

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UE 219

In the Matter of

PACIFICORP, dba PACIFIC POWER

Application to Implement the Provisions of  
Senate Bill 76

**STAFF'S OPENING BRIEF**

1 Staff of the Public Utility Commission of Oregon (Staff) files this Opening Brief to  
2 address the Klamath River Renewal Corporation’s (KRRC’s) request for an order authorizing  
3 amendment of the Funding Agreement between the KRRC and the Public Utility Commission of  
4 Oregon (Commission or PUC). On November 12, 2023, the KRRC filed its request seeking  
5 approval by the Commission to amend the Funding Agreement between the KRRC and the PUC  
6 to authorize a disbursement amount in excess of Oregon’s share of the customer contribution for  
7 the cost of Klamath River dam removal, \$184 million. For the reasons outlined below, Staff  
8 respectfully requests that the Commission deny the KRRC’s request.

9 BACKGROUND

10 PacifiCorp operates the Klamath Hydroelectric Project, which long included four  
11 hydroelectric dams on the Klamath River, known as the J.C. Boyle, Copco 1 and 2, and Iron  
12 Gate dams. The J.C. Boyle dam was located in Oregon, with the other three dams located in  
13 California. In 2008, various parties concerned about the effects of relicensing the project with  
14 the Federal Energy Regulatory Commission (FERC) reached an Agreement in Principle (AIP)  
15 for the removal of the dams in lieu of relicensing.<sup>1</sup> The AIP was later formalized in the Klamath  
16 Hydroelectric Settlement Agreement (KHSA) which first took effect on February 18, 2010.<sup>2</sup>

17 Under the terms of the AIP and the KHSA, a \$450 million multi-state cost cap was  
18 established for funding dam removal activity, with an amount not to exceed \$200 million  
19 collected through a surcharge from PacifiCorp customers in Oregon and California. Specifically,  
20 PacifiCorp’s Oregon customers would pay up to 92 percent, or \$184 million, and PacifiCorp’s  
21 California customers were to pay up to 8 percent, or \$16 million for dam removal. The State of  
22 California agreed to contribute the remaining \$250 million of the \$450 million state cost cap  
23 through a bond issue.<sup>3</sup>

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25 <sup>1</sup> See *In the Matter of PacifiCorp, Application to Implement the Provisions of Senate Bill 76*, Docket UE 219, Order  
No. 10-364 at 3, corrected by Order No. 10-390 (September 16, 2010).

26 <sup>2</sup> *Id.*, at 4.

<sup>3</sup> *Id.*

1 In 2009, the State of Oregon enacted Senate Bill 76 (ORS 757.732 through  
2 ORS 757.744) to codify the State’s obligations under the AIP and the then forthcoming KHSA.<sup>4</sup>  
3 ORS 757.736(2) directed PacifiCorp to file tariffs for two customer surcharges: one surcharge  
4 for Oregon’s share of the costs of removing the J.C. Boyle Dam and a second surcharge for  
5 Oregon’s share of the costs of removing the Copco 1 and 2 Dams and the Iron Gate Dam.  
6 Together, the two customer surcharges were to fund Oregon’s \$184 million share of the \$200  
7 million state customer contribution and were to be deposited in interest-bearing accounts.<sup>5</sup> The  
8 Commission was required to conduct a hearing and enter an order within six months “setting  
9 forth findings and conclusions as to whether the imposition of surcharges under the terms of the  
10 final agreement results in rates that are fair, just and reasonable.”<sup>6</sup> The Commission, in Order  
11 No. 10-364, found the surcharges were fair, just and reasonable.

12 *Surcharge.* PacifiCorp’s surcharge schedule, Schedule 199, went in effect from March  
13 18, 2010, was modified at various times, and was cancelled effective November 6, 2019.<sup>7</sup> All  
14 amounts collected under the surcharges were to be remitted into the interest-bearing trust  
15 accounts created under ORS 757.738.<sup>8</sup>

16 *Funding Agreements.* Per ORS 757.738(3) the PUC was required to direct the trustee of  
17 the trust accounts to transfer amounts necessary to pay the costs of removing the Klamath River  
18 dams upon the request of an agency of the United States or its designee. First, the Oregon  
19 Department of Fish and Wildlife (ODFW), then the KRRC, was designated as the dam removal  
20 entity (DRE) authorized to request transfer of these funds under the terms of 2016 amendments  
21 to the KHSA (AKHSA).<sup>9</sup> To provide for disbursements from the trust accounts to fund dam

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22 <sup>4</sup> Or Laws 2009, ch 690.

23 <sup>5</sup> Or Laws 2009, ch 690, § 4(3), 5(1).

24 <sup>6</sup> ORS 757.736(4).

25 <sup>7</sup> See Docket UE 219, Order Nos. 10-364, corrected by Order No. 10-390, 16-218, 18-257, and Advice Filings Nos. 13-010 and 19-012.

26 <sup>8</sup> ORS 757.736(8); ORS 757.738(1).

<sup>9</sup> Docket UE 219, Order No. 16-330, Appendix A at 4-6; Order No. 17-018, Appendix A at 4-5.

1 removal, the PUC entered an Interagency Agreement with ODFW in 2016 authorizing  
2 disbursement up to \$320,000, which were provided to the KRRC under a grant agreement.<sup>10</sup> In  
3 2017, following designation as the DRE, the PUC entered into a Funding Agreement directly  
4 with KRRC.<sup>11</sup> With this funding, the KRRC took action to effect dam removal beginning in  
5 2016. Draw down and physical removal of the dams, however, required FERC approval. Due to  
6 delays in that regulatory process, while physical dam removal was anticipated to be conducted in  
7 the year 2020, it did not begin until 2023. As recently as 2018, PUC Staff expressed concern  
8 that, because the KRRC had begun to receive disbursements from the trust accounts, impacting  
9 interest rate forecasts, PacifiCorp would fall short of the funds necessary to fund the Oregon  
10 customer contribution.<sup>12</sup>

11 *FERC License Proceedings.* Consistent with the terms of the AKHSA, PacifiCorp and  
12 the KRRC filed license transfer and surrender applications with FERC to transfer the license for  
13 the four dams slated for removal to the KRRC, which would remove the dams upon FERC  
14 approval for license surrender. FERC separated these four dams from PacifiCorp's project  
15 license, and placed them in the Lower Klamath Project license.<sup>13</sup> FERC did not approve a  
16 transfer removing PacifiCorp from the project license with the KRRC as the sole remaining  
17 licensee, but ultimately, FERC approved a transfer of the Lower Klamath Project license to  
18 KRRC with the states of Oregon and California as co-licensees.<sup>14</sup> In 2022, FERC approved the  
19 surrender of the Lower Klamath Project license and directing the removal of the four dams with  
20 the conditions set forth in its order. The KRRC's plan for removal requires drawdown-related

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22 <sup>10</sup> Docket UE 219, Order No. 17-018, Appendix A at 5.

23 <sup>11</sup> See Docket UE 219, Order Nos. 16-330 and 17-018.

24 <sup>12</sup> Docket UE 219, Order No. 18-257, Appendix A at 6.

25 <sup>13</sup> *In re PacifiCorp*, Project Nos. 2082-062, 14803-000, *Order Amending License and Deferring Consideration of*  
26 *Transfer Application*, 162 FERC ¶ 61,236 (2018).

<sup>14</sup> *In re PacifiCorp*, Project Nos. 2082-062, 2082-066, 14803-000, 14803-003, *Order Approving Partial Transfer of*  
*License, Lifting Stay of Order Amending License, and Denying Motion for Clarification and Motion to Dismiss*, 172  
FERC ¶ 61,062 (2020); *In re PacifiCorp*, Project Nos. 2082-062 14803-000 14803-004, *Order Approving Transfer*  
*of License*, 175 FERC ¶ 61, 236 (2021).

1 activity and removal in 2023 and 2024, with restoration and monitoring activities occurring for at  
2 least five additional years.<sup>15</sup>

3 *Memorandum of Agreement.* In November 2020, a number of parties to the KHSA,  
4 including PacifiCorp, the State of Oregon, the State of California, the Karuk Tribe, Yurok Tribe,  
5 and KRRC, signed a Memorandum of Agreement (MOA).<sup>16</sup> Under the terms of the MOA,  
6 PacifiCorp and the states of Oregon and California agreed to terms addressing issues related to  
7 the FERC license transfer, as noted above. The parties also agreed to create an additional  
8 contingency fund to ensure dam removal will be completed in the event that costs exceed the  
9 state cost cap of \$450 million. PacifiCorp and the States will each contribute \$15 million to  
10 create a fund of \$45 million and they will share any cost overruns that may occur over this  
11 amount equally.<sup>17</sup> If the accrued interest is not disbursed to KRRC, then PacifiCorp and the  
12 states of Oregon and California will be obligated to provide that amount in the event costs  
13 exceed the available funds.

14 *Disbursements to KRRC.* Pursuant to the two Funding Agreements discussed above, a  
15 total of \$184 million has been disbursed from the trust accounts as directed by the PUC to cover  
16 the necessary costs of removing the Klamath River dams.<sup>18</sup> There are funds remaining in the  
17 surcharge trust accounts, approximately \$4.7 million, which continue to accrue interest.<sup>19</sup> These  
18 remaining funds are the subject of the KRRC's request to amend the Funding Agreement to  
19 allow for disbursement in excess of Oregon's share of the \$200 million customer contribution.  
20 Under the terms of the MOA, If the remaining funds are not disbursed to the KRRC, then  
21 PacifiCorp and the states of Oregon and California will be jointly obligated to provide that

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23 <sup>15</sup> *In re PacifiCorp*, Project Nos. 2082-063, 14803-001, *Order Modifying and Approving Surrender of License and*  
*Removal of Project Facilities*, 181 FERC ¶ 61,122 (2022) amended by 186 FERC ¶ 62,021 (2024).

24 <sup>16</sup> Memorandum of Agreement, available at: [https://klamathrenewal.org/wp-content/uploads/2020/11/Klamath-](https://klamathrenewal.org/wp-content/uploads/2020/11/Klamath-MOA.pdf)  
[MOA.pdf](https://klamathrenewal.org/wp-content/uploads/2020/11/Klamath-MOA.pdf) (Accessed March 22, 2024).

25 <sup>17</sup> 175 FERC ¶ 61,236, 62,366.

26 <sup>18</sup> Docket UE 219, KRRC Request at 3 (November 13, 2023).

<sup>19</sup> *Id.*

1 amount in the event that dam removal costs exceed the available funds. And, per the terms of the  
2 FERC license surrender order, the co-licensees (California, Oregon and KRRC) have a  
3 responsibility to meet all terms and conditions of the surrender order, so the dam removal project  
4 must still be completed.

5 DISCUSSION

6 1. *The Commission Should Deny the Request to Amend the Funding Agreement Because the*  
7 *Changes Requested are Likely Inconsistent with the Requirements of ORS 757.736.*

8 The KRRC's request requires the Commission to consider the manner in which the  
9 legislature addressed setting the PacifiCorp customer surcharges, the types of accounts the  
10 Commission is required to use, and the circumstances in which the Commission is authorized or  
11 required to direct disbursement from the funds. These provisions are primarily set forth in  
12 ORS 757.736 and ORS 757.738. Specifically applicable here is ORS 757.736(9), which provides:

13 (9) If the commission determines at any time that amounts have been collected  
14 under this section in excess of those needed, or in excess of those allowed, the  
commission must:

15 (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

16 (b) Adjust future surcharge amounts as necessary to offset the excess amounts.

17 Because the PUC has already disbursed the Oregon customer contribution of \$184 million, the  
18 remaining amounts in the trust accounts appear to be in excess of amounts allowed, and may also  
19 be in excess of what is needed.<sup>20</sup> In either case, the PUC would be required to direct the trustee  
20 to refund the excess amount or otherwise use it for the benefit of customers. Based on the  
21 information available, Staff does not recommend that the PUC amend the Funding Agreement to  
22 authorize further disbursements to the KRRC at this time.

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26 <sup>20</sup> This issue was not specifically identified for briefing. Staff notes that given that Oregon's share of the \$200 million customer contribution has been collected and disbursed, and any dam removal costs in excess of the state cost cap will be addressed under the provisions of the MOA, per 175 FERC ¶ 61,236, 62,366 (2021), the remaining funds in the trust accounts may be in excess of what is needed for purposes of dam removal.

1           A.     *The Remaining Funds in the Trust Accounts are Likely in Excess of What is*  
2                     *Allowed.*

3           The legislature adopted several specific provisions regulating the surcharge amounts:

- 4                     1) The surcharges “may not exceed the amounts necessary to fund  
5                             Oregon’s share of the customer contribution of \$200 million identified  
6                             in the agreement in principle.” ORS 757.736(3).
- 7                     2) The total amount collected in a calendar year under both surcharges  
8                             was not to exceed more than two percent of PacifiCorp’s annual  
9                             revenue requirement as determined in PacifiCorp’s last general rate  
10                            case before January 1, 2010. ORS 757.736(3).
- 11                    3) The surcharges were to be a specified amount per kilowatt hour billed  
12                            to retail customers, as determined by the Commission.  
13                            ORS 757.736(7).
- 14                    4) The amount of each surcharge was to be calculated based on a  
15                            collection schedule that would fund, by December 31, 2019, Oregon’s  
16                            share of the customer contribution of \$200 million. ORS 757.736(7).  
17                            The Commission was authorized to change the collection schedule if a  
18                            dam was to be removed in a year other than 2020. ORS 757.736(7).
- 19                    5) The surcharges were to be set so that total annual collections of the  
20                            surcharges remain approximately the same during the collection  
21                            period. ORS 757.736(7).
- 22                    6) In setting the surcharges, the Commission was to account for the actual  
23                            and expected changes in energy usage over the collection period.  
24                            ORS 757.736(7).
- 25                    7) In setting the surcharges, the Commission was to “account for the  
26                            actual and expected changes in interest rates on the collected funds  
                              over the collection period.” ORS 757.736(7).

21           The amounts collected under the customer surcharges must be paid into trust accounts  
22           established by the Commission pursuant to the parameters of ORS 757.738. In particular, the  
23           Commission was directed to establish a separate trust account for amounts generated by each of  
24           the two surcharges as “interest-bearing accounts with an agency of the United States identified in  
25           the [KHSA], or in a depository that is qualified under ORS 295.001 to 295.108 to receive public  
26

1 funds.”<sup>21</sup> This language was amended in 2011 to allow establishment of one or more of the  
2 interest-bearing trust accounts with the State Treasurer.<sup>22</sup> At the same time, ORS 757.736(7)  
3 was also amended to specify that “when setting the rate for the surcharges, the commission shall  
4 account for the actual and expected changes in energy usage over the collection period and  
5 account for the actual and expected changes in interest rates on the collected funds over the  
6 collection period.”<sup>23</sup>

7 ORS 757.736(9) directs the Commission to act when “*amounts have been collected*” in  
8 excess of what is needed or allowed. Surcharges and the accumulated accrued interest are not  
9 expressly referenced in ORS 757.736(9); the reference is merely to “amounts.” Whether the  
10 remaining funds in the trust accounts are amounts in excess of what is allowed under this statute  
11 requires statutory interpretation to determine what the legislature intended.

12 To discern legislative intent in enacting a statute, we give primary weight to the statutory  
13 text, in context, with appropriate additional weight accorded to any relevant legislative history.<sup>24</sup>  
14 The text of the statute itself is “the best evidence of legislative intent.”<sup>25</sup> The context of a statute  
15 includes other provisions of the same statute and other related or earlier statutes, along with case  
16 law interpreting that statute and the related statutes.<sup>26</sup>

17 Considering the plain meaning of the word “amount,” it likely referenced both the  
18 surcharge and accrued interest.<sup>27</sup> “Amount” commonly means a “total number or  
19 quantity: AGGREGATE \* \* \* SUM, NUMBER\* \* \* the sum of individuals \* \* \* [or] the  
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21 <sup>21</sup> Former ORS 757.738(1) (2009).

22 <sup>22</sup> Or Laws 2011, ch 394, § 2.

23 <sup>23</sup> *Id.*

24 <sup>24</sup> ORS 174.020; *City of Portland v. Bartlett*, 369 Or 606, 610 (2022); *State v. Gaines*, 346 Or 160,  
171-72, 206 P3d 1042 (2009).

25 <sup>25</sup> *Morrow and Morrow*, 191 Or App. 354, 357 (2004).

26 <sup>26</sup> *In the Matter of Site Certificate for Boardman to Hemingway Transmission Line*, 370 Or 792, 800 (2023)  
(citations omitted).

27 <sup>27</sup> See *Oregon AFSCME Council 75, Local No. 2503 v. Hood River County*, 248 Or App 293, 299 (2012).



1 quantity at hand or under consideration.”<sup>28</sup> The verb “collect” means “to receive, gather, or  
2 exact from a number of persons or other sources.”<sup>29</sup> Thus, considering both sources of text, the  
3 use of “amounts collected” likely refers to the total surcharge collected from PacifiCorp  
4 customers *and* the accrued interest collected in the trust funds. Moreover, while ORS 757.736(9)  
5 uses the phrase “*amounts have been collected*”, without distinguishing between the surcharge  
6 and accrued interest, other sections of the same statute direct the Commission to authorize the  
7 establishment of surcharges based on a collection schedule, and requires the use of interest-  
8 bearing trust funds.<sup>30</sup> Further, the collection schedule had to specifically account for the actual  
9 and expected changes *in interest rates on the collected funds*.<sup>31</sup>

10 With respect to the reference in ORS 757.736(9) to amounts collected *in excess of what is*  
11 *allowed*, the word “allowed” commonly means “permitted”.<sup>32</sup> There are a number of limitations  
12 on the collection of the surcharges in this statutory section. Two of those limitations, as noted  
13 above, set limits that collections may not exceed:

- 14 1) The surcharges “may not exceed the amounts necessary to fund Oregon’s  
15 share of the customer contribution of \$200 million identified in the agreement  
16 in principle.” ORS 757.736(3).  
17 2) The total amount collected in a calendar year under both surcharges was not to  
18 exceed more than two percent of PacifiCorp’s annual revenue requirement as  
19 determined in PacifiCorp’s last general rate case before January 1, 2010.  
20 ORS 757.736(3).

21 These two limitations may be read in the context of the provisions that require the  
22 Commission to deposit the surcharge collections in interest-bearing accounts and adjust the  
23 surcharges to account for the accrual of interest during the collection period. Collection in

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24 <sup>28</sup> *Id.*, citing *Webster’s Third New Int’l Dictionary* 72 (unabridged ed 2002).

25 <sup>29</sup> *Webster’s*, at 444. The term also means “to claim and receive in payment or fair recompense,” or “to present as  
26 due and receive payment for.” *Id.*

<sup>30</sup> ORS 757.736(7), (8); ORS 757.738.

<sup>31</sup> ORS 757.736(7).

<sup>32</sup> *Webster’s*, at 58.

1 excess of either of these limits is not allowed. The amount of the annual calendar year limit is  
2 known,<sup>33</sup> based on data from a prior rate case and can be readily compared to the amount that has  
3 been collected. With respect to the limitation that the surcharges may not exceed Oregon’s share  
4 of the \$200 million customer contribution, the total amount collected under the surcharges with  
5 interest may not exceed \$184 million. This amount has been collected and disbursed, which  
6 would leave the remainder of funds in the accounts an amount in excess of what is allowed.

7 Parties may argue that “amounts [that] have been collected under this section,” is written  
8 only in reference to capping the *amount of the surcharge* imposed on ratepayers. This interpretation  
9 rests on there being no reference to imposing an absolute limit on amounts in the trust accounts. In  
10 other words, the “collection period” would refer to the time the surcharge was first imposed until it  
11 ceased. This interpretation is likely reached, in part, by considering ORS 757.736(10), which  
12 directs what must occur if one or more Klamath River dams will not be removed:

13 If any excess amounts *remain in the trust accounts* after [applying any excess  
14 balances therein to implement FERC relicensing requirements], the [Commission]  
15 shall order that the excess amounts be refunded to customers or otherwise be used  
for the benefit of customers in accordance with [Commission] rules and policies.<sup>34</sup>

16 This provision is no longer applicable as removal of all four dams is required under the terms of  
17 FERC’s surrender order. And while, the language referring to “excess amounts” is more clearly  
18 stated as a disposition of any amounts remaining in the trust accounts, the statute is not compelling  
19 context for a limited interpretation of ORS 757.736(9) because neither ORS 757.736(11) nor ORS  
20 757.736(9) makes any distinction between whether the amounts were derived solely from  
21 surcharges collected from customers or include accrued interest.

22 More persuasive context is the language in ORS 757.736(7), which was added in 2011,  
23 requiring the Commission *to adjust the amount of the surcharges to account for the accrual of*  
24 *interest*. While ORS 757.736(9) does not expressly reference accrued interest, it directs the

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26 <sup>33</sup> \$19.06 million. See Docket UE 219, Order No. 19-212, at 3, n. 6 (June 20, 2019).

<sup>34</sup> ORS 757.736(10) (emphasis added).

1 Commission to take action if determines “*at any time*” that amounts have been collected in  
2 excess of those needed, or in excess of those allowed. (Emphasis added). The statute does not  
3 limit the Commission’s ability to review whether amounts were collected in excess of what is  
4 needed or allowed to the surcharge collection period and directs the Commission to take action  
5 any time excess amounts are identified, during or after the collection period.

6 Additional support for a limitation on the accrued interest is found in the surrounding text  
7 of ORS 757.736(9). Whenever amounts are collected in excess of what is needed or allowed, the  
8 Commission is directed to take one of two actions:

9 (1) “Direct the trustee of the appropriate trust account under ORS 757.738 to  
10 refund these excess amounts to customers or to otherwise use these amounts  
11 for the benefit of customers”; or

12 (2) “Adjust future surcharge amounts as necessary to offset the excess amounts.”

13 Under this second option, an adjustment of the surcharge must necessarily account for the  
14 accrual of interest, as required ORS 757.736(7). If the term “excess amounts” did not also  
15 include accrued interest, no adjustment could fully offset the calculation. Both options appear to  
16 refer to “excess amounts” not only as a reference to the surcharge principle collected from  
17 customers, but also accrued interest. Otherwise, for example, if only the principle was to be re-  
18 directed, the accrued interest would potentially be left stranded in the trust funds, without any  
19 mechanism to disburse the accrued interest. That interpretation also assumes the co-mingled  
20 funds could be readily identified, which is not feasible.

21 A directive to return funds is provided in two additional circumstances. Under  
22 ORS 757.736(10), if:

23 *one or more Klamath River dams will not be removed*, the commission shall direct  
24 PacifiCorp to terminate collection of all or part of the surcharges imposed under this  
25 section. In addition, the commission shall direct the trustee of the appropriate trust  
26 account under ORS 757.738 to apply any excess balances in the accounts to Oregon’s  
allocated share of prudently incurred costs to implement Federal Energy Regulatory  
Commission relicensing requirements. *If any excess amounts remain in the trust  
accounts after that application, the Public Utility Commission shall order that the*

1           *excess amounts be refunded to customers or otherwise be used for the benefit of*  
2           *customers in accordance with Public Utility Commission rules and policies.*

3   Emphasis added. The language here is more explicitly stated as a disposition of any amounts  
4   remaining in the trust accounts, and again, without making a distinction between surcharge  
5   collection and accrued interest, directs either the refund or beneficial use of “excess amounts.”  
6   We do not find the use of the phrase “excess balances” in the one sentence above to have a  
7   distinct meaning apart from the phrase “excess amounts” used elsewhere in this subsection as  
8   well as in subsection (9). Subsection (9) authorizes the Commission to act while the surcharges  
9   are in the process of being collected and at any other time. Given the broader application of the  
10   Commission’s authority in that context, the more general reference to “excess amounts” is  
11   consistent with the use of the same term in the last sentence of subsection (10), referring to any  
12   amount collected or remaining, including interest. And, ORS 757.738(4) provides that if any  
13   amount remains in a trust account “after the trustee makes all payments necessary for the costs of  
14   removing the Klamath River dams as described in ORS 757.736(11), the Commission shall  
15   direct the trustee of the account to either refund those amounts to customers or otherwise use the  
16   excess amounts for the benefit of customers.” In all three instances, collection of amounts in  
17   excess of what is needed or allowed, failure to remove a dam, and payment of all necessary costs  
18   for dam removal, the Commission is required to take action. The amount of interest that has  
19   accrued in the trust accounts is an appropriate consideration in identifying excess amounts in  
20   each instance.

21           The statutory context and the legislative history also appear to support this interpretation.  
22   First, the authorization to open trust accounts with the State Treasurer and to adjust the surcharge  
23   to account for changes in interest rates was added to ORS 757.736 and ORS 757.738 with the  
24   enactment of House Bill 3461 in 2011. The legislative history for House Bill 3461 confirms the  
25   intent was to reduce the obligation of ratepayers to fund the \$184 million Oregon contribution  
26   with the accrual of interest. In the Senate Floor Debate, Senator Doug Whitsett explained:<sup>35</sup>

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35 Audio Recording, Senate Floor Debate, HB 3461, May 26, 2011, audio file at 07:54:32 (statement of Sen Doug Whitsett) (Emphasis added).

1 The State Treasurer expects and assures us that they will be able to achieve much  
2 higher investment returns, *thereby reducing the overall cost to PacifiCorp*  
3 *ratepayers*. The bill also directs the Oregon Public Utility Commission to  
4 account for actual and expected changes in energy usage over time and to account  
5 for actual and expected changes in interest rates on the collected funds when  
6 setting the surcharge rate. *The bill simply makes the charges more fair to*  
*PacifiCorp customers. SB 76 required PacifiCorp to accumulate a total of \$184*  
*million from Oregon ratepayers. Over time, House Bill 3461A will reduce the*  
*amount that the ratepayers must pay into the accounts by increasing the*  
*investment returns on those accounts.*

7 Further, the reference to the KHSA or “final agreement” as defined in ORS 757.732(3)  
8 confirms the Oregon legislature was aware that Oregon’s share of the customer contribution is  
9 set at a maximum of \$184 million.<sup>36</sup> And the KHSA contains language acknowledging the use  
10 of interest accrual to meet the customer contribution. Under Section 7.3.2, the KHSA parties  
11 delineate their approach to implementing the agreement:<sup>37</sup>

- 12 A. Collect \$172 million of the total Customer Contribution by December 31,  
13 2019, consistent with Section 4;  
14 B. Earn approximately \$28 million in interest on the Klamath Trust Accounts to  
15 provide Value to Customers, which results in a total of \$200 million in the  
accounts available for Facilities Removal costs as illustrated in Appendix H to  
this Settlement.

16 Appendix H to the KHSA is PacifiCorp’s “Calculation of the Initial Customer Surcharge  
17 Target”.<sup>38</sup> The Appendix is a spreadsheet showing surcharge collections for Oregon and  
18 Washington based on the assumption of a 3.5 percent interest rate to achieve the \$200 million  
19 customer contribution. The ten-year total shows a “total surcharge collection” of \$200,415,000.  
20 The Appendix states this is based on a collection of \$172 million in principle and \$28,415 in  
21

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23 <sup>36</sup> The AIP is the “agreement in principle” defined in ORS 757.732(1). The AIP was formalized in the KHSA, which  
is the “final agreement” defined in ORS 757.732(3) as the successor agreement to the AIP.

24 <sup>37</sup> A copy of the KHSA was submitted in Docket UE 219 as Exhibit PPL/104, Brockbank (March 18, 2010). “Value  
25 to Customers” is a defined term in the KHSA, meaning “potential cost reductions described in Section 7.3.8. These  
cost reductions would (1) decrease the Customer Contribution defined in Section 4.1.1.C, (2) decrease the costs of  
ongoing operations, or (3) decrease the costs of replacement power, as compared against the assumptions contained  
26 in PacifiCorp’s Economic Analysis.

<sup>38</sup> *Id.*

1 interest.<sup>39</sup> Appendix H indicates the parties assumed the surcharge collection amount includes  
2 both interest and principal. It is further consistent with the parties’ understanding that accrued  
3 interest up to \$28 million would be used to reduce the customer contribution amount collected.  
4 And amounts over \$28 million, here \$415,000, would be available for use as value to customers  
5 unless necessary for facilities removal.

6 In addition, Section 7.3.8 of the KHSA illustrates the KHSA parties’ expectation that  
7 interest accrual would reduce the amount of the customer contribution based on customer  
8 surcharge collections. The expectation was that \$28 million would accrue. If less interest  
9 accrued, the customer surcharge collection would necessarily be higher, to meet the required  
10 customer contribution amount. If more interest accrued, the customer surcharge collection may  
11 be reduced, unless the funds are necessary for dam removal. While the distinction between  
12 accumulated interest below \$28 million and above \$28 million was not incorporated into  
13 ORS 757.732–ORS 757.744, the limitation of Oregon’s share of the customer contribution was  
14 adopted, as was the expectation that interest would be used to reduce the customer contribution  
15 and, accordingly, the surcharge amount allowed. There is nothing in ORS 757.736 that indicates  
16 an intent to modify the clear directive in Section 4.3 of the KHSA that adjustments to the  
17 surcharge collection amounts “shall not alter the maximum level of the Customer Contribution or  
18 State Cost Cap.”<sup>40</sup>

19 The KRRC, in its November 13, 2023 Request, argues that because the customer  
20 contribution of \$200 million is described in the AIP and the KHSA as “nominal” dollars, and  
21 therefore the customer contribution amount was to be calculated when the funds are collected,  
22 not expended, noting that \$1 collected in 2011, using a CPI adjustment, would be worth \$1.40 in  
23 September 2023.<sup>41</sup> KRRC implies that the \$200 million customer contribution is more than \$200  
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25 <sup>39</sup> *Id.*

26 <sup>40</sup> *Id.* at 27.

<sup>41</sup> Docket UE 219, KRRC Request at 3-4 (November 13, 2023).

1 million today. Staff does not find the use of the term “nominal” to describe the customer  
2 contribution relevant to the issue before the Commission. First, the reference to the \$200 million  
3 contribution in ORS 757.736(3) does not use the term “nominal”. Second, neither the AIP nor  
4 the KHSA use the term “nominal” to refer to the \$450 million state cost cap. The term is only  
5 used in reference to the \$200 million customer contribution and the \$250 million bond funding  
6 where the agreement explains that these components together comprise the \$450 million cost  
7 cap. Setting nominal limits on these two components ensured the amounts collected will not  
8 collectively exceed the \$450 million cost cap. As noted above, Section 4.3 of the KHSA  
9 confirms that any adjustment to the Oregon or California surcharges “shall not alter the  
10 maximum level of the Customer Contribution or State Cost Cap.” It appears that the KRRC’s  
11 Request to adjust Oregon’s share of the customer contribution in the Funding Agreement would  
12 do both. Thus, Staff does not find contextual support in the AIP or the KHSA to override the  
13 text of SB 76 and its context, as discussed above.

14 In summary, determining whether amounts are in excess of “what is allowed” under  
15 ORS 757.736(9) requires reviewing surcharge collections from customers, together with the  
16 accrual of interest. Here, given that the PUC has already directed the disbursement of \$184  
17 million in surcharge collections and accrued interest, the remaining funds in the trust accounts  
18 are likely excess amounts.

19 *B. The Remaining Funds in the Trust Accounts May Only be Disbursed for Purposes*  
20 *of a Refund to Customers or a Use that is for the Benefit of Customers.*

21 If the Commission determines the amounts collected are in excess of what is needed or  
22 allowed, which Staff recommends above, ORS 757.736(9) requires the Commission to:

- 23 (a) Direct the trustee of the appropriate trust account under ORS 757.738 to  
24 refund these excess amounts to customers or to otherwise use these amounts  
25 for the benefit of customers; or  
26 (b) Adjust future surcharge amounts as necessary to offset the excess amounts.

1 Option (b) above is no longer feasible now that PacifiCorp has cancelled the surcharge  
2 schedule.<sup>42</sup> The Commission must therefore direct the trustee to either refund the excess  
3 amounts to customers, or to apply the excess amount in the trust accounts to another use that is  
4 for the benefit of customers.

5 The term “customers” is defined in ORS 757.732(3) as “the Oregon retail electricity  
6 customers of PacifiCorp.” A refund to customers would mean providing direction to the trustee  
7 and to PacifiCorp regarding the parameters and process for effecting a refund to retail customers.  
8 Amendment of the Funding Agreement would not be consistent with a refund to customers.  
9 Alternatively, the Commission may direct the trustee to “use these amounts for the benefit of  
10 customers.” Staff does not support amendment of the Funding Agreement to allow for further  
11 distributions to the KRRC unless it is for for the benefit of customers.

#### 12 CONCLUSION

13 Based on the foregoing, Staff recommends that the Commission deny the KRRC’s  
14 Request for authorization to amend the Funding Agreement.

15 DATED this 27th day of March 2024.

16 Respectfully submitted,

17 ELLEN F. ROSENBLUM  
18 Attorney General

19 */s/ Johanna M. Riemenschneider*

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21 \_\_\_\_\_  
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24 Of Attorneys for Staff of the Public Utility  
25 Commission of Oregon

26 <sup>42</sup> See Commission November 5, 2019 Approval of Advice Filing 19-012, ADV 1027, available at:  
<https://edocs.puc.state.or.us/efdocs/UBF/adv1027ubf14536.pdf>.