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 REPLY BRIEF

I. Introduction.

Staff of the Public Utility Commission of Oregon (Staff) files this Reply Brief in response to the initial briefs filed by the Klamath River Renewal Corporation (KRRC), and PacifiCorp, and to the joint brief filed by the Oregon Citizens' Utility Board (CUB) and Alliance of Western Energy Consumers (AWEC).

II. Discussion.

A. Reliance on the KHSA for Authority to Amend the Funding Agreement is Misplaced.

Both PacifiCorp and the KRRC base arguments in their opening briefs on language that appears in the Klamath Hydroelectric Settlement Agreement (KHSA), but which is not included in ORS 757.736. PacifiCorp alleges the "KHSA signatories addressed what would happen if interest exceeded the forecast amount," citing KHSA Section 7.3.7(A), and arguing its terms do not limit the accrual of interest.[1] The KRRC argues that the Commission should look to the KHSA, specifically Section 7.3.8(A), for instruction on how to address accrued interest.[2]

Neither PacifiCorp nor the KRRC appear to acknowledge that the Commission is not a party to the KHSA and is not bound by its terms. Rather, the Commission is subject to the legislature's directives in 2009's Senate Bill (SB) 76 and 2011's House Bill (HB) 3461, now codified in ORS 757.736.[3]

Any value the KHSA provides in the interpretation of ORS 757.736 is limited. While the 2009 legislature anticipated that the Agreement in Principle (AIP) would be memorialized in a "final agreement", the initial KHSA was not executed until 2010, after SB 76 was enacted in 2009.[4] It may provide some context for 2011's HB 3461. However, the KHSA is not a source

[1] PacifiCorp Opening Brief at 3-4, 8.

[2] KRRC Opening Brief at 12-13.

[3] 2009 Ch. 690 §4; 2011 Ch. 394 §1.

[4] Or Laws 2009 Ch. 690; *See In the Matter of PacifiCorp, Application to Implement the Provisions of Senate Bill 76*, Docket UE 219, Order No. 10-364 at 4, corrected by Order No. 10-390 (September 16, 2010).

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for inserting text into ORS 757.736 that the legislature omitted. Such an approach is contrary to the methodology for statutory construction in ORS 174.010. Moreover, the legislative history for HB 3461 clarified the bill was intended to reduce the obligation of ratepayers to fund the $184 million Oregon customer contribution with the accrual of interest. Staff's Opening Brief provides the relevant legislative history.[5]

Finally, to the extent we can look to the KHSA in interpreting ORS 757.736, it supports Staff's interpretation that accrued interest is to be used to reduce the customer contribution.[6] PacifiCorp and the KRRC point to language in the KHSA illustrating the expectation that accrued interest was expected to reduce the Customer Contribution of $200 million by "approximately $28 million" in interest, and further that additional interest beyond $28 million may be used "unless the funds are required for Facilities Removal."[7] This is language the Oregon legislature did not include in either SB 76 or HB 3461.

We do note that the cited provisions of the KHSA are more consistent with Staff and AWEC and CUB's interpretation of ORS 757.736 than PacifiCorp's or the KRRC's. Neither PacifiCorp nor the KRRC allege that more than $28 million in interest has accrued to reduce the $200 million Customer Contribution obligation for Oregon and Washington customers to the $172 million in customer surcharges anticipated in the KHSA. Actual returns were much lower than anticipated by the KHSA parties. Indeed, at the time the surcharge tariff was withdrawn, approximately $173.2 million had been collected from just Oregon customers through the surcharge, and only $10.86 million in interest had accrued.[8]

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[5] Staff's Opening Brief at 12-13.

[6] *See* Staff's Opening Brief at 13-14.

[7] *See* KRRC Opening Brief at 12.

[8] Docket ADV 1027, UE 219, Advice No. 19-012, Staff Report for November 4, 2019 Public Meeting regarding cancellation of Schedule 199 at 5 (October 30, 2019), available here: https://edocs.puc.state.or.us/efdocs/HAU/ue219hau73744.pdf

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B. A Narrow Interpretation of "Collect" in ORS 757.736(9) Ignores the Statute's Text and Relevant Context and the Inherent Fungibility of Amounts in the Trust Funds.

Both the KRRC and PacifiCorp propose a narrow interpretation of the term "collected" in ORS 757.736(9). The KRRC argues that "collected" refers only to the collection of surcharges from customers, citing other provisions of ORS 757.736 that refer to collection of the surcharges as context.[9] PacifiCorp also argues that the term "collected" only refers to collection of the surcharges from customers.[10] Neither interpretation acknowledges that the term "collected" does not refer to the word "surcharge" in ORS 757.736(9). Rather, this statute refers to "amounts":

> (9) 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.
>
> (Emphasis added).

As detailed in Staff's Opening Brief, there are two important pieces of context for interpreting how narrow or how broadly the terms "amounts" and "collected" were intended to apply in ORS 757.936(9).[11] First, under ORS 757.736(3), the surcharges "may not exceed the amounts necessary to fund Oregon's share of the customer contribution of $200 million identified in the agreement in principle." The Joint Opening Brief of AWEC and CUB provides further support that this cap was firmly intended to limit the Commission's authority to fund the project.[12]

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[9] KRRC Opening Brief at 9-10.

[10] PacifiCorp Opening Brief at 7.

[11] The KRRC also alleges the Commission has applied a narrow interpretation in Order No. 10-364. KRRC Opening Brief at 10. KRRC does not explain how an order issued after legislation was passed provides context for statutory interpretation. Moreover, Staff does not read Order No. 10-364 to provide an opinion on the issue before the Commission.

[12] AWEC and CUB Joint Opening Brief at 4.

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Second, under ORS 757.736(7), the Commission was required when setting the surcharges to "account for the actual and expected changes in interest rates on the collected funds over the collection period." While ORS 757.736(9) does not expressly reference accrued interest, it directs the Commission to take action if determines at any time that amounts have been collected in excess of those needed, or in excess of those allowed. If interest were not relevant to determining whether an amount had been collected in excess of amounts allowed, then the Commission was not authorized to adjust surcharges under ORS 757.736(9)(b) in the event of higher interest rates, and the only amount in excess of what is allowed would be the collection from customers of an amount in excess of Oregon's 92 percent share of the customer contribution, or $184 million, both of which would result in the collection of excess amounts. Such an interpretation gives no effect to the requirement in ORS 757.736(7), that the surcharges were to account for the accrual of interest. This is contrary to the requirement of statutory construction that multiple provisions of a statute be construed so as to give effect to all of them.[13] And, the interpretation advocated by the KRRC and PacifiCorp is contrary to the clear intent of the legislature in passing HB 3461 that accounting for the accrual of interest on the surcharges "would reduce the overall cost to PacifiCorp ratepayers."

PacifiCorp further argues that "As a practical matter, no surcharge dollars collected via Schedule 199 remain in the Oregon trust accounts." The Company claims, without any evidentiary support, that there is no amount collected from customers remaining in the trust accounts that could be subject to refund.[14] Staff disputes this claim. Money is fungible.[15] Staff is unaware of any means by which the surcharges collected from customers can be distinguished from amounts collected in the trust accounts through the accrual of interest.

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[13] ORS 174.010.

[14] PacifiCorp Opening Brief at 6, 8.

[15] *Dudek v. Umatilla County*, 187 Or App 504, 515 (2003) citing *United States v. Sperry Corp*, 493 US 52, 62 n. 9 (1989).

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C. A Finding that Funds are Necessary for Dam Removal is not Required for the Commission to Take Action under ORS 757.736(9), nor can such a Finding be Made.

PacifiCorp argues that directing the distribution of the remaining amounts under ORS 757.736(9) is only appropriate if the funds are in excess of those needed.[16] And, both PacifiCorp and the KRRC argue that the remaining balance in the trust funds is needed because the KRRC's project budget is currently above the $450 million state cost cap.[17]

The text of ORS 757.736(9) uses the term "or", which is disjunctive.[18] Thus, if the Commission determines at any time that the amounts collected are either "in excess of those needed, *or* in excess of those allowed," it is required to act as provided in the statute. The use of the term "or" cannot be read as the conjunctive "and". If the Commission determines that the amounts collected are in excess of those allowed, it is not required to determine that they are also in excess of what is needed before it takes action.

Even if it were to do so, there is, at the very least, a serious question as to whether the funds remaining in the trust accounts are needed for dam removal. Under the terms of the November 2020 Memorandum of Agreement (MOA), PacifiCorp and the states of Oregon and California agreed to a funding mechanism that will provide funding for dam removal in the event that costs exceed the state cost cap of $450 million. PacifiCorp and the states will share any cost overruns that may occur over this amount equally.[19] The Federal Energy Regulatory Commission (FERC) based its approval of the project license transfer in part on finding that the MOA provides "further assurance there would be sufficient funding to carry out the surrender proposal if approved."[20] Given that the amount needed to fund Oregon's share of the $200

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[16] PacifiCorp Opening Brief at 11-12.

[17] PacifiCorp Opening Brief at 12; KRRC Opening Brief at 10-12.

[18] *Burke v. State ex rel. Dep't of Land Conservation & Dev.*, 352 Or 428, 435 (2012), *see also* AWEC and CUB Joint Opening Brief at 6.

[19] 175 FERC ¶ 61,236, 62,366 (2021).

[20] *Id*.; 181 FERC ¶ 61.122 (2022).

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million customer contribution has been disbursed for the purpose of funding facilities removal, consistent with the limits of ORS 757.736, and any dam removal costs in excess of the state cost cap will be addressed under the provisions of the MOA, the remaining funds in the trust accounts are likely excess amounts that are not "needed" for purposes of dam removal.

D. The KRRC does not Identify a Use for the Excess Funds that is for the Benefit of Customers.

The KRRC alleges that if the Commission finds the remaining funds in the trust accounts are in excess of what is allowed, disbursement to the KRRC for payment of facility removal expenses is a benefit to customers.[21, 22] For its position, the KRRC relies on SB 76 and Commission Order No. 10-364, but these authorities merely provide support for a customer contribution consistent with the $200 million customer contribution, already fulfilled by prior disbursements.

The KRRC further cites to FERC's finding that license surrender is in the public interest.[23] However, a use for the benefit of customers is a use that is good or helpful to PacifiCorp's retail electricity customers specifically, not a use that generally benefits Oregon residents. Had the legislature intended excess amounts to be expended in the public interest, such language would have been used. The text of ORS 757.736(9) may not be construed to insert language that has been omitted.[24]

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[21] KRRC Opening Brief at 13.

[22] The KRRC also alleges that PacifiCorp customers benefited from continued operation of the Klamath dams at a lower production cost. For its claim of $81 million in value to customers, KRRC only cites a section of the KHSA, from the year 2010. *See* KRRC Opening Brief at 7. Staff disputes this figure, but as the KRRC does not connect this alleged benefit to any value that could be provided to customers by amending the Funding Agreement with the KRRC, does not address it further.

[23] KRRC Opening Brief at 13.

[24] ORS 174.010.

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As explained in Staff's Opening Brief, Staff does not support amendment of the Funding Agreement to allow for further distributions to the KRRC unless it is for the benefit of customers.[25]

E. PacifiCorp's Objection to a Customer refund is Irrelevant to the Interpretation of ORS 757.736(9).

PacifiCorp objects to the general concept of the Commission directing the trustee to refund excess amounts in the trust accounts or otherwise use the amounts for the benefit of customers, as the Commission is directed to do under ORS 757.736(9). The Company argues: 1) that all of the funds collected from customers have been disbursed to the KRRC so no refund can be implemented, and 2) PacifiCorp does not have custody of the trust accounts. PacifiCorp implies that this provision only applies to surcharges in the custody of PacifiCorp and alleges the Commission should consider the complexities and transactional costs as it analyses the dispute.[26]

PacifiCorp again relies on the misperception that the monies collected from customers and the accrued interest have somehow been separately tagged for identification. That is, of course, not the case, as money is fungible. The legislature has made its intent plain that the accrued interest be applied to reduce the burden on PacifiCorp customers, and that the Commission need to act if it determines "at any time" that excess amounts have been collected. Refunds are not limited to those funds collected by PacifiCorp prior to their transfer to the trustee. There are three provisions in SB 76 where the legislature has provided authority for the Commission to direct the trustee to send the funds back to PacifiCorp in order to provide a refund or otherwise use the funds to benefit customers.[27] A public utility's discomfort with the process is not a relevant consideration in construing the application of these statutes.

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[25] Staff Opening Brief at 16.

[26] PacifiCorp Opening Brief at 13-14.

[27] ORS 757.736(9), ORS 757.736(10), ORS 757.738(4).

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III. **Conclusion.**

Based on Staff's Opening Brief and the arguments set forth above, Staff recommends that the Commission deny the KRRC's request for authorization to amend the Funding Agreement.

DATED this 30th day of April 2024.

Respectfully submitted,

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