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December 4, 2023

## *Via Electronic Filing*

Public Utility Commission of Oregon  
Attn: Filing Center  
201 High St. SE, Suite 100  
Salem OR 97301

Re: In the Matter of PACIFICORP, dba PACIFIC POWER,  
Application to Implement Provisions of Senate Bill 76.  
**Docket No. UE 219**

Dear Filing Center:

Please find enclosed the Joint Response to KRRC of the Alliance of Western Energy Consumers and Oregon Citizens' Utility Board in the above-referenced docket.

Thank you for your assistance. If you have any questions, please do not hesitate to call.

Sincerely,

/s/ Anna V. Congdon  
Anna V. Congdon

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**UE 219**

In the Matter of	)	
	)	
PACIFICORP, dba PACIFIC POWER,	)	JOINT COMMENTS OF THE
	)	ALLIANCE OF WESTERN ENERGY
	)	CONSUMERS AND OREGON
Application to Implement the Provisions of	)	CITIZENS' UTILITY BOARD
<u>Senate Bill 76.</u>	)	

**I. INTRODUCTION**

Pursuant to OAR 860-001-0400(4), the Alliance of Western Energy Consumers (“AWEC”) and the Oregon Citizens’ Utility Board (“CUB”) file this Joint Response to the Klamath River Renewal Corporation’s (“KRRC”) request to amend Funding Agreement DM #7810225 (“Funding Agreement”) to authorize disbursement of approximately \$4.8 million of accrued interest held in trust accounts related to PacifiCorp customers’ contributions to the cost of removing the Klamath Dams.<sup>1</sup> In one sense, AWEC and CUB do not oppose KRRC’s request because the amendments KRRC seek to the Funding Agreement do not actually provide any additional authorization to collect this interest. AWEC and CUB do, however, strongly oppose the substance of KRRC’s request, which invites the Public Utility Commission of Oregon (“Commission”) to defy Oregon law and distribute to KRRC funds that the Oregon Legislature explicitly directed are to be refunded to ratepayers or otherwise used “for the benefit of customers.”<sup>2</sup> As KRRC concedes that Oregon ratepayers have fully contributed their allocated

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<sup>1</sup> Docket UE 219, KRRC Request for Order to Amend Funding Agreement DM #7810225, dated November 13, 2023 (“KRRC Request”).

<sup>2</sup> O.R.S. § 757.736(9).

portion of costs associated with the removal of the Klamath River Dams, KRRC has not, and cannot, demonstrate that transferring these interest funds to KRRC will provide any benefit to Oregon ratepayers. As such, KRRC's Request must be rejected.

If the Commission disagrees with AWEC and CUB's primary legal arguments, AWEC and CUB respectfully request that the Commission exercise its broad authority and discretion to deny the KRRC Request given the frequency and magnitude of recent rate increases PacifiCorp's customers have been exposed to.

On June 27, 2023, AWEC and CUB responded to a similar request from KRRC that included relevant background on the Klamath Dam removal process and the associated funding requirements, which AWEC and CUB incorporate here by reference.

## **II. DISCUSSION**

KRRC has admitted it has received the full amount of customer contributions from Oregon ratepayers permitted by law. Nonetheless, KRRC presents seven points of discussion to justify its invitation to the Commission to contravene Oregon law and disburse earned interest revenue, designated to be used for the benefit of ratepayers, for the sole benefit of KRRC. AWEC and CUB address each of these discussion points below and recommend the Commission decline KRRC's invitation to violate Oregon law. Furthermore, AWEC and CUB recommend the Commission refund the subject earned interest "for the benefit of ratepayers" as an offset to the substantial rate increases scheduled to become effective January 1, 2024.

### **1. The timing and cost of dam removal is irrelevant.**

As its opening argument to the Commission, KRRC admits that the Commission fixed neither the “actual schedule for dam removal” nor “the actual cost of dam removal...”<sup>3</sup> Additionally, KRRC admits that “the Commission required collection of rate surcharges less than the 2% cap ending December 31, 2019.”<sup>4</sup> Finally, KRRC concedes that “the Commission did not purport to fix the actual cost of dam removal, which depends on the actual schedule as well as the conditions of regulatory approval.”

AWEC and CUB agree with each of these admissions by KRRC and acknowledge the accuracy of each statement. Importantly, none of these statements establish a foundation for KRRC’s request for additional money from the interest-baring accounts required by O.R.S. § 757.738 (“Oregon Trust Accounts”). Indeed, taken together, these factual statements confirm that the Commission established neither an actual cost of dam removal, nor a specific timeline for dam removal. This is self-evident, as the Commission has no jurisdiction to determine the cost and removal timing for the Klamath Dams, which operate under a FERC license. However, it remains undisputed that the Oregon legislature did in fact fix the amount Oregon ratepayers would be required to contribute to dam removal costs. Specifically, Oregon law explicitly states that “[t]he surcharges [authorized by law and approved by the Commission] may not exceed the amounts necessary to fund Oregon’s share of the customer contribution of \$200 million...”<sup>5</sup> Nothing presented by KRRC regarding the amount and schedule of collection of rate surcharges or the actual cost and schedule of dam removal contest or seek to challenge this fact of law. Actual costs

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<sup>3</sup> KRRC Request at 3.

<sup>4</sup> KRRC Request at 3.

<sup>5</sup> O.R.S. 757.736(3).

in excess of the estimate previously found to be “correct[.]”<sup>6</sup> are not justification to exceed the customer contribution limit established by Oregon law.

In presenting its initial point, KRRC asserts that the Klamath Agreement in Principle (“KAP”) “established procedures to address any actual cost in excess of \$450,000,000”<sup>7</sup> and references Section IX.E of the KAP and Section 7.2.1.(A)(4) of the KHSA. KRRC misrepresents these agreements in an unavailing attempt to imply the agreements provide for the relief KRRC seeks. KRRC is wrong and has distorted the provisions it references.

Section IX.E of the KAP states in relevant part:

The [KHSA] may address terms and conditions materially consistent with the goals of the Agreement in Principle, as well as other subjects, including but not limited to the following:

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Provisions for funding any costs in excess of the \$450,000,000 which arise after the Secretary makes a determination to remove the dams, consistent with provisions previously set forth in this Agreement in Principle

\*\*\*\*<sup>8</sup>

Section 7.2.1.A of the KHSA states in relevant part:

The Definite Plan may be based on all elements of the Detailed Plan described in Section 7.2.2 and will be consistent with FERC requirements for surrender. Such elements shall be in the form required for physical performance, such as engineering specifications for a construction activity, and shall also include consideration of prudent cost overrun management tools such as performance bonds. The Definite Plan shall also include:

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(4) Accounting procedures that will result in the earliest practicable disclosure of any actual or foreseeable overrun of cost of any task relative to the detailed estimate...

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<sup>6</sup> Order No. 10-364 at 17.

<sup>7</sup> KRRC Request at 3.

<sup>8</sup> KAP, Section IX, Attachment 2 to KRRC Request.

The most generous reading of these provisions in favor of KRRC’s claim would indicate that the KHSA “include[d] consideration of prudent cost overrun management tools.” However, neither the KAP nor the KHSA provided for customers to contribute more than the specified customer contribution amount; in Oregon’s case, \$184,000,000. KRRC admits it has received the full amount of Oregon customers’ share from the Oregon Trust.<sup>9</sup> Neither authority referenced by KRRC permits the distribution of additional funds beyond the approved state cost cap.

As noted in AWEC and CUB’s Joint Comments dated June 27, 2023, the 2020 Memorandum of Agreement (“MOA”) does provide an avenue for KRRC to receive “additional contingency funding” of \$45 million, but only if the Oregon and California state legislatures appropriate such funds, and PacifiCorp contributes its \$15 million share. To the extent KRRC seeks additional revenue to cover costs beyond the initial agreed upon and approved \$450,000,000 cost estimate, its remedy lies with the legislatures of the states, and PacifiCorp, not with the Commission. This may be why PacifiCorp supports KRRC’s request, as it avoids the possibility that the utility could itself be required to fund cost over-runs for dam removal.

**2. KRRC’s interpretation of “nominal” dollars does not change the amount it is entitled to recover.**

As its second argument to the Commission, KRRC concedes that both the KAP and the KHSA specifically establish that the “customer contribution of \$200,000,000 is to be calculated when the funds are collected, not expended.”<sup>10</sup> The implication of KRRC’s argument appears to be that the \$200 million cost cap should be adjusted for inflation based on when customer contributions were collected. That, however, is not what nominal dollars are. Nominal dollars are

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<sup>9</sup> KRRC Request at 3.

<sup>10</sup> KRRC Request at 4.

what the name implies – the simple number of dollars stated. The definition in the KAP and the KHSA that “nominal dollars” are “dollars that are not adjusted for inflation at the time they are collected” is simply a means of ensuring that the customer contribution was not interpreted to be in “real” dollars, which does adjust for inflation. In effect, if the customer contribution was intended to be adjusted for inflation, then the KHSA and Oregon law would have required the Oregon customer contribution to be \$184 million exclusive of interest, instead of the \$158.24 million plus interest that the Commission originally approved.<sup>11</sup>

If KRRC’s interpretation were correct, then it stands to reason that some party at some point would have identified this issue. Instead, there has never been any confusion throughout the long history of this docket as to what was intended by the KHSA and SB 76. Indeed, Section 7.3.8.A of the KHSA is explicit that “the Parties acknowledge above that the surcharges from the Customer Contributions will be placed in interest-bearing accounts and that the interest that accrues in the accounts may be used to reduce the amount collected through the surcharges *so that the total Customer contribution, including accrued interest through December 31, 2019, totals \$200,000,000.*”<sup>12</sup>

Simply put, it is abundantly clear that the law, the KHSA, Commission orders, and all parties to this docket (other than KRRC) intended what they said – that Oregon customers are responsible for \$184 million of the \$200 million of dam removal costs, including interest, collected by December 31, 2019.

### **3. Interest earned in the Trust Accounts is still subject to the state cost cap.**

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<sup>11</sup> Order No. 10-364 at 17.

<sup>12</sup> KHSA § 7.3.8.A (emphasis added).

KRRC's third argument centers on the understanding, held by the Commission, the Legislature, and parties to the KAP and KHSAs, that accrued interest would contribute to the overall funding of the dam removal project.<sup>13</sup> In making this claim, KRRC again cites the KAP, which referenced "earnings on the surcharge trust" as a potential funding source, as well as O.R.S. 757.738(1)(a), which required the Commission to establish the Oregon Trust Accounts. Again, AWEC and CUB agree that KRRC has correctly quoted the provisions referenced and, as noted above, also agree that interest was a necessary part of the customer contribution. And, again, AWEC and CUB point out that KRRC has misplaced its reliance on the cited language and has presented an unsupportable argument.

There is no disagreement that interest earned, assumed to be at 3.5 percent,<sup>14</sup> was intended to contribute to the overall customer contribution value. Indeed, in authorizing the Commission to establish the Oregon Trust Accounts and set the underlying surcharges, the Oregon Legislature specifically directed the Commission to "account for the actual and expected changes in interest rates on the collected funds over the collection period."<sup>15</sup> It is further undisputed that accrued interest did in fact contribute to the overall customer contribution, as the Commission approved surcharges calculated to collect \$158.24 million from Oregon ratepayers, with forecast earned interest providing the remainder, up to the Oregon maximum of \$184 million.<sup>16</sup> Finally, it remains beyond dispute that the Oregon Trust Accounts have distributed the maximum amount of \$184,000,000.<sup>17</sup>

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<sup>13</sup> KRRC Request at 4-5.

<sup>14</sup> Order No. 10-364 at 17.

<sup>15</sup> O.R.S. § 757.736(7).

<sup>16</sup> See Order No. 10-364 at 17.

<sup>17</sup> KRRC Request at 3.



Interest accruals acted as desired and anticipated, reducing revenue collection from Oregon ratepayers by over \$25 million, while ensuring Oregon customers contributed their full and fair share of dam removal costs. An “assur[ance of] sufficient funds to complete dam removal”<sup>18</sup> was never the intention of accrued interest, notwithstanding KRRC’s unsupported, inaccurate, and self-serving assertion. Oregon ratepayers have contributed their agreed-upon, and statutorily limited, amount for dam removal costs, supported by interest earned on the Oregon Trust Accounts. The interest rate to be applied the account was thoroughly investigated by the Commission and a wide range of stakeholders, and it was always designed to offset ratepayers’ contribution to the \$184 million total cap.<sup>19</sup> Distribution to KRRC of remaining accrued interest earned on ratepayer-contributed funds held in the Oregon Trust Accounts is prohibited by Oregon law, and such prohibition cannot be circumvented by a demonstration that interest accruals operated as intended.

**4. The forecasted nature of interest earnings does not impact the amount of the state cost cap.**

KRRC’s fourth argument, based on the inability of all parties to foresee a decade’s worth of interest rate changes, suffers from the same fatal assumption and logic flaws as the assertions discussed above. The implication of KRRC’s argument here appears to be that, because it would have been impossible to perfectly forecast the amount of interest that would accrue in the Trust Accounts, that KRRC is entitled to any amount of interest that accrues, even if it exceeds the statutorily authorized amount. This is a logical leap that entirely ignores the actual legal requirements established by the Legislature and the Commission’s orders approving the

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<sup>18</sup> KRRC Request at 5.

<sup>19</sup> Order No. 10-364 at 17.

surcharges. All parties knew that some level of interest would accrue on the account, yet the total amount eligible for recovery was always \$184 million.

It is true that the earned interest amounts intended to contribute to Oregon’s share of the full dam removal costs were forecast; initially at 3.5 percent.<sup>20</sup> The Oregon Legislature specifically recognized the forecasted nature of the earned interest contribution, requiring the Commission to “account for the actual and expected changes in interest rates on the collected funds over the collection period.”<sup>21</sup> In Order 16-218, the Commission complied with this directive, increasing the surcharges to account for lower than expected interest accrual, and to ensure full recovery of Oregon customers’ share of the maximum-allowed dam removal cost contributions.

The agreed-upon fact that accrued interest was forecast and not fixed in no way justifies KRRC’s request to receive funds in excess of the maximum amount allowed by Oregon law. Oregon ratepayers contributed, and KRRC received, the agreed-upon maximum amount of money toward the dam removal projects that the Commission was authorized by the Oregon Legislature to collect. Again, KRRC’s discussion does not provide an avenue to circumvent Oregon law and allow distribution from the Oregon Trust Accounts of any funds above the already-distributed \$184 million.

**5. Applicable law requires that interest above Oregon customers’ statutorily capped contributions be refunded to customers or otherwise used for their benefit.**

KRRC’s fifth argument in support of its request to misappropriate ratepayer funds is more troubling than those already discussed in that it blatantly misstates and misapplies Oregon law. KRRC asserts that “ORS 757.736(10) provides for refund of funds held in the Oregon Trust *only*

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<sup>20</sup> Order No. 10-364 at 17.

<sup>21</sup> O.R.S. § 757.736(7).

‘[i]f one or more Klamath River dams will not be removed...’<sup>22</sup> This statement is true, but only because the focus of O.R.S. § 757.736(10) is on the possibility that “one or more Klamath River dams will not be removed...”<sup>23</sup> Section 757.736(10) is not, as implied by KRRC, the only section of Oregon law addressing refunds of amounts in the Oregon Trust Accounts. Indeed, O.R.S. § 757.736(9) explicitly states “[i]f the commission determines at any time that amounts have been collected under this section in excess of those needed, *or in excess of those allowed*, the commission must: (a) Direct the trustee of the appropriate trust account ... to refund these excess amounts to customers or to otherwise use these amounts for the benefit of customers.”<sup>24</sup> Accordingly, while § 757.736(10) addressed what to do if monies were collected in advance and then the scope, and therefore the cost, of the dam removal efforts was reduced, which did not occur, § 757.736(9) establishes what must be done in the present circumstance, where funds have been collected in excess of those allowed by law. The trustee has made all payments necessary to provide the authorized costs from Oregon customers for removing the Klamath River dams. This point is agreed upon by all. Per the KRRC Request, \$4,747,365 remains in the trust accounts after all authorized payments have been made. As such, the Commission is required to “refund those amounts to customers or...otherwise use [them] for the benefit of customers.”<sup>25</sup>

Oregon law prohibits further distribution of Oregon Trust Account funds to KRRC and instead requires the remaining accrued interest be refunded to ratepayers, or otherwise be used to benefit ratepayers, not KRRC. KRRC’s select and incomplete discussion of Oregon law is

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<sup>22</sup> KRRC Request at 5, emphasis in original.

<sup>23</sup> O.R.S. § 757.736(10).

<sup>24</sup> O.R.S. § 757.736(9), emphasis added.

<sup>25</sup> O.R.S. 757.738(4).

disingenuous and misleading and fails to provide a valid, and legal, alternative to the explicit directions and limitations established by the Oregon Legislature.

**6. Whether additional interest above the state cost cap is necessary for dam removal or not is irrelevant.**

KRRC’s sixth assertion to justify its claim for access to additional Oregon Trust Account funds is based on the updated, January 2023 budget for complete dam removal, now projected at \$503,000,000. Specifically, KRRC asserts it needs the additional \$4.7 million from the Oregon Trust Accounts for “habitat restoration and other actions required by the license surrender order.”<sup>26</sup> Furthermore, KRRC contends it has “managed its procurement contracts, overhead, and all other aspects of this project to minimize the consequence of delay in final regulatory approval.”<sup>27</sup> As such, KRRC contends the remaining accrued interest funds are “necessary to complete dam removal.”<sup>28</sup>

AWEC and CUB take no position on KRRC’s claims of prudent management efforts, as this claim is irrelevant to the issue at hand. The Oregon Legislature established “Oregon’s share of the customer contribution of \$200 million”<sup>29</sup> as a statutory cap on the amount of money that could be collected from Oregon customers. The Commission found this share to be \$184 million, based upon the terms of the KHSA.<sup>30</sup> KRRC has already received the full \$184 million that the Commission was authorized to collect and distribute. Oregon law does not provide a contingency for additional customer contributions in the instance of cost over-runs. The MOA, however, does. The fact that the dam removal efforts have been more costly than anticipated does not afford the

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<sup>26</sup> KRRC Request at 6.

<sup>27</sup> KRRC Request at 6.

<sup>28</sup> KRRC Request at 6.

<sup>29</sup> O.R.S. § 757.736(7).

<sup>30</sup> Order No. 10-364 at 12-13.

Commission with the ability to exceed “Oregon’s share of the customer contribution of \$200 million...” Instead, KRRC has a remedy available, through the Oregon and California legislatures, and PacifiCorp if it seeks further funding. That said, AWEC and CUB note with some skepticism KRRC’s apparent claim that further dam removal may not occur without access to the remaining \$4.8 million in the Trust Accounts, an amount that is less than 1% of the total cost of dam removal. If this is indeed KRRC’s claim, then it should at least produce some evidence in support. Further access to the Oregon Trust Accounts as a remedy to KRRC’s cost overrun difficulties is prohibited by Oregon law.

**7. The public interest requires that the Commission refund remaining amounts in the Trust Accounts to customers or otherwise use these funds for their benefit.**

KRRC’s final argument is that the Commission and the Federal Energy Regulatory Commission (“FERC”) have found the dam removal project to be in the public interest and KRRC has mobilized support to effectuate the completion of the removal project, including successfully removing the smallest dam, Copco No. 2.<sup>31</sup> Curiously, KRRC states that “[t]he public interest requires that [KRRC] complete dam removal...as that is the only legal path forward.”<sup>32</sup> KRRC supports this legal obligation with a discussion that the FERC license surrender order is “final and non-appealable.”<sup>33</sup>

What KRRC fails to enunciate, because it does not exist, is how this obligation established by a Federal administrative agency supersedes or otherwise obviates the limitation on customer contributions established by the Oregon Legislature. While KRRC may understand it has a legal obligation to complete the dam removal, an obligation AWEC and CUB do not dispute in this

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<sup>31</sup> KRRC Request, at 6-7.

<sup>32</sup> KRRC Request at 7.

<sup>33</sup> KRRC Request at 7.

discussion, the Commission undoubtedly has a legal obligation to cap Oregon customer contributions to the dam removal project. With respect to the issues within the scope of the Commission's jurisdiction, the best evidence of what the public interest requires is what the Legislature said. No party disputes that KRRC has already received the full amount of Oregon customers' share of the statutorily established customer contribution of \$200 million. Distributing the accrued interest held in the Oregon Trust Accounts to KRRC is an explicitly illegal path forward. Indeed, the only legal path for the Commission is refunding the remaining funds to ratepayers, or otherwise using them for the express benefit of customers, as required under O.R.S. § 757.738(4).

**8. The Commission should refund accrued interest in the Trust Accounts to customers to help offset upcoming rate increases.**

Consistent with Oregon law, the Commission should refund remaining amounts in the Trust Accounts or otherwise use those amounts for the benefit of customers. As PacifiCorp recently disclosed, customers will see an average 12.8% rate increase on January 1, 2024.<sup>34</sup> Refunding accrued interest in the Trust Accounts at the same time can help partially mitigate this substantial rate increase, which comes on the heels of an even larger rate increase last year.

### **III. CONCLUSION**

Oregon customers have complied with their legal obligation to fully fund their share of the customer contribution of \$200 million toward the cost of removal of the Klamath River dams. Oregon's share, \$184 million, was comprised of amounts collected directly from retail customers via surcharges and interest earned on those surcharge revenues once deposited into interest-bearing accounts. Oregon law does not permit further distribution of funds held in the Oregon Trust

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<sup>34</sup> Docket UE 421, PacifiCorp Resp. to Bench Requests 1-1 through 1-4 (Nov. 20, 2023).  
13 – AWEC-CUB RESPONSE TO KRRC

Accounts to KRRC and KRRC has not demonstrated an avenue through this statutory limitation. Indeed, Oregon law explicitly requires that any amounts remaining in the Oregon Trust Accounts be refunded to customers, or otherwise used for the benefit of customers. Given the magnitude of rate increases approved to become effective January 2024, AWEC and CUB request the Commission refund the remaining accrued interest to customer for their immediate benefit, as mandated by Oregon law.

Dated this 4<sup>th</sup> day of December, 2023.

Respectfully submitted,

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/s/ Tyler C. Pepple

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