

**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

PACIFICORP MOTION TO STAY
PENALTIES

1 PacifiCorp d/b/a Pacific Power & Light Company (PacifiCorp or the Company) respectfully requests the Washington Utilities and Transportation Commission (Commission) exercise its broad discretion and stay all penalties while the Commission resolves Staff’s Complaint in docket UE-220376 (Complaint). Until the Commission has clearly articulated the standards that PacifiCorp is required to follow under CETA, and concluded that PacifiCorp has violated them, daily penalties should not accrue.

I. Standard of Review

2 Washington considers the following factors when determining whether to grant a stay: (1) has the movant demonstrated there are debatable issues that would be presented on appeal; and (2) is the injury suffered without a stay greater than the injury the non-moving party would suffer with a stay?¹

3 The moving party must demonstrate that the equities require maintaining the status quo pending resolution of the issues presented.² Courts apply a sliding scale under

¹ Wa. R. App. Pr. 8.1(b)(3).

² *Purser v. Rahm*, 702 P.2d 1196, 1204 (1985).

RAP 8.1(b)(3): “the greater the inequity, the less important the inquiry into the merits of the appeal. Indeed, if the harm is so great that the fruits of a successful appeal would be totally destroyed pending its resolution, relief should be granted, unless the appeal is totally devoid of merit.”³

II. Argument

4 Staff asserts that PacifiCorp has violated two Washington statutes, two Commission regulations, and one Commission Order.⁴ Staff alleges that these five violations amount to a maximum \$730,000 penalty, and requests the Commission assess additional penalties for each day that PacifiCorp does not take corrective action to revise its CEIP (an additional \$1.52 million in potential penalties).⁵

5 PacifiCorp disagrees that any penalties are warranted, and reserves the right to address this issue in due course if the Complaint proceeds. However, this Motion focuses on whether the Commission should permit daily penalties to accrue while the Complaint is resolved. As discussed below, the Commission’s broad discretionary powers,⁶ specific power to stay certain proceedings,⁷ and persuasive appellate rules support granting PacifiCorp’s motion.

6 While the public has a paramount interest in receiving affordable, reliable, and resilient services, none of those concerns are raised here. Further, Staff’s Complaint is based on several materially disputed issues of law and fact, and the potential for

³ *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956, 958 (1986), *rev’d on other grounds*, 108 Wn.2d 38 (1987).

⁴ Compl. ¶¶ 21-24 (discussing Order 01, RCW 19.280.030(3)(a)(iii), RCW 19.280.030(3)(a)(ii), WAC 480-100-640(7), WAC 480-100-660(4), and Order 01 from Dkt. UE-210829).

⁵ *Id.* ¶ 25 (the Commission generally has ten months to resolve the Complaint (RCW 80.04.120(3)); 300 days of \$1,000 daily penalties, and five separate violations each day, amounts to \$1.52 million).

⁶ RCW 80.04.160 (“The Commission has, and it is hereby given, power to adopt rules to govern its proceedings, and to regulate the mode and manner of all investigations and hearings.”).

⁷ RCW 34.05.467; WAC 480-07-860.

\$2.25 million in total penalties, including \$1.52 million in additional daily penalties during the pendency of the Complaint, is punitive and arbitrary.

7 Staying additional daily penalties will preserve the status quo and ensure that the Commission can diligently investigate the important and technical issues presented.

A. Staff’s Complaint raises several materially disputed issues of law and fact.

8 When determining whether to grant a stay, the Commission should consider whether PacifiCorp has demonstrated that the Complaint includes debatable issues.⁸ Concurrent to this motion, PacifiCorp has filed a Motion to Dismiss and an Answer in this proceeding. Both indicate there are serious concerns with Staff’s Complaint.

9 The Motion discusses several disputed questions of law. For example, PacifiCorp argues that: (1) the Complaint violates PacifiCorp’s rights to due process; (2) Staff has failed to demonstrate any harm from PacifiCorp’s actions; and (3) the Commission lacks the power to grant Staff’s relief. Each claim presents jurisdictional or justiciability concerns, and if the Commission agrees with PacifiCorp on any of these issues, the Commission must dismiss the Complaint for failure to state a claim, and PacifiCorp is entitled to judgment as a matter of law on the pleadings.

10 The Answer also raises several disputed questions of fact. For example: (1) Staff provides no evidence to demonstrate how PacifiCorp incorrectly modeled the SCGHG in violation of Order 01, when the Order only provided conclusions of law, and was silent on how to specifically implement the adder;⁹ (2) Staff has not provided any evidence to

⁸ Wa. R. App. Pr. 8.1(b)(3).

⁹ Complaint ¶ 11 (citing Order 01, ¶ 11 which directed PacifiCorp to “include in its final CEIP both an Alternative LRCIP and a preferred portfolio that incorporates the SCGHG as required by WAC 480-100-605 and RCW 19.280.030(3)(a). The Company must use these portfolios in its calculation of projected incremental cost, as required by WAC 480-100-640(7).”).

discredit PacifiCorp’s 212,431 MWh energy efficiency target that was driven by SCGHG modeling, nor PacifiCorp’s removal of coal from electricity utilized to serve Washington retail load by 2025; and (3) Staff goes so far to summarily conclude that PacifiCorp’s CEIP “*may*” comply with CETA, which would render the Complaint moot.¹⁰

11 Both the Motion to Dismiss and Answer support suspending the accrual of any penalties and preserving the status quo until the Commission has adequate time to investigate the issues presented.¹¹

B. The Public Interest will not be harmed by a stay.

12 When determining whether to stay additional daily penalties, the Commission should consider the injury to PacifiCorp from penalties, compared to any harm to the public interest if a stay is granted.¹²

13 First, PacifiCorp should not accrue penalties while the Commission determines whether the Company correctly incorporated the SCGHG, especially when Staff’s Complaint does not allege any corrupt or malicious conduct. When determining whether to assess penalties the Commission balances, among other things, whether the conduct arises from new requirements of first impression, and if there are any gross or malicious actions.¹³ While CETA is an ambitious decarbonization policy, the law is not without ambiguity. The Commission’s recent CETA rulemakings have highlighted ample spaces

¹⁰ Complaint ¶ 15 (original emphasis).

¹¹ *Purser*, 702 P.2d at 1204; *Boeing*, 716 P.2d at 958.

¹² Wa. R. App. Pr. 8.1(b)(3).

¹³ *MCIMetro Access Transmission Services, Inc., v. U.S. West Communications, Inc.*, Dkt. UT-971063, Final Order ¶ 158 (Feb. 1999); *WUTC v. Electric Lightwave, Inc.*, Dkts. UT-001532 and UT-001533, Supplemental Order Denying Penalty Mitigation (Mar. 19, 2001) (the complete factors include: (1) whether the conduct arises from new requirements of first impression; (2) did the respondent know its conduct constituted a violation; (3) was the conduct knowing or intentional; (4) was the conduct or gross or malicious; (5) were there repeated violations; (6) has the Commission previously found violations; (7) was the offending conduct improved; and (8) were remedial steps undertaken.).

for reasonable disagreement. More to the point, Staff's Complaint arises from the first utility CEIPs, that precedes established compliance targets for 2025, 2030, and 2045 as required by CETA. And although the SCGHG was generally addressed in the Commission's previous rulemaking and in Order 01 in Docket UE-210829, the Commission has not considered the specific issue of how PacifiCorp should correctly model the adder. This is a novel and technical issue of first impression that supports granting a stay. Notably, CETA's enforcement scheme does not include penalties related to the application of SCGHG, focusing instead on the manner in which utilities meet CETA's major compliance targets, and CETA is instructive in allowing to Commission to relieve a utility of any administrative penalties for good cause.¹⁴

14 Second, the lack of electric utility precedent and *de minimis* penalty amounts strongly weigh in favor of granting PacifiCorp's motion. It would be unjust for PacifiCorp to accrue daily penalties (up to a potential \$2.25 million), when the Commission has never conducted a penalty proceeding, nor assessed penalties, against an electric utility. PacifiCorp is not aware of any docket where the Commission has resolved, much less awarded, penalties against an electric utility under RCW 80.04.380. For example, the Commission has conducted 367 complaint proceedings over the past three decades.¹⁵ Only twenty-eight dockets involved electric utilities, nine involved natural gas utilities, and the Commission has only assessed penalties in one proceeding.¹⁶

¹⁴ RCW 19.405.090.

¹⁵ From dockets publicly available online at the Commission's website.

¹⁶ *Cost Management Services, Inc. v. Cascade Natural Gas Corporation*, Dkt. UG-061256, Order 03 (Jan. 12, 2007).

In that docket, the Commission assessed a natural gas company a “*de minimis* penalty of \$5,000 to discourage future violations.”¹⁷

15 While infrequently addressed, the Commission generally favors measured restraint when determining whether to assess penalties:

The small number of cases in which the Commission has spoken of the policies underlying penalties, as well as the language of the decisions, demonstrate that the Commission’s general penalty policy—a policy with which I agree—is to impose penalties not principally as “punishment.” Instead, the Commission relies on penalties for their value as an incentive to the malefactor and others to comply with laws and regulations, and as a deterrent to future violations.

Historically, it appears the Commission has used sparingly its power to impose penalties. The Commission traditionally has chosen a conservative approach and worked with the regulated industries to spare them imposition of penalty assessments to the extent feasible. That approach certainly has its virtues, where it can achieve the corrective result. And it may well be the case that this approach was successful in a pervasively regulated environment.¹⁸

16 Further, the “penalty imposed should demonstrate the level of the Commission’s concern about open and repeated violations [and] should equate with the severeness of the violations and should offer disincentive to future violations.”¹⁹

17 The Commission should apply a similar light-touch approach, preserve the status quo, and not permit \$2.25 million in potential penalties to accrue as the Commission resolves the Complaint.

18 Third, the Commission should consider the lack of urgency. While important to ensure appropriate modeling and cost recovery in future rate dockets, the correct way to model the SCGHG within a utility CEIP is neither an immediate nor pressing issue. CEIPs will be submitted every four years, and utilities have until 2030 and 2045 to

¹⁷ *Id.* ¶ 92 (original italics).

¹⁸ *MCIMetro Complaint*, ¶¶ 293–294 (Chair Levinson, concurring in part, dissenting in part).

¹⁹ *Everett Airporter v. San Juan Airlines*, Dkt. TC-910789, at 6 (Jan. 1993).

comply with CETA. It would be a different issue if time was of the essence (for example, if PacifiCorp refused to repair a service line, or increase generation during a capacity shortage, etc.). This lack of urgency mitigates against daily additional penalties. That tool should be reserved for extreme instances of non-compliance, not modeling disagreements like those presented in Staff's Complaint.

19 Finally, the Commission should consider a judicious calculation of potential penalties. This includes principles of suitability and proportionality. Regarding the first, the Commission typically assesses penalties for isolated or for recurring events. For example, Staff recently alleged that a telecommunications company improperly disconnected 923 customers from service when a gubernatorial proclamation prevented the company from doing so.²⁰ Each disconnection amounted to an isolated event; Staff did not allege a continuing violation even though the company did not re-establish service for the customers.²¹

20 Even assuming Staff's Complaint has merit, PacifiCorp's SCGHG modeling is an isolated event, contained within a single planning document that is implementing a new law for the first time. It is unclear how PacifiCorp's actions could amount to a continuing violation of Commission authorities, when a company disconnecting almost 1,000 customers from service during a global pandemic did not.

21 Regarding proportionality, penalties should be fair and measured. For example, in the complaint discussed above Staff alleged that the 1,000 disconnections amounted to a violation of a Commission regulation (WAC 480-120-172(3)(a)), even though the disconnections violated several gubernatorial proclamations (Proclamation No(s)).

²⁰ *WUTC v. Lumen Technologies Group, et al.*, Dkt. UT-210902, Complaint (Apr. 6, 2022).

²¹ *Id.* ¶ 38.

20-23.2, and 20-23.16), and potentially a Commission Order (Order 04).²² This was reasonable, because the Complaint focused on the specific violation of Commission authority (disconnection requirements). Staff did not aggregate the potential penalties.

22 Similar principles apply here. The gravamen of Staff's Complaint is that PacifiCorp failed to correctly model the SCGHG. PacifiCorp disagrees, and believes that it complied with both the spirit and the letter of the law. Even if Staff's allegations are correct, it is unclear how this fairly amounts to a five-fold increase in penalties (violations of two separate Washington statutes, to separate Commission regulations, and a Commission Order), nor additional daily penalties. A proportional response supports staying all penalties.

III. Conclusion

23 PacifiCorp respectfully requests the Commission stay the accrual of any penalties until Staff's Complaint is resolved.

Dated this 27th day of June, 2022.

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²² *WUTC Complaint*, ¶¶ 37–38.