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March 27, 2024

***VIA ELECTRONIC FILING***

Public Utility Commission of Oregon
Attn: Filing Center
201 High Street SE, Suite 100
Salem, OR 97301-3398

**Re: UE 219—PacifiCorp's Initial Brief**

PacifiCorp, dba Pacific Power submits for filing its Initial Brief in the above referenced proceeding.

Informal inquiries may be directed to Cathie Allen, Regulatory Affairs Manager, at (503) 813-5934.

Sincerely,

Matthew McVee
Vice President, Regulatory Policy and Operations

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**UE 219**

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| In the Matter of<br><br>PACIFICORP d/b/a PACIFIC POWER<br><br>Application to Implement the Provisions of Senate Bill 76. | PACIFICORP'S INITIAL LEGAL BRIEF |

PacifiCorp dba Pacific Power respectfully submits this legal brief addressing whether certain interest accrued on two trust accounts managed by the Public Utility Commission of Oregon (Commission) should be available to the Klamath River Renewal Corporation (Renewal Corporation). As detailed below, the plain language of the Klamath Hydroelectric Settlement Agreement (KHSA), Oregon Senate Bill (SB) 76, and this Commission's orders make clear that the contested interest amounts should be available to the Renewal Corporation to fund Klamath River dam removal and restoration.

## I. BACKGROUND

The expansive history of efforts to remove four dams on the mainstem Klamath River in southern Oregon and northern California is well documented before the Commission. This brief focuses on the facts most relevant to the issue currently before the Commission.

### A. Klamath Dam Removal Has Begun

For over a decade, PacifiCorp has been working closely with Klamath Basin tribes, state and federal resource agencies, the Renewal Corporation, and other stakeholders to further the policy objective of dam removal in a manner that is in the best interest of PacifiCorp's customers. This historic project, the largest dam removal in North America, is currently underway. PacifiCorp has transferred ownership and operational control of the

Lower Klamath Project (FERC 14803) to the Renewal Corporation, the dam removal entity under the KHSA. As authorized by the Federal Energy Regulatory Commission and myriad state agencies, the Renewal Corporation is implementing dam removal. Copco No. 2 was removed last year, three reservoirs were successfully drained earlier this year, and the physical deconstruction of the three remaining dams (J.C. Boyle, Copco No. 1, and Iron Gate) and related infrastructure has begun.

**B. Customer Contributions under the KHSA**

The facts regarding PacifiCorp's contribution to the cost of dam removal and restoration under the KHSA via customer surcharges is undisputed. PacifiCorp's financial contribution includes principal collected from California and Oregon customers via surcharges, and interest earned on the collected amounts. The settlement obligated PacifiCorp to collect approximately $172 million from its Oregon and California customers. Those amounts would be deposited into interest bearing trust accounts overseen by this Commission and the California Public Utilities Commission, respectively, with a target of $200 million in principal plus interest by December 31, 2019.[1]

Because dam removal under the KHSA (executed in 2010) was targeted to begin in 2020, the surcharges would be collected over almost a decade to reduce the impact to customer bills and allow the accrual of interest over an extended period time. Given the long surcharge collection horizon, variable interest rates, and complex permitting and implementation timelines associated with the largest dam removal in history, the KHSA

[1] See KHSA Sections 7.3.2(A)-(B) and 7.3.8. PacifiCorp's contribution to dam removal via California and Oregon customer surcharges was first agreed to 2008 by PacifiCorp, Oregon Governor Kulongoski, and other stakeholders in the 2008 Klamath Agreement in Principle.

signatories recognized that "it is not possible to precisely estimate the amount of interest that will accrue in the Klamath Trust Accounts."[2]

The KHSA signatories addressed what would happen if interest exceeded the forecast amount: "To the extent the interest in the accounts exceeds $28,000,000, the additional earnings may be used as a Value to Customers *unless the funds are required for Facilities Removal*."[3] Indeed, the signatories acknowledged that the $200 million in principal plus interest was a minimum contribution: "Nothing in [Section 7.3.8(A)] will limit the Customer Contribution *to less than $200,000,00.*"[4]

## C. Implementation of Customer Surcharge Collections

### 1. SB 76

PacifiCorp successfully collected surcharge amounts from its Oregon customers consistent with SB 76 and this Commission's orders. In the lead up to the KHSA, the Oregon legislature passed SB 76 and codified the mechanisms of surcharge collections from Oregon customers. SB 76 required PacifiCorp to file "tariffs for the collection of two non-bypassable surcharges from its customers for the purpose of paying the costs of removing Klamath River dams…."[5] To minimize customer impact, SB 76 set an annual cap on collections at two percent of PacifiCorp's most recent annual revenue requirement.[6] The two surcharges would be calculated and adjusted (to reflect changing interest rates) to achieve Oregon's $184 million share of the $200 million KHSA contribution of principal plus interest by

[2] KHSA 7.3.8(A).
[3] KHSA 7.3.8(A) (emphasis added).
[4] KHSA 7.3.8(A) (emphasis added).
[5] ORS 757.736(2).
[6] ORS 757.736(2).

December 31, 2019.[7] SB 76 directed PacifiCorp to remit the collected surcharge amounts to two trust accounts established by the Commission.

Critical to this matter, SB 76 provided for refunds to customers under only one circumstance:

> If the commission determines at any time that amounts have been collected under this section in excess of those needed, or in excess of those allowed, the commission must:
>
> (a) Direct the trustee of the appropriate trust account under ORS 757.738 to refund these excess amounts to customers or to otherwise use these amounts for the benefit of customers; or
>
> (b) Adjust future surcharge amounts as necessary to offset the excess amounts.[8]

**2. Approval of the Schedule 199 Klamath Surcharges**

As directed by SB 76, PacifiCorp developed two non-bypassable surcharges (Schedule 199), one to collect funds to remove J.C. Boyle dam and another to collect funds for removing the three dams located in California (Copco No. 1, Copco No. 2, and Iron Gate), and submitted them to the Commission for review. In 2010, the Commission determined that the Schedule 199 surcharges were "in the best interest of customers" and "fair, just and reasonable" in light of the "significant tangible and intangible benefits associated with the KHSA." [9] In reaching that conclusion, the Commission "considered both the quantifiable and unquantifiable benefits and risks of the KHSA and relicensing option."[10]

The Surcharge Order expressly recognized the difference between principal collected from customers and interest earned on that principal:

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[7] ORS 757.736(7).
[8] ORS 757.736(9).
[9] Docket No. UE 219, Order No. 10-364 at 12 (Sept. 16, 2010). This order, as modified by Commission's October 11, 2010, errata order (Order No. 10-390), is referred to herein as the Surcharge Order.
[10] Surcharge Order at 13.

> ORS 757.736 sets forth a framework for the calculation of two dam removal surcharges, one for J. C. Boyle Dam and another for the Copco 1, Copco 2 and Iron Gate dams. Staff and parties reviewed the calculation of Schedule 199 to ensure that it was correctly calculated. The surcharges are calculated to collect an amount that when added to interest on the collected amount will total $184 million, Oregon's share of the customer contribution, by December 31, 2019.[11]

This plain language demonstrates the Commission's understanding that the total Oregon customer contribution would include surcharge dollars collected from customers via Schedule 199 and interest accrued on those amounts after they were remitted to the trust accounts.

### 3. PacifiCorp's Uncontested Surcharge Collections

PacifiCorp collected surcharges under Schedule 199 without controversy from July 2010 to January 2020. During the Commission's recurring reviews of the Schedule 199 rates, no party argued that PacifiCorp was over-collecting or objected to adjustments necessary to ensure the trust account balances would reach the required amounts by the required time.[12]

PacifiCorp on October 28, 2019, filed Advice No. 19-012 to cancel the Klamath surcharge collections under Schedule 199. The Commission approved PacifiCorp's request on less than statutory notice at the November 5, 2019, public meeting. Once again, no party objected or argued that PacifiCorp had over collected from customers.

PacifiCorp deposited all amounts collected via Schedule 199 into two trust accounts established and managed by the Commission. Upon transfer, PacifiCorp had no custody or

[11] Surcharge Order at 17.

[12] See, e.g., Docket No. UE 219, Order No. 11-174 (May 25, 2011) (maintaining Schedule 199 without objection or revision); Order No. 14-211 (June 10, 2014) (maintaining Schedule 199 without objection or revision); Order No. 16-218 (June 8, 2016) (approving uncontested adjustment to Schedule 199); Order 17-217 (June 15, 2017) (maintaining Schedule 199 without objection or revision); Order No. 18-257 (July 3, 2018) (approving uncontested adjustment to Schedule 199); and Order No. 19-212 (June 20, 2019) (maintaining Schedule 199 without objection or revision).

control over, or management responsibility for, the surcharge principal and accrued interest; that responsibility lay with the Commission and the trustee. The Commission subsequently transferred the trust account balances to the Renewal Corporation under the terms of a funding agreement approved in January 2017.[13] PacifiCorp understands that the Commission has disbursed all principal collected from its Oregon customers via Schedule 199, and interest accrued up to $184 million, to the Renewal Corporation, and that the balances remaining in the two trust accounts (approximately $4.7 million as of April 30, 2023) constitute additional accrued interest.

## II. ARGUMENT

The dispute surrounding the interest remaining in the Oregon trust accounts arose when the Renewal Corporation asked the Commission on June 1, 2023, to disburse those amounts to its account to fund dam removal and restoration work. The Oregon Citizens' Utility Board (CUB) and the Alliance of Western Energy Consumers (AWEC) opposed the Renewal Corporation's request, arguing that the remaining interest in the Oregon trust accounts should be returned to PacifiCorp's customers. As detailed below, PacifiCorp has not over collected from its Oregon customers, interest is not capped under the KHSA, SB 76, or the Surcharge Order, and the remaining interest balance is needed to complete dam removal.

### A. PacifiCorp Has Not Over Collected Via Schedule 199

SB 76 expressly addressed the issue of what should happen if PacifiCorp over *collected* surcharge principal via Schedule 199. Central to this discussion is the distinction between the amounts PacifiCorp *collected* from customers via Schedule 199, and the interest that *accrued* on such principal after it was deposited into the Oregon trust accounts. The plain

[13] See Docket No. UE 219, Order No. 17-018 (Jan. 12, 2017).

language of SB 76 states that refunds are necessary only if "the commission determines . . . that amounts have been *collected* . . . in excess of those needed, or in excess of those allowed."[14] In other words, only principal collected from customers via Schedule 199 is subject to refund.

CUB and AWEC argue that the narrow SB 76 refund provision for over collection of principal also applies to interest. This interpretation, which conflates principal and interest, flies in the face of the plain language of SB 76.[15] The Oregon legislature was obviously aware that the trust account balances would include principal *collected* from Oregon customers and interests that *accrued* on those amounts. Had the legislature intended to provide for the refund of interest, they would have drafted SB 76 accordingly. To conclude that the term "collected" also means "interest accrued", the Commission would need to insert words into the relevant statutory provision; the Commission, however, may neither insert what the legislature omitted, nor omit what the legislature inserted.[16]

CUB and AWEC have not alleged that PacifiCorp over collected from Oregon customers via Schedule 199, neither in this current dispute over remaining interest nor during the decade that the surcharges were collected and routinely reviewed in this docket. Because the plain language of SB 76 *only* allows for refunds of over collected surcharge principal, the lack of evidence or argument alleging overcollection is dispositive, and CUB's and AWEC's objections to the disbursement of remaining interest balances should be rejected.

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[14] ORS 757.736(9) (emphasis added).
[15] *See, e.g., Portland Gen. Elec. Co. v. Bureau of Lab. & Indus*., 317 Or. 606, 610-11 (1993) ("words of common usage typically should be given their plain, natural, and ordinary meaning.")
[16] ORS 174.010 ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted …."); *Int'l Ass'n of Fire Fighters, Loc. 3564 v. City of Grants Pass*, 262 Or. App. 657, 661 (2014).

As a practical matter, no surcharge dollars collected via Schedule 199 remain in the Oregon trust accounts. PacifiCorp understands that the collected amounts have been transferred to, and fully expended by, the Renewal Corporation. Thus, there is no money "collected" from customers via Schedule 199 that is even available for refund to customers; all that remains is interest.

**B. The KHSA, SB 76, and the Surcharge Order do not Cap Interest**

Central to CUB's and AWEC's arguments is the faulty premise that the total contribution of Oregon customers to dam removal is capped at $184 million, inclusive of principal and interest. There is no question that customer contributions *collected* via the Schedule 199 surcharges are capped at the amount necessary to achieve $184 million in combined principal plus interest by the required date. As noted above, SB 76 included express mechanisms for addressing the over collection of surcharge amounts from customers. But the plain language of the KHSA, SB 76, and the Surcharge Order do not cap interest.

The KHSA was executed in 2010 and established a target for dam removal to begin a decade later in January 2020. In an effort to minimize the impact on PacifiCorp's customers, the settlement directed PacifiCorp to collect surcharges from its customers over an extended period of time, which would allow interest to accrue over time, thereby reducing the total principal collections. The settlement required the California and Oregon Klamath trust accounts to have $200 million in principal plus interest *by* December 31, 2019.[17] So the KHSA did not establish a maximum trust account balance of $200 million; rather, it set a $200 million requirement by a date certain. Because dam removal was not targeted to start

[17] KHSA 7.3.2(A) and (B).

until January 2020, the signatories implicitly recognized that trust account balances would continue to accrue interest over the multi-year dam removal and restoration period.

SB 76 similarly required the surcharges to "be calculated based on a collection schedule that will fund, by December 31, 2019, Oregon's [$184 million] share of the customer contribution of $200 million …."[18] Again, the requirement is a $184 million balance in the Oregon trust accounts, including principal and interest, *by* a date certain. Like the KHSA, SB 76 recognizes that interest would continue to accrue after that date certain given the long implementation horizon of dam removal and restoration.

Similarly, the Commission did *not* establish an absolute maximum of principal and interest. Instead, the Commission approved Schedule 199 to achieve Oregon's share of the $200 million customer contribution (calculated as $184 million) *by* December 31, 2019, via a combination of principal and interest. In doing so, the Commission also implicitly recognized that interest could continue to accrue *after* December 31, 2019, given uncertain regulatory timelines and the long period over which the trust account balances would be expended in furtherance of extensive dam removal and restoration work.

The KHSA, SB 76, and the Surcharge Order provisions discussed above reflect a common sense understanding of how bank accounts work, how interest accrues, and how funds are expended in complex multi-year projects that involve significant federal and state regulatory approvals. They each required PacifiCorp to collect sufficient amounts from customer over nearly a decade such that the principal collected, and the interest accrued on those amounts once deposited into the Oregon trust accounts, totaled $184 million by a date certain (December 31, 2019)—a date that aligned with the targeted start of dam removal.

[18] ORS 757.736(7).

CUB and AWEC would have the Commission believe that interest could not accrue once the Oregon trust account balances reached $184 million without triggering a refund obligation. There is absolutely nothing in the KHSA, SB 76, or the Surcharge Order that would make that true. Hypothetically speaking, interest would stop accruing if there was a requirement to transfer the trust accounts balances to a non-interest-bearing account once the principal plus interest amounts equaled $184 million. Of course, no such contractual, statutory, or regulatory requirement exists, and one cannot be read into the statute.[19]

Also hypothetically, interest would not accrue if the entire $184 million balance was totally expended on the same day the balance reached that amount. Of course, that is an impossibility given the uncertain and long permitting and implementation timelines associated with this project.

Finally, CUB's and AWEC's own positions demonstrate that they do not actually believe that additional interest must be refunded. The Commission has transferred $184 million from the Oregon trust accounts to the Renewal Corporation consistent with its funding agreement. Presumably, the Renewal Corporation deposited those amounts into interest bearing accounts. If CUB and AWEC were serious that the Renewal Corporation was entitled to access only $184 million in combined principal and interest, and that interest beyond that amount must be refunded, then they would also need to argue that interest that accrued on the Renewal Corporation's own interest-bearing accounts must be clawed back. For obvious reasons, CUB and AWEC do not make that absurd argument, and by failing to do so, they undermine their own position that there is a hard cap on interest.

[19] ORS 174.010; *Int'l Ass'n of Fire Fighters, Loc. 3564*, 262 Or. App. at 661.

CUB's and AWEC's logical inconsistencies also highlight the arbitrary nature of this dispute. Had the Commission-Renewal Corporation funding agreement paced distributions from the trust account more quickly, it is very possible there would be no interest left in the trust accounts for them to contest.

### C. The Remaining Interest is Necessary for Dam Removal and Restoration

PacifiCorp understands that the Renewal Corporation's current budget for dam removal and restoration is approximately $503 million. CUB and AWEC do not dispute that budget. Because the $450 million provided to the Renewal Corporation under the KHSA ($250 million from a California bond and $200 million from PacifiCorp) falls short of the current budget, there is no credible argument that the funds are not necessary for dam removal and restoration. The plain language of the KHSA and SB 76 demonstrate that the remaining interest should be available to the Renewal Corporation because those funds are necessary for dam removal.

First, the KHSA expressly addressed what would happen if interest on the California and Oregon trust accounts exceeded the forecast of $28 million. Specifically, the KHSA states that if "interest in the accounts exceeds $28,000,000, the additional earnings may be used as a Value to Customers *unless* the funds are required for Facilities Removal."[20] Because it is uncontested that the remaining interest is "necessary", there is no need to unpack whether the remaining interest should be used as Value to Customers.

Second, as discussed above, SB 76 provides *only* for the refund of over collected surcharge amounts, not interest generated in the trust accounts. Assuming for the sake of argument that the term "collected" as used in ORS 757.736(9) includes interest accrued on

[20] KHSA 7.3.8(A) (emphasis added).

collections, the plain language of that section does not authorize a refund. The statute states that refunds are appropriate only if "amounts collected … [are] in excess of those needed."[21] Again, CUB and AWEC do not argue that the remaining interest is not needed, and there is no record evidence suggesting that the remaining interest is not needed to further the KHSA's objectives. Given that the $450 million allocated to the Renewal Corporation under the KHSA is less than its roughly $503 million budget, it is obvious on its face that the remaining interest is "needed" to achieve dam removal and restoration.

**D. Practical Issues Associated with Remitting Interest to Customers**

Significant practical issues would arise if the remaining interest was remitted to PacifiCorp's customers. The money collected from customers via Schedule 199 has been transferred to, and expended by, the Renewal Corporation. Thus, the money actually collected cannot be refunded to customers. If the Commission were to determine that the interest should be remitted to customers, that would not be a "refund", since the dollars collected are gone. Instead, the remaining interest would need to be transferred to customers by the trustee in some way. By way of contrast, the remaining interest is not like rate charges PacifiCorp might collect from customers and place into a balancing account with an obligation to refund or credit unused amounts. Instead, the interest remaining in the Klamath trust accounts is not the same money collected from customers.

PacifiCorp does not have custody or control over those funds and cannot transfer or credit them to customers. The Commission would need to transfer the money to customers (or instruct the trustee to do so). Because the interest being transferred to customers would not be the same money that was collected, there is an open question about whether those

[21] ORS 757.736(9).

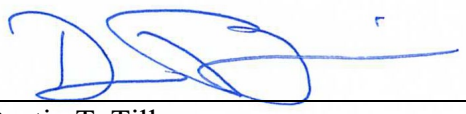
amounts would constitute taxable income and would need to include a 1099 or other taxable income documentation. SB 76 cleverly avoided this dilemma by requiring refunds *only* if the surcharge was over collected (not if extra interest accrued), thus returning back to customers the same dollars that were collected.[22]

The Commission should consider these complexities and associated transactional costs as it analyses this dispute.

## III. CONCLUSION

The KHSA, SB 76, and the Surcharge Order, when viewed in light of basic cannons of statutory construction, make clear that the interest remaining in the Oregon trust accounts should be available to the Renewal Corporation as necessary for completing dam removal and restoration in furtherance of the landmark KHSA. PacifiCorp respectfully supports the Renewal Corporation's outstanding request for disbursement of the remaining interest and associated funding agreement amendment.

Respectfully submitted March 27, 2024,



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[22] Of course, SB 76 also provides that any money remaining after the costs of dam removal and restoration have been fully paid should be transferred to customers. But given the status of the Renewal Corporation's budget and available funding, the potential complexities of such refunds are moot.