



**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

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In the Matter of the Application of PacifiCorp (U901E), an Oregon Company, for an Order Authorizing a Rate Increase Effective January 1, 2011 and Granting Conditional Authorization to Transfer Assets Pursuant to the Klamath Hydroelectric Settlement Agreement.

Application 10-03-015  
(Filed March 18, 2010)

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**REPLY BRIEF OF CONSERVATION GROUPS**

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American Rivers, California Trout, Institute for Fisheries Resources, Pacific Coast Federation of Fishermen’s Associations, and Trout Unlimited (“Conservation Groups”) reply to the Opening Brief submitted by Division of Ratepayer Advocates.

## **ARGUMENT**

### **I. The Only Significant Issue in this Proceeding is Whether the California Surcharge is Premature.**

DRA supports the KHSA (DRA Op. Br. at 1) and finds that the agreement is in the public interest (*id.* at 9). It agrees that:

- (i) the KHSA is a reasonable alternative to relicensing or decommissioning the Klamath Hydroelectric Project under the ordinary requirements of the Federal Power Act (*id.* at 5);
- (ii) the Surcharge is reasonable (*id.* at 13);
- (iii) depreciating the remaining book value of PacifiCorp’s investment in this project, through accelerated depreciation recovered in rates, is a reasonable mechanism (*id.* at 15); and
- (iv) the preconditions for transfer of the project to the Dam Removal Entity under Pub. Util. Code 851 are reasonable (*id.* at 17).

DRA does not object to the sufficiency or effectiveness of refund procedure proposed in the Application. If the Commission approved this Application and the KHSA subsequently failed for any reason, all collected funds will be used to process the relicensing application or otherwise benefit customers, or will be refunded. *See* KHSA § 4.4; Application, p. 6. There is no risk related to waste of the collected funds.

At the end of the day, DRA’s basis for opposing this Application is concern that collection of the California Surcharge now is “premature.” DRA Op. Br. at 1. Indeed, DRA recommends denial of the Application without prejudice given the risks that two “requirements” for KHSA implementation – namely, passage of the California Bond Measure and enactment of federal Authorizing Legislation -- may not timely occur, and

the KHSA may terminate as a result.<sup>1</sup> DRA Op. Br. at 6. In Sections II-IV of this Reply Brief, we address the issue: is approval of the Application premature? In Section V, we address the related issue of the timing of the Section 851 authorization.

**II. DRA’s Recommendation for Delay in the California Surcharge Would Probably Result in Termination of the KHSA.**

DRA is concerned about a Surcharge averaging \$1.61 per month for a typical customer (Application, p. 5). In response, it recommends denial of this Application and direction that PacifiCorp file a subsequent application once both the California Bond Measure and federal Authorizing Legislation are enacted. In the alternative, it recommends that the Commission double the periods for collection of surcharge and depreciation to 18 years. *Id.* at 19-20. As discussed below, either such delay would be a potential termination event under the KHSA. DRA’s witness acknowledged that its recommendation does not contain any mechanism to manage any such risk resulting from this proceeding. Oct. 18, 2010 Reporter’s Transcript (“RT”) 93:11-16.

We now explain how that new risk would arise. Dam removal will proceed under the KHSA if the U.S. Interior Secretary makes an Affirmative Determination by March 31, 2012. KHSA §§ 3.3.4 – 3.3.5. A condition precedent for this determination is authorization by both California and Oregon for the Customer Contribution. *Id.*, § 3.3.4.C.

As to amount, the Customer Contribution -- including interest accrued in the Oregon and California trust accounts after collection -- is defined to total \$200 million. KHSA § 4.1.1.D, E. That includes the \$16 million (including accrued interest) subject to this Application. *Id.*, § 4.1.1.E. As to timing, the Secretary must find that the total will be in these trust accounts by December 2019, since January 2020 is the target date for decommissioning to commence.<sup>2</sup> The KHSA also provides that PacifiCorp will seek this

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<sup>1</sup> As discussed in our Opening Brief Argument II.A.1.c and again below, passage of the California Bond Measure is not a requirement for KHSA implementation. It is necessary only if the Customer Contribution plus other available or assured non-customer funds are insufficient to effect dam removal pursuant to the Detailed Plan contained in the Secretarial Determination.

<sup>2</sup> KHSA section 4.1.1.E requires a California Surcharge sufficient to produce \$16 million, including accrued interest. KHSA section 7.3.2 further specifies that the California and Oregon Surcharges must

Commission's approval for a depreciation schedule based on the assumption that the project's dams will be removed in 2020. *Id.*, § 4.5.2.A.

As discussed in Argument II.A.1.c of our Opening Brief, the Secretary may make the Affirmative Determination absent a California Bond Measure. However, the KHSA does not permit that determination absent the Customer Contribution. Specifically, the KHSA provides that the determination must include one of two findings related to State funding. Either:

- (i) The States of Oregon and California have authorized all of the funding required by KHSA section 4 (KHSA § 3.3.4.C). This includes the Customer Contribution and California Bond Measure (*id.*, § 4.1.2), which cumulate to the State Cost Cap of \$450 million (*id.*, § 4.1.3); or
- (ii) "...[T]he Customer Contribution required by Section 4.1.1 has been established but California Bond Funding required by Section 4.1.2 has not been approved, in whole or part..." provided the Secretary finds that the Customer Contribution plus any available or assured non-customer funding will be sufficient for dam removal pursuant to the Detailed Plan contained in the Secretarial Determination. *See* KHSA § 3.3.4 (text following sub-paragraph E).

If the Commission adopted DRA's recommendation for the Surcharge, the Customer Contribution required to proceed with dam removal would not be available by the required date of December 2019. In its primary form, this recommendation would defer the start of collection until some date after November 2012. DRA Op. Br. at 19-20. That delay would mean that the California trust accounts would hold less than \$16 million in December 2019. *See* RT 34:24 – 35:19. In the alternative, DRA recommends a collection schedule of 18 years starting 2011 (Op. Br. at 20), in which event the California trust accounts would reach \$16 million sometime in 2029. Faced with that prospective shortfall in the Customer Contribution, the Secretary would either have to make a negative determination in March 2012, or have to defer any determination past March 2012. Each would be a potential termination event for the KHSA. *See* KHSA § 8.11.1.B, D.

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cumulate to \$200 million by December 2019, to permit decommissioning to proceed in January 2020. While the parties have the discretion to modify this schedule for dam removal by amendment to the KHSA (*see id.*, § 7.3.2.), they are under no obligation to agree to such modification (*id.*, § 8.4).

There are three possible scenarios that could rescue the KHSA from a potential termination event resulting from the Commission's adoption of DRA's recommendation for the Surcharge. However, rescue would probably fail in each such scenario.

A first rescue scenario would require all of the following events to occur by March 31, 2012, permitting the Secretary to timely proceed with an Affirmative Determination: (i) the passage of both the California Bond Measure and federal Authorizing Legislation, (ii) PacifiCorp's submittal of a subsequent Application, and (iii) the Commission's approval of that application. However, it is highly improbable that the Bond Measure will be passed by that date. As DRA points out, the next water bond (including Klamath funding) is tentatively scheduled for November 2012. DRA Op. Br. at 11.

Under a second rescue scenario, collection would start sometime after 2011, but PacifiCorp would seek a rate increase for California customers in excess of 2%, so as to accrue \$16 million by December 2019. However, such an increase would itself be a potential termination event, violating an express limitation to 2% or less to avoid rate shock. KHSA § 4.1.1.B. PacifiCorp and the signatory parties do not support a rate increase greater than 2%.

A third rescue scenario would require the signatory Parties to agree to amend the KHSA to permit the Secretarial Determination to occur after March 31, 2012. That scenario is also improbable. That delay would be inconsistent with terms and foundational agreements of the KHSA. PacifiCorp and other signatory parties agreed that a Secretarial Determination by March 31, 2012 is prudent if not necessary to support dam removal by 2020, given permitting and logistical considerations associated with the largest such removal effort every attempted. And the parties further agreed that dam removal by December 2020 is necessary to advance the public interest in restoration of fishery and other public trust resources which existing conditions impair and endanger.

In sum, DRA's recommendation is a poison pill for an agreement it otherwise supports to advance the public interest in this utility asset.

### **III. DRA's Recommendation Would Penalize Oregon Customers.**

DRA's recommendation for a delay in the California Surcharge, if approved, would penalize Oregon customers. The Oregon Public Utilities Commission has authorized a Surcharge for Oregon customers totaling \$184 million, including accrued interest as of December 2019. The KHSA anticipates cooperation between the two states, including these Commissions, to achieve the Customer Contribution necessary for implement dam removal. DRA would effectively place that entire burden on Oregon customers, until and if the Commission approved any subsequent application, despite the fact that California customers reasonably expect to receive very substantial benefits from successful implementation.

**IV. DRA's Recommendation Would Probably Return the Project to Relicensing.**

PacifiCorp would return to relicensing if the Commission rejects this Application and the KHSA fails as a result. PacifiCorp would then incur further expenses to process its relicensing application before the Federal Energy Regulatory Commission and the States' water quality agencies. These expenses have averaged more than \$7 million per year between 2000-2009. *See* PPL-100, 14:3-5. As acknowledged by the DRA, PacifiCorp and its customers would be subject to costs exceeding \$460 million, as well as risks of litigation and damages, if FERC issued a new license under the Federal Power Act.

**V. DRA's Recommendation for Two Rounds of Section 851 Authorization is Unnecessary.**

DRA recommends that PacifiCorp be required to file Compliance Advice Letters on KHSA implementation, followed by a new application for Pub. Util. Code section 851 authorization “within a reasonable amount of time that the facility will be transferred, not nine years in advance.” DRA Op. Br. at 18. This recommendation for duplicative reviews is unnecessary to protect customers’ interest in this utility asset.

The Commission has before it the KHSA’s package of conditions for transfer of the Klamath Hydroelectric Project to the Dam Removal Entity. As discussed in our Opening Brief, transfer will occur upon PacifiCorp’s confirmation that all such conditions have occurred, including (i) enactment of statutory immunity from liability for damages caused by dam removal and (ii) the Dam Removal Entity’s notice that it has all permits necessary for performance. The Commission may now determine whether the KHSA’s conditions for transfer, assuming they all occur later, will satisfy the requirements of Pub. Util. Code section 851. PacifiCorp and other signatory parties do not intend to change the conditions between now and 2020. As a result, the Commission may provide conditional authorization that the transfer will occur if and once the Commission has reviewed confirmation that all conditions specified in the KHSA and Application have, in fact, occurred. The Commission will retain jurisdiction to review the sufficiency of such confirmation. In sum, there is no reason to make a determination twice whether the same transfer is in the public interest.

At the hearing, DRA’s witness expressed a policy concern about authorizations on conditions subsequent. RT 66:9 – 67:1, 68:2 – 69:8. This Application does not establish a general precedent that a utility may collect a surcharge to effect a transfer, or receive Section 851 authorization, in advance of certainty that such transfer will occur. The Application addresses the unique circumstances of the Klamath Hydroelectric Project. Providing rate and Section 851 authorizations in 2011, in the face of some uncertainty whether the KHSA will be implemented to conclusion in 2020, is necessary to avoid even greater costs and risks associated with continuing ownership and operation, and relicensing, of the asset under the ordinary requirements of the Federal Power Act.

## CONCLUSION

We support an order approving this Application as necessary to implement the Klamath Hydroelectric Settlement Agreement. Authorizing the Surcharge, depreciation schedule, and conditional transfer of the utility asset will protect and advance the interests of PacifiCorp's customers. Starting now is necessary to avoid potential termination of the KHSA under DRA's recommendations.

Dated: November 24, 2010

Respectfully submitted,

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**Certificate of Service**  
**CPUC A.10-03-015**

I hereby certify that I today served a copy of “Reply Brief by Conservation Groups,” by electronic mail to each person on the official Service List in this proceeding.

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