Service Date: February 10, 2023

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION Complainant, v. PACIFICORP, d/b/a PACIFIC POWER & LIGHT COMPANY, Respondent.	DOCKET UE-220376 ORDER 06 GRANTING MOTION TO WITHDRAW

BACKGROUND

1 On November 1, 2021, PacifiCorp d/b/a Pacific Power & Light Company (PacifiCorp or Company) filed with the Washington Utilities and Transportation Commission (Commission) its Draft Clean Energy Implementation Plan (CEIP) in Docket UE-210829 along with a Petition for Exemption from WAC 480-100-605 (Petition).

2 On December 9, 2021, PacifiCorp's Petition was heard at the Commission's regularly scheduled Open Meeting.

3 On December 13, 2021, the Commission issued Order 01 in Docket UE-210829, denying PacifiCorp's Petition.

4 On December 30, 2021, PacifiCorp filed with the Commission its final CEIP in Docket UE-210829.

5 On June 6, 2022, the Commission, through its staff (Staff), issued a Complaint and Notice of Prehearing Conference in Docket UE-220376 (Complaint). The Complaint alleges that PacifiCorp violated Commission Order 01 in Docket UE-210829,[1] Revised Code of Washington (RCW) 19.280.030(3)(a)(ii), RCW 19.280.030(3)(a)(iii),

[1] *In re Petition of PacifiCorp d/b/a Pacific Power & Light Co Seeking Exemption from the Provisions of WAC 480-100-605*, Docket UE-210829, Order 01, Denying Petition for Exemption, (Dec. 13, 2021).

Washington Administrative Code (WAC) 480-100-640(7), and WAC 480-100-660(4) by failing to incorporate the social cost of greenhouse gases (SCGHG) in the preferred portfolio of its CEIP. The Complaint requested the Commission find PacifiCorp in violation of statute, Commission rule, and Commission order and assess a penalty of $1,000 per day for each of the five violations alleged.

6 On June 27, 2022, PacifiCorp filed with the Commission an Answer, a Motion to Stay Penalties, and a Motion to Dismiss.

7 The Commission initially convened a virtual prehearing conference on June 30, 2022, before Administrative Law Judge Andrew J. O'Connell.

8 On July 5, 2022, the Commission issued Order 01, granting among other things, a motion to continue the prehearing conference until several issues were resolved by Commission order.

9 On August 1, 2022, the Commission issued Order 02, denying a motion filed by PacifiCorp to dismiss the Complaint and stay penalties.

10 On August 25, 2022, the Commission issued Order 03, denying a motion filed by Staff to consolidate this proceeding with Docket UE-210829.

11 The Commission reconvened a virtual prehearing conference in this matter on September 6, 2022, before Administrative Law Judge Andrew J. O'Connell.

12 On September 8, 2022, the Commission entered Order 04, Prehearing Conference Order; Notice of Hearing, adopting with modifications a procedural schedule proposed by the parties at the reconvened prehearing conference.

13 On November 14, 2022, Staff contacted Judge O'Connell on behalf of the parties to indicate that the parties had reached a multiparty settlement in principle and to request the Commission suspend the procedural schedule.

14 On November 17, 2022, the Commission issued a Notice Suspending Procedural Schedule and Notice of Deadlines for Filing Motion and Responses to Motion.

15 On December 1, 2022, Staff timely filed a Motion to Withdraw Complaint (Motion) and a Settlement Agreement to Withdraw Staff's Complaint (Agreement). Staff, PacifiCorp, Sierra Club, and NW Energy Coalition (NWEC) (collectively the Settling Parties) join the Agreement and support Staff's Motion. The Alliance of Western Energy Consumers

(AWEC) does not oppose Staff's Motion or the Agreement. The Public Counsel Unit of the Washington Attorney General's Office (Public Counsel) opposes Staff's Motion and the Agreement.

16 On December 23, 2022, Public Counsel filed its response in opposition to the Motion and the Agreement.

17 On January 18, 2023, the Commission issued a Notice of Hearing, setting a virtual hearing on Staff's Motion and Agreement for January 26, 2023.

18 On January 26, 2023, the Commission convened a virtual hearing in this matter. The Commission heard argument from representatives of Staff, PacifiCorp, Sierra Club, and Public Counsel. The Commission also heard testimony from witnesses for Staff, PacifiCorp, and Public Counsel.

19 Nash I. Callaghan, Assistant Attorneys General, Olympia, Washington, represents Staff.[2] Zachary Rogala, Senior Attorney, PacifiCorp, Portland, Oregon, represents PacifiCorp. Nina Suetake, Ann Paisner, and Lisa Gafken, Assistant Attorneys General, Seattle, Washington, represent Public Counsel. Tyler Pepple and Sommer J. Moser, Davison Van Cleve, P.C., Portland, Oregon, represent AWEC. Rose Monahan, Staff Attorney, Sierra Club Environmental Law Program, Oakland, California, and Jim Dennison, Associate Attorney, Sierra Club Environmental Law Program, Boulder, Colorado, represent Sierra Club. Lauren McCloy, Policy Director, NWEC, represents NWEC.

DISCUSSION

20 The Commission determines that the applicable standard of review is identified in WAC 480-07-380, that Staff's Motion meets that standard, and that the Commission should grant Staff's Motion for the reasons explained below.

[2] In formal proceedings such as this, the Commission's regulatory staff participates like any other party, while the presiding administrative law judge makes the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

I. Issues in Dispute

21 The issue for the Commission's resolution is whether Staff's Motion should be granted. The allegations in the Complaint assert a total five violations of Commission order, Commission rule, and statute for which the Commission could, if proven, assess penalties of up to $1,000 per day for each. The issues in dispute in this proceeding are, therefore, whether PacifiCorp violated Order 01 in Docket UE-210829, RCW 19.280.030(3)(a)(ii), RCW 19.280.030(3)(a)(iii), WAC 480-100-640(7), or WAC 480-100-660(4) by failing to incorporate the SCGHG in the preferred portfolio of its CEIP. The Agreement, pursuant to which Staff seeks withdrawal, fails to resolve any issue in dispute.[3]

22 The Agreement indicates the following: Staff will file its Motion; PacifiCorp will file a revised CEIP within 30 days of this Order using the P02-SCGHG portfolio as the basis of the CEIP preferred portfolio, including all Washington-allocated resources selected in P02-SCGHG and any additional Washington-allocated resources that are necessary to comply with the Clean Energy Transformation Act (CETA); PacifiCorp will also filed a thorough and detailed explanation of how the SCGHG is incorporated into the revised CEIP and how it was incorporated into the initial final CEIP; the Settling Parties will review to confirm that PacifiCorp's revised CEIP is consistent with the Agreement through a preclearance process prior to its filing with the Commission; and, that there is no resolution of any contested issue of fact or law presented in the Complaint, including whether any penalty is warranted.[4] No term in the Agreement, therefore, resolves any allegation included in the Complaint.

II. Standard of Review

23 Pursuant to WAC 480-07-380(3)(a), Staff must obtain the Commission's permission to withdraw its complaint after an adjudication has commenced.[5] The Commission's rule requires that a motion to withdraw "must include any settlement or other agreement pursuant to which the party is seeking withdrawal."[6] The Commission will grant such a motion when the requested withdrawal is in the public interest.[7]

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[3] Agreement at 1-4, ¶¶ 3-14.

[4] *Id.* at 1-3, ¶¶ 3-9.

[5] WAC 480-07-380(3)(a).

[6] *Id.*

[7] WAC 480-07-380(3)(b).

24 Staff and the Settling Parties argue that to grant the Motion the Commission need only determine that it is in the public interest. Public Counsel argues that the Commission cannot grant the Motion without also determining that the Agreement meets the Commission's standard for settlement agreements, which would require the Commission to consider whether the Agreement is "lawful, supported by an appropriate record, and consistent with the public interest in light of all the information available to the commission."[8]

25 Staff argues that the Motion and the Agreement meet either standard, but that only the standard for granting a motion to withdraw applies in this case. Public Counsel argues that the Motion and the Agreement fails to meet either standard, but that the Commission must apply its standard for consideration of settlement agreements in this case. The Commission agrees with Staff for two reasons: the Agreement does not resolve any issues in dispute, and Public Counsel's interpretation would disincentivize full disclosure and informal resolutions.

26 First, Public Counsel relies upon Commission rules WAC 480-07-730, WAC 480-07-740, and WAC 480-07-750.[9] WAC 480-07-730 states that a "settlement is an agreement among two or more parties to a commission adjudication that resolves one or more disputed issues in that proceeding."[10] If the Agreement resolved whether PacifiCorp violated Commission order, Commission rules, or statutes, then the interpretation advocated by Public Counsel could prevail. The Agreement does not, however, purport to resolve any issue in dispute.[11] Thus, Commission rules WAC 480-07-730, WAC 480-07-740, and WAC 480-07-750 do not apply.

27 A motion to withdraw need not also include a settlement or other agreement.[12] If such a settlement or agreement exists, however, the rule requiring its inclusion ensures disclosure of all information pertinent to and all motivations behind the motion. The assurance of this disclosure preserves the Commission's ability to reach a fully informed decision.

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[8] WAC 480-07-750(2).

[9] Public Counsel's Response at 12, ¶ 37; *id.* at 19-20, ¶¶ 34-35 [sic].

[10] WAC 480-07-730.

[11] *Compare* Complaint at 6-7, ¶¶ 20-24, *with* Agreement at 1-4, ¶¶ 3-14; Callaghan, TR at 54:2-10, 67:24-68:8.

[12] *See* WAC 480-07-380(3).

28 Second, applying the standard of review for which Public Counsel advocates in a case such as this, where an agreement provides additional information and context for the Commission's consideration but does not include any resolution of disputed issues, would produce an absurd procedural quandary disincentivizing full disclosure and incentivizing obfuscation of the motivations behind the motion. It would also disincentivize informal resolutions in cases like this by applying a heightened standard for review despite no resolution of the disputed issues. Such a situation would irrationally disincentivize settlements, which would be contrary to both the Administrative Procedure Act and the Commission's procedural rules, and would incentivize either the withholding of or disinterest in pursuing information pertinent to the Commission's consideration.[13]

29 Yet, Public Counsel's argument is not without merit. The standard for which Public Counsel advocates should apply when a settlement agreement included with a motion to withdraw resolves disputed issues in the case. Here, it does not apply. Accordingly, Public Counsel's argument must fail. Because the Agreement is not a settlement that resolves any issue in dispute, the Commission should apply the standard of review in WAC 480-07-380(3) and should only consider whether the Motion is in the public interest. Regardless, the Commission agrees with Staff that the Motion and Agreement also satisfy the standard of review advocated for by Public Counsel.[14]

III. The Public Interest

30 Pursuant to WAC 480-07-380(3)(b), the Commission will grant a party's motion to withdraw a complaint when the requested withdrawal is in the public interest. Here, the Commission determines it is.

31 Public Counsel argues that granting the Motion would not be in the public interest for two reasons. First, Public Counsel argues that granting the Motion would set a bad precedent or send a poor signal to PacifiCorp and other investor-owned utilities as the Commission considers future CEIPs and utilities' compliance with Washington climate goals.[15] Specifically, Public Counsel argues that incorrect accounting of the SCGHG might greatly affect the incremental cost calculations and resource selections in future

[13] RCW 34.05.060; WAC 480-07-700.

[14] *See* Callaghan, TR at 86:19-87:13.

[15] Public Counsel's Response at 18, ¶ 51; Chase, TR at 113:8-23; Paisner, TR at 60:13-25.

CEIP periods, even if those in the current CEIP period are not so affected.[16] In addition, Public Counsel argues that despite ample opportunity PacifiCorp has not provided in the record of this proceeding or Docket UE-210829 a clarification, explanation, or refiling showing how its CEIP incorporates the SCGHG as required by Commission order, Commission rules, and statute.[17] Second, Public Counsel argues that there is insufficient support in the record to support the Motion.[18]

32 Firstly, like Public Counsel, the Commission is not impressed by PacifiCorp's lack of clarity or its failure to supplement this record to provide clarity. However, the Commission finds that granting Staff's Motion will not set bad precedent or send a poor signal to PacifiCorp and other investor-owned utilities regarding current or future CEIPs. It is appropriate, here, to acknowledge and emphasize Staff's efforts prior to this case. Staff's testimony makes clear its frustration and dissatisfaction with PacifiCorp's draft CEIP, final CEIP, and PacifiCorp's prior attempts, or lack thereof, to explain how it incorporated the SCGHG.[19]

33 Staff believes that filing the Complaint was the correct and appropriate action under the circumstances.[20] Staff explains that the lack of clarity in PacifiCorp's filing and apparent lack of forthright disclosure subsequently as contributing directly to Staff's filing of the Complaint.[21] The Commission anticipates that Staff will take appropriate action in the future should circumstances demand it. Staff's demonstrated willingness to file and pursue the Complaint, along with the other parties, in addition to the potential for significant penalties, are strong incentives for future compliance, clarity, and forthrightness. Contrary to Public Counsel's perspective, the Commission finds that granting Staff's Motion will not create bad precedent or send a poor signal to PacifiCorp or any other investor-owned utility for future CEIPs.

34 Public Counsel's evidentiary arguments focus on the extent of record support for a determination on the merits; whether PacifiCorp's final CEIP violated Commission order,

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[16] Public Counsel's Response at 21-22, ¶ 38 [sic]; Chase, Exh. SKC-1T at 13:18-14:6; Chase, TR at 113:8-23.

[17] Public Counsel's Response at 15, ¶ 43; *id.* at 21, ¶ 37 [sic]; Chase, Exh. SKC-1T at 12:3-14; Chase, TR at 114:21-115:3; Paisner, TR at 120:10-13, 123:10-11.

[18] Public Counsel's Response at 13-15, ¶¶ 40-43; *id.* at 19-22, ¶¶ 53-39 [sic]; Paisner, TR at 59:8-60:6, 120:23-121:3. Public Counsel relies upon RCW 34.05.461 to support this argument.

[19] *See* Rector, Exh. ASR-1T at 12:7-15:8.

[20] Callaghan, TR at 66:4-7, 72:21-73:1.

[21] *See* Rector, Exh. ASR-1T at 12:7-15:8.

Commission rules, or statute.[22] Its arguments, however, are misdirected. Considering the extent of support in the record as a portion of whether the Motion is in the public interest, the question is correctly directed at whether there is sufficient support in the record for the Motion – not for a determination on the merits. The Commission determines there is sufficient support for Staff's Motion.

35 In the Motion, Staff states: "While the other settling parties do not necessarily agree with the statements and conclusions in Staff's testimony, the Settling Parties believe the testimony represents sufficient supporting documentation in the record to approve the settlement and grant the motion."[23] The Commission agrees. In Staff's testimony, witness Rector expresses frustration and dissatisfaction with PacifiCorp's attempts to explain how it incorporated the SCGHG and also a degree of uncertainty leading to those frustrations.[24] This theme appears in several areas, including the following excerpts:

> **Q. Is the final CEIP clear about whether or not the Company incorporated the SCGHG into its preferred portfolio?**
> A. No. . . .[25]
>
> **Q. Based on the information submitted by PacifiCorp, does Staff conclude that the Company incorporated the SCGHG into its CEIP for certain resources?**
> A. Yes. As noted in the complaint, the CEIP mentions the use of the SCGHG when determining cost-effective energy efficiency potential. Further, the data request responses demonstrate that the Company incorporated the SCGHG into its modeling methodology in at least some of the portfolios it analyzed when the Company claims that its "preferred portfolio was created on the basis of the "P02-MM" and the "P02-SCGHG-MM" studies." As described in Staff's complaint, "MM" represents a scenario with a medium natural gas price and a medium carbon price. A medium carbon price and the SCGHG are not equal.[26]

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[22] Public Counsel's Response at 13-15, ¶¶ 40-43; *id.* at 20, ¶ 36 [sic]; *id.* at 22, ¶ 39 [sic].

[23] Motion at 5, n. 5.

[24] Rector, Exh. ASR-1T at 12:6-21:3.

[25] *Id.* at 12:6-8.

[26] *Id.* at 18:7-19:3.

36 At hearing, PacifiCorp witness Ghosh provided greater explanation of the P02-SCGHG and P02-MM-CETA portfolios, including information about how PacifiCorp attempted to incorporate a SCGHG dispatch cost adder, evaluated the results of various portfolios against its need to meet Washington's clean energy targets, and created the P02-MM-CETA portfolio.[27]

37 While disagreement among the parties remains (as to whether PacifiCorp failed to appropriately incorporate the SCGHG in its final CEIP), these portions of the record support Staff's assertion that litigation uncertainty exists and was a consideration when it joined the Agreement and decided to file the Motion. Staff weighed the value of continuing the litigation, including its perceived uncertainty of achieving a favorable result, against the value of the Settling Parties' Agreement and "being able to continue and make progress in [PacifiCorp's] CEIP" in Docket UE-210829.[28]

38 Staff further explains in its Motion:

> While the Settling Parties had disagreements on the merits of the Complaint and whether penalties would be appropriate, the settlement is a compromise that balances the cost and risk of fully litigating the complaint with the potential benefits. The settling parties believe this outcome is in the public interest considering that the refiling required by the settlement results in a PacifiCorp CEIP that the Settling Parties agree complies with the requirements of statute, commission rule, and order, and avoids unnecessary delays in [Docket UE-210829].[29]

39 The Commission agrees. The Agreement's terms make no determination upon the merits of this case, including whether PacifiCorp violated Commission order, Commission rule, or statute, and whether penalties should be assessed.[30] Further, the Agreement does not preempt the Commission from further pursuing the alleged violations of the Complaint and any penalties for those violations, which Public Counsel noted as one of its

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[27] Ghosh, TR at 104:23-107:7.

[28] Callaghan, TR at 64:13-65:9; Motion at 4-5, ¶ 8.

[29] Motion at 4, ¶ 8.

[30] *Id.* at 5, ¶ 9; Agreement at 3, ¶ 9; Callaghan, TR at 54:2-10.

concerns.[31] Staff explains that its "goal of administrative penalties is to incent a regulated entity into compliance."[32] This is consistent with the Commission's enforcement policy.[33] Because granting the Motion does not resolve any issues on their merits and the Commission's ability to pursue the alleged violations, if it chose, is not impeded, the Commission finds that these terms support granting the Motion.

40 Staff explains that this proceeding is delaying a full evaluation of PacifiCorp's CEIP in Docket UE-210829, stating: "as long as this complaint is ongoing, it's extremely difficult, if not impossible, to reach a resolution [in Docket UE-210829]."[34] Staff emphasizes that moving forward in Docket UE-210829 with a CEIP that the Settling Parties agree is compliant is in public interest.[35] Considering the posture and circumstances of this case, the Commission agrees that removing a barrier to progress in the Commission's evaluation of PacifiCorp's CEIP in Docket UE-210829 is in the public interest.

41 The Commission also finds that the Agreement's terms resulting in a refiling of PacifiCorp's CEIP that the Settling Parties agree is compliant are in the public interest. At hearing, Sierra Club explained that pursuant to the Agreement PacifiCorp must file very detailed explanations for how the SCGHG is incorporated into the refiled CEIP's preferred portfolio and also how it was incorporated into the original preferred portfolio in the final CEIP.[36] Because PacifiCorp's modeling is very complex and difficult for interested persons to engage with, says Sierra Club, having the comparative "information on the record will be extremely useful" to the Commission, the parties, and the public for evaluating future CEIP filings.[37] The Commission agrees. The Motion and Agreement will achieve a refiled CEIP that the Settling Parties agree is compliant, a detailed explanation of how the SCGHG is incorporated into the refiled CEIP, and a backwards-looking, comparative explanation of how the SCGHG was incorporated into the final CEIP. These are outcomes that are achievable through informal resolution that are

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[31] Callaghan, TR at 71:25-72:17, 74:25-76:19; Rogala, TR at 72:20-74:9; Public Counsel's Response at 12, ¶ 37; *see id.* at 16-19, ¶¶ 44-52.

[32] Motion at 4, ¶ 8; *see also* Callaghan, TR at 66:22-67:7, 76:20-21.

[33] *In re Enforcement Policy of the Wash. Utils. & Transp. Comm'n*, Docket A-120061, Enforcement Policy of the Wash. Utils. & Transp. Comm'n (Jan. 7, 2013).

[34] Callaghan, TR at 65:1-3.

[35] Motion at 5, ¶ 9; Callaghan, TR at 64:20-65:9.

[36] Monahan, TR at 57:24-58:6.

[37] *Id.* at 62:15-64:2.

unlikely to result from continued litigation.[38] In addition, the Commission agrees with Sierra Club that this information will be extremely useful and instructional to the Commission, parties, and the public in the evaluation of future CEIPs filed by PacifiCorp and other investor-owned utilities.

42 While granting Staff's Motion would not provide a resolution on the merits of the allegations in the Complaint, Staff has supported its Motion and the Agreement sufficiently, reasonably, and effectively. Accordingly, the Commission determines that Staff's Motion is in the public interest for the reasons explained in this Order, including the benefits of the terms of the Agreement, the ability to move forward in Docket UE-210829, Staff's uncertainty of a favorable outcome from continuing the litigation, and that the Motion and Agreement do not resolve the issues of fact or law presented in the Complaint or preclude future Commission action, if necessary. Additionally, even applying the heightened standard of review advocated by Public Counsel, the Commission would also determine that the Agreement is lawful, supported by an appropriate record, and consistent with the public interest in light of all the information available to the Commission for the reasons explained in this Order.

43 The Commission should, therefore, grant Staff's Motion.

ORDER

44 THE COMMISSION orders that Commission Staff's Motion to Withdraw Complaint is GRANTED.

DATED at Lacey, Washington, and effective February 10, 2023.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

/s/ *Andrew J. O'Connell*
ANDREW J. O'CONNELL
Administrative Law Judge

[38] Agreement at 2, ¶¶ 4-6; *see* Monahan, TR at 57:12-58:6, 62:15-64:2; Ghosh, TR at 100:25-102:12, 103:19-107:7; Rector, TR at 103:15-18.