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April 30, 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 Reply Brief in the above-referenced docket.

Thank you for your assistance. Please do not hesitate to contact me if you have any questions.

Sincerely,

/s/ Jesse Gorsuch
Jesse Gorsuch

Enclosure

In contrast, the arguments presented by KRRC and PacifiCorp are based upon misreadings of Oregon law, omissions of key provisions of agreements to which PacifiCorp and KRRC are parties, apparent willful disregard for other agreements, and unsupportable leaps in logic. KRRC, with support from PacifiCorp, has failed to carry its burden to demonstrate that additional disbursements from the Oregon Trust Funds are not contrary to SB 76 and, therefore, are in excess of the Public Utility Commission of Oregon’s (“Commission”) authority to approve and authorize. As detailed below, the Commission should deny KRRC’s request to modify the Funding Agreement. Further, the Commission should act upon its statutory obligation to refund any and all remaining amounts within the Oregon Trust Funds, or otherwise use these funds for the benefit of PacifiCorp’s Oregon customers.

ARGUMENT

Fundamentally, KRRC and PacifiCorp ask the Commission to ignore the full text and context of SB 76 and the Klamath Hydroelectric Settlement Agreement (“KHSA”), and the historical precedent of Commission decisions, based on PacifiCorp’s and KRRC’s interpretation of a single undefined word in SB 76. Until this case, there is no evidence that any party, including PacifiCorp, has ever understood SB 76 and the KHSA as these parties now interpret them, specifically that SB 76 and the KHSA allow the Commission to require customers to fund up to \$184 million for Klamath Dam removal *exclusive* of interest. As KRRC even concedes,² interest has always been understood to be a component of the total Oregon customer contribution – it is specifically provided for in the KHSA³ and has been incorporated into every Commission decision

² KRRC Opening Brief, p.10.

³ KHSA §§ 7.3.2 & 7.3.8.A.

approving surcharge amounts during the collection period.⁴ If KRRC and PacifiCorp want the Commission to reverse these decisions and overturn these agreements, then the legal requirement to do so should be crystal clear. As the filings in this proceeding demonstrate, such support for their argument does not exist and, rather, the statutory language and applicable precedent support the opposite conclusion. The Customer Advocates urge the Commission not to rewrite history for the benefit of a party that, unlike customers, it has no statutory obligation to represent.⁵ KRRC has other means of acquiring the remaining funding necessary to finalize removal of the Klamath Dams, and it should avail itself of them instead of attempting to appropriate funding that belongs to customers.

I. Response to Staff

Staff presents a comprehensive discussion of the history of the Klamath River Dams removal process, along with a detailed analysis of the terms and context within the foundational legislation enabling the collection of Oregon ratepayers' \$184 million share of the maximum \$200 million Customer Contribution, as provided by the KHSA. Additionally, Staff shows that the legislative history demonstrates that interest accrued on the trust account balances "is an appropriate consideration in identifying excess amounts...."⁶ Specifically, Staff notes Oregon Senate Floor Debate discussions that make clear the Legislature's intention that "higher investment returns [were intended to] reduc[e] the overall cost to PacifiCorp ratepayers..." and that "[t]he bill simply makes the charges more fair to PacifiCorp customers."⁷ Finally, Staff emphasizes the

⁴ See Order Nos. 10-364 at p. 17; 15-201; 16-218; 17-217; 18-257; 19-212.

⁵ ORS 756.040(1).

⁶ Staff's Opening Brief, p. 11, ll. 1-19.

⁷ Staff's Opening Brief, p. 12, pp. 2-4 (*quoting* Audio Recording, Senate Floor Debate, HB 3461, May 26, 2011).

Senate floor discussion which clarified that “[o]ver time, [the enabling legislation] w[ould] reduce the amount that the ratepayers must pay into the accounts by increasing the investment returns on those accounts.”

Ultimately, Staff recommends that the Commission decline to distribute the remaining funds to KRRC.⁸ Central to Staff’s recommendation against granting KRRC additional monies from the Oregon Trust Accounts is Staff’s conclusion that any funds remaining in the Oregon Trust Accounts are in excess of what is allowed under Oregon law. The Customer Advocates agree with Staff’s reasoned analysis and respond here to expand upon specific points addressed within Staff’s analysis.

While the Customer Advocates’ statutory construction analysis presented in their Opening Brief focused, in part, on ORS 757.736(9)’s use of the verb “collected”, in anticipation of argument from PacifiCorp, Staff’s attention is focused on the noun “amounts”. Both briefs, however, arrive at the same conclusion – that the statute’s language applies to both the principal recovered from customers and interest accrued on that principal. Specifically, Staff notes that ORS 757.736(9) “directs the Commission to act when ‘*amounts have been collected*’ in excess of what is needed or allowed” without specification between the amount of surcharge and the amount of accrued interest.⁹ Furthermore, Staff notes that “while ORS 757.736(9) uses the phrase ‘*amounts have been collected*’, without distinguishing between the surcharge and accrued interest, other sections of the same statute direct the Commission to authorize the establishment of surcharges based on a collection schedule, and requires the use of interest-bearing trust funds.”¹⁰ Accordingly, Staff

⁸ See Staff Opening Brief, p. 5.

⁹ Staff Opening Brief, p. 7 (emphasis in original).

¹⁰ Staff Opening Brief, p. 8 (emphasis in original).

concludes that “the use of ‘amounts collected’ likely refers to the total surcharge collected from PacifiCorp customers *and* the accrued interest collected in the trust funds.”¹¹

Additionally, Staff finds that an interpretation limiting the application of ORS 757.736(9)’s refund provision to only surcharge monies imposes a limitation on the Commission’s ability to act that is not found in the statute. Specifically, Staff notes that ORS 757.736:

directs the Commission to take action if [it] determines “*at any time*” that amounts have been collected in excess of those needed, or in excess of those allowed. The statute does not limit the Commission’s ability to review whether amounts were collected in excess of what is needed or allowed to the surcharge collection period and directs the Commission to take action any time excess amounts are identified, during or after the collection period.¹²

Moreover, and contrary to PacifiCorp’s inaccurate representation of Oregon law¹³, Staff accurately identifies two instances, in addition to ORS 757.736(9), where the Oregon Legislature established a trigger requiring monies held in the Oregon Trust Accounts to be refunded to ratepayers. From this complete statutory context, Staff concludes that the Legislature’s use of “excess balances”, as used in ORS 757.736(10), and “excess amounts” as used in ORS 757.736(9) and (10) are synonymous and indicate the Legislature’s intention of addressing both surcharge and accrued interest monies by way of the refund triggers.

Moreover, a review of ORS 757.736 further supports Staff’s and the Customer Advocates’ conclusion. This statute reveals that when the Legislature intended to distinguish between the surcharge and interest components of the Customer Contribution, it knew exactly how to do so.

¹¹ Staff Opening Brief, p. 8 (emphasis in original).

¹² Staff Opening Brief, p. 8, l. 24 – p. 9, l. 5.

¹³ See PacifiCorp’s Initial Legal Brief (“PacifiCorp Opening Brief”), p. 4.

ORS 757.736 contains numerous specific references to “surcharges imposed”¹⁴, thereby distinguishing those specific revenues from other funds adding to the Customer Contribution discussed in ORS 757.736, e.g. “interest rates on the collected funds over the collection period.”¹⁵ Tellingly, the Legislature did not use the same specificity between surcharge funds and accrued interest funds in ORS 757.736(9) with respect to “amounts ... collected” under ORS 757.736 that are “in excess of those needed, or in excess of those allowed....”

Indeed, to agree with the arguments presented by KRRC and PacifiCorp, the Commission must insert language the Legislature demonstrated it knew how to use, and specifically chose not to. Imputing such omitted language is improper and contrary to the canon of statutory construction¹⁶ and should be rejected by the Commission.

As noted by Staff, “given that the PUC has already directed the disbursement of \$184 million in surcharge collections and accrued interest, the remaining funds in the trust accounts are likely excess amounts.”¹⁷ Under Oregon law, excess amounts in the Oregon Trust Accounts must be refunded to customers or used for the benefit of customers. Accordingly, the Commission should reject KRRC’s request to receive these excess funds.

II. SB 76 Limits Oregon Customers’ Contribution to Klamath River Dam Removal to \$184 Million, Inclusive of Interest.

As anticipated, both KRRC and PacifiCorp rely primarily on a statutory argument that interprets the word “collected” in ORS 757.736(9) to apply only to the specific dollars

¹⁴ See ORS 757.736(3), (4), (5), (7), (8), (10).

¹⁵ ORS 757.736(7).

¹⁶ See ORS § 174.010. See also *Buero v. Amazon.com Servs.* 521 P.3d 471, 483 (OR 2022).

¹⁷ Staff Opening Brief, p. 14, ll. 16-18.

PacifiCorp recovered from customers through the surcharge¹⁸, ignoring the total amount collected from customers by way of that surcharge. As the Customer Advocates and Staff have already shown in their Opening Briefs, however, nothing in the text and context of the statute compels this interpretation.¹⁹ Indeed, KRRC’s and PacifiCorp’s interpretation contradicts and ignores other statutory language, legislative history, and language from the KHSA that demonstrate a clear intent to include interest in the total Customer Contribution - the total amount “allowed” under ORS 757.736(9). In fact, within the context of its argument on this issue, KRRC concedes, as it must, that the “Customer Contribution” in the KHSA includes interest.²⁰

At most, KRRC’s statutory analysis demonstrates that the Legislature did not use the word “collected” as a term of art. It is not defined in the law and its ordinary meaning – to call for and obtain payment of²¹ – admits to several different interpretations depending on the context in which it is used. While PacifiCorp certainly “collected” surcharges from customers, the total amounts that were “collected” in the Oregon Trust Accounts include both surcharge revenues and interest. What matters, and what the Commission should focus on, is that the entire context of the statute, including its intent to implement the KHSA, Commission orders interpreting the statute, and every review of the surcharges until their termination, indicates an intention to cap Oregon customers’ contribution to dam removal at \$184 million, inclusive of interest. A selective interpretation of a single word does not change this fact.

¹⁸ KRRC Opening Brief, p. 8-12; PacifiCorp Opening Brief, p. 6-8.

¹⁹ Customer Advocates’ Opening Brief, p. 13-14.

²⁰ KRRC Opening Brief, p. 10.

²¹ Webster’s II New Riverside University Dictionary, p. 281 (1984).

What is especially odd about KRRC’s and PacifiCorp’s argument here is that accepting it would mean that Oregon customers have underfunded their share of dam removal costs. KRRC alleges that its budget shows that the cost of removal will significantly exceed the amounts remaining in the Trust Accounts.²² Both KRRC and PacifiCorp allege that additional amounts are needed to complete dam removal.²³ Thus, if KRRC and PacifiCorp are correct that the amount required to be “collected” under ORS 757.736 applies only to surcharges, then customers have not met their obligation under the statute, which required a “collection schedule that will fund, by December 31, 2019, Oregon’s share of the customer contribution of \$200 million”²⁴ Yet neither party requests that the Commission resume collection of the surcharges which, under their legal analysis, would be required to provide additional funding toward these removal costs. If KRRC needs additional funding to complete dam removal, then it is disingenuous for it to argue that amounts collected from Oregon customers do not exceed the statutorily authorized amount but not also request that the surcharges be reimposed to recover what KRRC believes represents Oregon customers’ contribution. Of course, KRRC does not make this argument because it concedes that the “Customer Contribution” includes both principal and interest.²⁵ In short, KRRC and PacifiCorp cannot have it both ways. The Commission should be especially wary of KRRC’s and PacifiCorp’s novel legal argument, as it opens the door for further collections from customers without any indication that the legislature intended such a result.

²² KRRC Opening Brief, p. 8.

²³ *Id.*; PacifiCorp Opening Brief, p. 11-12.

²⁴ ORS 757.736(7).

²⁵ KRRC Opening Brief, p. 10.

III. Dam Removal Must Be Accomplished Regardless of Whether Remaining Trust Account Funds are Disbursed to KRRC or Not.

In their Opening Briefs, KRRC and PacifiCorp asserts that the \$4,876,639 of remaining balance in the Oregon Trust Accounts (as of December 31, 2023) “is needed to complete dam removal...”²⁶ Initially, while both KRRC and PacifiCorp claim that “no party challenges the reasonableness of the Renewal Corporation’s current budget estimate ...” this conclusion is premature at best.²⁷ The Customer Advocates have not taken a position on KRRC’s budget for dam removal because the current phase of this proceeding has been limited to legal argument. The Customer Advocates cannot take a factual position on the reasonableness of KRRC’s budget because no fact-finding has occurred or been allowed under the procedural schedule. Nor is any such fact-finding necessary because as the Customer Advocates and Staff have demonstrated, the remaining balance in the Oregon Trust Accounts exceeds amounts allowed by law to be distributed to KRRC, so the reasonableness of KRRC’s budget is irrelevant.

For its part, PacifiCorp goes so far as to assert that “[b]ecause the \$450 million provided to [KRRC] under the KHSA (\$250 million from a California bond and \$200 million from PacifiCorp) falls short of the current budget, there is no credible argument that the funds are not necessary for dam removal and restoration.”²⁸ PacifiCorp is wrong and its argument omits commitments PacifiCorp has made to address the very situation now facing the KRRC.

The Federal Power Act requires that KRRC remove the Klamath River Dams and remediate the areas affected by the former reservoirs.²⁹ KRRC is obligated to successfully

²⁶ KRRC Opening Brief, p. 1; PacifiCorp Opening Brief p. 11-12.

²⁷ KRRC Opening Brief, p. 10-11.

²⁸ PacifiCorp Opening Brief, p. 11.

²⁹ *Request for Order to Amend Funding Agreement DM #7810225* (“Disbursement Request”), dated November 13, 2023, pp. 7-8.

complete the removal and remediation project, regardless of the final cost. The approximately \$4.8 million at issue in this dispute will not bridge the gap between the initial \$450 million cost estimate and the now estimated \$503 million budget, and thus providing it to KRRC is an unavailing partial solution.

The Customer Advocates further note PacifiCorp's deafening silence regarding its commitment to provide contingency funds, expressly for the purpose of addressing unexpected cost overruns beyond the original \$450 million cost budget. The Additional Contingency Funding agreed to in the Memorandum Of Agreement ("MOA") executed by, *inter alia*, PacifiCorp, the State of Oregon and the State of California, declared "PacifiCorp's...full commitment to dam removal" and clarified that "[t]he additional contingency funding will be in the amount of \$45 million to ensure Facilities Removal will occur and be completed." Specifically, the MOA established that the subject parties "agreed that this additional contingency fund provides a clear and definitive commitment of resources that will ensure Facilities Removal is completed. PacifiCorp and the States will each contribute \$15 million for this additional contingency fund ***and share any cost overruns that may occur over this amount equally.***"³⁰

PacifiCorp has specifically pledged to bear one-third of all cost over-runs currently identified by KRRC. In contrast, PacifiCorp's ratepayers specifically declared they "do not accept liability for any costs in excess of \$450,000,000 for [removal of the Klamath River Dams], absent specific subsequent agreement."³¹ KRRC asserts that the current cost estimate to comply with

³⁰ 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") (emphasis added).

³¹ *Agreement in Principle*, p. 9, filed as Attachment 2 to Disbursement Request.

Federal law is \$503 million.³² Accordingly, the trigger for PacifiCorp to act on its promise has tripped. KRRC's request for funds from the Oregon Trust Accounts in excess of those agreed upon by all parties and authorized under Oregon law should be denied. Rather than supporting KRRC's attempt to inappropriately access excess Oregon Trust Account funds, PacifiCorp should perform as it committed to act.

IV. The KHSA Does Not Permit Remaining Interest to be Used for Klamath Dam Removal

In support of its request for funds in excess of the amount permitted by Oregon law, KRRC, citing Section 7.3.8(A) of the KHSA, contends that "the KHSA expresses the parties' clear intention that additional accrued interest, in whatever amount, may not be used as a Value to Customers if it is required for Facilities Removal, even if that causes the customer contribution to exceed \$200 million."³³ KRRC is wrong and has selectively provided terms of the KHSA out of context.

The entirety of Section 7.3.8(A) of the KHSA reads:

The Parties acknowledge above 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. The Parties further acknowledge that it is not possible to precisely estimate the amount of interest that will accrue in the Klamath Trust Accounts. To the extent the interest in the accounts exceeds \$28,000,000, the additional earnings may be used as a Value to Customers unless the funds are required for Facilities Removal. Nothing in this paragraph will limit the Customer Contribution to less than \$200,000,000.³⁴

³² Disbursement Request, p. 3.

³³ KRRC Opening Brief, p. 12.

³⁴ *Klamath Hydroelectric Settlement Agreement*, Section 7.3.8(A), Attached as Exhibit PPL/104 to *Application to Implement the Provisions of Senate Bill 76*, dated March 18, 2010, Docket UE 219.

There is no language in this subsection of the KHSA that authorizes Customer Contribution in excess of \$200 million, as claimed by KRRC, and no language that demonstrates an agreement of the parties to allow KRRC access to the funds presently at issue.

The first sentence, omitted by KRRC in its arguments, memorializes the undisputed expectation that surcharge revenues and accrued interest resulting from the deposition of surcharges into interest-bearing accounts would co-mingle and combine to total the \$200 million Customer Contribution. The second sentence acknowledges the challenges inherent in forecasting the amount of interest that will accrue on the balances and describes the outcome if interest exceeds the forecast: it will provide “Value to Customers” (defined as, among other things, amounts that “decrease the customer contribution for Facilities Removal”) unless it is needed for Facilities Removal.³⁵

Thus, the clause KRRC relies on – “unless the funds are required for Facilities Removal” – does not provide a blank check for KRRC to use any amount of accrued interest if the cost of facilities removal exceeds the Customer Contribution. Rather, this clause merely *caveats* the potential for higher-than-expected interest to reduce customers’ total obligation below \$200 million, an interpretation supported by the last sentence of this subsection. In other words, more interest would reduce the surcharges, but would not reduce customers’ total obligation of \$200 million if all of that amount was needed for Facilities Removal. But nothing in that subsection contradicts or overrides other explicit provisions of the KHSA that \$200 million, inclusive of surcharge revenues and interest, was the *total* Customer Contribution and, together with California bond funding, the “State Cost Cap.”³⁶

³⁵ *Id.* p. 7.

³⁶ KHSA §§ 4.1.3, 7.3.2, 7.3.8.A,

V. PacifiCorp Customers Would Not Benefit Incrementally From the Disbursement of the Remaining Oregon Trust Account Funds to KRRC

In its Opening Brief, KRRC argues that supporting the Klamath River Dam removal project with funds in excess of those authorized by the Oregon Legislature would qualify as those funds being “used for the benefit of customers” because the dams would be removed. Initially, while the Customer Advocates disagree with KRRC’s analysis, as discussed below and in their Opening Brief, the Customer Advocates appreciate KRRC’s effort to address a specific question posed by the Commission,³⁷ which PacifiCorp has flatly ignored.

As discussed above and in the Customer Advocates’ Opening Brief, the Oregon Legislature and the Commission have determined that PacifiCorp’s Oregon customers benefit up to a value of \$184 million from dam removal. In approving the KHSA and the associated surcharges, the Commission found that these surcharges were “fair, just and reasonable” because, among other things, the “KHSA also caps customer costs and liabilities for Klamath dam removal and the environmental restoration of the Klamath River *at a reasonable level . . .*”³⁸ Cost certainty for customers was an express condition of the Commission’s approval of the KHSA and its finding that dam removal benefitted customers relative to relicensing. And this cost certainty was provided ten years before dam removal was scheduled to begin. All parties to the KHSA knew that circumstances would not be precisely as predicted when the agreement was signed, which is why the cost certainty that customers received, regardless of changed circumstances, was so important and worth them paying \$200 million toward removal costs. If the Commission is to accept KRRC’s invitation to perform a new analysis of the level of customer benefits from dam removal, then the

³⁷ Docket No. UE 219, Scoping Memorandum (Dec. 15, 2023).

³⁸ Docket No. UE 219, Order No. 10-364 at 12 (Sept. 16, 2010) (emphasis added).

KHSA must be reopened and renegotiated among the parties.

Furthermore, as discussed in the Customer Advocates' Opening Brief, KRRC fails to demonstrate how PacifiCorp customers benefit as customers, as opposed to members of the public generally.³⁹ Dam removal may be a public good, but that does not alone justify additional payments from PacifiCorp's customers specifically.

VI. There is No Time Limit Associated with the Cap on Customer Contributions.

PacifiCorp asserts that the Customer Advocates' arguments are based on "the faulty premise that the total contribution of Oregon customers to dam removal is capped at \$184 million, inclusive of principal and interest."⁴⁰ PacifiCorp concludes that this premise is "faulty" because it finds that SB 76 and the KHSA did not cap the Customer Contribution, they simply capped the Customer Contribution by a certain date, specifically December 31, 2019.⁴¹ KRRC makes a similar argument.⁴²

PacifiCorp's and KRRC's arguments are perplexing given what seems to be unambiguous language contradicting it in SB 76 and the KHSA. ORS 757.736(3) specifies that the "surcharges imposed under this section may not exceed the amounts necessary to fund Oregon's share of the customer contribution of \$200 million" No date accompanies this funding milestone in the statute. Similarly, Section 4.1.3 of the KHSA makes clear that the "Customer Contribution and the California Bond Funding shall be the total state contribution and shall be referred to together as the 'State Cost Cap.'" Again, the KHSA does not say that this is the "total state contribution" as of a certain date. December 31, 2019, was simply the date by which Oregon's share of the

³⁹ Customer Advocates' Opening Brief at 9-12.

⁴⁰ PacifiCorp Opening Brief, p. 8.

⁴¹ PacifiCorp Opening Brief, p. 9.

⁴² KRRC Opening Brief at 11.

Customer Contribution was to be collected, not a measuring stick that Oregon could then surpass with accrued interest. If that were the case, it would have made no sense for the Commission to be as deliberate as it was in tracking progress toward the customer funding cap. As the Commission stated in initially approving the surcharges:

The interest rate is an assumption and actual earnings may vary over the period of time that the amounts collected under the surcharge are held in a trust account. The Company calculated the surcharges to equally spread the \$158.24 million amount over the collection period, resulting in an annual collection rate of approximately \$16.16 million per year

We find that Pacific Power correctly calculated the surcharges pursuant to the requirements of SB 76. As a primary intent of SB 76 is to implement the KHSA, we find it appropriate to honor the assumption of a 3.5 percent interest rate. Nevertheless, we are mindful of ICNU's challenges to that assumption, as well as to Staff's concerns that the 3.5 percent interest rate assumption is actually too high Consequently, we adopt Staff's proposed annual review process, finding that this approach provides a sufficient opportunity for the Company, Staff and interested parties to review and adjust the surcharges, as appropriate.⁴³

The Customer Contribution represents the total customer obligation, which the Commission "may not exceed;"⁴⁴ it is not a point-in-time estimate.

For similar reasons, PacifiCorp introduces a red herring when it argues that, for the Customer Advocates' argument to be logically consistent, the Commission would need to claw back any interest earned on funds after those funds were disbursed to KRRC.⁴⁵ Any interest KRRC earns on funds that have already been disbursed to KRRC is irrelevant to the Commission's decision on the remaining interest in the Oregon Trust Accounts because neither SB 76 nor the KHSA say anything about interest earned after funds are disbursed. Under SB 76, the Commission's directive was to establish surcharges "calculated based on a collection schedule that

⁴³ Order No. 10-364 at 16-17.

⁴⁴ ORS 757.736(3).

⁴⁵ PacifiCorp Opening Brief, p. 10.

will fund, by December 31, 2019, Oregon’s share of the customer contribution of \$200 million identified in the agreement in principle” while, to “the extent practicable,” setting the surcharges “so that total annual collections of the surcharges remain approximately the same during the collection period,” and accounting for “the actual and expected changes in energy usage over the collection period and ... the actual and expected changes in interest rates on the collected funds over the collection period.”⁴⁶ In other words, the Commission was required to ensure that: (a) \$184 million in surcharges and interest in total was collected; (b) that it was collected by December 31, 2019; and (c) that it was collected ratably over the ten-year period from January 1, 2010 through December 31, 2019, to the extent practicable. And, if amounts remain in the trust accounts above the \$184 million cap (because forecasts are often wrong), the Commission is directed to refund these amounts to customers or otherwise use them for customers’ benefit.⁴⁷ The statute simply does not apply after amounts are distributed to KRRC. In that case, the Funding Agreement between the Commission and KRRC applies, which includes specific provisions governing KRRC’s use of funding from the trust accounts. As long as KRRC complies with the terms of the Funding Agreement, whether it earned interest on amounts disbursed to it has no bearing on whether the Commission has the legal authority to disburse more than \$184 million from the trust accounts.⁴⁸

⁴⁶ ORS 757.736(7).

⁴⁷ ORS 757.736(9).

⁴⁸ Additionally, as a practical matter, the Customer Advocates note that, to the extent KRRC has earned interest on disbursed amounts, that interest is likely insubstantial. The Funding Agreement requires KRRC to identify project costs justifying disbursement. Funding Agreement § 7. Thus, disbursed funds were likely expended soon after KRRC received them.

VII. Funds Remaining in the Oregon Trust Accounts are Commingled Surcharge and Interest Revenues.

As anticipated by the Customer Advocates' Opening Brief,⁴⁹ PacifiCorp's fundamental platform in support of distributing the excess funds in the Oregon Trust Accounts is that the remaining balance was not "collected" from ratepayers, but rather is entirely comprised of accrued interest.⁵⁰ In addition to its deficient statutory analysis, which the Customer Advocates address above and in their Opening Brief, PacifiCorp's premise that there are no surcharge funds remaining in the Oregon Trust Accounts is unsupported and logically flawed. PacifiCorp asserts that it "understands that the collected amounts have been transferred to, and fully expended by, [KRRC]. Thus, there is no money 'collected' from customers via Schedule 199 that is even available for refund to customers; all that remains is interest."⁵¹ PacifiCorp has not explained how it has come to "understand" that funds, collected from four separate sources, (two surcharges and two interest-bearing accounts) and co-mingled over the course of up to fourteen years have been segregated upon disbursement to KRRC such that surcharge dollars were disbursed first, followed by a portion of the accrued interest, thereby allowing only interest to remain in the Oregon Trust Accounts. Staff notes that such an attempt at the identification of the source of the individual dollars, co-mingled within the Oregon Trust Accounts, is "not feasible".⁵² The Customer Advocates assert any such claim by PacifiCorp is a fallacy and ignores, in PacifiCorp's words, "a common sense understanding of how bank accounts work, how interest accrues, and how funds are expended in complex multi-year projects"⁵³

⁴⁹ See Customer Advocates Opening Brief, pp. 13-16.

⁵⁰ See PacifiCorp Opening Brief, pp. 6-8.

⁵¹ PacifiCorp Opening Brief, p. 8.

⁵² Staff Opening Brief, p. 10, ll, 19-20.

⁵³ PacifiCorp Opening Brief, p. 9.

PacifiCorp’s claim that “[a]s a practical matter, no surcharge dollars...remain in the Oregon [T]rust [A]ccounts”⁵⁴ cannot be supported and should be ignored. The Commission should reject KRRC’s request for access to funds in excess of those authorized from Oregon ratepayers for removal of the Klamath River Dams, and instead should order a refund of the remaining Oregon Trust Account balances to ratepayers.

VIII. *The Oregon Legislature Repeatedly Established Refunds as a Viable Statutory Option to Address Excess Funds*

In its final plea to avoid supporting the cost overruns experienced by KRRC related to removing the Klamath Dams, PacifiCorp argues that “significant practical issues” impair its ability to effectuate Oregon law. As an initial point, PacifiCorp, inaccurately and without support, asserts that the remaining balance in the Oregon Trust Accounts is entirely accrued interest. As discussed above, this claim is impossible to demonstrate and ignores the reality of the co-mingled income-bearing trust accounts. Accordingly, PacifiCorp’s complaint should be disregarded.

Moreover, PacifiCorp claims that “SB 76 cleverly avoided [the] dilemma [of refunding interest to ratepayers] by requiring refunds *only* if the surcharge was over collected (not if extra interest accrued), thus returning back to customers the same dollars that were collected.”⁵⁵ Unfortunately for PacifiCorp, Oregon statutes stand in clear opposition to its “clever” effort to avoid refunding ratepayers their due funds.

PacifiCorp’s claim that SB 76 established only one refund requirement, ORS § 757.736(9), related to over-collected surcharge revenues, is simply wrong. Indeed, in the very next subsection, ORS § 757.736(10), the Legislature established a second obligation to refund “any excess amounts

⁵⁴ PacifiCorp Opening Brief, p. 8.

⁵⁵ PacifiCorp Opening Brief, p. 11 (emphasis in original).

[that] remain in the trust accounts” in the event that one or more of the Klamath River Dams was not removed as anticipated. This refund obligation was not limited to surcharge amounts but applies to “any amounts” remaining within the Oregon Trust Accounts.

Furthermore, ORS 757.738(4) creates a third refund obligation trigger, requiring that “[i]f any amounts remain in a trust established under this section after the trustee makes all payments necessary for the costs of removing the Klamath River dams...the commission shall direct the trustee of the account to refund those amounts to customers or to otherwise use the excess amounts for the benefit of customers.” In either of these other scenarios, PacifiCorp would be faced with the same “practical issues” presented here.⁵⁶ These additional sections demonstrate that the Oregon Legislature clearly desired excess funds, whether sourced through surcharges or accrued interest, be refunded to Oregon ratepayers if the circumstances warrant it. PacifiCorp’s concerns that it does not have custody over the remaining trust amounts and that returning them could introduce a taxable event are not insurmountable obstacles. PacifiCorp is a sophisticated actor. The Commission should direct the trustee to return remaining funds to PacifiCorp with further direction to PacifiCorp to return those funds to its customers. To the extent this course of events is somewhat more complicated than the typical refund to customers PacifiCorp administers (such as when the corporate tax rate was reduced), PacifiCorp can figure it out and, to the extent necessary, file a refund plan with the Commission for review and approval.

CONCLUSION

As detailed above, and in the Customer Advocates’ and Staff’s Opening Briefs, the balance of funds currently in the Oregon Trust Accounts are amounts in excess of those authorized to be

⁵⁶ PacifiCorp Opening Brief, p. 12.

collected from Oregon ratepayers and remitted to KRRC. Oregon law clearly establishes that in the event such excess funds exist, they are to be refunded to Oregon ratepayers, or otherwise used for their benefit. Removal of the Klamath River Dams is required under Federal law and financial support above that authorized by the Oregon Legislature and used by the Commission to compare the benefits of dam removal versus relicensing, is improper, contrary to Oregon law and beyond the Commission's authority. Furthermore, KRRC's proper remedy lies with PacifiCorp, and the States of Oregon and California, to make good on the promise to provide contingency funding specifically intended to address just the circumstance in which KRRC finds itself. The Commission should, therefore, deny KRRC's request to modify the funding agreement.

Dated this 30th day of April, 2024.

Respectfully submitted,

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