

1 **II. Surcharge Calculation**

2 The KHSA sets the initial targeted surcharge collection from PacifiCorp's Oregon and
3 California ratepayers at \$172 million by December 31, 2019. The KHSA also establishes
4 "approximately \$28 million in interest" to be earned on trust account balances by the same date.
5 The sum of the collected surcharge and interest earnings "results in a total of \$200 million in the
6 accounts available for Facilities Removal costs."² The analysis providing these results, and
7 relied upon by the Company in determining the annual revenue requirement to be collected from
8 the Company's Oregon ratepayers, assumes an annual interest rate of 3.5 percent applied to
9 balances in the trust account established by the Commission for collection and disbursement of
10 surcharges. As surcharge balances will be invested in a manner that does not put principal at
11 risk, this assumption of a 3.5 percent annual interest rate is an estimate and actual earnings could
12 differ considerably, on both average and cumulative bases, over the timeframe of the trust's
13 existence.

14 ICNU's assertion in its Opening Brief that the 3.5 percent interest rate used to
15 determine an annual revenue requirement is "too-low" is believed by Staff to be exactly the
16 opposite given the desideratum of principle preservation and current yields on investments
17 considered by Staff to be suitable. Staff notes that the average annual "[m]arket yield[s] on U.S.
18 Treasury securities at [the specified] constant maturity, quoted on [an] investment basis" for the
19 week ending August 6th, 2010 are as follows: 30-day bill 0.15 percent; 90-day bill 0.16 percent;
20 6-month bill 0.20 percent; 1-year bill 0.27 percent; 2-year note 0.54 percent; and 3-year note
21 0.82 percent.³ Staff considers the "more reasonable, yet conservative 6% interest rate"
22 assumption advocated in ICNU's Opening Brief⁴ to be less reasonable and much less

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24 ² See Section 7.3.2.A of the KHSA. The 92 percent share from PacifiCorp's Oregon ratepayers of the \$200 million
total surcharge collected and associated interest earned equates to \$184 million.

25 ³ See the Federal Reserve Statistical Release H.15 website at <http://federalreserve.gov/releases/h15/data.htm>. Staff
26 requests that the Commission take official notice of the United States Treasury rates posted on its website pursuant
to OAR 860-014-0050(1)(a) and (b).

⁴ See ICNU's Opening Brief at 13.

1 conservative than the 3.5 percent used in the analysis supporting PacifiCorp’s two-state annual
2 revenue requirement. Staff views the likelihood of undercollection to be greater than the
3 likelihood of overcollection.

4 Staff has proposed periodic adjustment to the surcharge rate, taking into consideration
5 actual interest earned and changes in load that may affect the rate of surcharge collection and the
6 likelihood of obtaining a total of surcharge collected plus interest earned of approximately
7 \$184⁵million by December 31, 2019. More specifically, Staff recommends that the Commission
8 require the Company to file annually updated surcharge rates, using its most recent forecast of
9 future loads, the history of interest earned, and other transactions impacting actual and projected
10 trust account balances.⁶ Such a requirement should include that no less than thirty days following
11 the annual Transition Adjustment Mechanism (TAM) filing, PacifiCorp, Staff and other
12 interested parties will meet to review the actual interest earned, the surcharge balance, and the
13 load forecast to determine whether it is necessary to file a revised surcharge tariff. If there is
14 over- or under-collection of the surcharge relative to obtaining a cumulative total of surcharge
15 collected plus interest earned of approximately \$184 million by December 31, 2019, Staff would
16 recommend PacifiCorp file a modified Schedule 199 tariff within 60 days following the TAM
17 filing, with the revised tariff to be effective 30 days from the revised tariff filing.

18 **III. Disclaimer of jurisdiction under ORS 757.480**

19 PacifiCorp argues that ORS 757.480, the Commission’s property transfer statute, was
20 repealed by implication by SB 76 because the two statutes are in irreconcilable conflict, citing
21 *Oregon v. Ferguson*, 228 Or App. 1, 4 (2009). See PacifiCorp’s Opening Brief on Surcharge
22 Issues at 24 fn.7. Oregon courts do not favor repeal by implication when interpreting statutory
23 or constitutional enactments. *Balzer Mach. v. Klineline Sand & Gravel*, 271 Or 596, 601 (1975);

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25 ⁵ The Oregon allocated portion of the \$200 million targeted collection with interest earned is \$184 million.

26 ⁶ "Other" transactions should include estimates prepared by the Company as to the amount and timing of requested disbursements prior to December 31, 2019.

1 *State v. Scott*, 237 Or 390, 397 (1964). Only if two provisions are totally irreconcilable will a
2 later provision prevail over the earlier. *Harris v. Craig*, 299 Or 12, 15 n 1, (1985). If the
3 provisions can function together, there must be some persuasive indication that the newer
4 provision was intended to supersede the earlier before the court will consider the later provision
5 to repeal the earlier. *Id.* When an apparent inconsistency arises between a new statute and a prior
6 one that has not been expressly repealed, the courts ordinarily attempt to construe the two
7 provisions in a manner that gives effect to both. ORS 174.010; *Bartz v. State of Oregon*, 314 Or
8 353 (1992). The newer statute will be held to impliedly repeal the older one only when the two
9 are irreconcilably inconsistent or when there is a "persuasive indication" that the newer statute
10 was intended to prevail over the earlier one. *Pioneer Trust Bank v. Mental Health Division*, 87
11 Or App 132, 136 (1987); *Harris v. Craig*, 299 Or 12, 15 n 1, (1985).

12 PacifiCorp must show that SB 76 is irreconcilably inconsistent with ORS 757.480 or that
13 there is a persuasive indication that SB 76 was intended to prevail over the ORS 757.480. While
14 the Company broadly asserts that SB 76 repealed ORS 757.480, PacifiCorp does not point to any
15 specific provision in SB 76 that conflicts with ORS 757.480. Rather the Company argues that
16 KHSA Section 7.4.2, which requires PacifiCorp to transfer the dams to the Dam Removal Entity
17 ("DRE") after all requirements for dam removal are met, conflicts with ORS 757.480. *See*
18 PacifiCorp's Opening Brief on Surcharge Issues at 24. But Section 7.4.2. was not included in SB
19 76. Section 7.4.2. is not a statute and cannot repeal ORS 757.480. Moreover, even if the
20 Company's novel and unsupported proposition that a term in an agreement may repeal a statute
21 is accepted for purposes of argument, ORS 757.480 is not irreconcilably inconsistent with
22 Section 7.4.2. Rather the Commission's property transfer statute only imposes an additional
23 requirement before the dams may be transferred to the DRE. PacifiCorp's repeal by implication
24 argument is without merit and should be rejected.

25 PacifiCorp argues in the alternative that the Commission should approve the transfer
26 under ORS 757.480 contingent upon satisfaction of the conditions precedent for the transfer

1 under of the KHSA. PacifiCorp contends that deferring consideration under ORS 757.480 is
2 inconsistent with both the KHSA and the Commission’s policy in favor of administrative
3 efficiency. *See* PacifiCorp’s Opening Brief on Surcharge Issues at 24-26. Staff does not agree
4 that the Commission exercising its statutory authority under ORS 757.480, when there is more
5 certainty that dam removal will occur, is inconsistent with the KHSA or is administratively
6 inefficient. Staff recommends that the Commission not make a determination under ORS
7 757.480 until the issue is ripe.

8 **IV. Schedule 199 Refund Provision**

9 Under ORS 757.736(5) the Commission must continue to collect the surcharges imposed
10 under the terms of the final agreement, which remain in effect pending a final decision on appeal.
11 That same subsection provides for a refund if the rates are determined not to be fair, just and
12 reasonable. Given the possibility of an appeal, Staff has recommended that the Commission
13 include the following language in Schedule 199, pending an appeal: “If the rates resulting from
14 these surcharges are determined not to be fair, just and reasonable the surcharges shall be
15 refunded pursuant to ORS 757.736, subsection (5).”

16 If the Commission determines that the surcharges are fair, just and reasonable and that
17 decision is affirmed on any appeal, ORS 757.736(5) will not longer apply and the sentence
18 quoted above should be deleted from Schedule 199. In its place Staff supports the following
19 language that was proposed by CUB in its opening brief: “If the rates resulting from these
20 surcharges are determined not to be fair, just and reasonable the surcharges shall be refunded.”

21 **V. Rate spread**

22 Staff and CUB both support the Company’s proposal that PacifiCorp-Oregon ratepayers’
23 portion of the annual dam removal costs should be allocated among customer classes based on
24 each class’s share of *generation* revenues. ICNU urges the Commission to allocate the dam
25 removal costs on the same basis as the rate spread proposed by PacifiCorp in its most recently
26 filed general rate case, UE 217. According to that proposal, the dam removal costs would be

1 spread on an equal percentage of each major class's overall revenue requirement—*i.e.*, where
2 distribution, transmission, and customer costs are combined with generation costs.

3 The Company's proposed rate spread follows the functional approach endorsed by the
4 Commission in UM 827⁷ by basing the surcharges on generation revenues since the associated
5 costs are generation-related; *i.e.*, reflecting the cost of removal of a generation resource, the
6 dams. In contrast, ICNU's allocation proposal would incorporate distribution- and transmission-
7 related costs and therefore does not appropriately apportion the generation-identified cost of dam
8 removal. The inclusion of distribution costs would result in residential customers being allocated
9 a larger share of the dam removal surcharges due to those customers' relatively larger share of
10 distribution costs—even though the cost of dam removal is clearly generation-related and not
11 distribution-related. The Commission should adopt the Company's rate spread proposal and
12 reject ICNU's proposal.

13 **VI. ICNU'S request to delay the Klamath Dams Removal Surcharges**

14 ICNU argues the Commission should terminate the Klamath surcharges until California
15 decides to contribute its share of the funds necessary to remove the Klamath dams in 2020, that
16 ICNU contends is a necessary pre-condition for dam removal, citing a June 29, 2010 press
17 release issued by Governor Arnold Schwarzenegger stating that he would seek postponement of
18 the bond measure from November 2010 until 2012.⁸ ICNU argues that any postponement of the
19 bond measure will prevent the United States Secretary of Interior from making a determination
20 by March 2012 whether dam removal should go forward under the KHSA.

21 ICNU's argument is predicated on a faulty reading of the KHSA. As explained in the
22 Intervenor State Agencies' Brief on Dam Removal Surcharges:

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25 ⁷ *In Re Methods for Estimating Marginal Costs of Service for Electric Utilities*, Docket UM 827, Order No. 98-374
(September 11, 1998).

26 ⁸ Staff objects to ICNU's belated request that the Commission take judicial notice of Governor Schwarzenegger's
press release for the reasons stated in CUB's Opening Brief at 11 n. 39.

1 “[A] California bond of up to \$250 million is in fact a potential source of
2 dam removal contemplated under the KHSA, KHSA, section 4.1.2.A., and could
3 affect secretarial determination that the states have provided funding from dam
4 removal. *See* KHSA section 3.3.4.C. However, voter approval of the California
5 bond by March 2012 is not a prerequisite to the secretarial determination and dam
6 removal going forward. If the bond funding has not been approved by that time,
7 the Secretary of Interior may still make a dam removal determination if the
8 customer contribution funding (i.e., \$200 million) will be sufficient to accomplish
9 dam removal or if California provides assurances that bond funding is necessary
10 to effect dam removal will be timely provided after March 2012. *See* KHSA
11 section 3.3.4(1) and (2). California may pursue financing mechanisms other than
12 a bond. *See* KHSA section 4.1.2.A.”

13 *Id.* at 3. In sum, contrary to ICNU’s argument, postponement of the California bond measure
14 will not prevent the Secretary of the Interior from making a determination that dam removal
15 should go forward under the KHSA.

16 The KHSA, subject to safeguards discussed below, requires the Commission to
17 implement the Klamath dam removal surcharges. ORS 757.736(2) requires PacifiCorp to file
18 with the Commission tariffs for the collection of two nonbypassable surcharges from its
19 customers for the purpose of funding the removal of the four Klamath River dams. That same
20 statute requires that the Commission require PacifiCorp to begin collecting the surcharges on the
21 date that the tariffs are filed and to continue to collect the surcharges pending a final decision on
22 the commission’s order, ORS 756.736(4), which requires the Commission to determine whether
23 the dam removal surcharges result in rates that are fair, just and reasonable. In the event of an
24 appeal, the surcharges imposed under the terms of the final agreement remain in effect pending a
25 final decision on the petition, but shall be refunded if the rates resulting from the surcharges are
26 finally determined not to be fair, just and reasonable. *See* ORS 757.364(5). Thus, SB 76
mandates that PacifiCorp collect the surcharges that are to remain in effect pending a final
decision on an appeal of the Commission order.


27 Safeguards to protect Oregon ratepayers include ORS 757.736(7), which provides that
28 “[t]he Commission may change the collection schedule if Klamath River dams will be removed
29 during a year other than 2020.” But ICNU evidence, if considered, does not support a finding
30 that a Klamath River dam will be removed in a year other than 2020. ORS 757.736(9) states that

1 if the Commission determines that amounts that have been collected in excess of those needed or
2 allowed, the Commission must direct the trustee to refund the excess amount or otherwise use
3 the amount for the benefit of customers, or adjust future surcharge amounts as necessary to offset
4 the excess amounts. ICNU's evidence, if considered, does not support a finding that the
5 Commission has collected amounts in excess of those needed or allowed. Finally, ORS
6 757.736(10) provides that "[i]f one or more Klamath River dams will not be removed, the
7 Commission shall direct PacifiCorp to terminate collection of all or part of the surcharges
8 imposed under this section." ICNU's evidence, if considered, does not support a finding that one
9 or more of the Klamath River dams will not be removed. *See* ORS 757.736(10). In sum,
10 ICNU's evidence provides no basis in law or fact for the Commission to suspend the tariff.

11 DATED this 18th day of August 2010.

12 Respectfully submitted,

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18 Of Attorneys for Staff of the Public Utility
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1 **CERTIFICATE OF SERVICE**

2 I certify that on August 18, 2010, I served the foregoing Reply Brief upon the parties in
3 this proceeding by electronic mail and by sending a true, exact and full copy by regular mail,
4 postage prepaid, or by hand-delivery/shuttle, to the parties accepting paper service.

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