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 STAFF'S RESPONSE TO PACIFICORP'S MOTION TO DISMISS AND MOTION TO STAY PENALTIES

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ROBERT W. FERGUSON
Attorney General

JEFF ROBERSON
Assistant Attorney General
Office of the Attorney General
Utilities & Transportation Division
P.O. Box 40128
Olympia, WA 98504-0128
(360) 664-1188
jeff.roberson@utc.wa.gov

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I. INTRODUCTION

1 The Commission, through its staff (Staff), complained against PacifiCorp (PacifiCorp), alleging that the company failed to incorporate the social cost of greenhouse gas emissions (SCGHGs) in various processes as required by state statutes, a Commission rule, and a Commission order.

2 PacifiCorp moves to dismiss the Commission's complaint, or, alternatively, to stay the accrual of some of the penalties sought as relief in the complaint. PacifiCorp's arguments in its motion to dismiss lack merit, and PacifiCorp's motion for a stay does not actually seek a stay, but rather to litigate the issue of penalties prematurely and inappropriately. The Commission should deny both motions.

II. RELIEF REQUESTED

3 Staff respectfully requests that the Commission deny PacifiCorp's: (1) motion to dismiss the complaint filed against PacifiCorp in this docket and (2) motion to stay penalties.

III. BACKGROUND

4 In 2020, the Commission adopted rules to implement the Clean Energy Transformation Act (CETA).[1] In its adoption order, the Commission addressed questions about CETA's command that utilities "incorporate the [SCGHG] as a cost adder when . . . [d]eveloping integrated resource plans and clean energy action plans . . . [and] [e]valuating and selecting intermediate term and long-term resource options."[2] The

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[1] LAWS OF 2019, chapter 288.
[2] LAWS OF 2019, chapter 288, § 14, *codified at* RCW 19.280.030(3)(a)(ii), (iii).

Commission concluded that this provision in CETA required utilities to consider the SCGHG "in actual investment decisions."[3]

5 In November 2021, PacifiCorp filed its first draft Clean Energy Implementation Plan (CEIP).[4] On that same day, it petitioned the Commission for an exemption from the rule that requires "that the alternative lowest cost and reasonably available portfolio [Alternative LCRP] include the [SCGHG] in the resource acquisition decision."[5] PacifiCorp explained that it required this exemption because its preferred portfolio "did not include a[] SCGHG dispatch adder in the resource acquisition decision because no state that PacifiCorp serves requires SCGHG to be used in this specific way."[6] These and other statements in the petition indicated that PacifiCorp intended to use its integrated resource plan (IRP) preferred portfolio as its CEIP preferred portfolio.

6 The Commission entered an order, Order 01, to deny PacifiCorp's petition, noting that the request conflicted with its interpretation of CETA.[7] At Staff's urging, the Commission ordered PacifiCorp "to include in its final CEIP both an Alternative LCRP and a preferred portfolio that incorporates the SCGHG as required by WAC 480-100-605 and RCW 19.280.030(3)(a)."[8]

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[3] *In re Adopting Rules Relating to Clean Energy Implementation Plans and Compliance with the Clean Energy Transformation Act*, Dockets UE-191023 & UE-190698, General Order R-601, 47 ¶ 131 (Dec. 28, 2020).
[4] *See generally in re CEIP of PacifiCorp*, Docket UE-210829, Draft Clean Energy Implementation Plan (Nov. 1, 2021).
[5] *In re Petition of PacifiCorp*, Docket UE-210829, PacifiCorp's Petition for Exemption of WAC 480-100-605, 1 ¶ 1 (Nov. 1, 2021) (internal quotation omitted).
[6] *Id.* at 3 ¶ 6 (internal quotation omitted).
[7] *In re Petition of PacifiCorp*, Docket UE-210829, Order 01, 3 ¶ 10 (Dec. 13, 2021) (Order 01).
[8] *Id.* at 3 ¶ 11, 4 ¶¶ 16, 18.

7 PacifiCorp later submitted its final CEIP. Language in the final CEIP indicates that PacifiCorp used its IRP preferred portfolio as its CEIP preferred portfolio,[9] the portfolio that PacifiCorp acknowledged in its exemption petition did not incorporate SCGHG as a cost adder in "[e]valuating and selecting intermediate and long-term resource options."[10]

8 The Commission, through its Staff, complained against PacifiCorp, alleging that the company's failure to use the SCGHG as a cost adder in its IRP and CEIP preferred portfolio violated Order 01, RCW 19.280.030(3)(a)(iii), RCW 19.280.030(3)(a)(ii), and the WAC 480-100-605, the rule from which PacifiCorp sought an exemption.[11]

9 PacifiCorp answered Staff's complaint[12] and moved to dismiss that complaint.[13] It also moved, as an as alternative form of relief, to stay the accrual of the penalties sought in Staff's prayer for relief.[14]

IV. ISSUES PRESENTED

10 Should the Commission deny PacifiCorp's motion to dismiss because: (1) PacifiCorp received due process in the form of (a) notice of the allegations against it through service of a complaint and (b) will receive a meaningful opportunity to be heard through this adjudicatory proceeding; (2) PacifiCorp misapplies due process vagueness to legal pleadings that do not proscribe behavior and, in any event, lacks the

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[9] *See in re CEIP of PacifiCorp*, Docket UE-210829, PacifiCorp Clean Energy Implementation Plan, at 9, 93-94.
[10] RCW 19.280.030(3)(a)(iii).
[11] *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket UE-220376, Complaint & Notice of Prehearing Conference, 6-7 ¶¶ 21-24 (June 6, 2022).
[12] *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket UE-220376, PacifiCorp Answer (June 27, 2022).
[13] *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket UE-220376, PacifiCorp Motion to Dismiss (June 27, 2022) (Motion to Dismiss).
[14] *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket UE-220376, PacifiCorp Motion to Stay Penalties (June 27, 2022) (Motion to Stay).

standing to make a vagueness claim that should fail on the merits; (3) the Commission has legislatively granted standing to vindicate Washington's sovereign interest in enforcing compliance with its laws; (4) the complaint alleges actual disputes based on PacifiCorp's completed failure to comply with various statutory provisions, a rule, and a Commission order; and (5) PacifiCorp's preemption and Commerce Clause claims rest on impermissible speculation about facts that would invalidate the complaint?

11 Should the Commission deny PacifiCorp's motion to stay penalties because: (1) PacifiCorp improperly seeks through its motion to effectively amend the complaint to reduce its penalty risk, and (2) the equities do not favor PacifiCorp given that it has yet to present debatable issues and it cannot show it will suffer a greater injury without a stay than the Commission, through its Staff, would suffer with a stay?

V. ARGUMENT CONCERNING THE MOTION TO DISMISS

12 PacifiCorp's motion to dismiss raises three types of arguments: (1) due process arguments, (2) standing and ripeness arguments, and (3) preemption or Commerce Clause arguments.[15] The Commission should reject each of those arguments in turn.

13 PacifiCorp's two-part due process claim lacks merit. It first contends that it lacked notice and a meaningful opportunity to be heard here, a claim that verges on frivolous given that the Commission served it with a complaint and set this matter for an adjudication where it can defend itself. It also contends that the complaint is void for vagueness, despite the fact that it lacks standing to do so. Even assuming it did have standing, PacifiCorp improperly attempts to apply due process vagueness to a document

[15] Motion to Stay at 3 ¶ 9.

not susceptible to a vagueness challenge and to improperly conflate what it perceives as ambiguity with constitutional vagueness.

14 PacifiCorp's standing and ripeness claims similarly lack merit. The standing claim ignores that the legislature has granted the Commission standing to sue to redress injuries to Washington's sovereign interest in compliance with its laws as an arm of the sovereign. Its ripeness claim fails because Staff alleges completed violations of statute, rule, and Commission order, and thus the complaint presents justiciable claims ripe for adjudication.

15 PacifiCorp's preemption claims fail based on the standards applicable to motions like the instant one because those claims are based on speculative facts or readings of the complaint. PacifiCorp can only justify dismissal on its preemption or Commerce Clause theories by resting the claim on speculative facts that justify dismissal. But in the context of a motion like this one, the Commission must do the opposite: any speculation about facts must involve facts that will sustain the complaint.

16 Given those legal realities, the Commission should deny PacifiCorp's motion to dismiss.

A. Applicable Legal Standards

17 A party may move to dismiss a complaint filed with the Commission.[16] In ruling upon any such motion, the Commission "consider[s] the standards applicable to a motion made under Washington superior court civil rule[s] 12(b)(6) and 12(c)."[17] Under those

[16] WAC 480-07-380(1).

[17] WAC 480-07-380(1)(a). In its motion to dismiss, PacifiCorp contends that WAC 480-07-305(5) governs the Commission's disposition of the motion. But WAC 480-07-305(5) governs the commencement of an adjudicatory proceeding, and WAC 480-07-380(1) explicitly sets out the governing standards for a motion to dismiss. The Commission should apply the standards set out in WAC 480-07-380(1).

standards, "[d]ismissal is warranted only if the" Commission "concludes, beyond a reasonable doubt" that the complaining party "cannot prove any set of facts which would justify" granting it the relief sought.[18] The Commission considers all the allegations in the complaint true, and it "may consider any hypothetical fact supporting [the complaining party's] claims."[19] The Commission should, accordingly, grant motions to dismiss "sparingly and with care and, as a practical matter, only" if the complaining party "include[d] allegations that show on the face of the complaint that there is some insuperable bar to relief."[20]

B. The Commission Has Afforded PacifiCorp Due Process

18 As noted, PacifiCorp claims that the complaint violates its due process rights in two ways.[21] First, the Company states that it "was not provided adequate notice of the contested issue, nor a meaningful opportunity to be heard."[22] Second, it contends that "Staff's [c]omplaint remains unconstitutionally vague."[23] The first argument is nearly frivolous, if not actually so. The second misapplies the vagueness doctrine, and, regardless, PacifiCorp lacks the standing to make it. The Commission should reject both.

1. PacifiCorp has received notice of the allegations against it and will receive a meaningful opportunity to defend itself against those allegations.

19 PacifiCorp first contends that it has not received constitutionally sufficient notice or a meaningful opportunity to defend itself.[24] Staff finds this argument baffling.

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[18] *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (internal quotations omitted).
[19] *Kinney*, 159 Wn.2d at 842.
[20] *Kinney*, 159 Wn.2d at 842.
[21] Motion to Dismiss at 6, ¶ 17.
[22] Motion to Dismiss at 3, ¶ 8.
[23] Motion to Dismiss at 8 ¶ 25.
[24] Motion to Dismiss at 8-9 ¶¶ 26-29.

20 As PacifiCorp notes, "the right to notice and a meaningful opportunity to be heard" are essential components of due process.[25] Due process's notice component requires that any notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action."[26] To satisfy this "reasonably calculated" requirement, "the means employed [must be] such as one desirous of actually informing" the respondent "might reasonably adopt to accomplish it."[27] Due process's "meaningful opportunity to be heard" component presents a much more straightforward requirement. It requires "[s]ome sort of hearing."[28]

21 PacifiCorp had sufficient notice. Courts recognize the service of a complaint as a constitutionally permissible manner of alerting a party to an action.[29] Staff used this exact means of providing notice to PacifiCorp.[30]

22 PacifiCorp will also have a meaningful opportunity to be heard in this proceeding. The Commission will set this matter for hearing if it denies the motion to dismiss.[31] PacifiCorp has the right to representation by counsel at that hearing.[32] It may engage in discovery before the hearing.[33] At the hearing, PacifiCorp may present evidence, cross-examine witnesses, and argument in its defense.[34] If the Commission finds that

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[25] *Downey v. Pierce County*, 165 Wn. App. 152, 164, 267 P.3d 445 (2011).
[26] *State v. Nelson*, 158 Wn.2d 699, 703, 147 P.3d 553 (2006) (internal citation omitted).
[27] *Id.*
[28] *Webb v. Wash. State Univ.*, 15 Wn. App. 2d 505, 517, 475 P.3d 1051 (2020).
[29] *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L. Ed. 865 (1950) ("[p]ersonal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding"); *City of Auburn v. Brooke*, 119 Wn.2d 623, 629, 836 P.2d 212 (1992) (quoting *State v. Leach*, 113 Wn.2d 679, 782 P.2d 552 (1989) (discussing the use of a complaint as a means of satisfying due process's notice requirements).
[30] *See* RCW 34.05.010(19) (defining service to include electronic service when the agency allows for such service by rule); WAC 480-07-150(4) (authorizing electronic service).
[31] *See* RCW 34.05.434; WAC 480-07-440.
[32] RCW 34.05.428; WAC 480-07-345(1).
[33] RCW 34.05.446; WAC 480-07-400 through -410.
[34] RCW 34.05.437, .449, .452; WAC 480-07-390, -470(4), (5), (10), (11), -480, -490, -495.

PacifiCorp violated the relevant statutes, regulations, or Commission order, it must do so solely on the basis of the record before it and it must reduce its findings to writing.[35] PacifiCorp may seek administrative review or reconsideration of any Commission order,[36] and it may seek judicial review of any final Commission order if aggrieved by it.[37] Those protections ensure that PacifiCorp receives a meaningful opportunity to be heard.[38]

23 PacifiCorp nevertheless contends that it will lose a meaningful opportunity to be heard because the Commission has docketed its CEIP for consideration elsewhere and it deserves the right to exhaust its administrative remedies in that docket "prior to responding to a [c]omplaint on that yet-to-be-resolved docket."[39] It offers no explanation as to where that right comes from or why it should have it: PacifiCorp can defend itself in this docket regardless of what happens in the CEIP docket, using the same argument here that it would use there, if necessary. In any event, if the Commission accepts PacifiCorp's arguments that the CEIP and this docket are intertwined, it can simply grant Staff's motion to consolidate the two,[40] which will allow PacifiCorp to make any overlapping arguments concerning the CEIP and the complaint in one place.

24 PacifiCorp further argues that it will be unable to seek judicial review of any final order in this docket because it will not have exhausted its administrative remedies in the CEIP docket.[41] That misreads the Administrative Procedure Act (APA). A final

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[35] RCW 34.05.461; *see* WAC 480-07-800.
[36] WAC 480-07-825, -850.
[37] RCW 34.05.570.
[38] *Goldberg v. Kelley*, 397 U.S. 254, 268-71, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (discussing the hallmarks of due process, all of which the APA and the Commission's rules offer).
[39] Motion to Dismiss at 9 ¶ 29.
[40] *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket UE-220376, Staff's Motion to Consolidate Proceedings (June 27, 2022).
[41] Motion to Dismiss at 9 ¶ 29.

Commission order imposing penalties would aggrieve PacifiCorp, allowing it to petition for judicial review[42] so long as it exhausted its administrative remedies in *this* docket.[43]

2. PacifiCorp's void-for-vagueness challenge fails for multiple reasons.

25 PacifiCorp next contends that the complaint at issue is unconstitutionally vague.[44] PacifiCorp cannot succeed on this claim.

26 The void for vagueness doctrine grows out of due process, and it applies to positive law. The doctrine stands for the proposition that "no prohibition can stand or penalty attach where an individual could not reasonably understand his [or her] contemplated conduct is proscribed."[45] Put otherwise, "[*a]ny statute, including a rule or regulation of an administrative agency*, which forbids an act in terms so vague persons of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[46]

27 At the outset, the vagueness doctrine does not apply to the complaint. Again, the vagueness doctrine applies to laws or regulations that prohibit or penalize behavior, ensuring that people can understand what those laws or regulations require to avoid sanction.[47] The complaint, the text that PacifiCorp claims is vague, is not a statute enacted by the legislature to proscribe behavior. Nor is it a rule, regulation, or order adopted or entered by the Commission for similar purposes. It does not, in and of itself prohibit conduct. Instead, the complaint is a mechanism the Commission may use to

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[42] RCW 34.05.530, .570.
[43] RCW 34.05.534.
[44] Motion to Dismiss at 7-8, ¶¶ 22-25.
[45] *Stastny v. Bd. of Tr. of Cent. Wash. Univ.*, 32 Wn. App. 239, 252, 647 P.2d 496 (1982).
[46] *Id.* at 252-53 (emphasis added).
[47] *Id.* at 252-53.

enforce prohibitions found elsewhere. The purposes underlying the vagueness doctrine do not apply here, and neither does the doctrine itself.

28 Even if the Commission did apply the vagueness doctrine to the complaint, it should deny the motion to dismiss for two reasons.

29 First, PacifiCorp lacks standing to pursue its claim. PacifiCorp argues that it lacked notice as to how exactly it needed to model the SCGHG in its preferred portfolio, offering three potential readings of the complaint that it contends create ambiguity.[48] Even assuming without deciding that each of those readings is reasonable, creating ambiguity, each requires PacifiCorp to incorporate the SCGHG in evaluating and selecting medium and long-term resource acquisitions in its preferred portfolio. Staff alleges that PacifiCorp did not do so outside of the context of its energy efficiency selections, and the Commission must accept that allegation as true for purposes of PacifiCorp's motion to dismiss.[49] Given that it failed to model the SCGHG in the preferred portfolio save in the one context, PacifiCorp lacks the standing necessary to bring a vagueness claim here.[50]

30 Second, PacifiCorp conflates the concepts of ambiguity and vagueness; claiming that the complaint is unconstitutionally vague because of what it perceives as

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[48] Complaint at 7-8 ¶¶ 22-23.
[49] *Kinney*, 159 Wn.2d at 842.
[50] *See City of Kennewick v. Henricks*, 84 Wn. App. 323, 326, 927 P.2d 1143 (1996) (""RCW 46.37.530(1)(c) unambiguously requires motorcycle riders to wear 'protective helmets.' Although Mr. Hendricks and Mr. Driven argue that the statute only vaguely identifies what types of helmets satisfy the requirement, they cannot dispute that the statute clearly requires helmets of *some* type. This requirement is the 'hard core' of the statute. Therefore, because they were wearing no helmets at the time of the citations, Mr. Henricks and Mr. Driven lack standing to claim vagueness as to the rules relating to acceptable types of helmets.").

ambiguity.[51] But ambiguity is not synonymous with unconstitutional vagueness,[52] and "[a] statute is not necessarily void for vagueness simply because it may be ambiguous or open to two constructions."[53] A "vagueness challenge, then, needs more than ambiguity."[54] That "more than ambiguity" is an allegation that a person cannot comport himself or herself with the law, or that the law allows arbitrary enforcement.[55] PacifiCorp alleges only ambiguity, and cannot have carried its burden of showing that the Commission should dismiss the complaint for vagueness without arguing, let alone showing, something more.

C. PacifiCorp's Standing And Ripeness Arguments Lack Merit

31 PacifiCorp next seeks dismissal of the complaint because, it claims, Staff failed to show standing through the pleading of an injury[56] and because Staff's complaint is not ripe.[57] The first claim ignores the nature of the complaining entity. The second ignores the actual violations alleged in the complaint. The Commission should, accordingly, reject both claims.

1. The Commission, through its Staff, has standing to pursue its claims against PacifiCorp.

32 PacifiCorp contends that the complaint fails to allege a concrete injury, and that Staff thus has no standing to seek relief. But the Commission and its Staff are

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[51] Motion to Dismiss at 7-8.

[52] *State v. Evans*, 177 Wn.2d 186, 206, 298 P.3d 724 (2013) ("The doctrine of unconstitutional vagueness is concerned with inherently hazy or variable (as opposed to merely ambiguous) terms . . . The mere fact that there are two reasonable interpretations of the statute's plain language . . . does not render the statute void for vagueness.").

[53] *Mumad v. Garland*, 11 F.4th 834, 838 (8th Cir. 2021).

[54] *Id.*

[55] *State v. Maciolek*, 101 Wn.2d 259, 264, 676 P.2d 996 (1984). Those factors do not apply to complaints, proving the point made above.

[56] Motion to Dismiss at 11-12 ¶¶ 35-37.

[57] Motion to Dismiss at 12-13 ¶¶ 38-42.

governmental entities, not private litigants. That gives them well-established standing to pursue violations of state statutes, regulations, or the Commission's orders.

33 The doctrine of standing "prohibits a litigant from raising another's legal rights."[58] As PacifiCorp notes, a litigant must generally show "a personal injury fairly traceable to the challenged conduct [of another] and likely to be redressed by the requested relief" in order to prove his or her standing.[59]

34 That general rule about the need to show a concrete and particularized injury to obtain standing does not apply where the litigant is the sovereign. As the Supreme Court once put it:

> Every government, e[n]trusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is not sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.[60]

Stated otherwise, the state has sovereign interests that it has standing to vindicate.[61] One of these sovereign interests is in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction – this involves the power to create and enforce a legal code, both civil and criminal."[62]

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[58] *Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution*, 185 Wn.2d 97, 103, 369 P.3d 140 (2016) (internal quotation omitted).
[59] *State v. Johnson*, 179 Wn.2d 534, 552, 315 P.3d 1090 (2014) (internal quotation omitted).
[60] *In re Debs*, 158 U.S. 564, 584,15 S.Ct. 900, 39 L. Ed. 1092 (1895), *disapproved of on other grounds by Bloom v. Illinois*, 391 U.S. 194 (1968); *id.* at 586.
[61] *See Vt. Agency of Nat. Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 771, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) ("[i]t is beyond doubt that the complaint asserts an injury to the United States – both the injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) and the proprietary injury resulting from the alleged fraud.").
[62] *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982).

35 What is true of a sovereign is also true of any arm of the sovereign, including agencies like the Commission.[63] As the courts have recognized in discussing the standing of federal agencies, "[w]hen the federal government or one of its agencies brings suit, its standing is usually based on its power, defined by Congress, to redress violations of the law of the United States. This may be in tension with the courts' current understanding of Article III standing, but it is nonetheless axiomatic."[64]

36 Here, the Commission complained against PacifiCorp, alleging, through its Staff, that PacifiCorp violated various statutory provisions that the Commission administers, one of the Commission's rules, and a Commission order. The complaint, in other words, alleges an injury to Washington's sovereign interest in compliance with its laws. The Commission has legislatively granted standing to maintain an action to vindicate those interests. Staff exercises that standing for purposes of this complaint.[65] PacifiCorp's standing claim fails.

37 And, indeed, it must be this way: accepting PacifiCorp's standing theory would cripple the Commission's ability to regulate in the public interest. The Commission, for example, routinely institutes actions to revoke a household goods carrier's permit for violations of the Commission's safety rules.[66] The Commission would not have standing to do so under PacifiCorp's theory, at least until the carrier has caused an incident, with the attendant injuries to the public or to property. The same issue presents itself in other industries the Commission regulates. For example, the legislature tasked the Commission

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[63] BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "arm of the state").
[64] *Sierra Club v. Two Elk Generation Partners, Ltd. Partnership*, 646 F.3d 1258 n.8 (10th Cir. 2011).
[65] *Cf.* RCW 34.05.458 (codifying the separation of functions doctrine).
[66] *E.g.*, *In re Investigation of Superheroes Moving & Storage LLC*, Docket TV-200321, Order 01 (May 10, 2022).

with ensuring that electric, gas, and water companies maintain safe facilities,[67] and the Commission has similar duties with regard to gas and hazardous liquid pipeline carriers.[68] If the Commission accepts PacifiCorp's theory, it could not maintain an action to discharge that duty unless and until the company's property cause injury or damage. That cannot be the law.

2. The complaint presents the Commission with a dispute ripe for adjudication.

38 PacifiCorp next contends that the Commission should dismiss the complaint on ripeness grounds. The Commission should reject that argument as Staff has alleged violations that are ripe for adjudication.

39 In the context of justiciability,[69] ripeness requires "an actual, present, and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement."[70]

40 Here, the complaint alleges that actions PacifiCorp has already taken violate state law, in the form of a statute, a rule, and a Commission order. The complaint thus presents the Commission with an "actual, present, and existing dispute."[71] The dispute here is ripe for adjudication because the existence of a violation is not contingent on future action by PacifiCorp.

41 PacifiCorp appears to make two ripeness arguments. Both lack merit.

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[67] RCW 80.28.010(2).
[68] RCW 81.88.060.
[69] In the land-use context, courts use the term "ripeness" to mean the requirement that a litigant exhaust his or her administrative remedies. *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 762, 265 P.3d 207 (2011).
[70] *City of Longview v. Wallin*, 174 Wn. App. 763, 777-79, 301 P.3d 45 (2013) (discussing ripeness as the first element of Washington's justiciability test).
[71] *Id.*

42 First, PacifiCorp contends that its "CEIP is in the initial stages of agency process"[72] and that Order 01 "was an interim decision," suggesting that the violation allegedly arising from that order does not involve "an issue that is ripe for Commission review." While Order 01 was probably an interim decision,[73] PacifiCorp did not seek review or a stay of it, meaning that the company was bound to comply with it. The complaint alleges that PacifiCorp failed to do so, and that the Commission should impose penalties for violation of the order. It thus presents the Commission with an "actual, present, and existing," dispute rather than a potential one,[74] meaning a dispute ripe for adjudication.

43 Second, PacifiCorp contends that its compliance with CETA will involve actions stretching over the next several decades.[75] To PacifiCorp, this means that "the Commission can determine if PacifiCorp complied with CETA when PacifiCorp requests that the Commission approve – if ever – rate recovery of specific CETA resources."[76] This argument invites the Commission to dismiss the complaint based on a straw person. Staff does not allege a generalized failure to comply with CETA that might only be justiciable after PacifiCorp acts in future years. Staff alleges that PacifiCorp has instead already violated several specific statutory provisions, a specific rule, and a specific Commission order.[77] Again, those allegations involve completed violations of the law,

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[72] Motion to Dismiss at 12 ¶ 38.
[73] The Commission entered Order 01 in a docket not yet set as an adjudication, and the Commission could therefore theoretically treat the order as a final order on the merits of the petition for an exemption rather than an interim order in an adjudicatory proceeding for PacifiCorp's CEIP.
[74] *Wallin*, 174 Wn. App. at 777.
[75] Motion to Dismiss at 12-13 ¶¶ 39-42.
[76] Motion to Dismiss at 13 ¶ 42.
[77] Complaint at 6-7 ¶¶ 21-24.

meaning that Staff's complaint presents the Commission with an actual, existing, mature dispute. Again, the allegations in the complaint are ripe for adjudication.

D. PacifiCorp's Preemption And Extraterritoriality Claims Are Speculative And Thus Inappropriate For A Motion To Dismiss

44 Finally, PacifiCorp contends that, under some factual circumstances, (1) the Federal Power Act preempts the laws, regulations, and order the complaint alleges that it violated; and (2) the Commerce and Supremacy Clauses of the United States Constitution preempt the laws, regulations, and order the complaint alleges that it violated. PacifiCorp cannot succeed on those claims for two reasons.

45 First, the text of PacifiCorp's own motion prevents the Commission from granting it. As stated above, the Commission can only grant a motion to dismiss if it cannot, under any circumstances, grant the relief sought in the complaint. But PacifiCorp acknowledges that the Commission may read the complaint as not seeking relief preempted by the Federal Power Act or the U.S. Constitution.[78] That admission makes it impossible for the Commission to order a dismissal.[79]

46 Somewhat relatedly, PacifiCorp argues that, under one interpretation of the complaint under which the Commission could permissibly grant relief, it has properly modeled the social cost of carbon.[80] The complaint alleges that it has not. PacifiCorp's naked assertion of fact is irrelevant for purposes of its motion to dismiss, and the Commission cannot dismiss the complaint based on that asserted fact.[81]

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[78] Motion to Dismiss at 17-18 ¶ 54.
[79] *Kinney*, 159 Wn.2d at 842.
[80] Motion to Dismiss at 18 ¶ 55.
[81] *Kinney*, 159 Wn.2d at 842.

VI. ARGUMENT CONCERNING THE MOTION TO STAY

47 PacifiCorp, alternatively, asks the Commission to stay the accrual of penalties. No such stay procedure exists. Instead, what PacifiCorp seeks is effectively the right to amend the complaint against it to its advantage. The Commission should decline to authorize that kind of mischief. Regardless, even under the standards for a stay cited by PacifiCorp, it has no entitlement to a stay.

A. The Commission Should Deny PacifiCorp's Request To Stay Penalties Because PacifiCorp Does Not Ask For A Stay At All

48 As relevant here, a stay is "an order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding."[82] In line with that definition, the standard that PacifiCorp asks the Commission to apply to its motion is RAP 8.1(b)'s standard for the stay of enforcement of a trial court's decision, that is, a stay in judgment.[83] The APA and the Commission's rules embrace a similar usage of the term "stay," as both speak of the suspension of a final order.[84] However, PacifiCorp does not seek to "stay" a proceeding or a judgment. Instead, it seeks two other, interrelated things.

49 First, PacifiCorp seeks, effectively, to amend the complaint against it to reduce the potential maximum penalty. But, "[i]n general," complaining parties are "the master[s] of" their complaints, and free to draft those complaints in a manner satisfactory to them.[85] The Commission should not set the precedent that this general rule no longer applies in Commission proceedings. Staff does not imagine that PacifiCorp would

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[82] BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "stay").
[83] *See* RAP 8.1(b).
[84] RCW 34.05.467 (allowing the agency itself to stay a final order), WAC 480-07-860 (allowing the Commission to stay a final order); *see* RCW 34.05.550 (allowing the court to stay agency action upon a petition for judicial review); *Wells Fargo N.A. v. Dep't of Rev.*, 166 Wn. App. 342, 355-56, 271 P.3d 268 (2012) (collecting cases and explaining why only final agency actions are subject to judicial review).
[85] *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91, 126 S.Ct. 606, 163 L.Ed.2d 415 (2005) (quoting 16 J. Moore et al., MOORE'S FEDERAL PRACTICE § 107.14[2][c], p. 107-67 (3d ed. 2005)).

appreciate Public Counsel's amendment of its next general rate case filings to massively reduce any requested revenue requirement increase, and Staff would find no amusement in a household goods carrier that is operating unsafely "amending" a complaint to "stay" the accrual of penalties to eliminate them. But neither of those differs much from what PacifiCorp asks the Commission to allow it to do here. The Commission should reject that request.

50 Second, PacifiCorp seeks to preemptively argue about the appropriate penalty. Indeed, PacifiCorp's motion mostly concerns itself with advocating for little, if any, penalty on the company for any violations the Commission finds it committed. For example, PacifiCorp contends that the penalty factors set out in the Commission's enforcement policy indicate that penalties are unwarranted.[86] The Company notes that it believes the Commission effectively does not penalize jurisdictional electric or gas companies.[87] It argues that the Commission practices "measured restraint when determining whether to assess penalties."[88] And it states that "the Commission should consider a judicious calculation of potential penalties. This includes principles of suitability and proportionality."[89] Those are arguments in favor of a "stay" in the accrual of penalties only because they are arguments against imposing much of a penalty at all; when viewed in that light the purpose of PacifiCorp's motion becomes clear. The Commission should not allow PacifiCorp to make untimely and cloaked arguments about the appropriate penalty; it should instead require the company to make those arguments openly and at the appropriate time. For that reason, it should deny the motion.

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[86] Motion to Stay Penalties at 4-5 ¶ 13, 5-6 ¶ 14.
[87] Motion to Stay Penalties at 5-6 ¶ 14.
[88] Motion to Stay Penalties at 6 ¶ 15.
[89] Motion to Stay Penalties at 7 ¶ 19.

B. The Commission Should Deny The Stay If It Applies PacifiCorp's Proposed Test

51 Even if the Commission considers PacifiCorp's motion on the merits, it should still deny it. If the Commission assumes without deciding that the test PacifiCorp cites applies,[90] it would look to (1) whether PacifiCorp "has demonstrated that there are debatable issues that would be presented on appeal," and (2) whether PacifiCorp would suffer a greater injury without the stay than the Commission, through its Staff, "would suffer with the stay."[91] Those factors, on balance, weigh against PacifiCorp.

1. PacifiCorp does not show debatable issues.

52 PacifiCorp contends that its motion to dismiss shows that it presents debatable issues. As explained above in Section V, the arguments PacifiCorp musters in support of that motion are meritless. Those arguments cannot justify the stay that PacifiCorp requests.

53 PacifiCorp also contends that its answer creates "disputed issues of fact." It does not. Staff based the allegations in its complaint on statements made in a verified pleading made by PacifiCorp,[92] and statements made in PacifiCorp's CEIP.[93] In the related context of summary judgment, Washington's courts recognize that a party cannot create a disputed issue of fact by repudiating prior sworn testimony.[94] The Commission should

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[90] And that test does not apply because it is the standard for whether to stay a trial court's judgment pending appeal. The Commission is not a trial court, nor has it rendered a judgment. And this matter is currently before the Commission as a complaint proceeding, not before Washington's appellate courts on appeal. Having said that, the Commission may as well apply PacifiCorp's test in this instance because Staff finds no more directly applicable one, something that allows an inference that what PacifiCorp seeks is not a stay, as argued above.
[91] Motion for Stay of Penalties at 1 ¶ 2.
[92] WAC 480-07-395(2).
[93] *E.g.*, Complaint at 2-3 ¶ 7, 3 ¶ 8, 4 ¶ 13, 5 ¶ 14, 6 ¶¶ 21-22, 7 ¶¶ 23-24.
[94] *Marshall v. AC & S Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989).

apply a similar logic here and reject PacifiCorp's attempts to walk back previous statements to create factual disputes.

2. PacifiCorp does not show that it would suffer greater harm without the stay than the Commission, through its Staff, would suffer with the stay.

54 The Commission must next consider whether PacifiCorp would suffer a greater injury without the stay than the Commission, through its Staff, would suffer with it. It will not.

55 At issue here are penalties. In a purely monetary sense, the injuries PacifiCorp or Staff would suffer with or without the stay are zero sum. If PacifiCorp receives the stay, Staff loses the potential to request that a certain amount of penalties be imposed on PacifiCorp at the end of this proceeding. If PacifiCorp does not receive the stay, Staff retains the ability to request that an identical amount of penalties be imposed at the end of the proceeding. In monetary terms, the two sides of the ledger net out to zero. PacifiCorp cannot show that it will suffer a greater injury if the injuries are equal in magnitude.

56 But, of course, there are non-monetary considerations. If PacifiCorp loses its motion for stay, it may still argue at hearing that the Commission should not penalize it on a continuing basis for any day after Staff filed the complaint, using the same arguments that it made in its motion. Staff, on the other hand, would lose any opportunity to seek the imposition of penalties for those days. Staff suffers a greater harm from a stay than PacifiCorp suffers from the lack of one.

3. On balance, the factors do not favor PacifiCorp.

57 PacifiCorp does not satisfy the criteria for a stay that it offers. It does not show material issues of fact or law, and it cannot show that its injury without the stay exceeds

the injury that the stay would cause those tasked with protecting the public interest. The Commission should deny the stay.

58 Further, as PacifiCorp notes, the purpose of a stay is to preserve the status quo while other judicial or quasi-judicial processes play out, considering the equities of a given situation.[95] Here, even if the Commission denies PacifiCorp the stay, the status quo will remain unchanged. The complaint imposes no penalties on PacifiCorp, and the Commission may ultimately never impose penalties, depending on how it disposes of Staff's complaint. PacifiCorp will thus retain the opportunity to argue that the Commission should not impose any continuing penalties for calendar days falling after Staff filed its complaint, and the equities thus do not require a stay.

VII. CONCLUSION

59 For the reasons discussed, the Commission should deny PacifiCorp's motion to dismiss and its motion to stay penalties.

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Respectfully submitted,

ROBERT W. FERGUSON
Attorney General

/s/ *Jeff Roberson*, WSBA No. 45550
Assistant Attorney General
Office of the Attorney General
Utilities and Transportation Division
P.O. Box 40128
Olympia, WA 98504-0128
(360) 664-1188
jeff.roberson@utc.wa.gov

[95] *Purser v. Rahm*, 104 Wn.2d 159, 178, 702 P.2d 1196 (1985).