

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UE-171

In the Matter of the Request of)
)
PACIFIC POWER & LIGHT) WATERWATCH OF OREGON’S
(PACIFICORP)) REPLY BRIEF
)
Klamath Basin Irrigation Rates)
_____)

I. INTRODUCTION

WaterWatch respectfully submits this reply in further support of our request to the Commission to grant PacifiCorp’s Motion for Summary Disposition in this proceeding, or in the alternative, rule that contract rates terminate immediately because they are not just and reasonable.

II. ARGUMENT

A. THE COMMISSION HAS THE AUTHORITY AND THE LEGAL OBLIGATION TO TERMINATE THE EXPIRING CONTRACT RATES OF BOTH THE ON-PROJECT AND OFF-PROJECT CONTRACTS

1. The Commission Should Terminate the Expiring Contract Rates Because They are Disallowed By Oregon Statute

Both the Klamath Water Users Association (“KWUA”) and the Klamath Off-Project Water Users (“KOPWU”) argue or imply that the Commission’s statutory mandates and authorities over rate setting somehow are not applicable here. Neither party presents any convincing information or authority in support of this novel idea or to overcome Staff’s analysis that “[t]he Commission should exercise its authority to terminate the special contract rates because they are no longer consistent with the Commission’s statutory obligations to set cost-based, nondiscriminatory rates.” Staff’s Response to PacifiCorp’s Motion for Summary Disposition (“Staff’s Response”) at 5.

KWUA and KOPWU’s argument that the Klamath River Basin Compact (the “Compact”) somehow overrides Oregon utility law also does not hold under any level of scrutiny. While the Compact may contain statements of an aspirational nature about possible future electrical rates, the Compact cannot and does not supplant this Commission’s statutory authority and statutory mandate to set cost-based, nondiscriminatory rates. Furthermore, nothing in the Compact prevents or is somehow inconsistent with the Commission exercising its statutory authority consistent with its statutory mandates. The Compact never expressly sets forth any specific rate as a rate for Klamath basin irrigators. Simply put, nothing in the Compact controls these proceedings or directs any specific result here.

- a) The Commission Has Regulatory Authority Over Rates Set in the Contracts and the Ongoing Duty to Evaluate the Off-Project Contract Rates Even if that Contract Were Not Expiring

As Staff explained in their Response, “[t]he Commission undoubtedly has the power to change the rates established in a written contract between a utility and one of its customers” and in fact has a “continuing *duty*” to do so upon a proper showing. Staff’s Response as 5. Thus, even if the contracts were not expiring, the Commission should disallow the rates because they are no longer consistent with Commission policy and the requirements of the law.

KOPWU argues that the Commission should not review the Off-Project contract rates because the Commission has an alleged policy against disturbing contract rates. KOPWU’s cites Wah Chang v. PacifiCorp to support this contention. KOPWU Response at 21, 42, 43, 44, citing OPUC Docket UM 1002, Order No. 01-873 at 6, 7, 8. In that case, Wah Chang sought retroactive relief and a refund under a contract it had recently

entered with PacifiCorp. Importantly, in that case the Commission had recently found Wah Chang's Special Contract rates to be "fair and reasonable" just four years prior to Wah Chang's request for a change to its five year contract. OPUC Docket UM 1002, Order No. 01-873 at 7. The Wah Chang case is entirely distinguishable from the present case. It offers no support for the irrigators here.

KOPWU's argument that the Commission should not review the contract rates at issue here because it approved the Off-Project Agreement in 1956 (KOPWU Response at 40, 44) is also hard to take seriously. That argument is also refuted by American Can Co. v. Davis, where the Court rejected an argument that the Commission was "in effect estopped to effect the change in rate" because the "contract ha[d] endured in one related form or another for so many years." 559 P.2d 898, 908 (Or.App. 1977).

Certainly just because a rate was reasonable and consistent with Commission policy and law 50 years ago cannot estop or prevent the Commission from determining whether that rate is legal today. If that were true, there would be little (or no) need for new rate setting cases or continuing Commission jurisdiction over rates. Whatever policy the Commission may have regarding revisiting settlement agreements or contract rates that it *recently* approved where shortly after approval the petitioner seeks retroactive relief from the contract and a refund due to unfavorable market conditions has little relevance here and does not override the Commission's continuing duty to ensure that contract rates are fair and reasonable and nondiscriminatory.

b) The Expiring Contract Rates Must be Terminated Because
They are Not Fair and Reasonable

KWUA argues that the question of whether the contract rates meet the "just and reasonable" standard is "beyond the scope of this proceeding" because this docket was

opened “to determine, as a legal matter, what rate should apply after April of 2006 . . .” KWUA Response at 15. The requirement that a rate charged by public utility be “fair and reasonable” is precisely the type of legal matter relevant in this docket. This legal standard, set forth in ORS 756.040(1), is a critical part of the Commission’s inquiry when evaluating rates.

In this case, as PacifiCorp (Motion for Summary Disposition at 11-13) and OPUC Staff (Response at 5-6) have explained, the rates are no longer fair and reasonable. Nothing about the facts here eliminates the Commission’s authority and mandate to disapprove unfair and unreasonable rates. It is difficult to envision how the Commission could “determine, as a legal matter, what rate should apply after April of 2006 . . .” without engaging in the fair and reasonable analysis. The irrigators suggestion that this Commission simply ignore part of its statutory mandate in ruling in this docket should be rejected.

c) The Expiring Contract Rates Must be Terminated Because They are Discriminatory

It is without question that the rates in both the On-Project and Off-Project Contracts are discriminatory against irrigators in other parts of Oregon served by PacifiCorp. See e.g. Staff’s Response at 6 (characterizing the On-Project and Off-Project irrigators’ rates as “a tremendous discount as compared with PacifiCorp’s other irrigation customers in Oregon under [PacifiCorp’s standard tariff]”). If this were not the case, presumably KWUA and KOPWU would not be parties here.

The dramatic difference between the discriminatory rates paid by the Klamath irrigators and other irrigators in Oregon underscores how discriminatory – and illegal –

the current Klamath rates are. ORS 757.310 and ORS 757.325 require the Commission to eliminate such discriminatory rates.

2. The Off-Project Contract Should be Found to Expire in 2006

- a) The Off-Project Contract is Not a Perpetual Contract and Even if it was the Commission Retains the Authority to Change its Rates

KOPWU relies heavily on Gabrilis, Inc., v. Dahl to argue that the Off-Project Contract, lacking an express expiration date, is a perpetual contract. 961 P2d 865 (Or.App. 1998). The Off-Project is not a perpetual contract, and even if it were, the Commission would retain the authority to revise the rates in it to ensure that they consistent with Oregon law.

In Gabrilis, the Oregon Court of Appeals explained that “[a]ll circumstances of each case must be considered in reaching a conclusion on the intended duration of the contract,” and that “[i]t is true that if there is nothing in the nature of or language of a contract to indicate that the contract is perpetual, courts will interpret the contract to be terminable at will on reasonable notice.” Id. at 868. The Gabrilis Court ruled that the country club memberships at issue there were perpetual contracts only because the “membership agreements contain[ed] a number of express provisions that, taken together” supported this conclusion. Id. The Off-Project Contract is silent as to any such express provisions that would lead a court to determine it was intended to be perpetual.

Also, in examining the circumstances of the Off-Project Contract, as PacifiCorp did in its Motion for Summary Disposition, there simply no basis for finding that the Off-Project Contract is a perpetual contract. In addition to the reasons PacifiCorp cites in support of the Off-Project expiring at the same time as the On-Project Contract (Motion at 17-18), it is not reasonable to believe that a private, for-profit utility would contract to

provide 1917 power rates forever. There is nothing in this contract, or the “nature” of a contract between such a utility and its customers that would support the finding of a perpetual contract.

KOPWU argues that the Off-Project Contract is perpetual, “remaining in force so long as water flows from Off-Project land to the Klamath River above Keno and PacifiCorp is using its FERC Project No. 2082 facilities to generate power.” KOPWU Response at 33. As an aside, WaterWatch notes that in response to WaterWatch’s First (UE 171) Data Request to KOPWU regarding information pertaining to “the alleged contribution of water by on- or off-Project water users to Klamath River surface water flows, and/or to PacifiCorp’s hydroelectric facilities on the Klamath River,” KOPWU’s Response was, in pertinent part, that such information “is not relevant to the issues in this proceeding or reasonably calculated to lead to discovery of admissible evidence.” Judge Grant later ruled in a discovery dispute between WaterWatch and KWUA regarding the same requested information that “if other parties, including the two irrigator groups, attempt to present information in this docket, UE 171, that is encompassed by WaterWatch’s request, I will strike any such information as not relevant.” UE-171, Ruling, Disposition: Motion to Compel Denied (April 14, 2005). While respecting that this docket is not the appropriate place to debate the theory that the irrigators are causing water to flow down the river, WaterWatch disputes any assertion that the Off-Project irrigators somehow augment flows over historical levels in the Klamath River that somehow benefit PacifiCorp’s hydroelectric project.

Even if the Off-Project Contract were a perpetual contract, the Commission retains the authority and the duty to ensure that the rates established by it meet Oregon

law. See Staff's Response at 5, citing American Can Co. v. Davis, 28 Or. App. 207, 221-224, 559 P2d 898 (1977). This Commission has continuing jurisdiction over contracts that purport to set rates for electrical power subject to the tariffs of the Commission. Nothing in the Off-Project Contract divests the Commission of its continuing authority and obligation to ensure that the rates established by the Commission meet the requirements of Oregon law.

b) The Commission Has the Authority to Determine that the Off-Project Contract Expires in 2006

KOPWU argues that the courts, and not the Commission, are suited to determining KOPWU's rights to 1917 power rates under the Off-Project Contract. However, KOPWU offers no reason why the Commission should not be permitted to perform its legal duty of reviewing the tariffs established by the Off-Project Contract.

KOPWU cites Intelli-Com, Inc. v. GTE Northwest, Inc. in support of its position that the Commission has "concluded that it has no particular expertise or authority to resolve a contract-related dispute simply because a regulated utility is involved." KOPWU Response at 22, citing Intelli-Com, Inc. v. GTE Northwest, Inc., OPUC Docket No. UC 255, Order No. 95-288 (March 17, 1995). Citation of the decision for this proposition overstates the ruling in the case. That case involved a simple business dispute between the buyer and seller of the business and whether a subsequent foreclosure sale of the lounge abrogated a contract made between the former lounge owner and a phone company regulated by the Commission. OPUC Docket No. UC 255, Order No. 95-288 (March 17, 1995) at 2. None of the Commission's statutory mandates, policies or tariffs were implicated; the only connection to the Commission was that it regulated one of the parties that provided telephone service inside the lounge and another

party that wanted to provide pay phone service in the lounge. In dismissing the complaint, the Commission noted that the complaint did not allege violation of any tariff provision, or rules or orders of the Commission, and did “not allege that similarly situated customers are treated more favorably” than the Complainant. Id.

The Intelli-Com dispute bears no resemblance to the present dispute. Here, the both the On- and Off-Project Contracts clearly implicates Commission rules, tariffs, statutes and policies because both groups of irrigators are being treated more favorably than similarly situated customers (see, e.g., Staff’s Response at 6) and the contract rates are not fair and reasonable (see, e.g., Staff’s Response at 5-6). The Commission is the proper body to review the tariffs established by both the On- and Off-Project Contracts.

Because the Commission’s rate orders are appealable to Oregon’s judicial system (ORS 756.580) and because the issues here require Commission review of the tariffs set by contract, the Commission should decide the issues in this proceeding and set the appropriate tariff rate for these groups of users. If KOPWU still desires judicial review after the Commission rules, it can appeal to the courts.

B. PACIFICORP’S FERC LICENSE DOES NOT REQUIRE PACIFICORP TO PROVIDE ELECTRIC POWER AT 1917 RATES FOREVER, NOR WOULD ANY ANNUAL LICENSE

1. PacifiCorp’s FERC License Only Required the Company to Negotiate With the Bureau of Reclamation: It has Met this Condition

With regards to the power rate that PacifiCorp’s predecessor was to charge the Bureau of Reclamation and the On-Project irrigators, the 1954 FERC license does nothing more than direct the licensee to “enter into a contract with the Department of Interior prior to issuance of a license.” KWUA’s Response, Exhibit B, In the Matter of

the California Oregon Power Company Upon Application for License, 13 F.P.C. 1, 1954 WL 47779 (January 28, 1954) at 4.

The contract was either to be an amended version of a 1917 agreement between the licensee and the United States, or a new agreement that:

[P]rovides for the storage in and release of water from Upper Klamath Lake in Oregon, and the use thereof by the Licensee for the generation of electric energy under terms and conditions substantially similar to those terms and conditions contained in the existing February 24, 1917 agreement, as amended.

Id. at 8.

Either contract was to cover a “time period at least equivalent to the time period of the license.” Id.

The parties opted to enter into a new agreement, rather than simply amend the 1917 agreement. That new agreement, the 1956 Contract, is Exhibit C to KWUA’s Response. It is undisputed that the 1956 Contract expressly expires 50 years from its effective date, in April of 2006.

KWUA threatens that if this Commission does not extend the 1917 power rates set forth in the expiring 1956 Contract then PacifiCorp will not be permitted to operate its Klamath hydro-generating facilities. KWUA 8 –10, 16, 18, et. seq. The basis of this argument is that PacifiCorp may be granted an annual FERC license in the coming year and annual licenses are issued under the terms and conditions of the existing, expiring license. KWUA Response at 7, citing Federal Power Act, § 15(a)(1). KWUA asserts that PacifiCorp would be in violation of any such annual license if the irrigators were not continuing to get power at the 1917 rates they currently enjoy.

This argument fails because the requirement of the license article has already been met, i.e. the parties have negotiated an agreement. Thus if FERC were to grant an annual

license, which under the Federal Power Act's § 15(a)(1) would include this exact same provision, the 1956 Contract would still fulfill the provision's requirement that the Licensee and United States enter into such an agreement, and the Contract's expiration date would still be April, 2006. Thus PacifiCorp would not be out of compliance with its annual license and the 1956 Contract will still expire.

In California Trout, Inc. v. Federal Energy Regulatory Commission, California Trout argued that California Edison should not be granted an annual license for a dam it operated until granted Clean Water Act §401 certification from the California Board. 313 F.3d 1131 (9th Circ. 2002). FERC rejected the argument on grounds that:

§ 15(a)(1) of the FPA mandates issuance of an annual license on the terms and conditions of the existing license, that issuance of the annual license is a ministerial act and non-discretionary and not a licensing action under the FPA, and that it therefore entails no proceeding in which intervention and rehearing may be sought.

Id. at 1133.

The Ninth Circuit Court of Appeals upheld FERC's interpretation of the Federal Power Act, finding that FERC lacked discretion to go beyond the terms of the original license and require Clean Water Act certification prior to issuance of an annual license. Id. at 1136-1137.

In summary, under the Federal Power Act and California Trout, an annual license here would simply contain the license provision directing PacifiCorp to enter into a contract with the United States to provide for water use and power generation consistent with the 1917 agreement. That contract has already been formed and will expire in 2006. Thus, the provision has been complied with and nothing more would need to be done with regards to it under an annual license.

C. THE COMMISSION SHOULD REJECT THE DEPARTMENT OF INTERIOR’S REQUEST TO DEFER RULING UNTIL THE FERC RELICENSING CONCLUDES

In their Response, the Bureau of Reclamation and the U.S. Fish and Wildlife Service request that the Commission “hold in abeyance and refrain” from deciding the UE-171 issues until they are properly addressed by FERC in the context of the dam relicensing. Response by the Bureau of Reclamation and the U.S. Fish and Wildlife Service to PacifiCorp’s Motion for Summary Disposition at 3. The agencies state that they believe this will avoid “confusion and conflict” at FERC and that any Commission ruling may “unduly prejudice” ongoing negotiations associated with the relicensing. Id. WaterWatch is involved in the dam relicensing and takes a different view.

Commission resolution regarding the legality of the expiring contract rates under Oregon utility law will provide a substantial benefit in the FERC relicensing process. The Commission should address the Klamath Basin irrigation rates in docket UE-171 (and UE-170 when and if appropriate) to provide certainty in the dam relicensing process regarding treatment of these rates under Oregon law. Such resolution will not cause confusion, conflict, or prejudice – rather it will allow the relicensing efforts to move forward in a more constructive fashion. The Commission should refuse to engage in the political gamesmanship urged upon it by the Department of Interior and complete this proceeding according to the schedule previously set for this docket.

D. PUBLIC POLICY WEIGHS HEAVILY IN FAVOR OF TERMINATING THE EXPIRING CONTRACT RATES

1. The Public has an Interest in the Wise Use of Power and Water That Would Continue to be Undermined by Continuation of the Expiring Contract Rates

The incredibly low 1917 electrical rates paid by Klamath irrigators leads to excessive use of power and water in the arid and overappropriated Klamath Basin which is not in the public interest.

Recently filed KOPWU Direct Testimony in UE-170 lends support to WaterWatch's statements in previous UE 170 and 171 filings that the low power rates in the Klamath lead to excessive use of power. KOPWU's Direct Testimony states:

As shown in the table below, the usage of the Off-Project irrigators tends to be higher on a per customer basis than either the current Schedule 41 customers, or the On-project irrigators. For example, **Off-Project irrigators' average use per customer is almost four times greater than Schedule 41 usage**, and twice as much as On-project irrigators.

UE 170, KOPWU Direct Testimony of Kathryn E. Iverson (May 9, 2005) at 6-7.

The table referenced shows that the Off-Project irrigators use an average of 75.79 MWh per customer while non-Klamath (Schedule 41) irrigators use only 19.63 MWh per customer. Id. at 7. On-Project irrigators use an average of 39.24 MWh per customer. Id.

While KOPWU does not speculate as to why the Klamath irrigators use two to four times more power per customer than other irrigators in Oregon, the data is consistent with analysis conducted by Oregon State University that anticipates conservation of energy if the rates go up to standard tariff. (See WaterWatch Response, Affidavit of Lisa Brown, Exhibit 1.). Such conservation of energy is in the public interest and weighs in favor of terminating the 1917 power rates.

Also in the public interest are the water savings that will likely result if the 1917 power rates are terminated. While most irrigated lands in Klamath Basin would continue to be profitable to irrigate under the standard tariff, some portion of the marginal lands currently irrigated likely would move out of production if the expiring contract power

rates are terminated. Id. In the Klamath Basin, where water has been severely overappropriated, there are strong public interest benefits to the water savings that would likely result from termination of the 1917 power rates.

Overappropriation in the basin has lead to severely declining fish and wildlife populations; listing of several aquatic species under the federal Endangered Species Act; failure to meet Tribal treaty and trust responsibilities and to provide for subsistence fisheries in the basin; economic harm to upper basin agricultural communities, communities that depend upon commercial salmon fishing, and Klamath River-related tourism and recreation industries; adverse impacts on domestic ground water supplies; and failure to meet the water needs of the basin's National Wildlife Refuges. Each year, one or more of these legitimate interests suffer because of the overappropriation of this limited and valuable resource. In this context, water use propagated by the 1917 power rates is not in the public interest.

Potential for substantial environmental and other benefits, including increased certainty that all of the legitimate demands for water in the basin are met more frequently, is in the public interest. These public benefits should be taken into consideration by the Commission in its decision regarding these contract rates.

2. Fairness Dictates that PacifiCorp Customers Not be Asked to Subsidize Klamath Basin Farmers

WaterWatch is a statewide river conservation group with approximately 1200 members statewide that is devoted to protecting and restoring streamflow in Oregon's rivers. WaterWatch has hundreds of members and staff who are PacifiCorp ratepayers who find it unfair that the rates they pay are, in effect, subsidizing rates for select Klamath Basin irrigators currently paying far below standard irrigation rates.

WaterWatch of Oregon Petition to Intervene in UE 170 (January 7, 2005) at 3. To be fair to WaterWatch's PacifiCorp ratepayers – and other ratepayers in the state - the Commission should eliminate the expiring contract rates and raise the Klamath Basin irrigators up to standard tariff as PacifiCorp has requested.

III. CONCLUSION

For the foregoing reasons, and the reasons stated in Staff's Response and PacifiCorp's Motion for Summary Disposition, WaterWatch requests that the Commission grant PacifiCorp's Motion for Summary Disposition, or in the alternative, rule that contract rates terminate immediately because they are not just and reasonable.

Respectfully submitted this 12th day of May, 2005,

John DeVoe OSB # 90247
Lisa Brown OSB # 02524
WaterWatch of Oregon
213 SW Ash Street, Suite 208
Portland, OR 97204
Phone: 503.295.4039
Fax: 503.295.2791
E-mail: john@waterwatch.org
lisa@waterwatch.org

Counsel for WaterWatch of Oregon

CERTIFICATE OF SERVICE

I hereby certify that I have this day served WaterWatch of Oregon's Reply Brief by postage prepaid mail (where postal address is provided) and email upon each person listed below at the addresses indicated, and upon the Oregon Public Utility Commission (email to Carol.Hulse@state.or.us; puc.filingcenter@state.or.us) (original and five copies mailed pursuant to 860-013-0060).

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Lisa Brown
WaterWatch of Oregon
213 SW Ash Street, Suite 208
Portland, OR 97204
503.295.4039 x26

EDWARD BARTELL
KLAMATH OFF-PROJECT WATER USERS,
INC.
30474 SPRAGUE RIVER ROAD
SPRAGUE RIVER OR 97639

JASON EISDORFER - **CONFIDENTIAL**
CITIZENS' UTILITY BOARD OF OREGON
610 SW BROADWAY STE 308
PORTLAND OR 97205
jason@oregoncub.org

EDWARD A FINKLEA
CABLE HUSTON BENEDICT
HAAGENSEN & LLOYD LLP
1001 SW 5TH, SUITE 2000
PORTLAND OR 97204
efinklea@chbh.com

DAN KEPPEM
KLAMATH WATER USERS ASSOCIATION
2455 PATTERSON STREET, SUITE 3
KLAMATH FALLS OR 97603

JIM MCCARTHY
OREGON NATURAL RESOURCES COUNCIL
PO BOX 151
ASHLAND OR 97520
jm@onrc.org

KATHERINE A MCDOWELL
STOEL RIVES LLP
900 SW FIFTH AVE STE 1600
PORTLAND OR 97204-1268
kamcdowell@stoel.com

BILL MCNAMEE
PUBLIC UTILITY COMMISSION
PO BOX 2148
SALEM OR 97308-2148

MICHAEL W. ORCUTT
HOOPA VALLEY TRIBE FISHERIES DEPT.
PO BOX 417
HOOPA, CA 95546

STEVE PEDERY
OREGON NATURAL RESOURCES
COUNCIL

sp@onrc.org

MATTHEW W PERKINS
DAVISON VAN CLEVE PC
333 SW Taylor, STE 400
PORTLAND OR 97204-2413
mwp@dvclaw.com

THOMAS P SCHLOSSER
MORISSET, SCHLOSSER, JOZWIAK &
MCGAW

t.schlosser@msaj.com

US BUREAU OF RECLAMATION
6600 WASHBURN WAY
KLAMATH FALLS, OR 97603
dsabo@mp.usbr.gov

GLEN SPAIN
PACIFIC COAST FEDERATION OF
FISHERMEN'S ASSOCIATIONS
PO BOX 11170
EUGENE, OR 97440-3370
fishlifr@aol.com

ROBERT VALDEZ
PO BOX 2148
SALEM, OR 97308-2148
bob.valdez@state.or.us

PAUL M WRIGLEY
PACIFIC POWER & LIGHT
825 NE MULTNOMAH STE 800
PORTLAND OR 97232
paul.wrigley@pacificorp.com

LOWREY R. BROWN
CITIZENS' UTILITY BOARD OF OREGON
610 SW BROADWAY, SUITE 308
PORTLAND, OR 97205
lowrey@oregoncub.org

JOHN CORBETT
YUROK TRIBE
PO BOX 1027
KLAMATH CA 95548
jcorbett@yuroktribe.nsn.us

JASON W. JONES
DEPT. OF JUSTICE
REG. UTILITY AND BUS. SECTION
1162 COURT ST. NE
SALEM, OR 97301-4096
jason.w.jones@state.or.us

STEPHEN PALMER
OFFICE OF THE REGIONAL SOLICITOR
2800 COTTAGE WAY, RM E-1712
SACRAMENTO, CA 95825