CABLE HUSTON BENEDICT HAAGENSEN & LLOYD LLP
ATTORNEYS AT LAW
SUITE 2000
1001 SW FIFTH AVENUE
PORTLAND, OREGON 97204-1136

TELEPHONE (503) 224-3092
FACSIMILE (503) 224-3176

RICHARD G. LORENZ

rlorenz@chbh.com
www.cablehuston.com

March 27, 2006

VIA ELECTRONIC FILING & FIRST CLASS MAIL

Oregon Public Utility Commission
550 Capitol St. NE, #215
PO Box 2148
Salem, OR 97308-2148
Attn: Filing Center

Re: UE 170 – Pacific Power & Light (dba PacifiCorp) Request for a General Rate Increase in the Company's Oregon Annual Revenues

Dear Filing Center:

Please find enclosed the original and one copy of the KLAMATH WATER USERS ASSOCIATION'S MOTION TO REOPEN RECORD OR, IN THE ALTERNATIVE REQUEST FOR OFFICIAL NOTICE in the above-referenced docket.

Thank you for your assistance. Should you have any questions regarding this matter, please feel free to contact me.

Very truly yours,

Richard Lorenz

Richard G. Lorenz

cc: UE-170 Service List (via email & first class mail)

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 170

In the Matter of the Request of	)	
	)	KLAMATH WATER USERS
PACIFIC POWER (d/b/a PacifiCorp)	)	ASSOCATION MOTION TO RE-OPEN
	)	RECORD OR, IN THE
Request for a General Rate Increase in the	)	ALTERNATIVE, REQUEST FOR
Company's Oregon Annual Revenues	)	OFFICIAL NOTICE
	)	
(Klamath Irrigator Rates)	)	

INTRODUCTION

Pursuant to OAR 860-013-0031 and 860-014-0050, the Klamath Water Users Association ("KWUA") requests that the Oregon Public Utility Commission ("Commission") re-open the record in this proceeding or, in the alternative, take official notice of a PacifiCorp pleading recently filed before the Federal Energy Regulatory Commission ("FERC"). This pleading is attached as Exhibit 1 to this Motion.

DISCUSSION

In a Memorandum dated March 13, 2006, Administrative Law Judge Grant specifically asked the parties to address the relationship between the annual charges PacifiCorp is required to pay to the Federal Treasury pursuant to the Federal Power Act and the Commission's authority to set retail rates. PacifiCorp has taken the position before this Commission that such annual charges are sufficient compensation to the Klamath Irrigation Project for any system benefits conferred upon PacifiCorp by the Irrigation Project.

Subsequent to the hearing and after the close of the record in this proceeding, however, PacifiCorp filed a pleading with FERC in which it argued that it should pay very little, if any, annual charges and that the system benefits conferred upon PacifiCorp by the Klamath Irrigation Project are "irrelevant" to such charges. In particular, PacifiCorp stated:

> Second Interior's and KWUA's assertions that adoption of the graduated flat rates methodology would fail to account for any water made available to PacifiCorp as a result of Klamath Irrigation Project ("KIP") operations are irrelevant. Even if it were assumed, *arguendo*, that KIP operations by USBR and Klamath Basin water users confer an added benefit upon Project operations, the [FERC's] decision in this Section 10(e)(1) proceeding must focus solely on benefits to PacifiCorp's generation facilities located *at Link River Dam*—namely, the East Side and West Side facilities.

In re PacifiCorp, FERC Project No. 2082-040, Answer of PacifiCorp to Comments Regarding Readjustment of Annual Charges for the Use of a Government Dam, p. 13 (March 20, 2006). *See* Exhibit 1 p. 13 (Internal citations and footnotes omitted). PacifiCorp's representation to FERC that the system benefits identified by KWUA are "irrelevant" to the annual charges set by FERC is directly responsive to the specific question posed by ALJ Grant on March 13.

The Commission should re-open the record in this proceeding to incorporate PacifiCorp's recent FERC filing. PacifiCorp's FERC filing was dated March 20, 2006, after the record closed in this proceeding. Therefore, it was not possible for the Commission to receive PacifiCorp's FERC filing prior to the close of the record in this proceeding. ORS 756.558 states:

> (1) At the conclusion of the taking of evidence, the Public Utility Commission shall declare the taking of evidence concluded. Thereafter no additional evidence shall be received except upon the order of the commission and a reasonable opportunity of the parties to examine any witnesses with reference to the additional evidence and otherwise rebut and meet such additional evidence.

Accordingly, the Commission can issue an order permitting PacifiCorp's pleading to be incorporated into the record.

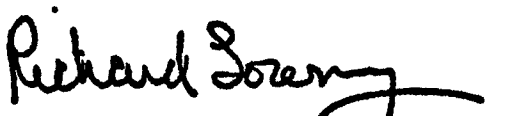
In the alternative, OAR 860-014-0050 permits the Commission or ALJ to take official notice of all matters that the courts of the State of Oregon may take judicial notice. An Oregon court may take judicial notice of facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See generally* ORS 183.450(4); ORE 201(b)(2); *In re Compensation of Calder*, 157 Or. App. 224, 227 (1998). Here, KWUA requests that the Commission review PacifiCorp's signed statements before a federal administrative body. There are no contested facts and the Commission can confirm the accuracy of the quoted text and PacifiCorp pleading by reviewing the docket on FERC's website.

CONCLUSION

The Commission should Re-open the record or, in the alternative, take official notice of PacifiCorp's representation to FERC that the system benefits provided by the Klamath Irrigation Project are "irrelevant" to the annual charges PacifiCorp is otherwise required to pay under the Federal Power Act.

DATED: March 27, 2006.

Respectfully submitted,



Edward A. Finklea, OSB # 84216
Richard Lorenz, OSB # 00308
Cable Huston Benedict Haagensen & Lloyd LLP
1001 SW Fifth Ave., Suite 2000
Portland, OR 97204-1136
Telephone: (503) 224-3092
Facsimile: (503) 224-3176
E-Mail: efinklea@chbh.com
rlorenz@chbh.com

Of Attorneys for the
Klamath Water Users Association

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PacifiCorp	)	**Project No. 2082-040**

ANSWER OF PACIFICORP TO COMMENTS REGARDING READJUSTMENT OF ANNUAL CHARGES FOR THE USE OF A GOVERNMENT DAM

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"),[1] PacifiCorp hereby answers the comments submitted by the U.S. Department of the Interior ("Interior")[2] and Klamath Water Users Association ("KWUA")[3] regarding the Commission's proposed readjustment of annual charges assessed to PacifiCorp for the Klamath Hydroelectric Project's ("Project") use of the U.S. Bureau of Reclamation's ("USBR") Link River Dam. For the reasons explained below, there is no merit to the comments submitted by Interior and KWUA; therefore, the Commission should proceed with its stated intention[4] of readjusting Government dam annual charges for the Project by adopting the graduated flat rates methodology effective April 17, 2006—the first day following the expiration of Contract No. 14-06-200-5076 between Interior and the California Oregon Power Company, dated January 31, 1956 ("1956 Contract").

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1 18 C.F.R. § 385.213.

2 Comments on Government Dam Use Charges for Klamath Project No. 2082, Project No. 2082-040 (filed Feb. 21, 2006) [hereinafter "Interior Comments"].

3 Request for Rehearing and Comments, Project No. 2082-039 (filed Feb. 21, 2006) [hereinafter "KWUA Comments"].

4 *See PacifiCorp*, 114 FERC ¶ 61,051, at P 30 (2006).

I. STATEMENT OF ISSUES

1. Pursuant to Sections 6 and 10(e)(1) of the Federal Power Act ("FPA"), together with authority reserved in the Project's license, the Commission is authorized to readjust Government dam annual charges at the Project at this time. 16 U.S.C. §§ 799, 803(e)(1); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992); *City of Seattle v. FERC*, 883 F.2d 1084 (D.C. Cir. 1989); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989); *Swinomish Tribal Cmty. v. FERC*, 627 F.2d 499, 506 (D.C. Cir. 1980); *Mont. Power Co. v. FPC*, 445 F.2d 739 (D.C. Cir. 1970); *Mont. Power Co. v. FPC*, 459 F.2d 863 (D.C. Cir. 1972); *Cal. Or. Power Co.*, 15 F.P.C. 14 (1956).

2. The Commission is without authority to establish Section 10(e)(1) annual charges that would compensate Klamath Basin water users. 16 U.S.C. § 803(e)(1); *FPC v. Conway Corp.*, 426 U.S. 271 (1976); *S.C. Pub. Serv. Auth. v. FERC*, 850 F.2d 788 (D.C. Cir. 1988); *PacifiCorp*, 114 FERC ¶ 61,051 (2006).

3. With the exception of any headwater benefits charges that may be appropriate under Section 10(f) of the FPA, federal law prohibits the Commission or any other agency of the United States from assessing any annual charge for PacifiCorp's use of Link River Dam that exceeds the graduated flat rates set forth in the Commission's regulations. 16 U.S.C. § 803(e)(2).

4. Continuation of the benefits provided under the 1956 Contract as a measure for Government dam annual charges would amount to an unreasonable assessment of annual charges. 16 U.S.C. § 803(e)(1); *City of Vanceburg v. FERC*, 571 F.2d 630, 647 (D.C. Cir. 1977); *PacifiCorp*, 114 FERC ¶ 61,051 (2006).

5. Interior and KWUA have failed to demonstrate that adopting an exception to the Commission's established program for assessing Government dam annual charges is warranted. 5 U.S.C. § 556(d); 16 U.S.C. §§ 803(e)(1), 803(e)(2); *Graham v. Ashcroft*, 358 F.3d 931 (D.C. Cir. 2004); *Reuters Ltd. v. FCC*, 781 F.2d 946 (D.C. Cir. 1986); *Ashland Exploration, Inc. v. FERC*, 631 F.2d 817 (D.C. Cir. 1980); *City of Vanceburg v. FERC*, 571 F.2d 630, 647 (D.C. Cir. 1977); 18 C.F.R. § 11.3(c); Annual Charges for Use of Government Dams and Other Structures Under Part I of the Federal Power Act, Order No. 379, FERC Stats. & Regs., Regs. Preambles 1982-1985 ¶ 30,570 (1984).

II. ANSWER

A. The Commission Is Authorized to Readjust Annual Charges for the Project's Use of Link River Dam.

Relying on Section 15(a)(1) of the FPA, Interior and KWUA in their comments continue to argue that the Commission cannot readjust annual charges for the Project's use of surplus water from Link River Dam during the annual license term.[5] Such assertions are inconsistent with the FPA and applicable precedent. It is true that Section

[5] Interior Comment at 1; KWUA Comment at 20; *see also* KWUA Comment at 8-10 (raising this same argument in its rehearing request).

15(a)(1) requires an annual license to be issued "under the terms and conditions of the existing license,"[6] and that the effect of this requirement is to "preserv[e] the status quo at the expiration of a long-term license . . . ."[7] But this does *not* mean that the Commission is precluded in all instances from readjusting annual charges during an annual license term. To the contrary, it is well established that the Commission may periodically readjust annual charges—even during an annual license term—pursuant to any statutory authority,[8] "if the underlying license contains a reservation of the Commission's authority to do so,"[9] or if the Commission and licensee mutually agree to such change.[10]

1. Under Section 10(e)(1) of the FPA and the Project's License, the Commission Possesses Reserved Authority to Readjust Government Dam Annual Charges.

Contrary to the assertions of Interior and KWUA in their comments that the Commission must preserve the "status quo," the FPA and the Project's license have *always* provided Commission authorization to readjust the Government dam annual charge. Section 10(e)(1) of the FPA itself authorizes periodic readjustment, providing that Government dam annual charges may be "readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten

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6 16 U.S.C. § 808(a)(1).

7 *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. FPC*, 510 F.2d 198, 205-06 (D.C. Cir. 1975).

8 *Mont. Power Co. v. FPC*, 445 F.2d 739, 748 (D.C. Cir. 1970) (holding that "the 1935 insertion in § 10(e), expressly putting the function of readjustment of rentals in the hands of the commission, applies to the generality of all such licenses outstanding"); *Mont. Power Co. v. FPC*, 459 F.2d 863 (D.C. Cir.), *cert. denied*, 408 U.S. 930 (1972) (affirming the Federal Power Commission's readjustment of annual charges under Section 10(e)).

9 *S. Cal. Edison Co.*, 106 FERC ¶ 61,212, at P 38 (2004) (citing *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 876 F.2d 109, 113-14 (D.C. Cir. 1989) ("*Platte River I*")).

10 *See* 16 U.S.C. § 799.

years thereafter upon notice and opportunity for hearing . . . ."[11] The Federal Power Commission ("FPC")—in the original licensing of this Project—held that this statutory authorization cannot be waived: "[T]he Commission could not bind itself not to readjust the charges at the end of the 20-year period and at periods of not less than 10 years thereafter as specified in section 10(e) of the act."[12]

In addition to this statutory authority to periodically readjust Government dam annual charges, the Project license itself reserves sufficient authority for the Commission to make such readjustments. The license was issued specifically:

> subject to the terms and conditions of the [FPA] which is incorporated by reference as part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the [FPA].[13]

Pursuant to the D.C. Circuit's ruling in *City of Seattle v. FERC*, the operative effect of this language makes the Project's license "subject to the Commission's right to adjust annual charges pursuant to section10(e)."[14] Other provisions of the license confirm the conclusion that the Commission reserved sufficient authority to readjust the Government dam annual charge for the Project. Article 35(d), for example, originally provided that:

> Upon termination of the [1956 Contract] other reasonable annual charges may be fixed with the approval of the Secretary of the Interior for the use of Link Dam under this license and the charges may be further readjusted from time to time, as provided in the first proviso of Section 10(e) of the Act.[15]

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11 *Id.* § 803(e)(1).

12 *Cal. Or. Power Co.*, 15 F.P.C. 14, 18 (1956).

13 *Cal. Or. Power Co.*, 18 F.P.C. 364, 367 (1957) (Ordering Paragraph (A)).

14 *City of Seattle v. FERC*, 883 F.2d 1084, 1088 (D.C. Cir. 1989).

15 *Cal. Or. Power Co.*, 13 F.P.C. 1, 11 (1954).

In sum, while the FPC determined in the original licensing proceeding that the 1956 Contract constituted "reasonable annual charges under *present* conditions" (*i.e.*, conditions in 1956),[16] it also reserved authority to require readjustments "in the event such charges become unreasonable."[17] Therefore, neither Section 15(a)(1) nor any other law, regulation or provision of the 1956 Contract prohibits such action during any annual license term. The Commission correctly concluded that it is authorized to readjust the Government dam annual charge for the Project.[18]

2. Under Section 6 of the FPA, the Commission Can Amend the License Upon Mutual Agreement with PacifiCorp.

More fundamentally, by relying upon Section 15(a)(1) and caselaw snippets regarding the preservation of the "status quo," Interior and KWUA presume a critical factual element that simply is not present here: the licensee's objection to the proposed license amendment or annual charge readjustment. While Section 6 of the FPA prevents the Commission—in the absence of statutory authority or authority reserved under the license—from unilaterally amending the license,[19] nothing precludes an amendment of an annual license where there is "mutual agreement between the licensee and the Commission."[20] Where, as here, the licensee does not oppose the Commission's proposed readjustment of annual charges, there is no Section 6 barrier, and there simply cannot be any "*prima facie* violation of Section 15(a)(1)," as alleged by KWUA.[21]

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16 *Cal. Or. Power Co.*, 15 F.P.C. 14, 20 (1956) (emphasis added).

17 *Id.*

18 *See PacifiCorp*, 114 FERC ¶ 61,051, at P 29 (2006).

19 *See Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 32 (D.C. Cir. 1992); *Platte River I*, 876 F.2d at 113-14.

20 16 U.S.C. § 799.

21 KWUA Comments at 11.

Rather, the Commission under such circumstances may amend the license, even if doing so would disrupt the "status quo."[22]

B. The Commission Is Without Authority to Establish Section 10(e)(1) Annual Charges to Compensate Klamath Basin Water Users.

In its comments, Interior proposes that the Commission should establish Section 10(e)(1) annual charges in a manner that compensates not only the United States for PacifiCorp's use of a Government dam, but also Klamath Basin water users.[23] The Commission should reject Interior's proposal. Section 10(e)(1) of the FPA authorizes the assessment of annual charges to be paid "to the *United States*."[24] It does not authorize the Commission to assess annual charges to be paid to any other entity. Continuation of the provisions of the 1956 Contract establishing fixed power rates as the measure of Government dam annual charges as proposed by Interior,[25] moreover, would require the Commission to exercise regulation over PacifiCorp's retail rates—an action that unquestionably would be outside its jurisdiction.[26] And the D.C. Circuit in *South Carolina Public Service Authority v. FERC* held that the Commission lacks authority to require compensation in matters outside its jurisdiction.[27]

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[22] *See Swinomish Tribal Cmty. v. FERC*, 627 F.2d 499, 506 (D.C. Cir. 1980); *PacifiCorp*, 97 FERC ¶ 61,348, at p. 62,625 (2001) (stating that an annual license "may, in the right circumstances, be subject to amendment"); *S. Cal. Edison Co.*, 94 FERC ¶ 61,326, at p. 62,215 (2001) (stating that "an annual license can be amended in the same manner as an original license"); *e.g.*, *Niagara Mohawk Power Corp.*, 90 FERC ¶ 61,148 (2000); *Mont. Power Co.*, 89 FERC ¶ 62,182 (1999).

[23] Interior Comments at 1, 3.

[24] 16 U.S.C. § 803(e)(1) (emphasis added).

[25] Interior Comments at 1.

[26] *FPC v. Conway Corp.*, 426 U.S. 271, 276 (1976); *PacifiCorp*, 114 FERC ¶ 61,051, at P 29 (2006) (holding that "this Commission clearly has no jurisdiction over PacifiCorp's retail rates").

[27] *S.C. Pub. Serv. Auth. v. FERC*, 850 F.2d 788, 791-92 (D.C. Cir. 1988).

C. The Commission Is Statutorily Precluded from Assessing Government Dam Annual Charges that Exceed the Graduated Flat Rates in Its Regulations.

The comments submitted by Interior and KWUA amount to nothing more than a transparent attempt to extract from PacifiCorp a Government dam annual charge that exceeds the charges established under the Commission's graduated flat rates methodology. Yet, once the 1956 Contract expires on April 16, 2006, the Commission will be without authority to impose an annual charge that exceeds the graduated flat rates set forth in its regulations. Upon expiration of the 1956 Contract, the license for the Project will no longer "fix a specific charge" for PacifiCorp's use of Link River Dam.[28] Section 10(e)(2) of the FPA, which establishes the "maximum annual charge" for the use of a Government dam,[29] will then apply. Section 10(e)(2) provides:

> In the case of licenses involving the use of Government dams or other structures owned by the United States, the charges fixed (or readjusted) by the Commission under paragraph (1) for the use of such dams or structures shall not exceed 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces in any year, 1½ mills per kilowatt-hour for over 40 up to and including 80 gigawatt-hours in any year, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours in any year.[30]

Accordingly, the Commission is authorized *only* to assess an annual charge for PacifiCorp's use of Link River Dam up to the amounts set forth in its graduated flat rates—as such rates adopt the maximum amounts allowable under Section 10(e)(2).[31] Moreover, except for any applicable Section 10(f) headwater benefits charges, no federal agency including the Commission, Interior, or USBR—can attach any other fee, rental

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[28] 16 U.S.C. § 803(e)(3); *see Cal. Or. Power Co.*, 18 F.P.C. 364, 368 (1957) (amending Article 35(d)).

[29] *JDJ Energy Co.*, 69 FERC ¶ 62,034, at p. 64,046 (1994).

[30] 16 U.S.C. § 803(e)(2).

[31] *See* 18 C.F.R. § 11.3(b).

payment or other charge for PacifiCorp's use of Link River Dam. Section 10(e)(2) unambiguously provides: "Except as provided in subsection (f), such charge shall be the *only* charge assessed by *any agency of the United States* for the use of such dams or structures."[32]

D. Continuation of the Benefits Provided Under the 1956 Contract as a Measure for Government Dam Annual Charges Would Result in the Assessment of Unreasonable Annual Charges.

Even assuming, *arguendo*, that Section 10(e)(2) would not be triggered upon expiration of the 1956 Contract, the Commission may not adopt the energy pricing provisions of the 1956 Contract as the Section 10(e)(1) annual charge, as advocated by Interior and KWUA.[33] Section 10(e)(1) of the FPA only authorizes the Commission to assess a "*reasonable* annual charge[]" for the use of USBR's Link River Dam.[34] And, while Section 10(e)(1) provides that licenses for the use of a Government dam cannot be "issued free of charge," it also directs the Commission, when fixing annual charges, to "seek to avoid increasing the price to the consumers of power by such charges . . . ."[35] As the D.C. Circuit held in *City of Vanceburg v. FERC*:

> [W]e do not suggest that the Commission is free automatically to assess as charges the full amount of the value conferred on a licensee. Section 10(e) sets a maximum and a minimum charge, and directs the Commission to exercise its discretion and expert judgment in fixing a "reasonable" charge somewhere within this range. The maximum charge is the fully compensatory charge represented by the full value, or "net benefit," of the dam-use license. The second proviso of Section 10(e) sets the minimum charge: ". . . but in no case shall a license be issued free of charge" for use

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[32] 16 U.S.C. § 803(e)(2) (emphasis added); *see Kittitas Reclamation Dist.*, 73 FERC ¶ 62,107, at p. 64,245 (1995).

[33] Interior Comments at 1; KWUA Comments at 20-21.

[34] 16 U.S.C. § 803(e)(1) (emphasis added); *see City of Tacoma v. FERC*, 331 F.3d 106, 115 (D.C. Cir. 2003) (holding that the Commission has "exclusive responsibility" to establish reasonable annual charges under Section 10(e)(1)).

[35] 16 U.S.C. § 803(e)(1).

> of a Government dam. Within this range, the Commission must set a reasonable charge by considering all relevant factors and arriving at a charge which minimizes consumer costs, encourages power development, but at the same time, compensates the Government to some extent for the benefit it has conferred on the licensee.[36]

The Government dam annual charge advocated by Interior and KWUA would result in the assessment of an unreasonable annual charge. It would be unreasonable for the Commission to impose a $7.2 million annual charge[37] for the East Side and West Side developments' utilization of surplus water from Link River Dam—which developments have a combined installed capacity of only 3.8 megawatts.[38] Such annual charge would dwarf even the "fully compensatory charge" discussed in *City of Vanceburg*, as the energy production of these two developments, which averages only 18,820 megawatt-hours per year,[39] cannot possibly have a value of $0.383 per kilowatt-hour.[40] Indeed, such annual charge would exceed the graduated flat rates assessed to the Project by a staggering factor of 382[41] and eclipse by more than $1 million each year the combined total of Government dam annual charges assessed to *all other projects in the United*

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36 *City of Vanceburg v. FERC*, 571 F.2d 630, 647 (D.C. Cir. 1977) (footnote omitted).

37 *See* Declaration of William R. Griffith ¶ 3, Answer of PacifiCorp to Department of the Interior Petition for Declaratory Order, App. B, Project No. 2082-027 (filed Nov. 2, 2005) [hereinafter, "Answer to Petition"].

38 PacifiCorp has previously demonstrated that the East Side and West side facilities are the only Project developments that utilize "surplus water or water power" from Link River Dam. *See* Comments of PacifiCorp Regarding Proposed Readjustment of Annual Charges for the Use of a Government Dam at 10-13, Project No. 2082-040 (filed Feb. 21, 2006) [hereinafter "PacifiCorp Comments"].

39 *See* Application for New License, Project No. 2082-027, Exhibit B §§ B7.3.1, B7.4.2 (filed Feb. 25, 2004) (stating 15,400 MWh as the 30-year long-term average energy production for East Side and 3,420 MWh for West Side).

40 In contrast, Oregon's standard tariff retail rate averages $0.072 per kilowatt-hour, or less than one-fifth of this amount.

41 Based on an average annual generation of 18,820 MWh, the Government dam annual charge for East Side and West Side would total $18,820. *See* 18 C.F.R. § 11.3(b).

States.[42] Such charge would unquestionably violate Section 10(e)(1)'s mandate to "avoid increasing the price to the consumers" of Project power,[43] as it would burden PacifiCorp's customers as a whole with charges grossly in excess of those allowable under the approved methodology.

E. Interior and KWUA Have Failed to Demonstrate that Adopting an Exception to the Commission's Established Program for Assessing Government Dam Annual Charges Is Warranted.

Because the 1956 Contract will expire on April 16, 2006, the Commission has determined to apply its well-established graduated flat rates methodology for assessing annual charges for PacifiCorp's utilization of surplus water from Link River Dam.[44] PacifiCorp, moreover, has demonstrated that the energy pricing terms of the 1956 Contract are greatly in excess of the reasonable annual charges mandated by Section 10(e)(1).[45] The Commission's determination to apply its generally-applicable regulations in this case, therefore, is *prima facie* reasonable because even though the Commission has discretion under Section 10(e)(1) to formulate Government dam annual charges within the limits prescribed under Section 10(e)(2),[46] it "must adhere to internally promulgated regulations limiting the exercise of that discretion,"[47] *i.e.*, the graduated flat rates established by regulation. As proponents of an exception to the generally-applicable regulation for calculating Government dam annual charges, Interior and

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[42] It is PacifiCorp's understanding that the Commission collects approximately $6.2 million annually in Government dam annual charges.

[43] 16 U.S.C. § 803(e)(1).

[44] *PacifiCorp*, 114 FERC ¶ 61,051, at PP 29-30 (2006).

[45] *See supra* Part II.D; Answer to Petition at 14-15.

[46] *See supra* Part II.C.

[47] *Graham v. Ashcroft*, 358 F.3d 931, 932 (D.C. Cir. 2004) (citing *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987)). Indeed, "[i]t is elementary that an agency must adhere to its own rules and regulations." *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986).

KWUA have failed to carry their heavy burden under 5 U.S.C. § 556(d)[48] to make an "extraordinary showing" that an exception to the Commission's regulation is warranted in this case.[49]

First, Interior's objection that the graduated flat rates methodology would "not fully compensate the government" is incorrect.[50] While adoption of the graduated flat rates methodology certainly will provide less of a benefit to Interior and KWUA than that currently provided by PacifiCorp under the 1956 Contract, such reduction does not mean that adoption of the graduated flat rates would under-compensate the federal government. As noted above, the D.C. Circuit in *City of Vanceburg* held that "[t]he object under Section 10(e) is to compute *reasonable* annual charges for the use of government dams."[51] And the Commission, recognizing that a reasonable annual charge must meet "the statutory goals of providing a reasonable return to the Federal government, encouraging hydropower development, especially small projects, and minimizing costs to consumers,"[52] found that the graduated flat rates methodology best balanced these goals:

> The Commission has chosen the three basic rate levels in this final rule (1, 1½, and 2 mills) because in our judgment they represent a reasonable

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48 *See Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000); *Pub. Serv. Comm'n v. FERC*, 866 F.2d 487, 488 (D.C. Cir. 1989) (holding that "the proponent of change bears the burden"); *First Nat'l Bank of Bellaire v. Comptroller*, 697 F.2d 674, 683 (5th Cir. 1983) (holding that under 5 U.S.C. § 556(d), the proponent of a statutory exception carried the burden).

49 *Ashland Exploration, Inc. v. FERC*, 631 F.2d 817, 823 (D.C. Cir. 1980) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1156 (D.C. Cir. 1969); *Basic Media, Ltd. v. FCC*, 559 F.2d 830, 833-34 (D.C. Cir. 1977); *Indus. Broad. Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970)). "An applicant for such a waiver has the burden of convincing the agency that it should depart from its general rules and of demonstrating to the reviewing court that the agency's reasons for refusing to do so were so insubstantial so as to amount to an abuse of discretion." *Id.* (citing *Sudbrink Broad., Inc. of Florida v. FCC*, 509 F.2d 418, 422 (D.C. Cir. 1974); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970)).

50 Interior Comments at 1.

51 *City of Vanceburg*, 571 F.2d at 643 (emphasis in original).

52 Annual Charges for Use of Government Dams and Other Structures Under Part I of the Federal Power Act, Order No. 379, FERC Stats. & Regs., Regs. Preambles 1982-1985 ¶ 30,570, at p. 30,947 (1984).

> balance among the statutory goals of minimizing costs to consumers and encouraging hydro development while obtaining reasonable compensation for the Government. The concept of reasonableness is, of course, imprecise. In this instance, however, Congress specified other goals to guide the Commission in deciding what is reasonable compensation: minimizing costs to consumers and encouraging hydro development, especially small projects.[53]

Thus, there is no merit to Interior's bare assertion that the graduated flat rates methodology would not fully compensate the federal government in this case. The Commission specifically developed this methodology pursuant to all the goals set forth in the statute; the regulation already assesses the full amount authorized by Congress;[54] and, as already shown herein, Interior's underlying objective—preservation of the pricing terms of the 1956 Contract—would result in over-compensation to the federal government.[55]

Second, Interior's and KWUA's assertions that adoption of the graduated flat rates methodology would fail to account for any water made available to PacifiCorp as a result of Klamath Irrigation Project ("KIP") operations are irrelevant.[56] Even if it were assumed, *arguendo*, that KIP operations by USBR and Klamath Basin water users confer an added benefit upon Project operations,[57] the Commission's decision in this Section 10(e)(1) proceeding must focus solely on benefits to PacifiCorp's generation facilities located *at Link River Dam*—namely, the East Side and West Side facilities.[58] The

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53 *Id.*

54 16 U.S.C. § 803(e)(2); *see supra* Part II.C.

55 *See supra* Part II.D.

56 *See* Interior Comments at 2; KWUA Comments at 21.

57 It is PacifiCorp's position that operation of the KIP does *not* confer any operational benefit to the Project. *See, e.g.*, Answer to Petition at 14-15; Headwater Benefits Basin Screening Report, Klamath River Basin, Docket No. HB32-96-11 (issued Aug. 1998).

58 *See* PacifiCorp Comments at 10-13.

graduated flat rates methodology would capture such benefits—it simply assesses a charge for each and every kilowatt-hour generated at these developments.[59] Any additional water made available to PacifiCorp for generational purposes at Link River Dam as a result of KIP operations, therefore, would increase PacifiCorp's annual charge for its use of surplus water from Link River Dam. As the Commission explained when promulgating the graduated flat rates methodology:

> [T]he graduated flat rates approach . . . will impose charges directly in proportion to the benefits received by the license—the amount of energy a project produces. . . . [B]y basing the graduated rates on kWh produced (and not on installed capacity), the individual characteristics of projects will directly affect how much the licensee will be paying each year as its annual charge.[60]

Benefits from KIP operations, if any, realized at PacifiCorp's facilities located downriver from Link River Dam are not realized at a Government dam and, while they may be applicable in an assessment of headwater benefits under Section 10(f),[61] are thus irrelevant to the Commission's evaluation in this proceeding.

Third, KWUA is incorrect that it would be inappropriate to adopt the graduated flat rates in recognition of a long-standing, complex relationship between the federal government and the licensee.[62] It is commonplace for licensees to enter into operational agreements for their hydroelectric projects located at a government dam.[63] In fact, where the licensee operates the federal dam or provides other benefits to the federal

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[59] *See* 18 C.F.R. § 11.3(b); *see also id.* § 11.3(c)(1) (requiring licensees to report, *inter alia*, "the gross amount of energy generated during the preceding fiscal year").

[60] Order No. 379, FERC Stats. & Regs., Regs. Preambles 1982-1985 ¶ 30,570, at p. 30,948.

[61] 16 U.S.C. § 803(f).

[62] KWUA Comments at 21.

[63] *See, e.g.*, *Cont'l Hydro Corp.*, 79 FERC ¶ 61,292 (1997) (Appendix A); *Boise-Kuna Irrigation Dist.*, 46 FERC ¶ 61,385 (1989) (Article 117); *Louisville Gas & Elec. Co.*, 113 FERC ¶ 62,078 (2005) (Article 307); *Price Dam P'ship*, 112 FERC ¶ 62,078 (2005) (Article 311); *JDJ Energy Co.*, 69 FERC ¶ 62,034 (1994) (Article 308).

government, such as dam construction or power benefits, the Commission's regulations specifically contemplate the granting of a *credit back to the licensee* of some or all of the Government dam annual charge—not the imposition of an exorbitant charge such as that advocated by KWUA.[64]

Fourth, Interior's contradictory approach of raising on one hand the issue of whether Congress has authorized USBR to develop power at the KIP, while conceding on the other hand that the issue is irrelevant in determining the appropriate annual charge to be assessed under Section 10(e)(1), is baffling.[65] Regardless of any USBR authority to develop hydropower facilities in the Klamath basin asserted by Interior,[66] Section 10(e)(2) of the FPA, as discussed above, provides that with the exception of any

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[64] *See* 18 C.F.R. § 11.3(d).

[65] Interior Comments at 2. Interior's allegation that "PacifiCorp has asserted that Interior is not entitled to any compensation for PacifiCorp's use of surplus water from the Klamath Reclamation Project because there was never any authority for the government to develop power at the Klamath Reclamation Project," completely misstates PacifiCorp's position in this proceeding. *Id.* Throughout this proceeding, PacifiCorp has consistently recognized its obligations to compensate the United States for the use of USBR's Link River Dam under Section 10(e)(1) of the FPA. *See* Answer to Petition at 6-7, 13-14, 16-17; *see generally* PacifiCorp Comments. And to the extent that Section 17 of the FPA requires the remittal to Interior of any proceeds from such annual charges, Interior will receive direct compensation for PacifiCorp's use of Link River Dam. *See* 16 U.S.C. § 810(a); Answer to Petition at 22-23.

[66] Interior Comments at 2-3. Although the issue of USBR's congressional authority to develop hydropower at the KIP is irrelevant for the purposes of establishing Section 10(e)(1) annual charges for PacifiCorp's use of Link River Dam, PacifiCorp disagrees with Interior's assessment of this issue. *See id.* It is PacifiCorp's view that, absent a specific reservation of authority under reclamation law to develop power, USBR has no authority to lease or sell power or power privilege at a project. *See Uncompahgre Valley Water Users Assoc. v. FERC*, 785 F.2d 269, 274 (10th Cir. 1986); *see also* Memorandum of Understanding Between the Federal Energy Regulatory Commission and the Department of Interior, Bureau of Reclamation, 58 Fed. Reg. 3269 (Jan. 8, 1993). No such specific authority has been granted for the KIP. The Klamath Act of February 9, 1905, only authorized the Secretary of the Interior to vary Klamath River basin lake levels "in carrying out any irrigation project that may be undertaken by him under the terms and conditions of the national reclamation Act." 43 U.S.C. § 601. The statute makes no mention of power development and there has been no subsequent statutory authorization for USBR to develop power at the KIP. In addition, neither the Secretary of the Interior's May 15, 1905, authorization of the KIP nor the May 1, 1905, report of the Board of Consulting Engineers upon which it is based mention hydroelectric power development. After Congress, in 1910, amended the project feasibility procedures to require Presidential authorization, President Taft approved the project on January 5, 1911. 46 Cong. Rec. H581-2 (Jan. 5, 1911), S646-7 (Jan. 9, 1911). Again, there was no mention of power development. In short, none of the authorizations (administrative, congressional or Presidential) for the KIP provides an authorization for USBR to develop power.

headwater benefits assessed under Section 10(f),[67] the Section 10(e)(1) Government dam annual charge "shall be the *only charge assessed by any agency of the United States*" for PacifiCorp's use of Link River Dam.[68]

III. CONCLUSION

WHEREFORE, for the foregoing reasons, there is no merit to the comments filed by Interior and KWUA, and the Commission should readjust the Government dam annual charge at the Project by adopting the graduated flat rates methodology for the Project's East Side and West Side developments—the only Project facilities that "utilize surplus water or water power from" Link River Dam.[69]

Respectfully submitted,

Michael A. Swiger
Steven Richardson
Charles R. Sensiba
E. Brendan Shane
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, N.W.
Seventh Floor
Washington, DC 20007-3877

Counsel for PacifiCorp

Dated: March 20, 2006

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[67] 16 U.S.C. § 803(f).

[68] *Id.* § 803(e)(2) (emphasis added).

[69] *Id.* §§ 797(e), 817(1); *see* PacifiCorp Comments at 10-13.

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 20th day of March, 2006.

Charles R. Sensiba
Van Ness Feldman, P.C.
1050 Thomas Jefferson Street, N.W.
Seventh Floor
Washington, DC 20007-3877
Telephone: (202) 298-1800
Facsimile: (202) 338-2416

CERTIFICATE OF SERVICE

I CERTIFY that I have on this day served the foregoing document upon all parties of record in this proceeding by delivery a copy via electronic mail or by mailing a copy properly addressed with first class postage prepaid.

Dated in Portland, Oregon, this 27th day of March, 2006.

Edward A. Finklea, OSB # 84216
Richard Lorenz, OSB #00308
Cable Huston Benedict Haagensen & Lloyd LLP
1001 SW Fifth Ave., Suite 2000
Portland, OR 97204-1136
Telephone: (503) 224-3092
Facsimile: (503) 224-3176
E-Mail: efinklea@chbh.com
rlorenz@chbh.com

Of Attorneys for the
Klamath Water Users Association

ACTIONS | **UE-170** | SCHEDULE

SERVICE LIST (Parties)

W=Waive Paper service | **Q=Confidential** | Sort by Last Name | Sort by Company Name

NANCY NEWELL	3917 NE SKIDMORE ST PORTLAND OR 97211 ogec2@hotmail.com
ALEXANDER, BERKEY, WILLIAMS & WEATHERS LLP	
SCOTT W WILLIAMS	2030 ADDISON STREET, SUITE 410 BERKELEY CA 94704 swilliams@abwwlaw.com
ALEXANDER, BERKEY, WILLIAMS & WEATHERS, LLP	
CURTIS G BERKEY	2030 ADDISON STREET, SUITE 410 BERKELEY CA 94704 cberkey@abwwlaw.com
BOEHM KURTZ & LOWRY	
KURT J BOEHM **(Q)** ATTORNEY	36 E SEVENTH ST - STE 1510 CINCINNATI OH 45202 kboehm@bkllawfirm.com
BOEHM, KURTZ & LOWRY	
MICHAEL L KURTZ **(Q)**	36 E 7TH ST STE 1510 CINCINNATI OH 45202-4454 mkurtz@bkllawfirm.com
CABLE HUSTON BENEDICT HAAGENSEN & LLOYD LLP	
EDWARD A FINKLEA **(Q)**	1001 SW 5TH - STE 2000 PORTLAND OR 97204 efinklea@chbh.com
CITIZENS' UTILITY BOARD OF OREGON	
LOWREY R BROWN **(Q)**	610 SW BROADWAY - STE 308 PORTLAND OR 97205 lowrey@oregoncub.org
JASON EISDORFER **(Q)**	610 SW BROADWAY STE 308 PORTLAND OR 97205 jason@oregoncub.org
COMMUNITY ACTION DIRECTORS OF OREGON	
JIM ABRAHAMSON **(Q)** COORDINATOR	PO BOX 7964 SALEM OR 97303-0208 jim@cado-oregon.org
DANIEL W MEEK ATTORNEY AT	

LAW

DANIEL W MEEK **(Q)** ATTORNEY AT LAW	10949 SW 4TH AVE PORTLAND OR 97219 dan@meek.net

DAVISON VAN CLEVE PC

MELINDA J DAVISON **(Q)**	333 SW TAYLOR - STE 400 PORTLAND OR 97204 mail@dvclaw.com
MATTHEW W PERKINS **(Q)**	333 SW TAYLOR - STE 400 PORTLAND OR 97204 mwp@dvclaw.com

DEPARTMENT OF JUSTICE

DAVID HATTON **(Q)** ASSISTANT ATTORNEY GENERAL	REGULATED UTILITY & BUSINESS SECTION 1162 COURT ST NE SALEM OR 97301-4096 david.hatton@state.or.us
JASON W JONES **(Q)** ASSISTANT ATTORNEY GENERAL	REGULATED UTILITY & BUSINESS SECTION 1162 COURT ST NE SALEM OR 97301-4096 jason.w.jones@state.or.us
JANET L PREWITT **(Q)** ASST AG	1162 COURT ST NE SALEM OR 97301-4096 janet.prewitt@doj.state.or.us

HOOPA VALLEY TRIBE FISHERIES DEPT

MICHAEL W ORCUTT	PO BOX 417 HOOPA CA 95546 director@pcweb.net

KLAMATH OFF-PROJECT WATER USERS INC

EDWARD BARTELL	30474 SPRAGUE RIVER ROAD SPRAGUE RIVER OR 97639

KLAMATH WATER USERS ASSOCIATION

GREG ADDINGTON EXECUTIVE DIRECTOR	2455 PATTERSON ST - STE 3 KLAMATH FALLS OR 97603 greg@cvcwireless.net

MORISSET, SCHLOSSER, JOZWIAK & MCGAW

THOMAS P SCHLOSSER	801 SECOND AVE - STE 1115 SEATTLE WA 98104-1509 t.schlosser@msaj.com

OFFICE OF THE REGIONAL SOLICITOR

STEPHEN R PALMER	2800 COTTAGE WAY - RM E-1712 SACRAMENTO CA 95825

OREGON DEPARTMENT OF ENERGY

PHIL CARVER	625 MARION ST NE STE 1 SALEM OR 97301-3742 philip.h.carver@state.or.us

OREGON ENERGY COORDINATORS ASSOCIATION

JOAN COTE **(Q)** PRESIDENT	2585 STATE ST NE SALEM OR 97301 cotej@mwvcaa.org

OREGON NATURAL RESOURCES COUNCIL

JIM MCCARTHY **(Q)** POLICY ANALYST	PO BOX 151 ASHLAND OR 97520 jm@onrc.org
STEVE PEDERY	5825 NORTH GREELEY AVENUE PORTLAND OR 97214 sp@onrc.org

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOC

GLEN H SPAIN **(Q)** NW REGIONAL DIRECTOR	PO BOX 11170 EUGENE OR 97440-3370 fish1ifr@aol.com

PACIFIC POWER & LIGHT

PAUL M WRIGLEY MANAGER - REGULATION	825 NE MULTNOMAH STE 800 PORTLAND OR 97232 paul.wrigley@pacificorp.com

PORTLAND GENERAL ELECTRIC

RATES & REGULATORY AFFAIRS	RATES & REGULATORY AFFAIRS 121 SW SALMON ST 1WTC0702 PORTLAND OR 97204 pge.opuc.filings@pgn.com
DOUGLAS C TINGEY	121 SW SALMON 1WTC13 PORTLAND OR 97204 doug.tingey@pgn.com

PUBLIC UTILITY COMMISSION

JUDY JOHNSON **(Q)**	PO BOX 2148 SALEM OR 97308-2148 judy.johnson@state.or.us
BILL MCNAMEE	PO BOX 2148 SALEM OR 97308-2148 bill.mcnamee@state.or.us

RFI CONSULTING INC

RANDALL J FALKENBERG **(Q)**	PMB 362 8351 ROSWELL RD ATLANTA GA 30350

	consultrfi@aol.com

STOEL RIVES LLP

JOHN M ERIKSSON	201 SOUTH MAIN ST SALT LAKE CITY UT 84111 jmeriksson@stoel.com
KATHERINE A MCDOWELL **(Q)**	900 SW FIFTH AVE STE 1600 PORTLAND OR 97204-1268 kamcdowell@stoel.com

WATERWATCH OF OREGON

LISA BROWN **(Q)**	213 SW ASH ST - STE 208 PORTLAND OR 97204 lisa@waterwatch.org
JOHN DEVOE **(Q)**	213 SW ASH ST - STE 208 PORTLAND OR 97204 john@waterwatch.org