BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PACIFICORP d/b/a PACIFICORP POWER & LIGHT COMPANY, Respondent.	DOCKET NO. UE-210829

POST-HEARING REPLY BRIEF OF NW ENERGY COALITION AND RENEWABLE NORTHWEST

November 27, 2024

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 4

I. It is PacifiCorp's Responsibility to "Demonstrate Compliance" Toward CETA's Goals. It has failed to do so. 4

A. IRP Planning Should not Override the CEIP Process: It Must Facilitate it. The 2022AS RFP is Relevant Because it Could Have Informed PacifiCorp's IRP Update and the CEIP Interim Target Revisions. 6

B. PacifiCorp's Assertion of "Reasonable Progress" is Unsupported. 9

C. PacifiCorp Has Not Established that its Plan Is "Lowest Reasonable Cost." 11

II. PacifiCorp's Manipulation of Renewables Costs Remains Unsupported. 11

III. The Commission Must Apply CETA Consistently and Predictably. 12

IV. There is a Legitimate Need for PacifiCorp to Conduct an Early 2025 All-Source RFP, and the Commission Possesses Authority to Order such Relief. 13

A. The Commission Has Broad Authority to Regulate Utilities in the Public Interest. 15

B. Ordering PacifiCorp to Conduct an All-Source RFP Would Not Invade PacifiCorp's Right to Self-Management. 16

CONCLUSION 20

INTRODUCTION

1. PacifiCorp characterizes this case as "routine," by attempting to frame it as merely a pedestrian application of existing statutes, regulations, and uncontested planning assumptions, all of which lead, inevitably and appropriately according to the Company, to the reduced interim targets for which PacifiCorp now seeks approval. The Company would have the Commission believe that this outcome—regression, rather than progress, on its interim targets—is unexceptionable, because application of four assumptions, three of which PacifiCorp asserts are uncontested and one of which is moot, naturally lead to this result. The problem with this reasoning is that it treats CETA's clean-energy standards, and more specifically its requirement that utilities demonstrate "progress toward" those standards, as secondary to and separate from the resource planning process and, more troublingly, to PacifiCorp's opaque internal assessment of its retail forecast, creating a tail wagging the dog scenario that makes CETA compliance subordinate to the Company's calculation of its financial interests.

2. PacifiCorp is essentially suggesting the Commission approve a framework for CETA implementation whereby compliance only need occur when external circumstances permit. While the COVID pandemic and related supply chain issues created difficulties and additional expense for the acquisition of the resources necessary to build new energy generating infrastructure (presumably of all kinds), and PacifiCorp's financial difficulties created additional challenges, neither of these scenarios are outliers—indeed such "unforeseen" events can be expected to occur with increasing frequency as climate change becomes more acute. The purpose of CETA is to address Washington electric utilities' contributions to climate change and to help insulate both utilities and communities served by them from its

worsening threats—such as extreme weather, wildfires, and even future pandemics. These are difficulties that, rather than providing excuses for stalled progress toward CETA's goals, illustrate the importance of attaining compliance consistent with the statutory timeframes to the greatest extent possible. Holding PacifiCorp to its commitments under the revised 2021 CEIP is wholly consistent with the Commission's existing guidance.[1] This guidance appropriately balances the importance of adhering to interim targets with the undeniable need, when circumstances dictate, to develop accommodations in the interests of equity and reasonableness.[2]

3. PacifiCorp's suggested approach to compliance is akin to a student declaring, "I'll do my homework as long as everything in my life is perfectly aligned - when I'm not stressed, when my extracurriculars aren't busy, when my internet is working perfectly, when there's no family drama, when I'm feeling 100% healthy. Sure, homework is 'required,' but that requirement only applies when conditions for it are optimal." As with the student, PacifiCorp is effectively attempting to rewrite the rules to render compliance optional based on external variables, rather than treating it as a fundamental requirement that must be planned for and achieved to the greatest extent possible despite challenges—particularly challenges that are likely to occur with increasing frequency in the future because of the very problem CETA was

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[1] *In re Puget Sound Energy CEIP*, Docket UE-210795, Order 14 (Nov. 8, 2024) (Denying Petition to Amend Orders 8 and 12, and Adjust PSE's Clean Energy Implementation Plan Annual Interim Targets for 2024 and 2025).

[2] "[T]he Commission does not expect or anticipate rote adherence with interim targets" and has flexibility within existing interim targets to consider whether "unreasonably expensive" measures are required to ensure compliance. *Id*. at. ¶ 10; *see also In re Adopting Rules Relating to Clean Energy Implementation Plans and Compliance with the Clean Energy Transformation Act*, Dockets UE-191023 & UE-190698 (consolidated), General Order 601 at fn. 34 (Dec. 28, 2020).

enacted to address—climate change. Just as a student is expected to manage their coursework through normal life disruptions, utilities should be expected to achieve compliance with CETA despite foreseeable challenges.

4. Carrying this analogy a step further, the COVID pandemic and related supply chain issues are akin to a major snowstorm that affects everyone in the class—while it might warrant some flexibility or accommodation,[3] it doesn't eliminate the basic requirement to complete the work. Given the increasing nature of such uncertainties, it is not unreasonable to expect utilities to plan ahead, develop backup plans in case of disruptions, proactively communicate about genuine obstacles, and continue to work towards the statutory requirements. While PacifiCorp insists that it has fulfilled some of these expectations and stresses the reasonableness of its excuses for not having fulfilled others, its conduct during this CEIP planning period has, at its core, sacrificed meaningful progress towards compliance to the Company's own expediency.

5. In its discussion of how these external pressures affected its planning and acquisition of CETA compliant resources, PacifiCorp fails entirely to address the possibility that acquisition of additional non-emitting resources, consistent with the approved revised CEIP, could have offset these real-world circumstances.[4] Ultimately, it is the Company's burden to support its proposed targets. It has failed to do so here, and the Commission should reject its efforts to

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[3] Which accommodation the Commission has already and repeatedly signaled it is not willing to provide, per fn. 2, *supra*.

[4] *See* Initial Brief of Public Counsel, ¶¶ 13-17 (explaining how PacifiCorp's multi-state model shortchanges Washington customers and pointing out that PacifiCorp's claims that long-term procurement will have negative cost implications for Washington's customers is at best unsupported and more likely is contradicted by existing evidence.)

shift that burden away from the utility and on to intervenors, Commission Staff, and the Commission itself.

ARGUMENT

I. It is PacifiCorp's Responsibility to "Demonstrate Compliance" Toward CETA's Goals. It has failed to do so.

6. PacifiCorp portrays this case as an open and shut inquiry whose outcome is determined by the narrative the Company has subscribed to. According to the Company's account, four assumptions predetermine the unavoidable outcome of reduced interim targets. Three of these assumptions—correct application of the WIJAM, correct updating of PacifiCorp's retail forecast, and incorporation of "actual" procurement from the 2020AS RFP—are, PacifiCorp asserts, uncontested. The fourth assumption on which the reductions were based—PacifiCorp's decision to extend the use of thermal resources in the 2023 Rate Case—is rendered moot, according to the Company, by the fact that Staff and the Commission approved that decision in the rate case. These considerations, as recounted by PacifiCorp, adequately support the interim target reductions and ostensibly negate RNW-NWEC's concerns about the adequacy of PacifiCorp's planning and modeling efforts in the 2023 IRP and 2021 IRP Two-Year Progress Report.[5]

7. PacifiCorp attempts to portray critiques of its CEIP engagement as irrelevant: "[t]he parties decline to engage with each of [the] primary justifications that lowered PacifiCorp's interim targets. Instead, they focus on matters not relevant to the determinations the Commission is required to make."[6] Apart from being factually incorrect, as explained below,

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[5] *See* RNW-NWEC Initial Post-Hearing Brief at ¶¶ 15-17, 24, 27-33.

[6] PacifiCorp Initial Brief at ¶ 5.

this accusation could with greater accuracy be leveled at PacifiCorp, because it persistently ignores a critical aspect of this proceeding: the burden of proof. PacifiCorp is already subject to interim targets in a Commission-approved CEIP that demonstrate a trajectory toward meeting CETA's requirements. In seeking to change its trajectory, PacifiCorp bears the burden of proof. Unfortunately for PacifiCorp, it could have undertaken actions that would have placed it on track to meet its CETA obligations, but it did not do so. Instead, the Company seeks to deflect focus away from the issues of real concern in an effort to characterize the Parties' differences as trivial and irrelevant. This is misleading because many of the critiques raised in this docket have questioned the Company's *justifications* for its actions, rather than the actions themselves.

8. A closer look at PacifiCorp's "uncontested" assumptions reveals this subterfuge. *Of course,* no party contests that PacifiCorp applied the WIJAM correctly; the real issue of concern is that the Company based its original targets on a methodology that was not Commission approved. *Of course,* no party contests that PacifiCorp acquired fewer resources from the 2020AS RFP than anticipated; the real issue to which RNW-NWEC take exception is that the Company has halted all near-term procurement efforts, revealing a de-prioritization of state compliance. *Of course,* no party contests that the Commission approved the extension of certain thermal units in PacifiCorp's rates; the real issue is that PacifiCorp did not allow its portfolio modeling tool to determine the most economic outcome but rather predetermined the

extent to which thermal resources would serve its customers to "mitigate [] market exposure."[7, 8]

9. Moreover, the Company's assertion with respect to the "uncontested" nature of these assumptions is itself misleading when it comes to the adequacy of PacifiCorp's planning efforts. While RNW-NWEC do not dispute the facts of the Company's 2023 General Rate Case settlement, RNW-NWEC *do* contest the notion that PacifiCorp's IRP development was appropriately conducted, especially with respect to near-term procurement needs and the economic viability of thermal resources as compared to non-emitting alternatives.

A. IRP Planning Should not Override the CEIP Process: It Must Facilitate it. The 2022AS RFP is Relevant Because it Could Have Informed PacifiCorp's IRP Update and the CEIP Interim Target Revisions.

10. PacifiCorp states that "[a]fter completing initial modeling from the 2021 Two-Year IRP Update," it determined that market prices necessitated "alternative strategies to mitigate this market exposure."[9] Ultimately, of course, the Company determined to mitigate its market exposure by extending the timeframe over which various thermal resources would serve Washington customers, effectively using the space in PacifiCorp's portfolio that would otherwise (under the approved 2021 CEIP) have been occupied by non-emitting CETA

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[7] *Id*. at ¶ 30.

[8] PacifiCorp cites a $70 million savings to Washington customers attributable to the re-allocation of emitting resources (PacifiCorp Initial Brief at ¶¶ 31-32). To be clear, RNW-NWEC's concern is not the Company's seeking of cost savings but the amount of manual manipulation applied post-model run during IRP development. Reducing the amount of manual manipulation would improve the transparency of the Company's modeling processes, as cost impacts can be better traced.

[9] PacifiCorp Initial Brief at ¶ 30.

compliant resources. Against this backdrop, PacifiCorp's assertion that the 2022AS RFP is irrelevant to this proceeding rings hollow.

11. The Company's logic is as follows: the fact that the 2022AS RFP was cancelled *after* filing of the CEIP and IRP updates renders it an irrelevancy for purposes of this docket because PacifiCorp should "only be judged based on information that it possessed at the time that it developed its plans to comply with CETA. And both the suspension and cancellation of the 2022AS RFP occurred well after PacifiCorp's modeling from the 2021 Two-Year IRP Progress Report was completed."[10]

12. However, PacifiCorp's response to UTC Staff's DR 60 in this docket[11] and other filings made in OPUC Docket LC 82[12] paint a different picture. As described in RNW-NWEC's Initial Brief, there is reason to believe PacifiCorp received third-party bids in the 2022AS RFP that it could have evaluated for cost competitiveness.[13] This process of bid receipt and evaluation would, by PacifiCorp's definition, be relevant as it would have occurred *during the development of the 2021 Two-Year IRP Progress Report*. If PacifiCorp received cost-competitive third-party bids in the 2022AS RFP, and the 2022AS RFP was a Specific Action supporting the 2021 Revised CEIP, this RFP would indeed be relevant not only to this proceeding and the Commission's determination of PacifiCorp's progress toward CETA, but

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[10] *Id.* at ¶ 71.

[11] Exh. RG-19X.

[12] *E.g.*, Exh. RG-30X, Public Utility Commission of Oregon Redacted Staff Report, Docket No. LC 82, at 10-11 (August 1, 2024).

[13] RNW-NWEC Initial Post-Hearing Brief at ¶¶ 32-34.

also, as raised by Commissioner Rendahl, the Commission's consideration of disallowance in a future rate case proceeding.[14]

13. Moreover, PacifiCorp declines to explain its decisions to suspend and ultimately terminate the 2022AS RFP except to say "it would have been imprudent and unreasonable" to procure resources under this RFP "when the company's economic analyses no longer supported the need for the significant volume of resources that the RFP called for," "especially given PacifiCorp's credit downgrades at the time."[15] This is the same circular reasoning by which PacifiCorp has justified its reduced interim targets based on "undisputed assumptions." This argument is tantamount to the hypothetical noncompliant student in our former analogy declaring: "I couldn't possibly complete the assignments because of circumstances beyond my control. And if you look at the only evidence I'm willing to share—which is my own statement about why I couldn't do it—that clearly supports my position. And any grades or participation data are irrelevant since they don't match my narrative. Let's just focus on my explanation of why I couldn't do it."

14. This analogy, while clearly absurd, is illustrative of the paradox PacifiCorp has created here with its selective use of evidence and attempted burden shifting. The Company is using the same flawed logic as the hypothetical student to assert that the only evidence in the record supports its conclusion (though it declines to supply other evidence the parties have identified, but which it designates as "irrelevant"). PacifiCorp attempts to hide the weakness of this

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[14] Comm'r Rendahl, Tr. 229:13-17.

[15] PacifiCorp Initial Brief at ¶ 74 (quoting Ghosh, Exh. RG-2T, at 11-12).

argument behind corporate and regulatory complexity and confidential data. The Commission should no more accept this argument than would the hypothetical professor.

15. The simple reality is that during its development of the 2021 Two-Year IRP Progress Report, PacifiCorp's modeling should have reflected a need for additional renewable and non-emitting resources to meet the 60% by 2025 target. RNW-NWEC's position is that a compliance threshold under a statute such as CETA is a regulatory requirement that should be reflected in a utility's portfolio modeling. As PacifiCorp itself acknowledges, that simply wasn't the case with its IRP update. As such, PacifiCorp should not be entitled to the relief it requests.

B. PacifiCorp's Assertion of "Reasonable Progress" is Unsupported.

16. PacifiCorp argues that even if the 2022AS RFP were relevant, the issue is moot because the Company has procured additional resources "amounting to 2,600 MW of new resources."[16] As an initial matter, this is the first time PacifiCorp has referenced this 2,600 MW of new resources, and it is unclear where these resources come from or where they are referenced in the record.[17] PacifiCorp asserts it procured "over 1,900 MWs of new renewable resources" from the 2020AS RFP (at COVID-inflated prices), which are "*now serving*

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[16] PacifiCorp Initial Brief at ¶ 74.

[17] The Two-Year IRP Progress Report and the Biennial CEIP Update provide different MW-estimates out of the 2020AS RFP than PacifiCorp cited in its Initial Brief. *Compare* Docket 210829, PacifiCorp 2021 CEIP (Refile) at 20 (March 13, 2023) (identifying 3,883 MWs of Washington-eligible projects); Docket UE-200420, PacifiCorp's 2023 IRP Vol. II at 411 (May 31, 2023) (identifying 2,498 MWs by year-end 2025); and Exh. PAC-1, Docket UE-210829, 2023 Clean Energy Implementation Plan Biennial Report at 11 (Nov. 1, 2023) (identifying 3,628.7 MWs in Washington-eligible projects) *with* PacifiCorp Initial Brief at ¶ 74 ("2,600 MWs of new CETA-compliant energy [] will come online prior to 2026.").

Washington customers."[18] It also, however, refers to (presumably the same) 1,900 MWs of new renewable energy which it "has contracted to bring . . . online *prior to 2026*."[19] Presumably this 1,900 MW is part of the 2,600, but it is impossible to determine this, or to determine whether these resources are "now serving Washington customers" or will be brought online prior to 2026, given the internal inconsistencies within PacifiCorp's brief and other filings. Assuming this 1,900 MW is indeed part of the 2,600 MW of "new resources" PacifiCorp has contracted to procure, the remainder is presumably made up with "another 755 MWs of battery storage capacity" the Company has procured.[20]

17. All of this, however, is beside the point. The larger issue is that it is PacifiCorp's burden to establish that reduction of its interim targets is warranted and that, notwithstanding its requested reduction, it is still making adequate progress. It has had ample opportunity to produce evidence that no bids into the 2022 RFP could have been online in time to contribute to its near-term interim targets. PacifiCorp has produced no such evidence. Instead, it has relied on equivocal testimony suggesting that the RFP is not relevant. This does not move the needle on its burden to show "reasonable progress." Even taken without equivocation, PacifiCorp's assertion that the acquisition of 2,600 MW of new resources constitutes reasonable progress runs afoul of the approved 2021 interim targets, and PacifiCorp has failed entirely to address this discrepancy. Moreover, setting aside the near-term interim targets, the cancellation of the 2022AS RFP undermines PacifiCorp's progress toward its 2030 and 2045 standards under CETA. These circumstances not only contradict PacifiCorp's claim that the

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[18] PacifiCorp Initial Brief at ¶ 35 (emphasis added).

[19] *Id.* at ¶ 39 (emphasis added).

[20] *Id*.

RFP cancellation is irrelevant to this proceeding; PacifiCorp has not even attempted to explain how its backsliding "demonstrate[s] progress toward meeting the standards under RCW 19.405.040(1) and 19.405.050(1)" as required by statute.[21]

C. PacifiCorp Has Not Established that its Plan Is "Lowest Reasonable Cost."

18. The closest PacifiCorp comes to defending its failure to demonstrate progress is by arguing that it had to curtail its procurement efforts out of cost considerations. PacifiCorp asserts its "lowest reasonable cost" means of achieving compliance with CETA's clean energy mandates is reflected in its halved interim targets and delayed procurement strategy. The Company cites WAC 480-100-610(5), which states, "[e]ach utility must demonstrate that it has made progress toward and has met [RCW 19.405.040(1) and RCW 19.405.050(1)] at the lowest reasonable cost."[22] However, PacifiCorp is in its own recalling of this rule highlighting its failure – to "demonstrate that it has made progress toward" the greenhouse gas neutrality standard, which is defined in rule as being measured by a utility's interim targets.[23] The "lowest reasonable cost" is defined not by an adjustment of interim targets to reduce costs, but by robust modeling practices to ensure targets are met cost-effectively. Because PacifiCorp has not adequately supported the cancellation of the 2022AS RFP or the modeling changes underlying its revised interim targets, as is discussed throughout this brief, pointing to the "lowest reasonable cost" as justification reads as an excuse rather than an explanation.[24]

II. PacifiCorp's Manipulation of Renewables Costs Remains Unsupported.

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[21] RCW 19.405.060(1)(b)(iii).

[22] PacifiCorp Initial Brief at ¶ 15, fn. 16.

[23] WAC 480-100-640(2).

[24] *See also*, Initial Brief of Public Counsel, ¶¶ 8-12 (highlighting PacifiCorp's inappropriate reliance on market purchases rather than long-term procurement).

19. Because COVID supply chain issues were widespread, affecting much more than the supply chains relevant only to renewable resources, RNW-NWEC continue to be concerned that the renewables cost adders in the 2021 Two-Year IRP Progress Report served a purpose unrelated to COVID impacts. If COVID-related inflation and supply chain issues were truly the drivers behind these cost adders, all resources modeled in the IRP should have experienced a level of cost escalation related to pandemic economic impacts. PacifiCorp's explanation in its Initial Brief — that renewable resource costs "reflect PacifiCorp's actual contracting experiences"[25] — addresses neither the Company's failure to apply cost adders in a resource-agnostic manner nor the types of resource costs reflected in bids from the 2022AS RFP (reiterating the potential relevance of this RFP process to PacifiCorp's resource planning and CEIP interim target reductions).

20. The modeling performed for the IRP directly informs the development of interim targets for the CEIP, and considering PacifiCorp's inadequate defense of its manual cost adjustments to renewable resources, RNW-NWEC reiterate their recommendation that the Commission not acknowledge the Biennial Update interim targets which were developed in a manner inconsistent with other reliable views of the market for renewable resources.[26]

III. The Commission Must Apply CETA Consistently and Predictably.

21. RNW-NWEC's initial brief addressed the Commission's Order 12 regarding Puget Sound Energy's CEIP: "When faced with a recent, if less egregious, case of backsliding by PSE, the Commission rejected the utility's modified interim targets, instead holding the

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[25] PacifiCorp Initial Brief at ¶ 36.

[26] *See* RNW-NWEC's Initial Post Hearing Brief at ¶¶ 22-26.

company to its original 2021 CEIP targets, noting UTC Staff's concerns that "the risk of stalled progress towards the 2030 CETA standard [outweighs] the risk that PSE may come up short of its original 2025 interim target." PSE, concerned about the future implications of noncompliance with the original 2021 CEIP targets, filed a petition requesting authority to lower its interim targets for the remainder of the current compliance period (years 2024 and 2025). On November 8, 2024, the Commission issued Order 14 denying PSE's petition, explaining that "keeping the targets in place provides incentive to PSE and others to make reasonable progress towards achieving CETA targets."[27]

22. The Commission also provides reassurance that it has "already given PSE and other regulated companies guidance that "the Commission does not expect or anticipate rote adherence with the interim targets."[28] Rather, it is the utility's "burden to make good faith efforts to work to adhere to those targets to the extent practicable or show the Commission why it was unable to do so."[29] A Commission decision to reject PacifiCorp's reduced interim targets in the Biennial Update with a plan to consider during a compliance proceeding whether the Company has made a "good faith effort" toward the Commission-approved interim targets from the Revised 2021 CEIP would be wholly consistent with this rationale.

IV. There is a Legitimate Need for PacifiCorp to Conduct an Early 2025 All-Source RFP, and the Commission Possesses Authority to Order such Relief.

23. As discussed in RNW-NWEC's Initial Brief, the record evidence supporting PacifiCorp's assertion that it is on track to meet CETA's 2030 mandate is "shaky at best" and

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[27] *In re Puget Sound Energy CEIP*, Docket UE-210795, Order 14 at ¶ 10.

[28] *Id*. at ¶ 10.

[29] *Id.* at ¶ 11.

unsupported by PacifiCorp's actions over the course of the current docket.[30] Recognizing the role of interim targets as a primary means of ensuring a utility remains on track to comply with CETA's 2030 and 2045 goals, RNW-NWEC reiterate the need for decisive Commission action to provide PacifiCorp with a much-needed redirect towards timely procurement ahead of the 2030 deadline.[31]

24. RNW-NWEC respectfully disagree with AWEC that a Commission-ordered RFP is inappropriate. In its Initial Brief, AWEC states:

> [T]he record in this case demonstrates that PacifiCorp will not be able to procure long-term resources in time for it to meet its current interim targets, which are the subject of this proceeding. In the long-term, the Commission does not need to order PacifiCorp to pursue CETA-compliant resources on an expedited basis. PacifiCorp is already appropriately incentivized to make prudent resource acquisitions given its compliance obligation in 2030, and it has a narrowing window to do so.[32]

But as PacifiCorp's actions in the current docket indicate, there is a real risk that incentives may be sacrificed to expediency if conditions don't align for timely regulatory compliance. PacifiCorp has already telegraphed that if new technologies on which it is relying to meet the 2030 deadline fail to materialize, the company will need to rely on CETA's "off-ramp."[33] Moreover, while the Company has indicated it *may* conduct a 2025 RFP, it has not committed

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[30] RNW-NWEC Initial Post-Hearing Brief at ¶ 43.

[31] Contrary to PacifiCorp's assertion, this recommendation is not an attempt to "further accelerate PacifiCorp's 100 percent clean energy transition in advance of 2032," (PacifiCorp Initial Brief at ¶ 44). Rather, it is a reasonable measure designed to mitigate the fact that due to its own planning failures, PacifiCorp is currently far from achieving compliance with the 2030 goal, much less achieving the 2045 goal 13 years early, for which outcome the Commission currently has nothing more than PacifiCorp's assurances. Such assurances are not evidence of "reasonable progress."

[32] AWEC Initial Post-Hearing Brief at ¶ 26.

[33] McVee, Tr. 239:16-21.

to do so, and will not make that decision unless and until the results of the 2025 IRP dictate in favor of an RFP.[34] As parties to the current proceeding have already witnessed, PacifiCorp is liable to cancel (or decide not to hold) an RFP if it determines—unilaterally—that its own financial interests so dictate.

25. Therefore, a Commission-ordered RFP would ensure, at a minimum, that PacifiCorp has the *opportunity* to procure resources that would bolster its chances of meeting the 2030 compliance threshold. Ordering PacifiCorp to conduct an IRP would have the added benefit of producing information relevant to both PacifiCorp's 2025 IRP and the next general rate case. With respect to the IRP, it would ensure that PacifiCorp has up-to-date cost information on acquisition of CETA-compliant resources.[35] Were PacifiCorp to procure resources as a result of the Commission-ordered RFP, that information could serve as evidence of the acquisition's fairness, justice, reasonableness, and sufficiency in the utility's next general rate case.[36]

A. The Commission Has Broad Authority to Regulate Utilities in the Public Interest.

26. The Commission possesses broad authority in its regulation of utilities in the public interest. *See, e.g.*, *People's Org. for Washington Energy Res. v. Washington Utilities & Transp. Comm'n*, 104 Wash. 2d 798, 808, 711 P.2d 319, 325 (1985) ("Most states delegate their rate making power to regulatory agencies in very broad terms"); *US W. Commc'ns, Inc. v. Washington Utilities & Transp. Comm'n*, 134 Wash. 2d 74, 96, 949 P.2d 1337, 1348

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[34] McVee, Tr. 223:19 – 225:8.

[35] While up-to-date cost information would be helpful, any approach to using that information in a resource planning process should be rigorous and transparently applied, in contrast to the cost adders at issue in this docket.

[36] *See* RCW 80.28.425.

(1997), as corrected (Mar. 3, 1998) ("The Commission has broad authority to regulate the practices of public utilities.").

27. CETA's provisions do not narrow the Commission's pre-existing existing authority; rather, they underscore the importance of the Commission's exercise of that authority in the public interest. RCW 19.405.010(5), (6). The Commission also has a strict mandate that "[i]t shall be the duty of the commission to enforce the provisions of this title and all other acts of this state affecting public service companies, the enforcement of which is not specifically vested in some other officer or tribunal." RCW 80.04.470.

28. The Commission has already interpreted its broad jurisdictional reach as encompassing the authority to direct utilities to "issue an all-source RFP if the IRP demonstrates that the utility has a resource need within four years." WAC 480-107-009(2). The authority under which the Commission adopted this provision is similarly broad:

> The commission is hereby authorized and empowered to adopt, promulgate and issue rules and regulations covering the … furnishing and supply of gas, electricity, wastewater company services, and water, and any and all services concerning the same, or connected therewith; and generally such rules as pertain to the comfort and convenience of the public concerning the subjects treated of in this title.

RCW 80.04.160.

B. Ordering PacifiCorp to Conduct an All-Source RFP Would Not Invade PacifiCorp's Right to Self-Management.

29. While neither AWEC nor any other party has yet raised legal arguments in opposition to RNW-NWEC's request for a Commission-ordered RFP, its arguments against Staff Condition 5 bear examination in this context, as they raise a well-worn argument that regulatory bodies may not invade the province of "management" delegated exclusively to the utility. In pertinent part, AWEC argues that the Commission "lacks statutory authority to

approve the part of this condition that would preclude PacifiCorp from canceling, suspending or terminating any RFP that originates from resource needs identified in the 2025 IRP."[37] The reason for this, AWEC explains, is that CETA's explicit inclusion of penalties carries a corollary inference that its failure to include "explicit authority to usurp the business discretion typically afforded to utilities" means that the Commission lacks authority over decisions related to RFP issuance or termination. While AWEC fails to cite any legal authority for this proposition, it is nonetheless recognizably grounded in a traditional legal view of utility regulatory authority referenced above, and for this reason a response is warranted.

30. The notion that a Commission invades a utility's self-management prerogatives when it steps "out of its role as an economic regulator and into the shoes of utility personnel by directing specific resource procurement practices or outcomes"[38] largely dates back to the U.S. Supreme Court's adoption of the so-called "general rule" first expressed in 1919 by the Illinois Supreme Court and articulated thus:

> The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses, unless there is an abuse of discretion in that regard by the corporate officers.

State of Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n of Missouri, 262 U.S. 276, 289, 43 S. Ct. 544, 547, 67 L. Ed. 981 (1923) (*quoting State Pub. Utilities Comm'n v. Springfield Gas & Elec. Co.*, 291 Ill. 209, 234, 125 N.E. 891, 901 (1919)). The Supreme Court elaborated on this theme, going on to observe, "[i]t must never be forgotten that, while

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[37] AWEC Initial Post-Hearing Brief at ¶ 20.

[38] *Id.*

the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership." *Id.* Most of the caselaw parroting this "general rule" is nearly a century old. *See, e.g. Pac. Tel. & Tel. Co. v. Whitcomb*, 12 F.2d 279, 285 (W.D. Wash. 1926); *State ex rel. Pac. Tel. & Tel. Co. v. Dep't of Pub. Serv.*, 19 Wash. 2d 200, 259-60, 142 P.2d 498, 527 (1943); *State ex rel. Winlock Water Co. v. Dep't of Pub. Works*, 180 Wash. 278, 280-81, 39 P.2d 603, 604 (1934).[39]

31. These antecedents are relevant because they provide a counterpoint to the current direction of state laws governing utility regulatory jurisdiction and recent judicial precedent interpreting them. As described above, recent decisions in Washington have generally acknowledged the Commission's broad grant of statutory authority. *E.g.*, *People's Org v. WUTC*, 104 Wash. 2d at 817 ("Washington is one of the majority of states wherein the legislatures have delegated the rate making authority to the regulatory agency *in very broad terms*" (emphasis added)). The shift away from the traditionally deferential view of the utility's rights attendant on ownership and management is evident in recent cases and examples from other jurisdictions which have more or less explicitly disavowed rigid adherence to the "general rule" articulated by *State of Missouri*.

32. Most notable of recent decisions is that of the Supreme Court of New Mexico earlier this year, in which the Court rejected a utility's reliance on the "general rule":

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[39] Note, however, that in at least one of these cases, a Washington court explicitly declined to find that the utility had violated the rule but instead determined it had acted within its conferred authority. *Whitcomb*, 12 F.2d at 287 (finding "rule" inapplicable because under Washington statutory law the Department of Public Service Regulation possessed power to abrogate utility contracts if "it sees fit to do so").

> [I]n the century since *Southwestern Bell* was decided, "[t]he 'invasion of management' prohibition ... has waned." We now understand that regulatory commissions have "substantial latitude in protecting the public" and "that commissions are generally empowered to act in areas seemingly reserved to management prerogative where the regulated action is 'impressed with the public interest.'"

Socorro Elec. Coop., Inc. v. New Mexico Pub. Regul. Comm'n, 2024-NMSC-017, ¶ 23, 557 P.3d 68, 77 (*quoting PNM Elec. Servs. v. N.M. Pub. Util. Comm'n*, 1998-NMSC-017, ¶ 21, 125 N.M. 302, 961 P.2d 147 and *Pub. Serv. Co. of Okla. v. State ex rel. Corp. Comm'n ex rel. Loving*, 1996 OK 43, ¶ 25, 918 P.2d 733). Similar holdings from California and Arizona further evidence the "waning" of the "general rule." *General Tel. Co. v. Public Utils. Comm'n*, 34 Cal.3d 817, 195 Cal.Rptr. 695, 670 P.2d 349, 353–56 (1983) (describing history of the "invasion of management" rationale in California and rejecting its application on instant facts); *Arizona Corp. Comm'n v. State ex rel. Woods*, 171 Ariz. 286, 297, 830 P.2d 807, 818 (1992) (Commission "must certainly" possess authority to prevent a utility corporation from engaging in transactions that will adversely affect ratepayers.)

33. The legal authority possessed by the Commission certainly allows for it to direct the type of remedial action that RNW-NWEC request, and ordering PacifiCorp to conduct an RFP does not represent an invasion of PacifiCorp's managerial prerogative. Further, other jurisdictions contain models for the balancing of these interests. By way of specific example, the Rhode Island code requires the state's regulated electric utility "to issue a request for proposals for at least six hundred megawatts (600 MW) but no greater than one thousand megawatts (1,000 MW) of newly-developed offshore wind capacity[,]" to "select a project or projects for negotiating a contract," and to negotiate "in good faith to achieve a commercially

reasonable contract[.]"[40] The statute retains to the utility the ability to exercise its managerial judgment to determine whether negotiations are likely to result in a commercially reasonable contract by notifying the Commission to this effect and seeking relief from the statutory requirements where appropriate.[41] This approach exemplifies a reasonable balancing between the utility's managerial discretion and the Commission's broad authority to regulate in a manner that directs specific resource acquisition in the public interest, and can serve as a model to this Commission as to one mechanism for balancing these important interests.

CONCLUSION

34. RNW-NWEC respectfully request that the Commission adopt their recommendations as articulated herein.

Respectfully submitted this 27th day of November, 2024.

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[40] R.I. Gen. L. § 39-31-10(a) & (c).

[41] *Id.* at (d).