BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UE 219

In the Matter of: PacifiCorp, dba Pacific Power, Application to Implement the Provisions of SB 76	**Joint Opening Brief on Surcharge Issues**

American Rivers, California Trout, Institute for Fisheries Resources, Pacific Coast Federation of Fishermen's Associations, Trout Unlimited, and the Klamath Tribes submit this Joint Brief on Surcharge Issues to the Public Utility Commission of Oregon (Commission) in support of the Oregon Klamath Surcharges as fair, just and reasonable.

I. INTRODUCTION

The Klamath River was once the third most productive river for salmon on the West Coast, behind only the Columbia-Snake and Sacramento River systems. The Klamath Basin is also home to one of the oldest federal Bureau of Reclamation irrigation projects and an important agricultural community. The Klamath Basin has been mired in continual crisis for decades, including decimated salmon runs, water curtailments, financial hardship for local communities, and ongoing litigation. But, on February 18, 2010, Secretary of the Interior Ken Salazar, Governors Arnold Schwarzenegger of California and Ted Kulongoski of Oregon, Dr. Jane Lubchenco of the National Marine Fisheries Service, Assistant United States Attorney General Ignacio Moreno, and others met at the Oregon Capitol building to execute the Klamath Hydroelectric Settlement Agreement (KHSA) and the Klamath Basin Restoration Agreement (KBRA) at a signing ceremony that drew more than 500 people. No other coalition of so many people from such diverse perspectives has ever even proposed – let alone produced – an approach for solutions this comprehensive in one of the west's most complex and controversial river basins. The Commission has an integral role in implementing this approach.

On March 18, 2010, PacifiCorp filed with the Commission an application to implement provisions of Oregon Senate Bill 76 (Oregon Surcharge Act or SB 76)

(enacted on July 14, 2009 and codified as O.R.S. 757.732-744), as a condition of the Klamath Hydroelectric Settlement Agreement (KHSA). *See* KHSA § 4.1. Specifically, the KHSA provides for the establishment and management of trust accounts consistent with Senate Bill 76. KHSA § 4.2.1 (establishment); KHSA § 4.2.4 (management). Pursuant to the agreement and the Act, PacifiCorp shall deposit funds collected through an increase in customer rates (Surcharges) into Commission-approved, interest-bearing accounts until needed for decommissioning and removal of four dams in PacifiCorp's Klamath Hydroelectric Project. KHSA § 4.2.1.

The Surcharges are a necessary and critical component of the KHSA, because they contribute to the financing for facilities removal. PacifiCorp's Klamath Hydroelectric Project has blocked the natural migration of salmon to tributaries in the Upper Klamath Basin for almost a century. Removal of the project's Iron Gate, Copco 1, and Copco 2 dams in California and J.C Boyle Dam in Oregon will restore fish access to over 400 miles of riverine habitat for those fish. ODFW/1, Dale/4. Absent facilities removal, the KHSA and its companion Klamath Basin Restoration Agreement will terminate, likely causing Basin communities to return to the litigation and strife that has made the Basin a national example of conflict over natural resources. *See* KHSA § 8.11.1 (identifying potential termination events).

The narrow issue before the Commission in this proceeding is whether the Surcharges for dam removal will result in fair, just and reasonable rates for PacifiCorp's customers. They will. No evidence exists in the record to prove otherwise.

II. ARGUMENT

A. THE SURCHARGES WILL RESULT IN RATES THAT ARE FAIR, JUST AND REASONABLE.

1. <u>The Surcharges Satisfy the Requirements of Oregon Revised Statute 757.736</u>.

Senate Bill 76 is codified in Oregon Revised Statute 757.732-744. Oregon Revised Statue (O.R.S.) 757.736 provides for Surcharges to fund the costs of removing Klamath River dams. Subsection 4 of this code provision specifies that the Commission "shall enter an order setting forth findings and conclusions as to whether the imposition

of surcharges under the terms of the final agreement results in rates that are fair, just and reasonable." O.R.S. 757.736(4).

Evidence in the record shows that the Surcharges: (a) are not excessive and provide only the amount necessary to fund Oregon's share of customer contributions to dam removal funding; (b) are based on a reasonable collection schedule of December 31, 2019; (c) are purposefully designed to ensure rate increases never exceed 2%; and, (d) are structured to maintain total annual collections at approximately the same level during the collection period to the extent practicable. PPL/200, Kelly/7-9; Schedule 199, Advice 10-008. Thus, the Surcharges will result in rates that are fair, just and reasonable. *See* O.R.S. 757.736(4).

The Industrial Customers of the Northwest (ICNU) submitted lengthy testimony mostly focused on technical issues about the Surcharges. *See e.g.*, ICNU/100, Falkenberg/1-11) (need to inform customers); *Id*./4, line 22; *Id*./5, line 17) (refundability). This Direct Testimony is the only testimony that ICNU presented regarding the Surcharges. We defer to PacifiCorp for its responses on these technical issues.

In stark contrast to these technical issues, PacifiCorp – among others – submitted substantial evidence proving that the Surcharges will result in rates that are fair, just and reasonable. *See e.g.*, Direct Testimony of Andrea Kelly, PPL/200; Direct Testimony of Cory Scott, PPL/300; *see also* Inventory of Analysis and Studies Relied Upon by Company, Exhibit to Direct Testimony of Cory Scott, PPL/303. Witnesses for both the Citizen's Utility Board and PUC Staff reviewed PacifiCorp's economic analysis and concluded that the terms of the KHSA are prudent and in the best interest of Oregon customers. PPL/203, Kelly/3, line 14-16; Staff/100, Brown/2, line 13-14; CUB/100, Feighner/1-5, 7. There is little to no dispute that the Surcharges will result in fair, just and reasonable rates.

2. <u>The KHSA and the Surcharge Manage Ratepayer Risks Better Than Relicensing</u>.

This proceeding does not require the Commission to choose between contingent dam removal and certain relicensing of PacifiCorp's hydroelectric facilities before the Federal Energy Regulatory Commission (FERC). The alternative to implementation of

the KHSA – relicensing – is not certain and involves very significant contingencies in schedule, cost, and liability, even though FERC's Office of Energy Projects has published a final Environmental Impact Statement ("FEIS") (Nov. 2007) recommending relicensing.[1] The many and significant risks of a future relicensing to the utility's ratepayers should be compared to the at-hand benefits of the KHSA to those very same customers.

For example, under Clean Water Act section 401(a)(1), 33 U.S.C. section 1341(a)(1), a new license for the Klamath Hydroelectric Project may issue only if and when the California Water Resources Control Board and Oregon Department of Environmental Quality each certify that the project will comply with applicable state water quality standards. In the certification proceedings which were pending before the KHSA was executed in February 2010, the very parties who have now settled, as well as other parties, had significant unresolved disputes whether it is even possible to modify the project's facilities or operations to comply with state water quality standards.[2] If one of these states eventually denies certification, then PacifiCorp or any other interested party may file an appeal in state court (*Roosevelt Campobello International Park v. U.S. Environmental Protection Agency*, 604 F.2d 1041, 1056 (1st Cir. 1982)), whose decision would then be reviewable in the U.S. Supreme Court pursuant to 28 U.S.C. section 1257(a). On judicial review, the certification denial may be upheld, or it may be reversed and remanded for further proceedings before the state agency. If a certification issues in the initial proceeding or on such remand, then the certification itself would be subject to judicial review in state court followed again by U.S. Supreme Court review.

If both certifications issue and survive judicial review, FERC would issue a license only if it determines, under Federal Power Act section 10(a)(1), 16 U.S.C. section 803(a)(1), that a license which incorporates all certification conditions is best adapted to a comprehensive plan of development for the affected waters. FERC may not modify or reject any such condition imposed by a state (*Jefferson County PUD no. 1 v. Washington*

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[1] *See* FERC eLibrary Accession No. 20071116-4001, http://elibrary.ferc.gov/idmws/File_list.asp?document_id=13555784.

[2] *See* http://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/ceqa_projects.shtml#klamath_hydro.

Department of Ecology, 511 U.S. 700 (1994)), although it would have the discretion to deny a license if it determined that a license so conditioned is not in the public interest.

Then a new license, if issued, would take affect only if: (i) PacifiCorp accepts the new license and its conditions within 60 days of issuance; and, (ii) it survives any judicial review under 16 U.S.C. section 825*l*, whether initiated by PacifiCorp or another party. PacifiCorp has the discretion to reject or appeal a license as issued.

Even after a new FERC license is in effect, PacifiCorp would pay for all costs required to perform its obligations under the license. The company itself explained that "[e]ven though the new license prescribes the required PM&E [protection, mitigation, and enhancement] measures, it cannot cap the costs of those measures...the costs of the measures often change in response to sit-specific conditions…[and] agencies often maintain the authority to reopen a license and require new conditions if additional improvements are deemed necessary." PPL/300, Scott/6, lines 7-13. This unavoidable risk under the relicensing alternate exposes ratepayers to enormous costs. For example, FERC staff estimated that a new license would: (i) require new capital expenditures for fishways and related conditions as required under Federal Power Act section 4(e) and 18 that would exceed $400 million (*see* PPL/300, Scott/6-7); (ii) result in new operational costs of $60 million over the term of the new license (PPL/300, Scott/6, line 18); (iii) entail additional fee and rental payments to the State of Oregon exceeding $4.5 million (*see* Exhibit WRD/1, Grainey/3-5; Exhibit ODFW/2, Pustis/4-5); (iv) reduce historical power generation by more than 20% for the project as a whole (*see* AR/100, Rothert/8, line 20; PPL/300, Scott/7, line 20) and at certain facilities PacifiCorp would lose up to 40% percent of generation (*see* PPL/300, Scott/8, line 1; *see also* Workshop Tr. 11:7 (company expert describing generation lose at J.C. Boyle dam under the terms and conditions of the FERC FEIS)).

Relicensing, therefore, is a very expensive proposition. Based on the FERC analysis at the time of the FEIS, FERC agency staff concluded that the project would operate at an annual net loss of $20.2 million. FERC FEIS, Table 4-3, pp. 4-2. These 2007 estimates do not include the additional costs of compliance with water quality certification conditions that would likely be required. PPL/304, Scott/2, line 11-15. Nor do they include associated litigation costs.

If a new license does not issue, does not survive judicial review, or is not accepted by PacifiCorp, FERC would then require decommissioning, pursuant to its policy that a project must either have a valid license or must be decommissioned. *See* FERC, "Policy Decommissioning at Relicensing," 60 Fed. Reg. 339 (Jan. 4, 1995). In that scenario, PacifiCorp would pay all costs required to perform decommissioning.

Make no mistake. Failure to obtain a new license is a real alternative before PacifiCorp. The company acknowledges it may not be able to meet water quality 401 certification standards. Scott PPL/300, Scott/10, lines 11-15. Further, many parties would be expected to oppose issuance of a new license. *See* AR/100, Rothert/6, line 13-17; PPL/300, Scott/10, line 18-23; Workshop Tr. 73:3-10. Under the Federal Power Act, the risks to ratepayers would remain open-ended even after the final order for relicensing or decommissioning has issued and takes effect. Under either scenario, PacifiCorp would remain liable under Federal Power Act section 10(c), 16 U.S.C. section 803(c), for any damages that occur as a result of lawful operations.[3] This risk is evident to Commission staff. *See* Staff/100, Brown/11, line 18-23 (noting that "there are potential legal liabilities associated with the economic fallout of failure of the initial measures . . . . This onus of responsibility for future problems and cost escalations is borne solely by the Company and its customers.")

These contingencies related to relicensing would be significant, and, importantly, they cannot be fully quantified in cost, schedule, or liability at this time. *See* PPL/300, Scott/6, lines 7-13; Exhibit DEQ/1, Stine/5. By contrast, the KHSA and the Surcharges manage these ratepayer risks far better. We agree with Commission staff testimony that: "[t]he KHSA mitigates the risks associated with decommissioning and removal of the facilities for PacifiCorp, and is therefore the least risky alternative for customers compared to relicensing." Staff/100, Brown/12, line 5-7. For example, the KHSA and the Surcharges incorporate procedures and requirements to manage all contingencies associated with dam removal. They: (i) avoid almost all capital investment in the project facilities; (ii) permit existing power operations largely to continue until 2020; (iii) cap PacifiCorp's investment in dam removal at $200 million, including $172 million subject

[3] This section provides: "Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory theory, constructed under the license, and in no event shall the United States be liable therefor."

to this application; and (iv) exempt PacifiCorp from any liability for damages associated with dam removal once the facilities are transferred for that purpose. *See* PPL/104; *see also* O.R.S. 757.736(3); KHSA § 4.1.1.C.

The Surcharges will result in rates that are fair, just and reasonable based merely on the evidence in the record. The fairness, justness and reasonableness becomes crystal clear when the substantial and open-ended risks to ratepayers from relicensing are evaluated against the KHSA approach to risk management as well as the certainty that the Surcharges provide to utility customers.

B. DELAYING THE SURCHARGE COLLECTION WOULD ADVERSELY AFFECT THE RATEPAYER INTEREST.

At the July 23rd Workshop in Salem, attorneys for ICNU suggested that the Surcharges are premature, and arguing that the Commission has discretion under SB 76 to put them on hold, proposed that the Commission suspend the Surcharges until the California Bond Measure is passed. *See* Workshop Tr. 83:11-85:10. We disagree.

Neither SB 76 nor O.R.S. 757 allows room for ICNU's suggestion. Plus, their proposed delay in the collection of the Surcharges actually cuts hard against the ratepayer interest. Delay would produce greater customer costs in the long-run. Specifically, deferring the Klamath surcharge collection until months or years later reduces the total time period over which such a rate surcharge must be collected. Reducing the collection period between now and the date for facilities removal (2020) would increase the total monthly amount that must eventually be collected from each PacifiCorp ratepayer. That abrupt revision to collection of the Surcharges would unnecessarily add to the total impact on customers' rate increase. Effectively, ICNU proposes that ratepayers pay more, pay it later in time, and pay it over an intensely shorter period rather than pay less now spread across a greater number of years. That is not a deal in the ratepayer's interest. Delay would also reduce the amount of accrued interest in the Trust Accounts available to offset that increase. Finally, delay would almost certainly push the rate surcharge well above the 2% maximum increase cap contemplated in SB 76 to help prevent rate shock. O.R.S. 757.736(3).

C. THE NEW ISSUES THAT ICNU RAISED AT THE WORKSHOP DO NOT CHANGE THE OUTCOME NOR ARE THEY A BASIS FOR DELAY.

In its April 5, 2010, Pre-hearing Conference Report, the Commission specified the issues and schedule for briefing in this matter. In the Workshop held July 23, 2010, counsel for ICNU raised a new issue with respect to the timing of the rate surcharge, claiming that recent requests by California Governor Schwarzenegger to delay the currently scheduled vote on the California Water Bond Act[4] (California Bond) somehow disables the KHSA or makes it impossible to perform. *See* Workshop Tr. 83:11 -85:10, 86:22 - 88:12. We respond now to this new issue. It does not change the conclusion that the Surcharges are fair, just and reasonable. That conclusion remains the same whether the California Bond remains on the ballot or not.

1. ICNU Incorrectly Characterizes the Relationship of the California Bond to the KHSA.

The passage of the California Bond is *not* a prerequisite or precondition to either the Secretarial Determination under the KHSA, or ultimate dam removal. ICNU incorrectly characterizes the relationship of the California Bond to the KHSA.

KHSA § 4.1.2(A) states that the signatories to the agreement agree to pursue the creation of funding sources including California Legislature approval of: ". . . of a general obligation bond ("Bond Measure") containing a provision authorizing the issuance of bonds for the amount necessary to fund the difference between the Customer Contribution and the actual cost to complete Facilities Removal, which bond funding in any event shall not exceed $250,000,000." This provision indicates that the bond measure is intended to cover any potential difference between the Customer Contribution (*e.g.*, the Surcharges) and the final cost. The KHSA caps dam removal funding at $450 million. KHSA § 4.1.1.(C)-(E). The first part of that capped amount comes from customer contributions through the Oregon and California surcharges in the amount of $200 million. KHSA § 4.1.1.C. The KHSA contemplates, and provision 79757 of the

[4] *The Safe, Clean and Reliable Drinking Water Supply Act of 2010* (called the "California Bond " herein) was adopted by the California Legislature as SBX7-2, filed with the California Secretary of State on November 9, 2009, and is currently still scheduled for a vote in California on November 2, 2010, as Proposition 18.

California Bond authorizes, *up to* $250 million of additional California monies *as necessary* beyond the customer contributions.

The actual costs of dam removal on the Klamath have not yet been determined. Studies and investigations are underway to resolve that uncertainty and are part of the ongoing federal National Environmental Policy Act (NEPA) process. The $450 million is an educated estimate of maximum potential costs. However, no one today knows with certainty the total cost for removal. Removal may cost $200 million or less, which would mean California Bond funding may never be necessary.[5]

California Bond funds essentially provide backup funding to the customer contribution. That backup funding is not a precondition on or bar to KHSA implementation. Nor is it relevant to the Commission's finding that the Surcharges are fair, just and reasonable.

The California Bond and KHSA implementation may proceed separately. A critical milestone in KHSA implementation is the Secretary of the Interior's "Secretarial Determination" regarding dam removal. KHSA § 3.3. The plain language of KHSA section 3.3.4 states that the Secretary may make an Affirmative Determination that the dams be removed even if the California Bond does not pass, so long as the Secretary has received satisfactory assurances that such funds as may actually be required (if any) will be made "Timely available." ICNU overlooks the end of section 3.3.4, which reads in relevant part as follows (with emphasis added):

> However, if the conditions [have been met, including establishing the Customer Contribution] but California Bond Funding required by Section 4.1.2 has not been approved, in whole or in part, the *Secretary may still make an Affirmative Determination* so long as one of the following additional conditions is met:
>
> (1) Based on the Detailed Plan, the Secretary finds that the Customer Contribution and any approved California Bond Funding will be sufficient to accomplish Facilities Removal; or,

[5] The FERC FEIS estimated total dam removal costs as likely to be about $79.9 million, with a range of four dam removal costs between $37.5 million and $102.4 million, based on their own independent analysis as well as all the prior preliminary independent engineering estimates to that date. *See* FERC FEIS, Table 4-4, pp. 4-6.

(2) If the Secretary finds that the Customer Contribution and any approved California Bond Funding may not be sufficient to accomplish Facilities Removal, the Secretary has received satisfactory assurances from the State of California that the California Bond Funding pursuant to Section 4.1.2.A necessary to effect Facilities Removal will be Timely available.

KHSA Sec. 1.4 defines "Timely" or "Timeliness" to mean "performance of an obligation by the deadline established in the applicable provision of this Settlement[,]" which for dam removal means by January 1, 2020. Again, ICNU incorrectly reads the KHSA to assert that the California Bond passage is a mandatory pre-condition, or that absence of a bond in 2010 is an absolute bar, to KHSA implementation.

Moreover, the KHSA expressly provides for flexibility regarding the California Bond. The KHSA parties purposefully rejected treating passage of a bond act in 2010 as a poison pill to settlement implementation. Specifically, KHSA states: "… At its sole discretion, the State of California may also consider other appropriate financing mechanisms to assist in funding the difference between the Customer Contribution and the actual cost of complete Facilities Removal, not to exceed $250,000,000 (in nominal dollars)." KHSA § 4.1.2. The fact is that the additional California contribution – if it is even ultimately needed – could be provided for through several other mechanisms during the next ten years.

For instance, the California Legislature could elect to provide such contribution from General Funds, it could pass a subsequent bond measure, or the citizens of California could place a bond directly onto a ballot. Further, there are also several billion dollars in already voter approved – but still unsold – conservation and watershed restoration bonds now in reserve, according to a July 1, 2010, report by the California State Treasurer.[6] Arguing that the Commission should delay its decision and miss a statutory deadline because the California Bond may or may not go before that state's voters in November 2010 is an unwarranted diversion. We agree with PacifiCorp that delaying the collection of the Surcharges would be unwise, inefficient, and detrimental to PacifiCorp ratepayers. *See* Workshop Tr. 94:21 - 96:9.

[6] *See* www.treasurer.ca.gov/bonds/debt/201007/authorized.pdf.

2. The California Bond Remains on the Ballot.

On November 9, 2009, California's Governor signed Senate Bill 2 of the Seventh Extraordinary Session, the Safe, Clean, Reliable, Drinking Water Supply Act of 2010. The California Secretary of State's office designated this Act as Proposition 18 and it is currently required to be submitted to the state's voters on the November 2, 2010 ballot. ICNU is correct that Governor Schwarzenegger and others recently proposed removing Proposition 18 from the November ballot. It is one thing to make such a proposal, but as of the time of this brief's filing with the Commission, to the best of our knowledge, the California Bond remains on the November ballot.

In order to remove Proposition 18 from the November ballot, the Legislature must reach a 2/3rds vote approving removal. Then the Governor must sign that bill approving removal. The Legislative removal process could also be challenged in court. These extraordinarily complicated and difficult legislative steps are running against a rapidly ticking clock. The California legislature's regular session ends August 31st, which is the date by which all bills to be signed by the Governor must be completed. The California legislature takes its "Final Recess" from September 1 through September 30. More importantly, the Secretary of State's office is currently preparing to send the state's voter pamphlet (a necessary part of the ballot process) to the state printer at 5 p.m. on August 9, 2010. Unless and until the legislative process is completed as described above to remove Proposition 18, the voter pamphlet will include the proposition.

It is true that the ballot could be changed and reprinted after the August 9, 5 p.m. deadline. It is true that we may not know about legislative efforts underway to take the bond off the ballot even as we file this brief. It is also true that Governor Schwarzenegger could call a special session to try to force the legislators to vote to pull the proposition from the ballot, and the Legislature could even call itself back for a special session. We concede ICNU's point that if the California Bond makes it to the November ballot, voters may reject it; of course, they may also approve. But, the sum and substance of this argument has nothing to do with the Surcharges.

The status of the California Water Bond does not change the outcome of this proceeding. Nor does it halt implementation of the KHSA. The nuances and oddities of

California politics and procedures have no bearing on the narrow issue before the Commission in this proceeding; namely, whether the Surcharges for dam removal will result in fair, just and reasonable rates for PacifiCorp's customers. They will. Substantial evidence in the record supports that outcome. That conclusion remains the same whether the California Bond remains on the ballot or not.

III. CONCLUSION

For the reasons stated above, we support the Surcharges as just, fair and reasonable. Implementing the surcharge now, regardless of future contingencies, will protect PacifiCorp ratepayers and minimize future rate hikes. We respectfully request that the Commission approve the Surcharges consistent with Senate Bill 76, O.R.S. 757, and the Klamath Hydroelectric Settlement Agreement.

Respectfully submitted,

_/s/ Kate Miller_____

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CERTIFICATE OF SERVICE

I hereby certify that I, Kate Miller, have this day served the Joint Opening Brief on Surcharge Issues of American Rivers, California Trout, Institute for Fisheries Resources, Pacific Coast Federation of Fishermen's Associations, Trout Unlimited and the Klamath Tribes in Docket #UE 219 upon all parties of record to this proceeding. Service has been made via regular mail or electronic mail as noted in the attached service list.

Dated this 9th day of July, 2010

_____

Kate Miller
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Summary Report

UE 219 PACIFIC POWER & LIGHT

Category: Electric Rate Case

Filed By: PACIFIC POWER & LIGHT

In the Matter of
PACIFICORP, dba PACIFIC POWER
Application to Implement the Provisions of Senate Bill 76.

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UE 219 PACIFIC POWER & LIGHT

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