

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 170

In the Matter of the Request of)	UNITED STATES' BUREAU OF
)	RECLAMTION AND U.S. FISH
PACIFIC POWER & LIGHT)	AND WILDLIFE SERVICE
(d/b/a PacifiCorp))	OPENING BRIEF
)	
Klamath Basin Irrigation Rates)	
_____)	

I.INTRODUCTION

In accordance with the post hearing briefing schedule established by the Chief Administrative Law Judge (ALJ) in his Corrected Prehearing Conference Memorandum, dated December 2, 2005, the United States Bureau of Reclamation (Reclamation) and the United States Fish and Wildlife Service (Service), collectively, Reclamation/Service, submit their Simultaneous Opening Brief in this docket concerning the rates for Klamath Basin irrigators. As identified in the ALJ's ruling adopting the list of issues, there are two issues that apply to this portion of the proceeding. August 17, 2005, Ruling. The ALJ summarized those issues and added one additional issue in his February 22, 2006, Memorandum.

The two remaining issues from the issues list are 1) what are the appropriate rates PacifiCorp should charge the Klamath Basin irrigators for electric service?; and 2) if any rate change affecting these customers is implemented, how and when should these customers be transitioned from the rates established in the historical contracts? Reclamation and the Service conclude that the appropriate rates are those that are adjusted in accordance with the benefits provided to PacifiCorp from the operation of the

Klamath Reclamation Project as dictated by the Klamath Compact and that those rates should be transitioned in accordance with Senate Bill 81 as explained below.

The additional issue the ALJ asked the parties to address is “the possible implications of the Federal Energy Regulatory Commission’s (FERC) proposal to decouple the Government dam use charges from PacifiCorp’s retail rates and set such charges for Klamath Project No. 2082 at the graduated rates set forth in 18 C.F.R. § 11.3 (b).” February 22, 2006, Memorandum at p. 2. Reclamation/Service conclude that this “decoupling” does not affect the issue of retail rate setting before the OPUC as explained below.

The Oregon Public Utility Commission (Commission or OPUC), by an order dated November 8, 2005 (Order No. 05-1202), determined that the appropriate rate standard to apply to the irrigation and drainage pumping in the Klamath Basin (irrigators) was the "just and reasonable" standard applicable to rates set for all other customers in Oregon. Order at p. 1. In a concurring opinion, Commissioner Baum noted that the ultimate rates to be determined for the Klamath Basin irrigators "will be dictated by the unique circumstances of this case." Order at p. 10. Commissioner Baum identified these "unique circumstances" to include the terms of the Compact and the historical factors and legal issues surrounding the contracts between the parties, the construction, operation and relicensing of the dams, the use of water rights and the costs and benefits related thereto. Id.

Commissioner Baum also noted that issues raised in Commissioner Beyer's dissent are relevant to the issue of "whether there should be a separate and distinct class of irrigation customers for the Klamath Basin.” Commissioner Beyer dissented from the

majority decision that held that Klamath Compact was "just an objective" and not a controlling standard for electrical rates in the Klamath Basin. He also listed the "unique circumstances" that must be considered when determining the appropriate rates for the Klamath Basin irrigators as discussed by Commissioner Baum.

In particular, Commissioner Beyer identified that it was important to explore whether "the Klamath Irrigators provide benefits to PacifiCorp's system, and therefore, to its core customers, that may give this Commission a basis for setting rates for these irrigators that are lower than those of other irrigators on the utilities system."

Commissioner Beyer further identified the issue of whether the irrigators provide PacifiCorp "some flexibility" in how the company operates its Klamath hydroelectric project.

The complete text of the remaining issues, as framed in the ALJ's order, are as follows:

1. What are the appropriate rates PacifiCorp should charge the Klamath Basin irrigators for electric service?
 - a. Are the current rates under the On-Project and Off-Project Agreements justifiable according to the "applicable statutory standard to the setting of electric rates for irrigators located within the Klamath Basin?" (i.e., are the current rates "just and reasonable," consistent with the "lowest power rate which may be reasonable" standard in the Compact, or other applicable standard?).
 - b. Should the Klamath Basin irrigation customers be included in the standard class of irrigation customers, or is there substantial and reasonable basis for establishing a separate and distinct class of irrigation customers in the Klamath Basin for purposes of service and rates (i.e., a separate service classification under ORS § 757.230)?
 - c. If it is determined that Klamath Basin should not be included in the same class as other Oregon irrigation customers and a different rate than the standard irrigation tariff is justified, what is the appropriate rate?

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

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

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

August 17, 2005 Ruling, Appendix A. The ALJ noted that KWUA, KOPWUA and Reclamation/Service identified additional subissues that are pertinent to the issue as to the appropriate rates. Rather than formally adopting them, the ALJ noted that the parties could address these subissues in the context of the main issue. August 17, 2005 Ruling, p. 3.

The Compact and SB 81 establish the Klamath Basin irrigators as a separate class for determining rates.¹ Further, the Compact defines the parameters to be used in setting the “just and reasonable” rates for Klamath Basin irrigators. These parameters require consideration of the “unique circumstances” of the Klamath Basin irrigators and benefits that are provided to PacifiCorp by the Klamath Basin irrigators, including those of the Klamath Reclamation Project. The evidence now before the Commission supports the establishment of a separate class of customers and the setting of a rate based on the “unique circumstances” that is lower than PacifiCorp’s proposed tariff.

¹ While the primary issue framed for this proceeding is to address the rates PacifiCorp should charge irrigation customers located within the Klamath River Basin, the rates at issue also apply to Reclamation and the Service in their use of power for irrigation and drainage purposes within the Klamath Project. Thus, when the term “irrigators” or “Klamath Basin irrigators” is used it encompasses the federal agencies.

II. Discussion

- A. What are the appropriate rates PacifiCorp should charge the Klamath Basin irrigators for electric service?**
- 1. The Commission has broad authority to set different rates for different classes of customers**

The Oregon Public Utility Commission (Commission) is required to represent customers of utility companies respecting services and rates to protect them from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates. ORS 756.040 (1); American Can Company v. Lobdell, 55 Or. App. 451, 638 P.2d 1152, 1158-1159 (1982); Cascade Natural Gas Corporation v. Davis, 28 Or. App. 621, 560 P.2d 301, 304 (1977); Publishers Paper Co. v. Davis, 28 Or. App. 189, 559 P.2d 891, 895 (1977). In setting such rates, the Commission adopts a classification system and has broad discretion in selecting policies and methods of allocating rates among the classes of customers. ORS 757.230 (1); American Can Company v. Lobdell, 638 P. 2d at 1159.

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

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

Thus, the statutory scheme prohibits discrimination among members of the same consumer class, but does not disallow discrimination among classes, unless that

discrimination is unjust. American Can Company v. Lobdell, 638 P. 2d at 1159. “[F]or the Commission to conclude that a different rate is justified for the Klamath Basin Irrigators, it must find that these customers should be treated as a separate class of customers.” Ruling at 4. The Commission has broad authority to establish customer classes. ORS 757.230; Portland General Electric Company/PacifiCorp, Order No. 97-498, UE 101/DR 20, October 17, 1997.

In particular, the statute provides that the Commission may establish a separate class of customers based on “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 the service and any other reasonable consideration.” ORS 757.230(1). (emphasis added.) In considering whether to establish a separate customer class, the Commission’s authority is broad, as provided in the last factor. Order No. 97-498, UE 101/DR 20, p. 6. In that case, the Commission held that the language of the last factor, “any other reasonable consideration,” means that the Commission can use “any economic justification—so long as it is a reasonable one”—in the creation of customer classes. Id. The Commission found, under the facts of that case, that its authority is broad enough to allow for rates tailored to the need of the individual customers, as long as there is a reasonable economic justification for doing so. Id. Here, the Commission is not being asked to tailor rates to individual customers, rather to establish a separate class for a group of customers, based on a reasonable economic justification—that these customers provide a specific and quantifiable value or benefit to PacifiCorp due to the unique circumstances of the Klamath Basin irrigators.

2. There is a Substantial and Reasonable Basis for Establishing a Distinct and Separate Class of Irrigation Customers in the Klamath Basin.

- a. The Klamath River Basin Compact provides a basis for establishing a separate class of customers and the appropriate rate for that class.**

Article IV of the Klamath River Basin Compact (Compact) sets forth certain parameters that justify establishing a separate and distinct class of irrigation customers in the Klamath Basin. That article directs Oregon (and California) to “provide for the ... lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells” from the use of water from the Klamath River Basin. Act of August 30, 1957, Pub. Law 85-222, 71 Stat. 497; ORS 542.620, Article IV-Hydroelectric Power. This directive sets apart the Klamath Basin irrigators from other irrigators in the Klamath Basin or elsewhere in PacifiCorp’s service area.

Article IV provides in full as follows:

It shall be the objective of each State, in the formulation and the execution and the granting of authority for the formulation and execution of plans for the distribution and use of the water of the Klamath River Basin, to provide for the most efficient use of the available power head and its economic integration with the distribution of water for other beneficial uses in order to secure the most economical distribution and use of water and the lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells.

Id. The Compact, including Article IV, is a state statute and part of the binding body of Oregon law. ORS 542.610(1); see 39 Or. Op. Atty. Gen. 748 (1979). This statute directs the State of Oregon, in the use of Klamath River water, to provide power at the lowest rate for the specified purposes.

In reviewing the text and context of Article IV of the Compact, it is clear that the Compact identifies the revenue as that derived from the use of Klamath River water to

generate power and it is that revenue that is to be allocated to the specified power users.

See PGE v. Bureau of Labor and Industries, 317 Or. 606, 610-611, 859 P.2d 1143, 1146 (1993) (stating statutory construction methodology); Order No. 05-114, OPUC (2005).

The Compact speaks directly to the use of Klamath River water for the generation of power to provide the “lowest power rates which may be reasonable” through the use of the “available power head” from the waters of Klamath River. The Compact further identifies a specific class of customers as those using power within the Klamath River Basin for “irrigation and drainage pumping, including pumping of wells.”

This issue of the appropriate use of water in the Klamath Basin for the generation of power was discussed in 1954 by the Klamath Compact Commission in formulating the Compact. The Compact Commission viewed the use of water for irrigation and for power to be part of a comprehensive plan for development in the basin. Reclamation/Service/17, Lesley/3. The Compact Commission noted that the decision regarding the development of hydroelectric power on the Klamath River between Keno and Copco Lake was a key consideration in formulating the Compact. Id., Lesley/6. The Compact Commission requested the Secretary of the Interior to withhold approval of any contract with the power company until it could be “formulated as an integral part of the draft of an interstate compact.” Id., Lesley/7.

The Bureau of Reclamation began the development of the Klamath Reclamation Project in 1905, at which time it made filings to secure all of the unappropriated water in the Upper Klamath River Basin for use within the Project for irrigation, power and other uses. Reclamation/Service/2, Lesley/2 (and documents cited therein). Reclamation was also given control of Upper Klamath Lake by the State of Oregon for use in developing

the reclamation project. Id.; Reclamation/Service/8, Lesley/5; Reclamation/Service/ 18, Lesley/1. PacifiCorp's predecessor, Copco, required the use of this water, including the water stored in Upper Klamath Lake, for its power development projects.

Reclamation/Service/9, 14; KWUA/216, Kandra/3; See Supplemental Opinion and Order Amending Order Issuing License, In the Matter of the California Oregon Power Company, Project No. 2082, 15 FPC 14, February 28, 1956.² It is this integration of the use of water for power and irrigation that was critical in the formation of Article IV of the Compact. This integration was critical because the development of power in the Basin was dependent on the established irrigation practices in the Upper Klamath Basin, including those within the Klamath Reclamation Project.

Water from the Upper Klamath River Basin, including the Klamath Reclamation Project, is necessary for PacifiCorp's power development downstream and the use of low rate power is necessary to the irrigation and drainage of those lands that use the irrigation water that provides the benefits to PacifiCorp's power development. See 23 FPC 59 (presiding examiners decision for Project No. 2082, January 13, 1960);

Reclamation/Service/14, Lesley/1; KWUA/211, Kandra/2; KWUA/216, Kandra/3;

²In the Federal Power Act license proceeding for PacifiCorp's hydroelectric project, the Federal Power Commission (now FERC) also found that the construction and operation of Project No. 2082 was not economically feasible without the use of the water stored behind Link Dam and the regulation of the dam as provided in the Link Dam agreement (1956 contract). The Commission confirmed these findings in a later order stating that "[t]he evidence in this case shows that the Big Bend development [now J.C. Boyle] and all of the existing and proposed developments rely for their operations on water releases from Link River Dam, a Government dam located upstream from all the developments. Such water releases are made pursuant to an agreement between the United States and Copco for a fifty-year term terminating in the year 2006 which corresponds with the term of the license for Project No. 2082." Order Adopting Initial Decision of Presiding Examiner, The California Oregon Power Company, Project No. 2082, 23 FPC 59, 4-5 (January 13, 1960).

PPL/1905, Richardson/14-17. The language of the Compact provides a reasonable basis for establishing a separate and distinct class of customers in the Klamath Basin. This class is separate and distinct because of the expressed relationship between the use of water for irrigation and the development of power in the Basin.

b. Senate Bill 81 further supports the above conclusion that the Klamath Basin irrigators are a separate and distinct customer class.

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

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

3. The Unique Circumstances of the Water Use Within the Klamath Reclamation Project further supports establishing a separate class of customers and for setting a rate lower than the proposed tariff.

Having established that the Compact defines a separate class of customers made up of the Klamath Basin irrigators, we now describe the “unique circumstances” that reinforces the justification for that separate class and defines the “just and reasonable” rate for this class. It is clear from the testimony that the Klamath Reclamation Project is unique in its use of water in the Klamath Basin. In addition, the history of the development of the Klamath Reclamation Project underscores its uniqueness. This uniqueness is what drew PacifiCorp’s predecessor to the Klamath Project in the early 1900s when Copco entered into a contract with the United States to build Link River Dam, without which, Copco’s hydroelectric power development would not be feasible. Reclamation/Service2, Lesley/2-4.

a. Development of the Klamath Project established the basis upon which benefits are provided to PacifiCorp.

In 1903, Reclamation engineers surveyed the Klamath Basin to determine whether a federal reclamation project was feasible for the area. Reclamation/Service/2, Lesley/2; Reclamation/Service/3, Lesley/1. Based on these surveys, Reclamation determined that a project was feasible and initiated water rights filings to secure the water necessary for such a large undertaking. Reclamation/Service/2, Lesley/2; Reclamation/Service/4, Lesley/1-2; Reclamation/Service/5, Lesley/1-3; KWUA/204, Kandra/1-6; KWUA/205, Kandra/1. These water rights filings and acquisitions of water rights were for multiple purposes under the Reclamation Act, including irrigation and power. *Id.*

It was clear that from the beginning of the Klamath Project in 1905, that power was necessary for its proper development because of the need for pumping of water to irrigate lands within the Project. Reclamation/Service/3, Lesley/7;

Reclamation/Service/8, Lesley/15-16; Reclamation/Service/9, Lesley/2. Initially, the United States intended to provide this power for use on the project itself, however, before Reclamation could exercise its claim for power, Copco proposed to develop hydroelectric power in the Klamath River canyon below Keno, Oregon. Reclamation/Service/2, Lesley/2.³

At this same time period, Reclamation had determined that it was necessary to provide for additional storage of water in Upper Klamath Lake as authorized by Congress and the State of Oregon. Reclamation/Service/18, Lesley/1. The Oregon statute expressly gave control of Upper Klamath Lake to the United States for use as a storage reservoir in developing federal reclamation projects. *Id.* Because the funding was not immediately available to the United States for the construction of a dam to develop this storage in Upper Klamath Lake, the United States entered into an agreement with Copco whereby Copco would construct the dam (Link River Dam) at the outlet of Upper Klamath Lake, transfer ownership of the dam to the United States, operate the dam for power purposes and provide power at specified rates for pumping within the Klamath Project. Reclamation/Service/2, Lesley/2-3; Reclamation/Service/8, Lesley/19-20; Reclamation/Service/9, Lesley/3; Reclamation/Service/6, Lesley/1-11. The ability to operate Link River Dam and use the surplus water from the Klamath Project was critical to Copco's power development. See footnote 2.

In the 1950s, Copco again restated the importance of the waters from the Klamath Reclamation project to its power operation downstream. See *In the Matter of the California Oregon Power Company*, Project No. 2082, 13 FPC 1, Opinion No. 266, January 28, 1954 (January 1954 Order), affirmed California Oregon Power Company v. Federal Power Commission, 239 F.2d 426 (CA9 1956); Supplemental Opinion and Order Amending Order Issuing License, *In the Matter of the California Oregon Power Company*, Project No. 2082, 15 FPC 14, February 28, 1956; Order Further Amending Order Issuing License (Major), *the California Oregon Power Company*, Project No. 2082, 18 FPC 364, 1, September 25, 1957; Order Adopting Initial Decision of Presiding Examiner, *The California Oregon Power Company*, Project No. 2082, 23 FPC 59, 4-5. As noted by the FPC based on statements from Copco, it was this ability to benefit from the operation of the Klamath Reclamation Project that made the hydro project feasible.

b. Operation of the Klamath Project provides significant benefits to PacifiCorp's power generation.

The benefits enjoyed by PacifiCorp, as it has stated many times, are critical to its power operation on the Klamath River. This is due in large part to the uniqueness of the Klamath Reclamation Project because of the Klamath Project's extensive drainage operation. This drainage operation is unique and unlike other irrigation projects. Reclamation/Service/2, Lesley/4. Initially, lands within the Klamath Project were

³ Contrary to the legal arguments in the testimony filed by PacifiCorp, PPL/1900, which are not relevant to this proceeding, Reclamation clearly had and still does have authority to develop power for use by the Klamath Reclamation Project and to lease any surplus power or rights to develop power from the Klamath Project. Act of April 16, 1906, 34 Stat. 116; subsection I of the Fact Finders Act of December 5, 1924; see also, Opinion of the Solicitor, U.S. Department of the Interior, M33504, September 26, 1944; U.S. ex rel Shoshone Irr. Dist. v. Ickes, 70 F.2d 771 (1934); Uncompahgre Valley Water Users Ass'n v. FERC, 785, F. 2d 269 (1986); Opinion of the Attorney General 30 Op. Atty Gen 197, 1913; 1993 MOU between Reclamation and FERC.

developed for irrigation by draining Lower Klamath and Tule lakes. Id.; Reclamation/Service/21 (map of Klamath Reclamation Project). To facilitate the draining of Lower Klamath Lake, Reclamation entered into an agreement with the railroad company in 1907. Reclamation/Service/20. Transcript of Proceedings (TP) 162-164 (Lesley). Reclamation also began to reduce the size of Tule Lake.

As part of this process, Clearlake dam and reservoir and the Lost River Diversion Channel were constructed to reduce flows to Tule Lake to promote evaporation of the lake and to provide for the development of the lakebed as irrigated agricultural lands. Reclamation/Service/2, Lesley/4. In particular, the Lost River Diversion Channel was constructed to divert floodwaters and excess irrigation flows from the Lost River to the Klamath River to reduce flooding in the Tulelake area. Reclamation/Service/2, Lesley/4-5. Reclamation also constructed the Klamath Straits Drain to facilitate development in the Lower Klamath Lake area. Reclamation/Service/2, Lesley/5. As part of this development, the D pumping plant was constructed to move water from the Tule Lake area, which is in the Lost River Basin, into the Lower Klamath Lake area and eventually to the Klamath River through the Drain. Id.

These features deliver accumulated drainage and flood waters to the Klamath River, which increases the water available to the hydroelectric project downstream. Reclamation/Service/2, Lesley/5; KWUA/300, Van Camp/16, 21. This, coupled with the additional storage provided by the Klamath Reclamation Project, provides operational control and a firm water supply to the hydroelectric project that otherwise would not be available. Reclamation/Service/2, Lesley/6. It is these benefits that formed the foundation for the 1956 contract wherein PacifiCorp provided the current contract power rates in exchange for the flexibility and benefits provided by the Klamath Reclamation Project to power production. Reclamation/Service/15.

c. The significant benefits provided to PacifiCorp's power generation by the Klamath Reclamation Project in 1956 are still provided today.

It is clear from the exhibits and testimony in this proceeding that the "unique circumstances" that provide the benefits from the Klamath Reclamation Project to PacifiCorp's hydroelectric project have not changed since the contract was entered into in 1956. In 1956, PacifiCorp's predecessor, Copco, was adamant that it needed the water from the Klamath Reclamation Project to make its power project feasible and economic and that it needed to control Link River Dam to ensure it could meet those needs. See footnote 2. No witness identified any changes that have occurred since 1956 in how the Klamath Reclamation Project diverts water and delivers the return flow and flood waters back to the Klamath River for use by PacifiCorp's hydro project. TP 20, lines 13-20 (Smith); TP 88, lines 3-23, 91, lines 14-17 (Karpak); TP 169, lines 13-18 (Lesley) TP 344, lines 10-12, 346, lines 15-18 (McNamee). This is so, because the natural system has not changed either as it relates to return flows generated by the Klamath Reclamation Project or the inflow and storage in Upper Klamath Lake that are made available to PacifiCorp below Keno Dam. The evidence in the record does not support even the changes discussed by PacifiCorp since 1997. KWUA/307, Van Camp Rebuttal/6-7; KWUA/309, 310 and 311; Reclamation/Service/26, Lesley/1; Reclamation/Service/27. Any such change is dependent on the particular hydrology of that year. That is no different than prior to 1997. Id.

KWUA and Reclamation provided testimony that concluded that the Klamath Reclamation Project provides significant benefits to PacifiCorp's operation. While the methods used by the KWUA and Reclamation/Service witnesses were somewhat different, the results were essentially the same. KWUA/300, Van Camp/18; Reclamation/Service/2, Lesley/4. Each witness concluded that between 260,000 and 270,000 acre-feet of water is made available to PacifiCorp's hydroelectric project from the operation of the Klamath Reclamation Project. Without the benefits of the additional water provided by the Klamath Reclamation Project, there would be a substantial reduction in water available for power production. Reclamation/Service/2, Lesley/7.

No witness for PacifiCorp provided any specific analysis to refute these methods or conclusions but, as stated by KWUA witness Van Camp on cross-examination, only offered suggestions to "fine tune" the methods proposed by KWUA, KOPWU and Reclamation/Service that showed significant benefits to PacifiCorp. A witness for PacifiCorp identified two concerns with the methods used by KWUA and Reclamation/Service. PPL/1802, Smith/1-2. KWUA and Reclamation/Service adequately addressed both of these concerns.

KWUA and Reclamation/Service showed that the Klamath Reclamation Project does provide a net increase in flow and that the timing of such flow provides benefits to PacifiCorp. While PacifiCorp questioned these conclusions, they provided no analysis of the existing data to refute the conclusions. To the contrary, KWUA and Reclamation/Service did use the available data and quantified the benefits of the additional flow of water from the Klamath Project. KWUA/300, Van Camp/17-18 and 21; Reclamation/Service/2, Lesley/6; Reclamation/Service/22-24; Reclamation/Service/26, Lesley/1-2. Further, PacifiCorp admitted that it retains flexibility in its operation of Link River Dam to the benefit of the power project. TP 21, lines 6-10 (Smith). Thus, the evidence provided by KWUA and Reclamation/Service is the only quantitative evidence in the record upon which to base a conclusion that benefits are provided. Reclamation/Service/26, Lesley/2-4.

d. The significant benefits provided by the Klamath Reclamation Project to PacifiCorp translate into a rate that is different than the standard irrigation tariff.

These benefits were translated into generation and cost benefits to PacifiCorp by witnesses for KWUA and KOPWU. KWUA/102, Schoenbeck/10. That process is consistent with the directives in the Klamath River Basin Compact. Again, PacifiCorp, and Commission staff for that matter, did not provide any testimony to refute the KWUA and KOPWU testimony or offer any alternatives. PacifiCorp, supported by general, subjective and qualitative statements by Commission staff⁴, merely state positions, without detailed analysis⁵, that the Klamath irrigators should pay the same power rates as all other irrigators state wide (subject to the SB 81 rate transition). In fact, staff did not conduct any analysis but merely adopted a position, the sole purpose of which is apparently to reduce electrical energy demand in the Klamath Basin. Staff/1502,

⁴ Reclamation/Service renew its objections to the testimony of Commission staff (Staff/1500). The majority of this testimony lacks foundation, is hearsay, legal opinion and largely not relevant to the issues in this proceeding. Similar objections were raised as to the testimony of ONRC (ONRC, et al./100 through 106). Thus, the Commission should not put any reliance on any of this testimony in making its decision.

⁵ See TP 332 lines 7-12; 333 lines 24-25; 335 lines 3-9, lines 16-25; 336 line 1, lines 19-20; 337 lines 15-25; 338 lines 19-20; 339 lines 2-6, lines 12-18; 340 lines 4-8; 346 line 7-10; 349 line 4-5 (McNamee)

McNamee/13 and 15; TP 379, lines 5-14 (McName). According to staff, the way to do that is to increase electric rates dramatically. There is no proof offered in the record to support any such position or that such a position is a reasonable basis for setting rates.

4. **The rates for the Klamath Basin Irrigators should be based on the established benefits to PacifiCorp's power generation and the cost of service to the irrigators.**

As discussed above, the Klamath River Basin Compact provides for a separate and distinct class of customers. Further, the Compact is part of the unique circumstances as discussed in both the concurring opinion of Commissioner Buam and the dissenting opinion of Commissioner Beyer. The Compact, being an Oregon statute, must be considered in setting rates for the Klamath Basin irrigators. The statute is unambiguous and mandates that any rates set for the Klamath Basin irrigators must be the lowest reasonable rates. To date, PacifiCorp has not addressed this issue or attempted to determine what this lowest reasonable rate should be. Both KWUA and KOPWU have addressed this issue and have presented the only evidence to the Commission regarding the lowest reasonable rate as required by the Compact and the unique circumstances surrounding irrigation water use in the Klamath Basin. KWUA/220, Kandra/7 and 25. The Commission must adopt the rates supported by this evidence.

As noted by the witness for KWUA, the Schedule 33 customers, Klamath Basin irrigators, should remain on schedule 33, however, the pricing under this tariff would be cost-based and not contractually based. KWUA/102, Schoenbeck/9. Implementation would be straightforward by determining the cost of service and capping the rates as provided in SB 81. *Id.* Mr. Schoenbeck further explained that on a class average basis, there is a substantial cost-of-service difference between those on Schedule 41 (non Klamath Basin irrigators) and those on Schedule 33 (Klamath Basin irrigators). TP 207, lines 16-19 (Schoenbeck). Therefore, it is appropriate to use a cost-based rate and

subtract from that a credit for the power generation value to PacifiCorp due to the water provided by the Klamath Reclamation Project in arriving at the appropriate rate to apply under SB 81. TP 209, lines 15-20.

B. The provisions of SB 81 are applicable to the rates established in this proceeding as explained by witnesses for KWUA and KOPWU.

Both KWUA and KOPWU provided testimony to support the proper application of SB 81 to the rates determined in this docket that apply to the Klamath Basin irrigators. As discussed above, these rates are substantially less than those proposed by PacifiCorp. KWUA proposed that the increase in rates is limited to just 50% above the current net rate paid by these customers and that the 50% increase cap be applied on a customer-by-customer basis. KWUA/102, Schoenbeck/13; TP 205 (Schoenbeck). KWUA then proposed a rate design method to reflect this transition period. *Id.* at 14. Reclamation/Service support this method.

C. The charges to be assessed by FERC against PacifiCorp for the use of the government dam are not related to the retail rates to be set by this Commission.

The ALJ asked the parties to address the possible implications of FERC's proposal to decouple the proposed government dam use charges from PacifiCorp's retail rates that will be set by this Commission. The ALJ specifically referenced page 11 of FERC's January 20, 2006 Order Denying Petition for Declaratory Order and Issuing Notice of Proposed Readjustment of Annual Charges for the Use of a Government Dam (114 FERC 61, 051) which was filed as PPL/1908, Richardson/11. In its order, FERC determined that it was appropriate at this time to "readjust PacifiCorp's charges for the

use of surplus water from Link River Dam” and “decouple these charges from PacifiCorp’s retail rates.”

First, both the U.S. Department of the Interior (Interior) and the KWUA filed for rehearing of FERC’s January 20th Order. Those rehearing requests are pending. In those requests, FERC is asked to reconsider its conclusion that the power rates and other obligations and benefits of the 1956 contract between Interior and PacifiCorp do not continue during the annual license period. If FERC grants the request on rehearing, then the appropriate charges would be those currently in the 1956 contract which address all charges to PacifiCorp, including the retail power rates at issue in this proceeding.

Second, should FERC deny the request for rehearing and proceed to set charges for the use of the government dam pursuant to the Federal Power Act, then both Interior and KWUA have commented to FERC that those charges should encompass the full benefit that PacifiCorp receives from the use of surplus water from the Klamath Project, and not merely a charge for the use of Link River Dam based the graduated fixed rates set forth in 18 C.F.R. § 11.3(b).⁶

Last, any charge assessed by FERC pursuant to the FPA that is short of the full compensation required by the 1956 contract does not affect this proceeding to determine retail power rates under Oregon law. If FERC does not continue the current power rates as specified in the 1956 contract, then any other charges will be directed to the United States for use of the government dam and the surplus water available from it. Until FERC has acted and set charges, it is unclear whether any such charges would be

⁶ PacifiCorp has commented to FERC that the dam use charges should be limited to the fixed rates based on generation of power at Link River Dam only (Eastside and Westside plants) and not based on generation of all plants within the Klamath hydro project no. 2082. This does not fully compensate either the United States or KWUA for the use of the dam and the surplus water behind it.

duplicated by any rates set in this proceeding for the Klamath Basin irrigators that are less than PacifiCorp's proposed rates. The Commission should assess the evidence in this case and determine whether it warrants the establishment of a separate and distinct class of customers and a rate less than that proposed by PacifiCorp independent of any action that may be taken by FERC. As noted in the earlier proceeding in this case, the Commission can reevaluate any charges assessed by FERC that affect retail rates and adjust the rates accordingly. August 17, 2005, Ruling, p. 5.

III. Conclusion

The issues to be resolved in this proceeding are intended to address the rates that apply to the Klamath Basin "irrigators." As discussed above, the Klamath River Basin Compact and Senate Bill 81 provide the basis for establishing a customer class that allows a separate rate to be established for that class. That rate must be based on the parameters described in Article IV of the Compact and the unique circumstances of the Klamath Basin irrigators and the benefits provided to PacifiCorp's power generation.

Dated: March 3, 2006

Respectfully submitted,

Daniel G. Shillito
Regional Solicitor

Stephen R. Palmer
Assistant Regional Solicitor
Office of the Regional Solicitor
U.S. Department of the Interior
2800 Cottage Way, Room E-1712

Sacramento, California 95825
Telephone: 916/978-5683
Telefax: 916/978-5694