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August 29, 2005

Via Electronic and US Mail

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

Re: In the Matter of PACIFIC POWER & LIGHT Request for a General Rate Increase in the Company's Oregon Annual Revenues
Docket No. UE 170

Dear Filing Center:

Enclosed please find the original and six copies of the Opening Brief Regarding Statutory Standard of Klamath Off-Project Water Users in Docket No. UE 170.

Please return one file-stamped copy of this document in the enclosed stamped envelope.

Thank you for your assistance.

Sincerely,

/s/ Sheila R. Ho
Sheila R. Ho

Enclosures
cc: Service List (via email)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Opening Brief Regarding Statutory Standard of the Klamath Off-Project Water Users upon the parties on the service list via email.

Dated at Portland, Oregon, this 29th day of August, 2005.

/s/ Sheila R. Ho

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 170

In the Matter of	)	
	)	KLAMATH OFF-PROJECT WATER
PACIFIC POWER & LIGHT	)	USERS' OPENING BRIEF REGARDING
(dba PACIFICORP)	)	THE STATUTORY STANDARD FOR
	)	ESTABLISHING ELECTRIC RATES FOR
Request for a General Rate Increase in the	)	KLAMATH BASIN IRRIGATION
Company's Oregon Annual Revenues.	)	CUSTOMERS
	)	

Pursuant to the prehearing conference memorandum issued in Public Utility Commission of Oregon ("OPUC" or the "Commission") Docket No. UE 170 on June 30, 2005, the Klamath Off-Project Water Users, Inc. ("KOPWU") submits this Brief regarding the statutory standard applicable to electric rates for PacifiCorp's (or the "Company") irrigation customers in the Klamath River Basin.

Klamath irrigation customers comprise a unique customer class that has been recognized as distinct by PacifiCorp's rate schedules and the Commission's rate orders for over fifty years. Consistent with the recognition of the unique facts and circumstances surrounding Klamath irrigation customers, the Klamath River Basin Compact (the "Compact"), ORS § 542.610 et seq., establishes a specific statutory standard that applies to establishing Klamath irrigation customers' electric rates. The Commission should adopt that standard, as described in detail below, in the first phase of this proceeding. In the second phase of the proceeding, the goal of the Commission and the parties will be to give effect to the language in the Compact in determining the appropriate rates for Klamath irrigation customers.

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The standard in the Compact provides in general terms that Klamath irrigation customers should receive electric service for agricultural irrigation and pumping purposes at the "lowest power rates which may be reasonable." ORS § 542.620. This standard is not the same as the "just and reasonable" standard found in ORS §§ 756.040 and 757.210, and it cannot reasonably be interpreted to have the same meaning. Nevertheless, the standard in the Compact works within the OPUC's authority to establish rates that are just as reasonable as a whole, by creating a specific standard that applies only to Klamath irrigation customers. The Commission has previously recognized that unique circumstances have justified the contract rates provided to Klamath irrigation customers since 1956. The language in the Compact reflects the intent that rates for Klamath irrigation customers continue to be established with the unique status of those customers in mind. For Off-Project Customers, the standard in the Compact and the Off-Project Agreement justify maintaining the rate in the Agreement rather than terminating the contract in April 2006 as proposed by PacifiCorp.[1/] If the Commission changes the Off-Project rate, however, the Compact and the historic circumstances surrounding electric service for irrigation and pumping in the Klamath River Basin indicate that Klamath irrigation customers should receive a rate that reflects the cost of serving those customers with power from Klamath Hydroelectric facilities and that takes into account the value provided by Klamath irrigators to PacifiCorp's system.

In the alternative, even if the Commission determines that the Compact is inapplicable to setting electric rates for Klamath irrigation customers and that the just and reasonable standard exclusively governs the establishment of rates for those customers, the

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1/ KOPWU is not waiving any arguments regarding the Off-Project Agreement through the statements in this Brief.

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unique facts and circumstances surrounding agricultural irrigation and pumping in the Klamath River Basin justify a different rate than PacifiCorp's standard irrigation tariff. KOPWU urges the Commission to determine that the Compact applies in establishing electric rates for Klamath irrigation customers or, in the alternative, recognize that the unique circumstances of those customers justify establishing an electric rate that takes into consideration the value of the water provided to PacifiCorp's Klamath hydro projects.

Finally, Senate Bill ("SB") 81, which mitigates any rate increase that results from Klamath irrigation customers being moved from the current contract rates to Schedule 41 or a similar rate schedule, does not affect the statutory standard applicable to Klamath irrigation customers. SB 81 was passed for a specific purpose: to protect Klamath irrigation customers from rate shock. The protections afforded by SB 81 have no bearing on the statutory standard applicable to setting electric rates for Klamath irrigators.

BACKGROUND

PacifiCorp provides electric service to KOPWU's members according to the terms of an April 30, 1956 Agreement (the "Off-Project Agreement" or the "Agreement") that applies to irrigation and pumping customers located within the Upper Klamath River Basin ("UKRB") but outside the boundaries of the Klamath Irrigation Project. PacifiCorp (or its predecessor) has provided electric service to Klamath irrigation customers under the terms of the Off-Project Agreement since 1956, and the Agreement bears no expiration date.

On November 12, 2004, PacifiCorp filed a general rate case with the OPUC, in which PacifiCorp proposed to terminate the Off-Project Agreement and move Off-Project Customers to standard irrigation tariffs at the same time the agreement for "On-Project"

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customers expires in April 2006. In prefiled testimony, PacifiCorp's then Vice President of Regulation and External Affairs stated:

> Oregon Klamath River Basin irrigators outside the boundaries of the Klamath Reclamation Project also buy power from PacifiCorp (UKRB). PacifiCorp plans to move these off-project irrigators to standard tariff rates concurrent with the expiration of the 1956 USBR. Both USBR and UKRB prices were premised on the value provided by the Klamath irrigation project to Klamath hydroelectric generation, and hence to the utility's other customers.

Re PacifiCorp, OPUC Docket No. UE 170, PPL/100, Furman/13 (Nov. 12, 2004).

On February 14, 2005, the OPUC opened Docket No. UE 171 to address separately the issues related to PacifiCorp's proposal to move Klamath irrigation customers to standard tariff rates. PacifiCorp filed a Motion for Summary Disposition ("Motion") in OPUC Docket No. UE 171 on March 31, 2005, requesting that the OPUC terminate the Off-Project Agreement and all terms in the Off-Project Agreement effective April 16, 2006. Re PacifiCorp, OPUC Docket No. UE 171, Motion at 2 (Mar. 31, 2005). KOPWU submitted responses in opposition to PacifiCorp's Motion on April 28 and May 12, 2005.

On June 6, 2005, the Commission issued an order dismissing PacifiCorp's Motion and remanding the proceeding back to UE 170 to investigate the appropriate rates for Klamath irrigation customers. OPUC Docket No. UE 171, Order No. 05-726 at 6 (June 6, 2005). The Commission's Order opening the investigation identified three primary issues to be examined in the remand proceeding:

1. What is the statutory standard applicable to the setting of electric rates for irrigators located within the Klamath River Basin?

2. What are the appropriate rates PacifiCorp should charge the Klamath River Basin irrigators for electric service?

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3. If any rate change affecting these customers is implemented, how and when should these customers be transitioned from the rates established in the historical contracts?

Id. at 4-5.

On June 30, 2005, Administrative Law Judge ("ALJ") Grant issued a prehearing conference memorandum, establishing that the Commission will resolve the first issue listed above—the statutory standard applicable to the setting of Klamath basin irrigators—in the first phase of this proceeding. On August 17, 2005, ALJ Grant adopted an issues list that identified the following additional issues to be addressed in determining the applicable statutory standard:

a. Is the statutory standard applicable to establishing rates for Klamath Basin irrigation customers the "just and reasonable" standard found in ORS §§ 756.040, 757.210 *et seq.,* the "lowest power rate that may be reasonable" standard found in the [Compact], ORS § 542.610 *et seq.*, or some other standard?

b. If the [Compact] establishes a different statutory standard than the "just and reasonable" standard for determining the appropriate rates for Klamath irrigation customers, 1) what standard does the Compact establish, and 2) what is the effect and meaning of that standard in terms of setting rates?

c. Does SB 81 prescribe, modify or otherwise affect the applicable statutory standard?

OPUC Docket No. UE 170, Ruling, Appendix A at 1 (Aug. 17, 2005). KOPWU addresses these questions in this Brief and urges the Commission to find that the Compact establishes the statutory standard that applies to setting electric rates for irrigation and pumping customers in the Klamath River Basin.

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ARGUMENT

A. The Statutory Standard Compact for Klamath Irrigation Customers' Electric Rates Is the "Lowest Power Rates Which May Be Reasonable" Standard in the Compact

The Compact is an agreement among Oregon, California, and the United States regarding the development and use of water resources in the Klamath River Basin. The Compact was codified in Oregon and California statutes in 1957, and was consented to by the U.S. Congress and signed by the President that same year.[2/] ORS § 542.610 et seq.; Cal. Water Code § 5900 et seq.; Pub. Law No. 85-222, 71 Stat 497 (1957). Article 1 of the Compact states that the purpose of the Compact is:

> To facilitate and promote the orderly, integrated and comprehensive development, use, conservation and control thereof for various purposes, including, among others: The use of water for domestic purposes; the development of lands by irrigation and other means; the protection and enhancement of fish, wildlife and recreational resources; the use of water for industrial purposes and hydroelectric power production; and the use and control of water for navigation and flood prevention.

ORS § 542.620. Article IV of the Compact describes the objectives of the parties to the Compact in implementing the agreement and specifically addresses electric rates for irrigation and pumping in the Klamath River Basin:

> It shall be the objective of each state, in the formulation and the execution and the granting of authority for the formulation and execution of plans for the distribution and use of the water of the Klamath River Basin, to provide for the most efficient use of available power head and its economic integration with the distribution of water for other beneficial uses in order to secure the most economical distribution and use of water and lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells.

2/ Article I, Section 10 of the U.S. Constitution requires Congressional consent for states to enter into a compact. Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

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ORS § 542.620. As described below, the Compact is a valid Oregon statute that speaks directly to the issues at hand, and the Commission must consider the Compact in determining the appropriate electric rates for Klamath irrigation customers. Basic rules of statutory construction provide that the Compact should be interpreted broadly, and Oregon's Attorney General has explicitly found that the provisions of the Compact should not be viewed in strictly literal terms. The proper reading of the Compact under these circumstances is that it creates a specific statutory standard that applies to the electric rates of Klamath irrigation customers within the OPUC's authority to establish just and reasonable rates as a whole.

1. The Commission Is Bound to Abide by the Terms of the Compact

The Compact is a valid and binding agreement among Oregon, California, and the federal government, and each of these parties is bound by its obligations under the agreement. Virginia v. Maryland, 540 U.S. 56, 66 (2003). The Oregon Attorney General has described the Compact as follows:

> Oregon, California and the federal government have entered into the Klamath River Basin Compact, codified in ORS 542.610 and 542.620. The United States Constitution, art 1, sec 10, par 3, requires the consent of Congress for states to enter into compacts. The Klamath River Basin Compact was ratified by Congress in 1957 and became effective September 11, 1957. The compact is a contract between the states involved and the federal government; the parties are bound by the compact's terms.

39 Or. Op. Atty Gen. 748, 749 (1979) (internal citation omitted). The Compact speaks directly to the electric rates for irrigation and pumping in the Klamath River Basin and, as the state agency charged with establishing retail electric rates in Oregon, the Commission is bound to follow the terms of the statute. Id.; see Virginia, 540 U.S. at 66. The Commission may not

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ignore the terms of a directly applicable statute in making a decision. To fail to apply the terms of an applicable statute would be arbitrary and unlawful. See Mt. Hood Stages, Inc. v. Hill, 243 Or. 283, 289 (1966).

2. The Compact Applies to the Setting of Electric Rates for Agricultural Irrigation and Pumping Customers in the Klamath River Basin

PacifiCorp argued in Docket No. UE 171 that the Commission should not consider the provisions of the Compact regarding hydro electric power and electric rates in examining the appropriate rates for Klamath irrigation customers because: 1) Section IV of the Compact establishes only an "objective" of the state as opposed to a requirement; and 2) the Compact applies only in the limited context of plans for the distribution and use of water in the Klamath River Basin. OPUC Docket No. UE 171, PacifiCorp Reply to Responses to Motion at 23 (May 12, 2005). Both general principles of statutory construction and the opinions of Oregon's Attorney General contradict PacifiCorp's narrow interpretation of the Compact.

a. The Compact Should Be Construed Liberally to Give Effect to the Intent of the Parties

Oregon's Attorney General recognized in a 1984 opinion regarding the Compact that it is "a general principle of statutory construction that compacts, like treaties, are to be given a liberal interpretation to carry out the intended objectives of the contracting parties." Or. Op. Atty Gen. OP-5559 at 2 (1984). As such, the Commission should read the Compact language broadly to effectuate the intent of the parties. The inclusion of the "lowest power rates which may be reasonable" standard reflects a deliberate intent that the electric rates for Klamath irrigation customers be considered differently than PacifiCorp's other irrigation customers. Nowhere in the OPUC's general ratemaking authority or in any other Oregon statute does a

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standard exist that directs the Commission to determine *the lowest* rates that may be reasonable for a particular class of customers or particular purposes.

b. Oregon's Attorney General Has Rejected an Overly Restrictive Construction of the Compact

Oregon's Attorney General opinions regarding the Compact provide guidance as to how the Commission should apply the rule of liberal construction in the context of the agreement. In a 1979 opinion, the Attorney General rejected a narrow view of the Compact similar to the one put forth by PacifiCorp in UE 171. 39 Or. Op. Atty Gen. 748 (1979). The Oregon Water Resources Department (the "Board") had asked the Attorney General whether the Board had authority under ORS §§ 536.300 and .310 to formulate an integrated program for water in the Upper Klamath River Basin and adopt minimum stream flows contrary to the preferences in Article III of the Compact. Id. at 748-49. The Attorney General provided opinions regarding a number of issues related to this request, including whether Article III of the Compact, which establishes priorities for "granting permits to appropriate waters," did not apply to the establishment of minimum stream flows because establishing such stream flows was not an "appropriation" of water. Id. at 751; ORS § 542.620. The Attorney General unequivocally rejected a narrow interpretation of the Compact's language:

> We do not take such a literal view of the compact's provisions. Establishment of minimum stream flows is merely an entitlement, but in a very real sense represents an "appropriation" of water by the state which affects water available for other uses. We believe such action is subject to the priority requirements of Article III.

39 Or. Op. Atty Gen. at 751. The Attorney General's statement rejecting a "*literal view* of the Compact's *provisions*" goes beyond mere disagreement with an *interpretation* of the Compact's *language*. Id. (emphasis added). This is important in considering PacifiCorp's arguments

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because of the conclusion that giving effect to the parties' intent is paramount when considering the Compact even if a literal, restrictive interpretation would provide a different result.

Other conclusions in the 1979 opinion reinforce this perspective. With a broad view of giving effect to the Compact's provisions in mind, the Attorney General also concluded that Oregon was obligated to abide by the priorities in the Compact when setting minimum stream flows despite explicit language in the minimum stream flows statute that could be construed to render the Compact inapplicable:

> Under ORS 536.310(7), minimum perennial stream flows are to be established by the board for the purpose of supporting aquatic life and minimizing pollution only "if *existing* rights and priorities under *existing* laws will permit." (Emphasis added). This provision was adopted in 1955; the compact was adopted two years later, in 1957. Again, under a literal interpretation of this statute, it could be argued that since the compact was not an "existing law" when ORS 536.310(7) was adopted, the board need not consider the compact when it sets minimum stream flows.
>
> We reject such an interpretation.

Id. (emphasis in original).

Although PacifiCorp has urged the Commission to adopt the narrow perspective that the Compact establishes merely an "objective" to be pursued only in the "formulation and execution of plans for the distribution and use of the water of the Klamath River Basin," this "literal view" of the Compact's provisions is improper. Id.; OPUC Docket No. UE 171, Motion at 16; ORS § 542.610. The Compact was drafted and enacted to comprehensively address the use of water resources in the Klamath River Basin, including "the use of water for . . . hydroelectric power production." ORS § 542.610. Article IV of the Compact sets out in general terms that the parties to the Compact intended that electric rates "for irrigation and drainage

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pumping" in the Klamath River Basin be the "lowest power rates which may be reasonable." ORS § 542.620. The proper view of this provision is the one that gives effect to the intent. Just as the Attorney General gave effect to the Compact by broadly concluding that establishing minimum stream flows are "in a very real sense" an "appropriation" to which the Compact applies, the setting of Klamath electric rates by the Commission in this proceeding is, in a very real sense, the only means to give effect to the statute calling for the "lowest power rates which may be reasonable." Id.; 39 Or. Op. Atty Gen. at 751.

PacifiCorp has argued that it is possible to give meaning to the Compact through particular water use practices because "efficient maximization of power head helps achieve the lowest reasonable rates." OPUC Docket No. UE 171, PacifiCorp Reply at 27. Even assuming for the sake of argument that such practices are in place and have the presumed effect, however, the only way in which Klamath irrigation customers will receive the "lowest power rates which may be reasonable" is if the Commission sets rates at that level. The term "reasonable" by itself contemplates that an appropriate decision maker will make a fact-based determination about what are the lowest "reasonable" rates. "Efficient maximization of power head" may help to increase hydro generation, but it cannot determine what rates are "reasonable." In Oregon, the OPUC is the *only* agency with the authority and expertise to make such a determination. If the Commission does not determine the "lowest power rates which may be reasonable" when setting electric rates for Klamath irrigators, then no other agency will, and that phrase will essentially be meaningless. The proper view of the Compact is that the Commission has been charged with determining the rates for Klamath irrigation customers according to a unique statutory standard.

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3. The Compact Establishes a Specific Statutory Standard for Klamath Irrigators That Applies Within the OPUC's Authority to Establish Just and Reasonable Rates as a Whole

The manner in which to give effect to the Compact's statutory standard is simple. Oregon statute dictates that "[w]hen a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent." ORS § 174.020(2). Application of this rule in the context of this case reveals that the Compact creates a specific statutory exception for Klamath irrigation customers that fits within the OPUC's authority to establish just and reasonable rates as a whole.

a. The "Lowest Power Rates Which May Be Reasonable" and the "Just and Reasonable" Standards Are Separate Standards

The Compact and the OPUC's general ratemaking statutes establish different standards with respect to setting electric rates for irrigation and pumping uses in the Klamath river basin. The Compact specifies the "lowest rates which may be reasonable for irrigation and pumping purposes," while the OPUC's ratemaking statutes generally call for "just and reasonable" rates for all uses and customer classes. Setting aside the discussion above about the import of giving effect to the Compact's provisions as opposed to narrowly interpreting the agreement's plain language, the two statutes are different on their face and have different meanings. PacifiCorp argued in UE 171 that the Compact and the just and reasonable standard are consistent because the provision calling for the "lowest power rates which may be reasonable" merely incorporates the "just and reasonable" standard. OPUC Docket No. UE 171, Motion at 16. To conclude that the two standards are the same, however, would mean that the choice of the specific language in the Compact has no meaning, which is inconsistent with the Oregon rules regarding statutory construction. In re Phelps, 122 Or. App. 410, 415 (1993)

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("Whenever possible, we avoid construing statutes in a manner that renders one or more of their provisions meaningless.") Furthermore, the "just and reasonable" standard was codified in an Oregon statute long before the Compact was approved. Woodburn v. Pub. Serv. Comm'n, 82 Or. 114, 117-19 (1916); ORS § 542.610. The legislature is presumed to have known the meaning of the terms it includes in a statute. Morissette v. U.S., 342 U.S. 246, 263 (1952); Salem v. Salisbury, 168 Or. App. 14, 34 (2000). If the drafters had intended that the Compact ensure that Klamath basin irrigators' electric rates be determined strictly according to the just and reasonable standard, there would have been no need to include any language regarding electric rates in the Compact. Salisbury, 168 Or. App. at 34.

General principles of statutory construction also support the distinction between the two standards. When multiple statutes are to be construed together, the provisions should be interpreted as to give meaning to all, and the court should not "insert what has been omitted, or . . . omit what has been inserted." ORS § 174.010. PacifiCorp's interpretation conflicts with both of these principles. Interpreting the phrase the "lowest power rates which may be reasonable" as consistent with, and equivalent to, the OPUC's just and reasonable standard: 1) inserts "just and reasonable" into ORS § 542.620 when that language does not appear on the face of the statute; and 2) gives no effect to the specific language in the statute. Oregon courts do not interpret statutes in a manner that renders the language in a statute meaningless. State v. Simpson, 11 Or. App. 271, 273 (1972).

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b. The Particular Intent in the Compact Regarding Klamath Irrigation Customers Controls Over the OPUC's General Authority to Set Just and Reasonable Rates as a Whole

Given the different standards, the rules of statutory construction dictate that the particular intent controls over the general. ORS § 174.020(2). The particular intent with respect to the two statutes is that power rates for irrigation and pumping in the Klamath River Basin be set at the "lowest power rates which may be reasonable." ORS § 542.620. The general intent is found in the OPUC's mandate to obtain adequate service at fair and reasonable rates for all customers. ORS §§ 756.040, 757.210. In such circumstances, the particular statute is considered an exception to the general statute. In re Allen, 326 Or. 107, 119 (1997). In other words, ORS § 542.620 establishes a specific standard to be applied to electric rates for Klamath irrigation customers within the context of the OPUC's authority to establish just and reasonable rates as a whole.

The 1979 Attorney General opinion reinforces this view of the Compact. 39 Op. Atty. Gen. Or. at 751. In the context of determining whether the Compact or Oregon's generally applicable statutes regarding water use policy controlled the establishment of such policies for the Klamath River Basin, the Attorney General concluded:

> ORS 536.310 is a general statute dealing with statewide water use considerations and policies. The compact, however, is an act dealing specifically with the Klamath River Basin. It is a well settled principal of statutory construction that where one statute deals with a subject in general and comprehensive terms and another statute deals with the same subject with more specificity, the two should be harmonized if possible but to the extent of any repugnancy, the specific statute controls over the general. This result is strengthened by the fact that in this case the specific provision (the compact) was adopted after the more general statute.

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> Accordingly, we conclude that although the board has general authority to establish a state wide, integrated and coordinated program for water use, that authority is subject to the requirements of the Klamath River Basin Compact.

Id. (internal citations omitted). The circumstances are the same with respect to the OPUC's general ratemaking authority and the Compact. The Commission has general authority to establish just and reasonable rates for customers statewide, but the Compact specifically addresses the electric rates for irrigation and pumping in the Klamath River Basin. As such, the setting of electric rates for irrigation and pumping in the Klamath River Basin is subject to the Compact's unique statutory standard. Given that the Commission is the only agency with the authority to establish electric rates for Klamath irrigation customers and the only agency with the discretion to determine the "lowest power rates which may be *reasonable*," it is unreasonable to conclude that the Compact does not apply to the issues in this proceeding. Moreover, it is contrary to Oregon law to find that the OPUC's general authority to establish just and reasonable rates as a whole trumps the more specific intent in the Compact.

B. The Compact Standard Requires Consideration of the Unique Circumstances in the Klamath River Basin When Setting Electric Rates for Klamath Irrigation Customers

One of the issues to be addressed in this phase of the proceeding is the "meaning and effect" of the Compact in terms of setting rates for Klamath basin irrigators. OPUC Docket No. UE 170, Ruling, Appendix A at 1. The separate and distinct standard for Klamath irrigation customers, along with the lack of an express termination date in the Off-Project Agreement itself, justify maintaining the current Off-Project rate. As described above and in KOPWU's pleadings submitted in UE 171, the Off-Project Agreement was signed in 1956 and bears no expiration

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date.[3/] The Agreement sets out that PacifiCorp will provide the contract rates to Off-Project Customers in exchange for an increased flow of water to PacifiCorp's hydroelectric facilities in the Klamath River Basin (i.e., Federal Energy Regulatory Commission ("FERC") Project No. 2082) as a result of agricultural development and irrigation pumping. The increased flow of water that results from irrigation of Off-Project lands provides value to PacifiCorp's Klamath hydroelectric facilities, and thus, to the entire PacifiCorp system. As long as the exchange contemplated in the Off-Project Agreement continues to occur and the Agreement remains in effect (i.e., it has not been terminated by a court), Off-Project customers should continue to receive the contract rate in the Off-Project Agreement. As described below, however, if the Commission intends to change the current rates for Klamath irrigation customers, the new rates should reflect the cost of providing service to those customers with power from the Klamath hydroelectric facilities and the value provided by Klamath irrigators to the PacifiCorp system.

1. Any New Rates for Klamath River Basin Irrigators Under the Compact Should Be Based on the Cost of Serving Those Customers With Power From Klamath Hydroelectric Facilities

If the Commission does not agree that the Off-Project contract rate should remain in effect, then, at the very least, the Compact requires that the Commission consider all the relevant factors and circumstances in establishing rates for Klamath irrigation customers. One important factor for the Commission to consider in setting Klamath River Basin electric rates is the cost of providing service to Klamath irrigation customers from the Klamath hydroelectric

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[3/] The current contract rates were established based on a series of tradeoffs made based on the circumstances at the time the Klamath contracts were executed. KOPWU described those circumstances and tradeoffs on pages 3-17 and 20-33 of KOPWU's Response to PacifiCorp's Motion in UE 171, and those pages are incorporated herein by reference.

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facilities.[4/] As the Commission noted in its Order in UE 171, the federal government intended to develop publicly owned hydroelectric facilities on the Klamath River to regulate the flow of water from Klamath Lake, but granted Copco that right subject to certain conditions. OPUC Docket No. UE 171, Order No. 05-726 at 2. Part of the bargain that Copco struck with the federal government to allow development of private hydroelectric resources was that Klamath irrigation customers would receive contract rates for the power used for pumping water on and around the Project. This "preference" for agricultural uses is reflected in both the Compact and the historic circumstances justifying the Klamath contract. These circumstances indicate that Klamath irrigation customers were intended to receive electric service based on lower-cost power generated by the hydroelectric facilities developed by Copco. Under these circumstances, a reasonable "meaning" of the Compact standard is that Klamath irrigation customer should be provided electric service at a rate that reflects the cost of providing service from PacifiCorp's Klamath hydroelectric facilities.

Such a preference is similar in function to other preferences provided to customers supplied with power from certain federally owned and operated hydroelectric facilities. See, e.g., Hungry Horse Dam Act, 43 U.S.C. § 593a (interpreted as providing a geographic preference requiring a calculated quantity of power from Hungry Horse Dam to be offered first for sale to customers in Montana). If the Commission intends to alter the electric rates for Klamath irrigators and determines that the Compact standard applies, KOPWU urges

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[4/] Other factors that the Commission should consider include: 1) the Off-Project Agreement itself, which does not terminate in 2006 and will continue unaffected unless terminated or altered; 2) the value that Off-Project customers provide to PacifiCorp and the Company's system, as contemplated by the Off-Project Agreement; 3) the facts and circumstances that justified the Klamath contract rates to begin with and that continue to justify those rates; 4) the terms and conditions of any annual license issued to PacifiCorp for Project No. 2082 after the current license expires; and 5) the terms and conditions of any new license issued to PacifiCorp for Project No. 2082 once the pending relicensing proceeding is complete.

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the Commission to establish rates that reflect the cost of providing electric service to Klamath irrigation customers from the Klamath hydroelectric facilities.

2. Any New Rate Established By the Commission Should Recognize the Value That Klamath Irrigation Customers Provide to the PacifiCorp System

The Commission also should consider the value that Klamath irrigators provide to the PacifiCorp system in setting any new rate for Klamath irrigation customers, as is contemplated by the Off-Project Agreement. PacifiCorp has indicated in this Docket that it is working on a methodology "that is capable of accurately valuing potential operational contributions from the Klamath Basin irrigators." OPUC Docket No. UE 170, PacifiCorp Response to Staff Data Request No. 317. As described above, under the standard in the Compact, Klamath irrigation customers' electric rates should reflect the cost of providing service from the Klamath hydroelectric facilities. In addition, if the Commission decides to change Klamath irrigation customers' current rates, the rate it adopts should incorporate the "credit for value" concept reflected in the Off-Project Agreement as well. The prehearing conference memorandum indicates that the parties will address the appropriate rate for Klamath irrigation customers according to the applicable standard adopted by the Commission in the second phase of this proceeding. KOPWU will discuss using the cost of the Klamath hydroelectric facilities and the credit for value methodology to determine any new rate in more detail in the second phase.

The decision regarding the meaning of the "lowest power rates which may be reasonable" for Klamath irrigation customers will ultimately be left to the Commission's discretion. The OPUC is the only agency in Oregon with the authority to establish electric rates for Klamath irrigation customers, and the only agency with the expertise to consider all the

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relevant factors when determining the appropriate rate. For Off-Project Customers, the standard in the Compact and the lack of express expiration date in the Off-Project Agreement justifies the current Off-Project rate remaining in effect after 2006.

C. Klamath Irrigation Customers Are Distinguishable From Other Irrigation Customers

Even if the Commission determines that the just and reasonable standard applies to establish electric rates for Klamath irrigation and pumping purposes rather than the Compact standard, Klamath irrigation customers nevertheless have characteristics that distinguish them from other PacifiCorp irrigation customers. These distinguishing characteristics justify a rate for irrigation and pumping purposes in the Klamath River basin other than the rate in PacifiCorp's standard irrigation tariff.

KOPWU described at length in its Response to PacifiCorp's Motion in UE 171 the history of the Klamath Reclamation Project and the other circumstances that have distinguished Klamath irrigation customers and justified the contract rates that PacifiCorp seeks to terminate. Klamath irrigation customers are inextricably linked to the value provided to all PacifiCorp customers by the Company's operation of the hydroelectric facilities that comprise FERC Project No. 2082. In addition, as described above, Off-Project Customers in particular provide value to PacifiCorp's hydroelectric facilities through return flow of water as contemplated in the Off-Project Agreement. The unique circumstances surrounding the provision of electric service to Klamath irrigation customers for over 50 years do not exist with respect to any other class of irrigation customers. The Commission should recognize the facts and circumstances that distinguish Klamath irrigation customers when setting the electric rates for those customers.

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D. SB 81 Does Not Affect the Applicable Statutory Standard or the Determination of the Appropriate Rate Under That Standard

SB 81 was signed by Governor Kulongoski and took effect on July 21, 2005, ensuring that Klamath irrigation customers have an important safety net in place if the Commission alters the current contract rates. In essence, SB 81 provides that, if the Commission determines that Schedule 41 or a similar rate schedule is appropriate for Klamath irrigation customers, Klamath irrigation customers will receive a rate increase no greater than 50% per year for a period of seven years. SB 81 was passed for one purpose only: to address the unprecedented rate shock that Klamath irrigation customers would suffer if the Commission switched those customers from the contract rates to PacifiCorp's cost-based rates established in UE 170. Given this limited purpose, SB 81 has no effect on the statutory standard applicable to setting rates for Klamath irrigation customers, and should not impact the Commission's decision in this Docket. SB 81 applies only if the Commission decides to alter the Klamath contract rates, and KOPWU made clear in supporting the bill that it did not resolve any issues related to PacifiCorp's proposals to terminate the Klamath contracts.

CONCLUSION

The unique statutory standard in the Klamath River Basin Compact applies specifically to Klamath irrigation customers and creates a limited exception to the Commission's obligation to establish just and reasonable rates for all customer classes. The OPUC is the only agency in Oregon with the authority to determine what are the "lowest power rates which may be reasonable" for Klamath irrigation customers, and it is up to the Commission to make that determination in this proceeding. The standard in the Compact reflects the intent that Klamath

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irrigation customers enjoy a unique position within PacifiCorp's overall rate structure, and if the Commission does not give effect to that intent, then no other agency will.

Dated this 29th day of August, 2005.

Respectfully submitted,

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