8 (Rozaklis). The one area on which the authorities seem to agree is that this issue is complex and incompletely understood. Mr. Rozaklis reiterated this point at the hearing. TR. 284:24 – 285:8 (Rozaklis). Balance and Mr. Deverel have presented their positions as absolute and definitive, contrary to the evidence.

Despite the differing conclusions of various authorities on this subject, Balance stated its disagreement in the form of a hyperbolic assertion of a "fundamental hydrogeologic linkage between ground water in the deep aquifer and the surface-water system." ONRC et al./204, Balance/9-10. Mr. Deverel offered a slightly more tempered claim, asserting a "*potential* influence of pumping on streamflow" and acknowledging at the hearing that there "definitely is a less sufficient hydraulic connection . . . in some places between the upper and lower aquifers." PPL/2002, Deverel/6 (emphasis added); TR. 49:19-21 (Deverel). These witnesses' disagreement with Mr. Rozaklis seems to be based on the general assumption that ground water pumping will "drawdown" ground water levels, and thus, ultimately will impact

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stream flows due to the hydraulic connection between the upper aquifer, lower aquifer, and surface waters. See, e.g., PPL/2002, Deverel/23.

The evidence does not support the parties' claims about a drawdown in ground water levels in Off-Project areas that is impacting surface flows in a "direct and immediate manner." KOPWU/202, Rozaklis/15. Balance cited a 1974 USGS report by Leonard and Harris to support its claims of a "fundamental hydrogeologic linkage" between the deep basalt aquifer and surface water. KOPWU provided this report as KOPWU/610 and it actually contradicts Balance's claims:

> Most of the irrigation wells . . . more than about 50 feet in depth tap volcanic-rock aquifers containing confined ground water. Confined water is that in an aquifer that is enclosed above and below by beds of low permeability so that the water is under pressure greater or less than the atmosphere. In Klamath Basin, confined water bodies result largely from the prevalence of good confining layers and inclined water-bearing units that extend into nearby mountain recharge areas. The diatomite, tuff, and fine-grained sediments are excellent confining layers and, when combined with the faulting and tilting of underlying permeable rocks, provide the necessary structures for a series of confined systems.

KOPWU/610 at 22. These statements about a "confined" deep aquifer and the suitability of diatomite, tuff, and fine-grained sediments as a confining layer are virtually identical to Mr. Rozaklis' conclusions cited above. KOPWU/202, Rozaklis/15. Furthermore, Balance failed to identify the 1974 report's ultimate conclusion that "[p]resent pumping of ground water has had no detectable effect on water levels. On the basis of geologic, well, and water-level data, it is concluded that 1970 pumpage could be doubled or trebled in most areas without adverse effects on the aquifer." KOPWU/610 at 62.

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Mr. Deverel took issue with Mr. Rozaklis' use of the Glover method to model subsurface stream accretions from return flows, because the Glover method assumes a bounded alluvial aquifer. PPL/2002, Deverel/10; KOPWU/202, Rozaklis/14. According to Mr. Deverel, using this method was improper because **"previous studies refute the existence of an impermeable (no-flow) barrier between the alluvium and deeper basalt aquifer."** PPL/2002, Deverel/10 (emphasis in original). As described above, however, studies such as the 1974 USGS report also support the existence of a relatively impermeable (no-flow) barrier between the upper aquifer (or alluvium) and the deep basalt aquifer. KOPWU/610 at 17 ("In most places, water in the lower basalt unit is confined by the overlying Yonna Formation, but some discharge occurs locally from seeps and springs."). Thus, the point about contradictory previous studies that Mr. Deverel so boldly attempts to make in PPL/2002 is of little consequence, because there are previous studies that support Mr. Rozaklis' assumptions as well.[3/]

Mr. Deverel relied heavily on a 2004 Oregon Water Resources Department ("OWRD") Report authored by Gerald Grondin (the "Grondin Report") to support his claims, but KOPWU demonstrated at the hearing that Mr. Deverel had portrayed the Grondin Report in a manner that misrepresented the actual impact of ground water pumping in Off-Project areas regardless of any hydraulic connection. KOPWU/609 is an excerpt of the Grondin Report.

[3/] Mr. Deverel's point, for all practical purposes, is a red herring because the vertical conductivity of an aquifer is typically much smaller than its horizontal conductivity. Thus, water percolating beneath the soil zone will move laterally much more readily than it will move downward. Moreover, water that does flow downward in an aquifer will either reach an impermeable bottom or intersect the water table and be absorbed into the existing ground water. Figure 2 attached to Mr. Deverel's opinions shows a relatively shallow water table that intersects the local stream. PPL/2002, Deverel/23. Such conditions are consistent with the assumptions of the Glover method.

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The purpose of the Grondin Report was to determine whether ground water permits for thirty-two Eastern Lost River subbasin wells should mature into water right certificates or expire based on specified conditions. KOPWU/609 at 2. The permits for these wells had been issued following an alternative dispute resolution process (the "ADR Wells"), and the permit conditions provided that the permits expire if: 1) long-term ground water pumping had resulted in "excessively declining grounds water levels" as defined in OWRD rules; and 2) Lost River stage or Bonanza Big Springs flows would be significantly diminished as a result of pumping at the ADR Wells. Id. In addressing these two issues, the Grondin Report first determined that long-term ground water pumping had not resulted in excessive declines in ground water levels based on data taken from nine state observation wells over a period of 40 years. Id. at 10. The Report also included calculations indicating that pumping from the ADR Wells would result in varying levels of ground water "drawdowns." KOPWU/609 at 23. These calculations were not based actual measurements from the ADR Wells. See id.

Mr. Deverel stated in PPL/2002 that the evaluation of the effect of pumping from specific wells by the Grondin Report revealed that the "estimated cumulative drawdowns ranged from less than 2 feet to over 7 feet." PPL/2002, Deverel/8. Mr. Deverel failed to point out, however, that these conclusions reflected the Report's calculations regarding the ADR Wells rather than the evaluation of long-term ground water pumping based on 40 years of actual well data. See PPL/2002, Deverel/8 and KOPWU/609 at 22-25. Indeed, as opposed to the 2 to 7 foot drawdown for the ADR Wells cited by Mr. Deverel, the Grondin report found that "[o]ver a 40-yr period, a possible decline of 1 to 2 ft occurred in south Swan Lake Valley, Yonna Valley, and

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south Langell Valley, and a possible 3 ft decline occurred near Lorella."[4/] KOPWU/609 at 11. The Report concluded that "these declines are not considered excessive." Id.

In addition, the Grondin Report specifically states that "[m]ost of the ADR ground water permits and associated wells are . . . directly connected to the Lost River via Bonanza Big Springs" and that hydrogeologic data "indicate the potential negative impact upon the Lost River flow is greatest here." Id. at 24. In other words, Mr. Deverel took findings from the Grondin Report that focused on ADR Wells located in the most sensitive location covered by the study. The results here were exaggerated, and the Grondin Report's calculations regarding ADR Well drawdowns do not reflect the Report's broader conclusions regarding the relative lack of impact of long-term ground water pumping and the resulting impact on stream flows. Indeed, the Grondin Report specifically noted that "[e]lsewhere, compartmentalization and sedimentary deposits above the basalt appear to limit the rate of water exchange between ground water in the basalt and the river." Id. at 23.

The primary problem with Mr. Deverel's reliance on findings that exaggerated the impact of ground water pumping in the Eastern Lost River Basin as a whole is that Mr. Deverel then applied a "conceptual model" to illustrate how long-term ground water drawdowns potentially could impact stream flows. PPL/2002, Deverel/9. The "concept" depicted by Mr. Deverel is at odds, however, with the evidence that Mr. Deverel himself relied upon. In fact, the Grondin Report concludes based on 40 years of actual well data that there is a "possible decline" of only one to three feet over the past 40 years. KOPWU/609 at 11. The 1974 USGS Report

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[4/] The Grondin Report also noted that a total decline of 20 feet had occurred at one well location due to local aquifer properties and compartmentalization that amplified ground water use impacts during drought. KOPWU/609 at 11.

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reached roughly the same conclusion: "Data indicate that present development and use of ground water in the area have had no measurable effect on water levels or the volume of water in the aquifer." KOPWU/610 at 32. Mr. Deverel admitted at the hearing that he had not performed any quantitative analysis to support his "conceptual model." TR. 57:25 – 58:1 (Deverel). Furthermore, Mr. Deverel failed to show how many, if any, of the ADR Wells were within the Off-Project Area.

Finally, Mr. Deverel's conceptual model also ignores the Grondin Report's specific finding that:

> The data indicate ground water levels in the sub-basin decline and recover seasonally and over multiple years. The seasonal fluctuations correspond to the seasonality of ground water recharge and ground water use. The fluctuation over multiple years corresponds to variations in long-term precipitation trend.

KOPWU/609 at 10. The 1974 USGS Report also described this seasonal ground water recharge, and there is no reasonable basis to dispute that it occurs.[5/] KOPWU/610 at 23. Under these circumstances, even if the concepts upon which Balance and Mr. Deverel base their disagreement with Mr. Rozaklis are legitimate, the quantitative evidence in the record provides no basis to conclude that ground water pumping is having a "direct and immediate impact" on surface water flows. Mr. Rozaklis drew his conclusions with full knowledge of the Upper Klamath Basin hydrogeology and with the acknowledgment that historic ground water levels

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[5/] Balance claims at one point that "[u]se of deeper ground water sources can – and usually does – significantly and persistently lower stream flows, especially late summer and dry-year flows." ONRC et al./204, Balance/11. This statement is contrary to the conclusions in the Grondin report and the 1974 USGS Report, as well as Balance's own conclusion in support of its 1996 recommendation to pump additional ground water to augment stream flow that "[p]umped water would be naturally replenished during subsequent normal or wet years." ONRC et al./205, Balance/36.

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showed some decline. KOPWU/202, Rozaklis/15. Mr. Rozaklis drew his conclusions with all of this information in mind, and the assumptions supporting his conclusions are sound.

ii. The Evapotranspiration Arguments Do Not Reflect Off-Project Agricultural Practices

Mr. Deverel stated at the hearing that, in preparing his opinions, his "intention . . . was to try to identify possible areas of uncertainty in [Mr. Rozaklis'] ET calculations." TR. 64:9-11 (Deverel). Given this approach, it is not surprising that he was able to come up with a basis upon which to disagree with Mr. Rozaklis, but the evidence demonstrates that Mr. Deverel's arguments are unsound. First, Mr. Deverel argued that Mr. Rozaklis had underestimated ET on Off-Project lands, stating that previous reports show a "reference ET" in these areas that exceeds the amounts that Mr. Rozaklis assumed. PPL/2002, Deverel/12. Mr. Deverel's suggestion to use a reference ET for all Off-Project areas reflects a lack of familiarity with Off-Project irrigation practices. "Reference ET" is a generic value of evapotranspiration for a particular crop and, as Mr. Deverel acknowledged, this assumes that water remains in the root zone. TR. 59:21-23 (Deverel). Many Off-Project irrigators pump drainage water throughout the winter, however, to maintain the water level below the root zone. TR. 243:10-16 (Rozaklis). Thus, use of a reference ET in this situation would overstate ET.

Mr. Deverel also incorrectly claimed that Mr. Rozaklis' ET estimates were too low because "many of the lands in the Upper Klamath area are allowed to flood during October and are drained during February." PPL/2002, Deverel/12. When questioned more specifically about this point at hearing, however, Mr. Deverel acknowledged that certain of these areas are U.S. Bureau of Reclamation ("USBR") lands adjacent to Agency lake that are flooded during the winter to store water for Upper Klamath Lake. TR. 69:6-11 (Deverel). This stored water is later

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pumped back to Upper Klamath Lake during low flow periods. TR. 64:16 – 65:4 (Deverel). Furthermore, Mr. Deverel could not identify whether all the remaining lands the he had identified as being flooded during the winter were actively irrigated lands. TR. 60:13 – 61:4 (Deverel). Mr. Deverel did indicate that, based on his conversations with others, he understood that potatoes and small grains may be grown on some of these lands. TR. 60:25 – 61:4 (Deverel). The evidence demonstrates that these crops constitute only 14% of the total irrigated field crops grown in all of Klamath County. KOPWU/202, Rozaklis/11. Furthermore, Mr. Rozaklis testified that his conclusions regarding drainage of Off-Project lands were based on personal observations and "discussions with farmers who operate some of the lands." TR. 243:21-23 (Rozaklis). These conclusions merit more weight than Mr. Deverel's inaccurate speculation based on second-hand knowledge.

Mr. Deverel's argument about ET on Off-Project lands is unique in that he provides an actual estimate of the impact of Mr. Rozaklis' allegedly erroneous assumptions. PPL/2002, Deverel/12. Nevertheless, these calculations either: 1) rely on use of a reference ET, which has been shown to be inappropriate due to the pumping of water out of the root zone during the winter by many Off-Project irrigators; or 2) assume that "*all* drained lands in the Upper Klamath Basin are assumed to be allowed to flood during November through February." Id. (emphasis added). In reality, this flooding applies to little or no Off-Project acreage or involves USBR lands on which water is "stored" during the winter and then pumped back to Upper Klamath Lake during low flow periods to increase water volumes. TR. 68:19 – 69:11 (Deverel). Thus, Mr. Deverel's calculations are incorrect or, at the very least, substantially overstate any alleged "error."

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iii. Balance Falsely Claims that Water is Diverted from Upper Klamath Lake to Off-Project Lands

Balance criticizes Mr. Bartell and Mr. Rozaklis for failing to "account for the fact that irrigated agriculture in the Klamath Project and off-Project areas **removes many tens of thousands of acre feet each year** from the Klamath River for summer irrigation for use in the Lost River, Yonna, and Swan [Lake] Valley and other adjacent watersheds." ONRC et al./204, Balance/2 (emphasis in original). In other locations, Balance states that water is "diverted from Upper Klamath Lake to Yonna and Swan [Lake] Valleys ("Pine Flat") and other de-facto off-Project areas." ONRC et al./200, Balance/3. These statements are patently false. USBR witness Cecil Lesley testified that no water is diverted from the Upper Klamath Lake or Klamath River to Off-Project lands in the Lost River, Yonna, and Swan Lake Valley, and that USBR does not otherwise divert water from Upper Klamath Lake to Off-Project lands in Lost River drainage. TR. 170:23 – 171:5 (Lesley). Indeed, it is physically impossible to divert water from to Swan Lake, Yonna Valley, or Pine Flat from Upper Klamath Lake or the Klamath River using existing canals and diversions in the Project. See Reclamation/Service/21, Lesley/1. No canals extend to this area from Upper Klamath Lake. In fact, the only canals in the Yonna Valley area carry water diverted from the Lost River (not Upper Klamath Lake or Klamath River), and these diversions serve On-Project lands as opposed to Off-Project lands. Id.; TR. 319:1-10 (Bartell).

iv. The 2002 ODEQ Report Attributes Increased Runoff to Agricultural Development

Balance criticized Mr. Bartell's reliance on the 1999 USGS report provided as KOPWU/107 to claim that the increased runoff in the Sprague and Williamson River basins since 1950 was due to agricultural development. ONRC et al./204, Balance/5. Balance argued

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that the USGS report stated that "relating specific land-use activities to changes in runoff is impossible to asses using available data" and that "a statement of this type does not seem to provide a basis for claiming 'added water' in any significant amount." Id. Furthermore, Balance argued that no USGS staff had further examined why the increased flow is occurring. Id. Balance ignored, however, that the ODEQ followed up on this data in 2002 and attributed the increased runoff to agricultural development. Mr. Bartell provided an excerpt of the ODEQ report as KOPWU/108, and he cited the ODEQ report in the same paragraph in which he cited KOPWU/107. KOPWU/100, Bartell/14. As described above, the ODEQ report relied on data from the USGS report and other sources to conclude that "it is more likely that the combined effects of hydrologic disturbance that have increased water yields in the Williamson and Sprague River subbasins are related to agricultural activities in the drainage." KOPWU/108, Bartell/4.

v. Balance's Arguments About Conveyance Losses Ignore the Reality of Irrigating with Pumped Ground Water

Balance claimed at various points that KOPWU's evidence did not "include any estimation of water loss that occurs as a result of water transit" and that "[p]umped ground water travels through an extensive array of irrigation canals, laterals, and drains in the Klamath Basin." ONRC et al./204, Balance/12. Balance relied on a 1905 study of conveyance losses to claim that that Mr. Rozaklis had not properly accounted for conveyance losses or "potential losses to the deep aquifer"[6/] associated with diverting surface water and transporting it through Klamath Project ditches for irrigation. ONRC et al./204, Balance/13. Despite the fact that Mr. Rozaklis

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6/ Balance's claims about potential losses to the deep aquifer due to surface water diversions conflict with its statement that the artesian wells in the Klamath Basin reflect the presence of an "upward" regional gradient, which implies that "ground water cannot physically move into very deep zones." ONRC et al./204, Balance/4. If water cannot move through the ground into very deep zones, then diversion of surface water should create no "potential losses to the deep aquifer." Id. at Balance/13.

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explicitly stated in his report that he focused on return flows from irrigation by pumping ground water from Off-Project wells, Balance acknowledged at hearing that no conveyance losses would occur from ground water pumping for irrigation with sprinklers because the water is transported through pipes rather than by a ditch. TR. 302:4-13 (Balance). Furthermore, the 1905 study was based on diversions from Upper Klamath Lake, and the evidence demonstrates that no water is diverted from Upper Klamath to Off-Project lands in the Lost River drainage. TR. 170:23-25 (Lesley). Exhibit KOPWU/606 is the 1905 study that Balance cited, and the conclusions that Balance relied upon are based on transporting water through sixteen miles of open ditch. KOPWU/606 at 1. Balance was unaware of any Off-Project areas in which water was transported through sixteen miles of open ditch, had not performed any analysis of the typical distance between a well and the land that it irrigates, and admitted that it generally relied on assumptions about On-Project practices to formulate conclusions about Off-Project lands. TR. 302:14-22, 303:3-10 (Balance). The evidence demonstrates that Off-Project practices differ from On-Project practices.

vi. Weather Records from Yreka, California, Provide No Basis to Dispute KOPWU's Return Flow Evidence

Balance also claimed that a "long-term pattern of climatic fluctuations" demonstrated by weather data from Yreka, California indicated that these fluctuations "may bear very directly on claims of agriculturally-added water." ONRC et al./204, Balance/6. KOPWU demonstrated at the hearing the absurdity of using Yreka data to discuss weather in the Upper Klamath Basin. TR. 305:4-6 (Balance). First, Balance acknowledged the general rainfall differences between Yreka and Klamath Falls. TR. 305:6 (Balance). Second, Balance's own evidence shows Yreka having an "above-normal" year while Klamath Falls was having a

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"normal" year based on precipitation records from Yreka and Klamath Falls for the period 1905-1912. TR. 308:8-14 (Balance); ONRC et al./205, Balance/40. Balance indicated at the hearing that this data was the longest-term record available, but the lack of precision undermines its reliability for the purpose for which it was used. TR. 305:2-3 (Balance).

d. The Commission Should Disregard Staff's Evaluation of the Evidence According to a Standard that is Impossible to Meet

The Commission should assign no weight to Staff's recommendations regarding KOPWU's evidence of return flows from Off-Project lands. Staff did not specifically criticize any particular aspect of KOPWU's evidence, rather it asserted vague generalizations about "partially documented methods," "optimistic" generation estimates and electric prices, and failure to consider "water withdrawals." Staff/1502, McNamee/10, 14. It is notable that, despite the fact that KOPWU has submitted at least seven pieces of testimony and four different briefs regarding the Klamath irrigators' rates since this issue first arose in November 2004, Staff has not submitted a single discovery request to KOPWU during that time. TR. 372:12-18 (McNamee).

In Order No. 05-1202, both Chairman Beyer and Commissioner Baum stated that the Commission's ultimate decision regarding the appropriate rates for Off-Project irrigation customers would include consideration of evidence of any "benefits" that those provide to the PacifiCorp system. See Order No. 05-1202 at 10-11. Staff urges the Commission to examine whether Off-Project irrigation and drainage pumping benefits the PacifiCorp system according to whether the return flows from Off-Project lands exceed water withdrawals by Off-Project customers. Staff/1502, McNamee/10-11. As an initial matter, Staff's own testimony demonstrates this standard is impossible to meet if water withdrawals vs. return flows are the

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only issues considered. Staff states that "[b]y its very nature, agricultural irrigation is a consumptive process" and that the amount of water that agricultural irrigation and drainage pumping will return to the watershed "will always be something less than 100 percent." Id. at McNamee/10. When asked at the hearing if Staff would be satisfied if KOPWU provided evidence to demonstrate that Off-Project return flows exceeded water withdrawals, Staff witness McNamee testified that "I think if you could show that you're returning more water than you're taking out, I'd be real interested in how you're doing that before I'd agree to it." TR. 370: 6-8 (McNamee).

In addition, Staff's proposed standard ignores the historical increases in flow caused by conversion of land for agricultural production, which the Off-Project Agreement explicitly identifies as a basis for the fixed rate. KOPWU/202, Rozaklis/28. Mr. Rozaklis attributed the "drainage" of certain areas as the source of net quantifiable gains of water to the system as compared to the historical, "natural" use in those areas. Id. at Rozaklis/22. Mr. McNamee's simple comparison of withdrawals vs. returns ignores substantial return flows that are the result of agricultural development of Off-Project lands.[7/]

Staff's proposed standard also disregards the timing of return flows. Return flows from deep water well pumping are net gains to PacifiCorp because the real and identifiable flow increases occur during the irrigation season. Ground water recharge occurs during periods of high precipitation, when flows exceed PacifiCorp's generation capacity. KOPWU/202, Rozaklis/15. In short, groundwater pumping provides PacifiCorp access to underground reservoirs during the low flow season when the Company needs additional flows most. These

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[7/] Furthermore, Mr. McNamee has not provided any qualifications to make hydrologic analysis, nor has he performed any such analysis in this proceeding. KOPWU/604 at 4.

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underground reservoirs refill during high flow times when PacifiCorp has no generation capacity for additional flow.

Finally, Staff's proposed standard incorrectly attributes all of KOPWU's "withdrawals" to the Klamath watershed despite the fact that, in the case of the Lost River Basin, pumping "withdrawals" from "the system" are not withdrawals from the Klamath System. TR. 369:11 (McNamee). The Lost River Basin does not naturally drain into the Klamath River. See KOPWU/400, Bartell/5. Therefore, any flows of the Lost River entering the Klamath River are solely the creation of On-Project water users or Off-Project water users, and not an act of nature.

Staff's recommendation that the Commission apply a standard in this proceeding that is impossible to meet indicates that Staff is not taking seriously important issues that may have a dire impact on Klamath Basin farms and individuals. Given that Mr. McNamee has never visited the Sprague, Williamson or Wood River Basins, that Staff's data responses indicate that Mr. McNamee based his testimony on various websites, and that application of the standard applied by Staff would have prevented the Off-Project Agreement from being approved in 1956 or in any rate case since then, Staff's position with respect the Off-Project return flows deserves no weight. Finally, Staff's testimony reflects a bias that is not based on independent evidence or study.

B. A Substantial and Reasonable Basis Exists to Continue Including Off-Project Irrigation Customers in a Separate Customer Class

ORS § 757.230 authorizes the Commission to establish separate service classifications for customers based on considerations such as "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." The

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evidence demonstrates that Off-Project customers currently are included in a separate class of Klamath Basin irrigation customers and that those customers should continue to be treated separately, just as they have been for the last 50 years. Chairman Beyer and Commissioner Baum identified in Order No. 05-1202 many of the "unique circumstances" that KOPWU believes justify the inclusion of Off-Project irrigators in a separate customer class. The evidence in this proceeding demonstrates that Klamath irrigation customers' different usage characteristics also justify a different customer class. Taken together, these facts provide a substantial and reasonable basis for continuing to include Klamath irrigation customers in a separate customer class.

1. The Off-Project Agreement Distinguishes Off-Project Irrigation Customers

Staff witness McNamee agreed at the hearing that Off-Project customers currently are included in a separate class of customers and that the existence of the Off-Project Agreement has served as the basis for including those customers in a separate customer class. TR. 363:15 – 364:3 (McNamee). There is no dispute that the Off-Project Agreement does not expire in 2006. Staff has asserted that the Commission should treat the Off-Project Agreement as expiring because the On-Project Agreement expires in April 2006. OPUC Docket No. UE 171, Staff Response to PacifiCorp Motion for Summary Disposition at 3 (Apr. 28, 2005). This rationale and lack of any evidence to support this broad assumption will hardly stand up to judicial scrutiny. One of the primary bases upon which the Commission has distinguished Off-Project customers for the past 50 years remains unchanged, and eliminating the current customer classification for Off-Project Customers is unjustified.

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2. The Klamath River Basin Compact Distinguishes Klamath Irrigation Customers

The parties have previously provided extensive briefs on the meaning and intent of the Klamath River Basin Compact, ORS § 542.610 et seq. No party disputes that the Compact is both a state and federal law. Id.; Pub. Law No. 85-222, 71 Stat 497 (1957). Article 1 of the Compact states that the purpose of the Compact is:

> To facilitate and promote the orderly, integrated and comprehensive development, use, conservation and control thereof for various purposes, including, among others: The use of water for domestic purposes; the development of lands by irrigation and other means; the protection and enhancement of fish, wildlife and recreational resources; the use of water for industrial purposes and hydroelectric power production; and the use and control of water for navigation and flood prevention.

ORS § 542.620. Article IV of the Compact describes the objectives of the parties to the Compact in implementing the agreement and specifically addresses electric rates for irrigation and pumping in the Klamath River Basin:

> 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 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 lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells.

ORS § 542.620. The Oregon Attorney General has found that the Compact "is a contract between the states involved and the federal government; the parties are bound by the compact's terms." 39 Or. Op. Att'y Gen. 748, 749 (1979) (internal citation omitted). Furthermore, the Attorney General has found that it is "a general principle of statutory construction that compacts,

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like treaties, are to be given a liberal interpretation to carry out the intended objectives of the contracting parties." Or. Op. Att'y Gen. OP-5559 at 2 (1984).

Chairman Beyer stated in dissent in Order No. 05-1202 that the Legislature obviously "had electricity rates in mind and was thinking about the economic use of water for agricultural purposes" when it enacted Article IV of the Compact into law and that "[c]learly, the Assembly had irrigators in mind" as well. Order No. 05-1202 at 11. KOPWU agrees with Chairman Beyer. No other state statute addresses so directly the "rates" that apply to particular uses of electricity in a particular area of Oregon. The Commission should not overlook the specificity in the Compact, which unequivocally identifies 1) "power rates," for 2) "irrigation and drainage pumping, including pumping from wells," in 3) the "Klamath River Basin." ORS § 542.620. If this language had no meaning other than merely restating the just and reasonable standard in the OPUC statutes, then the specification of a particular use of electricity in a particular area of the state would be superfluous. Statutes are not interpreted in this manner. In re Phelps, 122 Or. App. 410, 415 (1993) ("Whenever possible, we avoid construing statutes in a manner that renders one or more of their provisions meaningless.").

If the above-quoted language from the Compact is to be given any meaning in relation to the electric rates for electricity for irrigation and drainage pumping customers in the Klamath River Basin, then this Commission is the only body that can give effect to that meaning. Inclusion of the terms "reasonable" in the Compact implies that the appropriate decision maker will make a fact-based determination about what are the lowest reasonable rates, and the OPUC is the only agency in Oregon with the authority and expertise to make such a determination. If the Commission does not consider and give meaning to the "lowest power rates which may be

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reasonable" language, then no other agency will, and that phrase will essentially be meaningless. KOPWU's witnesses have provided extensive evidence to support continuing to serve Off-Project irrigators under a different rate schedule that includes lower rates. The 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 customer class.

3. Off-Project Customers Exhibit Different Usage Characteristics and Cost of Service Than Schedule 41 Customers

Ms. Iverson demonstrated that Off-Project customers should remain in a separate customer class because those customers exhibit different usage characteristics than customers on the standard irrigation tariff. The evidence demonstrates that Off-Project irrigation customers' usage is almost four times as great as Schedule 41 customers, and that the additional usage is "largely attributable to the many large deep water wells on Off-Project lands." KOPWU/300, Iverson/3; KOPWU/100, Bartell/9. A deep water well that is 100 feet deep uses approximately ten-fold the amount of electric power that is required for a low-lift pump to move surface water 10 feet out of a stream or lake. KOPWU/100, Bartell/11. Klamath Water Users Association ("KWUA") witness Don Schoenbeck confirmed that Klamath irrigation customers have greater average peak loads as well. The average Schedule 33 customer has a peak load greater than 45 kW, while the average Schedule 41 customer's peak load is less than 20 kW. KWUA/102, Schoenbeck/6.

PacifiCorp's marginal cost of service study supports the distinction between Klamath Basin irrigation customers and Schedule 41 customers. That study reflects that the cost to serve Klamath irrigation customers as a whole is approximately 15% less than Schedule 41

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customers, and that the target functionalized class revenue requirement is 16% less than for Schedule 41 customers. KOPWU/300, Iverson/4-5. For delivery revenues only, the cost to serve Klamath irrigation customers is 26% lower than other irrigation customers. KOPWU/500, Iverson/2. PacifiCorp witness David Taylor acknowledged these facts in testimony, concluding that "the overall cost per kWh for the Klamath irrigators is lower than for other irrigators." PPL/412, Taylor/12. Finally, Ms. Iverson demonstrated that PacifiCorp's current Schedule 41 rates do not appropriately reflect the reduced cost of serving Klamath irrigation customers. KOPWU/300, Iverson/5. If Klamath irrigation customers were served under Schedule 41, the base rates paid by Klamath irrigators would be only 2.3% less than other irrigators. Id. This plainly does not reflect that Klamath irrigators are 16% less costly to serve.

PacifiCorp essentially has ignored any results of its marginal cost of service study in this proceeding and instead PacifiCorp witness William Griffith claimed that Klamath irrigation customers are not unique because those and Schedule 41 customers "both groups contain a full range of customer usage characteristics, from small to large." PPL/1214, Griffith/7. Mr. Griffith's argument proved meaningless, however, when PacifiCorp acknowledged that all its "Oregon rate schedules contain customers that cover a full range of usage." KOPWU/502, Iverson/1. The usage characteristics and cost to serve Klamath irrigation customers provide a substantial and reasonable basis to continue to maintain the separate class of Schedule 33 customers.

4. The Value from Off-Project Irrigation and Drainage Pumping Distinguishes Off-Project Customers

KOPWU has thoroughly documented and described its evidence that demonstrates the return flows from irrigation and drainage pumping on Off-Project lands. There

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is no evidence that any other PacifiCorp customer provides a similar benefit. Counsel for PacifiCorp asked Mr. Schoenbeck at the hearing whether paving his driveway would provide a similar benefit to PacifiCorp. TR. 222:11 – 223:4 (Schoenbeck). This analogy is absurd. Off-Project irrigators actively pump drainage water to the Klamath River System that will not otherwise reach surface water, including pumping water out of closed basins and draining previously submerged lands. KOPWU/100, Bartell/13. The evidence demonstrates that this pumping results in actual return flow in substantial volumes. Furthermore, the Klamath Irrigation Project has been developed over the last 100 years as a means to efficiently withdraw water from the Klamath River system and deliver return flows to the river, including return flows from Off-Project lands. The Commission has recognized the unique history and circumstances surrounding the development of irrigated agriculture in the Upper Klamath Basin, and there is no evidence that the same relationship exists anywhere else in PacifiCorp's service territory. The value provided by Off-Project customers provides a substantial and reasonable basis to continue to include those customers in a separate customer class.

C. The Off-Project Rate Should Remain in Effect for Off-Project Irrigation Customers if Those Customers Continue to Be Included in a Separate Class of Irrigation Customers

The evidence in this proceeding demonstrates that Off-Project irrigation customers should continue to be included in a separate customer class under Schedule 33, and that the appropriate rate for Off-Project irrigation customers under that schedule is the Off-Project rate. That rate is cost-justified based on the return benefit from Off-Project customers, it does not expire in April 2006, and there is no basis to alter that rate in this proceeding.

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Even if the Commission terminates the Off-Project rate, the facts and circumstances described above justify maintaining Schedule 33 customers as a separate customer class. Eliminating the separate class of Klamath irrigation customers would mark a dramatic and fundamental change in the rates that this Commission has established for PacifiCorp for the last 50 years and would sever the historic link between electric power and agricultural irrigation pumping in the Upper Klamath River Basin. If the Commission decides to establish a new cost-based rate for Klamath irrigation customers, KOPWU recommends that the new rate reflect the lower cost of providing service to those customers. As Ms. Iverson testified, PacifiCorp's cost of service study reflects the lower cost to serve Klamath irrigation customers. KOPWU/300, Iverson/5 n.1. To any new cost-based rate, KOPWU recommends that the Commission apply a rate credit that reflects the value that Off-Project irrigation provides to the PacifiCorp system. If the Commission disagrees with KOPWU's estimate of this value, the Commission should order a subsequent proceeding to determine the appropriate amount. Finally, as described below, if the Commission orders a new cost-based rate for Off-Project irrigation customers, the rate mitigation protections of ORS § 757.227 apply.

II. Any Change in the Off-Project Rates Must Be Implemented Consistent with the Commission's Statutes and Policies

Governor Kulongoski signed SB 81 on July 21, 2005, enacting into law rate mitigation measures designed to lessen the devastating economic impact of the unprecedented rate increase proposed by PacifiCorp in this proceeding. Both the Klamath irrigators and PacifiCorp supported SB 81, recognizing the need for customer protections in the event that the Klamath contracts were terminated and new cost-based rates for Klamath irrigators were established. Since its passage, SB 81 has been codified in ORS § 757.227.

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KOPWU and PacifiCorp now disagree over whether the statutory language stating that the rate mitigation will apply to the total charges for electricity service, "including all special charges and credits," includes the Bonneville Power Administration ("BPA") agricultural pumping credit. KOPWU's interpretation gives full effect to the meaning of the statute and provides Klamath irrigation customers with the full benefit of the designated rate mitigation. PacifiCorp, on the other hand, proposes to ignore the statute's plain language and exclude the BPA credit, which would result in customers receiving rate credits for two years less than ORS § 757.227 allows. PacifiCorp claims that KOPWU's interpretation violates federal law, but the Company's argument is based on the incorrect assumption that the Klamath contracts will remain in effect if the rate mitigation provisions of ORS § 757.227 apply.

A. The Rate Mitigation Protections in ORS § 757.227 Apply if the Commission Moves Off-Project Irrigation Customers to Cost-Based Rates

ORS § 757.227 generally provides that, if the Commission moves Klamath irrigation customers from the current contract rate to a new cost-based rate in this proceeding, then the Commission will order PacifiCorp to provide rate credits to those customers in amounts that ensure no customer receives a total annual rate increase, including all special charges and credits, no greater than 50% for a period of seven years. KOPWU and PacifiCorp disagree about the meaning of ORS § 757.227(4), which states:

> For the purpose of determining the increase in the cost of electricity to a class of customers by reason of a transition described in subsection (2)(a) of this section, the commission shall:
>
> (a) *Include the total charges for electricity service, including all special charges and credits* other than the rate credit provided under this section; and
>
> (b) Exclude any local taxes or fees paid by the class of customers.

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ORS § 757.227(4) (emphasis added). According to PacifiCorp, the language referring to "all special charges and credits" does not include the BPA credit. KOPWU disagrees, and the plain language of the statute supports KOPWU's interpretation.

To resolve this issue, the Commission should apply the three-step statutory interpretation analysis described in PGE v. BOLI, 317 Or. 606, 610 (1993). Under this analysis, the Commission's task in interpreting the "including all special charges and credits" language is to discern the legislature's intent. Id. at 610. In the first step, the text of the statute is examined and provides the best evidence of the legislative intent. Id. The first step also involves examining the provision at issue in the context of other provisions of the same statute as well as related statutes. Id. at 611. In considering the text and context of the statute, the Commission can also utilize rules of construction that bear directly on the meaning of the text or the interpretation of the provision in context. Id. These rules provide that words of common usage typically should be given their plain, natural, ordinary meaning, and that use of the same term throughout a statute indicates that the term has the same meaning throughout the statute. Id.

Only if the intent of the legislature cannot be discerned from examining the text and context of the statute, should the Commission proceed to the second step of the analysis, which involves consideration of the legislative history. Id. at 611-12. If the legislature's intent still remains unclear after examining the text and context of the statute as well as the legislative history, then the last step is to resort to general maxims of statutory construction. Id. at 612. The application of the PGE v. BOLI analysis in this case demonstrates that KOPWU's interpretation is correct and that PacifiCorp's interpretation would rob Klamath irrigation customers of a valuable year of rate mitigation, undermining the legislature's intent.

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B. PacifiCorp's Interpretation Misunderstands ORS § 757.227 and Conflicts With the Plain Language of the Statute

The plain meaning analysis of ORS § 757.227 is straightforward but has been unnecessarily complicated by PacifiCorp asserting a patently incorrect interpretation. Mr. Griffith has claimed that the "reference to 'all special charges and credits' was meant to refer to horsepower contract minimums that are special charges applicable to some Klamath Contract customers" and does not refer to the BPA credit. PPL/1216, Griffith/6. Mr. Griffith explained at the hearing that his reading "was that the special charges and credits related to other parts of the contract rate, such as horsepower charges, which would also increase by fifty percent a year." TR. 129:5-8 (Griffith). Mr. Griffith stated that this was his "interpretation of what [SB 81] said" and that he had no documentation to support that position. Id. at 129:11-16 (Griffith).

1. Mr. Griffith Incorrectly Assumes that Charges in the Klamath Contracts Remain in Effect if ORS § 757.227 Applies

Mr. Griffith's interpretation reflects a lack of understanding of ORS § 757.227. The rate mitigation provisions in ORS § 757.227 apply only if the Commission terminates the current contract rates and moves Klamath irrigation customers to a new cost-based rate. If the Commission is applying ORS § 757.227, the "other parts of the contract rate, such as horsepower charges," will be irrelevant because the Klamath contracts will no longer be effective and the horsepower charges are not "special charges" that would apply. TR. 129:5-8 (Griffith). Mr. Griffith's testimony refers to a "SB 81 Klamath Contract rate," which appears to be based on the misunderstanding that the Klamath Contracts would remain in effect during the ORS § 757.227 rate mitigation period:

> The effect of Ms. Iverson's proposal is that individual customers would be charged different SB 81 Klamath Contract rates based on

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> whether or not they receive the BPA credit. Moreover, the BPA credit can routinely change. Under Ms. Iverson's proposal, any change to the BPA credit would require a change to the SB 81 Klamath Contract rate for some customers.

PPL/1216, Griffith/6. ORS § 757.227 does not specify that PacifiCorp must provide Klamath customers a particular *rate* during the mitigation period; it specifies that those customers will receive *rate credits*. Exhibit PPL/1217 illustrates PacifiCorp's misunderstanding in chart form, depicting the "SB 81 Klamath Contract rates" that would apply during the seven-year rate mitigation period, and indicating that the horsepower contract minimums in the Off- and On-Project Agreements would remain in effect. See also PPL/1216, Griffith/7. Continuing to apply these charges is inconsistent with ORS § 757.227 and is particularly curious given PacifiCorp's argument that the On-Project Agreement expires in April 2006. PPL/100, Furman/13. Given the inconsistency and confusion in PacifiCorp's position regarding the potential application of the ORS § 757.227 rate credits, KOPWU believes that PacifiCorp's claims regarding implementation of the law generally should be assigned little or no weight.[8/]

Mr. Griffith has claimed that including the BPA credit in the calculation of the correct ORS § 757.227 rate credit "dilutes the BPA credit" and is discriminatory, because it "would mean that customers who received the BPA credit would be paying a different rate than customers – would be paying a different contract rate than customers who don't receive the BPA credit, just because they receive the BPA credit." TR. 127:8-12 (Griffith). These arguments also

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8/ Attorneys for KOPWU and PacifiCorp jointly drafted SB 81 with the assistance of the Office of Legislative Counsel. At the hearing, Mr. Griffith corrected his testimony to reflect that KOPWU and PacifiCorp had agreed at the time of drafting that the rate mitigation provisions would apply to existing metering points rather than specific customers. TR. 103:11 – 104:15, 105:21 – 107:19 (Griffith). It was of primary importance to KOPWU that SB 81 apply to existing metering points to allow transfer of property in certain circumstances subject to the rate mitigation provisions. KOPWU/601 at 2-3.

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appear to be based on the incorrect premise that the Klamath contracts will continue during any the period of any rate mitigation under ORS § 757.227.

Furthermore, the argument that considering the BPA credit in calculating the ORS § 757.227 rate credit would violate federal law is a red herring. Despite Mr. Griffith's insistence that ORS § 757.227 cannot be implemented as KOPWU suggests, PacifiCorp manages to deal with many more complex issues without violating federal law. For Klamath irrigation customers alone, PacifiCorp provides different rates for different customers (Off-Project Rate, On-Project Rate, and the On-Project drainage rate) that do not all qualify for the BPA credit. PacifiCorp manages to administrate the BPA credit appropriately under the current circumstances, and the Company has not offered a valid basis why it cannot do so if ORS § 757.227 applies. To the extent that PacifiCorp's concern about non-qualifying customers receiving the BPA credit is legitimate, it is easily addressed by placing qualifying customers on one rate schedule and non-qualifying customers on another. Approximately 2% of Off-Project customers do not qualify for the BPA credit. TR. 151:14-23 (Griffith). KOPWU is not suggesting that non-qualifying customers should receive the benefits of the BPA credit.

2. The Provisions of ORS § 757.227 that Address the Rate Credit Demonstrate that the "Net" Rate Increase Must Not Exceed 50%

Mr. Griffith emphasized at the hearing that subsection ORS § 757.227(5) states that the law "applies only to customers of an electric company that purchase electricity at metering points that before the transition described in subsection (2)(a) of this section were eligible for rates that were set under contracts entered into before 1960 and remained unchanged throughout the period of the contract." TR. 118:10-15 (Griffith). According to Mr. Griffith, the "term 'remain unchanged' means the base contract rates" and the reference to base contract rates

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means that "base" rate should not increase more than 50% under the statute. TR. 118:16-23 (Griffith).

First, Mr. Griffith's assumption ignores that ORS § 757.227(5) does not address the determination of the appropriate rate credit for Klamath irrigators—it defines what customers are eligible for the rate credits. Mr. Griffith stated at the hearing that "maybe there's a conflict here between sections (4) and sections (5)," but no conflict exists. TR. 119:14-15 (Griffith). The two provisions address separate issues.

Second, the subsections of ORS § 757.227 that define how to calculate the rate credit do not refer to the "rates that were set under the contract" language that Mr. Griffith emphasizes. ORS § 757.227(2) specifically states that the "rate increase" to which the rate mitigation applies is one that results in an "increase in the cost of electricity" for the Klamath customers that exceeds 50%. ORS § 757.227(4) defines how the Commission should calculate the "increase in the cost of electricity" referred to in subsection (2), stating that it shall include the "total charges for electricity service, including all special charges and credits." ORS § 757.227(3) defines the rate credits that PacifiCorp must provide, specifying that the "rate credits . . . 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."

Under basic rules of statutory construction, the Commission should interpret subsection (3) as referring to the same "rate increase" as subsection (2), and the "rate increase" in subsection (2) is to be calculated according to the "total charges for electricity service, including all special charges and credits." PGE, 317 Or. at 611 (Use of the same term throughout a statute indicates that the term should be given the same meaning in each provision);

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ORS § 757.227(4). Thus, for purposes of determining the appropriate SB 81 rate credit, the Commission must mitigate whatever rate increase occurs when credits such as the BPA credit are included. In other words, the plain language of ORS § 757.227 demonstrates that it is the "net" increase that can be no greater than 50%, not the "base" rate increase, as Mr. Griffith contends.

3. A Common Sense Reading Demonstrates that PacifiCorp is Incorrect

Common sense dictates that "credits" includes the BPA credit. The BPA rate credit is a "credit" that applies to many of the Klamath irrigation customers' electric service. PacifiCorp's Schedule 98 specifically states that all "bills of qualifying agricultural pumping customers on Schedule 33" shall receive the credit, and the Company does not dispute the applicability of the credit to those customers. Thus, according to the statute's plain meaning, the BPA credit should be taken into account when calculating the overall amount of the ORS § 757.227 rate credit in any years that the rate mitigation applies.

Other provisions of ORS § 757.227 confirm this interpretation. As described above, ORS § 757.227(4) describes how the "total cost of electricity" is to be determined, and subsection (4)(b) explicitly excludes from the calculation any local taxes or fees paid by the class of customers. There is no specific exclusion of the BPA credit, and it is reasonable to assume that the legislature would have created such an exception if it would have intended one to apply. See Bayridge Ass'n Ltd. Partnership v. Dep't of Revenue, 321 Or. 21, 31 (1995). The most basic rule of statutory construction provides that the Commission should not "insert what has been omitted" into the statute. ORS § 174.010. PacifiCorp's interpretation would insert into ORS § 757.227(4)(b) a provision excluding the BPA credit.

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C. PacifiCorp's Interpretation Undermines the Statutory Intent

Attachment 1 to this Opening Brief is a chart that demonstrates that PacifiCorp's interpretation conflicts with the statutory intent that Klamath irrigation customers have the opportunity for seven years of rate mitigation if those customers are moved to new cost-based rates.[9/] The following tables summarize the percentage revenue increases and the annual rate credits depicted in Attachment 1.

PacifiCorp's Proposal								
	Y1	**Y2**	**Y3**	**Y4**	**Y5**	**Y6**	**Y7**	**Y8**
% Revenue Increase	95%	78%	69%	64%	60%	23%	0%	0%
Rate Credit (¢/kWh)	5.561	5.062	4.275	3.045	1.166	0.000	0.000	0.000

KOPWU's Proposal								
	Y1	**Y2**	**Y3**	**Y4**	**Y5**	**Y6**	**Y7**	**Y8**
% Revenue Increase	50%	50%	50%	50%	50%	50%	50%	12%
Rate Credit (¢/kWh)	5.710	5.466	5.099	4.549	3.726	2.491	0.642	0.00

These tables demonstrate that KOPWU's proposal will result in Off-Project customers receiving a full seven years of rate mitigation, with 50% increases in revenues per year. PacifiCorp's proposal, on the other hand, would result in Off-Project customers reaching the current revenues under Schedule 41 in Year 6, which would deprive Klamath customers of two years of valuable rate mitigation. The legislature did not intend such a result.

In addition, Mr. Griffith stated at the hearing that the rates for Klamath irrigation customers under ORS § 757.227 would not approach the standard tariff rate in seven years under KOPWU's proposal. TR. 120:7-16 (Griffith). According to Mr. Griffith, Klamath customers "would be at about one-half of tariff . . . at the end of seven years." Id. at 120:11-13 (Griffith).

9/ Ms. Iverson developed Attachment 1 using information from KOPWU/301 and PPL/1217. Attachment 1 assumes current Schedule 41 rates and revenues, and depicts the revenues and rate credit for Off-Project customers only. Attachment 1 also assumes that Off-Project customers will be served at Schedule 41 rates after the ORS § 757.227 rate mitigation period.

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Attachment 1 demonstrates that Mr. Griffith's statement is incorrect. KOPWU's proposal results in revenues from Off-Project customers approximating current Schedule 41 revenues for those customers at the end of the seven years, with only a 12% increase in year 8. The legislature did not intend to prematurely extinguish the rate mitigation for Klamath customers by excluding the BPA credit, and it would be unlawful and poor policy to adopt such an arbitrary, unnecessarily harsh, and inaccurate interpretation.

III. The Off-Project Rate Is Consistent With the Public Interest and Should Not Be Modified

Any decision to set new, cost-based rates for Off-Project customers necessarily involves a decision to terminate or alter the Off-Project Agreement. KOPWU believes that altering the terms of a contract or prematurely terminating a binding agreement are issues that are more appropriately left to a court and urges the Commission to abstain from deciding such matters. KOPWU argued this point in detail on pages 20-33 of its Response to PacifiCorp's Motion for Summary Disposition in UE 171, which KOPWU incorporates herein by reference. The Commission did not resolve that issue in UE 171, concluding that, regardless of the particular terms in the Off-Project Agreement, the Commission has authority to review the terms of any contract for the sale of electricity to retail customers and, "upon a proper showing," modify the contract rate. Order No. 05-726 at 4. The Commission cited American Can v. Davis as the primary descriptor of this authority. Id., citing 28 Or. App. 207, 224 (1977).

American Can involved the appeal of OPUC Order No. 74-658, in which the Commissioner altered a fixed rate contract rate based on a showing that that the contract: 1) impaired the ability of the utility to continue its service; 2) cast upon other customers an excessive burden; 3) was unduly discriminatory; and 4) adversely affected the public interest.

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Re Pacific Power & Light Co., OPUC Docket No. UF 3074, Order No. 74-658 at 32 (Sept. 30, 1974). The Oregon Court of Appeals has described the "American Can doctrine" as the "Oregon analog" of the federal "Mobile-Sierra" doctrine that governs the Federal Power Commission's ("FPC") authority to alter a fixed rate contract. Oregon Trail Elec. Consumers Cooperative, Inc. v. Co-Gen Co., 168 Or. App. 466, 478 n.9 (2000). In Oregon Trail, the Court of Appeals summarized the background and purpose of the Mobile-Sierra doctrine as follows:

> In each of the Mobile-Sierra cases, the parties had entered into contracts setting fixed prices for the long-term sale of power. Thereafter [a party] applied unilaterally for a price modification under provisions that permitted the appropriate federal regulatory agency, upon application, to review prices for whether they were unjust, unreasonable, unduly discriminatory, or preferential. The Court concluded that the statutes merely described the agencies' power to review rates upon a proper request; they neither conferred on the parties a right to that review nor gave the agencies independent regulatory power to modify price on that basis. Consequently, the fact that the parties had contracted for firm prices in each case meant that they had bargained away their right to apply for modification of prices on the ground that they were unjust and unreasonable. Because of the importance of preserving the integrity of long-term utility contracts, the Court held that the agencies were required to reject the applications for modification.
>
> *In reaching that conclusion, the Court specifically contrasted the regulatory provisions for review of prices as unjust and unreasonable with other provisions that gave the agencies unilateral regulatory authority to modify prices on the ground that they were contrary to the public interest.* The Court noted that, although parties who contractually agreed to a fixed purchase price were precluded from 'unilaterally changing their contracts simply because it is in their private interests to do so,' that fact did not deprive the regulatory agencies of their authority under the federal statutes to intervene and adjust prices that were contrary to the public interest. That power, the Court observed, remained in place notwithstanding the parties' contractual agreement.

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Id. at 478-79 (internal citations omitted) (emphasis added), discussing United Gas Pipeline Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348 (1956).[10/] The "federal statutes" that the Court of Appeals referred to were the Federal Power Act and the Natural Gas Act, which both include "just, reasonable, and nondiscriminatory" standards and "file and suspend" procedures that are virtually identical to those in ORS §§ 757.205-757.220. Thus, according to the Oregon Court Appeals' description of the federal "analog" to American Can, the authority to review a fixed rate contract does not derive from regulatory power to review whether rates proposed by a utility are just, reasonable, and nondiscriminatory. Oregon Trail, 168 Or. App. at 478-79. Instead, the authority to examine a contract rate is found in the general grant of power to regulate in the public interest. Id. at 479; see, e.g., ORS § 756.040(2) ("The commission is vested with power and jurisdiction to supervise and regulate every public utility . . . in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction."). Under these circumstances, the Commission correctly determined in Order No. 74-658 that it should not alter a fixed rate contract without a finding that the rate is adverse to the public interest. That standard should apply in this proceeding as well if the Commission intends to terminate or alter the Off-Project rate.

The OPUC derived the four-part test applied in Order No. 74-658 from the Sierra case, in which the Court set aside a FPC order that deemed a long-term, fixed rate contract unreasonable "solely because it yield[ed] less than a fair return on the net invested capital." Sierra, 350 U.S. at 354-55. The Court found that although the FPC could not *impose* such a low

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[10/] The contract at issue in Oregon Trail was an agreement between a co-generation facility and an electric cooperative for the purchase of electricity that was governed by the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Oregon Trail, 168 Or. App. at 468-70. The court determined that the OPUC lacked authority under PURPA to alter the contract rate. Id. at 482.

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rate on a utility, the Federal Power Act did not prevent a utility from agreeing to such a rate or entitle a utility to relief from that rate if such an agreement was made. Id. at 355. The Court stated that the "the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other customers an excessive burden, or be unduly discriminatory." Id. The Court remanded the order for the FPC to determine whether the contract was adverse to the public interest. Id. The four-part standard enunciated in Sierra and adopted by the Commission in Order No. 74-658 should apply in this proceeding as well.[11/]

A. The Evidence Demonstrates that the Off-Project Agreement Promotes the Public Interest

No party has provided evidence in this proceeding to justify terminating the Off-Project according to the Commission's four-factor test. The Off-Project Agreement in no way impairs PacifiCorp's ability to continue providing service. KOPWU's evidence demonstrates that return flows from irrigation and drainage pumping on Off-Project lands benefit the PacifiCorp system by allowing the Company to generate additional low-cost hydropower. KOPWU/202, Rozaklis/6. This benefit facilitates PacifiCorp's service to customers at lower costs. Furthermore, the Commission approved an $834 million total company revenue

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[11/] PacifiCorp argued in UE 171 that the heightened standard for alteration of a fixed rate contract did not apply because the American Can court found that Mobile-Sierra standards did not apply to contracts between utilities and retail customers. OPUC Docket No. UE 171, PacifiCorp Reply to Responses to Motion for Summary Disposition at 14 (May 12, 2005). PacifiCorp was incorrect. The Oregon Trail court stated that the American Can doctrine is the "Oregon analog" of the Mobile-Sierra doctrine. Oregon Trail, 168 Or. App. 466, 478 n.9. Oregon Trail was decided twenty-three years after American Can and represents the Court of Appeals' most recent decision on this subject. Furthermore, the American Can court's refusal to apply Mobile-Sierra standard was dicta and otherwise curious, given that the court's task was to review the Commissioner's decision, not to decide issues that already had been resolved by the Commissioner. Finally, the American Can court's conclusion that the OPUC's ability to alter a contract rate stems from the authority to review whether rates are just and unreasonable does not reflect the U.S. Supreme Court's conclusion that such power is derived from general authority to regulate in the public interest. Compare American Can, 28 Or. App. at 224 and Mobile, 350 U.S. at 346; Sierra, 350 U.S. at 355.

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requirement for PacifiCorp in UE 170. Even if PacifiCorp served Off-Project customers at the current Schedule 41 rates, the revenues attributable to those customers would constitute less than 1% of the Company's total revenues. This minimal amount has no impact on PacifiCorp's ability to provide service.

The Off-Project Agreement also does not burden other customers. The value of return flows from Off-Project lands provides at the very least $5 million in value to PacifiCorp in terms of increased hydroelectric generation. As Ms. Iverson's testimony demonstrates, this amount more than covers any alleged shortfall between the cost to serve Off-Project irrigators and the revenues collected from those irrigators under the Off-Project Agreement. KOPWU/300, Iverson/7.

The Off-Project rate is not discriminatory. Off-Project irrigation customers are included in a separate class of customers, and the Off-Project Agreement, the Compact, and the circumstances surrounding the development of the Agreement have justified the Off-Project rate for the last 50 years. There are no similarly situated customers that do not receive the Off-Project rates under these circumstances. Thus, the contract rate does not result in rate discrimination.

Finally, the Off-Project rate is consistent with the public interest. Return flows from Off-Project irrigation and drainage pumping benefits the PacifiCorp system. Furthermore, the Compact expresses a policy that promotes "irrigation and drainage pumping, including pumping from wells" within the Klamath River Basin by calling for the lowest power rates which may be reasonable for those purposes. ORS § 542.620. The evidence demonstrates that the development of agricultural pumping on Off-Project lands primarily took place after the Off-

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Project was executed in 1956. KOPWU/100, Bartell/5-6. Maintaining the Off-Project rate promotes the policies in the Compact.

B. The Heightened Standard is Intended to Protect Investments Such As Those Made by Off-Project Customers

The Mobile case demonstrates that the basis for the heightened standard that governs alteration of fixed rate contracts is to protect the types of investments that Off-Project customers have made. The Mobile Court stated that limiting the alteration of fixed rate contracts to situations in which the contract was adverse to the public interest "affords a reasonable accommodation between the conflicting interest of contract stability on the one hand and public regulation on the other." Mobile, 350 U.S. at 344. According to the Court, the lack of authority in the Natural Gas Act for a gas company to unilaterally alter a long-term agreement preserved "the integrity of contracts," which provided certainty that allowed customers to make substantial investments in reliance on fixed rate agreements. Id. At the same time, however, denying the power to unilaterally change a contract "in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest." Id.

Mr. Bartell testified that the execution of the Off-Project Agreement altered the path of irrigation development on Off-Project lands because it promoted the development of irrigation from groundwater pumping rather than constructing dams and canal systems to deliver water to Off-Project lands. KOPWU/100, Bartell/5-6. Page 3 of Exhibit KOPWU/609 includes a table that shows that the majority of wells for irrigation purposes in the Eastern Lost-River Sub-basin were constructed after 1956. Furthermore, Mr. Bartell testified that "landowners have invested millions of dollars in irrigation systems and irrigation efficiency based on the contracted

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rate." KOPWU/100, Bartell/8. Altering or terminating the Off-Project rate in this proceeding would undermine the substantial investments that Off-Project customers have made in reliance on the Off-Project rate.

IV. The Proposal to Decouple Dam Charges Does Not Appear to Impact the Off-Project Agreement

Chief ALJ Grant requested that the parties address the possible implications of the Federal Energy Regulatory Commission's ("FERC") proposal to decouple the Government dam use charges from retail rates. KOPWU believes that FERC's proposal to decouple the Government dam use charges has no implications with respect to the continuation of the rate in the Off-Project Agreement. KOPWU will review the other parties' statements and respond as appropriate in its Reply Brief.

CONCLUSION

For the reasons stated above, KOPWU requests that the Commission issue an order upholding the continuation of the Off-Project Agreement rate as fair, just and reasonable.

Dated this 6th day of March, 2006.

Respectfully submitted,

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Attachment 1

PACIFIC POWER & LIGHT COMPANY
State of Oregon
Comparison of PacifiCorp and KOPWU Rate Proposals

PACIFICORP'S PROPOSAL FOR OFF-PROJECT (RATE 35) CUSTOMERS

	Base Revenue	Low Income Sched 91	BPA Credit Sched 98	Public Purpose Sched 290	Other Charges [1]	Net Revenue	% Revenue Increase	Equivalent Rate Credit $	¢ per kWh
At Full Schedule 41	$4,100,675	$14,667	($445,630)	$123,020	($1,036,019)	$2,756,713		*Difference between Sch. 41 net revenues and proposed net revenues*	
Revenues Including the BPA Credit									
Current	333,340	14,667	(211,957)	10,000		146,050			
Year 1: April 2006	502,232	14,667	(246,704)	15,067		285,262	95%	$2,471,450	5.561
Year 2: April 2007	751,125	14,667	(281,451)	22,534		506,875	78%	$2,249,838	5.062
Year 3: April 2008	1,124,465	14,667	(316,198)	33,734		856,668	69%	$1,900,044	4.275
Year 4: April 2009	1,688,920	14,667	(350,945)	50,668		1,403,310	64%	$1,353,403	3.045
Year 5: April 2010	2,533,380	14,667	(385,692)	76,001		2,238,357	60%	$518,356	1.166
After Year 5 (Sch. 41):	4,100,675	14,667	(445,630)	123,020	(1,036,019)	2,756,713	23%	$0	0.000

Off-Project revenues would reach full Schedule 41 revenues in year 6 under PacifiCorp's proposal, and rate credits would be unavailable in years 6 and 7. The hypothetical impact on revenues in years 6 and 7 is shown below for illustrative purposes.

Year 6: April 2011	3,800,070	14,667	(420,439)	114,002		3,508,300	57%	($751,588)	(1.691)
Year 7: April 2012	5,697,883	14,667	(445,630)	170,936		5,437,856	55%	($2,681,143)	(6.032)

KOPWU'S PROPOSAL FOR OFF-PROJECT (RATE 35) CUSTOMERS

	Base Revenue	91 Low Income	98 BPA Credit	290 Public Purpose	Other Charges [1]	Net Revenue	% Revenue Increase	Equivalent Rate Credit Rate Credit $	¢ per kWh
At Full Schedule 41	$4,100,675	$14,667	($445,630)	$123,020	($1,036,019)	$2,756,713		*Difference between Sch. 41 net revenues and proposed net revenues*	
Revenues Including BPA Credit									
Current	333,340	14,667	(211,957)	10,000		146,050			
Year 1: April 2006	437,579	14,667	(246,704)	13,127		218,670	50%	$2,538,043	5.710
Year 2: April 2007	576,945	14,667	(281,451)	17,308		327,469	50%	$2,429,244	5.466
Year 3: April 2008	768,952	14,667	(316,198)	23,069		490,490	50%	$2,266,222	5.099
Year 4: April 2009	1,039,853	14,667	(350,945)	31,196		734,770	50%	$2,021,942	4.549
Year 5: April 2010	1,428,985	14,667	(385,692)	42,870		1,100,830	50%	$1,655,883	3.726
Year 6: April 2011	1,995,306	14,667	(420,439)	59,859		1,649,393	50%	$1,107,319	2.491
Year 7: April 2012	2,817,902	14,667	(445,630)	84,537		2,471,475	50%	$285,237	0.642
After Year 7 (Sch. 41):	4,100,675	14,667	(445,630)	123,020	(1,036,019)	2,756,713	12%	$0	0.000

Special Charges:	**Rate (¢ per kWh)**	**Units**		**Charge**
Schedule 91	0.033	44,445,270	$	14,667
Schedule 98	-1.026	43,433,762		(445,630)
Schedule 290				3%
[1]Other Special Charges				
Schedule 95	-0.013	44,445,270	$	(5,778)
Schedule 96	0.002	44,445,270		889
Schedule 198	0.019	44,445,270		8,445
Schedule 292	0.064	44,445,270		28,445
Schedule 293	-2.403	44,445,270		(1,068,020)
			$	(1,036,019)