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March 13, 2006

Via Electronically and U.S. Mail

Public Utility Commission
Attn: Filing Center
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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 Reply 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 Reply 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 13th day of March, 2006.

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 170

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In the Matter of)
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PACIFIC POWER & LIGHT)
(dba PACIFICORP))
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Request for a General Rate Increase in the)
Company's Oregon Annual Revenues)
(Klamath River Basin Irrigator Rates).)
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**REPLY BRIEF OF
KLAMATH OFF-PROJECT WATER USERS, INC.**

March 13, 2006

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INTRODUCTION

The opening briefs submitted by PacifiCorp (or the “Company”), Staff of the Oregon Public Utility Commission (“OPUC” or the “Commission”), Oregon Natural Resources Commission et al. (“ONRC et al.”), and the Hoopa Valley Tribe take a “scattershot” approach to attempting to justify terminating the “Off-Project Agreement” (or the “Agreement”) under which PacifiCorp has provided electric service to members of the Klamath Off-Project Water Users, Inc.’s (“KOPWU”) members for 50 years. The broad array of inconsistent and unfounded arguments in the opening briefs of the parties that oppose the continuation of the Off-Project Agreement cover a wide range of topics but fail to demonstrate why the Commission should terminate or alter the Off-Project rate. KOPWU described in its Opening Brief the basis for PacifiCorp’s irrigation customers located on “Off-Project” lands in the Upper Klamath River Basin to continue receiving electric service in accordance with the terms of the Off-Project Agreement. KOPWU’s response to the opposing parties’ opening briefs is below.

ARGUMENT

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

The testimony and opening briefs submitted by Staff and PacifiCorp indicate that the Commission should eliminate the Klamath irrigation customer class and terminate the Off-Project rate unless KOPWU has demonstrated that doing so is unjustified. PacifiCorp Opening Brief at 4; Staff Opening Brief at 3. Staff witness Bill McNamee confirmed this perspective at the hearing, stating that “my job is to review [KOPWU’s] proposal” regarding the Klamath

irrigator customer class and the Off-Project Agreement. TR. 365:18-20, 367:9-11, 371:21, 371:22-24 (McNamee). Mr. McNamee's statement is legally incorrect and only reinforces the notion that he pre-judged whether the Off-Project Agreement is justified. The "job" of Staff and all other parties in this proceeding is to review *PacifiCorp's* proposals, not KOPWU's. PacifiCorp has the burden to demonstrate that changes to its rates are just and reasonable, or, in the case of the proposal to prematurely terminate the Off-Project Agreement, to demonstrate that the Agreement is contrary to the public interest. ORS § 757.210(1)(a). PacifiCorp's existing rates are presumed by statute to be lawful and reasonable until a court determines otherwise. ORS § 756.565. Despite the fact that Mr. McNamee and other witnesses examined the evidence to determine whether KOPWU demonstrated that the Off-Project rate should continue, the Commission's statutory obligation is to examine whether PacifiCorp has demonstrated that it should not. The evidence does not support terminating the Off-Project Agreement or demonstrate that serving Off-Project customers at Schedule 41 rates is just and reasonable.

1. Merely Comparing the Off-Project Rate to PacifiCorp's Standard Irrigation Tariff Is Inappropriate

PacifiCorp argues that the Off-Project rates are not justifiable according to the just and reasonable standard because those rates are lower than the prices in Schedule 41 or 200. PacifiCorp Opening Brief at 3-4. These arguments ignore that the Commission has approved these rates under the just and reasonable standard in the past even though they were not equal to Schedule 41 and 200 prices, and that the Commission had a legal basis for doing so. A simple comparison between Schedule 41 rates and Schedule 33 rates is inappropriate.

Staff witness McNamee's testimony acknowledges that the Off-Project Agreement has been approved on bases other than comparing the Off-Project rate to the prices in

PacifiCorp's standard irrigation tariff. Mr. McNamee testified that the Commission lacks the authority to "advantage one customer at the expense of the utility's other customers" and that a difference in costs and revenues between the Off-Project Agreement and standard irrigation tariffs would provide an "advantage" to Off-Project customers. Staff/1500, McNamee/15; TR. 361:19 (McNamee). The Commission previously authorized the Off-Project Agreement on a basis other than simply comparing Off-Project costs and revenues to Schedule 41 costs and revenues or else the rates would have constituted an unlawful advantage for the past 50 years. There is no compelling or persuasive evidence in the record to suggest that the Commission should evaluate the Off-Project Agreement according to some new, vague standard that has no rational relation to the historic fixed rate.

The evidence demonstrates that the basis for approving the Off-Project Agreement has been the benefits of return flows provided by agricultural development and pumping for irrigation and drainage purposes on Off-Project lands. The Off-Project Agreement itself states that the fixed rate is provided in consideration for an "increased flow of water caused by the development of lands for agricultural purposes within the Upper Klamath River Basin, which . . . will be used for the generation of electric power in Copco's proposed dam improvements on the Klamath River below Keno." KOPWU/202, Rozaklis/28. The Commission has previously recognized that the Klamath customers receive the contract rates "in exchange for water rights for hydroelectric projects on the Klamath River." Re PacifiCorp, OPUC Docket No. UE 94, Order No. 96-175 at 16-17 (July 10, 1996). KOPWU's evidence demonstrates that the Off-Project rate is justified from a cost of service standpoint according to benefit of return flows from agricultural development, irrigation and drainage pumping on Off-

Project lands. This evidence provides the basis for sustaining the Off-Project rate under the just and reasonable standard.

2. The Off-Project Agreement Contemplates Water Use for Agricultural Purposes by Off-Project Customers

Parties argue that the “credit for value” concept in the Off-Project Agreement is not a valid consideration for reduced rates. Staff Opening Brief at 2; PacifiCorp Opening Brief at 8. This argument comes 50 years too late. If this were the standard by which the Off-Project Agreement was judged in 1956, the Agreement never would have been approved in the first place. KOPWU finds it troubling that PacifiCorp is now arguing against the very essence of the Off-Project Agreement despite the fact that the Company’s predecessor, the California Oregon Power Company, agreed to this concept in 1956 and testified that it was “one of the fundamental reasons for making the request of these lower rates.” KOPWU/106, Bartell/3. Furthermore, KOPWU finds it particularly troubling that a purportedly neutral party such as Staff claims that the “credit for value” concept “isn’t the way we do ratemaking” despite the fact that the Commission has set rates on this basis for Klamath customers for the last 50 years. TR. 372:7, 375:20-21 (McNamee). As described above, Staff’s perspective turns on its head the notion that rates approved by the Commission are lawful and reasonable until a court finds otherwise. ORS § 756.565.

A number of parties also argue that KOPWU’s return flow evidence does not consider the consumptive use of Off-Project irrigators’ agricultural practices and, given that consumptive use, Off-Project irrigators cannot demonstrate a “net” benefit to PacifiCorp of irrigation and drainage pumping in the Upper Klamath River Basin. Staff Opening Brief at 5; PacifiCorp Opening Brief at 16-18. This is simply untrue. The Off-Project Agreement

contemplates an “increased flow of water caused by the *development of lands for agricultural purposes* within the Upper Klamath River Basin.” KOPWU/202, Rozaklis/28 (emphasis added). Mr. Rozaklis compared historic consumptive use with current consumptive use of drained areas on Off-Project lands, and his evidence demonstrates that significant increases in water supply have resulted from development of lands for agricultural purposes. KOPWU/202, Rozaklis/17-22; KOPWU/100, Bartell/12-13. In other words, Off-Project irrigators are providing the specific benefit that the Off-Project Agreement contemplates.

Finally, the consumptive use test of “withdrawals vs. return flows” is inappropriate to apply to wells, despite certain parties’ advocacy to the contrary. Staff/1502, McNamee/13. Such a test implies that all Off-Project wells unlawfully deplete flow during the irrigation season. The independent evidence described below strongly disagrees with this conclusion. Even in the rare circumstances that a hydraulic connection does exist on Off-Project lands, the Oregon Water Resources Department (“OWRD”) regulates against those wells to prevent potential stream flow depletions.

3. Unsupported and Hastily-Formulated Criticisms of KOPWU’s Evidence Do Not Demonstrate that Return Flows Do Not Occur

PacifiCorp, Staff, and ONRC et al. reiterate in opening briefs their unjustified and exaggerated criticisms of KOPWU’s return flow evidence. These parties largely rely on their witnesses’ mischaracterization of the evidence in the record, rather than relying on specific passages from that evidence itself. See, e.g., PacifiCorp Opening Brief at 18, 19, 20; ONRC et al. Opening Brief at 7, 12, 14. KOPWU explained in its Opening Brief why these witnesses’ criticisms were unfounded or contradicted by the evidence. A few additional issues warrant a response here.

Overall, the opening briefs reveal that PacifiCorp and ONRC et al. disagree with only a few specific points regarding KOPWU's return flow evidence, and that those parties dramatically overstate the estimated impact of those criticisms on KOPWU's overall conclusions. Even if the Commission were to accept all those criticisms as true, however, evaluating those estimated impacts according to realistic assumptions and the evidence in the record reveals that any adjustment that was warranted would amount to little more than "noise" with respect to KOPWU's overall conclusions.

KOPWU urges the Commission to disregard PacifiCorp's and ONRC et al.'s admittedly speculative adjustments that are unsupported by any quantified conclusions. If the Commission is inclined to consider those unfounded theories, however, then the appropriate point of comparison for any adjustment would be the total 200,000 acre feet of return flow from Off-Project lands cited by Mr. Rozaklis. KOPWU/202, Rozaklis/6. Mr. Rozaklis specifically stated in his report that his estimate of 131,000 acre feet of increased water supply was "conservative," because it purposefully excluded Off-Project return flows from sources that were not readily quantifiable. Id. at Rozaklis/8.

a. Off-Project Ground Water Pumping Has a Substantial, Positive Impact on Stream Flow Volumes

Both PacifiCorp and ONRC et al. grossly oversimplify the evidence and exaggerate the impact of Mr. Rozaklis' conclusion that ground water pumping does not affect stream flows in a "direct and immediate manner." KOPWU/202, Rozaklis/15. PacifiCorp and ONRC et al. paint a picture of Klamath Basin hydrogeology in which Off-Project irrigators pump water from one big pool of directly interconnected surface and ground water. The "hard" evidence in the record flatly contradicts this claim. First, the authorities that have examined this

issue disagree. As Mr. Rozaklis stated at hearing, the “Grondin Report” (KOPWU/609) that both PacifiCorp and ONRC et al. portray as absolute evidence of a direct connection between ground and surface water “goes through a blow-by-blow description of several hydro geologic investigations that all seem to come to different conclusions regarding the nature of groundwater flow in the Klamath Basin.” TR. 285:3-8 (Rozaklis). Second, the authorities that have concluded that ground water and surface water is interconnected all recognize that, where connections exist, those conditions are more efficient in some areas and less efficient in others. Even PacifiCorp’s witness, Mr. Deverel, acknowledged this point at the hearing. TR. 49:19-21 (Deverel) (There “definitely is a less sufficient hydraulic connection . . . in some places between the upper and lower aquifers.”).

i. PacifiCorp and ONRC et al. Disregard the Irregularity of Any Hydraulic Connection that Exists

PacifiCorp and ONRC et al. mischaracterize and oversimplify the evidence in the record regarding Klamath Basin hydrogeology. In general, the Grondin Report finds that the most “efficient” connection exists near the river where ground water directly intersects a stream but that elsewhere the connection is non-existent or less efficient:

The Lost River stage in the sub-basin locally influences the elevation of ground water in basalt. Observable influences appear limited to areas near the river and where a direct connection between the ground water in basalt and the river exists. An example is recorder data for well KLAM 50318 and the Lost River adjacent to Bonanza Big Springs. In this area, basalt is exposed in the riverbed, and a direct connection between the river and the ground water in basalt exists via springs.

* * *

At many locations, little or no river stage influence upon ground water in basalt may occur. This can be expected at sites sufficiently up the ground water gradient away from the Lost River

and in areas where sufficient sediment exists between the river and basalt to dampen the river influence.

KOPWU/609 at 13-14 (internal citations omitted). Setting aside that the authorities disagree about the extent of interconnection, the most important point about this passage and the one that unequivocally supports Mr. Rozaklis' conclusion that Off-Project ground water pumping does not impact stream flows in a "direct and immediate manner" is that *Off-Project lands in the Lost River basin primarily are located in the upper reaches of the basin and farther away from the stream.* See KOPWU/202, Rozaklis/10. The Grondin Report states that "the most efficient connection to the river occurs at fault-controlled valley floor springs where basalt is at or near the land surface." KOPWU/609 at 15. Off-Project lands and wells generally are farther away from the valley floor and farther away from the stream in the upper Lost River basin. Lands that are directly adjacent to the Lost River in the lower reaches of the valley generally are On-Project Lands. See Reclamation/Service/21, Lesley/1.

Mr. Rozaklis stated at the hearing that he had not concluded that there was "no" hydraulic connection between ground water and surface water and that the Grondin Report had no impact on his conclusions regarding the impact of ground water pumping. TR. 233:5-10, 252:14 (Rozaklis). This is because Mr. Rozaklis' analysis specifically focused on ground water pumping from *Off-Project* wells. KOPWU/202, Rozaklis/4. PacifiCorp and ONRC et al. largely rely on generalizations about Upper Klamath River Basin hydrogeology while ignoring the specific circumstances of the Off-Project wells on which Mr. Rozaklis focused. Mr. Rozaklis is the only witness that traveled to Off-Project lands for the specific purpose of assessing ground water pumping, he is the only witness that has drawn a conclusion about the impact of *Off-Project* ground water pumping on stream flows, he was fully informed as to Klamath Basin

hydrogeology when he formulated his opinions, and his conclusions reflect his first-hand knowledge of Off-Project agricultural practices. The generalizations and oversimplification of the evidence and circumstances by PacifiCorp and ONRC et al. provide no legitimate basis to question Mr. Rozaklis' conclusions.

Glaringly absent from both PacifiCorp's and ONRC et al.'s briefs are specific citations or quotations from either the Grondin Report (KOPWU/609) or the Leonard and Harris Report (KOPWU/610) to support the parties' claims. These parties cite these reports generally for claims of a direct connection but rely on their witnesses' mischaracterization of the findings to support their position. E.g., PacifiCorp Opening Brief at 18, ONRC et al. Opening Brief at 5. KOPWU demonstrated how Mr. Deverel improperly imposed upon the entire Lost and Sprague River basins the Grondin Report's estimated impacts of pumping from specific Alternative Dispute Resolution ("ADR") wells located in the most sensitive areas of the Lost River basin. KOPWU Opening Brief at 20. As Mr. Rozaklis stated at the hearing, "it's hard to generalize" about the impact, or lack thereof, of ground water pumping in the Upper Klamath basin. TR. 237:21-22 (Rozaklis). PacifiCorp and ONRC et al., however, have felt free to.

Where PacifiCorp and ONRC et al. do cite specific points from the reports, they misrepresent the import of the evidence. PacifiCorp and ONRC et al. claim that the Grondin Report concludes there is a direct and proportional hydraulic connection between ground water and surface water throughout the entire Lost River Basin. PacifiCorp Opening Brief at 18; ONRC et al. Opening Brief at 6. First, as described above, these findings were made in the context of calculating the potential impacts of pumping from ADR wells that were located in the single most sensitive part of the Lost River basin. KOPWU Opening Brief at 20; KOPWU/609

at 22-25. Second, the Grondin Report specifically states this “directly proportionality” assumption as a “basic hydrological principle” that was applied in the context of calculating the estimated impact of the ADR wells using a particular equation. KOPWU/609 at 23. There is no evidence that the Grondin Report intends this assumption to apply uniformly to all areas of the Lost River Basin.

Finally, despite their reliance on the Grondin and Leonard and Harris reports, neither PacifiCorp nor ONRC et al. acknowledge those reports’ overall conclusions that long-term ground water pumping has had no impact on overall ground water levels and that ground water is recharged seasonally. KOPWU/609 at 11; KOPWU/610 at 62. Thus, even if the Commission were to accept the PacifiCorp or ONRC et al. theory about “one big pool” of interconnected ground and surface water from which Off-Project irrigators are pumping, the evidence in the record shows that Off-Project pumping has no impact on the overall pool levels.

ii. OWRD’s Denial of Permits for Wells that Interfere With Surface Water Supports KOPWU’s Claims

PacifiCorp and ONRC et al. also rely on certain proposed OWRD orders denying ground water permits in the Lost River Basin as evidence that “ground water pumping depletes surface flows.” PacifiCorp Opening Brief at 18. These proposed orders actually confirm KOPWU’s conclusions that the permitted wells on Off-Project lands do not impact stream flows in a direct and immediate manner.^{1/} Indeed, OWRD obviously is strictly regulating ground water use and, as these orders demonstrate, denying permit applications for wells in areas where there is a connection between ground surface water, creating “potential for substantial interference

^{1/} As Mr. Rozaklis described in his report, he determined the amount and locations of Off-Project wells using OWRD data for all permitted well sites in the Klamath River Basin. KOPWU/202, Rozaklis/8.

with surface water” during the irrigation season. ONRC et al./404-406. Furthermore, OWRD recommends shutting down wells that do not meet legal requirements. ONRC et al./407 at 6. Finally, as described in the next section, independent scientific evidence actually contradicts the claims that Off-Project wells are depleting the river during the low-flow period.

iii. Independent Scientific Research Confirms the Increase in Stream Flows Due to Agricultural Development

PacifiCorp and ONRC et al. incorrectly claim that Off-Project irrigators deplete stream flows during the irrigation, but the evidence in the record demonstrates just the opposite. PacifiCorp Opening Brief at 18; ONRC et al. Opening Brief at 5. KOPWU/107 is a 1999 U.S. Geological Survey (“USGS”) study that states:

Although the greatest rate of irrigation expansion occurred between 1950 and 1980, the t-test and rank-sum test results do not show a significant decrease in stream flow during that period relative to climate. *In fact, the tests showed significant flow increase during the low-flow season in the Sprague River.*

KOPWU/107, Bartell/24 (emphasis added). The USGS’ conclusions were based on 75 years of measured stream flow on the Sprague River. Id. The Oregon Department of Environmental Quality (“ODEQ”) followed up on this USGS report in 2002, concluding that annual Sprague River flows had increased by an average of approximately 140,000 acre-feet since 1950.

KOPWU/108, Bartell/4. Furthermore, the ODEQ attributed these increased flows to agricultural development, stating 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.” Id.

There is no dispute about this evidence—it is a scientifically proven fact that there is more water flowing in the Sprague River on an annual basis than there was prior to 1950. The

Commission should recognize the significance of this increased 140,000 acre-feet of Sprague River flow for a number of reasons, not the least of which is that it alone exceeds Mr. Rozaklis' total estimate of 131,000 acre-feet of return flows from all Off-Project lands. KOPWU/202, Rozaklis/6. This only reinforces Mr. Rozaklis' statement that his return flow estimates are "conservative." Id. at Rozaklis/8.

Mr. Deverel complained that the USGS and ODEQ should have assessed climatic variations according to differences in snow pack in order to draw the conclusions about the increased stream flow as a result of agricultural activities. PPL/2002, Deverel/20. Mr. Deverel made this suggestion despite the USGS' specific finding that:

Climate data, which included annual precipitation data from Klamath Falls, Crater Lake, and Medford, as well as annual average air temperature data from Klamath Falls, showed no significant difference between the [1922-1950 and 1951-1996] periods, suggesting the possibility of human activities as a cause of the difference in runoff between the two periods.

KOPWU/107, Bartell/28. Like most of Mr. Deverel's and Balance's criticisms, Mr. Deverel provides no basis to disagree with the USGS' findings, no indication that any snow pack variation existed, and he fails to state what effect, if any, considering snow pack would have. See PPL/2002, Deverel/20. These vague and generalized complaints are consistent with the strategy of asserting as many arguments as possible in the hope that one will bear fruit, but they provide no basis to doubt the scientific conclusions of independent government bodies.

**iv. The Commission Should Disregard PacifiCorp's
Adjustment to Account for the Alleged Impact of
Ground Water Pumping on Stream Flows**

Perhaps the greatest exaggeration in PacifiCorp's brief is the argument that lack of adjustment in Mr. Rozaklis' conclusions to account for the alleged depletion of stream flows

by ground water pumping “renders meaningless his conclusions about benefits from ground water pumping.” PacifiCorp Opening Brief at 18. This claim does not in any way reflect even the testimony of PacifiCorp’s witness who acknowledged a range of interconnection “efficiency,” where any interconnection exists at all. TR. 49:19-21 (Deverel). In short, PacifiCorp and ONRC et al. generalize and over-simplify the evidence, and ignore actual Off-Project practices in an unsuccessful effort to refute the benefits of ground water pumping. The evidence supports Mr. Rozaklis’ conclusion that Off-Project ground water pumping has a substantial, positive impact on stream flows during the irrigation season.

b. Realistic Adjustments for Any Alleged Error in KOPWU’s Consumptive Use Assumptions Would Have Nominal Impact

Both PacifiCorp and ONRC et al. take issue with Mr. Rozaklis’ assumption that Off-Project lands are not flooded during the winter and therefore do not warrant reducing the amount of return flow based on evapotranspiration. PacifiCorp Opening Brief at 17; ONRC et al. Opening Brief at 11. These parties claim that Mr. Rozaklis’ conclusions should be decreased by as much as 50% because certain lands are allowed to flood in during the winter. Id. KOPWU explained in its Opening Brief that Mr. Deverel’s allegations about the flooding of Off-Project lands during the winter related, at best, to small amounts of lands related to potato and small grain production. KOPWU Opening Brief at 23. Furthermore, Mr. Deverel’s conclusion about other flooded lands apparently related to areas that the U.S. Bureau of Reclamation floods during the winter to store water that is pumped back to Upper Klamath Lake for low flow periods. Id. This practice could provide substantial benefit to PacifiCorp. Thus, the arguments about underestimating wintertime ET are greatly exaggerated.

The 50% impact on Mr. Rozaklis' conclusions that these parties have alleged was based on Mr. Deverel's assumption that *all* Off-Project lands would be flooded during the winter, and the evidence in the record demonstrates that this assumption obviously is unsound. See PPL/2002, Deverel/12. Under these circumstances, even if the Commission were inclined to use an alternative wintertime ET assumption, any assumption that rationally related to the evidence in the record would have a de minimis impact on Mr. Rozaklis' overall conclusions.

ONRC et al. repeats its patently unsound arguments regarding alleged transit losses associated with the travel of pumped ground water through "an extensive array of irrigation canals, laterals, and drains." ONRC et al. Opening Brief at 12. This argument was shown at hearing to be based on ignorance about the fact that pumped ground water travels relatively short distances through pipes rather than ditches. TR. 302:4-13 (Balance). Furthermore, ONRC et al.'s estimates of the impacts of these losses are based on irrelevant studies of transit losses that occur when water is transported through miles and miles of ditches in the Klamath Irrigation Project. KOPWU/606 at 1.

**c. Off-Project Return Flows Generate Power In PacifiCorp's
Hydroelectric Facilities When Generation Capacity Is
Available**

PacifiCorp incorrectly argues that "Mr. Rozaklis's computation does not account for times when increased flow occurs during high run-off periods." PacifiCorp Opening Brief at 20, citing TR. 239-40. This erroneous conclusion ignores Mr. Rozaklis' lengthy and detailed discussion in Section 4.7 of his report regarding his assumptions about when Off-Project return flows would generate additional hydroelectric power in PacifiCorp's Klamath facilities. KOPWU/202, Rozaklis/24-27. Mr. Rozaklis summarized his analysis as follows:

I analyzed the hydropower benefit to PacifiCorp from increased water supplies from off-Project lands by comparing historical stream flows in the Klamath River at each of PacifiCorp's hydropower facilities with the generation capacity at each facility. I assumed that, whenever the historical flow at each location was less than the generation capacity at that location, increased water supplies from off-Project lands contributed to PacifiCorp's historical hydropower generation.

KOPWU/202, Rozaklis/26. Based on this analysis, Mr. Rozaklis discounted the amount of energy from Off-Project return flows, summarizing part of his conclusions in a table that was unambiguously titled "Percent of Time that Increased Supplies from Off-Project Lands Can Effectively Be Used for Hydropower Generation." Id. at Rozaklis/27. PacifiCorp inexplicably misrepresents Mr. Rozaklis' conclusions by ignoring his analysis.^{2/}

PacifiCorp also faults Mr. Rozaklis for not accounting for any inconsistency in Off-Project return flows. PacifiCorp Opening Brief at 24. This argument ignores the testimony of PacifiCorp's own witness, Mr. Smith, who stated that flows into Upper Klamath Lake were relatively stable. PPL/1800, Smith/7. The largest portion of the increased water supplies from Off-Project lands flow into Upper Klamath Lake.

Finally, PacifiCorp claims that KOPWU overvalued the 81,000 MWh that Off-Project return flows provided to the Company despite the fact that KOPWU used the 30-year average market price that PacifiCorp provided in its current FERC license application for the Klamath facilities. PacifiCorp Opening Brief at 24; KOPWU/300, Iverson/7. PacifiCorp stated

^{2/} PacifiCorp cited pages 239-40 of the hearing transcript to support its claim, apparently referring to Mr. Rozaklis' acknowledgment that "[i]ncreased flow during high periods provides – has a lower percentage chance of providing value." TR. 240:2-3 (Rozaklis). Mr. Rozaklis agreed with this point at the hearing and he agreed with this point in formulating his report, which is exactly why Mr. Rozaklis analyzed and discounted his energy estimate based on when Off-Project return flows would provide result in hydroelectric generation. PacifiCorp grossly misrepresents the meaning of Mr. Rozaklis' statement at the hearing.

in its application that this price would generally represent the cost of replacement power if power from the Klamath hydroelectric facilities were unavailable. Re PacifiCorp, FERC Docket No. P-2082-027, Final License Application, Exhibit H at 2-6, 2-7 (Feb. 23, 2004). PacifiCorp's current position calls into question the veracity of those statements.

PacifiCorp suggests that the Company's decremental generation costs are the appropriate value for the generation that results from Off-Project return flows. PacifiCorp Opening Brief at 25-26. Like most of its arguments, however, PacifiCorp does not state what that value is or what impact, if any, using that value would have on KOPWU's overall conclusions. Thus, there is no basis to apply any value other than the 30-year market price that PacifiCorp assumed in its FERC application and KOPWU applied in this proceeding.

4. The Discussion of Water Law and Policy in the Opening Briefs Ignores the Language of the Klamath River Basin Compact

Having unsuccessfully attempted to demonstrate that KOPWU's members deplete stream flows and provide no additional water supply, PacifiCorp and ONRC et al. make the alternative argument that the Commission should disregard KOPWU's return flow evidence based on Oregon water law and policy. With respect to the increased water supplies that KOPWU quantified, ONRC et al. claims that "under Oregon water law that water would belong to the public, no irrigator would retain any interest in it, and it couldn't be used for hydropower generation." ONRC et al. Opening Brief at 33. ONRC et al. also argues that the return flows that KOPWU has demonstrated entering the Klamath system from Off-Project lands indicate excessive Off-Project water use, resulting in unlawful "waste." Id.

The primary problem with ONRC et al.'s argument is that it ignores the Klamath River Basin Compact (the "Compact"), which speaks specifically to the fate of water that is used

for agricultural purposes in the Upper Klamath River Basin. Section III.2(b) of the Compact expressly imposes “conditions” on the use of water in the Basin, and one of these conditions is:

That water diverted from Upper Klamath Lake and the Klamath River and its tributaries upstream from Keno, Oregon, for use in Oregon and not consumed therein and appearing as surface return flow and waste water within the Upper Klamath River Basin shall be returned to the Klamath River or its tributaries above Keno, Oregon.

ORS § 542.620. In other words, despite ONRC et al.’s claims, the Compact expressly promotes the flow of waste water from irrigated lands to the Klamath River. The fact that the Compact specifies that waste water must be returned above Keno ensures that the water is available for hydroelectric generation, contrary to ONRC et al.’s claim that “couldn’t” be used for that purpose. ONRC et al. Opening Brief at 33.

Interestingly, PacifiCorp points out this language from the Compact but argues that it means the exact opposite of what ONRC et al. claim that Oregon water law demands. PacifiCorp Opening Brief at 22. PacifiCorp argues that Off-Project irrigators have a “legal obligation” to deliver return flows to the Klamath River. Id. PacifiCorp fails to acknowledge that it is the State of Oregon, not Off-Project irrigators, that has a legal obligation under the Compact to establish laws and policies that ensure that return flow and waste water return to the Klamath River. PacifiCorp’s argument only reinforces the importance of return flows for irrigated agriculture in the Klamath Basin and that the Commission is bound in this proceeding to take all appropriate action in furtherance of the policies expressed in the Compact.

The final problem with ONRC et al.’s argument is that, like most of their arguments, they provide no evidence or quantified analysis to demonstrate that “waste” is

occurring. Unsupported and contradictory allegations are entirely consistent with the scattershot approach but provide no basis to terminate the Off-Project Agreement.

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

PacifiCorp and Staff claim that KOPWU's evidence does not demonstrate that Klamath irrigation customers merit a separate customer classification. PacifiCorp Opening Brief at 5, citing Staff/1502, McNamee/9-10. Again, Klamath irrigation customers already are included in a separate customer class, and PacifiCorp has the burden in this proceeding to demonstrate that eliminating that class is justified. The evidence demonstrates that Off-Project customers are less costly to serve and have larger average usage that directly results from the many deep water wells on Off-Project lands. KOPWU/300, Iverson/3-5; KOPWU/100, Bartell/9. PacifiCorp's argument that Off-Project customers are merely a zonal subgroup of all irrigation customers ignores the substantial history underlying Klamath irrigation customers' electric service and the specific distinction of electric use for irrigation and drainage pumping in the Compact.

PacifiCorp also argues that Off-Project customers have allegedly known for forty years that the Off-Project rate would not continue based on individual service agreements that include statements indicating that the rates would be subject to change by the appropriate state agency. PacifiCorp Opening Brief at 7. The language cited by PacifiCorp does not demonstrate that the Off-Project Agreement expires in 2006; rather, that language only indicates that the individual electric service agreements may be renegotiated in the future in favor of a different contract. The individual service agreements that PacifiCorp refers to state that the Company will provide electric power and energy in accordance with the terms of the April 30, 1956 Off-Project

Agreement, and that Agreement does not expire. Thus, PacifiCorp is bound to provide electric service to Off-Project customers according to the terms of the Off-Project Agreement regardless of the terms of individual electric service agreements.

Finally, both PacifiCorp and Staff ignore the fact that the Compact specifically distinguishes irrigation and drainage pumping customers in the Klamath Basin. The Compact specifically identifies: 1) “power rates,” for 2) “irrigation and drainage pumping, including pumping from wells,” in 3) the “Klamath River Basin.” ORS § 542.620. No evidence has been provided to demonstrate that agricultural pumping, including pumping from wells, for all irrigation customers should receive the “lowest power rates which may be reasonable.” *Id.* This distinction provides a substantial and reasonable basis for continuing to include Klamath irrigators in a separate customer class.

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

A. Any New Cost-Based Rate that the Commission Establishes for Off-Project Customers is the Generally Applicable Rate

PacifiCorp predictably excludes from its opening brief any detailed discussion of the Company’s proposal with respect to implementing ORS § 757.227. *See* PacifiCorp Opening Brief at 26. It will not be surprising if PacifiCorp includes detailed argument to support its position in the reply brief to which KOPWU will have no opportunity to respond.

PacifiCorp argues that ORS § 757.227 will not apply if the Commission does not move Klamath customers to a “generally applicable” rate schedule. *Id.* at 26 n.13. If the Commission terminates the Off-Project Agreement and moves Off-Project customers to any cost-based tariff, that tariff will be the “generally applicable cost-based rate” that is appropriate

for Off-Project customers. ORS § 757.227(2)(a). The rate mitigation provisions in ORS § 757.227 will apply under those circumstances.

B. Staff Agrees with PacifiCorp without Considering the Plain Meaning of ORS § 757.227

Staff's agreement with PacifiCorp's interpretation of ORS § 757.227 without analyzing the plain meaning of the statute should not be given any weight. Staff argues that KOPWU has "manipulated" the calculation of the SB 81 rate credit in an "attempt to circumvent the legislative intent" by stating that the plain language of ORS § 757.227 requires consideration of the Bonneville Power Administration ("BPA") agricultural pumping credit in calculating the appropriate rate credits under the statute. Staff Opening Brief at 7-8. As an initial matter, KOPWU was a co-drafter of Senate Bill ("SB") 81 and sponsored the bill in the legislature. Counsel for KOPWU drafted the clause that states that all "special charges and credits" shall be included in calculating the total cost of electricity at the specific request of her client with the BPA credit in mind. Attachment 1 to KOPWU's Opening Brief demonstrates that Off-Project customers will receive the full benefit of seven years of rate mitigation under KOPWU's interpretation and that Off-Project revenues will essentially equal Schedule 41 revenues at that time. Staff's claim that KOPWU has "manipulated" the calculation of the SB 81 rate credit to "circumvent" the legislative intent is insulting and uniformed. Staff Opening Brief at 7-8.

Staff's discussion of the rate credits provided for in ORS § 757.227 completely ignores the plain meaning of the statute. Staff has cited the basic principles of statutory interpretation in briefs previously submitted in this proceeding, and it is well known that the first step in any statutory analysis in Oregon is to examine the plain meaning of the statute. Staff Opening Brief on Rate Standard at 2 (Aug. 29, 2005), citing PGE v. BOLI, 317 Or. 606, 610

(1993). Nevertheless, Staff does not cite the applicable law in its opening brief and does not even mention the plain language of ORS § 757.227. Staff Opening Brief at 7-8. Instead, Staff refers to statements from Senate Floor Speeches regarding SB 81 indicating that the rate mitigation was intended to result in Klamath irrigation customers reaching “market rates” in seven years. Id. at 7-8. Staff then incorrectly asserts that Klamath irrigators have attempted to “circumvent” the intent of the legislature by including the BPA credit in the calculation of the SB 81 rate credit, because doing so would not result in Klamath irrigators reaching “market rates” in seven years. Id. at 8. Staff’s interpretation is wrong on several counts.

First, ORS § 757.227(4) specifically states that “[f]or 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.” Staff’s “analysis” ignores this language altogether, and Staff’s reliance on legislative history to determine the legislative intent without first examining the text and context of the statute is impermissible under Oregon law. PGE, 317 Or. at 610.

Second, Staff elevates the statements in the floor speeches that the Klamath customers should reach standard tariff rates in seven years above the actual language in ORS § 757.227. The statute provides that “[r]ate credits under this section may not be provided for more than seven years;” it does not *require* that Klamath irrigation customers reach standard tariff rates during that time. ORS § 757.227(3). Staff also claims that Exhibit Staff/1500, McNamee/17, lines 13-17 demonstrates that Klamath irrigators will not reach standard tariff revenues in seven years under KOPWU’s proposal, but that testimony does not even mention the

rate mitigation provisions of ORS § 757.227 and provides absolutely no support for Staff's conclusion. Attachment 1 to KOPWU's Opening Brief demonstrates that providing rate credits for seven years according to KOPWU's proposal results in Off-Project customers approximately reaching Schedule 41 revenues in seven years.

Finally, the discussion about Klamath irrigators not reaching standard tariff rates in seven years ultimately is irrelevant. Although SB 81 was drafted with the general intent in mind that revenues from Off-Project customers^{3/} would generally reflect standard tariff revenues at the end of seven years, the statute was drafted with the knowledge that it would be impossible to assure that those revenues equal Schedule 41 revenues in that period. PacifiCorp already has filed a new rate case in Oregon, seeking to increase Schedule 41 rates, and the Company has publicly stated that it intends to file annual rate cases for the next several years with price increases of approximately 5%. Under these circumstances, the interpretation of ORS § 757.227 should not be driven by concerns about reaching Schedule 41 rates in seven years because those rates will constantly be changing. The plain language of the statute should be the Commission's guide, and that language is unambiguous. The BPA credit must be included in determining the appropriate ORS § 757.227 rate credit.

Staff's witness stated at the hearing that, as a staff member, "my job, once again, is to provide the Commission with as good an analysis and recommendations as I can do." TR. 379:12-14 (McNamee). Staff's recommendation regarding implementation of ORS § 757.227 fails to cite the applicable law, ignores the statute's unambiguous language, improperly assigns

^{3/} As described above, KOPWU was a co-drafter of SB 81 and KOPWU's initial calculations of how long it would take Off-Project revenues to approximate Schedule 41 revenues were performed with *Off-Project customers* in mind.

meaning to legislative history that the Commission can lawfully consider only if the statute is ambiguous, and relies on allegations about KOPWU's interpretation that are completely unsupported by Staff's testimony. If the Commission orders a rate increase in this proceeding that invokes the ORS § 757.227 rate mitigation provisions, then the proper implementation of the statute will be of the utmost importance to assuring that Klamath basin farms continue to operate. Staff's unlawful and uninformed recommendations do a disservice to the Commission in this proceeding.

C. The Passage of SB 81 Had No Impact on the Rights of KOPWU's Members to Continue to Receive Electric Service Under the Off-Project Agreement

The Hoopa Valley Tribe claims that the passage of SB 81 demonstrates the Legislature's expectation that Commission will move the Klamath irrigators to Schedule 41 rates. Hoopa Valley Tribe Opening Brief at 11. The evidence in the record demonstrates that this statement is patently incorrect. PacifiCorp and KOPWU jointly supported SB 81, but both parties made clear that "the bill in no way prejudices any parties' position regarding the validity of the 1956 contracts. This change in law is needed to ensure that OPUC has the authority to address the rate shock that may arise if the 1956 contracts are terminated." KOPWU/601 at 2. ORS § 757.227 provides specific rate mitigation authority in the event that the Commission authorizes PacifiCorp's request to impose an unprecedented rate increase on Klamath irrigation customers. KOPWU's evidence demonstrates that terminating the Off-Project Agreement and moving Off-Project customers to standard irrigation is unjustified and unlawful, and the Commission should deny PacifiCorp's request.

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 13th day of March, 2006.

Respectfully submitted,

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