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September 16, 2005

Via Electronic and US 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
Docket No. UE 170

Dear Filing Center:

Enclosed please find the original and six copies of the Reply Brief of Klamath Off-Project Water Users in Docket No. UE 170.

Please return one file-stamped copy of this document in the enclosed stamped envelope.

Thank you for your assistance.

Sincerely,

/s/ Sheila R. Ho
Sheila R. Ho

Enclosures

cc: Service List (via email)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Reply Brief of the Klamath Off-Project Water Users upon the parties on the service list via email.

Dated at Portland, Oregon, this 16th day of September, 2005.

/s/ Sheila R. Ho
Sheila R. Ho

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 170

In the Matter of)	
)	
PACIFIC POWER & LIGHT)	KLAMATH OFF-PROJECT WATER
(dba PACIFICORP))	USERS' REPLY BRIEF REGARDING
)	THE STATUTORY STANDARD FOR
Request for a General Rate Increase in the)	ESTABLISHING ELECTRIC RATES FOR
Company's Oregon Annual Revenues.)	KLAMATH BASIN IRRIGATION
)	CUSTOMERS
)	

The Klamath Off-Project Water Users, Inc. ("KOPWU") submits this Reply Brief regarding the statutory standard applicable to electric rates for PacifiCorp's (or the "Company") irrigation customers in the Klamath River Basin. KOPWU urges the Public Utility Commission of Oregon ("OPUC" or the "Commission") to retain the current contract rates for Klamath irrigation customers rather than terminating those contracts in April 2006 as requested by PacifiCorp. The Off-Project Agreement bears no expiration date and the Commission should not upset that Agreement unless it is terminated by the parties or a court. If the Commission decides that the current rates for Klamath irrigation customers should change, the Commission should apply the "lowest power rates which may be reasonable" standard in the Klamath River Basin Compact (the "Compact") to determine the appropriate rates.

The opening briefs submitted by PacifiCorp, OPUC Staff, and other parties supporting the termination of the Klamath contracts include issues and arguments that, for the most part, were raised in UE 171. These parties generally argue that: 1) the just and reasonable standard governs the establishment of electric rates for Klamath irrigation customers; and 2) the Compact does not establish a statutory standard that applies to those customers' electric rates,

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because the Compact’s only legal significance is to create an “objective” to be pursued in the context of water distribution and management plans for the Klamath basin. Interpreting the Compact in this way gives no meaning to the language regarding the electric rates for irrigation and pumping purposes in the Klamath basin, and Oregon’s Attorney General has determined that such a “literal view” of the Compact is improper. 39 Or. Op. Atty Gen. 748 (1979). As KOPWU explained in detail in its Opening Brief, if the provision of the Compact describing the “lowest power rates which may be reasonable” is to have any meaning, then the Commission is the agency that must determine that meaning and give it effect.^{1/} KOPWU Opening Brief at 6-15. No other Oregon agency has the authority to establish electric rates for Klamath irrigation customers. Interpreting that specific language in the Compact in the manner advocated by Staff, PacifiCorp, and the other parties renders it meaningless.

In this Reply Brief, KOPWU focuses on arguments that appear to tread new ground regarding the meaning of the Compact and the statutory standard that applies to Klamath irrigation customers’ electric rates. First, a number of parties incorrectly characterize KOPWU’s arguments regarding the Compact as a claim that the Compact “preempts” the Commission’s authority to establish just and reasonable rates. Second, PacifiCorp argues that the Commission is precluded from “administering” the Compact by applying it to Klamath irrigation customers’ electric rates. Third, PacifiCorp argues that the standard in the Compact does not apply in this case because Article IV of the Compact does not distinguish Klamath irrigators from all other irrigation customers. Finally, PacifiCorp argues that the absence of any mention of the Compact

^{1/} KOPWU’s Opening Brief anticipated a great majority of the arguments raised by the opposing parties in opening briefs based on the arguments put forth in UE 171. KOPWU is not reiterating its response to those arguments in this Reply Brief as they have been sufficiently rebutted.

in Senate Bill (“SB”) 81 indicates that the Compact is inapplicable. The Commission should reject these arguments for the reasons explained below.

ARGUMENT

A. The Compact Does Not Preempt or Override the Commission’s Authority to Establish Just and Reasonable Rates

A number of parties claim in opening briefs that KOPWU has argued that the Compact “overrides” or “preempts” the Commission’s authority to establish just and reasonable rates. PacifiCorp Opening Brief at 6-7; Staff Opening Brief at 2; WaterWatch et al. Opening Brief at 5. Staff goes so far as to claim that “[b]ecause the KWUA and KOPWU do not want to pay ‘just and reasonable’ cost-of-service rates for their electricity, they attempt to make [the Compact’s] very general objective language a ‘rate standard’ that would preempt the Commission’s legislatively delegated duty to establish just and reasonable rates for [public] utilities.” Staff Opening Brief at 2. These claims grossly exaggerate KOPWU’s arguments.

KOPWU has argued that the Compact creates a specific standard that applies to Klamath irrigation customers that works within the Commission’s authority to establish just and reasonable rates as a whole. KOPWU Opening Brief at 2. KOPWU does not claim that the Compact “preempts” the Commission from otherwise exercising its authority to establish just and reasonable rates. Instead, KOPWU has argued that the Compact creates a separate standard, but the Commission can apply that in the context of establishing just and reasonable rates as a whole.

Staff’s claim does not reflect the nature of the just and reasonable determination. Rates are judged to be just and reasonable as a whole, not with respect to the individual components of the rates. As a result, the Commission can establish the “lowest power rates

which may be reasonable” for Klamath irrigators under the Compact and still establish rates that are just and reasonable overall. As KOPWU stated in its Opening Brief, the Compact provides a specific standard that works within the Commission’s just and reasonable authority. KOPWU Opening Brief at 2.

Setting aside the mischaracterization of KOPWU’s position, Staff fails to understand that Klamath irrigators’ current contract rates are included in an overall PacifiCorp rate structure that the Commission has determined to be just and reasonable many times since 1956. Furthermore, Staff ignores that ORS § 756.565 specifically provides that PacifiCorp’s rates, with the Klamath contracts included, are presumed to be just and reasonable until the Commission determines otherwise. No such determination has been made. Despite Staff’s claim that KOPWU “does not want to pay just and reasonable rates,” KOPWU urges the Commission to establish just and reasonable rates in same the manner it has in the past—by recognizing the unique circumstances surrounding the Klamath irrigators and the value they provide to the PacifiCorp system. See Re PacifiCorp, OPUC Docket No. UE 94, Order No. 96-175 at 16-17 (July 10, 1996) (discussing allocation of contract rates that the Klamath customers receive “in exchange for water rights for hydroelectric projects on the Klamath River”). KOPWU does not believe that anything has changed to warrant disrupting its contract.

B. The Commission Does Not “Administer” the Compact by Applying Article IV in Establishing Electric Rates for Klamath Irrigation Customers

PacifiCorp argues that the Commission is “precluded from administering” the Compact by ORS § 542.630, and, therefore, the Compact does not apply to Klamath irrigation customers’ electric rates. PacifiCorp Opening Brief at 10-11. According to PacifiCorp, if the Compact were applicable to Klamath irrigators’ electric rates, ORS § 542.630, which provides

that the “Water Resources Director shall be the only representative of this state in administering the Klamath River Basin Compact set forth in ORS 542.620,” would dictate that the Water Resources Director would be responsible for establishing Klamath irrigators’ electric rates. Id. PacifiCorp’s claim is misplaced, because KOPWU does not ask the Commission to “administer” the Compact as that term is used in the Compact.

The Commission must examine both the text and context of the provision at the first level of statutory interpretation. PGE v. Bureau of Labor & Indus., 317 Or. 606, 610-11 (1993). PacifiCorp states that the plain meaning of “administer” is to “administer the law,” but this broad definition provides little help in resolving the issue at hand. PacifiCorp Opening Brief at 11. Examining how “administer” is used in the context of the Compact itself reveals the more specific meaning of that term in the agreement. Section IX of the Compact, titled “Administration,” creates the Klamath River Basin Compact Commission (“Compact Commission”) to “administer [the] compact” and provides that the Oregon Water Resources Commission shall be Oregon’s representative on the Compact Commission. ORS § 542.620. Section IX also sets out specific procedures and procedures governing the Compact Commission’s administration of the agreement. The language that PacifiCorp quotes from ORS § 542.630 merely further defines Oregon’s representation on the Compact Commission by specifically appointing the Water Resources Director as the “*only representative* of this state in administering the [Compact.]” ORS § 542.630 (emphasis added).

The problem with PacifiCorp’s interpretation that ORS § 542.630 precludes the OPUC from applying the Compact in this proceeding is that it also would preclude the Water Resources Director from applying the Compact, because the Director would be “administering”

the Compact as well. As described above, Section IX of the Compact explicitly charges the Compact Commission, not the Water Resources Director, with administering the agreement. This provision does not mean, however, that the Water Resources Director is precluded from making any decisions regarding issues of Klamath Basin water management to which the Compact is relevant. Such an interpretation is unreasonable in that it would require the Compact Commission to rule on every issue that invoked the Compact. In addition, such an interpretation is inconsistent with the Oregon Attorney General opinion that states that the Oregon Water Resources Director was specifically required to interpret and apply the limitations of the Compact in establishing minimum streamflow requirements. 39 Or. Op. Atty Gen. 748, 751. It is unreasonable to conclude that the Water Resources Director would be precluded from considering those limitations because doing so would constitute “administering” the Compact.

KOPWU does not ask the Commission to assume the role of “administering” the Compact by applying Section IV of the agreement to the consideration of electric rates for Klamath irrigation customers. Administration of many provisions of the Compact falls outside of the Commission’s jurisdiction and expertise. KOPWU merely requests the Commission apply the provisions of the Compact that speak to “power rates,” which is an issue that only the Commission has authority to consider. As KOPWU pointed out in its Opening Brief, the Compact’s standard of the “lowest power rates which may be *reasonable*” implies that some decisionmaking body must make this determination. KOPWU asks the Commission to make that determination in this proceeding and conclude that the standard in the Compact is similar to the preferences created for other electric customers under certain federal laws. Under that standard, the cost of power to Klamath irrigation customers should reflect the cost of power from

the Project itself, and the overall rates should take into account the value provided to the PacifiCorp system by irrigation and pumping by those customers.

C. The Klamath River Basin Compact Applies to Klamath Irrigators

PacifiCorp also argues that Article IV of the Compact, titled “Hydroelectric Power,” does not apply in this proceeding because it does not specifically identify Klamath irrigation customers as the focus of the “lowest power rates which may be reasonable” standard. PacifiCorp Opening Brief at 8-9. According to PacifiCorp, a geographic limitation of that standard “is simply not found in the words of the Compact.” Id. at 9. PacifiCorp urges the Commission to acknowledge that “the Legislature knows how to include qualifying language in a statute” and construe the lack of specific identification of Klamath irrigators as evidence that Article IV applies on a broader basis. Id.

PacifiCorp’s interpretation ignores both the plain language and the context of the Compact. First, Article IV explicitly refers to the “Klamath River Basin,” which is defined in the Compact as a specific geographic area. Second, despite the fact that PacifiCorp acknowledges that the first level of statutory construction requires consideration of the context of Article IV of the Compact, PacifiCorp’s claim disregards that context. Id. The Compact is a Klamath-specific statute that applies to Klamath-specific issues—there is no basis to interpret Article IV any differently. Finally, given that the Compact is an agreement between Oregon, California, and the United States, accepting PacifiCorp’s interpretation would mean that Article IV’s language regarding power rates would at least apply to all of Oregon and California, if not the entire United States. It is unreasonable to interpret a Compact that relates to a specific river basin as including certain provisions that were intended to apply on a national scale.

D. SB 81 Does Not Affect the Applicability of the Compact

PacifiCorp also argues that absence of any reference to the Compact in SB 81 indicates that the Compact does not apply to Klamath irrigation customers' rates. PacifiCorp Opening Brief at 11-12. According to PacifiCorp, "the rate mitigation protection which the Klamath Basin irrigators sought and obtained is premised on their transition to rates set under the just and reasonable standard, not some preferential standard such as what KWUA and KOPWU assert exists under the Compact." Id. at 12. PacifiCorp's argument misapprehends the specific purpose of SB 81, which is to provide rate mitigation for Klamath irrigation customers, if the Commission terminates the Klamath contracts and switches those customers to a rate that would result in a greater than 50% increase.

SB 81 is not premised on any rate standard, and the absence of reference to the Compact in SB 81 is irrelevant to the statutory standard that applies to the Commission's examination in this proceeding. Furthermore, SB 81 does not apply in the limited manner proposed by PacifiCorp. SB 81 would apply if the Commission set Klamath irrigators' base rates based on: 1) PacifiCorp's generally applicable, cost-based rate, but ordered a rate credit to recognize Klamath irrigation customers' specific circumstances, such as a credit for the value of the water provided to the Klamath project; 2) a rate based on the cost of power produced at the Klamath project; or 3) a rate based on the Compact's "lowest power rates" standard according to other criteria established by the Commission. Under these circumstances, SB 81 would apply as long as the rate increase facing Klamath irrigation customers was greater than 50%.

SB 81 provides statutory rate mitigation as a tool of last resort for Klamath irrigation customers, if the Commission orders a rate increase of unprecedented magnitude for

those customers. KOPWU hopes that it will be unnecessary to use SB 81 to mitigate an excessive rate increase being imposed on Klamath irrigation customers. KOPWU urges the Commission to once again set rates according to the terms of the 1956 Off-Project Agreement, which would keep the rates stable. The fact that SB 81 will provide rate mitigation in the event that rates are increased, however, has no bearing on the statutory standard that applies to establishing electric rates for Klamath irrigation customers.

CONCLUSION

The Compact's specific language regarding the lowest power rates which may be reasonable applies to establishing electric rates for Klamath irrigation customers. KOPWU does not argue that the Compact "preempts" the Commission's authority to establish just and reasonable rates, and KOPWU does not ask that the Commission "administer" the Compact. KOPWU merely requests that the Commission maintain the Off-Project Agreement rate that has been in effect for 50 years, but apply the standard in the Compact if the Commission determines that altering the Klamath contract rates is justified.

Dated this 16th day of September, 2005.

Respectfully submitted,

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