

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 219

In the Matter of)	
)	
PACIFICORP, dba PACIFIC POWER)	OPENING BRIEF OF
Application to Implement the Provisions of)	THE CITIZENS' UTILITY BOARD
Senate Bill 76.)	OF OREGON
)	

I. INTRODUCTION

The Citizens' Utility Board of Oregon ("CUB's") interest in this docket was aroused when it became clear that parties to the Klamath Basin negotiations were starting to draft legislation for submission to the Oregon legislature in regard to removal of certain Klamath Basin dams. CUB was concerned that the proposed legislation did not contain any provisions permitting Oregon Public Utility Commission ("OPUC") review of whether the surcharges that the Klamath Hydroelectric Settlement Agreement ("KHSA") would bring were reasonable, prudent and in the interests of Oregon customers— CUB did not believe this lack of review to be in the public interest of Oregon's PacifiCorp ("the Company") customers.¹

CUB worked strenuously to have provisions providing for OPUC review included in the resulting legislation so as to ensure that customers were adequately protected from

¹ "Removal of the dams may have benefits to the Klamath basin and coastal fishing economies, so the State of Oregon as a whole may have an interest in dam removal. But, the interests of the State and the interests of PacifiCorp's ratepayers are not necessarily the same." CUB 100 Feighner/1-2

unnecessary rate increases² – SB 76 which was signed by the Governor on July 14, 2009.³ Commensurate with the passage of SB 76, containing the CUB suggested surcharge review provisions, CUB appears before the Commission today to brief the issues raised in the resulting Docket - UE 219. CUB's brief will deal with the issues set forth below. A summary of CUB's position in regard to these issues is also set forth in this introductory section.

- Whether the Surcharges proposed for funding costs of removing the dams result in rates and tariffs that are fair just and reasonable ORS 757.210 – CUB believes they do.
- Whether Staff's proposed depreciation schedule is appropriate pursuant to ORS 757.140 – CUB believes that it is.
- Whether the Company's proposed rate spread is appropriate – CUB believes that it is.
- Whether Governor Schwarzenegger's June 29 Press Release related to California Prop 18 has any bearing on the OPUC's ability to find that the proposed surcharges are prudent – CUB believes it does not.
- Whether SB 76 preempts ORS 757.480 requiring the Commission to issue a disclaimer of jurisdiction in regard to Project property transfer to the dam removal entity and, if it does not, whether the land transfer should be approved now contingent upon the satisfaction of certain conditions precedent and the rule governing property transfers - CUB does not believe that ORS 757.480 is preempted by SB 76. While CUB does not agree that the time is

² CUB/100 Feighner/2 lines 1-4.

³ SB 76 was adopted into the Oregon Revised Statutes as ORS 757.732 through ORS 757.738.

ripe for a decision in this regard CUB would not object to the Commission making a finding subject to the application of certain conditions precedent.

- Whether the refund provision in schedule 199 should be removed when the Commission's Order becomes final - CUB believes it should not.

II. THE SURCHARGES PROPOSED FOR FUNDING COSTS OF REMOVING THE DAMS RESULT IN RATES AND TARIFFS THAT ARE FAIR, JUST AND REASONABLE.

As stated in the testimony of Alan R. Dale, ODFW:

The KHSA provides for funding of dam removal costs from three sources – the customer surcharges in Oregon, a customer surcharge in California, and a California bond. The Oregon surcharges are intended to produce Oregon's share of customer contributions through annual collections that remain approximately the same during the collection period. KHSA Section 4.1.1.A.

The surcharges were also designed so that the customer contribution to dam removal costs would be fully funded, including accrued interest, by the year 2020. This is the target date for dam removal under the KHSA. KHSA Section 7.3.1.

Finally, the surcharges were designed to generate moneys that would be available in a trust account for expenditures for dam removal activities as early as the summer of 2012. Under the KHSA, the Secretary of the Department of Interior will determine by March 31, 2012 whether dam removal will proceed. KHSA Section 3.3.4. If the determination is affirmative, and the two states concur within 60 days of the determination, the designated dam removal entity will commence to develop dam removal plans, apply for necessary permits, and undertake initial actions in preparation for dam removal. KHSA Section 7.2.1. Those activities are intended to be paid for from the surcharge trust accounts. KHSA Sections 1.4 (definition of 'Facilities Removal'), 4.2.4.⁴

⁴ ODFW/1 Dale/6 lines 1 through 19.

A. Pacificorp bears the burden of proof to show that its rates are just and reasonable.

PacifiCorp has the burden of proof to demonstrate that its proposed Surcharge results in rates and tariffs that are just and reasonable.⁵ The Commission has the independent review authority to determine whether PacifiCorp's customers are in fact going to be charged just and reasonable rates.⁶ And in this proceeding, the Company bears the burden of proof throughout the proceeding and the burden does not shift to any other party."⁷ If other parties dispute the rates proposed by PacifiCorp, PacifiCorp retains the burden to show that all its suggested charges are just and reasonable.⁸

B. Fair, just and reasonable rates reflect the costs that are prudently incurred and are necessary to provide adequate services to customers.

In its initial application in this docket, PacifiCorp argued that the "relatively modest" rate change proposed under the KHSA was "fair, just and reasonable." PacifiCorp based this claim on the fact that the increase it continues to seek is small and is being added to rates that were found to be fair, just and reasonable in January of this year.⁹ This is too simple an analysis. The size of an increase, no matter how small, or how modest, is an improper test for determining whether a rate is fair, just and reasonable. For rates to be fair, just and reasonable, they must reflect costs that are prudently incurred and are necessary to provide adequate services to customers. Thus the proper test is whether the actions taken by PacifiCorp in regard to the KHSA were prudent. Prudence review is based on what the Company knew at the time that it made

⁵ ORS § 757.210(1); Pacific Northwest Bell Tel. Co. v. Sabin, 21 Or. App. 200, 213-14 (1975); OR 757.210(10(a)).

⁶ ORS § 756.040(1); Pacific Northwest Bell Tel. Co., 21 Or. App. at 213.

⁷ Re PacifiCorp, OPUC Docket No. UE 116, Order No. 01-787 at 6 (Sept. 7, 2001); UE 115. Order No. 01-777 at 6 (Aug. 31, 2001).

⁸ *Id.*

⁹ CUB/100 Feighner/3 line 18 to CUB/100 Feighner/4 at line 3.

each of the relevant decisions and took each of the relevant actions.¹⁰ If PacifiCorp's actions were prudent then the surcharges and the resulting rates should be viewed as fair, just and reasonable.¹¹

C. Applying the facts to the law CUB finds that PacifiCorp's decisions and actions were prudent and that the resulting surcharges are fair, just and reasonable.

In this case PacifiCorp has done something very unusual. Rather than relicense the Klamath Dams for several more decades of power generation, the Company has negotiated the KHSA with the states of Oregon and California and the Federal Government which will allow the dams to be removed. The KHSA limits the cost to PacifiCorp's customers for dam removal, but places that costs on only two out of six of the states in the Company's service territory. PacifiCorp could, as noted above, have pursued relicensing with the costs of that relicensing being allocated across its entire service territory under the terms of the Revised Protocol thus allowing for allocation pursuant to the hydro endowment that would have placed most of the hydro costs onto the customers of the old Pacific Power system. Now, under the removal plan Oregon customers will bear the brunt of the removal costs.¹² So how was this decision prudent and the resulting allocation fair, just and reasonable?

CUB's analysis of the dam removal project's costs has determined that the portion of the project's costs incurred by the Oregon customers of PacifiCorp while large is acceptable given the expected benefits of the project as compared to the quantity of

¹⁰ See generally "In re PacifiCorp Order No. 02-469 at 31; In re Pacific Power and Light Co., UE 170, Order No. 05-1050("Prudence is determined by the reasonableness of the actions based on the information that was available (or could reasonably have been available) at the time") page 23 et seq..

¹¹ CUB/100 Feighner/4 at lines 4 to 9.

¹² CUB/100 Feighner/2 lines 5-20.

financial risks that will be assumed by customers.¹³ The SB 76 legislation which provides that the overall contribution be limited to \$200 million (184 million to Oregon customers)¹⁴ provides adequate assurance that ratepayers will not be responsible for cost overruns or other unanticipated charges.¹⁵ The predicted costs of decommissioning compare favorably with the costs associated with relicensing the dams, and decommissioning poses significantly fewer risks to PacifiCorp and other project stakeholders.¹⁶ All of these factors weighed into CUB's decision.

PacifiCorp modeled the costs of the proposed settlement agreement in comparison to several different potential cost levels for relicensing dams. In analyzing these scenarios CUB has found that the settlement agreement is preferable to the combination of costs and risks contained in each of the relicensing scenarios. Some of the costs and risks of relicensing are set forth in the testimony of the other parties to this docket.¹⁷ And of course in the parties' confidential and highly confidential testimony given at the July 23, 2010 workshop.¹⁸ Of particular note is the non confidential testimony of Steve Rothert who avers that even though a relicensing proceeding for this project began in 2000 that the Federal Power Act does not set a deadline for relicensing proceeding decisions and that to date the Klamath relicensing proceeding has proved to be "one of the most contentious and difficult such proceedings in the 75-year history of the Federal

¹³ CUB/100 Feighner/4 lines 16 to 19.

¹⁴ See updated PacifiCorp figures - Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 page 75 testimony of Andrea Kelly; Docket UE 219 Workshop hand out Calculation of Surcharge.

¹⁵ Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 page 74-76 testimony of Andrea Kelly explaining why a 3 and a half percent interest rate was chosen for purposes of calculation.

¹⁶ *Id.*

¹⁷ DEQ/1 Stine/4 lines 4 through 26 and page 5 lines 1 through 12. ODFW/2 Pustis; WRD/1 Grainey/1; AR/100 Rothert/4 through page 7 line 6.

¹⁸ Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 confidential pages 17-33 and highly confidential pages 38-61 testimony of Andrea Kelly, Cory Scott, Dean S. Brockbank, Tim Hemstreet, Bill Griffin, Steve Rothert, Kelcey Brown, Gordon Feighner and Bob Jenks.

Power Act.”¹⁹ And the testimony of Staff, Ms. Kelcey Brown who notes that when looking at relicensing the largest and most important cost estimate is the costs associated with the mitigation measures PacifiCorp might incur in obtaining the license for the Project. And when looking at decommissioning, absent the cost of dam removal, it is the cost of replacement power.²⁰ CUB’s assessment of the dam removal project applies to PacifiCorp’s entire system as well as to Oregon customers.²¹ CUB’s financial analysis of the dam removal project is set forth in detail in CUB’s confidential testimony and CUB’s previously admitted confidential Exhibit 102.²²

The Company’s proposed allocation to major customer classes is also acceptable to CUB.²³

CUB supports the KHSA. Continuing to operate the Klamath River dams until 2020 provides substantial benefits to customers, especially when potential carbon costs are taken into consideration.²⁴ The guarantee of limited financial liability to Oregon customers makes the settlement preferable to the lack of certainty that would accompany the FERC relicensing process.^{25, 26} CUB’s analysis of PacifiCorp’s financial work papers confirms the Company’s own assertion that the rate increase associated with the KHSA is prudent and is, therefore, fair, just and reasonable.^{27, 28}

¹⁹ AR/100 Rotherth/5 lines 19 through 21 and page 6 lines 1-2; Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 page 72-73 testimony of Steve Rotherth.

²⁰ Staff/100 Brown 5 at lines 8 through 15; Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 page 70-71 testimony of Kelcey Brown.

²¹ CUB/100 Feighner/4 line 16 through page 5 line 10.

²² CUB/100 Feighner/5 line 11 through page 7 line 13; UE 219/CUB/Exhibit 102 Feighner 1.

²³ UE 219/CUB/Exhibit 103 Feighner/1 and 2; UE 219/CUB/Exhibit 104 Feighner/1; UE 219/CUB/Exhibit 105 Feighner/1.

²⁴ CUB/100 Feighner/7 lines 2-4; Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 pages 48-50 Highly Confidential testimony of Andrea Kelly.

²⁵ AR/100 Rotherth/8 through 10.

²⁶ Staff/100 Brown/2 lines 8 through 15; Staff/100 Brown/10 lines 16 to 23 and page 11 lines 1 through 23 and page 12 lines 1 through 2.

²⁷ CUB/100 Feighner/7 lines 2 – 8; Staff/100 Brown 12 lines 5-7.

CUB urges the Commission to find that the surcharge proposed for Oregon customers results in rates that are fair, just and reasonable.

III. Staff’s proposed depreciation schedule is appropriate pursuant to ORS 757.140

As noted in the testimony of Ms. Brown, Staff’s proposed depreciation schedules for the four facilities and other approved costs are based on the assumption that the facilities will be removed in 2020. The Commission may change the proposed depreciation schedules if removal of the dams is expected to occur in a year other than 2020.²⁹ CUB has reviewed Staff’s proposed depreciation schedules and is in agreement with them.

CUB respectfully requests that the Commission approved Staff’s proposed depreciation schedules.

IV. CUB does not agree with ICNU’s challenge to rate spread.

PacifiCorp has adopted the rate spread that is consistent with how it has allocated dam relicensing costs in the past.³⁰ PacifiCorp believes that spreading the cost on generation revenues subject to the 2 percent cap by customer class is within the spirit of SB 76.³¹

ICNU’s witness Mr. Falkenberg testified that ICNU wanted the company to pattern its increase after what was done in UE 217 – “an increase pattern that was almost across

²⁸ Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 page 80-81 testimony of Kelcey Brown.

²⁹ ORS 757.734(1).

³⁰ UE 219/CUB/Exhibit 103 Feighner/1 and 2; UE 219/CUB/Exhibit 104 Feighner/1; UE 219/CUB/Exhibit 105 Feighner/1.

³¹ *Id.*

the board.”³²Mr. Falkenberg also stated that the “Company used a methodology that had a floor of one and a half percent . . . and a cap of 2 percent. And Schedule 48, which is the [ICNU] customers . . . ended up with the largest increase.”³³

CUB disagrees with ICNU’s assessment. In his testimony at the July 23, 2010 hearing Mr. Jenks drew people’s attention to the handout distributed by the Company on this issue. He noted as follows:

Presentation Attachment 2.

From that sheet we can see that the residential class, Class 4, is being charged a surcharge of .101 cent; and Schedule 48, the one that is supposed to be paying a disproportionate amount, is being charged a surcharge of .079 cents. So the surcharge for residential customers is approximately 25 percent higher than the surcharge for the Schedule 48 customers.

And that is what happens when we mix between - - costs between percentages and actual costs. The charges being charged to residential customers are a greater amount, but because we have - - we pay for most of the distribution system of PacifiCorp, and industrial customers contribute very little in the distribution system, and our percentage is small, but the percentage isn’t - - again, the percentage isn’t the cost. The percentage reflects the fact that we pay higher rates when we pay distribution costs that other - - other customers don’t charge.

So that, , I wanted to - - so the starting point is we’re paying a higher amount for it.³⁴

Mr. Jenks also addressed the traditional means of addressing hydro relicensing costs in terms of generation costs. He discussed the fact that CUB’s analysis of the prudence of PacifiCorp’s actions was based on his understanding that relicensing costs would be dealt with under the traditional model. Mr. Jenks noted that in Oregon costs are allocated

³² Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 page 90 testimony of Randal Falkenberg.

³³ *Id.*

³⁴ Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 page 97 testimony of Bob Jenks.

on a functional basis based on the functionalized marginal costs. Generation costs get allocated to the customer classes based on their contribution to the marginal generation costs. This is demonstrated in CUB Exhibits 103 through 105.³⁵ If that traditional model is not applied then CUB's analysis would have to be redone.³⁶ In closing Mr. Jenks addressed ICNU's argument that the rate spread should be applied in the same manner as in the general rate case. He noted first off that ICNU's rendition of the agreement in the rate case was incorrect – there is no equal percentage increase to customers in the Stipulation before the Commission. A rate mitigation adjustment is used to bring the industrial class down to the average increase. A rate mitigation adjustment is used to prevent rate shock, where the level of the increase will cause harm. Mr. Jenks concluded therefore, that in order to do what was being espoused by ICNU there would have to be a raise in the mitigation adjustment which is supposed to deal with rate shock. And, since the surcharge is already in place and this docket will not change rates, there is no rate shock and use of the Mitigation Adjustment would be inappropriate.³⁷

CUB therefore respectfully requests that the Commission reaffirm the rate spread currently in place for the surcharge. CUB agrees with the Company that spreading the cost on generation revenues subject to the 2 percent cap by customer class is within the spirit of SB 76.

³⁵ UE 219/CUB/Exhibit 103 Feighner/1 and 2; UE 219/CUB/Exhibit 104 Feighner/1; and UE 219/CUB/Exhibit 105/1.

³⁶ Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 page 97-98 testimony of Bob Jenks.

³⁷ Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 page 98-100 testimony of Bob Jenks.

V. Governor Schwarzenegger’s Press Release does not alter the Commission’s authority to find that the surcharges are prudent.

ICNU’s attorney Melinda Davison stated at the hearing held on July 23, 2010, that ICNU believes that the surcharge is premature and that the surcharge has already been over collected.³⁸ She based this statement upon her assessment that a Press Release issued by California’s Governor Arnold Schwarzenegger, that the promised California bond measure would not be included in the ballot until 2012, means that the dams will not come out in 2020.³⁹ This she said, gave the OPUC discretion/authority under SB 76 section IV subsection 7 to change the collection of the surcharge.⁴⁰

Mr. Broackbank, on behalf of the Company responded that the KHSA does not have any definitive timeline for California to have its funding in place and that the state can use alternative funding. He further stated that if the costs do not exceed \$200 million then the California bond is not required and that all that is needed until 2020 is assurances that the funding will then be available.⁴¹

³⁸ Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 page 83 comments of Melinda Davison.

³⁹ CUB objects to ICNU’s request that the Commission take judicial notice of Governor Schwarzenegger’s Press Release CUB also objects to ICNU’s comments on Prop 18 made at the July 23, 2010 hearing and to any comments that ICNU may make in its opening brief. CUB’s objects because (a) ICNU failed to apprise the other parties of its intent to raise the Press Release issues prior to the hearing – there were three weeks between the issuance of the Press Release and the hearing; (b) CUB objects because the only information provided at the meeting was not in the form of testimony; and (c) CUB objects because ICNU failed to provide a copy of the press release spoken of at the hearing to CUB until Friday, August 6, 2010 the last working day before CUB’s Opening Brief was due. That said, CUB does not believe it really matters whether the Commission takes judicial notice as the press release has absolutely no bearing on the Commission’s ability to make a prudency decision on the surcharges or on the other matters at issue in this proceeding.

⁴⁰ Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 page 83, 85-86 comments of Melinda Davison.

⁴¹ Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 page 95 testimony of Dean Brockbank lines 1 through 25 and page 96.

CUB's review of the KHSA shows that 4.1.2 A permits the State of California not only to consider bonds but also "other appropriate financing mechanisms to assist in funding the difference between Customer Contribution and the actual cost of complete Facilities Removal, not to exceed \$250,000,000 (in nominal dollars)." This means that the fact that the California Prop 18 bond measure may not be on the ballot until 2012 is of no import and it certainly does not mean that the dams will not come out in 2020. Short of a definitive finding that a dam will be removed in a year other than 2020 the Commission has no discretion to change the collection schedule under SB 76 Section IV subsection 7. And in CUB's opinion the Commission currently has no basis on which to make such a definitive finding.

CUB respectfully requests that the Commission deny ICNU's request to change the surcharge collection schedule.

VI. CUB does not support PacifiCorp's request for a Disclaimer of Jurisdiction or its proposed alternative.

PacifiCorp's request for a disclaimer of jurisdiction is inappropriate and not legally justifiable. PacifiCorp argues that SB 76 preempted ORS 757.480. CUB reviewed this matter and has determined that SB 76 does not preempt ORS 757.480.

A. Federal and State Preemption Law.

For decades, Supreme Court opinions on preemption have followed a template like the one described in [Pacific Gas & Elec. v. Energy Resources Comm'n, 461 U.S. 190, 203-04, 103 S.Ct. 1713, 75 L.Ed.2d 752 \(1983\)](#):

"It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms. Absent explicit pre-emptive language,

[85 P.3d 874]

Congress' intent to supersede state law altogether may be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

(Internal quotation marks and citations omitted.) Thus, traditionally, preemption is either express or implicit. Implicit preemption, in turn, is either "occupying the field" preemption or "conflict" preemption. "Conflict" preemption occurs, under this analysis, when simultaneous compliance with federal and state law is physically impossible or when compliance with state law impedes implementation of federal law.⁴²

The KHSA does not contain a preemption clause related to transfer of land to the DRE or the State.⁴³ Indeed the section on preemption states at subpart "D" that "[u]pon

⁴² *Liberty Northwest Ins. Corp. v. Kemp*, 85 P.3d 871, 873-874, 192 Or. App. 181 (Or. App., 2004)

⁴³ The only overt preemption clause in the KHSA states the following and it is related to liability of PacifiCorp:

E. In consideration for PacifiCorp executing the Settlement, the legislation that Parties will support, in accordance with Section 2.1.1.A and 2.1.1.B, shall:

i. Provide PacifiCorp with full protection from any liability arising from, relating to, or triggered by actions associated with Facilities Removal with provisions that are materially consistent with the following:

a. Notwithstanding any other federal, state, local law or common law, PacifiCorp shall not be liable for any harm to persons, property, or the environment, or damages resulting from either Facilities Removal or Facility operation arising from, relating to, or triggered by actions associated with Facilities Removal, including but not limited to any damage caused by the release of any material or substance, including but not limited to hazardous substances.

b. Notwithstanding Section 10(c) of the Federal Power Act, this protection from liability preempts the laws of any state to the extent such laws are inconsistent with the Authorizing Legislation, except that the Authorizing Legislation shall not be construed to limit any otherwise available immunity, privilege, or defense under any other provision of law.

c. **This liability protection shall become operative** as it relates to any particular Facility **upon transfer of title to that Facility from PacifiCorp to the DRE.**

ii. Authorize and direct the Secretary to issue a Secretarial Determination consistent with the provisions of Section 3.

the Effective Date and prior to the enactment of Authorizing Legislation, the Parties shall perform obligations under this Settlement that can be performed under their existing authorities.”⁴⁴ And, as the opening quotation above notes, generally there is a requirement for congressional legislation in order for preemption to be at issue. There is no federal legislation to date regarding the agreements made under the KHSA. Thus there can be no explicit or implicit preemption in this matter.⁴⁵ In addition, the entire premise behind SB 76 is the establishment of surcharges and the mechanism with which to carry them out. Nowhere in SB 76 is there any discussion of the transfer of land from PacifiCorp to the Dam Removal Entity (DRE) – the Dam Removal Entity simply is not mentioned.

The discussion of land transfer that is contained in the KHSA at Section “7. DRE. Transfer, Decommissioning and Removal”, 7.6.4, B also states that each state is to undertake inspection and preliminary due diligence regarding the nature and condition of the lands and that each state at its own discretion may elect not to accept the transfer of all or any portion of the land. This provision again belies any intent that the agreement, and the resulting SB 76 were intended to preempt ORS 757.480.

KHSA, 2. Implementation of Settlement, 2.1 General Duty to Support Implementation, 2.1.1 Legislation, E. (emphasis added)

⁴⁴ KHSA, 2. Implementation of Settlement, 2.1 General Duty to Support Implementation, 2.1.1 Legislation, D.

⁴⁵ We note that in the international arena federal legislation is not required and an Executive Agreement with a foreign country may preempt state law but we are not dealing with international law here. *American Insurance Association et al. v. Garmaendi, Insurance Commissioner, State of California*, 539 US 396, 416 (2003); an Interstate Compact might also merit closer review but nowhere does this “Agreement” style itself as an interstate compact. In addition this “Agreement” contains one explicit reference to preemption. Had the drafters intended additional preemptions to apply they clearly knew how to draft for that purpose.

Even were such preemption a fact, given that the removal of the dams is in question until after the Federal Government's and the State's final decisions, the time is not ripe for PacifiCorp to make such a request.

CUB respectfully requests that the Commission not disclaim its jurisdiction in regard to the land transfer.

B. PacifiCorp's proposed alternative to a disclaimer of jurisdiction.

PacifiCorp proposes, in the alternative to disclaimer of jurisdiction, that the Commission approve transfer to the dam removal entity of its properties under the auspices of this proceeding and that it do it contingent on the conditions in the KHSA. The Company states that a finding of fair, just and reasonable rates implicates the kind of public interest finding that the Commission needs to make under the property statute.⁴⁶

CUB like Staff and ICNU does not believe that the time is ripe to make this determination. However, CUB would not oppose the Commission, should the Commission wish to make a decision contingent upon the Company meeting all of the provisions provided for in OAR 860-027-0025.⁴⁷ But, as Staff has noted, it is convenient for PacifiCorp to file this application jointly with the prudency review for the surcharges but it would not be unduly burdensome to ask PacifiCorp to file again later once there is more certainty that dam removal will actually occur.⁴⁸

CUB respectfully suggests that the time is not ripe for a decision on this issue and that the Commission should require PacifiCorp to file again on this issue at a later date.

⁴⁶ Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 page 100- 101 comments of Katherine McDowell.

⁴⁷ Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 page 103-105 testimony of Kelcey Brown and comments of Melinda Davison and Catriona McCracken.

⁴⁸ Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 page 103 testimony of Kelcey Brown.

VII. CUB does not support PacifiCorp’s request to modify the language in schedule 199.

Schedule 199 includes two surcharges: (1) for the costs of removing the J.C. Boyle Dam and (2) for the costs of removing Copco 1, Copco 2, and Iron Gate Dams. These surcharges have been designed so that total annual collections of the surcharges remain approximately the same during the collection period. All amounts collected under Schedule 199 will be transferred to the trust accounts established by the Commission under ORS 757.738.⁴⁹

Schedule 199 currently contains a refund provision which states that the tariff shall remain in effect “pending review by the Commission as to whether the imposition of surcharges under the terms of the final agreement results in rates that are fair, just and reasonable or during any period of judicial review of such a finding. If the rates resulting from these surcharges are finally determined not to be fair, just and reasonable the surcharges shall be refunded pursuant to ORS 757.736, Subsection (5).”⁵⁰

PacifiCorp wants the Commission to remove the refund condition. PacifiCorp is requesting that the Commission allow Schedule 199 to go into effect without the refund condition upon a final determination under ORS 757.736(4) that the dam removal surcharges result in rates that are fair, just and reasonable.⁵¹

Staff recommends that the Commission not approve PacifiCorp’s request to remove the entirety of the refund provision currently contained in Schedule 199. Instead, Staff proposes that the language undergo a lesser modification.⁵²

~~“pending review by the Commission as to whether the imposition of surcharges under the terms of the final agreement results in rates that are fair,~~

⁴⁹ Staff/100 Brown/12 lines 9 through 15.

⁵⁰ PPL/200 Kelly/7 lines 6 through 12.

⁵¹ PPL/200 Kelly/7 lines 13 through 19.

⁵² Staff/100 Brown/3 lines 10 through 15; Transcript of Proceedings: Workshop/Issues Presentation, Friday, July 23, 2010 page 107-108 testimony of Kelcey Brown.

~~just and reasonable or during any period of judicial review of such a finding.~~

If the rates resulting from these surcharges are finally determined not to be fair, just and reasonable the surcharges shall be refunded pursuant to ORS ~~757.736, Subsection (5).~~” (strike out added for ease of reference)

Upon further review, CUB has reached the decision, contrary to the comments of its Counsel at the hearing on July 23, 2010, that it does not even support the Staff proposed limited modification. CUB believes the language in the tariff should mirror the statutory language. For reasons other than those set forth by ICNU CUB agrees that the tariff needs to contain the subject to refund language.

VIII. Conclusion.

PacifiCorp has opted “[t]o boldly go where no [company] has gone before”⁵³ CUB applauds them for their efforts. While the Company has been unable to make projections for absolutely every little contingency that may crop up between now and 2020, the Company has made substantial efforts to provide the parties and the Commission with detailed documentation of currently knowable and projectable numbers, scenarios for obtaining necessary certifications and possible physical hurdles.

CUB has reviewed all of the documentation available to it and has determined that based upon what was known to PacifiCorp at each step along the way that the decisions it has made to date have been prudent. Given the prudence of the Company’s actions CUB therefore finds, and encourages the Commission to find, that the proposed surcharges result in rates that are fair, just and reasonable for PacifiCorp’s residential customers.

⁵³ StarTrek the Original Series.

In regard to Staff's proposed depreciation schedules CUB also respectfully requests that the Commission adopt them. And, in regard to rate spread CUB respectfully requests that the Commission adopt the rate spread proposed by the Company and not that proposed by ICNU. However, in regard to the other issues in this docket CUB states the following:

It is not surprising that in the momentum of the moment the Company has, in regard to certain other of the issues in this docket, slightly over-reached. CUB understands PacifiCorp's urgency to wrap up as many of the details in this matter as soon as possible so as not to leave loose ends to be later tripped over. But there are in CUB's view some matters that must be left until later, until the relevant facts have been determined. For this reason CUB respectfully requests that the Commission deny PacifiCorp's requests to:

- Disclaim Jurisdiction under ORS 757.480 or in the alternative make a ruling based on contingencies; and its request to
- Delete the refund language from schedule 199.

As for the issue raised by ICNU in relation to Governor Schwarzenegger's June 29 Press Release, related to California Prop 18, CUB respectfully requests that if asked the Commission not take Judicial Notice of this document (for the reasons set forth in the brief above) but that if the Commission does take Judicial Notice of that pronouncement that the Commission find that the Governor of California's actions have no bearing on

this case or the Commission's ability to rule on the prudence of the surcharges at issue in this matter.

Dated: August 9, 2010

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'G. C. M.', written in a cursive style.

G. Catriona McCracken, Attorney #933587
Legal Counsel
Citizens' Utility Board of Oregon
610 SW Broadway Ste 400
Portland, OR 97205
(503) 227-1984
Catriona@oregoncub.org

UE 219 – CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of August, 2010, I served the foregoing **OPENING BRIEF OF THE CITIZENS' UTILITY BOARD OF OREGON** in docket UE 219 upon each party listed in the UE 219 OPUC Service List by email and, where paper service is not waived, by U.S. mail, postage prepaid, and upon the Commission by email and by sending an original and five copies by U.S. mail, postage prepaid, to the Commission's Salem offices.

(W denotes waiver of paper service)

DAVISON VAN CLEVE
MELINDA J DAVISON
333 SW TAYLOR - STE 400
PORTLAND OR 97204
mail@dvclaw.com

**W KLAMATH TRIBES AND
KLAMATH WATER**
CARL ULLMAN
PO BOX 957
CHILOQUIN OR 97624
bullman3@earthlink.net

**W OREGON DEPARTMENT OF
C ENVIRONMENTAL QUALITY**
CHRIS STINE
165 E 7TH AVE., STE 100
EUGENE OR 97401
chris.stine@state.or.us

**W OREGON DEPARTMENT OF FISH
C AND WILDLIFE**
KEN HOMOLKA
3406 CHERRY AVE NE
SALEM OR 97303
ken.homolka@state.or.us

**(C denotes service of
Confidential material
authorized)**

**C DEPARTMENT OF
HC JUSTICE**
DAVID HATTON, AAG
REGULATED UTILITY &
BUSINESS SECTION
1162 COURT ST NE
SALEM OR 97301-4096
david.hatton@state.or.us

**C MCDOWELL RACKNER &
HC GIBSON PC**
KATHERINE A MCDOWELL
ATTORNEY
520 SW SIXTH AVE - SUITE 830
PORTLAND OR 97204
katherine@mcd-law.com

**W OREGON DEPARTMENT OF
C ENVIRONMENTAL
QUALITY**
STEVE KIRK
475 NE BELLEVUE DR
BEND OR 97701
steve.kirk@state.or.us

**W OREGON DEPARTMENT OF
C FISH AND WILDLIFE**
RICK KEPLER
3406 CHERRY AVE NE
SALEM OR 97303
rick.j.kepler@state.or.us

W OREGON DEPARTMENT OF
C JUSTICE
KURT BURKHOLDER
1515 SW 5TH AVE, STE 410
PORTLAND OR 97201
kurt.burkholder@doj.state.or.us

C OREGON PUBLIC UTILITY
HC COMMISSION
KELCEY BROWN
PO BOX 2148
SALEM OR 97308-2148
ed.durrenberger@state.or.us

W OREGON WATER RESOURCES
C DEPARTMENT
MARY GRAINEY
725 SUMMER ST NE, STE A
SALEM OR 97301
mary.s.grainey@wrd.state.or.us

W OREGON WATER
C RESOURCES
DEPARTMENT
RON C KOHANEK
725 SUMMER ST NE, STE A
SALEM OR 97301
ron.c.kohanek@wrd.state.or.us

PACIFICORP, DBA PACIFIC
POWER
OREGON DOCKETS
825 NE MULTNOMAH ST, STE 2000
PORTLAND OR 97232
oregondockets@pacificorp.com

RFI CONSULTING INC
RANDALL J FALKENBERG
PMB 362
8343 ROSWELL RD
SANDY SPRINGS GA 30350
consultrfi@aol.com

W SALMON RIVER RESTORATION
COUNCIL
PETER BRUCKER
HCR 4
BOX 1089
SAWYERS BAR CA 06027
ptbp2day@gmail.com

W YUOK TRIBE
JOHN CORBETT
PO BOX 1027
KLAMATH CA 95548
jcorbett@yuroktribe.nsn.us

W WATERWATCH OF OREGON
LISA BROWN
213 SW ASH ST - STE 208
PORTLAND OR 97204
lisa@waterwatch.org

W TROUT UNLIMITED
C CHARLTON H BONHAM
1808B 5TH STREET
BERKELEY CA 94710
cbonham@tu.org

W TROUT UNLIMITED
C KATE MILLER
227 SW PINE STREET, SUITE 200
PORTLAND OR 97204
kmiller@tu.org

C CABLE HUSTON BENEDICT
ET AL
J LAURENCE CABLE
1001 SW 5TH AVE STE 2000
PORTLAND OR 97204-1136
lcable@cablehuston.com

C NATURAL HERITAGE INSTITUTE

RICHARD ROOS-COLLINS
100 PINE ST., STE 1550
SAN FRANCISCO CA 94111
rrcollins@n-h-i.org

AMERICAN RIVERS

BRETT SWIFT
320 SW STARK ST - STE 418
PORTLAND OR 97204
bswift@amrivers.org

W S. CRAIG TUCKER

PO BOX 282
ORELEANS CA 95556
ctucker@karuk.us

**C CABLE HUSTON BENEDICT
ET AL**

RICHARD LORENZ
HAAGENSEN & LLOYD LLP
1001 SW FIFTH AVE - STE 2000
PORTLAND OR 97204-1136
rlorenz@cablehuston.com

W NCCFFF

MARK C ROCKWELL
19737 WILDWOOD WEST DR
PENN VALLEY CA 95946
summerhillfarmpv@aol.com

**W PACIFIC COAST
C FEDERATION OF**

FISHERMEN'S ASSOC
GLEN H SPAIN --
CONFIDENTIAL
PO BOX 11170
EUGENE OR 97440-3370
fish1ifr@aol.com

Respectfully submitted,



G. Catriona McCracken
Legal Counsel
The Citizens' Utility Board of Oregon
610 SW Broadway, Ste. 308
Portland, OR 97205
(503)227-1984
Catriona@oregoncub.org