

McDowell Rackner & Gibson PC



AMIE JAMIESON
Direct (503) 595-3927
amie@mcd-law.com

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VIA ELECTRONIC FILING AND FIRST CLASS MAIL

PUC Filing Center
Public Utility Commission of Oregon
PO Box 2148
Salem, OR 97308-2148

Re: Docket UE 219 – In the Matter of PacifiCorp’s Application to Implement Provisions of Senate Bill 76.

Enclosed for filing in the above captioned docket are an original and five copies of PacifiCorp’s Opening Brief on Surcharge Issues.

A copy of this filing was served on all parties to this proceeding as indicated on the attached Certificate of Service.

Very truly yours,

A handwritten signature in black ink, appearing to read "Amie", written over a horizontal line.

Amie Jamieson

Enclosures

cc: Service list

1 THE PUBLIC UTILITY COMMISSION
2 OF OREGON

3 UE 219

4 In the Matter of PacifiCorp's Application to
5 Implement Provisions of Senate Bill 76.

PACIFICORP'S OPENING BRIEF ON
SURCHARGE ISSUES

6
7 PacifiCorp d/b/a Pacific Power (or the Company) submits this Opening Brief on
8 Surcharge Issues to the Public Utility Commission of Oregon (Commission) pursuant to the
9 Prehearing Conference Report issued on April 5, 2010, by Administrative Law Judges Traci A.
10 G. Kirkpatrick and Shani Pines.

11 I. INTRODUCTION

12 PacifiCorp filed an Application to Implement Provisions of Senate Bill 76
13 (Application) on March 18, 2010. Through the Application and the concurrently-filed
14 Schedule 199 in Advice No. 10-008, the Company sought to implement the provisions of
15 SB 76.¹ Specifically, the Application and advice filing complied with the requirements that
16 the Company file the Klamath Hydroelectric Settlement Agreement (KHSA) and associated
17 analyses, and implement tariffs for the collection of two nonbypassable surcharges to fund
18 costs of removing the Klamath Hydroelectric Project (Project) dams.

19 The Company's Application and surcharges set forth in Schedule 199 comply with
20 the requirements of SB 76. The Company's supporting analyses also show that the KHSA
21 provides important benefits to Oregon customers and protects customers from risks
22 associated with relicensing. As a result, the Company requests that the Commission find
23 that the rates resulting from the surcharges filed in Advice No. 10-008 result in fair, just, and
24 reasonable rates. The Company also requests that the Commission grant final approval of
25

26 ¹ SB 76 is codified at 757.732 through 757.744.

1 PacifiCorp's Schedule 199, approve the Company's proposed method for evaluating
2 collections under Schedule 199 on an annual basis and, under ORS 757.480, conditionally
3 approve the transfer of the Project to the Dam Removal Entity (DRE) as contemplated in
4 the KHSA.

5 **II. BACKGROUND**

6 **A. Factual Background**

7 **1. Overview of the Project and Relicensing**

8 The Project is a 169-megawatt hydroelectric facility located on the Klamath River in
9 southern Oregon and Northern California. PPL/100, Brockbank/2. The Project includes four
10 hydroelectric dams, Iron Gate, Copco No. 1, Copco No. 2, and J.C. Boyle, that are the subject
11 of SB 76, as well as two small diversion dams on tributaries to the Klamath River. PPL/100,
12 Brockbank/2. The Project as currently licensed includes the East Side and West Side
13 generating facilities, which use water diverted by the Link River Dam that is not included in the
14 Project. PPL/100, Brockbank/2. The Project also includes the Keno Dam, which has no
15 generation facilities but regulates water levels in Keno Reservoir as required by the Project
16 license. PPL/100, Brockbank/2.

17 The Company operates these developments under one Federal Energy Regulatory
18 Commission (FERC) license. PPL/100, Brockbank/2. Since 2006, when the FERC license
19 governing the Project expired, the Company has been operating the Project under annual
20 license extensions under the same terms and conditions of the expired license. PPL/100,
21 Brockbank/3-4. As a result, the Project has been continuing to provide PacifiCorp and its
22 customers reliable, low-cost, and emission-free power while the relicensing process has been
23 proceeding. PPL/100, Brockbank/3.

24 On December 15, 2000, PacifiCorp filed a Notice of Intent to relicense the Project.
25 PPL/100, Brockbank/6. PacifiCorp pursued a collaborative approach to relicensing through
26 which it sought significant stakeholder input and attempted to achieve consensus on study

1 plans before the plans were submitted to FERC for review. PPL/100, Brockbank/6. The
2 Company hoped that this approach would minimize disagreements among parties to the
3 discussions related to project impacts and proposed mitigation alternatives, ultimately leading
4 to a shorter and less expensive relicensing process. PPL/100, Brockbank/6-7.

5 PacifiCorp filed its final license application with FERC in February 2004. PPL/100,
6 Brockbank/6. In its application, the Company proposed three major changes to the Project—
7 (1) decommissioning the East Side and West Side developments; (2) separating the Keno
8 development from the Project; and (3) reducing the amount of land included within the Project.
9 PPL/100, Brockbank/9-10. The Company proposed these changes to ensure that the Project
10 was not assigned mitigation measures unrelated to operation of the hydroelectric facilities.
11 PPL/100, Brockbank/10.

12 In March 2006, the Company submitted applications to California and Oregon for
13 Clean Water Act (CWA) Section 401 water quality certifications of the Project, the approvals of
14 which are necessary for FERC to issue a license. PPL/100, Brockbank/5, 7. That same
15 month, federal agencies party to the relicensing proceeding—the National Marine Fisheries
16 Service, U.S. Fish and Wildlife Service, Bureau of Reclamation, and Bureau of Land
17 Management—issued draft terms and conditions for a new Project license. PPL/100,
18 Brockbank/7. These federal agencies proposed license conditions that would require
19 implementation of protection, mitigation, and enhancement (PM&E) measures associated with
20 fish passage and other environmental benefits that would reduce power generation at the
21 Project and increase the costs of a new license. PPL/100, Brockbank/7. PacifiCorp
22 challenged the proposed terms and conditions in a formal administrative proceeding, and the
23 agencies issued modified terms and conditions in accordance with the administrative law
24 judge's findings in that proceeding. PPL/100, Brockbank/8. These terms and conditions are
25 set forth in FERC's final environmental impact statement (FEIS). PPL/300, Scott/4.

26

1 PacifiCorp initiated settlement discussions in the relicensing proceeding in October
2 2004 following submittal of its final license application. PPL/100, Brockbank/10. PacifiCorp
3 has pursued settlement for the majority of its recently completed hydro relicensing
4 proceedings, and has entered into settlements to decommission other hydro projects after
5 beginning the traditional FERC relicensing process. PPL/100, Brockbank/10. FERC also
6 encourages settlements and has recently changed its relicensing process to facilitate
7 settlement. PPL/100, Brockbank/10. PacifiCorp and key stakeholders began conducting
8 settlement meetings beginning in January 2005. PPL/100, Brockbank/10-11. During
9 settlement, the federal government and the states of Oregon and California expressed a
10 strong preference in favor of removing the dams rather than relicensing the Project. PPL/200,
11 Kelly/10.

12 The settlement meetings resulted in the Klamath Agreement in Principle (AIP), entered
13 into by the states of Oregon and California, the Department of the Interior (DOI), and
14 PacifiCorp (Parties) on November 13, 2008. PPL/100, Brockbank/11; Preamble to SB 76.
15 The AIP laid out a framework for resolution of the relicensing issues through the potential
16 decommissioning and removal of the four main stem hydroelectric dams in the Project—J.C.
17 Boyle, Copco No. 1, Copco No. 2 and Iron Gate. PPL/100, Brockbank/11. The AIP reflected
18 the preliminary view of the United States, Oregon, and California that the potential benefits of
19 removing the Project outweighed the potential costs of the removal. Preamble of Senate
20 Bill 76. The AIP provided for the transfer of the dams for purposes of removal to a DRE
21 designated by the United States government. Preamble of Senate Bill 76.

22 After the AIP was executed, PacifiCorp pursued further negotiations with the Parties
23 and an expanded group of stakeholders, agencies, and other interested parties. PPL/100,
24 Brockbank 12. The negotiations culminated in the KHSA, executed on February 18, 2010.
25 PPL/100, Brockbank/12. PacifiCorp's applications to Oregon and California for CWA Section
26 401 water quality certification of the Project, approvals that are necessary for the relicensing

1 process to conclude, are being held in abeyance while the process set forth in the KHSA
2 proceeds. PPL/100, Brockbank/13.

3 **2. Klamath Hydroelectric Settlement Agreement**

4 On February 18, 2010, the Parties and other stakeholders signed the KHSA. PPL/100,
5 Brockbank/12. The KHSA provides a framework for removal of the four dams in the Klamath
6 Project no earlier than 2020, contingent on Congressional approval and a scientific
7 assessment by the Secretary of the Interior (Secretary) confirming that removal is in the public
8 interest. PPL/200, Kelly/2.

9 The KHSA is included in the Application at Exhibit PPL/104. It contains nine sections,
10 summarized at PPL/100, Brockbank/15-16 and in Exhibit PPL/103. Under the KHSA, the
11 Secretary will develop and review scientific analysis and prepare a detailed plan for dam
12 removal. Based upon this information, the Secretary will determine whether certain conditions
13 of the KHSA have been satisfied and whether facilities removal: (1) will advance restoration of
14 salmonid fisheries of the Klamath Basin; and (2) is in the public interest, which includes but is
15 not limited to consideration of potential impacts on affected local communities and tribes. The
16 Secretary will use best efforts to make this determination by March 31, 2012. Exhibit
17 PPL/103, Brockbank/1-2. The KHSA conditions include passage of federal legislation to
18 authorize implementation of the KHSA and provide liability protection for PacifiCorp and its
19 customers upon transfer of the dams to the DRE. Exhibit PPL/103, Brockbank/2.

20 If the Secretary makes an affirmative determination, the states of California and
21 Oregon have 60 days within which to concur with the determination. If the Secretary makes a
22 negative determination, the KHSA will terminate, unless the parties agree to work to cure the
23 termination or amend the KHSA. Exhibit PPL/103, Brockbank/2.

24 The KHSA sets a \$450 million cost cap for facilities removal. Customer contributions
25 are capped at \$200 million, prorated between PacifiCorp's Oregon and California customers
26 (up to \$184 million from Oregon customers and up to \$16 million from California customers).

1 Exhibit PPL/103, Brockbank/2. In addition, \$250 million would come from the state of
2 California, either through the issuance of a bond or other means. Exhibit PPL/103,
3 Brockbank/2-3. Consistent with the provisions of SB 76, the KHSA contemplates the recovery
4 of PacifiCorp's undepreciated investment in the Project, ongoing operating costs and the costs
5 of replacement power. Exhibit PPL/104 at 28-30.

6 The KHSA outlines the conditions and process under which the dams would be
7 transferred to the DRE for removal. The target date for facilities removal is December 31,
8 2020. Exhibit PPL/103, Brockbank/3.

9 The Company was guided by four principles in its negotiation of the KHSA: (1) protect
10 customers from uncertain costs of dam removal; (2) transfer dams to a third party for removal;
11 (3) protect customers from liability of dam removal; and (4) ensure that customers continue to
12 benefit from the low-cost power of the dams until the dams are removed. PPL/200, Kelly/10-
13 11.

14 The KHSA addresses each of these elements. The first, protection against uncertain
15 costs, is captured in the dam removal cost cap. See Exhibit PPL/104, Section 4.1.1.C. The
16 second, transfer to a third-party for removal, is found in the KHSA condition requiring
17 designation of a DRE. See Exhibit PPL/104 at 4. The third, protection against dam removal
18 liability, is in Section 2.1.1.E of the KHSA, which requires passage of federal legislation
19 providing liability protection to PacifiCorp and its customers as a condition precedent to dam
20 removal. See Exhibit PPL/104, Section 2.1.1.E. The fourth, ensuring the benefits of power
21 pending dam removal, is provided by the KHSA's provisions allowing PacifiCorp to continue to
22 operate the dams until 2020. See Exhibit PPL/104, Section 7.3.3.

23 **3. Costs and Risks of Relicensing and the KHSA**

24 The Company evaluated the relative costs of the KHSA and relicensing to ensure that
25 the KHSA was in the economic interests of its customers. In compliance with SB 76, the
26 Company filed and outlined this analysis as a part of its Application.

1 To estimate the costs of relicensing, the Company relied on the costs and data
2 developed as part of the 2007 FERC FEIS. PPL/200, Kelly/14; PPL/300, Scott/8. In addition,
3 the Company included costs associated with measures potentially necessary to obtain CWA
4 Section 401 water quality certifications from California and Oregon. PPL/300, Scott/8. The
5 Company's relicensing cost assessment was the most comprehensive conducted to date.
6 PPL/304, Scott/2.

7 The Company's estimated relicensing costs are in excess of \$400 million in capital
8 costs and \$60 million in operations and maintenance (O&M) costs over a 40-year license
9 term. PPL/300, Scott/6; Confidential Exhibit PPL/301. The majority of the capital costs would
10 result from implementing aquatic resource PM&E measures, including the fish passage
11 license conditions that would be contained in a new FERC Project license. PPL/300, Scott/6.
12 The Company would need to expend additional funds for terrestrial resource, recreational
13 resource, land use, and cultural PM&E measures. PPL/300, Scott/6-7. Because the costs
14 related to measures required to obtain CWA Section 401 water quality certifications are
15 uncertain, the Company based costs for such measures on those explored during the
16 relicensing proceeding to address project-related water quality effects. PPL/300, Scott/8; Tr.
17 8, lines 7-15.²

18 This baseline relicensing case was conservative. PPL/200, Kelly/14. This scenario is
19 based on cost estimates developed during the relicensing proceeding several years ago.
20 PPL/300, Scott/9. The final terms and conditions for relicensing could be higher than the
21 Company's current estimates. PPL/200, Kelly/16. Other parties, including the Oregon
22 Department of Environmental Quality (DEQ/1); Oregon Department of State Lands (ODFW/2)
23 and the Oregon Water Resources Department (WRD/1), all pointed to relicensing

24 _____
25 ² In the scheduling conference for the Commission Workshop, the ALJ indicated that the
26 Commission would consider statements made at the Workshop as comment, rather than evidence. It is in
this manner, as comment on the pre-filed testimony and policy issues in the record, that the Company
cites to the transcript from the Commission Workshop throughout this brief.

1 considerations that would provide additional costs to what was assumed in the relicensing
2 case. PPL/304, Scott/3. Upon review, Staff concluded that the Company's estimate of
3 relicensing costs was reasonable. Tr. 68.

4 The relicensing scenario includes a 20 percent reduction in the energy that could be
5 produced from the Project as a result of additional water bypass requirements. PPL/300,
6 Scott/7. The Company assumed that lost generation would be replaced with renewable, non-
7 carbon emitting resources. PPL/200, Kelly/15. As a proxy for renewable energy, the
8 Company applied a carbon adder to the forward price curve. PPL/200, Kelly/15.

9 The Company also evaluated the costs of settlement under the KHSA. Confidential
10 Exhibit PPL/302. The Company estimated capital costs to be approximately \$9 million and
11 O&M costs to be approximately \$70 million. PPL/300, Scott/8. The estimated capital costs
12 reflect the costs of interim water quality improvements and hatchery improvements. PPL/300,
13 Scott/8. The O&M costs reflect increased funding related to hatcheries, restoration and study
14 funding, lands and cultural resources funding, aquatic habitat enhancement, water quality
15 monitoring, improvement costs, and implementation and management costs. PPL/300,
16 Scott/8.

17 In addition, costs under the KHSA scenario include the cost of renewable replacement
18 power, based on the assumption that generation at the Project would cease effective
19 December 31, 2019. PPL/200, Kelly/15; Tr. 9, lines 7-9. In addition, the settlement costs
20 would include \$3 million to decommission the East Side and West Side developments and the
21 \$172 million dam removal customer surcharge.

22 To evaluate the costs and benefits of continuing with relicensing the Project as
23 compared with the costs and benefits of entering into the KHSA, the Company compared the
24 Present Value Revenue Requirement (PVRR) of relicensing to the PVRR of the KHSA over a
25 44-year period beginning in 2010, which reflects a 40-year license beginning in 2013.
26 PPL/200, Kelly/14-15. The costs used in the relicensing scenario are set forth in Confidential

1 Exhibit PPL/301; the costs used in the KHSA scenario are set forth in Confidential Exhibit
2 PPL/302.

3 The economic analysis shows that the KHSA results in a PVRR that is less than the
4 cost of relicensing. PPL/200, Kelly/15. The Company's Confidential Exhibit PPL/202
5 summarizes the results of the economic analysis.³ The Company's analysis also shows that
6 the KHSA settlement provides Oregon's customers with a PVRR benefit over the costs of
7 relicensing. Tr. 31, lines 22-25; Confidential Attachment Bench Request 1-4.

8 In addition to evaluating the costs of relicensing and settlement under the KHSA, the
9 Company also evaluated risks to customers under each scenario. Without the KHSA to
10 facilitate removal of the dams, which is the expressed policy preference of the federal,
11 Oregon, and California governments, PacifiCorp's customers would be exposed to additional
12 risks and liabilities related to relicensing. For example, there is a risk that costs for PM&E
13 measures would escalate once the measures are designed and constructed. PPL/300,
14 Scott/9-10. In addition, the Company may be required to implement additional PM&E
15 measures, specifically those necessary to obtain the CWA Section 401 certifications.
16 PPL/300, Scott/10. The Company would also be exposed to the risk that it may not be able to
17 secure approvals for relicensing and it could be required to decommission and remove the
18 Project without cost and risk protections. PPL/200, Kelly/16; PPL/300, Scott/10. Finally, the
19 Company would likely incur additional costs resulting from continued litigation related to
20 environmental issues. PPL/200, Kelly/16. The KHSA protects PacifiCorp's customers from all
21 of these risks.

22

23

24 ³ In addition, in response to Bench Request 1 filed on July 9, 2010, the Company provided Highly
25 Confidential Attachment Bench Request 1-1, which provides an overview of the Company's analytical
26 economic analysis. Highly Confidential Attachment Bench Request 1-1. The Company also filed the
Highly Confidential and Confidential workpapers supporting its economic analysis as Highly Confidential
Attachments Bench Request 1-2 and 1-3, and Confidential Attachment Bench Request 1-4.

1 **B. Requirements of Senate Bill 76**

2 On July 14, 2009, the Oregon legislature passed SB 76. The statute requires
3 PacifiCorp to file a copy of the KHSA with the Commission within 30 days after execution,
4 along with complete copies of the analyses or studies of rate-related costs, benefits, and risks
5 to customers of relicensing that the Company reviewed during its decision-making process for
6 entering into the KHSA. ORS 757.736(1).

7 PacifiCorp must include with the filing "tariffs for the collection of two nonbypassable
8 surcharges from its customers for the purpose of paying the costs of removing Klamath River
9 dams." ORS 757.736(2). One surcharge shall be for the costs of removing the J.C. Boyle
10 Dam and one surcharge shall be for the costs of removing the other three dams.

11 ORS 757.736(2). The costs of removing the dams include costs of: (1) physical removal of
12 the dams; (2) site remediation and restoration; (3) avoiding downstream impacts of dam
13 removal; (4) downstream impacts of dam removal; (5) permits required for the removal;
14 (6) removal and disposal of sediment, debris, and other materials, if necessary; and
15 (7) compliance with environmental laws. ORS 757.736(11).

16 The surcharges may not exceed Oregon's share of the customer contribution of
17 \$200 million; the surcharges also may not exceed more than two percent of PacifiCorp's
18 annual revenue requirement as determined in the Company's last case under ORS 757.210
19 decided by the Commission before January 1, 2010. ORS 757.736(3). In addition, the
20 surcharges must be of a specified amount per kilowatt-hour billed to retail customers.
21 ORS 757.736(7). The calculation of the surcharges should result in total annual collections
22 remaining approximately the same during the collection period. ORS 757.736(7). The
23 Commission shall require PacifiCorp to begin collecting the surcharges on the date of its filing
24 of the final agreement, analyses, and tariffs. ORS 757.736(2). All amounts collected under
25 the surcharges shall be paid into trust accounts established for amounts generated by each of
26 the two surcharges. ORS 757.736(8); ORS 757.738(1).

1 Within six months of the Company's filing under SB 76, the Commission must conduct
2 a hearing under ORS 757.210 and enter an order setting forth its decision on whether the
3 imposition of the surcharges results in fair, just, and reasonable rates. ORS 757.736(4).⁴
4 PacifiCorp shall continue to collect the surcharges pending the Commission's decision on the
5 reasonableness of the rates resulting from the surcharges. ORS 757.736(2). If the Supreme
6 Court of Oregon, upon review of the Commission's decision, as set forth in SB 76, finds that
7 the surcharges did not result in fair, just, and reasonable rates, the surcharges shall be
8 refunded. ORS 757.736(5).

9 If one or more of the dams will not be removed, the Commission shall direct PacifiCorp
10 to terminate all or part of the surcharges. ORS 757.736(10). The Commission shall also
11 direct the trustee to apply any excess balances in the accounts to Oregon's share of prudently
12 incurred relicensing requirements. ORS 757.736(10). Any remaining amounts shall be used
13 for the benefit of customers, as ordered by the Commission. ORS 757.736(10).

14 **C. Procedural Background of UE 219**

15 On March 18, 2010, within 30 days after execution of the KHSA, the Company
16 submitted its Application in this proceeding and supporting testimony of Dean S. Brockbank,
17 Andrea L. Kelly, and Cory E. Scott. On the same date, the Company filed Advice No. 10-008
18 implementing the surcharges through Schedule 199, effective March 18, 2010.

19 Schedule 199 spread the surcharges among customer classes based on each class'
20 share of the generation revenues, while ensuring that no customer class increase exceeded
21 two percent or was less than 1.5 percent. PPL/200, Kelly/9. Staff addressed Advice No. 10-
22 008 in a Public Meeting Memo, dated March 22, 2010. In the memo, Staff recommended that
23 the Commission allow Schedule 199 to remain in effect and specifically supported the rate

24 _____
25 ⁴ SB 76 also requires the Commission to determine an accelerated depreciation schedule for the
26 Project within six months of execution of the KHSA. ORS 757.734(1). PacifiCorp addressed the
Company's proposed depreciation rates in its Brief on Depreciation Rate Issues filed in this proceeding
on July 20, 2010.

1 spread underlying Schedule 199: "Staff supports the concepts of surcharges based upon
2 generation revenues as the associated costs are generation related, reflecting the costs of
3 dam removal. Staff also supports the 1.5 percent floor and the two percent cap on the
4 surcharge for any customer class as reasonable means to mitigate the impact to any one
5 customer class." Staff Memo at 2. The Commission acknowledged Schedule 199 at its
6 March 30, 2010 Public Meeting, permitting it to remain in effect without modifications.

7 The Company's Application and Advice No. 10-008 fulfilled the Company's obligations
8 under SB 76 to file with the Commission: (1) the KHSA and copies of certain studies and
9 analyses relating to dam removal and relicensing; and (2) tariffs for the collection of two dam
10 removal surcharges to be effective on the date of filing. See ORS 757.732(1) and (2).

11 Because the Company's analyses contained confidential and highly confidential information,
12 the Commission entered Special Protective Orders to protect such information pursuant to
13 ORS 757.736(6). *Re PacifiCorp's Application to Implement Provisions of Senate Bill 76*,
14 Order No. 10-148 (Apr. 19, 2010); Order No. 10-152 (Apr. 21, 2010).

15 The Company's Application included a request that the Commission disclaim
16 jurisdiction over approval of the transfer of the dams under ORS 757.480, on the basis that
17 SB 76 preempted Commission jurisdiction under ORS 757.480. In the alternative, the
18 Company requested that the Commission conditionally approve the transfer under
19 ORS 757.480, contingent upon (1) satisfaction of the conditions precedent for transfer in the
20 KHSA; and (2) PacifiCorp filing the information required by OAR 860-027-0025.

21 The Company's filing set forth the detailed calculations related to Oregon's share of
22 the dam removal surcharges. PPL/201. The KHSA set the initial targeted surcharge
23 collection at \$172 million—well below the \$200 million statutory cap set by ORS 757.736(3).
24 PPL/200, Kelly/7. The \$172 million target was based on a ten-year collection period and
25 assumed a 3.5 percent interest rate on the trust balances. PPL/200, Kelly/7-8. Oregon's 92
26 percent share of this \$172 million is \$158.24 million. PPL/200, Kelly/8. Spread equally over

1 the collection period beginning on March 18, 2010, as is required under ORS 757.736(7), the
2 annual collection rate is \$16.16 million. PPL/200, Kelly/8. This annual collection rate does not
3 exceed two percent of PacifiCorp's Oregon revenue requirement, as mandated by
4 ORS 757.736(3). PPL/200, Kelly/8.

5 On May 26, 2010, the Citizens' Utility Board of Oregon (CUB); the Industrial
6 Customers of Northwest Utilities (ICNU); the Oregon Department of Fish and Wildlife; the
7 Oregon Water Resources Department; the Oregon Department of Environmental Quality; and
8 American Rivers, California Trout, and Trout Unlimited (Trout Unlimited) filed direct testimony
9 on surcharge and depreciation rate issues. Staff filed direct testimony on surcharge issues on
10 May 26, 2010, and filed direct testimony on depreciation issues on June 4, 2010. PacifiCorp
11 filed reply testimony on June 24, 2010.

12 On July 23, 2010, the Commission held a workshop (Commission Workshop). At the
13 Commission Workshop, PacifiCorp, Staff, CUB, and Trout Unlimited made technical
14 presentations and answered questions relating to the cost-benefit analyses of the KHSA as
15 compared to relicensing. PacifiCorp, Staff, CUB, and ICNU also presented on the other three
16 issues identified by the Commission: the calculation of the surcharges, disclaimer of
17 jurisdiction under ORS 757.480, and proposed modifications to Schedule 199. Staff and
18 PacifiCorp filed briefs on depreciation rate issues on July 20, 2010.

19 III. APPLICABLE LEGAL STANDARDS

20 SB 76 defines the scope of the Commission's review of the KHSA in this case. Under
21 the statute, the Commission is charged with determining whether the surcharges the
22 Company has implemented pursuant to SB 76 result in rates that are fair, just, and
23 reasonable. ORS 757.736(4).

24 SB 76 does not set forth the specific standard the Commission shall apply in
25 evaluating whether the surcharges produce rates that are fair, just, and reasonable. However,
26 the fair, just, and reasonable standard is well-established in Commission ratemaking.

1 *Springfield Educ. Ass'n v. Springfield School Dist. No. 19*, 290 Or. 217, 229-30 (1980) (term
2 “just and reasonable” acknowledges legislature’s broad delegation of authority to the
3 Commission to set utility rates). The Commission should apply the standard here consistently
4 with its past precedent.

5 The Commission has previously found that its duty under the just and reasonable
6 standard is to “balance the interest of the customer and the utility under ORS 756.040.” *Re*
7 *Portland Gen. Elec. Co.*, Order No. 08-487 at 63. Under ORS 756.040, the Commission
8 evaluates whether the overall rates are just and reasonable, not the reasonableness of the
9 methodologies or theories used to calculate rates. Order No. 08-487 at 7. The Commission’s
10 decision must “ultimately serve customers’ interests in adequate, safe, and reliable service at
11 just and reasonable rates.” Order No. 08-487 at 63. This precedent indicates that the
12 Commission should review whether the surcharges balance the interests of the customer and
13 utility, and consider the surcharges in the context of PacifiCorp’s overall rates, including the
14 fact that the surcharges are a relatively modest rate increase to base rates approved by the
15 Commission within the past year.

16 The language of ORS 757.736 is also instructive in defining the Commission’s scope
17 of review in this case. SB 76 requires PacifiCorp to file its analyses and studies that “relate to
18 the rate-related costs, benefits and risks for customers of removing or relicensing the Klamath
19 River dams” for Commission review. At the same time, the statute precludes the Commission
20 from using this sensitive information for “any purpose other than determining whether the
21 imposition of surcharges under the terms of the final agreement results in rates that are fair,
22 just and reasonable.” Thus, the statutory language of SB 76 implies that: (1) the Commission
23 may review analysis of the relative costs, benefits and risks of removal and relicensing to
24 determine whether the surcharges produce fair, just, and reasonable rates; and (2) the
25 Commission’s review of the KHSA is limited to a determination of whether the surcharges
26

1 produce fair, just, and reasonable rates. That is, if the Commission finds that the surcharges
2 meet the standard of SB 76, the Commission may not decline to approve them.

3 The parties have raised two issues on the applicable legal standards. First, CUB
4 argues that the Commission should review the KHSA under a traditional prudence standard to
5 determine whether the surcharges produce fair, just, and reasonable rates. CUB/100,
6 Feighner/4. This argument overlooks the fact that SB 76 expressly applies the prudence
7 standard to PacifiCorp's recovery of investment, operational costs, and replacement power,
8 but does not reference this standard in connection with review of the dam removal
9 surcharges. See ORS 757.734(2); ORS 757.740. However, while the Company does not
10 agree with CUB's position, the Commission need not resolve this issue because CUB agrees
11 that the record in this case supports a finding that the Company was prudent in executing the
12 KHSA. See CUB/100, Feighner/4. In other words, the evidence the Company provided to
13 satisfy its view of the fair, just, and reasonable standard is also sufficient to satisfy CUB's view
14 of the standard.

15 Second, at the Commission Workshop ICNU argued that the Commission may decline
16 to approve the surcharges on the basis that a condition precedent to the KHSA might not be
17 met. Tr. 83, lines 14-16. Even if the Commission had a sufficient record upon which to make
18 such a finding—which it does not⁵—SB 76 does not provide the Commission with discretion to
19 suspend the surcharges now, before they are even approved.

20 ⁵ At the Commission Workshop, ICNU represented that Governor Schwarzenegger "issued a
21 press release in which he stated that the bond measure would not be placed on the November ballot." Tr.
22 83, lines 17-20. ICNU provided parties with a copy of the referenced press release on August 6, 2010,
but has not yet requested that the Commission take official notice of the press release.

23 ICNU argued that under Section 3.3.4.C of the KHSA, the Secretary must make a determination
24 by March 31, 2012 that California has authorized funding for the facilities removal, and that such a
determination is not possible because the expected \$250 million bond measure in California will not be on
the ballot until 2012. Tr. 87, line 11-88, line 12.

25 ICNU's argument asks the Commission to make a factual finding that the dams may not be
26 removed and suspend the surcharge on the basis of that finding. ICNU has presented no factual basis
for making such a finding in this proceeding. Even if ICNU requests official notice of the press release
and the Commission takes official notice, the press release does not prove that the bond measure will be

(continued...)

1 ICNU argued that ORS 757.736(7) provides the Commission with the discretion to put
2 the surcharges on hold to evaluate how events under the KHSA unfold. Tr. 86, lines 1-21.
3 Section 7 states that "The commission may change the collection schedule if a Klamath River
4 dam will be removed during a year other than 2020." This Section requires the Commission to
5 make a finding that the dams "will not be removed" or "will be removed" in a year other than
6 2020, not a finding that one of those events *may* occur at some time in the future. In any
7 event, ICNU's argument is antithetical to the policy of SB 76, which requires implementation of
8 the dam removal surcharges without delay, notwithstanding the existence of conditions
9 precedent to dam removal in the KHSA.

10 ICNU also cited to Section 9 of SB 76, which states that if the Commission determines
11 that amounts have been collected in excess of those needed or those allowed, the
12 Commission must direct the trustee to refund the excess amounts or otherwise use the
13 amounts for the benefits of customers, or adjust future surcharge amounts as necessary to
14 offset the excess amounts. ORS 757.736(9). Because the statute describes what occurs
15 when the Commission finds that a dam will not be removed on schedule in Sections 7 and 10,
16 Section 9 does not apply in this case. Even if it did, however, there is no basis in the record to
17 find that amounts collected are in excess of those needed or allowed.

18 In summary, SB 76 does not give the Commission discretion to decline to implement
19 the surcharges now based upon ICNU's unsupported speculation that, at some point in the
20 future, conditions to the KHSA might not be met.

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22 postponed, or more importantly, that a condition precedent to the KHSA cannot now be satisfied,
23 importantly, the KHSA explicitly states that the Secretary may make the necessary determination even if
24 bond funding has not occurred. Tr. 95, line 20-96, line 3; PPL/104 at 21. Additionally, the KHSA provides
25 that California may use an alternative funding mechanism to bond funding. Tr. 95, lines 11-14; PPL/104
at 21. Therefore, there is no basis upon which the Commission can conclude that dam removal will not
occur, even if ICNU can establish as a factual matter that the California bond measure may be
postponed.

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1 IV. DISCUSSION

2
3 **A. The Surcharges Result in Fair, Just, and Reasonable Rates Because the KHSA in**
4 **is the Best Interest of Customers.**

5 The Company provided significant evidence that the surcharges result in fair, just, and
6 reasonable rates because the KHSA was negotiated for the benefit of customers and serves
7 their economic interests. Additionally, the surcharges were calculated consistently with the
8 requirements of SB 76 and are therefore fair, just, and reasonable.

9 The evidence is undisputed in this case that the Company negotiated the KHSA with
10 the express goal of advancing and protecting the interests of its customers. As a result, the
11 KHSA includes a cap on dam removal costs, provides protection against dam removal
12 responsibility and liability, and ensures access to power from the Project until at least 2020.
13 PPL/200, Kelly/10-11.

14 Because of the KHSA's advantageous provisions and because of the costs and risks
15 inherent in relicensing, the Company's economic analysis supports the Company's decision to
16 execute and implement the KHSA. All of the parties to this case who reviewed the evidence
17 on this issue reached the same conclusion.

18 Staff testified that the KHSA strikes the appropriate balance of cost and risk for
19 customers and found that the proposed surcharges for dam removal are in the best interest of
20 customers. Staff/100, Brown/2. Staff observed that the base case comparing the KHSA and
21 relicensing was close economically. Tr. 72. As the Company explained, this outcome was by
22 design, in order to produce a durable and balanced settlement. PPL/200, Kelly/15; Tr. 11,
23 lines 10-14. Staff then stressed the risks of relicensing avoided by the KHSA, especially the
24 risk associated with a failure to obtain CWA Section 401 certifications, which could lead to
25 dam removal cost burden borne solely by PacifiCorp's customers. Tr. 69-72.

26 Staff noted that a number of stakeholders in the Klamath Basin believed that dam
removal was in the public interest and would work very hard in the CWA Section 401

1 certification proceedings to achieve that goal. Tr. 72. Trout Unlimited confirmed this
2 observation, stating that if relicensing proceeded, stakeholders “will work very hard to try to
3 achieve the removal result through whatever venue possible.” Tr. 73.

4 Staff concluded that the KHSA was the least risky alternative for customers compared
5 with relicensing, and that PacifiCorp’s decision to enter into the KHSA was a reasonable one.
6 Staff/100, Brown/12; Tr. 71.

7 CUB also undertook a comprehensive economic analysis of the KHSA and relicensing,
8 which it summarized in the highly confidential section of the Commission Workshop. Highly
9 Confidential Tr. 57-60. In its testimony, CUB noted that while the costs incurred under the
10 KHSA are large, the costs are “acceptable given the expected benefits of the project as
11 compared to the quantity of financial risks that will be assumed by customers.” CUB/100,
12 Feighner/4. CUB concluded that the KHSA is prudent and agreed that the rates resulting from
13 the surcharges are fair, just, and reasonable. CUB/100, Feighner/5, 7.

14 ICNU was the only party that claimed that the KHSA resulted in higher costs than
15 would have been the case absent SB 76. ICNU/100, Falkenberg/4. ICNU, however, never
16 reviewed the Company’s economic analysis, even after the Commission tailored a special
17 form of protective order to facilitate ICNU’s review of this information. PPL/203, Kelly/3. In
18 response to discovery, ICNU was unable to provide any quantitative evidence supporting its
19 claim that costs will be higher under the KHSA than under relicensing. ICNU’s Response to
20 PacifiCorp’s Data Request No. 1.2. *See Re. PacifiCorp Application to Implement the*
21 *Provisions of Senate Bill 76*, Docket UE 219, PacifiCorp’s Motion to Admit Pre-filed
22 Testimony, Exhibits, and Data Responses (July 20, 2010).

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1 **B. The Commission Should Approve PacifiCorp's Proposed Surcharges as Fair,**
2 **Just, and Reasonable Because the Surcharge Calculations are Consistent with**
3 **SB 76.**

4 **1. The Calculations of the Surcharges Are Consistent with SB 76.**

5 As required by ORS 757.736(2), Schedule 199 includes two dam removal surcharges,
6 one for the J.C. Boyle dam and one for the Copco No. 1, Copco No. 2, and Iron Gate dams.
7 PPL/200, Kelly/7. The surcharges are calculated so as not to exceed Oregon's share of the
8 customer contribution of \$200 million, as required by ORS 757.736(3). PPL/200, Kelly/7-8.
9 To calculate the surcharges, the Company began with Oregon's 92 percent share of the
10 \$172 million target set forth in the KHSA, or \$158.24 million. PPL/200, Kelly/8; Exhibit
11 PPL/201. The Company used the assumptions included in Appendix H of the KHSA—
12 specifically the interest rate assumption of 3.5 percent and the ending date of the surcharges
13 of December 31, 2019. PPL/200, Kelly/8; Exhibit PPL/104 at Appendix H. The surcharge
14 collection level can be adjusted in the future, as proposed by the Company in Section III.B.1.b
15 below. PPL/203, Kelly/6.

16 In addition, the surcharges do not exceed two percent of the Company's revenue
17 requirement as determined in the Company's last case under ORS 757.210 decided before
18 January 1, 2010, as required by ORS 757.736(3). PPL/200, Kelly/8. Moreover, the
19 surcharges are calculated to remain approximately the same during the collection period and
20 are of a specified amount per kilowatt hour, as required by ORS 757.736(7). PPL/200,
21 Kelly/8.

22 **a. The Rate Spread in Schedule 199 is Appropriate.**

23 PacifiCorp has allocated the surcharges among customer classes based on each
24 class' share of generation revenues, subject to a two percent cap and 1.5 percent floor for
25 each customer class. PPL/200, Kelly/9. The Company's proposal recognizes that dam
26 removal surcharges are generation-related costs. PPL/203, Kelly/7. Implementing a rate
spread based on generation revenues is consistent with how net power costs are spread in

1 the Company's Transition Adjustment Mechanism (TAM). PPL/203, Kelly/7. It is also
2 consistent with how traditional relicensing costs would be spread. Tr. 98. Staff and CUB both
3 support the Company's rate spread. Tr. 80-81; 97-100.

4 ICNU proposes that the surcharges be spread equally across all customer classes, as
5 was proposed in the direct testimony in the Company's most recent rate case, Docket UE 217.
6 ICNU/100, Falkenberg/8. ICNU argues that dam removal costs are independent of energy
7 usage and should therefore be considered demand-related costs. ICNU/100, Falkenberg/9.
8 ICNU also argues that the Company's proposed rate spread penalizes industrial customers.
9 ICNU/100, Falkenberg/10.

10 Costs related to removing generation assets are generation-related. PPL/203, Kelly/8.
11 ICNU's proposal to use the rate spread from the Company's direct case in UE 217 ignores the
12 fact that the costs at issue in a general rate case include distribution- and transmission-related
13 costs, whereas in this case only generation costs are at issue. PPL/203, Kelly/8. Even more
14 notable, it ignores the rate spread contained in the stipulation in UE 217 to which ICNU is a
15 party.⁶ The Company does not agree with ICNU that its proposed rate spread penalizes
16 industrial customers. As illustrated in PacifiCorp's Calculation of Surcharge Presentation,
17 Attachment 2 at the Commission Workshop, residential customers pay a larger amount of the
18 total surcharges than industrial customers. Moreover, the rates per kilowatt-hour for
19 residential customers, \$0.00101 and \$0.00033, are higher than for Schedule 48 Large
20 General Service customers, \$0.00079 and \$0.00026. Tr. 97, line 2-8. ICNU's statement that
21 the Company's proposed rate spread penalizes industrial customers is not borne out by the
22 evidence.

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25 _____
26 ⁶ The rate spread in the UE 217 Stipulation is set forth in section 16 and in page 1 of Exhibit C.

The stipulated rate spread does not spread the stipulated rate increase equally across customer classes.

1 **b. Modifying Schedule 199 to Reflect a Different Rate for Each of the**
2 **Ten Years the Tariff Will Be in Effect is Unnecessary.**

3 ICNU proposes that Schedule 199 be modified to reflect reductions related to
4 projected sales growth each year. ICNU/100, Falkenberg/8. ICNU's proposal is unnecessary
5 because the tariff must be updated periodically to reflect actual collections and updated load
6 forecasts. PPL/203, Kelly/7. The Company proposes that the Commission reject ICNU's
7 proposal in favor of the following proposal for updating Schedule 199 on an annual basis: the
8 Company would meet with Staff each year within 30 days of filing the TAM. The purpose of
9 linking the meeting to the timing of the TAM is that the Company will have its updated load
10 forecast for use in the TAM. Staff and the Company would review the status of collections
11 and the new forecast in order to determine whether revised rates are necessary. If Staff
12 determines that revised Schedule 199 rates are necessary, the Company will file a revised
13 tariff within 60 days of the TAM filing. The revised tariff would have an effective date of at
14 least 30 days from the date of filing. The Company's proposal would ensure that amounts
15 collected under Schedule 199 reflect changes in load, without speculating as to load growth
16 over the next ten years, as ICNU's proposal would require.

17 **c. The 3.5 Percent Interest Rate Used to Calculate the Surcharges is**
18 **Reasonable.**

19 The Company calculated the surcharges using an interest rate of 3.5 percent,
20 consistent with the parties' agreement in the KHSA. PPL/203, Kelly/6. Staff does not object
21 to the Company's proposed interest rate. Tr. 81, line 23-82, line 2. ICNU argues that the
22 3.5 percent interest rate is below the current rate for conservative interest-bearing
23 investments. ICNU/100, Falkenberg/6. ICNU cites the Company's testimony on single A
24 utility bonds in UE 217 as evidence that the 3.5 percent interest rate is too low. ICNU/100,
25 Falkenberg/6. ICNU's argument, however, assumes that the surcharges would be deposited
26 into investments that would put the principal at risk. The KHSA parties expected that the trust
funds would be invested in a manner that would not put the principal at risk. PPL/203, Kelly/6.

1 Consistent with that expectation, PacifiCorp understands that the Commission has currently
2 deposited the surcharges into a money market account. Tr. 76. Moreover, ICNU does not
3 provide evidence that an interest rate of 3.5 percent is unreasonable for accounts qualified to
4 receive public funds under ORS 295.001 to 295.008. See ORS 757.738(1). The Commission
5 should therefore reject ICNU's arguments as unsupported by the evidence.

6 **2. The Commission Should Approve the Company's Proposals for Tracking**
7 **Collections on a Customer Basis and Providing Customer Notice of the**
8 **Surcharges.**

9 The Company proposes to track collections under the surcharges on a customer class
10 basis. PPL/203, Kelly/5. ICNU proposes that the Company track the amount of collections on
11 a customer-by-customer basis, but that at a minimum amounts be collected on a customer
12 class basis. ICNU/100, Falkenberg/5-6. ICNU's argument in favor of tracking amounts by
13 customer is that amounts may be refunded in the future under SB 76, and customers that paid
14 the surcharges but are no longer on PacifiCorp's system should receive such refunds.

15 ICNU/100, Falkenberg/6. ICNU's proposal is unnecessarily burdensome, especially given the
16 significant unlikelihood of refunds in the future. PPL/203, Kelly/5. For a refund to occur after
17 the Commission has finally determined that rates resulting from the surcharges are just and
18 reasonable, two conditions must be met. First, dam removal must fail to occur.

19 ORS 757.736(10). Second, amounts collected under the surcharges must have been in
20 excess of the Company's Oregon-allocated relicensing costs. *Id.* As shown in the Company's
21 testimony and economic analysis, the likelihood of this occurring is extremely low. PPL/203,
22 Kelly/5. ICNU's proposal is therefore unreasonable given the difficulties of tracking amounts
23 on a customer basis and maintaining contact information for departing or moving customers
24 for a period of 10 years.

25 In the remote likelihood of a refund to customers, the Company believes that the
26 refund should be provided through a rate surcredit to existing customers on a going forward
basis. For example, this method was utilized in 2004 when the Commission ordered

1 distribution of the Department of Justice's \$1.75 million settlement with the Williams
2 Companies to customers through tariff Schedule 180. The tariff applied rate surcredits to bills
3 to then-current customers only. See Advice No. 04-005 (Apr. 16, 2004).

4 The Company also requests that the Commission reject ICNU's proposal to include a
5 bill stuffer in customer bills explaining elements of SB 76. ICNU/100, Falkenberg/4.
6 PacifiCorp already included bill messages on the first bills in which the surcharges appeared.
7 PPL/203, Kelly/5-6; See Workshop Presentation, Calculation of Surcharge, Attachment 1.
8 The Company also separately identifies the each surcharge as a line item on the monthly bill.
9 PPL/203, Kelly/5. The Company also plans to inform customers of any changes to the
10 surcharges in the future consistent with its normal business practices. PPL/203, Kelly/6. In
11 light of these facts, there is no need to order the Company to produce a bill stuffer explaining
12 the surcharges.

13
14 **C. The Commission Should Conditionally Approve the Transfer of the Dams under
ORS 757.480 Pending Satisfaction of the Conditions Precedent in the KHSA.**

15 **1. Conditional Approval under ORS 757.480 is Appropriate.**

16 In the Company's Application, the Company requested that the Commission disclaim
17 jurisdiction under ORS 757.480 on the basis that the Commission could not disapprove the
18 transfer without acting inconsistently with SB 76. In the alternative, the Company requested
19 that the Commission approve the transfer, subject to satisfying the conditions of the KHSA
20 and filing the information required in OAR 860-027-0025.

21 ORS 757.480(1) requires a utility to obtain Commission approval before disposing of
22 any utility property necessary or useful in the performance of its duties in excess of \$100,000.
23 Every sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation
24 subject to this provision that is done other than in accordance with a Commission order is
25 void. ORS 757.480(3). The Commission requires that applicants show that the proposed

26

1 disposition of property will be consistent with the public interest, which is a “no harm”
2 standard. OAR 860-027-0025(1)(l).

3 The explicit policy of SB 76 is to support and facilitate removal of the Klamath dams
4 pursuant to the KHSA. SB 76 provides that “subject to final analysis and confirmation by the
5 Secretary of the Interior and review by the states of Oregon and California, the [KHSA] will . . .
6 set forth a framework for action based on the preliminary view that removal of dams on the
7 Klamath River is in the public interest.” Preamble to SB 76. Section 7.4.2 of the KHSA
8 requires PacifiCorp to transfer the dams to the DRE, the entity designated by the Secretary of
9 Interior, upon notice that all requirements for dam removal have been met. This transfer is
10 central the KHSA’s provisions to exempt PacifiCorp and its customers from liability for dam
11 removal. Because the property transfer statute provides that a disposition of property that has
12 not been ordered by the Commission is void, but SB 76 provides that the KHSA will govern
13 whether the dams will be transferred, ORS 757.480 is in conflict with SB 76 and would
14 therefore not apply in this case.⁷

15 The Commission can avoid resolving this legal issue, however, by simply approving
16 the transfer of the dams to the DRE in this Application, subject to satisfaction of the conditions
17 for transfer in the KHSA and filing of the materials required by OAR 860-027-0025.⁸ The
18 Company proposes the following conditions precedent:

19

20 ⁷ Under Oregon law, if an earlier and later statute “are in irreconcilable conflict, then the earlier
21 must yield to the later by implied repeal or amendment.” *Oregon v. Ferguson*, 228 Or. App. 1 at 4 (2009)
22 (citations and quotations removed). Because the two statutes are in conflict, the property transfer statute
23 must yield to SB 76, and Commission approval cannot be required as a prerequisite to the dam transfer.
The legislature’s intent that PacifiCorp transfer the dams to the DRE for removal, subject to meeting the
conditions set forth in the KHSA, is clear. Therefore, the Commission’s ability to approve or reject a
transfer to the DRE under ORS 757.480 has been repealed by implication.

24 ⁸ SB 76 does not allow the Commission to use the information filed by the Company under the
25 statute for any other purpose than reviewing the dam removal surcharge. See ORS 757.736(6).
26 However, if the Commission evaluates the transfer under ORS 757.480, PacifiCorp consents to the
Commission’s use of the economic analyses provided with the Company’s Application for the purposes of
evaluating transfer of the dams under ORS 757.480.

- 1 • the passage of federal legislation which contain provisions that are materially
2 consistent with Section 2.1.1.A of the KHSA;
- 3 • the availability of sufficient funds to cover the estimated costs of dam removal,
4 provided by both the states of California and Oregon, as set forth in Section 4.1 of
5 the KHSA;
- 6 • an Affirmative Determination by the Secretary determining that: (i) the costs of dam
7 removal will not exceed available funds; (ii) removal of the dams will advance
8 restoration of the salmonid fisheries of the Klamath Basin; and (iii) removal of the
9 dams is in the public interest, as required in Section 3 of the KHSA; and
- 10 • the issuance by the DRE of the DRE Notice, as defined in Section 7.4.1 of the
11 KHSA, at such time as all necessary permits and approvals have been obtained for
12 the removal of a particular dam (Facility), all contracts necessary for Facilities
13 Removal have been finalized, and Facilities Removal is ready to commence.

14 If the Commission evaluates the transfer under ORS 757.480, the Commission must
15 determine whether the transfer is consistent with the public interest, *i.e.* that it does “no harm.”
16 OAR 860-027-0025(1)(I). In making such a determination, the Commission should conclude
17 that the legislature has already made a finding that transfer of the dams, subject to the
18 conditions precedent for transfer in the KHSA being met, is in the public interest. A finding
19 that the transfer is not in the public interest would be directly contrary to the legislature’s
20 express policy in SB 76.

21 Moreover, if the Commission finds that the dam removal surcharges result in fair, just,
22 and reasonable rates, a logical consequence of this finding is that transfer of the dams to the
23 DRE for removal is in the public interest. A finding of just and reasonable rates implies a
24 finding that the KHSA is in the best interests of customers.

25
26

1 **2. Staff's Proposal to Defer Consideration under ORS 757.480 is Contrary to**
2 **the Policy Behind SB 76 and is Unnecessary.**

3 Staff proposes that the Commission not address whether ORS 757.480 applies to the
4 Project removal "until such time as PacifiCorp actually decides on dam removal." Staff/100,
5 Brown/3. By executing the KHSA, however, PacifiCorp has already made the decision that it
6 will move forward with dam removal, subject to the conditions precedent in the KHSA.
7 PPL/203, Kelly/2. Under the terms of the KHSA, the Company is obligated to transfer the
8 dams if the conditions precedent are met. PPL/203, Kelly/2. Therefore, there is no basis to
9 withhold conditional approval of the transfer of the dams until a later date.

10 Furthermore, waiting to evaluate the transfer at an unknown later date would be
11 inconsistent with the intent of SB 76 that the Commission move immediately to implement
12 SB 76. The timelines set forth for the Commission's evaluation of the Company's filings
13 pursuant to SB 76 are rapid—not more than six months after PacifiCorp files the KHSA and
14 tariffs for the fair, just, and reasonable determination, and not more than six months after
15 execution of the KHSA for findings related to depreciation schedules. See ORS 757.734(1);
16 ORS 757.736(4). Waiting until 2019 to evaluate removal of the dams, based on the target
17 date for initiation of removal of 2020, is inconsistent with the legislature's express policy of
18 quickly implementing the requirements of the KHSA and SB 76.

19 Finally, waiting to evaluate the transfer would be inconsistent with the Commission's
20 policy in favor of administrative efficiency. See *Re. PacifiCorp*, Docket UE 170, Order No. 06-
21 172 (Apr. 12, 2006) (striking testimony to further the principle of administrative efficiency).
22 Resolving the property transfer issue now based upon the record specifically contemplated by
23 SB 76 avoids a number of difficult and contentious issues which could be raised in a future
24 proceeding, including the proper standard and scope of review, the allowable evidence,
25 federal and state preemption, and the res judicata or collateral estoppel impact of the
26 Commission's decision in this proceeding.

1 Therefore, evaluating the transfer now would make implementation of SB 76 and the
2 Commission's procedures more efficient. In summary, requiring a subsequent proceeding to
3 review transfer of the Project to the DRE would create a new precondition to KHSA
4 implementation, one that could lead to uncertainty among stakeholders as to whether the
5 Commission fully supports the KHSA. Creating a new precondition is inconsistent with the
6 legislature's intent that the KHSA govern removal of the dams. For these reasons, PacifiCorp
7 respectfully requests that the Commission approve the transfer, subject to the conditions
8 precedent for transfer in the KHSA being met and PacifiCorp filing the information necessary
9 under OAR 860-027-0025.

10
11 **D. The Commission Should Approve PacifiCorp's Proposed Modifications to
 Schedule 199.**

12 In Advice No. 10-008, the Company filed Schedule 199 with an effective date of March
13 18, 2010, to implement the two dam removal surcharges required by SB 76. The tariff
14 included a refund provision, which stated that the tariff shall remain in effect "pending review
15 by the Commission as to whether the imposition of surcharges under the KHSA results in
16 rates that are fair, just, and reasonable or during any period of judicial review of such a
17 finding. If the rates resulting from these surcharges are finally determined not to be fair, just,
18 and reasonable the surcharges shall be refunded pursuant to ORS 757.736, Subsection (5)."
19 Subsection 5 of ORS 757.736 states that judicial review of an appeal of the Commission's
20 decision on the reasonableness of the rates resulting from the surcharges is conferred on the
21 Supreme Court, and that the surcharges shall be refunded if the rates are determined not to
22 be fair, just, and reasonable.

23 In Ms. Kelly's direct testimony, PacifiCorp proposed revising Schedule 199 to remove
24 this refund condition. PPL/200, Kelly/7; Exhibit PPL/201. PacifiCorp clarified at the
25 Commission Workshop that it proposed removing this provision once the Commission's
26 decision finding that the rates resulting from the surcharge are fair, just, and reasonable is

1 final. Tr. 107, lines 16-18. The Commission's decision would be final 60 days after the
2 Commission order if no petition for review is filed, or at the conclusion of the proceeding
3 before the Supreme Court if a petition is filed. See ORS 183.482(1) (requiring that a petition
4 for judicial review be filed "within 60 days only following the date the order upon which the
5 petition is based is served unless otherwise provided by statute."). If the Commission finds
6 that rates resulting from the surcharges are fair, just, and reasonable, and no party appeals
7 that finding, the Commission's order is final. After that point, there is no basis for refund under
8 Subsection 5.

9 Staff has proposed modifying Schedule 199 to remove the sentence proposed by
10 PacifiCorp, but to modify the last sentence to state "If the rates resulting from these
11 surcharges are determined not to be fair, just and reasonable the surcharges shall be
12 refunded pursuant to ORS 757.736 Subsection (5)." Staff/100, Brown/13. Once the
13 Commission's decision on the reasonableness of rates is final, there will be no basis for
14 refund under ORS 757.736(5) and it is inappropriate for the tariff to suggest otherwise.

15 Although the refund provision in ORS 757.736(5) will no longer be applicable once the
16 Commission's decision in this proceeding is final, the surcharges could be refunded in the
17 future pursuant to ORS 757.736(10). ORS 757.736(10) states that if one or more of the dams
18 will not be removed, the Commission shall direct the trustee of the accounts to apply any
19 excess balances to Oregon's share of prudently incurred costs to implement relicensing
20 requirements. If any excess amounts remain after that application, the Commission shall
21 order that the excess amounts be refunded to customers or otherwise be used for the benefit
22 of customers. ORS 757.736(10). Therefore, the sentence in the tariff that PacifiCorp
23 proposes to be removed could be replaced with a sentence that states "The surcharges may
24 be refundable only as provided in ORS 757.736(10)." PacifiCorp does not believe such
25 language is necessary to implement a refund that is required by SB 76, but would not object to
26 including such language.

1 **V. CONCLUSION**

2 Based on the foregoing, the Company respectfully requests that the Commission find
3 that the surcharges contained in Schedule 199 result in fair, just, and reasonable rates,
4 approve Schedule 199 as proposed by the Company, implement the annual review of
5 collections under Schedule 199 proposed by the Company, and conditionally approve the
6 transfer of the Project to the DRE under ORS 757.480.

7
8 DATED: August 9, 2010.

Respectfully submitted,

9 McDowell Rackner & Gibson PC

10 

11 _____
12 Katherine McDowell
Amie Jamieson

13 Attorneys for PacifiCorp

14 PACIFICORP

15 Jordan A. White
16 Senior Counsel
Pacific Power
17 1407 W. North Temple, Suite 320
Salt Lake City, Utah 84116
18 Phone: (801) 220-2279
Facsimile: (801) 220-4615

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served a true and correct copy of the foregoing document in
3 UE 219 on the following named person(s) on the date indicated below by email and first-
4 class mail addressed to said person(s) at his or her last-known address(es) indicated below.

5

6 David B. Hatton
Assistant Attorney General
Department of Justice
7 1162 Court St. NE
Salem, OR 97301-4096
8 david.hatton@state.or.us

Melinda Davison
Davison Van Cleve PC
333 SW Taylor – Ste. 400
Portland, OR 97204
mail@dvclaw.com

9

10 Glen H. Spain
Pacific Coast Federation of Fishermen's
Associations (PCFFA) and
Institute for Fisheries Resources (IFR)
11 fish1ifr@aol.com

Kelcey Brown
Public Utility Commission Of Oregon
PO Box 2148
Salem Or 97301
kelcey.brown@state.or.us

12

13 Steve Kirk
Oregon Dept. of Environmental Quality
steve.kirk@state.or.us

Chris Stine
Oregon Dept. of Environmental Quality
chris.stine@state.or.us

14

15 Rick Kepler
Oregon Dept. of Fish and Wildlife
rick.j.kepler@state.or.us

Ken Homolka
Oregon Dept. of Fish and Wildlife
ken.homolka@state.or.us

16

17 Mary Graine
Oregon Water Resources Dept.
mary.s.graine@wrd.state.or.us

Ron C. Kohanek
Oregon Water Resources Dept.
ron.c.kohanek@wrd.state.or.us

18

19 Peter Brucker
Salmon River Restoration Council
ptbp2day@gmail.com

Kurt Burkholder
Oregon Dept. of Justice
kurt.burkholder@doj.state.or.us

20

21 Kate Miller
Trout Unlimited
kmiller@tu.org

Charlton H. Bonham
Trout Unlimited
cbonham@tu.org

22

23 Richard Lorenz
Cable Huston Benedict
Haagensen & Lloyd LLP
1001 SW Fifth Ave., Suite 200
24 Portland, OR 97204-1136
rlorenz@cablehuston.com

Laurence Cable
Cable Huston Benedict
Haagensen & Lloyd LLP
1001 SW Fifth Ave., Suite 200
Portland, OR 97204-1136
lcable@cablehuston.com

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Randal Falkenberg
RFI Consulting
PMB 362
8343 Roswell Road
Sandy Springs, GA 30350
consultrfi@aol.com

John Corbett
Yurok Tribe
jcorbett@yuroktribe.nsn.us

G. Catriona McCracken
Citizens' Utility Board of Oregon
catriona@oregoncub.org

Kevin Elliott Parks
Citizens' Utility Board of Oregon
kevin@oregoncub.org

Raymond Myers
Citizens' Utility Board of Oregon
ray@oregoncub.org

Gordon Feighner
Citizens' Utility Board of Oregon
gordon@oregoncub.org

Bob Jenks
Citizens' Utility Board of Oregon
bob@oregoncub.org

S. Craig Tucker
ctucker@karuk.us

Carl Ullman
Klamath Tribes
Klamath Water Project
bullman3@earthlink.net

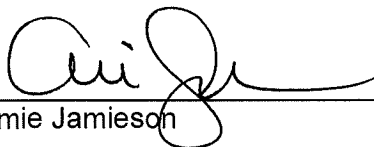
Mark C Rockwell
NCFPP
summerhillfarmvp@aol.com

Richard Roos-Collins
Natural Heritage Institute
100 Pine Street, Ste. 1550
San Francisco, CA 94111
rrcollins@n-h-i.org

Brett Swift
American Rivers
320 SW Stark St - Ste 418
Portland, OR 97204
bswift@amrivers.org

Lisa Brown
Waterwatch Of Oregon
Lisa@Waterwatch.Org

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Amie Jamieson