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February 6, 2006

Public Utility Commission of Oregon  
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P.O. Box 2148  
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RE: In the Matter of MidAmerican Energy Holding Company Application for  
Authorization to Acquire Pacific Power & Light, dba PacifiCorp  
Docket No.: UM-1209

Dear Clerk:

Attached please find for electronic filing the following document:

1. **YUROK TRIBE'S BRIEF IN SUPPORT OF STIPULATION OF SETTLEMENT**

The original document has been forwarded to your offices by first class mail.

Should you have any questions regarding this matter, please do not hesitate to contact our Berkeley office.

Very truly yours,

ALEXANDER, BERKEY, WILLIAMS & WEATHERS LLP

/s/ Curtis G. Berkey  
Curtis G. Berkey

Enclosures

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**Docket No. 1209**

In the Matter of	)	
	)	
MIDAMERICAN ENERGY HOLDING CO.	)	<b>YUROK TRIBE’S BRIEF</b>
	)	<b>IN SUPPORT OF STIPULATION</b>
Application for Authorization to Acquire Pacific	)	<b>OF SETTLEMENT</b>
Power & Light, dba PacifiCorp and to Exercise	)	
Substantial Influence Over the Policies and	)	
Actions of PacifiCorp	)	

Intervenor Yurok Tribe submits this brief in response to the Commission’s Order of January 18, 2006, which requested additional information regarding mitigation measures and benefits contained in the Stipulation executed by various parties on December 23, 2005. The Yurok Tribe signed the Stipulation on January 4, 2006 and the Notice of its approval was filed with the Commission on January 9, 2006. As requested by the Commission, the Yurok Tribe addresses the following aspects of the Stipulation: 1) the harm the Tribe identified in its motion to intervene and opening testimony and the mitigating measure in the Stipulation that eliminates or reduces that harm; 2) the benefits contained in the Stipulation from the Yurok Tribe’s perspective that are within the Commission’s jurisdiction, are not intended to mitigate harms and are not otherwise required by law now or in the future; 3) the magnitude of the benefits and any remaining harms; and 4) the basis for concluding that the Application meets the public interest standard set out in ORS 757.511. The Yurok Tribe fully supports the Stipulation and, as demonstrated below, believes its meets the public interest standard under ORS 757.511.

1. Harms Identified by the Yurok Tribe and Mitigation Measures Which Address those Harms

In August, 2005, the Yurok Tribe sought intervention in this proceeding. The Tribe had two broad concerns: (1) the impacts of PacifiCorp's dams on the Tribe's anadromous fishery on the Klamath River and (2) the ability of PacifiCorp and MidAmerican to finance the costs of mitigation conditions that might be imposed by the Federal Energy Regulatory Commission in the relicensing proceeding now underway. On August 26, 2005, Administrative Law Judge Smith granted the Tribe's petition to intervene and limited its participation to "issues directly related to the legal issues in this proceeding," including but not limited to the application of the public interest standard of ORS 757.511. Subsequently, on November 1, 2005, Administrative Law Judge Smith issued a Ruling which listed the issues that are "subjects of concern in this docket." Ruling at 2. Among those issues, the Yurok Tribe was particularly concerned about issue 2.b., "[a]cknowledgment and ability [of MEHC] to pay possible liabilities pursuant to FERC relicensing of hydroelectric projects owned by PacifiCorp." Ruling at 2. Because the direct impact of PacifiCorp's dams on the Yurok Tribe's fishery was not included on this list, the Tribe confined its subsequent testimony to the potential liabilities the companies faced with regard to licensing conditions and operation of the hydroelectric facilities on the Klamath River.

In brief summary, the testimony of Troy Fletcher for the Yurok Tribe explained that the Tribe is taking the position in the relicensing proceeding that FERC should, to the maximum extent permitted by law, impose conditions on the new license that will permit the restoration and maintenance of the Yurok Tribe's fishery on the Klamath River and its tributaries throughout the fishery's native habitat and historic range. In the Tribe's view, FERC should consider fish passage measures, including dam removal, trap and haul and volitional methods, as appropriate conditions on the PacifiCorp's license. The conditions should also include measures to restore

watersheds, riparian areas and streams throughout the Klamath River Basin. The factual basis of the Tribe's position is that PacifiCorp's dams in the Klamath Hyrdoelectric Project have adversely affected the Tribe's fishery, as evidenced by declining populations of coho (listed as threatened under the Endangered Species Act), chinook, green sturgeon, lamprey and other related species. The estimates available to the Tribe for the costs of salmonid fishery improvement in the Klamath Basin range from \$200 million to \$500 million. Full fish passage without the removal of dams is estimated to cost up to \$100 million.

Mr. Fletcher's testimony also addressed the Yurok Tribe's concern that PacifiCorp's dams impair the water quality in the Klamath River, by, among other things, creating conditions behind the dams that allows a toxic algae *microcystis aeruginosa* ("microcystis") to grow. The testimony noted that in the summer of 2005 there were microcystis algae blooms in the reservoirs above PacifiCorp's dams, which eventually spread throughout the Klamath River below Iron Gate Dam to and including the Yurok Reservation downstream. The presence of the algae in the river was a threat to the health of the Yurok tribal members, as the recorded levels were hundreds of times above the level set by the World Health Organization as creating risk to human health.

The Yurok Tribe foresaw increased risk that MidAmerican's acquisition of PacifiCorp might impair PacifiCorp's ability to pay the costs of mitigation measures imposed by FERC as conditions on a new license. This was an issue included among the issues list in Administrative Law Judge Smith's Ruling of November 1, 2005, and the Yurok Tribe's submissions presented evidence and analysis relevant to that issue. The Stipulation addresses this concern in Exhibit 1, Consolidated List of Commitments, Commitment O 29:

MEHC and PacifiCorp agree that once a FERC license is issued and (a) PacifiCorp either (i) affirmatively accepts the license, or (ii) is deemed to have accepted the license pursuant to the terms of the license and FERC rules and procedures, and (b) the license's conditions are not subject to further appeals,

PacifiCorp shall have the ability to fund implementation of all final license conditions. This provision is generally applicable, but also specifically applies to the following PacifiCorp hydropower projects: Klamath, Lewis River, and Prospect. (emphasis added).

By executing the Stipulation, “MEHC and PacifiCorp agree to perform all of the Commitments set forth in Exhibit 1 according to the provisions of each Commitment.” Stipulation at ¶ 13.

This commitment obligates MEHC and PacifiCorp to avoid impairment of the ability of PacifiCorp to pay for the mitigation measures ordered by FERC with regard to the Klamath Hydroelectric Project, in both the structuring of the relationship between the companies and in the operation of PacifiCorp and MEHC following the acquisition. In the Yurok Tribe’s view, this provision, and MEHC’s and PacifiCorp’s legal obligation to comply without limitation, satisfies the Tribe’s concern that PacifiCorp will have the ability to implement the license conditions imposed by FERC, in particular those that concern the restoration and maintenance of the Tribe’s Klamath River fishery. As the Tribe’s testimony noted, the financial commitment required to implement FERC mitigation measures on the Klamath River is likely to be quite substantial. MEHC’s and PacifiCorp’s obligation to safeguard the ability to pay for these measures is significant from the Yurok Tribe’s perspective, and substantially mitigates the harm identified in the Tribe’s moving papers and testimony. For this reason, the Tribe executed the Stipulation and urges the Commission to approve it.

2. Benefits Within the Commission’s Jurisdiction But Not Intended to Mitigate Harms.

With regard to the Yurok Tribe’s specific concerns, the Tribe is not aware of benefits in the Stipulation that are within the Commission’s jurisdiction to approve or order that are not intended to mitigate harms the Tribe identified.

3. Magnitude of the Benefits and Unaddressed Harms

MEHC's and PacifiCorp's commitment to safeguard the ability of PacifiCorp to fully finance environmental measures imposed by FERC as a condition of a new license for the Klamath Hydroelectric Project on the Klamath River is significant, inasmuch as it removes one potential obstacle to the Tribe's goal of restoring anadromous fishery runs throughout their historic and native range in the Klamath Basin. Because the Commission does not have jurisdiction in this proceeding to order MEHC and PacifiCorp to adopt measures to mitigate harm to the Klamath River fishery caused by the Klamath Hydroelectric Project, the companies' commitment to maintain the ability to fund the mitigation measures that FERC orders is a significant benefit to the Tribe given the limited scope of this proceeding.

Although the Stipulation and Commitments do not specifically address the issue of harm to the Yurok Tribe from toxic algae formed by PacifiCorp's dams on the Klamath River, this issue may be addressed in the FERC conditions and the companies' commitment to finance any such mitigation measures would be benefit to the Tribe. In addition, in companion proceedings brought by these same parties before the California Public Utilities Commission, the Yurok Tribe, environmental groups, other tribes, and the utility company applicants, reached a settlement which does address the health threat caused by toxic algae in PacifiCorp's reservoirs. In that settlement agreement, PacifiCorp agrees that following approval of its acquisition by MEHC, it "will provide \$150,000 per year for three years to fund a study" "to identify the presence, distribution and possible causes of blue-green algae . . . and their toxins within the Klamath Basin." Settlement Agreement, ¶ C-5 (October 21, 2005). The California PUC Administrative Law Judge has recommended to the Commission that it approve the settlement (with some exceptions not relevant here). Draft Decision of ALJ Kenney (January 17, 2006).

The Tribe anticipates that the acquisition will be approved in California, and the process of determining the root causes of the toxic algae will commence at once. Thus, though the threat to public health caused by the toxic algae will remain following the conclusion of this proceeding, that harm is being addressed in California, and the Yurok Tribe believes that the Stipulation here nonetheless contains significant benefits to the Tribe and to the public.

4. Public Interest Standard

The Yurok Tribe believes the Stipulation satisfies the public interest standard of ORS 757.511. That section provides, *inter alia*, that the Commission should approve an application to acquire a public utility if the Commission determines “that approval of the application will serve the public utility’s customers in the public interest.” In Order No. 01-778, dated September 4, 2001, this Commission adopted a legal standard to be applied in the public interest determination. The public interest standard is satisfied by a two-fold showing: 1) that the acquisition provides a net benefit to the utility’s customers; and 2) that the acquisition will not impose a detriment on Oregon citizens as a whole. Order at 11. The net benefit is to be assessed according to “the total set of concerns presented by each” application, rather than being limited solely to economic considerations. *Id.*

Hundreds of the Yurok Tribe’s members in Oregon are served by PacifiCorp. The Tribe regards MEHC’s and PacifiCorp’s commitment to safeguard the financial ability to comply with FERC mitigation conditions as a benefit of tremendous importance. In the Tribe’s view, the significance of this benefit to its members in Oregon (and California) far outweighs any potential detriment from other provisions of the Stipulation. Thus, the net benefit standard is met.

For these reasons, the Yurok Tribe urges the Commission to approve the Stipulation and application.

Dated: February 6, 2005

Respectfully submitted,

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## ACKNOWLEDGMENT OF SERVICE

I certify that I have this day caused to be served the foregoing document:

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upon all parties of record in this proceeding by mailing a copy properly addressed with first class postage prepaid or by electronic means pursuant to OAR 860-013-0070, to the following parties or attorneys or parties:

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I further certify that on February 6, 2006, in addition to filing the document electronically, I caused to be mailed the original of the Yurok Tribe's Brief in Support of Stipulation of Settlement with the Public Utility Commission of Oregon, via first class mail, to the following address:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on February 6, 2006, at Berkeley, California.

/s/ Curtis G. Berkey  
Counsel for Petitioner,  
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