

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)

**REPLY BRIEF OF THE
DIVISION OF RATEPAYER ADVOCATES**

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I. INTRODUCTION

The Division of Ratepayer Advocates (DRA), pursuant to Rule 13.11 of the Commission’s Rules of Practice and Procedure and the June 18, 2010 “Scoping Memo and Ruling of Assigned Commissioner,” submits the following Reply Brief in response to issues raised in the Opening Briefs of PacifiCorp¹ and the Conservation Groups² regarding the “Application of PacifiCorp 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).³

II. BALANCING THE UNCERTAINTIES ASSOCIATED WITH THE KHSA AND THE RELATIVE RISKS TO CUSTOMERS OF KHSA IMPLEMENTATION COMPARED TO FURTHER RELICENSING EFFORTS, SHOULD THE PACIFICORP APPLICATION BE GRANTED?

As explained in its Opening Brief “DRA supports the Klamath Hydroelectric Settlement Agreement (KHSA [or Agreement]) for its potential to resolve years of controversy surrounding the operation of the Klamath Hydroelectric Project (Project) and agrees that if implemented, the KHSA it would reduce risk to PacifiCorp’s ratepayers associated with relicensing or decommissioning the Project.”⁴ DRA nevertheless believes it is premature to grant the relief requested in the Application, because of significant uncertainty regarding whether the KHSA will be executed. PacifiCorp claims that “some of DRA’s recommendations are inconsistent with, and antithetical to, the KHSA itself”⁵ PacifiCorp is incorrect. DRA’s recommendations do

¹ Opening Brief of PacifiCorp, filed November 17, 2010, (PacifiCorp Opening Brief).

² Joint Opening Brief of Conservation Groups, filed November 17, 2010, (CG Opening Brief). The Conservation Groups include American Rivers, Institute for Fisheries Resources, Pacific Coast Federations of Fisherman’s Associations, and Trout Unlimited.

³ DRA’s Opening Brief addressed all the topics in the common briefing outline as directed by the Administrative Law Judge, but its Reply Brief focuses on the final topic and contentions of PacifiCorp and the Conservation Groups as related to that topic.

⁴ Opening Brief of the Division of Ratepayer Advocates, , filed November 17, 2010, (DRA Opening Brief), p. 1

⁵ PacifiCorp Opening Brief, p. 7.

not conflict with the KHSA because failure of a Commission to implement any of the KHSA funding provisions does not constitute a breach of the KHSA.⁶ In particular, the KHSA envisioned that this Commission would need to independently evaluate the requested surcharge and accelerated depreciation⁷ and strike a balance between the interests of its ratepayers and the risks and uncertainties attendant to the implementation of the KHSA. In fact, DRA's recommendation would not prevent the KHSA from moving forward once other significant conditions precedent required by the KHSA have been achieved.

DRA therefore disagrees with PacifiCorp's contention that a delay in implementation of the surcharge by the Commission "may appear to the federal government, the State of Oregon, and the other signatories to be a deliberate attempt to terminate the KHSA by failing to comply with the specific requirements of the KHSA for customer contribution funding."⁸ Any such delay would instead represent a careful balancing of the interests of PacifiCorp ratepayers contributing to the costs of removing the Klamath dams with the other important conditions precedent of the KHSA. Commissioners deserve no less than the most recent, accurate and reliable information before deciding whether to impose a rate increase. In this regard, granting a delay would ensure consistency in securing the California Bond funding.

A. Delaying the imposition of the surcharge is more likely to benefit ratepayers.

PacifiCorp contends that the proposal to delay implementation of the customer surcharge "would almost certainly have negative impacts on PacifiCorp's customers."⁹ PacifiCorp speculates that these "negative impacts" could include "creating a terminable event through inadequate funding" or increasing the "out-of-pocket costs to PacifiCorp's customers by requiring the customer contribution to be collected over a far shorter period of time."¹⁰

Neither scenario would necessarily follow from delaying the implementation of the customer surcharge until required federal legislation is in place and the \$250 million California

⁶ Exhibit (Ex.) PPL 104, Klamath Hydroelectric Settlement Agreement. (KHSA), § 4.8, p. 30.

⁷ KHSA § 4.8, p. 30; § 1.6.6, p. 8.

⁸ PacifiCorp Opening Brief, p. 15.

⁹ PacifiCorp Opening Brief, p. 12. § 4.8

¹⁰ PacifiCorp Opening Brief, p. 12.

Bond funding has been secured. While it is true that Section 8.11.1 D of the KHSA lists failure of the California Public Utilities Commission to implement the funding provision as a potentially terminable event,¹¹ that fact alone is not reason for the Commission to require PacifiCorp customers to start funding the dam removal before other conditions precedent have occurred. There are numerous other terminable events listed in the KHSA, and any one of them could require renegotiation of the Agreement or could cause it to fail. For example, if the required federal legislation is not enacted,¹² the Commission's decision to defer implementation of the surcharge would be irrelevant.

Nor is it necessarily true that PacifiCorp's customers will need to contribute more money if the Commission delays implementation of the surcharge. If the Commission delays implementation of the surcharge until the federal legislation is enacted and the remainder of the California funding is secured, it would only shorten the contribution period (and therefore require collecting more money in a shorter time frame) if the Project remained on track for removal by 2020. That is by no means certain given the substantial remaining obstacles to implementing the KHSA. It is possible the KHSA will never be implemented, in which case imposing the surcharge will have imposed an unnecessary burden on ratepayers.

B. The fact that the surcharge could be returned does not adequately protect the interest of ratepayers.

PacifiCorp urges the Commission not to follow DRA's recommendation to delay implementation of the customer contribution surcharge "due to a concern that customers' payments will be wasted or misused."¹³ DRA's concern is not that the customers' payments will be "wasted or misused" but that requiring such payments now will impose an unnecessary burden to fund an event that may not happen. PacifiCorp contends that:

"Regardless of whether the KHSA is implemented or not, PacifiCorp's customers will be protected and will receive the full

¹¹ KHSA § 8.11.1 E. p. 64.

¹² KHSA, § 8.11.1 A. Even though the KHSA provides that parties to the Agreement must meet and confer in the event of a terminable event, it is difficult to imagine a cure that would address failure to secure the required federal legislation.

¹³ PacifiCorp Opening Brief, p. 16.

benefit of any funds collected through the customer contribution surcharge.”¹⁴

The fact that the money might be returned or otherwise used for the benefit of customers does not justify requiring ratepayers to prefund an obligation that may never materialize.

C. Regardless of whether the Customer Contribution is the first source of funding for dam removals, it is unlikely that the Customer Contribution will be sufficient to remove all four dams, so it is reasonable to impose the surcharge only after the remaining California funding has been secured.

PacifiCorp points out that the “KHSA states that the customer contribution will be the primary means of funding facilities removal, and that the bond funding (or some alternative financing mechanism) is only required if the actual costs of removal exceed the \$200 million collected from customers.¹⁵ PacifiCorp therefore contends that DRA’s recommendation to delay imposition of the customer surcharge of \$16 million (nominal dollars) until the remaining \$250 million in California funding as been secured is an “upside-down interpretation of the KHSA funding requirements.”¹⁶ PacifiCorp and the Conservation Groups claim that the cost of dam removal is not yet known.¹⁷ Even if the cost of the dam removal is not yet known, the fact that the KHSA provides for three potential sources of funding: the Customer Contribution of \$200 million, the California Bond Funding of \$250 million,¹⁸ and a plan to address excess cost if necessary,¹⁹ demonstrates that the parties expected the removal of four dams, some located in remote and difficult to access terrain, to be a very expensive undertaking. Removing the four Klamath dams would be the largest dam removal ever undertaken.

¹⁴ PacifiCorp Opening Brief, p. 16.

¹⁵ PacifiCorp Opening Brief, p. 13.

¹⁶ PacifiCorp Opening Brief, p. 14.

¹⁷ PacifiCorp Opening Brief, p. 12. (“the actual cost of the facilities removal is not yet known, and may not exceed the \$200 customer contribution.”); CG Opening Brief, p.13.

¹⁸ KHSA § 4.1.2, pp. 24-25.

¹⁹ KHSA § 3.3.4 D, p. 21.

Even if the Customer Contribution of \$200 million is the first source of funding, it is highly unlikely that amount will cover the full removal costs, so it is reasonable to delay imposition of the surcharge until the California Bond funding has been secured.

D. The Commission should not authorize transfer of the Project until closer till the time when the dams will be removed.

PacifiCorp claims that its proposal to file a compliance advice letter once four preconditions have been achieved at some point in the future prior to removal of the damns no earlier than 2020 is a reasonable process that is consistent with Commission practice.²⁰ PacifiCorp cited three cases in which the Commission conditionally approved the transfer of utility assets pursuant to Section 851 (and/or Section 854) of the Public Utilities Code, subject to conditions that would be reflected in a future compliance advice letter. However, in none of the cases cited by PacifiCorp did the Commission preapprove a transaction that would occur nine years in the future, at the earliest.

In two of the three cases²¹ the Commission provided that the authority to transfer the assets would expire if it was not exercised in a year. In the third case, the Commission limited the authority to transfer the assets to the three years.²² Limiting the conditional authority to transfer the assets to a reasonable time in the future makes sense, because the Commission's decision should be based on facts that exist at the time the decision is made, something that is impossible for a transaction that will happen at least nine years from now.

DRA also disagrees that “the only disputed issues relate to Surcharge collection and depreciation.”²³ Although DRA's witness Mr. Loy agreed that DRA would not object to the

²⁰ PacifiCorp Opening Brief, p. 21.

²¹ PacifiCorp Opening Brief, p. 18. See D.01-06-007, Ordering Paragraph 4 (“The authority granted by this decision shall expire if not exercised within one year from the effective date of this order.”); D.00-04-016, Ordering Paragraph 1 (“This authorization shall expire if not exercised within one year of the effective date of this order.”).

²² PacifiCorp Opening Brief, p. 18. See D.01-05-076, Ordering Paragraph 1 (“Within three years of the effective date of this order, Pacific Gas and Electric Company (PG&E) may sell and transfer to Solano County Farmlands and Open Space Foundation (Buyer), a California public benefit corporation, the Property as set forth in Application (A.) 01-02-005, subject to the reservations described therein.”).

²³ PacifiCorp Opening Brief, p. 7.

transfer of the Project if the four conditions were met, that does not mean that the Commission should authorize the transfer nine years before it could occur, at the earliest. The Commission should base its decision to authorize the transfer based on current information, and doing so would not “needlessly tie up Commission resources²⁴ or necessarily delay removal of Project facilities.” Instead, it would be reasoned decision making based on the most current information.

III. CONCLUSION

DRA respectfully requests that the Commission deny without prejudice PacifiCorp’s Application until important conditions precedent to the KHSA have been met, including passage of federal legislation and the securing the remaining financing needed to remove the dams.

Respectfully submitted,

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²⁴ PacifiCorp Opening Brief, p. 19.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of each document “**REPLY BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES**” in **A.10-03-015** by using the following service:

E-Mail Service: sending the entire document as an attachment to an e-mail message to all known parties of record to this proceeding who provided electronic mail addresses.

U.S. Mail Service: mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on, **November 24, 2010** at San Francisco, California.

/s/ ROSCELLA V. GONZALEZ

Roscella V. Gonzalez