

JOHN R. KROGER
Attorney General



MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

August 9, 2010

Public Utility Commission
Attn: Filing Center
550 Capitol St. NE #215
P.O. Box 2148
Salem, OR 97308

Re: Docket No. UE-219; Brief

Enclosed for filing in this matter are the original and five copies of the Intervenor State Agencies' Brief on Dam Removal Surcharges.

Sincerely,

Kurt Burkholder
Assistant Attorney General
Of Attorneys for Intervenor
State Agencies

Encl. & 5 copies

CERTIFICATE OF SERVICE

I certify that, on August 9, 2010, I served the foregoing Intervenor State Agencies' Brief on Dam Removal Surcharges upon the parties on the service list, by U.S. Mail, and by electronic mail where paper service has been waived.

/s/ Kurt Burkholder
Kurt Burkholder

	(W denotes waiver of paper service)		
W	AMERICAN RIVERS STEVE ROTHERT 432 Broad St Nevada City, CA 95959 srothert@americanrivers.org	W	S CRAIG TUCKER PO Box 282 Oreleans CA 95556 ctucker@karuk.us
W	AMERICAN RIVERS BRETT SWIFT 320 SW Stark St – Ste 418 Portland OR 97204 bswift@amrivers.org	W	KLAMATH WATER USERS ASSN J LAURENCE CABLE 1001 SW 5 th Ave Ste 2000 Portland OR 97204 lcable@cablehuston.com
	ICNU MELINDA J DAVISON 333 SW Taylor – Suite 400 Portland OR 97204 mjd@dvclaw.com	W	KLAMATH WATER USERS ASSN RICHARD LORENZ 1001 SW 5 th Ave Ste 2000 Portland OR 97204 rlorenz@cablehuston.com
W	KLAMATH TRIBES AND KLAMATH WATER PROJECT CARL ULLMAN PO Box 957 Chiloquin OR 97624 bullman3@earthlink.net		DEPARTMENT OF JUSTICE DAVID HATTON 1162 Court St NE Salem OR 97301 david.hatton@state.or.us
W	NCCFFF MARK C ROCKWELL 19737 Wildwood West Dr Penn Valley CA 95946 summerhillfarmvp@aol.com		KATHERINE A MCDOWELL 520 SW Sixth Ave – Suite 830 Portland OR 97204 katherine@mcd-law.com

W	OREGON DEPARTMENT OF FISH AND WILDLIFE KEN HOMOLKA 3406 Cherry Ave NE Salem OR 97303 ken.homolka@state.or.us	W	OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY CHRIS STINE 165 E 7 th Ave – Suite 100 Eugene OR 97401 chris.stine@state.or.us
W	OREGON DEPARTMENT OF FISH AND WILDLIFE RICK KEPLER 3406 Cherry Ave NE Salem OR 97303 rick.j.kepler@state.or.us	W	OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY STEVE KIRK 475 NE Bellevue Dr Bend OR 97701 steve.kirk@state.or.us
	OREGON PUBLIC UTILITY COMMISSION ED DURRENBERGER PO Box 2148 Salem OR 97308 ed.durrenberger@state.or.us	W	OREGON WATER RESOURCES DEPARTMENT Mary Grainey 725 Summer St NE – Suite A Salem OR 97301 mary.s.grainey@wrд.state.or.us
W	PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOC GLEN H SPAIN PO Box 11170 Eugene OR 97440 fishlift@aol.com	W	OREGON WATER RESOURCES DEPARTMENT RON C KOHANEK 725 Summer St NE – Suite A Salem OR 97301 ron.c.kohaneк@wrд.state.or.us
	PACIFICORP OREGON DOCKETS 825 NE Multnomah St – Suite 2000 Portland OR 97232 oregondockets@pacificorp.com		RANDALL J FALKENBERG RFI CONSULTING INC PMB 362 8343 Roswell Rd Sandy Springs GA 30350 consultrfi@aol.com
W	SALMON RIVER RESTORATION COUNCIL PETER BRUCKER HCR 4 BOX 1089 Sawyers Bar CA 06027 ptb92day@gmail.com	W	TROUT UNLIMITED CHARLTON H BONHAM 828 San Pablo Ave – Suite 208 Albany CA 94706 cbonham@tu.org

W	WATERWATCH OF OREGON LISA BROWN 213 SW Ash St – Suite 208 Portland OR 97204 lisa@waterwatch.org	W	TROUT UNLIMITED KATE MILLER 227 SW Pine Street – Suite 200 Portland OR 97204 kmiller@tu.org
W	YUOK TRIBE JOHN CORBETT PO Box 1027 Klamath CA 95548 jcorbett@yuroktribe.nsn.us	W	NATURAL HERITAGE INSTITUTE RICHARD ROOS-COLLINS 100 Pine St – Suite 1550 San Francisco CA 94111 rrcolins@n-h-i.org
W	CITIZENS' UTILITY BOARD OF OREGON GORDON FEIGNER 610 SW Broadway – Suite 308 Portland OR 97205 gordon@oregoncub.org	W	CITIZENS' UTILITY BOARD OF OREGON ROBERT JENKS 610 SW Broadway – Suite 308 Portland OR 97205 bob@oregoncub.org
W	CITIZENS' UTILITY BOARD OF OREGON G CATRIONA MCCRACKEN 610 SW Broadway – Suite 308 Portland OR 97205 catriona@oregoncub.org	W	CITIZENS' UTILITY BOARD OF OREGON RAYMOND MYERS 610 SW Broadway – Suite 308 Portland OR 97205 ray@oregoncub.org
W	CITIZENS' UTILITY BOARD OF OREGON KEVIN ELLIOTT PARKS 610 SW Broadway – Suite 308 Portland OR 97205 kevin@oregoncub.org		

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UE 219

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

In the Matter of
PACIFICORP
Application to Implement the Provisions of
Senate Bill 76

INTERVENOR STATE AGENCIES' BRIEF ON
DAM REMOVAL SURCHARGES

The Oregon Department of Fish and Wildlife, Department of Environmental Quality, and Water Resources Department (Intervenor State Agencies) submit this brief in support of the Klamath Dam Removal Surcharges (Surcharges).

1. Introduction

The Surcharges are a critical building block in a carefully-wrought structure. The structure is the Klamath Hydroelectric Settlement Agreement (KHSA), which in all its parts presents a comprehensive solution to a number of long-festering resource disputes in the Klamath Basin of southern Oregon. Without the Surcharges, the structure falls apart.

Another building block is dam removal. PacifiCorp's Klamath Hydroelectric Project has stopped 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. *Direct Testimony of Alan R. Dale, Exhibit ODFW/1, p. 4.* This reintroduction will trigger and complement other habitat and water quality work and flow management in the basin under the KHSA and its companion Klamath Basin Restoration Agreement, resolving historic conflicts over water supply for farms, ranches, wildlife refuges, and fish and wildlife resources in the basin. Again, without the Surcharges, dam removal will not occur, the KHSA structure will fall apart, and the significant public benefits of this undertaking will not be realized.

1 The Commission, of course, is not charged with deciding whether dam removal is
2 appropriate or necessary. However, the costs and risks to customers of dam removal are relevant
3 to the Commission's determination whether the dam removal surcharges will result in rates that
4 are fair, just, and reasonable, especially when compared to the costs and risks of project
5 relicensing should dam removal not go forward.

6 2. Surcharges Fair, Just, and Reasonable

7 As shown in testimony and exhibits submitted by PacifiCorp, the Surcharges meet the
8 requirements of ORS 757.736(3) and (7) that the Surcharges: (a) do not exceed the amount
9 necessary to fund Oregon's share of customer contributions to dam removal funding; (b) are
10 based on a collection schedule that will fund Oregon's share by December 31, 2019; (c) do not
11 result in rate increases exceeding 2%; and (d) result in total annual collections that remain
12 approximately the same during the collection period to the extent practicable. *Direct Testimony*
13 *of Andrea Kelly, Exhibit PPL/200, pages 7-9; Schedule 199, Advice 10-008.* For these reasons,
14 the Commission should determine that the Surcharges result in rates that meet the 'just and
15 reasonable' test set forth in ORS 757.736(4).

16 This test is further satisfied when the unbounded costs and risks to customers of
17 relicensing the hydroelectric project are compared to dam removal under the KHSA, which caps
18 customer costs and liabilities. In addition to evidence submitted by PacifiCorp on this point, the
19 record shows that relicensing would entail additional approximate costs of \$4,182,750 and
20 \$406,600, respectively, for state hydro fee and rental payments (over a 50-year license term).
21 *Direct Testimony of Mary Grainey, Exhibit WRD/1, pp. 3-5; Direct Testimony of Nancy Pustis,*
22 *Exhibit ODFW/2, pp. 4-5.*

23 Under relicensing, PacifiCorp customers would also be exposed to the risk of uncertain
24 outcome of water quality certification proceedings pending before the Oregon and California
25 water quality agencies. The water quality certifications must be obtained before the Federal
26 Energy Regulatory Commission may license continued operation of the Klamath Hydroelectric
27 Project. It is unknown at this time whether the state agencies would grant the certifications, and
28 if they did, what certification conditions and mitigation costs would be required of PacifiCorp
29 and its customers. *Direct Testimony of Chris Stine, Exhibit DEQ/1, p.5.*

3. Surcharges Not Premature

1 During the workshop held by the Commission on July 23, 2010, counsel for the Industrial
2 Customers of Northwest Utilities (ICNU) argued -- based on a press release announcement by
3 California Governor Schwarzenegger that he would seek postponement of the November 2010
4 vote on a California water bond -- that the U.S. Secretary of Interior would not be able to make a
5 determination by March 2012 whether dam removal should go forward, and that the Surcharges
6 are therefore "premature" and should be "put on hold" by the Commission. *Workshop*
7 *Transcript, p. 85.* The Intervenor State Agencies offer the following perspectives on this
8 argument in the event the Commission considers it relevant to this proceeding.

9 First, a California bond of up to \$250 million is in fact a potential source of dam removal
10 funding contemplated under the KHSA, *KHSA § 4.1.2.A*, and could affect the prerequisite for the
11 secretarial determination that the states have provided funding for dam removal. *See KHSA §*
12 *3.3.4.C.* However, voter approval of the California bond by March 2012 is not an absolute
13 prerequisite to the secretarial determination and dam removal going forward. If the bond
14 funding has not been approved by that time, the Secretary of Interior may still make a dam
15 removal determination if the customer contribution funding (i.e., \$200 million) will be sufficient
16 to accomplish dam removal, or if California provides assurances that bond funding necessary to
17 effect dam removal will be timely provided after March 2012. *See KHSA § 3.3.4(1) and (2).*
18 California may pursue financing mechanisms other than a bond. *See KHSA § 4.1.2.A.*

19 The KHSA parties will not know the cost estimate for dam removal until 2012 (based on
20 the detailed plan under development), or whether funding from the various funding sources will
21 be sufficient. *See KHSA § 3.3.2.F.* In the meantime, surcharges need to be collected now to stay
22 on schedule for the collection target of December 31, 2019 specified by ORS 757.736(7), while
23 respecting the 2% rule under ORS 757.736(3), and also (ironically, considering ICNU's
24 contention), to ensure that the customer contribution required under the KHSA as a prerequisite
25 to the secretarial determination in 2012 is satisfied.

26 Second, the trust accounts where surcharge moneys are deposited will need to be tapped
as early as mid-2012 for expenses incurred to develop dam removal specifications, apply for
necessary permits, and perform other tasks in preparation of dam removal. *Direct Testimony of*

1 *Alan R. Dale, Exhibit ODFW/1, p. 6; see ORS 757.736(11)(e) and (g).* It cannot be premature to
2 collect the Surcharges now if the trust accounts must contain funds for these purposes by 2012.

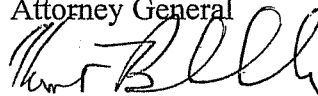
3 Finally, the Intervenor State Agencies respectfully suggest that the Commission may
4 have limited if any discretion to suspend collection of the Surcharges. Pursuant to ORS
5 757.736(2), the Surcharges are already being collected. Under ORS 757.736(4), the Commission
6 “shall enter an order” whether the Surcharges will result in rates that are fair, just, and
7 reasonable, within six months of PacifiCorp’s filing. ICNU did not describe how the
8 Commission might “put on hold” collection of the Surcharges. The Commission is not given
9 express authority to suspend or postpone the Surcharges. The Commission does have authority
10 to decide that the Surcharges will *not* result in rates that are fair, just, and reasonable, but even in
11 this event the Surcharges remain in effect pending a final decision on Supreme Court review.
12 *ORS 757.736(5).*

13 Moreover, an adverse ‘just and reasonable’ determination would be contrary to the
14 weight of the evidence in the record for this proceeding showing that the Surcharges are fair,
15 just, and reasonable. ICNU’s contention, on the other hand, is supported only by a press release
16 having no legal effect.

17 DATED August 9, 2010.

18 Respectfully submitted,

19 JOHN R. KROGER
20 Attorney General



21 Kurt Burkholder, OSB # 804658

22 Assistant Attorney General

23 Of Attorneys for Intervenor State Agencies
24
25
26