

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**Docket No. UE 170**

In the Matter of	)	
PACIFIC POWER & LIGHT (dba PacifiCorp)	)	RESPONSE BRIEF OF HOOPA
	)	VALLEY TRIBE ON RATE
Request for a General Rate Increase in the	)	STANDARD
Company's Oregon Annual Revenues	)	
(Klamath River Basin Irrigator Rates).	)	
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The Hoopa Valley Tribe (the "Tribe") submits this response brief on the appropriate standard for the setting of electric rates for irrigators located within the Klamath Basin.

1. The Plain Language and Context of the Klamath Compact Do Not Support The Arguments of the Klamath Irrigators or the Bureau of Reclamation.

Pursuant to the Commission's June 30, 2005 Prehearing Conference Memorandum, and August 17, 2005 Ruling Adopting Issues List, the only issue presently before the Commission is the appropriate statutory standard applicable to the setting of electric rates for Klamath Basin irrigators. Klamath Water Users Association ("KWUA"), Klamath Off-Project Water Users Association ("KOPWU"), and the Bureau of Reclamation ("USBR") argue that the Klamath River Basin Compact ("Klamath Compact") *establishes* the rate standard and *requires* the "lowest power rate that may be reasonable." In making this argument, the Klamath irrigators and USBR ignore what Article IV of the Compact actually says.

In interpreting the Klamath Compact, the Commission must first consider the text and context of the statute. *PG&E v. Bureau of Labor and Industries*, 317 Or. 606, 610-611, 859 P.2d 1143 (1993). Article IV of the Klamath Compact reads:

It shall be the objective of each State, in the formulation and the execution and the granting of authority for the formulation and execution of plans for the distribution and use of the water of the Klamath River Basin, to provide for the

most efficient use of the available power head and its economic integration with the distribution of water for other beneficial uses in order to secure the most economical distribution and use of water and the lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells.

Based on a plain reading of the text, Article IV only applies "in the formulation and the execution and the granting of authority for the formulation and execution of plans for the distribution and use of water of the Klamath River Basin." Therefore, unless this Commission is formulating, executing, or granting authority for plans for the distribution and use of water (actions wholly outside its jurisdiction), Article IV of the Compact is irrelevant to this proceeding. Second, even in the context of formulating, executing, or granting authority for plans for the distribution and use of water, Article IV *requires* nothing. There are no mandatory prescriptions of any kind in Article IV. Article IV establishes an *objective*, and the objective established has nothing to do with the setting of power rates - the objective refers solely to distribution and use of water. Third, the stated *objective* is "to provide for the most efficient use of the available power head." Article IV concludes by referring to low power rates as a possible favorable outcome of: (1) meeting the objective (2) to formulate and execute plans (3) that provide for efficient use of the available power head. This is a far cry from "directing the State of Oregon, in the use of Klamath River water, to provide power at the lowest rate." *See USBR Opening Brief*, at p. 4.

In addition to the text of Article IV, the context of the Compact shows that its purpose is not to set power rates, but is solely related to the use and distribution of water resources. *See* Compact Article I (stating purpose of Compact is to "facilitate and promote orderly, integrated and comprehensive development, use, conservation, and control" of Klamath Basin water and to further the cooperation between Oregon and California regarding the use of such water).

Because the Compact relates solely to water distribution issues (and not to the setting of power rates), the Oregon Legislature designated the Oregon Water Resources Director as the sole Oregon representative for administering the Compact. ORS § 542.630.

KOPWU suggests that this Commission should disregard the plain language of Article IV and instead give the Compact a "broad construction." As support, KOPWU cites a 1979 Oregon Attorney General opinion drafted at the request of the Oregon Water Resources Department. *KOPWU Opening Brief*, at p. 9. The Attorney General's Opinion does not support KOPWU's argument. In the Opinion, the Attorney General rejects a "literal" interpretation of the word "appropriation" (found in Compact Article III), and instead interprets the word in a manner consistent with more contemporary principles of water law.<sup>1</sup> That is very unlike the present case, in which USBR and the Klamath Irrigators are asking the Commission to wholly disregard almost every word of Article IV. There is a difference between liberally interpreting a truly ambiguous word (as occurred in the Attorney General Opinion), and completely ignoring selective words and phrases to reach a favored interpretation.

Nothing in the text or surrounding context of the Compact supports USBR's or the Klamath irrigators' argument that Article IV *mandates* a special low rate for Klamath irrigators.<sup>2</sup>

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<sup>1</sup> The issue in the Attorney General opinion was whether the establishment of an instream flow could constitute an "appropriation" under the Compact. Under general principles of water law that applied when the Compact was drafted, a water right generally could be obtained only through the "appropriation" of water from a stream; i.e., physically diverting water out of the stream bed. By 1979, some states allowed water rights for "instream uses" even though water was not actually being diverted, or "appropriated," out of the stream bed. The Attorney General's opinion that "instream uses" are equivalent to "appropriations" under Article III simply provided an interpretation of an ambiguous word in light of the prevailing principles of water law. The Attorney General did not render an opinion wholly at odds with the language and context of the Compact.

<sup>2</sup> USBR does not actually argue that the Compact sets a special rate standard for Klamath irrigators. Instead, it argues that the Compact sets Klamath irrigators apart as a different "class" of power consumer. This Commission has reserved the question of "classification" for future briefing. *See* August 17, 2005 Ruling. The only inquiry in the current round of briefing is what rate standard applies. Regardless, the Compact is equally irrelevant to the "classification" question. Nothing in the Compact dictates either a separate rate standard or a separate classification for Klamath irrigators. The Tribe reserves all rights to provide further briefing on the classification issue at the appropriate time.

Nothing in the Compact divests this Commission of its authority and responsibility to set just and reasonable rates. Nothing in the Compact refers to this Commission or purports to amend prevailing Oregon law on power rates.

2. KWUA's and KOPWU's Remaining Arguments Do Not Overcome The Plain Language And Context Of The Compact.

KWUA's Opening Brief does not focus on the text of Article IV (presumably because the text does not support its position) and instead makes some collateral points, which do nothing to counter the clear language of Article IV. KWUA points out that the Compact is the "law of Oregon." *KWUA Opening Brief*, at p. 4. The Tribe does not dispute that the Compact has the force of law in Oregon, but that is beside the point. Even if the Compact is binding "law," it is a law wholly irrelevant to the rate standard question presented in this case. There are many "laws" in Oregon that do not relate to this proceeding, and that have no effect on the authority of this Commission. The Compact is one of them.

KWUA (and KOPWU) also make various arguments regarding canons of statutory interpretation. Other briefs have pointed out that KWUA's arguments on the use of such canons are misplaced. *See PUC Staff's Opening Brief*, at p. 2-3. KWUA's argument fails to consider the first (and in this case determinative) step of statutory analysis - that a statute be interpreted by looking at its plain language. If the meaning of a statute is clear after reviewing the text and context, the court's inquiry ends without resorting to any of the statutory construction principles addressed by KWUA. *PG&E v. Bureau of Labor and Industries*, 317 Or. at 610-611.

KWUA argues that Article IV will be rendered "meaningless" or "superfluous" unless their interpretation is adopted. That is hardly true. Article IV will retain its place in Oregon law, as a provision relating to efficient use of water, in a Compact relating solely to distribution and

use of water. The fact that this Commission is correctly unwilling to bootstrap a mandatory power rate standard out of Article IV does not render it a meaningless provision of Oregon law.

KWUA's discussion of federal power preference clauses is also irrelevant to this proceeding. The existence of other federal statutes dealing with power rate preferences has no relevance whatsoever to interpretation of the plain language of the Klamath Compact.

KWUA (and USBR) also attempt to tie the right to low power rates to PacifiCorp's federal license to operate the Klamath Hydroelectric Project. This also is irrelevant. This Commission ruled in the UE 171 proceeding that it, and not FERC, has jurisdiction to set utility rates in Oregon. Also, Oregon law imposes a duty on this Commission to review rates, even where those rates are established by private contracts. *American Can Co. v. Davis*, 28 Or. App. 207, 224, 559 P.2d 898 (1977) (Commission had duty to set just and reasonable rates and to, upon a proper showing, change the Crown-Pacific Contract with respect to the rate to be charged thereunder). Nothing in the FERC license or the 1956 contract alters the Commission's authority and duty under Oregon law to ensure just and reasonable rates.

The Commission should also ignore KWUA and KOPWU's arguments related to the methodology for calculating the appropriate rate. *KWUA Opening Brief*, at p. 11-14; *KOPWU Opening Brief*, at p. 15-19. The irrigators' arguments are based on the incorrect premise that they are entitled to lower power rates than those which are "just and reasonable." First, this initial round of briefing is solely to determine the appropriate rate standard. After the Commission makes its ruling, it is the Tribe's understanding that the parties will submit additional briefing on the appropriate classification for Klamath irrigators and the appropriate rate to be charged.<sup>3</sup> The irrigators' arguments are thus premature. Second, the irrigators' arguments focus solely on the

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<sup>3</sup> The Tribe reserves all rights to submit briefing on the remaining issues of customer classification and determination of appropriate rates. The Tribe has limited its current briefing to the issues requested by the Commission, and intends to fully brief the remaining issues at the appropriate time.

rate that they think should be charged *under the Compact*. The Compact does not set the rate standard and thus the irrigators' proposed methodology should not be considered.

3. SB 81 Indicates That Oregon Legislature Believes That Power Rates For Klamath Irrigators Are Going To Go Up Significantly.

USBR incorrectly argues that SB 81 "provides further support for establishing a separate class of customers that includes the Klamath Basin 'irrigators' as defined in the Compact." *USBR Opening Brief*, at p. 7. The apparent purpose of SB 81 is to mitigate any "rate shock" that could be experienced by bringing Klamath irrigators up to the rates paid by all other irrigators in the State of Oregon, which are 6 to 10 times higher. If the Legislature truly believed that Klamath irrigators were legally entitled to the "lowest power rates" under the Klamath Compact, it is unclear why the Legislature would have needed SB 81. It is more reasonable to assume that the Legislature understands the obligation of this Commission to ensure just and reasonable rates, realizes the possibility that Klamath irrigator rates will be going up considerably, and wanted to take action to spread out the impact of those rate increases. SB 81 has no effect whatsoever on this Commission's role in setting just and reasonable rates; it merely provides a statutorily imposed mechanism for implementing any rate increase approved by this Commission.

4. Conclusion.

The applicable standard is the "just and reasonable" standard consistently applied by this Commission in accordance with Oregon law. The Klamath Compact does not say what USBR and the Klamath irrigators wish it said. The Compact does not set a rate standard, establish a new class of power consumer, or affect this Commission's duties in any way. The Commission should proceed under the usual "just and reasonable" rate standard.

DATED this 16th day of September, 2005.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on the 15th day of September, 2005, in addition to electronic service, I mailed the original and five copies of Response of Hoopa Valley Tribe on Rate Standard with the Public Utility Commission of Oregon, via **First-Class Mail** to:

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P.O. Box 2148  
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I further certify that on the on the 15th day of September, 2005, served a copy of Response of Hoopa Valley Tribe on Rate Standard on counsel via **First-Class Mail and/or E-mail** to the following addresses:

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I declare the above to be true and correct under penalty of perjury. Executed this 15th day of September, 2005, at Seattle, Washington.

/s/ Rob Roy Smith  
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