

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)
_____)

DIRECT TESTIMONY OF STEVE ROTHERT

1 Introduction

2 **Q. Please state your name, business address, and position.**

3 A. My name is Steve Rothert. My business address is California Regional Office,
4 American Rivers, 432 Broad Street, Nevada City, CA 95959. I am employed as
5 California Director for American Rivers.

6 **Q. On whose behalf do you submit this testimony?**

7 A. I submit this testimony on behalf of American Rivers, California Trout, and Trout
8 Unlimited, each of whom is an intervenor.

9 **Q. Briefly describe the mission and operations of American Rivers.**

10 A. American Rivers is a nonprofit conservation organization, incorporated under the laws
11 of the District of Columbia, with its principal place of business in Washington, D.C.,
12 and regional offices around the country, including in Oregon and California. American
13 Rivers' mission is to restore and protect America's rivers for the benefit of fish,

1 wildlife and people. Our major programs include hydropower relicensing, river
2 restoration, fish barrier removal, flood management reform and instream flow
3 protection. With over 70,000 supporters throughout the nation, including approximately
4 950 in Oregon and 6,000 in California, American Rivers is the nation's leading river
5 conservation organization.

6 **Q. Please briefly describe the mission and operations of California Trout.**

7 A. Founded in 1971, California Trout's mission is to protect and restore wild trout and
8 steelhead waters throughout California. California Trout achieves this mission through
9 placed-based conservation in five regional offices: Southern California, Mammoth
10 Lakes, South Lake Tahoe, McKinleyville, and Mt. Shasta. Our Mt. Shasta staff have a
11 10 year history of working in the Klamath basin. California Trout has 7,500 members
12 statewide with headquarters in San Francisco.

13 **Q. Please briefly describe the mission and operations of Trout Unlimited.**

14 A. Trout Unlimited's mission is to conserve, protect, and restore North America's trout
15 and salmon fisheries and their watersheds. Among other programs, Trout Unlimited
16 implements on-the-ground and policy level hydropower reform efforts, including
17 intervention and participation in the licensing of the Klamath hydroelectric project over
18 the last decade. Trout Unlimited recently celebrated its fiftieth anniversary, and it is
19 the nation's largest non-profit, coldwater fisheries conservation organization with over
20 140,000 members nationwide, including Oregon and California where the Klamath

1 hydroproject is located. In Oregon, Trout Unlimited has approximately 2,600
2 members, many of whom are PacifiCorp ratepayers.

3 **Qualifications**

4 **Q. Briefly describe your educational background and business experience.**

5 A. I have a Bachelor's degree in ecology from University of California, Los Angeles, and
6 Master of Science in river management from University of California, Berkeley. I have
7 the following professional experience: Coordinator of the national Hydropower Reform
8 Coalition from 1994-1996, managing the coalition's efforts in dozens of hydropower
9 dam relicensing proceedings before the Federal Energy Regulatory Commission
10 (FERC) across the U.S.; Director of Southern Africa programs for International Rivers
11 Network (IRN) from 1996-2001, based in Botswana, where I managed IRN's efforts
12 related to international river and hydropower dam issues; and, California Director for
13 American Rivers from 2001 to present. In my current position I manage California
14 operations and programs related to hydropower relicensing, river restoration, fish
15 passage barrier removal, and Central Valley river and water management. I have been
16 actively involved in more than twenty hydropower relicensing proceedings in my
17 career.

18 **Q. Have you been personally involved in the licensing and other regulatory proceedings
19 and negotiations related to the Klamath Hydroelectric Settlement Agreement?**

20 A. Yes. On behalf of American Rivers, I have participated in the licensing proceeding
21 before the Federal Energy Regulatory Commission (FERC) since PacifiCorp filed its

1 Notice of Intent to seek a new license on December 15, 2000. I also have participated
2 in the water quality certification proceeding before the California Water Resources
3 Control Board (CWRCB) since PacifiCorp filed its initial request on March 26, 2006.
4 Finally, I participated actively in the negotiations that resulted in the Klamath
5 Hydropower Settlement Agreement (KHSA), which is the subject of this proceeding, as
6 well as the Klamath Basin Restoration Agreement (KBRA), which addresses other
7 facilities in the Klamath Basin.

8 **Public Benefits of KHSA, including Fairness and Reasonableness of Surcharge**

9 **Q. Please describe the general function of the relicensing process.**

10 A. A non-federal hydropower project is licensed by FERC under the Federal Power Act
11 Part I. A license has a term of not more than 50 years, subject to renewal. A license
12 must assure that a given project is best adapted to a comprehensive plan of development
13 of the affected lands and waters. That ultimate standard is applied based on the laws
14 and facts that exist at the time of a given licensing decision.

15 The Klamath Hydroelectric Project received its original license in 1954. It
16 complied with laws applicable at that time, including Oregon and California's
17 respective laws regulating water rights. If it were to proceed, FERC would assure that
18 the project would comply with laws applicable at the time of its relicensing decision,
19 including many laws that did not exist in 1954. These include: Clean Water Act
20 (1972), Endangered Species Act (1973), National Environmental Policy Act (1969),

1 Coastal Zone Management Act (1972), and Forest Land Planning and Management Act
2 (1976), among others.

3 **Q. What steps remain in the relicensing proceeding for this project?**

4 A. PacifiCorp's testimony describes the progress of the relicensing proceeding to date.
5 See PPL/100, Brockbank/6-9; PPL/102, "Klamath Chronology."

6 There would be several steps if the relicensing proceeding were not stayed as
7 proposed by the KHSA. The CWRCB and the Oregon Department of Environmental
8 Quality (ODEQ) would each make a final decision whether to issue a water quality
9 certification under Clean Water Act section 401(a)(1), and if so, under what conditions.
10 Further, as the basis for its decision, the CWRCB would prepare its own
11 Environmental Impact Report under the California Environmental Quality Act.

12 Under Clean Water Act section 401(a)(1), such certifications (or waivers) are a
13 condition precedent to a licensing decision. Upon receipt of these regulatory
14 documents, FERC would decide whether to issue a new license, incorporating water
15 quality and other mandatory conditions.

16 **Q. Absent KHSA, how long do you believe that the relicensing proceeding would have
17 continued?**

18 A. Through 2020 at the earliest, and probably years longer.

19 **Q. Why would it take so long? Didn't the proceeding start in 2000?**

20 A. The Federal Power Act does not set a deadline for a relicensing decision. Although the
21 statute and implementing rules encourage a schedule of six years or less, this

1 proceeding is an exception -- one of the most contentious and difficult such proceedings
2 in the 75-year history of the Federal Power Act.

3 Let me take us back to January 2008, when we started the focused negotiations
4 that later produced the KHSA. At that time, which was the eighth year of the
5 relicensing proceeding, there were fundamentally divergent views how best to advance
6 the public interest. PacifiCorp was pro-actively seeking a new license, while many
7 regulatory agencies, conservation groups, and tribes had concluded that license denial
8 was necessary to restore the threatened fisheries, water quality, and other non-
9 developmental uses of the Klamath River as required by applicable laws.

10 The evidentiary record at that time, including FERC's *Final Environmental*
11 *Impact Statement* (Nov. 2007), had not resolved many of the disputed factual issues
12 about the project's impacts on these resources or alternatives to mitigate them. There
13 were at least two legal issues that would probably be decided by the U.S. Court of
14 Appeals or even Supreme Court, since there is no controlling precedent. Under Clean
15 Water Act section 401(a)(1), does a state have the authority to deny water quality
16 certification and require dam removal instead? No state has done so, yet, in the 38-
17 year history of the Clean Water Act. Does FERC have authority to require
18 decommissioning over a licensee's objection that the project is still used and useful?
19 While FERC adopted a policy in 1994 claiming such authority, it has never exercised it
20 over the objection of a licensee.

1 Ultimately, the relicensing proceeding occurred within the context of systemic
2 disputes about the future of the Klamath Basin. This large basin (totaling nearly 16,000
3 square miles of lands) once had one of the most productive salmon fisheries on the
4 entire West Coast. The development of its water resources for hydropower, irrigation,
5 and other uses has resulted in routine litigation between stakeholders across many
6 decades. The relicensing proceeding promised to continue that past indefinitely.

7 **Q. What is the general function of settlements in relicensing proceedings?**

8 A. Beginning in the 1990's, FERC adopted rules and policies that encourage settlements as
9 the basis for relicensing decisions. This approach reduces litigation costs, risks, and
10 delays. It advances resource solutions that the affected licensees and other stakeholders
11 jointly support. See FERC, "Policy Statement on Hydropower Licensing Settlements"
12 (2006), available at <http://www.ferc.gov/legal/maj-ord-reg/policy-statements.asp>.

13 Indeed, I estimate that American Rivers, California Trout, and Trout Unlimited,
14 along with other members of the Hydropower Reform Coalition
15 (www.hydroreform.org), have entered into more than one hundred such settlements
16 with utility (as well as merchant generator) licensees since 1992. With few exceptions,
17 FERC has approved such settlements, on finding that they are superior to alternatives to
18 advance the public interest. Indeed, again with few exceptions, the utility licensees
19 have recovered in rates all of the costs required to implement these approved
20 settlements, because the relevant public utility commissions found that the costs
21 provided just and reasonable protection of ratepayer interests.

1 **Q. How does the KHSA advance the public interest in the Klamath Basin?**

2 A. The KHSA conditionally ends litigation between the signatories related to the
3 relicensing proceeding. Provided that implementation of the agreement continues
4 towards dam removal in 2020, the signatories will support a stay of the relicensing
5 proceeding. Under the new federal law that the signatories will support, that stay, and
6 the relicensing proceeding itself, will end in 2020 when the project is transferred to the
7 Dam Removal Entity for removal.

8 More importantly, dam removal will re-establish passage for anadromous and
9 riverine fish that project has blocked since 1918. That will contribute substantially to
10 the restoration of these public trust resources. The KHSA will be implemented in
11 concert with the KBRA, which undertakes systematically to resolve other water
12 resources disputes in a manner that will contribute to the sustainability of the affected
13 resources and communities.

14 **Q. How does the KHSA advance the interest of ratepayers?**

15 A. This Commission will decide this ultimate question. I further understand that SB 76
16 defines the scope of this proceeding and includes a specific focus on a fairness and
17 reasonableness review of the surcharges proposed under the KHSA. I respectfully
18 submit my view that the KHSA will advance the interests of ratepayers in several ways.

19 Assuming that it secured a new license, PacifiCorp would incur very substantial
20 new costs to continue a project which would probably lose 20% of its historical power
21 value due to a new minimum flow release schedule. These costs include: at least \$400

1 million in capital modifications, including fishways, necessary to comply with modern
2 environmental laws; and \$60 million in operational costs. See PPL/300, Scott 6-7.
3 The KHSA avoids that investment.

4 Assuming that FERC denied a new license and required PacifiCorp to remove
5 the dams, PacifiCorp would have exclusive fiscal responsibility for such performance.
6 Under the Federal Power Act section 801, a licensee always has exclusive responsibility
7 for performance of any license duty. In this scenario, PacifiCorp would recover its
8 costs of such compliance from ratepayers, whatever those costs may be. The KHSA
9 takes a different approach. As a condition precedent for dam removal, the KHSA calls
10 for new federal legislation which will amend the Federal Power Act as applied to this
11 project. PacifiCorp's responsibility for dam removal will be capped at \$200 million,
12 including \$172 million subject to this application. See PPL/104, §§ 4, 7.

13 In the ordinary course, PacifiCorp would retain liability for any damages which
14 the project causes to public or private rights, whether under a license or in the event
15 FERC required dam removal. Under the Federal Power Act section 10(c), compliance
16 with a license duty does not immunize the licensee against such damages. Again, in
17 this scenario, PacifiCorp would recover its costs of such compliance from ratepayers,
18 whatever those costs may be. The KHSA takes a different approach. It limits
19 PacifiCorp's existing liability under Federal Power Act section 10(c) to the period
20 between 2010 and dam removal. As a mandatory condition precedent for such dam
21 removal, the KHSA calls for new federal legislation that will authorize a Dam Removal

1 Entity (other than PacifiCorp) to perform dam removal and assume all such liability:
2 PacifiCorp and its ratepayers will be immune from such liability upon transfer. See
3 PPL/104, § 2.1.1.E.

4 Finally, PacifiCorp will establish a new relationship of good will in the Klamath
5 Basin. The KHSA commits the signatories to actively support implementation, and not
6 to bring litigation against PacifiCorp for continued operations of the project in
7 compliance with the KHSA. See PPL/104, §§ 2 - 2.1. Indeed, through its leadership
8 in resolving disputes related to this project, PacifiCorp has established substantial good
9 will with all such signatories. That good will and partnership will reduce PacifiCorp's
10 litigation risk until 2020, when the KHSA will end that risk. A systematic comparison
11 of the KHSA and non-KHSA futures demonstrates the fairness and reasonableness of
12 the surcharges proposed in this application.

13 **Q. Does that conclude your direct testimony?**

14 **A. Yes.**

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served the foregoing Direct Testimony of Steve Rothert upon all parties of record listed on the Service list below, via electronic mail and/or via mailing a copy properly addressed with first class postage prepaid.

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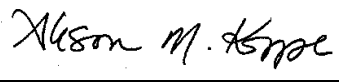
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