**BEFORE THE WASHINGTON**
**UTILITIES AND TRANSPORTATION COMMISSION**

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| WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant,<br><br>v.<br><br>PacifiCorp d/b/a Pacific Power & Light Company, Respondent | Docket UE-210829<br><br>PacifiCorp Reply Brief |

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## I. ARGUMENT

*1* PacifiCorp d/b/a Pacific Power & Light Company (PacifiCorp) submits this Reply Brief for the Washington Utilities and Transportation Commission's (Commission) consideration, and respectfully requests the Commission approve PacifiCorp's 2023 Biennial Clean Energy Implementation Plan (CEIP) Update (CEIP Update).

### A. PacifiCorp's 7.36 GWs of renewable and non-emitting resource additions over the past decade, and 2.6 GWs that will come online by 2026, demonstrates adequate progress.

*2* PacifiCorp procurement efforts to-date demonstrates adequate progress in complying with the Clean Energy Transformation Act (CETA). From the 2013 Integrated Resource Plan (IRP)[1] to the 2021 Two-Year IRP Progress Report,[2] PacifiCorp has increased its renewable and nonemitting resources by 7.36 gigawatts (GWs). This includes 6.6 GWs of renewable resources since 2014, and as noted in this proceeding, an additional 755 megawatts (MWs) of recently procured storage resources. At the same time, PacifiCorp has decreased its greenhouse gas emitting resources by 341 MWs (net of coal capacity decreases and natural gas capacity increases). These capacity additions are reflected in the table below.

[1] *In re PacifiCorp's 2013 IRP,* Docket No. UE-120416, 2013 IRP, at 80-85 (Apr. 30, 2013) (available here: https://apiproxy.utc.wa.gov/cases/GetDocument?docID=9&year=2012&docketNumber=120416).
[2] *PacifiCorp's 2021 Two-Year IRP Progress Report*, at 146-154 (Mar. 31, 2023) (available here: https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/energy/integrated-resource-plan/2023-irp/2023_IRP_Volume_I.pdf).

**Table 1—PacifiCorp's 10-Year Resource Capacity Additions**

| Resource | 2013 IRP Nameplate Capacity (MW) | 2021 Two-Year IRP Progress Report Nameplate Capacity (MW) | Difference (MW) |
|---|---|---|---|
| Coal | 6,168 | 5,246 | (922) |
| Natural Gas | 2,556 | 3,137 | 581 |
| Wind (Owned) | 1,032 | 2,935 | 1,903 |
| Wind (Non-Owned) | 1,154 | 2,535 | 1,381 |
| Solar | 579 | 3,278 | 2,699 |
| Hydroelectric | 1,145 | 1,400 | 255 |
| Geothermal | 44 | 54 | 10 |
| Storage | 0 | 353 | 353 |
| Recent Storage Procurement | | | 755 |
| Total Renewable and Nonemitting Additions | | | 7,356 |

*3* This means that PacifiCorp owns, operates, or has contracted for, one of the largest renewable and nonemitting resource capacity fleets in the country—and has done so in a single decade. For perspective, Puget Sound Energy reports 1,742 MWs of renewable resource capacity from its comparable 2023 Electric Progress Report.[3]

*4* When PacifiCorp states that it is confident that it can deliver on its plan to comply with CETA by 2030, in addition to achieve CETA's 100 percent clean energy standard,[4] it is based on this proven track record. And the 2,600 MWs of new resources that will come online in the next few years demonstrates adequate progress for purposes of complying with CETA. And because these procurement efforts have been for system resources, PacifiCorp has not come close to triggering CETA's cost cap.[5]

*5* These efforts should not be lost on the Commission, and should temper current intervenor allegations that are unsupported by the record.[6]

[3] Appendix C: Existing Resource Inventory, § 2.1, C.6.
[4] CEIP Update, at Figure 1.1.
[5] *Id.* at Table 4.3 (indicating a $1.35 million incremental revenue requirement to comply with CETA over the current four-year compliance period, a 0.4 percent estimated increase to customer rates).
[6] Public Counsel In. Br., ¶ 1 (calling PacifiCorp's CEIP efforts a "profound planning failure"); *Id.* ¶ 6 (PacifiCorp's CEIP efforts are a "willful planning failure that has harmed PacifiCorp's Washington customers."); RNW-NWEC In. Br., ¶ 21 (This proceeding "centers on PacifiCorp's backsliding in its

### B. Staff's Primary Recommendation and Alternative Condition 6 are prohibited by Washington law.

*6* CETA requires CEIPs to demonstrate progress towards complying with the law.[7] Yet those plans have to be the lowest reasonable cost, after considering risk.[8] The Commission "expect[s] utilities to propose reasonable interim targets" and comply with CETA "in a cost-effective manner."[9]

*7* When asked whether Staff agreed that analyses from the 2021 IRP and 2021 Revised CEIP "no longer reflects PacifiCorp's least-cost, least-risk, planning or analysis," Staff confirmed "that the 2023 IRP and 2023 IRP Update provide more recent data and updated assumptions, which reflect current market conditions and technological advancements that differ from those in 2020 and 2021."[10] When asked to confirm that Staff "did not analyze the modeling that supported PacifiCorp's interim targets," Staff agreed: It "did not directly discuss the modeling analysis supported PacifiCorp's interim targets."[11]

*8* Staff's focus on a demonstration of progress does not allow the Commission to also ignore the multiple Washington authorities that require CEIPs to be based on least-cost, least-risk, planning principles. Because Staff concedes the 2021 Revised CEIP no longer reflects PacifiCorp's least-cost, after consideration of risk, plan to comply with

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obligation" to comply with CETA."); Staff In. Br. ¶ 21 ("The Commission should not permit PacifiCorp to update its interim targets on the basis of the Company's word that it will plan to procure in the next CEIP. It has been claiming it will procure more generation for nearly fifteen years of IRP cycles; despite those claims, PacificCorp remains short of the resources it needs to supply Washington's load while complying with law.").

[7] *E.g.,* RCW 19.405.060(1)(b)(iii); WAC 480-100-640(1).

[8] RCW 19.280.030(1)(j) (IRPs must consider implementing CETA "at the lowest reasonable cost and risk to the utility and its customers, while maintaining and protecting the safety, reliable operation, and balancing of its electric system"); WAC 480-100-620(11)(a) ("Each utility must provide a narrative explanation of the decisions it has made, including how the utility's long-range integrated resource plan expects to . . . Achieve the clean energy standards . . . at the lowest reasonable cost"); RCW 19.280.020(11) requiring utilities to comply with CETA "in a timely manner and at the lowest reasonable costs"); WAC 480-100-600 (same); WAC 480-100-610(5) (similar).

[9] *In re Commission CETA Rulemaking*, Docket Nos. UE-191023 and UE-190698, General Order 601, ¶ 105 (Dec. 28, 2020).

[10] Ex. RG-4 (Staff Response to PacifiCorp Data Request No. 19(a)).

[11] Ex. RG-4 (Staff Response to PacifiCorp Data Request No. 6).

CETA, and Staff did not submit or conduct any analyses of the modeling that informed PacifiCorp's 2023 CEIP Update, Staff's Primary Recommendation is prohibited by Washington law. As noted by AWEC, "the Company's analysis demonstrates that lowering PacifiCorp's interim targets is 'going to be saving customers money' relative to costs that would be incurred to meet PacifiCorp's current interim targets."[12]

*9* The same arguments hold for Staff's Alternative Recommendation Condition 6, which recommends the Commission approve a 73 percent interim target for renewable energy for 2029.[13] This 73 percent figure is drawn from PacifiCorp's 2021 Revised CEIP, which Staff concedes is no longer supported by PacifiCorp's current modeling.[14] Because Washington requires interim targets to be based on an analysis of costs and risks to comply with CETA, and 73 percent is not supported by either, Staff Alternative Condition 6 cannot be approved.

### C. Staff's Condition 2 is either unconstitutional, or it lacks record evidence and would improperly limit the Commission's ability to consider more cost-effective, less-risky allocation methodologies.

*10* PacifiCorp and Staff may be talking past each other on this issue. PacifiCorp is not concerned with using the current Commission-approved allocation methodology for each CEIP. While this condition limits the Commission's flexibility and discretion in the future,[15] the Company has no strong concerns with this requirement. Nor is PacifiCorp concerned, generally, with a requirement to submit a new allocation methodology in the future, as PacifiCorp already has several independent obligations to do so.[16]

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[12] AWEC In. Br., ¶ 9.
[13] Staff In. Br., ¶¶ 59-61.
[14] Ex. RG-4 (Staff Response to PacifiCorp Data Request No. 19(a)).
[15] *E.g.,* AWEC In. Br., ¶ 17 ("If the Company plans to propose a new allocation methodology in its 2025 general rate case that is ultimately approved, it is unclear whether the Company would be able to incorporate those results in time for its 2025 CEIP filing. If the Company cannot incorporate the Commission's decision, then PacifiCorp's CEIP will be inconsistent with the ultimately approved allocation methodology. A more flexible approach is likely more ideal.").
[16] *E.g., In re PacifiCorp's 2022 PCAM,* Order 07, ¶ 111 (Oct. 30, 2024).

*11* PacifiCorp's primary concerns are that Condition 2 could unconstitutionally reallocate shares of *existing* CETA-compliant resources that are already paid for by other states' customers, or that it would prejudge, without record evidence, which allocation methodologies regarding *new* resources that the Commission should consider in a future rate case.

*12* But it is unclear what Staff has proposed. When PacifiCorp asked for clarification on this condition, Staff objected on the basis of relevance.[17] When asked further whether Staff believes PacifiCorp "has excess capacity and energy available from its non-emitting resource fleet that is otherwise not allocated to other states and included in customer rates in those other states," Staff responded that it "did not analyze other states allocations/rates nor capacity."[18] When asked whether it was Staff's position that PacifiCorp's federal or state obligations are not relevant to Washington proceedings, Staff demurred: "No . . . Staff is not arguing that compliance with legal obligations in other states is never relevant in proceedings before the Commission."[19]

*13* Without additional clarification, PacifiCorp needs to respond to both possible scenarios: that Condition 2 could result in a larger reallocation of either existing, or new, CETA-compliant resources.

*14* The first interpretation (a larger share of existing resources) would be prohibited by the Dormant Commerce Clause. This prohibition prevents states from, among other things, "mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to products derived therefrom."[20] "Economic protectionism is not limited to attempts to convey advantages

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[17] Ex. JNS-28X (Staff Response to PacifiCorp DR 20: ("The Washington UTC only regulates utility actions in Washington State or actions that impact Washington customers. Impacts to customers in other states are outside the jurisdiction of Washington UTC and not subject to Staff review. See RCW 80.01.040. PacifiCorp Data Request 10 asked questions related to whether Staff considered impacts to other states; because Washington UTC does not have authority over cost allocations adopted by other jurisdictions, these questions were not relevant to the biennial CEIP update.")).
[18] Ex. JNS-28X (Staff Response to PacifiCorp DR 20(b).
[19] *Id.* (Staff Response to PacifiCorp DR 20(c)-(d)).
[20] *New England Power Co. v. New Hampshire,* 455 U.S. 331, 339 (1982).

on local merchants; it may include attempts to give local consumers an advantage over consumers in other States."[21] State actions that are discriminatory on their face, or in their purpose or practical effects, are subject to strict scrutiny and courts apply "a virtually *per se* rule of invalidity."[22]

*15* A Washington requirement that directed PacifiCorp to re-allocate existing CETA-compliant resources—that are already serving customers in other states—is discriminatory on its face and would be unconstitutional under the Dormant Commerce Clause. Washington cannot dictate what resources serve residents of other states, which includes requiring others states' customers to give up resources that are currently providing them with power. This would be unconstitutional economic protectionism, because it would attempt "to give [PacifiCorp's Washington customers] an advantage over [PacifiCorp's customers] in other states."[23] If it was unconstitutional for the New Hampshire Commission to *prohibit* New England Power from selling power from specific resources to customers outside the state, it would be unconstitutional for Washington Commission to *require* PacifiCorp to sell power from specific resources to customers inside the state.[24] It is simply not feasible on a legal or practical level for Washington to unilaterally reallocate shares of generation resources to Washington customers when those generation resources are in rate base and used and useful for customers in other states.

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[21] *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.,* 520 U.S. 564, 577-78 (1997) (quotation marks and citation omitted).
[22] *Oregon Waste System, Inc. v. Oregon Dep't of Environmental Quality*, 511 U.S. 93, 99 (1994).
[23] *Owatonna,* 520 U.S. at 577-78.
[24] *New Hampshire,* 455 U.S. at 339 ("The order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states. The Commission has made clear that its order is designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states. Moreover, it cannot be disputed that the Commission's 'exportation ban' places direct and substantial burdens on transactions in interstate commerce. Such state-imposed burdens cannot be squared with the Commerce Clause when they serve only to advance 'simple economic protectionism.'") (citations omitted)

*16* The second interpretation (larger share of new resources) is also problematic. Besides being overly burdensome to submit competing methodologies with estimates of net power cost impacts in a single proceeding, as AWEC notes, this condition "would pre-approve PacifiCorp's increased allocation of renewable and non-emitting resources for Washington customers compared to the Washington Interjurisdictional Allocation Methodology (WIJAM), but without *any* supporting evidence and analysis that such an outcome would result in fair, just, reasonable and sufficient rates in Washington."[25]

*17* The Company is aware of its obligation to submit a new allocation methodology in each state that it operates. This successor methodology will, by design, account for State-specific policies and preferences. Yet contrary to Condition 2, it could include the *same or even lower* allocation of CETA-compliant resources compared to the WIJAM. For example, as Public Counsel correctly notes,[26] the Company's current allocation methodology allows for the procurement of Washington-situs resources, with 100 percent of the costs and benefits from these resources being allocated to Washington customers. This means that PacifiCorp could propose a similar methodology as WIJAM (or with an even smaller allocation of CETA-compliant resources than what WIJAM currently provides for), and include a similar provision that allows for Washington-situs procurement, that could provide a viable, and potentially less costly and less risky CETA compliance pathway.

*18* The Company needs the time to explore these options, and the Commission needs to retain the discretion to consider subsequent proposals, and reach a decision based on the facts and circumstances in the next rate case. Condition 2 would prejudge these outcomes and is not supported by substantial evidence.

[25] AWEC In. Br., ¶ 18 (original emphasis).
[26] Public Counsel In. Br. ¶ 22.

### D. Because PacifiCorp's thermal resource assumptions reflect the resources that currently serve Washington customers, this issue is moot.

*19* It is uncontested that PacifiCorp's CEIP Update reflects several thermal resources that currently serve Washington customers.[27] Staff supported each of these resource decisions in PacifiCorp's last rate case.[28] Nonetheless, Staff now states "it was absolutely inappropriate to base a resource plan on an outcome in an order that has not been issued,"[29] and that PacifiCorp "has made this error before," for example when basing the 2021 Revised CEIP on an allocation methodology besides WIJAM.[30]

*20* Staff's timing is off. PacifiCorp submitted its final 2021 IRP Two-Year Progress Report on March 31, 2023,[31] filed its rate case on April 19, 2023,[32] and submitted its Amended 2023 IRP on May 31, 2023.[33]

*21* This means that PacifiCorp's only prudent course forward after determining these resources would significantly reduce customer rates in the 2021 IRP Two-Year Progress Report—again, by over $70 million—was to incorporate these assumptions in both the rate case (filed one month *after* the 2021 IRP Two-Year Progress Report), and the CEIP Update (filed seven months *after* the rate case).

*22* More importantly, even though PacifiCorp was reasonable to incorporate these assumptions in the CEIP Update, this issue is moot because these resource are currently serving Washington customers. The Commission's decision in the 2023 rate case

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[27] *E.g.,* CEIP Update, at 7, 10 (Including: (1) that Washington will continue to receive electricity from Jim Bridger Units 1 and 2 through 2029 after both are converted to natural gas in 2024, as opposed to no longer receiving service from these units after 2023 as assumed in the Revised CEIP; (2) that Washington retains a system share of Chehalis and Hermiston natural gas plants, as opposed to no longer receiving service from these units after 2023 as assumed in the Revised CEIP; and (3) that Washington will continue to receive service from Colstrip Unit 4 and Jim Bridger Units 3 and 4 through 2025, as opposed to no longer receiving service after 2023 as assumed in the Revised CEIP).
[28] *In re PacifiCorp's 2023 Rate Case*, Consolidated Docket Nos. UE-230172 and UE-210852, Multiparty Agreement (Dec. 14, 2023).
[29] Staff In. Br., ¶ 34.
[30] *Id.* n. 86.
[31] *In re PacifiCorp's 2021 Two-Year Progress Report,* Docket No. UE-200420, 2021 Two-Year Progress Report (Mar. 31, 2023).
[32] *In re PacifiCorp's 2023 Rate Case,* Docket No. UE-230172, Revised Application (Apr. 19, 2023).
[33] *In re PacifiCorp's 2021 Two-Year Progress Report,* Docket No. UE-200420, Amended 2023 IRP (May. 31, 2023).

confirms that whether PacifiCorp's CEIP Update should incorporate the same resources when determining how to comply with CETA "has already been resolved."[34] To do otherwise would put the Commission cross-wise with itself: It would have concluded that it was just and reasonable for these resources to serve Washington customers (in the 2023 rate case), yet now conclude these resources do not result in the lowest reasonable cost, after consideration of risk, strategy to comply with CETA (in this proceeding).

*23* The Commission should avoid this result. The fact that each of these resources are currently serving Washington customers, and are included in PacifiCorp's revenue requirement, renders this issue academic.

### E. It was correct to revise PacifiCorp's renewable cost assumptions to reflect actual bids from the 2020AS RFP.

*24* RNW-NWEC sought "information relating to the 2022AS RFP through data requests, in the hope of better understanding renewable cost data PacifiCorp ostensibly used in the development of the renewable cost escalators,[35] yet "PacifiCorp declined to disclose this information."[36] This is incorrect. The CEIP Update does not include any renewable cost assumptions from the 2022AS RFP, because the CEIP Update is only based on information from the 2020AS RFP.[37] PacifiCorp cannot provide RNW-NWEC information that, for the CEIP Update, does not exist.

*25* RNW-NWEC are concerned that "PacifiCorp's manipulation of the modeling informing the 2023 Biennial CEIP Update, and the termination of the 2022AS RFP, may have been efforts to delay the procurement timeline to allow the Company's own projects

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[34] *In re Hungry Buzzard Recovery, LLC et. al,* Docket TG-072226, Order Denying Motion to Dismiss, at 2 (Apr. 7, 2008) (issues are moot when they "have become academic or dead, has already been resolved, and the issue is not a recurring one likely to be raised again between the parties.").
[35] RNW-NWEC In. Br., ¶ 31.
[36] *Id.* ¶ 32.
[37] MDM-20X (PacifiCorp response to RNW-NWEC DR 1) ("PacifiCorp has no information to provide from the 2022 All-Source Request for Proposals (2022AS RFP) because no bids from this RFP informed PacifiCorp's renewable cost escalators in the Company's 2023 Integrated Resource Plan (IRP) / 2023 IRP Update filings. Bids in the 2022AS RFP were received in March 2023 by which time the 2023 IRP analysis was largely complete.").

to better compete."[38] This is incorrect. PacifiCorp's procurement of 755 MWs of storage resources are all power purchase agreements. PacifiCorp cannot engage in self-dealing when it is only contracting with third-parties.

*26* Staff "is hesitant to rely on Dr. Ghosh's statements at the hearing [that PacifiCorp would not include a renewable resource cost adder in the 2025 CEIP] when not even two weeks prior, the Company was still planning on using these adders for the next eight years."[39] This is incorrect. Staff requested information regarding the cost adders in the *CEIP Update*, not the *2025 CEIP*.[40] This is contrasted with Dr. Ghosh's statements at the hearing, where Dr. Ghosh testified that the *2025 CEIP* would not include these adders.

*27* The Commission should view this innuendo for what it is. No party argues that the 2020 NREL ATB incorporated price impacts caused by the COVID-19 epidemic. As a result, the 2020 NREL ATB did not provide reliable or reasonable renewable cost assumptions. And no party contests that PacifiCorp's renewable resource adjustments are merely a simple average of bids received from the 2020AS RFP.[41] It would be unreasonable to require Washington customers to pay for almost two GWs of resources procured from the 2020AS RFP at these heightened prices (as approved in the 2023 rate case), yet ignore these same prices and rely on the pre-pandemic NREL ATB resource costs for the CEIP Update.[42]

*28* Yet even if PacifiCorp was incorrect in doing so, parties have not submitted any evidence demonstrating how these cost assumptions impact PacifiCorp's interim targets.

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[38] RNW-NWEC In. Br., ¶ 19.
[39] Staff In. Br., ¶ 38 (discussing PacifiCorp's response to Staff DR 59).
[40] RG-18X (PacifiCorp response to Staff DR 59(a) ("The referenced adders apply through 2028, and transition linearly during 2029-2031such that the adders are eliminated by 2032. In 2032 and all future years, costs are based on National Renewable Energy Laboratory (NREL) escalation forecasts, and no adders are applied.").
[41] *E.g.,* Bench Request No. 2 (PacifiCorp response to Staff Data Request 54); RG-18X (PacifiCorp response to Staff Data Request 59).
[42] Hr'g Tr. at 329-330 ("I don't think it would have been reasonable, because I think the problem is, you know, we run the risk of running an IRP that has near-term renewable resource costs that are artificially low. And based on that, we might select a lot of stuff in the near term and then go out and realize we can't get this at this price. And so I believe it was a reasonable assumption based on very significant repricing that we were seeing in the market.").

When combined with the facts that no parties contest three of PacifiCorp's primary justifications that demonstrably reduce PacifiCorp's interim targets,[43] this lack of evidence regarding how these renewable resource cost assumptions impact PacifiCorp's interim targets—in any direction—should be given limited weight.

### F. PacifiCorp's resource procurement efforts over the past decade are prima facie just, reasonable, and prudent.

*29* PacifiCorp is sensitive to Staff and Public Counsel's concerns regarding Washington's exposure to market purchases. And the Company takes the Commission's directions on this issue to heart from PacifiCorp's recent power cost adjustment mechanism proceeding.[44]

*30* Yet the truth of the matter is that, because Commission orders are prima facie correct,[45] and because the Commission has not disallowed any costs over the past decade associated with PacifiCorp's procurement efforts (owned resources, market purchases or otherwise)—it would be inappropriate to impose a penalty for a determination that was not reached in those rate orders, when those rates were determined to be just and reasonable. The conclusion that Commission orders are correct is "especially true where, as here, the issues involve complex factual determinations peculiarly within the expertise of the commission."[46]

*31* Respectfully, Staff and Public Counsel cannot use orders from PacifiCorp's recent rate proceedings to collaterally attack issues in this proceeding, when there is no evidence to support the conclusion that PacifiCorp has "steadfastly refused to procure or allocate resources to Washington, robbing it of lower power costs,"[47] or that PacifiCorp has a

[43] RG-5 (detailing PacifiCorp's estimates of updated interim targets).
[44] *In re PacifiCorp's 2022 PCAM,* Order 07, ¶¶ 124-138 (Oct. 30, 2024).
[45] RCW 80.04.430.
[46] *PacifiCorp v. WUTC*, 194 Wash.App. 571, ¶ 27, 376 P.3d 389 (2016) (*citing Cole v. Wash. Utils. & Transp. Comm'n,* 79 Wash.2d 302, 309, 485 P.2d 71 (1971)).
[47] Public Counsel In. Br. ¶ 14.

"long history of failing to procure resources" that has left PacifiCorp "short of the resources it needs to supply Washington's load while complying with law."[48]

*32* More to the point, even assuming these Commission orders in fact demonstrated what Staff and Public Counsel believe they do, Staff and Public Counsel would still need to demonstrate how PacifiCorp's CEIP Update is not in fact the least-cost, after consideration of risk, strategy to comply with CETA. Yet by their own admissions, Staff and Public Counsel have almost entirely declined to analyze, evaluate, or otherwise submit evidence that contradicts the modeling or inputs that informed the CEIP Update.[49]

*33* The Commission's prior orders on PacifiCorp's recent IRP, PCAM, PCORC, and rate case proceedings speak for themselves, and the Commission should disregard Staff and Public Counsel's arguments on this point.

### G. Cancelling the 2022 AS RFP does not impact PacifiCorp's interim targets for the current compliance period, because no resources were scheduled to come online prior to 2026.

*34* As PacifiCorp noted in its Initial Brief, it would not have been possible to develop a CEIP Update that addressed alternative procurement strategies, when the only information available to the Company at the time supported the need for the 2022AS RFP. So while the CEIP Update discusses in detail the 2022AS RFP, as RNW-NWEC correctly notes,[50] cancelling the RFP after the CEIP Update was filed means this issue is not relevant to a determination of whether the CEIP Update was based on then-reasonable information.

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[48] Staff In. Br. ¶ 25.

[49] *E.g.,* Ex. RG-4 (Staff Response to PacifiCorp Data Request No. 6) ("When asked to confirm that Staff "did not analyze the modeling that supported PacifiCorp's interim targets," Staff agreed: It "did not directly discuss the modeling analysis supported PacifiCorp's interim targets."); *E.g.,* Hr'g Tr. at 354-358 (confirming Public Counsel does not contest the CEIP Update correctly incorporated the WIJAM, the most recent retail sales forecast, actual procurement from the 2020AS RFP, and revised thermal resource assumptions).

[50] RNW-NWEC In. Br., ¶¶ 29-30; Exh. KW-1T, at 15-17.

*35* Yet putting aside this timing problem, even if PacifiCorp had procured resources from the 2022AS RFP, none were expected to come online prior to 2026.[51] While the Company acknowledges that cancelling the 2022AS RFP impacts PacifiCorp's interim targets in CETA's *second* four-year compliance period (beginning in 2026), this action cannot serve as the basis to reject PacifiCorp's CEIP Update that is focused on CETA's *first* four-year compliance period (ending in 2025).

### H. The Commission lacks the power to engage in State-directed procurement, and it would be poor policy to do so.

*36* RNW-NWEC concedes that it "is not aware of any proceedings in which a state utility commission ordered a utility to issue a request for proposals absent a request by the utility."[52] Nonetheless, RNW-NWEC believes the Commission "has authority under the Clean Energy Transformation Act to utilize remedies it determines are available—including an order to issue an RFP—to ensure compliance with statutory deadlines."[53]

*37* RNW-NWEC's brief takes a different approach. It does not cite a single authority in CETA to support its argument. Instead, it cites to a Legislative Finding in RCW 19.405.010(5),[54] the Commission's organic statute (RCW 80.01.040(3)), general Commission powers (RCW 80.04.160 and 80.04.470), and PacifiCorp's obligation to comply with all Commission decisions (RCW 80.04.070 and 80.04.380). In four short paragraphs, RNW-NWEC concludes the Commission "has broad authority and substantial discretion" to fashion a remedy in this proceeding.[55]

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[51] While RNW-NWEC cites the 2021 Revised CEIP which stated that resources would come online "by the end of 2025," this language was drafted before the schedule for the 2022AS RFP was revised, and before PacifiCorp received bids from the procurement effort indicating none would come online until 2026. *Compare* RNW-NWEC ¶ 29 (citing 2021 Revised CEIP), *with* Exh. MDM-2T, at 21 (as noted by company witness McVee, "procurement from the 2022AS RFP would have almost immaterial impacts of PacifiCorp's compliance during the first compliance period," because no resources would have come online prior to 2026).

[52] KW-6X (RNW-NWEC Response to PacifiCorp Data Request No. 34).

[53] *Id.*

[54] While RNW-NWEC also cites to the public interest legislative finding in RCW 19.405.010(6), it does not make an argument based on this sub-section. This brief does not respond to that citation. *Grant County v. Bohne*, 577 P.2d 138 (1978) ("We therefore do not consider points unsupported by argument or law.").

[55] RNW-NWEC In. Br. ¶ 46.

*38* That is incorrect.

*39* Legislative findings are not binding, and merely serve "as an important guide in understanding the intended effect of operative sections."[56] But it should go without saying, "a stated intent cannot override an otherwise unambiguous statute."[57] The Commission cannot rely "on a statement of legislative intent to override the unambiguous elements . . . [of CETA] . . . or to add an element not found there."[58] Here, RNW-NWEC cites to no authority in CETA that allows the Commission to engage in State-directed procurement, nor does RNW-NWEC identify any ambiguities in the law that would allow legislative findings to back-fill this lack of authority. Without either, State-directed procurement under CETA lacks a statutory hook.[59]

*40* Even if legislative findings were relevant, RCW 19.405.010(5) does not support RNW-NWEC's argument. This sub-section begins with a discussion of how "utilities"—and not the Commission—"have an important role to play in this transition, and must be fully empowered, through regulatory tools and incentives, to achieve the goals of this policy." The finding then proceeds to discuss the Commission's powers, which presumably should be used to "empower" utility compliance with CETA. Under any reasonable construction of the word, "empowering" a utility to comply with CETA would not include "requiring" it to engage in specific actions.[60] It would be odd indeed, as RNW-NWEC argues, that "empowering" means "State-directed procurement."

*41* This means that RNW-NWEC has not discussed any authorities in CETA that would support State-directed procurement. In effect, RNW-NWEC's argument is: "While

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[56] *State v. Wolvelaere,* 195 Wash.2d 597, ¶ 25, 461 P.3d 1173 (2020).
[57] *Id.* ¶ 31.
[58] *Id.* (quoting *State v. Alvarez,* 74 Wash. App. 250, 258, 872 P.2d 1123 (1994), *aff'd* 904 P.2d 754 (1995)).
[59] *State v. Evans,* 117 Wash.2d 186, ¶ 9, 298 P.3d 724 (2013) ("Plain language that is not ambiguous does not require construction.").
[60] *E.g.,* "Empower." Merriam-Webster.com Dictionary, Merriam-Webster (defined as "to give official authority or legal power to," or to "enable", or to "promote the self-actualization or influence of") (available here: https://www.merriam-webster.com/dictionary/empower).

not discussed anywhere in CETA, the Commission's general powers allow for State-directed procurement to require utilities to comply with CETA."

*42* That cannot be the Commission's conclusion. If the Commission has always had the power to engage in State-directed procurement—because RNW-NWEC's argument is that RCW 80.01.040(3), RCW 80.04.160 and 80.04.470 allows the Commission to do so, which have been the law for decades[61]—then why pass CETA in the first place? Because CETA's more specific authorities, enacted over a century after RCW 80.01.040(3), RCW 80.04.160 and 80.04.470, control, the Commission can safely conclude RNW-NWEC's argument lacks support.[62]

*43* Besides the lack of authority, it would be poor policy to engage in State-directed procurement. Consider several examples.

*44* Would the Commission now be a manager of utility operations, and no longer an economic regulator? Every treatise on economic regulation has cautioned against legislative bodies providing, or utility commissions assuming, that the State has or should be provided this power.[63]

*45* Would State-directed procurement remove the Commission's ability to engage in fulsome prudency evaluations of resources that PacifiCorp procured from any State-

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[61] RCW 80.01.040 (enacted 1945); RCW 80.04.160 (enacted 1911); RCW 80.04.470 (enacted 1911)).

[62] *Gen. Tel. Co. of the Northwest, Inc. v. WUTC,* 104 Wash.2d 460, 706 P.2d 625 (1985) ("The specific statute supersedes a general statute when both apply."); *ETCO, Inc. v. DOLI,* 66 Wash.App. 302, 831 P.2d 1133, 1136 (1992) ("Where two statutes dealing with the same subject matter are in apparent conflict, established rules of statutory construction require giving preference to the more specific statute, and to the latter adopted statute.").

[63] *E.g.,* Regulation and its Reform, Stephen G. Breyer, at 185 (1984) ("Classical regulation ought to be looked upon as a weapon of last resort. The problems accompanying classical regulation would seem sufficiently serious to warrant adopting a least restrictive alternative approach to regulation. Such an approach would view regulation through a procompetitive lens. It would urge reliance upon an unregulated market in the absence of a significant market defect. Then, when the harm produced by the unregulated market is serious, it would suggest first examining incentive-based intervention, such as taxes or marketable rights, or disclosure regulation, bargaining, or other less restrictive forms of intervention before turning to classical regulation itself. It would urge the adoption of classical regulatory methods only where less restrictive methods will not work."); Lee Loevinger, "Regulation and Competition as Alternatives," 11 The Antitrust Bulletin 101, 125 (1966) ("The difficulty is that no regulatory agency can acquire or utilize effectively the range of data which influence a competitive market. Consequently, the ability of regulation to substitute for competition has an inherent limitation which cannot be wholly overcome by any improvement in the regulatory structure or process.").

directed RFP? AWEC states the issue well: "When a commission steps in the shoes of the utility, it disrupts the balance of risk allocated between ratepayers and shareholders. Further, if the Commission directs a specific action and the outcomes proves to disadvantage customers, a prudence disallowance is effectively precluded because the utility is acting in accordance with Commission direction."[64]

*46* Would PacifiCorp's procurement efforts be protected by the State's sovereign immunity? This is not hyperbole. Last year Texas held exactly that: the Electric Reliability Council of Texas (ERCOT) is entitled to sovereign immunity as an "arm of the State," and could not be sued for damages caused by ERCOT in response to Winter Storm Uri.[65] While a traditional investor-owned utility could never claim these protections, removing the Company's ability to plan to serve its customers through resource procurement, and instead have that function controlled by a state agency (in addition to the Commission's other regulatory powers), is a different question.

*47* There are also liability implications for the Commission itself. Would the Commission be exposing itself to derivative lawsuits? Consider the following scenario. PacifiCorp has recently had its credit downgraded by two credit ratings agencies.[66] PacifiCorp has material cash outlays due to ongoing litigation expenses, which has limited the Company's liquidity.[67] As a result of this proceeding, the Commission directs PacifiCorp to procure resources which results in further credit downgrades or liquidity or solvency concerns. Would PacifiCorp's shareholders have standing to bring a derivative

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[64] AWEC In. Br. ¶ 21.
[65] *CPS v. ERCOT,* 671 S.W.3d 605, 623-629 (2023).
[66] *E.g., "PacifiCorp Downgraded to BBB+, Outlook Revised to Negative; Berkshire Hathaway Energy Co. Outlook Also Negative*," S&P Global Ratings (June 20, 2023) (available here: https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/3009376); *"Moody's Rating Action: Moody's downgrades PacifiCorp to Baa1, outlook stable"* (Nov. 21, 2023) (available here: https://www.moodys.com/research/Moodys-downgrades-PacifiCorp-to-Baa1-outlook-stable--PR_482643?cy=centraleur&lang=en).
[67] *E.g.,* Berkshire Hathaway Energy Company 2023 Form 10-K, at 77-78 (Dec. 31, 2023) (available here: https://bit.ly/3wyWQw6).

lawsuit against the Commission, who would appear to be acting as an officer or director, ostensibly or otherwise, of the corporation?

*48* Would an RFP be for Washington-situs or system resources? Either way, what are the cost implications for other states? As AWEC notes, would the Commission have to preapprove cost recovery of all resources that it directs PacifiCorp to procure (including all necessary distribution and transmission network upgrades required for these resources)? Would Washington be responsible for increased borrowing costs—system-wide—caused by these procurement efforts, because PacifiCorp does not have an Washington-specific credit profile? Should all resources be excluded from PacifiCorp's power cost adjustment mechanism, because the Commission, and not PacifiCorp, decided the utility should procure these resources, yet PacifiCorp would nonetheless be responsible for managing them? Should the Commission establish a tracking mechanism to track the costs incurred from State-directed procurement, in case CETA's cost-cap is triggered?

*49* There are also too many issues that cannot be adequately considered in this proceeding. If the Commission is interested in this issue it should, similar to the Oregon Commission, initiate a rulemaking or investigation to determine whether the Commission has the power to engage in State-directed procurement.[68]

[68] *E.g., In re PacifiCorp's Continual Progress,* Docket No. UM 2345, Scheduling Order (Oct. 1, 2024) (Requesting legal briefing on three questions, including: "Does the Commission have the legal authority to order PacifiCorp to take one or more of the following actions: [listing several specific actions]"; "What legally sound options exist for the Commission to ensure reliable energy supply and continual progress toward HB 2021 requirements in the event of utility inaction?"; and "If the Commission directs PacifiCorp to issue and conduct an RFP, or to procure resources, what are the implications of such decisions based on [listing several policy issues]." ) (available here: https://edocs.puc.state.or.us/efdocs/HDA/um2345hda331753120.pdf).

## I. It would be unjust, and an unconstitutional taking of property without due process of law, to assess penalties against PacifiCorp in this proceeding.

*50* Public Counsel argues that PacifiCorp's CEIP Update is one of three cases in Public Counsel history that warrants administrative penalties.[69] This is despite the fact that Public Counsel's prior comments on the CEIP Update stated it "understands the reasons that PacifiCorp provided for downward adjustment of its interim targets," did not discuss administrative penalties, and its only request for the Commission to consider was that it direct PacifiCorp to provide additional discussion on the status of the 2022 AS RFP in a follow-up report.[70]

*51* This about-face is important prologue, because it highlights how assessing penalties in this proceeding would be an unconstitutional taking of property without due process of law.

*52* First consider the procedural problems. In this proceeding: (a) PacifiCorp was not notified of the potential for administrative penalties until after the filing of intervenor testimony, even though Public Counsel provides no examples where a request for administrative penalties was not first initiated by filing a complaint, pleading, or separate proceeding;[71] (b) the first notice of potential penalties was limited to factual allegations, because they were contained in pre-filed testimony; and as a result (c) PacifiCorp was only given notice of which statutes it allegedly violated, and how those authorities are supported by Public Counsel's factual allegations, until post-hearing briefing—well after the close of the evidentiary hearing in this proceeding.[72]

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[69] Hr'g Tr. at 361-362 (confirming that Public Counsel has only recommending penalties in two cases, this would be the third); SDV-4X (Public Counsel Response to PacifiCorp's Data Request 15 (discussing Docket Nos. UE-031942 and UE-220376, neither of which resulted in administrative penalties).
[70] Public Counsel Comments, at 2 (Jan. 11, 2024) (available here: https://apiproxy.utc.wa.gov/cases/GetDocument?docID=678&year=2021&docketNumber=210829).
[71] Hr'g Tr. at 362-363.
[72] SDV-4X (Public Counsel Response to PacifiCorp's Data Request 21) (When asked: "Please confirm that your argument for penalties is based on the alleged violation of RCW 19.405.060(1)(b)(iii), that PacifiCorp's CEIP Update has failed to "demonstrate progress". If anything other than an unconditional yes, please explain." Public Counsel responded: "Public Counsel objects to this request as it calls for attorney legal theories. Subject to this objection, Public Counsel responds: Public Counsel's

*53* Next consider substantive concerns. Under Public Counsel's theory of the case: (a) there is no objective measurement—no specific renewable target—for PacifiCorp to have planned for that could avoid Public Counsel's recommendation for administrative penalties in the first place;[73] and (b) Public Counsel seeks an unbounded administrative penalty, based on whenever PacifiCorp creates a "CETA-compliant CEIP,"[74] again a standard that Public Counsel admits is not based on any objective standard.

*54* To this day, PacifiCorp has no notice of what constitutes a violation of Washington law that merits penalties, because Public Counsel confirms there are no specific renewable energy targets that could avoid penalties. Yet even if Public Counsel provided an objective standard of what interim targets could have avoided penalties, PacifiCorp would still have no reasonable opportunity to respond, because Public Counsel's legal authorities (and application of these authorities to evidence in the proceeding), were not fully disclosed until after the close of the evidentiary hearing.

*55* When there is a potential deprivation of property (as presented by requests for administrative penalties), due process requires the Commission provide PacifiCorp adequate notice of the laws that PacifiCorp has allegedly broken,[75] and the right to appear and be heard to defend against all factual or legal allegations prior to the assessment of

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recommendation is based on Washington law and Commission rules, including, without limitation, RCW 19.405.060(1)(b)(iii).").

[73] Hr'g Tr. at 363 ("public counsel's response reflects the fact that our determination of PacifiCorp's progress towards CETA targets is not based on a specific set of interim targets, but rather, on a holistic evaluation of its CEIP."); SDV-4X (Public Counsel Response to PacifiCorp's Data Request 19: When asked "What renewable energy interim targets for years 2023-2029 does Public Counsel believe would demonstrate adequate progress?" Public Counsel objected to the request, and responded: "Public Counsel's determination that PacifiCorp does not demonstrate adequate progress toward its CETA obligations is based on a holistic evaluation of its CEIP. PacifiCorp bears the burden of proving its CEIP is compliant with CETA.").

[74] Hr'g Tr. at 363.

[75] *E.g., Spokane v. Douglass,* 115 Wash.2d 171, 178, 795 P.2d 693 (1990) ("The due process clause of the Fourteenth Amendment requires that citizens be afforded fair warning of proscribed conduct."); *Id.* at 179 ("Under the due process clause, an 'ordinance is unconstitutional when it forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application.") (citing *Burien Bark Supply v. King Cy.,* 106 Wash.2d 868, 871, 725 P.2d 994 (1986).

penalties.[76] These requirements are reflected in, and consistent with, Commission Staff's complaint on PacifiCorp's 2021 Revised CEIP.[77] The Commission needs to reject Public Counsel's advocacy on this issue, which would provide neither of the constitutional protections required to ensure adequate due process, nor follow the Commission's less than two-year old precedent on how to prosecute alleged violations of Washington law, and specifically, violations of CETA.

### J. No parties contest PacifiCorp's use of the most current retail sales forecast, use of the WIJAM, or that PacifiCorp incorporated actual resources from the 2020AS RFP in the CEIP Update.

*56* Public Counsel appears to be the only party that addressed the fact that PacifiCorp incorporated actual, as opposed to planned-for, procurement from the 2020AS RFP in the 2023 CEIP Update. Yet Public Counsel raises this point, not to argue that these procurement efforts did not reduce PacifiCorp's interim targets in the 2023 CEIP Update compared to the 2021 Revised CEIP, but instead that PacifiCorp has not adequately procured resources to comply with CETA.[78]

*57* While the Company believes, as discussed above, that its procurement efforts demonstrate reasonable progress for complying with CETA, Public Counsel's argument misses the point: Reduced procurement from the 2020AS RFP lowered PacifiCorp's interim targets in this CEIP Update. Because no party contests this demonstrable fact (nor have any raised, much less discussed, that the use of the WIJAM and updated retail sales

[76] *E.g., Post v. City of Tacoma,* 167 Wash.2d 300, ¶ 24, 217 P.3d 1179 (2009) ("Though the procedures may vary according to the interest at state, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."); *Hasit LLC v. City of Edgewood,* 179 Wash.App. 917, ¶ 23, 320 P.3d 163 (2014) ("Because LID assessments involve a deprivation of property, affected owners have the right to a hearing as to whether the improvement resulted in special benefits to their properties and whether their assessments are proportionate, which necessarily includes the right to adequate notice of the hearing.").

[77] *E.g., In re Commission Staff's SCGHG Complaint,* Docket No. UE-220376 (an administrative complaint, initiated by a third-party, which included factual and legal allegations that PacifiCorp could respond to, and based on a procedural schedule where the moving party (Staff) had both the burdens of proof and persuasion).

[78] Public Counsel In. Br., ¶ 23 (Public Counsel states this reduced procurement, in addition to cancelling the 2022 AS RFP, indicate "PacifiCorp has done nothing to demonstrate a commitment to plan to meet Washington's CETA targets.").

forecast similarly reduced PacifiCorp's interim targets), it would be unreasonable to reject the CEIP Update without acknowledging that these factors reduced PacifiCorp's interim targets compared to the Revised CEIP.[79] There can be no "room for two opinions," where only one side of these issues are supported by record evidence.[80]

### K. PacifiCorp acknowledges CRITFC's concerns.

*58* PacifiCorp acknowledges CRITFC's concerns and will incorporate CRITFC's constructive feedback in future outreach efforts and CEIP planning processes.

## II. CONCLUSION

*59* PacifiCorp respectfully requests the Commission approve PacifiCorp's CEIP Update—including renewable energy interim targets for 2023 through 2029.

Respectfully submitted November 27, 2024,

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[79] *In re Electric Lightwave,* 123 Wash.2d 530, 543, 869 P.2d 1045 (1994) ("Substantial evidence is 'evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.'").
[80] *ITT Rayonier, Inc. v. Dalman,* 122 Wash.2d 801, 809, 860 P.2d 64 (1993).