PACIFIC POWER
A DIVISION OF PACIFICORP

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April 30, 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 Reply Brief**

PacifiCorp, dba Pacific Power submits for filing its Reply 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 REPLY BRIEF |

PacifiCorp dba Pacific Power respectfully submits this legal brief responding to the initial brief of staff of the Public Utility Commission of Oregon (Staff) and the joint initial brief of Citizen's Utility Board and Association of Western Energy Consumers (collectively, CUB/AWEC).

## I. INTRODUCTION

The central facts of this matter are uncontested, which leaves the Public Utility Commission of Oregon (Commission) to decide a single, narrow legal issue – whether certain interest earned on two trust accounts established to fund Klamath dam removal are available to the Klamath River Renewal Corporation (Renewal Corporation) to complete that project and fulfill the objectives of the landmark Klamath Hydroelectric Settlement Agreement (KHSA). The contested residual interest amounts were earned on principal (i.e., surcharges) collected from PacifiCorp's customers for the sole purpose of facilitating Klamath dam removal and restoration. No party to this proceeding argues that PacifiCorp improperly collected, or over-collected, these underlying surcharge amounts from customers. Indeed, despite annual reviews, the rate and manner of PacifiCorp's surcharge collections went unchallenged for nearly a decade.

But now, at this late date, Staff and CUB/AWEC contend that certain residual interest amounts remaining in the trust accounts should not be available to fund the very same public interest project for which the principal giving rise to the interest was collected in the first place. To support their arguments, Staff and CUB ignore clear statutory directives and ask the Commission to accept flawed statutory interpretations. As detailed below, Staff's and CUB/AWEC's arguments should be dismissed, and the Renewal Corporation's outstanding request to disburse the residual interest should be granted.

## II. ARGUMENT

### A. The Refund Provisions of SB 76 Do Not Apply to Interest

It is undisputed that the contribution of PacifiCorp's Oregon customers to dam removal under the KHSA would be comprised of principal (i.e., surcharges collected from Oregon customers) and interest. It is also undisputed that the combined balance of principal and interest was required to be $184 million by December 31, 2019. The fundamental question before the Commission is whether interest that would accrue on the Oregon trust accounts *after* December 31, 2019, would be available to fund the necessary costs of dam removal and restoration or whether the trustee must refund those amounts to PacifiCorp's customers.

Staff and CUB/AWEC would have the Commission believe that the phrase "amounts [that] have been collected" includes both principal and interest. But the plain language of the statute makes clear that is not the case. ORS 757.736, which includes the refund provision that is the focus of this dispute, established the framework for surcharge collections and their remittal to the trust accounts. Multiple subsections unambiguously illustrate that the Legislature intended that the terms "amounts" and "collected" mean the surcharge amounts

PacifiCorp collected via Schedule 199 *before* they were remitted to the interest-bearing trust accounts:

- Subsection 2 requires 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."[1]
- Subsection 2 also specifies the timing by which PacifiCorp must "begin *collecting* the surcharges."[2]
- Subsection 2 further directs PacifiCorp to continue "to *collect the surcharges*" until the Commission orders PacifiCorp to cease such collections.[3]
- Subsection 3 caps the "*amounts collected* in a calendar year" at no more than two percent of PacifiCorp's annual revenue requirement.[4]
- Subsection 7 directs the Commission to set the "total annual *collections* of the surcharge" at levels that "remain approximately the same during the *collection period*."[5]
- Subsection 8 states that "all *amounts collected* under the surcharges imposed … shall be paid into the appropriate trust account …."[6]

In each of those cases, the derivative terms "collect", "collecting", "collected", and "collections" indisputably refer to the surcharge amounts PacifiCorp collected from its customers via Schedule 199 *before* they were deposited into interest-bearing accounts.

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[1] ORS 757.736(2) (emphasis added).
[2] ORS 757.736(2) (emphasis added).
[3] ORS 757.736(2) (emphasis added).
[4] ORS 757.736(3) (emphasis added).
[5] ORS 757.736(7) (emphasis added).
[6] ORS 757.736(8) (emphasis added).

Subsection 8 brings this into sharp focus by directing that "amounts collected" must be deposited into the interest-bearing trust accounts; practically speaking, only after the collected amounts were deposited would interest begin to accrue. Thus, the "amounts [that] have been collected" could not possibly refer to both principal and interest.

Despite the undeniably consistent use of the term "collected" throughout ORS 757.736, Staff and CUB/AWEC would have the Commission believe that a single use of the phrase "amounts [that] have been collected" in the refund language of ORS 757.736(9) applies to both the Schedule 199 principal collected from customers and the interest earned on the collected amounts after they were deposited into the trust accounts. That subsection allows for refunds if "amounts have been collected … in excess of those needed, or in excess of those allowed."

Staff and CUB/AWEC, however, offer no statutory support for interpreting the phrase "amounts [that] have been collected" in subsection (9) as applying to both principal and interest, and every other use of the term "collected" in the same section explicitly refers to the surcharge amounts collected from customers *before* they were deposited into interest-bearing accounts. Indeed, their arguments run afoul of a most rudimentary principle of statutory construction – that "when the legislature uses the same term through an enactment, it intended that term to have the same meaning."[7] The plain language of ORS 757.736(9), when read in context and with common sense, allows for only one sound interpretation – that the phrase "amounts [that] have been collected" refers to the surcharge dollars collected from PacifiCorp's customers under Schedule 199 *before* they were

[7] *Nw. Nat. Gas Co. v. City of Gresham*, 359 Or. 309 (2016).

deposited into interest-bearing accounts, and not the interest that was earned *after* those amounts were deposited.[8]

The contested residual amounts in the trust accounts are comprised exclusively of interest earned on the amounts collected (and interest earned on interest, since interest continues to accrue on the residual balances). The dollars collected from customers, and interest earned up to $184 million, has been transferred to the Renewal Corporation and expended in furtherance of dam removal and restoration. And since the interest that accrued, and continues to accrue, was not "collected" from customers as that term is used in ORS 757.736, it is not eligible to be refunded to customers under subsection (9).[9]

**B. PacifiCorp Did Not Collect More Than Allowed**

PacifiCorp did not collect more money from customers via Schedule 199 than allowed. PacifiCorp collected surcharge dollars from its customers consistent with the parameters established in Order No. 10-364[10] and at the collection rate as modified during the Commission's routine review. Notably, neither Staff nor CUB/AWEC argued in this proceeding, or at any time during the decade of Schedule 199 collections and administrative reviews, that PacifiCorp collected more money that it was authorized to collect. And it is undisputed that the combined total of surcharge collections plus accrued interest totaled

[8] If the "amounts" that were "collected" must include both principal and interest in subsection (9), as Staff and CUB/AWEC argue, then those terms must have the same meaning in the other subsections of ORS 757.736. Even a cursory reading of the other subsection reveals that such an interpretation would generate nonsensical results.

[9] The term "interest" only appears once in ORS 757.736, when the Legislature directed the Commission to adjust the surcharge collection rate to reflect expected changes in interest rates. ORS 757.736(7). Reading the term "interest" into other subsections of ORS 757.736 would conflict with Oregon's statutory construction regime, specifically 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.")

[10] As modified by Errata Order No. 10-390.

$184 million on the required date, December 31, 2019. Because the target was achieved by the required date, any argument that amounts were over collected from customers rings hollow.

Despite never raising this issue during the contested case giving rise to Order No. 10-364, or during the decade of annual reviews, Staff and CUB/AWEC now argue that any interest accrued beyond $184 million is an "overcollection" that must be refunded to customers. The cornerstone of their argument is that the KHSA and SB 76 established a hard $184 million cap on principal and interest. In making this argument, they necessarily ignore plain language establishing $184 million as a target amount to be achieved *by a specific date*, December 31, 2019.

The KHSA required the California and Oregon trust accounts to have $200 million in principal plus interest *by* December 31, 2019.[11] Similarly, SB 76 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 …."[12] The Commission also managed the surcharge collections to ensure that the combined principal plus interest balance would be $184 million by December 31, 2019. In each of these cases, the signatories, the Legislature, and the Commission 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 the extensive and technically complex dam removal and restoration work.

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

[12] ORS 757.736(7).

Each of those authorities also established that the $184 million target would be comprised of principal and interest. As discussed above, the only express refund provision in those authorities is limited to the principal/surcharge collections. Had the KHSA drafters, Oregon legislature, or this Commission intended that interest could not accrue beyond $184 million, or after December 31, 2019, they would have drafted the KHSA, SB 76, and implementing orders to provide for interest refunds accordingly.

Because PacifiCorp did not collect more than allowed by December 31, 2019, and because Staff and CUB/AWEC cannot point to any statutory or regulatory requirements to refund interest that accrued after December 31, 2019, the Commission should reject Staff's and CUB/AWEC's arguments.

**C. There Is No Evidence that The Residual Interest is Unnecessary**

Both Staff and CUB/AWEC suggest that the residual interest may not be necessary for dam removal and restoration. But unfounded suggestions cannot win the day. The only evidence regarding the current budget for dam removal and restoration comes from the entity charged with delivering the project, the Renewal Corporation. The Renewal Corporation's current budget is $503 million, which exceeds the $450 million made available under the KHSA by $53 million. And the Renewal Corporation has represented that the residual interest would be used to fund the project. Neither Staff nor CUB/AWEC offer any evidence that the Renewal Corporation's budget is incorrect. Only one conclusion can reasonably be drawn in the absence of record evidence to the contrary – that the residual interest is necessary to fund dam removal and restoration.

The availability of alternate funding sources, namely the $45 million contingency fund established in a November 2020 Memorandum of Agreement (2020 MOA), does not

render the residual interest "unnecessary." Simple math bears this out. The KHSA makes $450 million available to the Renewal Corporation. The 2020 MOA adds $45 million in additional contingency funding to that amount, for a total of $495 million in available funding. The Renewal Corporation's uncontested budget is $503 million, which is an $8 million shortfall relative to available funding. Thus, the residual interest is obviously necessary to bridge the funding gap.

In light of the undisputed record, the Commission should reject Staff's and CUB/AWEC's argument that the residual interest is unnecessary to fund dam removal.

## III. CONCLUSION

Staff's and CUB/AWEC's flawed statutory interpretations and unsupported factual arguments should be rejected, and the Renewal Corporation's outstanding request to disburse the residual interest should be granted.

Respectfully submitted April 30, 2024

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