

ISSUED: February 24, 2006

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 170

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

DISPOSITION: MOTION TO APPEAR AS *AMICUS CURIAE* DENIED

The Center for Tribal Water Advocacy (CTWA) seeks permission to appear and participate in this case as *amicus curiae*. CTWA contends that its participation in this matter will assist the Commission in resolving the important issues related to stream flows, water quality and tributary habitat in the Klamath River Basin. The Pacific Coast Federation of Fishermen's Association (PCFFA) and the Hoopa Valley Tribe support the request; the Klamath Off-Project Water Users (KOPWU) objects to it. For the reasons that follow, I deny CTWA's motion.

DISCUSSION

CTWA is a non-profit public interest organization dedicated to protecting water resources of the members of North Western Indian Tribes and the general public. CTWA's membership includes members of the Klamath, Yurok and Hoopa Valley Tribes that engage in recreational and cultural activities in and around the Klamath River and its tributaries. CTWA contends that it has a direct and personal stake in the outcome of these proceedings due to its significant interest in water use and supply issues in the Klamath River Basin. Specifically, CTWA states it has an interest in ensuring that diversion of surface flows and pumping of ground water in the Klamath River basin will not (1) diminish streamflows needed for the fish and wildlife resources in the Klamath River and Tributaries; (2) exacerbate existing water quality problems in the Klamath River and Tributaries; (3) allow inefficient or wasteful use of water, (4) result in speculation of water; and (5) set bad precedent.

If granted status as *amicus curiae*, CTWA intends to raise arguments relating to the On-Project contract and its rates for discounted electricity. These arguments include whether the On Project contract:

- (a) violates ORS 756.185, which states that "Any public utility which does, or causes or permits to be done, any matter, act or thing prohibited by ORS chapter 756, 757 or 758 or omits to do any act, matter or thing required to be done by such statutes, is liable to the person injured thereby in the amount of damages sustained in consequence of such violation;"
- (b) violates existing state and federal environmental and consumer laws;
- (c) allows Klamath Basin irrigators in both Oregon and California, to avoid standard pump fees in violation of Oregon Water Resources Department regulations;
- (d) provides Klamath Basin irrigators with free powerline extensions subsidized by other PacifiCorp customers in violation of current consumer laws; and
- (e) violates the Tribal Trust responsibility of the Bureau of Reclamation, Bureau of Land Management and other federal entities.

CTWA contends its interests are not adequately represented by current parties, explaining that it does not purport to represent, in any capacity, members of the two Tribes (Yurok and Hoopa Valley) that are already parties in this case. CTWA clarifies that it represents only its membership, many of whom happen to be members of federally recognized Indian Tribes but have separate and distinct interests and concerns from such tribes.

The Hoopa Valley Tribe supports CTWA's request. It contends that CTWA's participation will assist the Commission in its resolution of this proceeding, will not prejudice any party, and will present views and interests of tribal governments and tribal members that are different from those presented by the Hoopa Valley Tribe.

PCFFA also supports CTWA's request, stating that "there is a broader context of federal Indian Treaty and water rights law in which this case is embedded that has not yet been argued or briefed, including the fact that Oregon's Klamath Tribes hold the most senior water right, 'from time immemorial,' in the upper Klamath Basin." PCCFA Response at 4. PCFFA explains that the Klamath Tribes are not Intervenor in this case and that, while the Yurok and Hoopa Valley Tribes have intervened, these California Tribes' interests are quite distinct from the specific senior water right interests of the Klamath Tribes in Oregon.

KOPWU opposes CTWA's request. It first questions the nature of CTWA's request, stating that it appears that CTWA is actually seeking a role in this proceeding that is

more akin to that of an intervener than it is to that of an *amicus curiae*. KOPWU also contends that CTWA's intended arguments would unreasonably broaden the issues and burden the record in this proceeding, and that it is unreasonable and prejudicial to require parties to respond to the arguments raised so late in this proceeding. Finally, KOPWU finds CTWA's argument that its interests are not adequately represented by current parties to be unpersuasive, given that its members include representatives of the Yurok and Hoopa Valley Tribes, both of which are current parties.

CONCLUSIONS

As PCFFA points out, the filing of *amicus* briefs is rare in administrative proceedings. Black's Law Dictionary (7th Ed. 1999) defines an *amicus curiae* as follows:

Amicus curiae. [Latin "friend of the court"] A person who is not a party to the lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter."

While neither Commission rules nor the Oregon Rules of Civil Procedure address requests to participate as *amicus curiae*, I conclude that the Commission has the discretion to allow a person to appear as *amicus curiae* if the *amicus* has an interest or special expertise, in order to provide a clarity or better resolution of the issues. Moreover, as CTWA articulates, a request to appear as *amicus curiae* status may be denied where the parties are well represented, unanimous consent of the parties is lacking, and the applicant appears as an advocate rather than a neutral entity. *Ryan v. Commodity Futures Trading & Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

I conclude that CTWA's request should be denied. First, the parties are well represented in this proceeding. As CTWA itself recognizes, two tribes whose members are also members of its organization, Yurok and Hoopa Valley, have intervened and participated in this proceeding. While I recognize that neither of these tribes has requested CTWA to appear on their behalf, CTWA has failed to establish that its interests are separate from the interests already represented. Second, CTWA has not presented itself as a neutral entity. I agree with KOPWU that CTWA's request is styled more akin to a petition to intervene. It also appears to raise factual issues that would be difficult, if not impossible, to address in an orderly manner prior to the scheduled issuance of an order in this proceeding before April 16, 2006. Third, joint consent of the parties is lacking, which is important at this late stage in the proceeding. Only two parties have consented to granting CTWA *amicus* status, while one party opposes the request.

Dated at Salem, Oregon, this 24th day of February 2006.

Michael Grant
Chief Administrative Law Judge