

**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

**PUBLIC COUNSEL'S RESPONSE TO COMMISSION STAFF'S
MOTION TO WITHDRAW COMPLAINT**

December 23, 2022

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I. INTRODUCTION

I. In accordance with WAC 480-07-380(3)(b), the Public Counsel Unit of the Washington State Attorney General's Office (Public Counsel) hereby responds to the Staff's Motion to Withdraw Complaint (Motion or Motion to Withdraw) that the Commission Staff (UTC Staff or Staff) of the Washington Utilities and Transportation Commission (WUTC or Commission) filed in Docket UE-220376 on December 1, 2022.¹ Staff submits its Motion to Withdraw Staff's Complaint "on the condition that the attached settlement stipulation is approved."² Public Counsel opposes as contrary to law and the public interest both the Motion and the attached Settlement Agreement to Withdraw Staff's Complaint (Settlement Agreement) that Staff offers in support of the Motion to Withdraw.³ The Settlement Agreement omits supporting documentation required under WAC 480-07-740(3)(a). The record in Docket UE-220376 and in Docket UE-210829 lacks evidence of any action by PacifiCorp to correct the violations alleged in Staff's June 6, 2022, Complaint and Notice of Prehearing Conference (Complaint). The Complaint details Staff's allegations that PacifiCorp has violated the legal requirements to include the social cost of greenhouse gases (SCGHG) in Clean Energy Implementation Plan

¹ See Staff's Motion to Withdraw Complaint, *Wash. Utils. & Transp. Comm'n v. PacifiCorp d/b/a Pacific Power & Light Co.*, Dockets UE-220376 (filed Dec. 1, 2022) (hereinafter "Motion to Withdraw"); see also Notice Modifying Deadline for Responses to Motion, Docket UE-220376 (issued Nov. 17, 2022); see also PacifiCorp Clean Energy Implementation Plan, *In re: PacifiCorp, d/b/a Pacific Power & Light Co. Clean Energy Implementation Plan*, Docket UE-210829 (filed Dec. 30, 2021); see also Commission Staff Complaint and Notice of Prehearing Conference, Docket UE-220376 (filed June 6, 2022). Concurrent with this response to Staff's Motion, Public Counsel is filing the Opposition Testimony of Stephanie K. Chase. See Opposition Testimony of Stephanie K. Chase, Exh. SKC-1T.

² Motion to Withdraw, ¶ 1; Settlement Agreement to Withdraw Staff's Complaint, Dockets UE-220376 (filed Dec. 1, 2022) (hereinafter "Settlement Agreement").

³ See Settlement Agreement.

(CEIP) preferred portfolios and in lowest reasonable cost portfolios (LRCP).⁴ The record in both dockets also shows no action by PacifiCorp over the past year consistent with the UTC Enforcement Policy⁵ that might justify mitigation or suspension of the proposed penalties, let alone withdrawal of the Complaint. For these reasons, the Commission should reject the Settlement Agreement and deny the Motion to Withdraw consistent with WAC 480-07-740, WAC 480-07-750, WAC 480-07-380, RCW 34.05.461(3), and RCW 34.05.461(4).

II. BACKGROUND

2. On December 1, 2022, the Staff filed its Motion requesting that the Commission approve withdrawal of the Staff's June 6, 2022, Complaint in Docket UE-220376 (Complaint Docket).⁶ In the Complaint, the Staff alleges PacifiCorp's failure to incorporate the SCGHG in PacifiCorp's CEIP that it filed on December 30, 2021, in Docket UE-210829 (CEIP Docket). The Complaint alleges that PacifiCorp violated Commission Order 01 in Docket UE-210829 rejecting PacifiCorp's exemption request regarding the SCGHG requirements in RCW 19.280.030(3)(a)(ii), RCW 19.280.030(3)(a)(iii), WAC 480-100-640(7), and WAC 480-100-660(4). The Complaint requested that the Commission find PacifiCorp in violation of statute, Commission rule, and Commission order, and assess a penalty of \$1,000 per day for each of the five violations alleged.

⁴ Complaint and Notice of Prehearing Conference, Docket UE-220376 (issued June 6, 2022) (henceforth referred to as "Complaint").

⁵ *In re: the Enft Pol'y of the Wash. Utils. & Transp. Comm'n*, Docket A-120061, Enforcement Policy for the Washington Utilities and Transportation Commission, ¶ 15 (Jan. 7, 2013) (hereinafter "Enforcement Policy").

⁶ *Id.*

3. On November 1, 2021, prior to filing its final CEIP, PacifiCorp had filed a draft CEIP along with its Petition for Exemption of WAC 480-100-605 (Exemption Petition), which requires that “the alternative lowest cost and reasonably available portfolio” include the social cost of greenhouse gases (SCGHG) “in the resource acquisition decision.”⁷ PacifiCorp explained in its Exemption Petition that its lowest reasonable cost portfolio (CETA Portfolio, or P02-MM-CETA) was developed using a mid-gas, mid-carbon cost price curve, and that it contains actions and investments necessary to meet PacifiCorp’s public service obligations in all six states it serves, plus the specific requirements of the Clean Energy Transformation Act (CETA).⁸ However, PacifiCorp stated in the Exemption Petition that P02-MM-CETA did not include an SCGHG dispatch adder “‘in the resource acquisition decision’ because no states that PacifiCorp serves requires SCGHG to be used in this specific way.”⁹

4. PacifiCorp also stated in its Exemption Petition that it “proposes to use Portfolio P02-MM, developed in the Company’s 2021 IRP, as its Alternative Portfolio for the purposes of the incremental cost calculation required by WAC 480-100-660.”¹⁰ PacifiCorp states that it would have proposed this portfolio as its preferred portfolio in its 2021 Integrated Resource Plan, but for the requirements of CETA, and that this portfolio “does not include SCGHG in the ‘resource acquisition decision,’ which necessitates the exemption from WAC 480-100-605 ...”¹¹

⁷ PacifiCorp’s Petition for Exemption of WAC 480-100-605, ¶ 1, Docket UE-210829 (filed on Nov. 1, 2021) (hereinafter “Exemption Petition”).

⁸ Exemption Petition, ¶ 6.

⁹ Exemption Petition, ¶ 6.

¹⁰ Exemption Petition, ¶ 11.

¹¹ Exemption Petition, ¶ 11.

5. The Commission rejected PacifiCorp’s Exemption Petition in Order 01 in Docket UE-210829, explaining that PacifiCorp must “include in its final CEIP both an Alternative LRCP and a preferred portfolio that incorporates the SCGHG as required by WAC 480-100-605 and RCW 19.280.030(3)(a)” and that PacifiCorp “must use these portfolios in its calculation of projected incremental cost, as required by WAC 480-100-640(7).”¹²
6. PacifiCorp filed its Clean Energy Implementation Plan (CEIP) on December 30, 2021 using a CEIP preferred portfolio based on the same resource portfolio—P02-MM-CETA—for which it had requested exemption. PacifiCorp had stated in its Exemption Petition that the P02-MM-CETA portfolio did not include SCGHG “in the resource acquisition decision.”¹³
7. The UTC Staff filed its Complaint on June 6, 2022, alleging that in failing to include a SCGHG cost adder in the resource acquisition decision in its CEIP preferred portfolio, PacifiCorp violated, 1) Order 01 of Docket UE-210829, 2) RCW 19.280.030(3)(a)(iii), 3) RCW 19.280.030(3)(a)(ii), 4) WAC 480-100-640(7) and 5) WAC 480-100-660(4).¹⁴ Staff requested that the Commission impose a maximum of one thousand dollars per day penalty per violation for each day that the CEIP is not revised to comply with Order 01, Commission rule, and statute.¹⁵ Staff also requested that the Commission order PacifiCorp to rerun its CEIP model using the SCGHG in accordance with the provisions noted above and submit a new CEIP preferred portfolio in compliance with Order 01, Commission rule, and statute. Staff stated that

¹²*In re: the Petition of PacifiCorp d/b/a Pacific Power & Light Co. Seeking Exemption from the Provisions of WAC 480-100-605*, Docket UE-210829, Order 01, ¶ 10 (Dec. 13, 2021) (hereinafter “Order 01”).

¹³ PacifiCorp Clean Energy Implementation Plan, Docket UE-210829 (filed Dec. 30, 2021); Exemption Petition, ¶¶ 6 & 11.

¹⁴ Complaint, ¶¶ 21–24.

¹⁵ Complaint, ¶ 25.

“Staff believes that properly including the SCGHGs into the preferred portfolio may have a meaningful impact on resource acquisition decisions” and further requested that the Commission “order such other or additional relief as is appropriate under the circumstances.”¹⁶

8. Staff filed testimony on the incorporation of SCGHG into PacifiCorp’s 2021 CEIP on October 21, 2022, along with Exhibits ASR-2 through ASR-20. In the testimony, Staff witness Andrew Rector recommends that the Commission require PacifiCorp to refile its CEIP using the P-02-SCGHG portfolio as the basis of its CEIP preferred portfolio and that the Commission penalize PacifiCorp up to the maximum amount for its violations of statute, rule, and Commission order.¹⁷ Rector states that PacifiCorp should refile its CEIP using the P02-SCGHG portfolio as the basis of the CEIP preferred portfolio and include a thorough, detailed explanation of how this portfolio applied only a SCGHG cost adder to every Washington allocated resource that was included in the portfolio.¹⁸ Rector states that the “refiled CEIP should include accompanying workpapers that illustrate the inputs and outputs that went into the portfolio, along with a step-by-step roadmap as part of the detailed explanation.”¹⁹ Witness Rector discusses the SCGHG’s treatment in law, rule, and Commission order, details PacifiCorp’s history of non-compliance with law, rule, and order, and describes how PacifiCorp should have treated the SCGHG in its modeling.²⁰

¹⁶ Complaint, ¶ 26.

¹⁷ Testimony of Andrew Rector, Exh. ASR-1T at 4:12–17 (filed Oct. 21, 2022).

¹⁸ Rector, Exh. ASR-1T at 4:19–23 (filed Oct. 21, 2022).

¹⁹ Rector, Exh. ASR-1T at 4:19 to 5:2.

²⁰ Rector, Exh. ASR-1T at 5:4–9.

9. Although Staff’s testimony remains in the record in Docket UE-220376, on December 1, 2022, Staff filed its Motion to Withdraw Complaint and the Settlement Agreement to Withdraw Staff’s Complaint.²¹ The Motion and Settlement reference each other, but do not cite any other new or existing evidence showing revision to PacifiCorp’s CEIP or other explanation of how the CEIP complies with the law on SCGHG.

10. The Settlement Agreement does not provide a CEIP revision or and does not state the content of revisions that would be filed in the future. No other supporting documentation is provided along with the Settlement Agreement. In footnote, Staff states that “[i]t is unclear whether omission approval is required for a ‘settlement or other agreement’ under WAC 480-07-380(3)(b). However, given that the terms of this settlement involve making a filing in a separate docket, the Settling Parties believe it is reasonable for the Commission to approve the settlement stipulation.”²² Staff makes no reference to the requirement in WAC 480-07-740 for supporting documentation for “all settlement agreements.”

11. In lieu of supporting documentation, the Settlement Agreement terms state that PacifiCorp will file a revised CEIP in Docket UE-210829 “30 days after a Commission order grants Staff’s Motion to Withdraw ...”²³ The Settlement Agreement states that in the 30-day filing PacifiCorp will use the P02-SCGHG portfolio as the basis of the CEIP preferred portfolio and to develop the alternative lowest reasonable cost portfolios in the revised CEIP.²⁴ The

²¹ Settlement Agreement; Motion to Withdraw.

²² Motion to Withdraw at 1 n.1.

²³ Settlement Agreement, ¶¶ 4, 8.

²⁴ Settlement Agreement, ¶ 5.

revised CEIP is to include all Washington-allocated resources selected in P02-SCGHG and any additional Washington-allocated resources that are necessary to comply with CETA.²⁵

12. The Settlement Agreement also provides that the revised CEIP will include, a thorough and detailed explanation of how the Revised CEIP preferred portfolio applied a SCGHG cost adder to each Washington-allocated resource in the preferred portfolio, along with a step-by-step roadmap as part of the detailed explanation PacifiCorp will also provide workpapers to the other Parties that demonstrate the inputs and outputs that went into the preferred portfolio. The Company will also detail how the final P02-SCGHG portfolio was incorporated into the P02-MM-CETA portfolio, along with a step-by-step roadmap as part of the detailed explanation indicating how the P02-SCGHG portfolio was incorporated into the P02-MM-CETA portfolio in the initial final CEIP filing.²⁶
13. The terms also include a “Preclearance Requirement” describing how PacifiCorp will provide a draft revision of its CEIP to the parties to the settlement seven days ahead of the deadline to file the CEIP revision with the Commission to allow a period of time for the parties to “determine whether the draft Revised CEIP is consistent with this Agreement.” If the revision is deemed inconsistent with the agreement, the Settlement Agreement does not appear to provide any consequence or recourse other than a statement that “the Parties will notify the Commission and develop a revised filing schedule once any inconsistencies are resolved.”²⁷
14. In the Motion, the Staff explains that there were “disagreements on the merits of the Complaint and the best methods of incorporating the SCGHG cost adder” during the settlement negotiations, but emphasizes that the parties to the settlement “were interested in resolving this dispute quickly because the issues raised by the Complaint prevent progress in the CEIP docket

²⁵ Settlement Agreement, ¶ 5.

²⁶ Settlement Agreement, ¶ 6.

²⁷ Settlement Agreement, ¶ 8.

until they were resolved.”²⁸ The parties to the Settlement agree that the P02-SCGHG portfolio, which PacifiCorp has already developed and discussed in its December 30, 2021, CEIP, complies with the minimum requirements in statute, Commission rule, and in Commission Order 01 in Docket UE-210829. Even though the contemplated CEIP revision does not exist in the record, the Staff explains its view that “the settlement results in a PacifiCorp CEIP that the Settling Parties agree complies with the requirements of statute, Commission rule, and order,” and that the need to make progress in the CEIP docket outweighed uncertainties of continuing to litigate the Complaint.²⁹ Staff states in the Motion that “if the Commission were to grant this motion, it would not represent a decision on the merits of the Complaint, and would not indicate whether the Commission would have found penalties appropriate had the case been fully litigated.”³⁰

15. On November 17, 2022, the Commission authorized the right for Public Counsel to respond to Staff’s Motion to Withdraw Complaint.³¹ Public Counsel concurrently submits this response to the Motion along with the Opposition Testimony of Stephanie K. Chase in opposition to both the Motion to Withdraw and Settlement Agreement.

²⁸ Motion to Withdraw, ¶ 7.

²⁹ Motion to Withdraw, ¶ 8.

³⁰ Motion to Withdraw, ¶ 9.

³¹ Notice Modifying Deadline for Responses to Motion, Docket UE-220376 at 2 (issued Nov. 17, 2022).

III. LEGAL STANDARDS

16. The Commission’s procedural rules address how to withdraw a complaint that serves as the basis for an adjudicative proceeding.³² A party may withdraw the complaint only upon permission granted by the Commission in response to a written motion, which must include any settlement or other agreement pursuant to which the party is seeking withdrawal.³³ The Commission will grant such a motion when the requested withdrawal is in the public interest.³⁴

17. WAC 480-07-740 provides that the “commission will review all settlement agreements to determine whether they comply with applicable legal requirements and whether approval of the agreements is consistent with the public interest.” In reviewing a proposed settlement, under WAC 480-07-750(2), the Commission “will approve a settlement if it is lawful, supported by an appropriate record, and consistent with the public interest in light of all the information available to the commission.”³⁵ The Commission must judge the reasonableness of a settlement under its statutory standards, and may approve the settlement, approve subject to conditions, or reject the settlement if it fails the standard.³⁶ Under WAC 480-07-740(3), the parties filing the settlement bear the burden to provide “supporting documentation sufficient to demonstrate that the settlement is consistent with the law and the public interest.”³⁷

³² WAC 480-07-380(3).

³³ WAC 480-07-380(3)(a).

³⁴ WAC 480-07-380(3)(b).

³⁵ WAC 480-07-750(2).

³⁶ *Id.*

³⁷ WAC 480-07-740(3); *see also* WAC 480-07-750(2).

18. The Commission must also resolve the issues in this case based on the record, while determining whether it will accept, reject, or modify a settlement.³⁸ The Commission “weighs the evidence offered in support of the common positions advocated by the settling parties against the evidence opposing the results advocated by the settling parties and evidence offered by non-settling parties in support of the alternative results that they advocate.”³⁹
19. Further, the Washington Administrative Procedure Act (APA) sets forth in RCW 34.05.461(3) that initial and final orders shall include a statement of findings and conclusions and the reasons and basis therefor, and that findings “shall be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings.” RCW 34.05.461(4) states that findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in the proceeding.
20. Lastly, legal requirements for the inclusion of SCGHG as a cost adder in the evaluation and selection of resources in both the CEIP preferred portfolio and the alternative lowest reasonable cost portfolio are found in both statute and Commission rule. RCW 19.280.030(3)(a) provides that “[a]n electric utility must incorporate the social cost of greenhouse gas emissions as a cost adder when . . . (ii) [d]eveloping integrated resource plans and clean energy action plans; and (iii) [e]valuating and selecting intermediate term and long-term resource options.”

³⁸ *In re Puget Sound Energy*, Dockets UE-121373, UE-121697 & UG-121705, and UE-130137 & UG-130138 (*consol.*), Order 07/06/06: Ord. Rejecting Multiparty Settlement, ¶ 17 (June 25, 2013); *see also Wash. Utils. & Transp. Comm’n v. Puget Sound Energy*, Docket UE-161123, Ord. 06 (July 13, 2017) (support for settlement was provided via a memorandum and testimony).

³⁹ *In re Puget Sound Energy*, Dockets UE-121373, UE-121697 & UG-121705, and UE-130137 & UG-130138 (*consol.*), Order 07/06/06: Ord. Rejecting Multiparty Settlement, ¶ 20 (June 25, 2013).

21. The Commission’s rules at WAC 480-100-620(11)(j) and (12)(i) require utilities to incorporate the SCGHG as a cost adder as stated in RCW 19.280.030 in integrated resource plans and clean energy action plans, which both inform and must be consistent with the CEIP. The definitions in WAC 480-100-605 state that the alternative lowest reasonable cost and reasonably available portfolio must include the social cost of greenhouse gases in the resource acquisition decision in accordance with RCW 19.280.030(3)(a).”
22. The Commission’s General Order, R-601 for Dockets UE-191023 and UE-190698 (consolidated) addressed the RCW 19.280.030(3)(a) requirements and clarified that
- While the phrase ‘selecting and evaluating’ in RCW 19.280.030(a)(i) and (iii) could be read to mean selection only within the IRP and not in actual investment decisions, RCW 19.280.030(a)(ii), which states that the SCGHG should be included when developing IRPs and CEIPs, contradicts that interpretation. Given that context, if subsections -.030(a)(i) and (iii) were in fact merely intended as planning requirements, not required for actual investing decisions, then subsection -.030(a)(ii) is redundant. We decline to so construe the statute.⁴⁰
23. WAC 480-100-640(7) specifies that “[e]ach CEIP must include a projected incremental cost as outlined in WAC 480-100-660(4).” WAC 480-100-660(4) specifies requirements for utilities’ incremental cost estimates in a CEIP and states that utilities must provide support in the form of workpapers, models, and associated calculations and must:
- (a) Identify all investments and expenses that the utility plans to make during the period in order to comply with the requirements of RCW 19.405.040 and 19.405.050.
 - (b) Demonstrate that the investments and expenses identified in (a) of this subsection are directly attributable to actions necessary to comply with, or make progress towards, the requirements of RCW 19.405.040 and 19.405.050.
 - (c) Provide the expected cost of the utility's planned activities and the expected cost of the alternative lowest reasonable cost and reasonably available portfolio.

⁴⁰ *In re Adopting Rules Relating to Clean Energy Implementation Plans and Compliance with the Clean Energy Transformation Act*, Dockets UE-191023 & UE-190698 (consol.), General Order R-601, ¶ 131 (Dec. 28, 2020) (hereinafter “CETA Rulemaking Order”).

IV. ARGUMENT

37. The Staff's Motion to Withdraw Complaint and the Settlement Agreement to Withdraw Staff's Complaint are insufficiently supported in the record and contrary to the public interest. Accordingly, the Commission should deny them pursuant to WAC 480-07-740, WAC 480-07-750, WAC 480-07-380(3), RCW 34.05.461(3), and RCW 34.05.461(4). The Motion and Settlement are based solely on a promise that PacifiCorp will at a future date comply with the CETA requirements for inclusion of SCGHG in the CEIP after the Commission issues an order approving withdrawal of the Complaint alleging that PacifiCorp violated those requirements. Stated another way, PacifiCorp agrees to comply with the laws it violated only after the Commission throws out the Complaint alleging those violations. Further, the Settlement Agreement provides no consequence to PacifiCorp if its proposed CEIP revision does not comply with the SCGHG requirements and the Settlement Agreement. If the Complaint is withdrawn, daily penalties cease to accrue.

38. Meanwhile, the record in both the CEIP Docket (UE-210829) and the Complaint Docket (UE-220376) shows that PacifiCorp has been and continues to be in violation of the various legal requirements for inclusion of SCGHG in the CEIP preferred portfolio acquisition decisions for almost a full year. Also, there is nothing in the record in either docket indicating any action that might justify mitigation or suspension of the Staff's proposed penalties consistent with the UTC's Enforcement Policy. Staff's assertion that continuing to litigate the Complaint will impede progress in the separate CEIP Docket is also unsupported and in any event could easily

be resolved by a Commission decision requiring PacifiCorp to provide evidence in the record before the Commission allows withdrawal of the Complaint, not after.

39. Until such record evidence exists to show PacifiCorp's compliance with the law on SCGHG in CEIPs, the logic underpinning both the Motion to Withdraw and the Settlement Agreement is circular. Evidence in the record shows that PacifiCorp continues each day to violate Commission order, Commission rules, and the CETA statutory requirements on SCGHG. PacifiCorp's own statements in the record clarify that it is in violation of the SCGHG requirements. Because a plan to comply with the law is not compliance with the law, both the Motion to Withdraw and Settlement Agreement lack sufficient support in the record and are contrary to public interest. For these reasons, the Commission should reject them both.

A. Nothing in the Record in Dockets UE-220376 or UE-210829 Demonstrates that PacifiCorp's CEIP Complies with the Legal Requirements Regarding Inclusion of SCGHG in the CEIP Preferred Portfolio and Lowest Reasonable Cost Portfolio.

40. Since filing its CEIP on December 30, 2021, PacifiCorp has provided nothing in the record in Dockets UE-220376 or UE-210829 to demonstrate or otherwise explain that PacifiCorp's CEIP complies with the law regarding inclusion of SCGHG in CEIPs. Staff explains this fact extensively in its testimony.⁴¹ While the Motion to Withdraw asserts that the Settlement Agreement will result in PacifiCorp filing a CEIP that complies with the law, the Settlement itself provides the detailed "Preclearance Requirement" outlining a timeline and process in the event PacifiCorp's revision does not comply. The very existence of this term in the Settlement contradicts Staff's assertion that the Settlement will result in a PacifiCorp CEIP that

⁴¹ Rector, Exh. ASR-1T at 8:1 to 26:8.

will comply with the law. Further, Staff states in the Motion that “if the Commission were to grant this motion, it would not represent a decision on the merits of the Complaint, and would not indicate whether the Commission would have found penalties appropriate had the case been fully litigated.”⁴² The Motion to Withdraw and the Settlement Agreement point to nothing new in the record. As support, the Settlement Agreement references Staff’s testimony in the Complaint docket, which discusses in extensive detail why the PacifiCorp CEIP on record fails to comply with the law on SCGHG inclusion in the CEIP.⁴³

41. PacifiCorp states in its Exemption Request that it developed its lowest reasonable cost portfolio—its “CETA Portfolio” or “P02-MM-CETA”—in PacifiCorp’s 2021 Integrated Resource Plan using a medium-gas, medium carbon cost price curve.⁴⁴ PacifiCorp explains further that this “portfolio contains actions and investments necessary to meet PacifiCorp’s public service obligations in all six states it serves, plus the specific requirements of the Clean Energy Transformation Act (CETA)” but that this portfolio “did not include an SCGHG dispatch adder ‘in the resource acquisition decision’ ...”⁴⁵

42. In Order 01 in Docket UE-210829, the Commission denied PacifiCorp’s Exemption Request, emphasizing that the requirement to include the SCGHG is set out in not only Commission rule but also the CETA statute.⁴⁶ The Commission also noted that PacifiCorp’s

⁴² Motion to Withdraw, ¶ 9.

⁴³ See Rector, Exh. ASR-1T.

⁴⁴ Exemption Petition, ¶ 6.

⁴⁵ Exemption Petition, ¶ 6.

⁴⁶ Order 01, ¶ 10.

claims that it would have difficulties including the SCGHG in its Alternative LRCP were not supported in the record.⁴⁷

43. In this Docket, the record is also insufficient to show that PacifiCorp's CEIP complies with the law regarding SCGHG inclusion in CEIP preferred portfolios or why it is so difficult for PacifiCorp to comply. The Settlement Agreement states that all the parties to the Settlement agree that the P02-SCGHG portfolio, which was discussed in the CEIP and thus has existed for over a year, would comply with the requirements for SCGHG inclusion.⁴⁸ If all PacifiCorp must do to comply with the law on inclusion of SCGHG in resource acquisition decisions in its CEIP is provide explanation for what it did over a year ago, it is unclear why PacifiCorp has not already done so. It is even more unclear how it is in the public interest to allow PacifiCorp additional time to comply with the law on this issue, and how the public benefits from the Commission granting withdrawal of the Complaint without requiring a compliant CEIP on the record.

B. Over the Past Year or More, PacifiCorp Has Taken No Action That Might Serve as a Basis to Justify Any Mitigation or Suspension of Proposed Penalties Consistent with the UTC Enforcement Policy, Let Alone Withdrawal of the Complaint for Penalties.

44. In addition to the absence of record evidence demonstrating that PacifiCorp's CEIP complies with the law on SCGHG, PacifiCorp has not taken any action that might support mitigation or suspension of penalties, let alone withdrawal of the Complaint alleging CETA SCGHG violations. The Commission has established criteria for enforcement actions and

⁴⁷ Order 01, ¶ 9.

⁴⁸ Motion to Withdraw, ¶ 7; Settlement Agreement, ¶ 5 & at 2 n.1.

penalties in the UTC Enforcement Policy. The Enforcement Policy also provides factors for determining whether mitigation or suspension of penalties is appropriate. PacifiCorp has made no favorable effort towards any of the considerations listed in the enforcement criteria or factors for mitigation or suspension that might justify the Commission granting withdrawal of the Complaint *before* the record includes evidence of a compliant CEIP.

45. As Public Counsel discussed in witness Stephanie Chase’s testimony, applying the Commission’s enforcement criteria to the facts in the record for both the CEIP Docket UE-210829 and the Complaint Docket UE-220376 supports imposing the maximum statutory penalties against PacifiCorp for failing to demonstrate on the record how or why PacifiCorp’s December 30, 2021, CEIP complies with the law on inclusion of SCGHG in resource acquisition decisions.⁴⁹ Further, nothing in the record provides detail on any circumstances that might justify mitigation or suspension of penalties.⁵⁰

46. Staff witness Rector explains in his testimony how PacifiCorp had multiple opportunities before and after filing its December 30, 2021, CEIP to explain what PacifiCorp did and how what it did in the resource portfolio analysis complied with the law on SCGHG inclusion.⁵¹ It remains unclear why PacifiCorp has not filed additional documentation to explain how what it provided in its CEIP complies with the law.

47. In its November 1, 2021, Exemption Petition, PacifiCorp stated that the P02-MM and P02-MM-CETA resource portfolios did not comply with the requirement stated in statute and

⁴⁹ See Chase, Exh, SKC-1T at 13:13 to 15:14.

⁵⁰ Chase, Exh, SKC-1T at 15:15 to 17:9.

⁵¹ Rector, Exh. ASR-1T at 29:4 to 30:12.

Commission rule that the SCGHG be included in the resource acquisition decision.⁵²

Nevertheless, these are the portfolios PacifiCorp references repeatedly throughout the CEIP as the basis for the CEIP preferred portfolio and incremental cost calculations.⁵³ Since filing its CEIP on December 30, 2021, PacifiCorp has provided no explanation in either the CEIP Docket or the Complaint Docket for why what it said in its Exemption Petition regarding the P02-MM and P02-MM-CETA portfolios complies with the law.⁵⁴

48. The Commission should consider the analysis of the UTC Enforcement Policy criteria provided in testimony from Staff witness Rector and Public Counsel witness Chase.⁵⁵ Regarding how serious or harmful the violation is to the public, the Commission should consider that incorrectly accounting for SCGHG could result in different resource selections, leading to incorrect incremental cost calculations feeding into the Commission’s decision on whether to approve a CEIP. Even though PacifiCorp stated in its Exemption Petition that using portfolios that did not use the SCGHG in the resource acquisition decision “results in no changes to PacifiCorp’s proposed actions during the CEIP period,” it is far from clear that this similarity would occur in future CEIP periods, or for other utilities who may take this same approach.⁵⁶ Following the process requirements of CETA is important to achieving Washington’s climate goals and providing more equitable outcomes. If PacifiCorp is allowed to subvert the process requirement here, they or other utilities may do so again in future CEIP filings, or for other

⁵² See Exemption Petition.

⁵³ See PacifiCorp Clan Energy Implementation Plan, Docket UE-210829 (filed Dec. 30, 2021).

⁵⁴ Rector, Exh. ASR-1T at 12:4 to 14:11.

⁵⁵ Rector, Exh. ASR-1T at 26:10 to 30:12; Chase, Exh. SKC-1T at 13:13 to 15:14.

⁵⁶ Chase, Exh. SKC-1T at 14:5–6.

CETA requirements.⁵⁷ The Commission should also require clarity in the record regarding whether the CETA requirements are met to avoid similar litigation over compliance with other CETA requirements, whether procedural or substantive.

49. Looking to the other criteria in the UTC Enforcement Policy, PacifiCorp failed to make any correction or provide additional explanation between filing its draft CEIP and Exemption Petition and filing its final CEIP. PacifiCorp states in its Exemption Petition that it did not include a SCGHG adder in the resource acquisition decisions for the portfolios used as the basis for the CEIP, even after the Commission denied the Exemption Petition.⁵⁸

50. PacifiCorp did not self-report the violations, and has been far from cooperative and responsive regarding the allegations of violations in the Staff's Complaint.⁵⁹ PacifiCorp's lack of candor persists despite numerous meetings with Staff and other interested individuals and almost a full year since the CEIP filing date of December 30, 2021. PacifiCorp has taken no action to correct the violations, let alone having done so promptly, given the amount of time that has passed since the CEIP filing date.

51. The five violations are ongoing on a daily basis, and affect all of PacifiCorp's 137,000 customers who suffer the consequences of PacifiCorp's failure to clearly comply with CETA requirements. The likelihood of recurrence is high if PacifiCorp or other utilities are allowed to commit similar violations for other CETA requirements. Similar violations for other CETA

⁵⁷ Chase, Exh. SKC-1T at 13:13 to 14:6.

⁵⁸ Chase, Exh. SKC-1T at 11:14–16.

⁵⁹ Rector, Exh. ASR-1T at 27:14 to 30:9.

requirements and associated litigation would ensue if the Commission were to approve the withdrawal of this complaint in the absence of a sufficient record to support such action.

52. PacifiCorp is a large, sophisticated entity that has repeatedly failed to meet regulatory deadlines for its CEIP as well as for its 2021 Integrated Resource Plan (IRP).⁶⁰ The Commission granted multiple extensions to allow PacifiCorp to comply with the legal requirements for the IRP and CEIP resource selection modeling and the Company did not meet those requirements.

C. Without Evidence in the Record to Show PacifiCorp’s Compliance with the Legal Requirements Regarding SCGHG in CEIPs, and Without Any Justification for Mitigation or Suspension of Penalties, the Motion to Withdraw and Settlement Agreement Lack Sufficient Support, Are Thus Contrary to the Public Interest, and Should Be Rejected by the Commission.

53. The Settlement Agreement and Motion to Withdraw do no more than set out a plan for PacifiCorp to meet the legal requirements for inclusion of SCGHG in the CEIP Preferred Portfolio. However, a plan to comply with the law is not by itself compliance. While a compliance program or other plan to comply is good for companies to have in response to an alleged violation, such a plan without actual compliance to accompany it is not enough to meet the requirements in statute, Commission rule, and Commission order regarding SCGHG. The record is thus insufficient to support the Settlement Agreement or the Motion to Withdraw as required by WAC 480-07-740, WAC 480-07-750, WAC 480-07-380, RCW 34.05.461(3), and RCW 34.05.461(4).

34. The settling parties offer the Settlement Agreement as support for the Staff’s Motion to Withdraw Complaint, but no supporting documentation for the Settlement Agreement. Because

⁶⁰ Chase, Exh. SKC-1T at 15:5–10; Rector, Exh. ASR-1T 29:4 to 30:9.

the Commission must reject the Settlement Agreement as lacking sufficient documentary support in the record consistent with WAC 480-07-740(3)(a) and WAC 480-07-750, the Commission must deny the Motion.

35. WAC 480-07-740 sets forth that “the commission will review *all* settlement agreements to determine whether they comply with applicable legal requirements and whether approval of the agreements is consistent with the public interest.”⁶¹ WAC 480-07-740(3)(a) requires settling parties to “include supporting documentation sufficient to demonstrate that the settlement is consistent with the law and the public interest.” In addition, the Washington State Administrative Procedure Act (APA) at RCW 34.05.461(3) requires that “[i]nitial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record ...” The APA clarifies that findings “shall be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings.”⁶² The APA states at RCW 34.05.461(4) that “[f]indings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding ...”

36. Here, the evidence of record in the adjudicative proceeding demonstrates that PacifiCorp has violated Commission order, Commission rule, and statute with regard to SCGHG considerations in its CEIP preferred portfolio, as the Staff describes in the June 6, 2022, Complaint. Nothing in the record demonstrates otherwise, and the Settlement Agreement provides nothing new to show otherwise. Because the Settlement Agreement fails to provide

⁶¹ WAC 480-07-740 (emphasis added).

⁶² RCW 34.05.461(3).

supporting documentation to support its proposed resolution, the Commission must find the Settlement deficient under WAC 480-07-740(3)(a).

37. Because the Commission must reject the Settlement Agreement, the Settlement cannot support the Staff's Motion to Withdraw Complaint, and therefore the Commission must also deny the Motion. WAC 480-07-380(3) states that the Commission will grant such a motion when the requested withdrawal is in the public interest. The record in the CEIP Docket and in the Complaint Docket still shows that PacifiCorp has done nothing to justify mitigation or suspension of proposed penalties, let alone withdrawal of the Complaint. If PacifiCorp has complied with the legal requirements for the SCGHG in CEIP preferred portfolios, it is mysterious that PacifiCorp has not made some sort of clarification on the issue in the record, or that they requested exemption from these requirements. The lack of any explanation for PacifiCorp's behavior is mystifying and presents a problem for the Commission moving forward into future CEIP proceedings if companies need not clarify that they have met CEIP requirements by taking this same approach as PacifiCorp has in this Docket, and in the CEIP Docket.

38. As Public Counsel witness Stephanie Chase explains in her testimony, incorrect SCGHG accounting can lead to incorrect incremental cost calculations and different resource selections, contradicting the climate goals in CETA to be set out in CEIPs. While resource selections may be similar or the same in this Docket, the same may not be true in future CEIP periods for PacifiCorp, or for other utilities who might adopt this same approach should the Commission approve the Settlement and grant the Staff's Motion. For these reasons, it is contrary to the

public interest for the Commission to approve the Settlement Agreement or grant the Motion to Withdraw the Complaint.

39. Finally, as stated in the Washington APA at RCW 34.05.461(3) and (4), there must be a basis in the record before the Commission issues a decision granting withdrawal of the Staff's Complaint, not after. For these reasons, both the Motion to Withdraw and the Settlement Agreement are contrary to public interest, and the Commission therefore must reject them both.

V. CONCLUSION

54. For the reasons described above, Public Counsel respectfully requests that the Commission enter an order rejecting the Settlement Agreement to Withdraw Staff's Complaint and denying Staff's Motion to Withdraw Complaint.

Dated this 23rd day of December, 2022.

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