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March 27, 2024

Via Electronic Filing

Public Utility Commission of Oregon
Attn: Filing Center
201 High St. SE, Suite 100
Salem OR 97301

Re: In the Matter of PACIFICORP, dba PACIFIC POWER,
Application to Implement the Provisions of Senate Bill 76
Docket No. UE 219

Dear Filing Center:

Please find enclosed the Alliance of Western Energy Consumers' and Oregon Citizens' Utility Board's Joint Opening Brief in the above-referenced docket.

Thank you for your assistance. If you have any questions, please do not hesitate to call.

Sincerely,

/s/ Anna V. Congdon
Anna V. Congdon

Enclosure

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 219

In the Matter of	)	
	)	OPENING BRIEF OF THE ALLIANCE
PACIFICORP, dba PACIFIC POWER,	)	OF WESTERN ENERGY CONSUMERS
	)	AND OREGON CITIZENS' UTILITY
Application to Implement the Provisions of Senate Bill 76.	)	BOARD

INTRODUCTION

Pursuant to the *Prehearing Conference Memorandum* issued by Administrative Law Judge ("ALJ") Mapes on December 20, 2023, and the *Memorandum* issued February 29, 2024, in the above captioned Proceeding, the Alliance of Western Energy Consumers ("AWEC") and the Oregon Citizens' Utility Board ("CUB") (collectively, the "Customer Advocates") hereby jointly present this Opening Brief to address the Commission's legal authority to remit the funds remaining in trust accounts to the Klamath River Renewal Corporation ("KRRC").

The Customer Advocates previously filed comments in response to the *Request for Order to Amend Funding Agreement DM #7810225* ("Remittance Request"), filed November 12, 2023, by KRRC.[1] The Customer Advocates refer to those comments for specific responses to KRRC's Remittance Request. This Opening Brief focuses primarily on the legal question of whether interest earned in the accounts created pursuant to ORS 757.738 ("Oregon Trust Accounts") should be considered part of the total Oregon customer contribution toward the cost of removing

[1] *Joint Comments of the Alliance of Western Energy Consumers and Oregon Citizens' Utility Board* (Dec. 4, 2023).

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the Klamath River Dams[2] and, if so, whether disbursement of those funds to KRRC would result in them being used "for the benefit of customers."[3]

As detailed below, the answer to these questions is that interest was very clearly intended to be included within Oregon customers' total contribution – an intention evidenced by the Oregon Legislature, the signatories to the Klamath Hydroelectric Settlement Agreement (including PacifiCorp), and the Commission – and that disbursement of remaining funds in the Oregon Trust Accounts to KRRC for dam removal would not result in these funds being used "for the benefit of customers."

The Customer Advocates do not challenge the previously identified benefits of removal of the Klamath River Dams, which this Commission and the Oregon Legislature have found worth contributing $184,000,000 from Oregon ratepayer surcharges and related accrued interest. However, as detailed below, Oregon law, Commission Orders, and negotiated and executed agreements between stakeholders prohibit KRRC from receiving any additional funds from the Oregon Trust Accounts. As such, the substance of KRRC's request exceeds the Commission's legal authority and must be rejected. The proper and readily available remedy for KRRC to address cost overruns for removal of the Klamath River Dams is to pursue the additional $45 million in funding agreed to be provided by the States of California and Oregon, and PacifiCorp. These stakeholders agreed to address the potential for the underestimation of remediation costs, and this remedy remains accessible to KRRC.

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[2] "Klamath River Dams" refers to the J.C. Boyle Dam, the Copco 1 Dam, the Copco 2 Dam and the Iron Gate Dam.

[3] ORS 757.736(9).

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BACKGROUND

In 2008, PacifiCorp, the State of Oregon, the State of California, and U.S. Department of the Interior entered into the Klamath Agreement in Principle ("KAP"), which provided for the removal of the Klamath River Dams, subject to, among other things, the passage of legislation in Oregon and execution of a final agreement to implement the KAP.[4] The following year, the Oregon Legislature passed Senate Bill 76 to implement the KAP. The legislation required execution of a final agreement to implement the KAP and approval of the final agreement by the Commission in order for Oregon customers to fund a portion of the Klamath River Dams' removal costs.[5] The final agreement was executed on February 18, 2010, and became known as the Klamath Hydroelectric Settlement Agreement ("KHSA").[6]

Materially for this case, both the KAP and KHSA establish a "State Cost Cap" of $450 million.[7] Of this $450 million, $200 million was to come from PacifiCorp's customers in Oregon and California and is known as the "Customer Contribution."[8] Based on an allocation method, Oregon customers were assigned 92% of the Customer Contribution, or $184 million.[9] SB 76 identifies this amount as "Oregon's share of the customer contribution of $200 million identified in the [KAP]" and makes clear that the surcharges imposed by SB 76 "may not exceed the amounts necessary to fund" Oregon's share.[10] In hearings on SB 76, members of the Senate Committee on Environment and Natural Resources confirmed with the Department of Justice

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4 KAP § II.B.i, iv.
5 ORS 757.736.
6 The KHSA was provided as Exhibit PPL/104 to PacifiCorp's Application to Implement the Provisions of Senate Bill 76 in this docket.
7 KAP § VI.A.; KHSA § 4.1.3.
8 KAP § VI.A; KHSA § 4.1.1.
9 KHSA § 4.1.1.D.
10 ORS 757.736(3).

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that, if the costs to remove the Klamath River Dams exceed the State Cost Cap, SB 76 provides no mechanism to collect additional funds from Oregon customers. Instead, PacifiCorp would need to request additional authorization from the Legislature if it wished to increase contributions from Oregon customers.[11]

The KHSA directly addresses the components that make up the customers' total contribution. The KHSA states that:

> "[T]he Parties intend to implement this Settlement based on the following approach to achieve the target dates for Decommissioning and Facilities Removal …
>
> A. Collect $172 million of the total Customer Contribution by December 31, 2019, consistent with Section 4;
>
> B. Earn approximately $28 million in interest on the Klamath Trust Accounts to 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."[12]

"Value to Customers" in the KHSA is defined, in part, as "potential cost reductions … [that] would (1) decrease the customer contribution for Facilities Removal …."[13] Appendix H to the KHSA sets forth a collection schedule consistent with the terms of this section, which assumes a 3.5% interest rate. Similarly, in PacifiCorp's Application to Implement the Provisions of Senate

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11 Chair Dingfelder: "Could PacifiCorp come back to the PUC and ask for additional [funding] above the $180 million in this legislation?"

Kirk Burkholder (DOJ): "I think as Paul has indicated, Chair, since the legislature is establishing in this bill that this will be the total ratepayer contribution and that it shall not exceed Oregon's fair share, I would have to say today that there's at least a strong argument and interpretation that in order to ask for more in the future, the utility would have to come back to the Legislature again."

Paul Graham (DOJ): "I'd agree with that …. What we have is really two caps. One, Mr. Burkholder and I both alluded to the roughly $180 million cap; the Commission cannot exceed that unless the legislative assembly says ok ..." Senate Committee on Environment and Natural Resources Hearing at 13:52 (Feb. 10, 2009, 3:00 p.m.)

12 KHSA § 7.3.2.

13 *Id.* § 1.4.

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Bill 76, it provided a calculation of the surcharges to Oregon customers, which assumed recovery from customers of $158.24 million (92% of $172 million) and the same 3.5% interest rate used in the KHSA.[14]

In approving the KHSA and the surcharges, the Commission noted that the "surcharges are calculated to collect an amount that when added to interest on the collected amount will total $200 million, Oregon's share of the customer contribution *[sic]*, by December 31, 2010 *[sic]*. Pacific Power calculated this amount to be $158.24 million, with the rate collection period beginning on March 18, 2010."[15] In the years following this order, the Commission reviewed the surcharge collections to determine whether they needed to be increased or decreased. In each such review, the amounts collected toward Oregon's share of the total Customer Contribution included interest.[16]

ARGUMENT

I. FUNDS CURRENTLY IN THE OREGON TRUST ACCOUNTS ARE "IN EXCESS" OF OREGON RATEPAYERS' SHARE OF THE CUSTOMER CONTRIBUTION.

In the February 29, 2024 Memorandum, ALJ Mapes requested briefing on "the threshold legal question of whether the funds in question constitute 'excess' funds." The specific statutory language is in ORS 757.736(9) and reads:

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14 Exh. PPL/200, Kelly/7-8; Exh. PPL/201.

15 Order No. 10-364 at 17 (Sept. 16, 2010). The Commission's order contains an error by identifying Oregon's share of the customer contribution to be $200 million, rather than $184 million. That this is an error is evident from the Commission's reliance on PacifiCorp's calculation of the surcharge amounts. That calculation identifies the total customer contribution to be $172 million, with Oregon's share of this amount as $158.24 million. PacifiCorp points to Section 7.3.2 of the KHSA as the basis for the total customer contribution of $172 million, which when added to $28 million in assumed interest in that same section, equals the $200 million total customer contribution (Oregon and California) and the State Cost Cap. (The Commission also erred by identifying the final collection date as December 31, 2010; that date should be December 31, 2019.)

16 *See, e.g.,* Order No. 15-201, Appen. A at 3 (June 23, 2015).

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> 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 … 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.[17]

The statute's use of the word "or" between the phrases "in excess of those needed" and "in excess of those allowed" indicates that if either circumstance exists, then the funds must be refunded to customers or used for their benefit. KRRC alleges that the remaining funds in the trust account are needed for dam removal.[18] Whether or not this is true, if the funds are "in excess of those allowed," then they exceed the amount statutorily authorized to fund dam removal and cannot be distributed to KRRC.

The Legislature was clear about how much funding from Oregon customers is allowed to be used for dam removal. ORS 757.736(3) states that "[t]he surcharges imposed under this section may not exceed the amounts necessary to fund Oregon's share of the customer contribution of $200 million identified in the [KAP]." Crucially, then, the statute looks to the KAP to define "Oregon's share of the customer contribution" and makes clear that the two surcharges "may not exceed the amounts necessary to fund" this contribution. The law also required PacifiCorp to file a "final agreement" (i.e., the KHSA) which the Commission was required to approve after determining that "imposition of the surcharges under the terms of the [KHSA] results in rates that are fair, just and reasonable."[19] The Commission expressly found that "a primary intent of SB 76

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17 ORS 757.736(9) (emphasis added).
18 Remittance Request at 6.
19 ORS 757.736(1), (4).

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is to implement the KHSA ….”[20] Thus, the provisions of the KAP and the KHSA effectively implement the Legislature’s intent and direction in SB 76.

The KAP requires that the funds from the surcharges would be deposited “in an interest bearing account.”[21] Further, the KHSA explicitly states that “the surcharges from the Customer Contributions will be placed in interest-bearing accounts and that *the interest that accrues in the accounts may be used to reduce the amount collected through the surcharges so that the total Customer Contribution, including accrued interest through December 31, 2019, totals $200,000,000*.”[22] Similarly, Section 7.3.2 contemplates that the trust accounts would “[e]arn approximately $28 million in interest … to 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.” That appendix, which was attached to the Customer Advocates’ comments on June 27, 2023, clearly demonstrates that interest was assumed to be part of the $200 million collection, not additive to it. Further, as noted above, “Value to Customers” is explicitly defined in the KHSA as a mechanism that can decrease customer contributions toward dam removal.

Accordingly, it is indisputable that the KHSA included interest within the “Customer Contribution.” There is also nothing to suggest that this construct was not also contemplated by the KAP and by the Oregon Legislature when it identified “Oregon’s share of the customer contribution of $200 million.”[23] Indeed, the evidence demonstrates that the Legislature’s intent was to implement the KAP and KHSA. Thus, the only rational reading of the statute that directs the Commission to refund to customers (or use for their benefit) funds that are “in excess of those

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20 Docket No. UE 219, Order No. 10-364 at 17 (Sept. 16, 2010).
21 KAP § VI.A.3.a.
22 KHSA § 7.3.8.A (emphasis added).
23 ORS 757.736(3).

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allowed," is that the "allowed" amount is Oregon's share of the Customer Contribution, which includes interest. Any other reading nullifies the provisions of the KHSA that explicitly contemplate the inclusion of interest in Oregon customers' maximum contribution.

Furthermore, in Order 10-364, the Commission fulfilled its statutory obligation to determine "whether the imposition of surcharges under the terms of the final agreement results in rates that are fair, just and reasonable."[24] In that order, the Commission found that the surcharges PacifiCorp proposed "are calculated to collect an amount that *when added to interest on the collected amount* will total $200 million *[sic]*, Oregon's share of the customer contribution, by December 31, 2010 *[sic]*. Pacific Power calculated this amount to be $158.24 million, with the rate collection period beginning on March 18, 2010."[25] Thus, in finding that the surcharges under the KHSA would result in fair and reasonable rates, the Commission also included interest in the total customer contribution.

That interest was intended to be included within Oregon customers' total contribution is further evident from the fact that the Commission repeatedly reviewed the surcharge collections between the time they were approved and the time the $184 million threshold was reached, and every time it approved the surcharge amounts it did so with an intent to collect $184 million by December 31, 2019 including interest.[26] Indeed, Staff even confirmed the appropriate surcharge amount with PacifiCorp based on interest rate levels: "Based on the Treasury interest rate statements provided by Staff, the Company evaluated the Schedule 199 surcharge rates. The Company consulted with Staff on October 25, 2019 regarding the forecasted level of collections,

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24 ORS 757.736(4).

25 Order No. 10-364 at 17 (emphasis added). *See supra* n. 15

26 *See, e.g.,* Order Nos. 15-201, 16-218, 17-217, 18-257, 19-212.

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and subsequently filed its application to cancel Schedule 199 on October 28, 2019."[27] PacifiCorp's advice filing itself clearly states that "based on the actual and forecast collections *and interest estimates* that the target amount will be fully collected with rates effective through November 5."[28] At no time during all of the Commission's reviews of the surcharges did any party ever suggest that the Commission was calculating the surcharges incorrectly by including interest in the total amount.

Accordingly, there is no evidence anywhere in the law, the KAP, the KHSA, or Commission orders implementing and approving the KHSA to suggest that interest is not incorporated into the Customer Contribution to dam removal. Conversely, there is substantial evidence to demonstrate that interest was explicitly contemplated as a component of this Customer Contribution – it provides "Value to Customers." Accordingly, any amount that exceeds "Oregon's share of the customer contribution of $200 million" is "in excess" of amounts allowed to be paid by Oregon customers for dam removal, regardless of whether the "excess" amount is considered to be principal or interest.

II. DIRECTING THE EXCESS FUNDS TO KRRC FOR DAM REMOVAL WILL NOT RESULT IN THE FUNDS BEING USED "FOR THE BENEFIT OF CUSTOMERS."

ORS 757.736(9)(a) requires excess funds be refunded to customers or otherwise used "for the benefit of customers." KRRC states that the remaining amount in the Oregon Trust Accounts would contribute toward dam removal, if disbursed to KRRC.[29] Thus, the question is whether additional contributions toward dam removal would benefit customers. There are at least three reasons why the answer to this question is no.

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27 Docket No. ADV 1027, Staff Report at 4 (Oct. 30, 2019).
28 PacifiCorp Advice No. 19-012 (Oct. 28, 2019) (emphasis added).
29 Remittance Request at 6.

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First, both the Legislature and the Commission have already determined that customers benefit from dam removal only up to Oregon's share of the total Customer Contribution (which, again, includes interest). If the Legislature felt that additional contributions toward dam removal would also benefit customers, then it would not have expressly limited the amount of the surcharges to Oregon's share of the $200 million Customer Contribution.[30] Thus, statutory interpretation indicates that the Legislature must have meant something other than dam removal when it directed the Commission to use excess funds "for the benefit of customers."

Second, as an economic regulator, the Commission has primarily considered the economic impact to customers when determining whether a utility action benefits customers. For instance, in UE 370 and UE 372, when the Commission determined that Portland General Electric's investment in the Wheatridge wind facility was prudent, its determination was not based on the fact that PGE acquired a renewable resource, but instead that it "act[ed] early to pursue a lower cost, tax-advantaged renewable resource [which] would benefit customers over the long term …."[31] Similarly, in acknowledging PacifiCorp's Energy Vision 2020 action items in its 2017 Integrated Resource Plan, one component of the Commission's decision was its recognition "that expiring tax incentives represent a time-limited opportunity that could significantly benefit customers."[32]

Consequently, there must be some showing that customers, *as customers of PacifiCorp*, benefit from an action for which they pay. Certainly, PacifiCorp customers receive a benefit when a city repaves the roads in the utility's service territory, but that does not mean

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30 ORS 757.736(3).
31 Docket Nos. UE 370/UE 372, Order No. 20-321 at 8 (Sept. 29, 2020).
32 Docket No. LC 67, Order No. 18-138 at 9 (Apr. 27, 2018).

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PacifiCorp's customers pay for the cost of this improvement in their utility rates. Similarly, the State of Oregon may benefit from removal of the Klamath River Dams and the reinstitution of a free-flowing river, but PacifiCorp's customers do not benefit any more than anyone else such that it justifies the use of additional ratepayer dollars.

Third, now is not the time to be giving away customers' money. PacifiCorp's customers are being hit by both rising costs for essentials, like food and rent, as well as rising utility bills. PacifiCorp's customers are facing rising rates and rising power costs; they are facing future costs to meet the state's decarbonization policies; and they are facing looming charges for coal plant decommissioning and to cover PacifiCorp's liability costs from the 2020 Labor Day fires. PacifiCorp cannot now look to its ratepayers to fund what would otherwise fall, in part, on the Company as anticipated through the MOA to cover cost overruns. KRRC, the entity PacifiCorp sold the dams to, has already received Oregon customers' full payment of $184 million for dam removal.[33] KRRC does not get to keep the change. To that end, the Commission should not spend this crucial time considering whether giving KRRC these excess funds is "for the benefit of customers." It is both illegal and inequitable to withhold funds in excess of $184 million in the Oregon Trust Accounts from customers and use them for other purposes. The $4.8 million in accrued interest should be refunded to PacifiCorp's customers immediately, as provided by statute, to help alleviate the financial difficulties of increasing electric rates.

Customers have paid their agreed-upon share for Klamath River Dam removal. The excess monies remaining in the Oregon Trust Accounts must be used to benefit customers uniquely as compared to other constituencies. The Customer Advocates submit that this is best

[33] Docket No. UE 219, KRRC Supplement to Dec. 12, 2022 Disbursement Request Under DM #7810225 at 1 (June 1, 2023).

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accomplished by refunding the excess as an offset to the significant rate increases PacifiCorp's customers have experienced and appear likely to continue to experience.

III. STATUTORY TEXT AND CONTEXT DEMONSTRATES THE SUBJECT FUNDS SHOULD BE CONSIDERED AS "COLLECTED" FROM OREGON RATEPAYERS.

As noted above, ORS 757.736(9) directs the Commission to refund to customers or use for their benefit any excess amounts that have been "collected." In the workshop held January 26, 2024, by Commission guidance, and at the February 7, 2024 pre-hearing conference, PacifiCorp asserted that a plain language reading of this statutory section prohibited a finding that the funds remaining in the Oregon Trust Accounts should be refunded to customers or otherwise used for the benefit of customers, as the funds are, allegedly, accrued interest and therefore were not "collected" from ratepayers. As the Customer Advocates anticipate this argument will form the majority of PacifiCorp's argument in favor of distributing the subject funds to KRRC in contravention of Oregon law, the Customer Advocates next address this argument.

Initially, the Customer Advocates note that PacifiCorp's newly developed legal argument is directly contrary to: (a) the provisions of the KHSA described above that explicitly include interest in the Customer Contribution and to which PacifiCorp is a signatory; (b) PacifiCorp's own testimony and exhibits supporting approval of the KHSA and the initial surcharges; and (c) each and every one of the Commission's decisions affirming or modifying the surcharges over the collection period, for which PacifiCorp was consulted regarding the proper surcharge level. PacifiCorp is either being disingenuous now, or it has been acting disingenuously throughout the long history of the Klamath Dam Removal process.

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As is well settled, the purpose of statutory interpretation is to "pursue the intention of the legislature if possible."[34] In doing so, the "first step" in statutory interpretation is "an examination of text and context."[35] PacifiCorp's proposed interpretation of the statutory language that "collected" can only mean that dollars must have been recovered from customers is unreasonably restrictive both in its interpretation of the term and by ignoring the statutory context.

While SB 76 does not define the term "collected," the ordinary meaning of this word means "to call for and obtain payment of."[36] Notably, SB 76 does not specify that amounts must be "collected" from customers, it simply states that if "amounts have been collected under this section … in excess of those allowed," then the Commission must refund this excess or use it for the benefit of customers. Moreover, the amount "allowed" by "this section" (ORS 757.736) is an amount that "may not exceed" Oregon customers' share of $200 million. In other words, ORS 757.736 required that the surcharges imposed by that section not exceed Oregon's share of $200 million, but left open the option that the surcharges could yield less than Oregon's share of $200 million. This could happen, for instance, if dam removal cost less than the State Cost Cap or, as occurred here, a portion of the Customer Contribution is composed of interest. Indeed, this is the precise scenario assumed by the parties to the KHSA. Thus, Oregon's share of the Customer Contribution was "collected" – was called for and obtained payment of – by a combination of surcharge revenues and interest. KRRC received the full value of Oregon's share of the Customer Contribution and the statute did not distinguish whether that contribution was "collected" through surcharges or interest.

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34 ORS 174.020(1)(a); *State v. Gaines*, 346 Ore. 160, 171 (2009).
35 *Gaines*, 346 Ore. at 171.
36 Webster's II New Riverside University Dictionary at 281 (1984).

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Furthermore, PacifiCorp's argument ignores the context of SB 76. The sole purpose of this legislation was to implement the KAP and KHSA; the Legislature would never have passed this bill (indeed, would have had no reason to pass this bill) without the KAP and KHSA. As has already been demonstrated, the KHSA unequivocally includes interest within the total amount of the Customer Contribution. For PacifiCorp's interpretation to accurately reflect Legislative intent, the Commission would need to find that the Legislature intended to implement the KAP and KHSA with the lone exception of the application of interest toward the Customer Contribution as "Value to Customers." Nothing in the text and context of SB 76 suggests that this was the case, nor have the Customer Advocates found anything in the Legislative history to support this novel reading. It also ignores every Commission order implementing SB 76 and the surcharges that that bill approved (all with PacifiCorp's acquiescence or even direct advocacy).

In addition to the Commission orders identified above, in Order 17-018, the Commission approved the funding agreement that KRRC now seeks to amend. In it, the Commission discussed the "Collection of Customer Contributions."[37] Within this discussion, the Commission outlined the surcharges recovered through approved tariffs and the establishment of the Oregon Trust Accounts, as well as their ultimate transition from supervision by Wells Fargo to that of the Oregon State Treasury "for the potential of earning higher rates of interest."[38] The Commission also discussed the annual review of the related tariff rates, "to reassess the surcharge revenues, interest rates, updated load forecasts, and fund balances…."[39] If all interest was to go to toward dam

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37 Order 17-018, Appendix A, p. 4.

38 Order 17-018, Appendix A, p. 4.

39 Order 17-018, Appendix A, p. 4. *See also* Staff Report, dated October 30, 2019, Approved November 5, 2019 (nothing "the full amount to be *collected* from Oregon ratepayers, $184 million, should be *collected* by November 5, 2019" and "is comprised of approximately $173.2 million of customer collections and $10.86 million of interest." (emphasis added).

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removal regardless of whether it exceeded the Customer Contribution, there would have been no reason for the Commission to monitor interest rates and recoveries as closely as it did. At no point were the surcharges alone ever close to covering Oregon's full share of the Customer Contribution; only with interest did the Commission determine that Oregon customers' obligation had been reached.[40]

An objective review of the agreements that serve as the foundation of the subject funds and the statutory requirements, as well as Commission discussion approving the related tariffs and authorizing distribution of funds to KRRC, demonstrate that, while the specific verb may vary, the underlying concept remains: Oregon ratepayers agreed to, and were required to, provide the full amount of their share of the Customer Contribution, $184,000,000 comprised of collected surcharges and accumulated interest, as required under agreements and under Oregon law. Oregon ratepayers did just that. PacifiCorp's assertion that the subject funds were not "collected" from ratepayers would lead to an interpretation of the multiple agreements and Oregon statute to require "collection" of $184,000,000 in surcharges from ratepayers, notwithstanding the presence of language clearly intended to incorporate accumulated interest with the associated surcharges to produce the end result of collections contributed by Oregon ratepayers toward the total Customer Contribution.[41]

PacifiCorp's claim places form over substance and seeks to circumvent Oregon law, while ignoring party agreements and Commission discussion and Orders. In essence, PacifiCorp's new legal theory amounts to a brazen and unsupported claim that, since the KAP was signed, everyone

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40 Docket No. ADV 1027.

41 AWEC and CUB note that PacifiCorp and KRRC have provided no demonstration that the Oregon Trust Account balance is comprised solely of accumulated interest and contains no surcharge funds, notwithstanding the co-mingled nature of the balances held in the Oregon Trust Accounts.

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– including PacifiCorp itself – has been doing it wrong. This is a bold claim under any circumstance, but particularly if the Company's only evidence in support is its interpretation of a single word in SB 76. The Commission should decline the Company's invitation to rewrite history and should maintain the same interpretation of SB 76 and the KHSA that all parties have had all along – that Oregon customers' share of the total Customer Contribution includes both surcharge revenue and interest, and any "excess" must be refunded to customers or used for their benefit. The same law that compelled Oregon ratepayers' action, for the benefit of KRRC, also protects Oregon ratepayers from requests to pay more than agreed, and more than the Commission used to evaluate the public interest when reviewing the plan to remove the Klamath River Dams. The Commission should honor Oregon law and deny KRRC's request for funds in excess of Oregon's full share of the Customer Contribution.

IV. KRRC'S PROPER REMEDY LIES WITH THE STATES OF CALIFORNIA AND OREGON, AND PACIFICORP.

While Oregon law and Commission precedent do not permit additional funds to be distributed from the Oregon Trust Funds, the Customer Advocates recognize the circumstances KRRC currently faces in its efforts to effectuate the removal of the Klamath River Dams. However, KRRC's available, and previously agreed-upon, remedy is not to seek additional funds from Oregon ratepayers through the Oregon Trust Funds. Rather, KRRC and PacifiCorp, who both now support additional and excess distribution of Oregon Trust Fund monies, have previously agreed that, in the "unlikely event" that costs for removal of the Klamath River Dams exceeded those forecast and memorialized in the KHSA, an "additional contingency fund" would be created

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and funded in the amount of $45 million.[42] Specifically, Jim Root, President of KRRC and William Fehrman, then-CEO and Chairman of PacifiCorp and President and CEO of Berkshire Hathaway Energy, among others, agreed that "additional contingency funding…in the amount of $45 million [would be provided] to ensure [removal of the Klamath River Dams] will occur and be completed."[43] Moreover, both KRRC and PacifiCorp "agreed that this additional contingency fund provides a clear and definitive commitment of resources that will ensure [removal of the Klamath River Dams] is completed."[44]

The Commission approved PacifiCorp's *Application for Approval of a Property Transfer Agreement with the Klamath River Renewal Corporation* by way of Order No. 21-242, entered July 29, 2021. In issuing its approval, the Commission adopted Staff's review and analysis, which relied on PacifiCorp's explicit "assert[ions]" that the MOA "'sets forth commitments among PacifiCorp, the states of Oregon and California, [KRRC], the Karuk Tribe and the Yurok Tribe to fully implement the KHSA, consistent with SB 76 and Commission Order Nos. 10-325 and 10-364.'" Those commitments included the contingency funding anticipated for cost overruns. Moreover, as noted above, the United States, California, Oregon, PacifiCorp, and PacifiCorp's customers, including Oregon ratepayers, specifically "d[id] not accept liability for any costs in excess of $450,000,000 for [the Klamath Dam] removal, absent specific subsequent agreement."[45] PacifiCorp, KRRC, and others did execute a specific subsequent agreement: the MOA. Oregon ratepayers are not a party to that agreement.

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42 *See Memorandum of Agreement,* p. 4 of 13, attached as Exhibit 4 to PacifiCorp's *Application for Approval of a Property Transfer Agreement with the Klamath River Renewal Corporation*, Docket Nos. UP 415/UE 219, dated January 14, 2021 ("MOA").

43 MOA, p. 4.

44 MOA, p. 4.

45 *See* Remittance Request, Attachment 2, p. 9.

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KRRC has an agreed-upon remedy available to access additional funds to cover unexpected cost increases associated with removal of the Klamath River Dams. KRRC should avail itself of this recognized remedy and should cease its repeated invitations to the Commission to exceed Oregon law and party agreements by distributing funds in excess of Oregon's full and fair share of the Customer Contribution. KRRC's request should be denied.

CONCLUSION

For the foregoing reasons, the Customer Advocates urge the Commission to deny KRRC's request for disbursement of the remaining funds in the Oregon Trust Accounts and recommend that these funds be immediately returned to PacifiCorp for disbursement to its customers.

Dated this 27th day of March, 2024.

Respectfully submitted,

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