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 PACIFICORP MOTION TO DISMISS; AND RESPONSE TO MOTION TO STAY PENALTIES**

I. INTRODUCTION

1 In accordance with WAC 480-07-380, the Public Counsel Unit of the Washington State Attorney General's Office (Public Counsel) hereby responds to the Motion to Dismiss and to the Motion to Stay Penalties (together, Motions), which PacifiCorp, d/b/a Pacific Power & Light Company (PacifiCorp or the Company) filed on June 27, 2022, in Docket UE-220376.[1] Public Counsel requests that the Washington Utilities and Transportation Commission (Commission or WUTC) deny PacifiCorp's Motion to Dismiss because it fails to demonstrate sufficiently that the Commission Staff has not stated a claim upon which relief can be granted.[2] Factual and legal issues remain unresolved in the Complaint proceeding regarding whether PacifiCorp appropriately considered the Social Cost of Greenhouse Gas emissions (SCGHG) in its Clean

[1] PacifiCorp Motion to Dismiss, *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Dockets UE-220376 (filed June 27, 2022) (henceforth referred to as "Motion to Dismiss"); PacifiCorp Motion to Stay Penalties, *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Dockets UE-220376 (filed June 27, 2022) (henceforth referred to as "Motion to Stay").
[2] *See* WAC 480-07-380(1)(a).

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Energy Implementation Plan (CEIP).[3] Furthermore, PacifiCorp has failed to demonstrate sufficient injury to warrant a stay of penalties. Accordingly, pursuant to WAC 480-07-380(1), Public Counsel opposes both of PacifiCorp's Motions as devoid of merit and requests that the Commission deny the Motions.

II. BACKGROUND

2 On June 6, 2022, the Commission issued a Complaint and Notice of Prehearing Conference in Docket UE-220376 (Complaint).[4] The Complaint alleges that PacifiCorp violated Commission Order 01 in Docket UE-210829, RCW 19.280.030(3)(a)(ii), RCW19.280.030(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. On June 27, 2022, PacifiCorp filed its Answer, Motion to Dismiss, and Motion to Stay Penalties in Docket UE-220376.

3 Public Counsel herein files its response to PacifiCorp's Motion to Dismiss and Motion to Stay Penalties in the above captioned proceeding. Public Counsel opposes the Motions because issues of fact and law remain in dispute with regard to whether PacifiCorp's inclusion of SCGHG in its CEIP complies with the Clean Energy Transformation Act (CETA) statutes, Commission rules implementing CETA, and Order 01 in Docket UE-210829. PacifiCorp also

[3] *See* Motion to Stay ¶¶ 6, 8–11; PacifiCorp Clean Energy Implementation Plan (filed Dec. 30, 3031).
[4] Complaint and Notice of Prehearing Conference, *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Dockets UE-220376 (filed June 6, 2022) (henceforth referred to as "Complaint").

has failed to demonstrate sufficient injury to warrant a stay of penalties. Accordingly, the Commission should deny both Motions.

III. ARGUMENT

4 As PacifiCorp itself states in its Motion to Stay, Staff's Complaint raises "several materially disputed issues of law and fact"[5] that remain unresolved in this proceeding, and thus require adjudication. PacifiCorp also fails to demonstrate in its Motion to Dismiss that the Staff has not stated a claim upon which relief can be granted for the following three reasons. First, the Complaint does not violate PacifiCorp's due process rights, because it had ample notice of the issues raised in the Complaint for months ahead of the Complaint filing date. Further, PacifiCorp was on notice of the applicable statutes and Commission enforcement regulations authorizing the enforcement action in the Complaint. Second, PacifiCorp fails to establish that the alleged harm was not sufficient to state a claim. Lastly, PacifiCorp fails to show that the Commission is acting outside of its authority in the Complaint by imposing requirements on state jurisdictions outside of Washington. PacifiCorp also fails to demonstrate sufficient injury to support a stay of the penalties in the Complaint. PacifiCorp fails to demonstrate that it would suffer irreparable harm resulting from the penalties, and the public interest warrants imposition of the penalties to ensure compliance with CETA.

[5] Motion to Stay ¶ 6.

A. Staff's Complaint Does Not Violate PacifiCorp's Due Process Rights Because Staff Filed the Complaint with Sufficient Notice to PacifiCorp and Is Consistent with Washington Statutes and Commission Regulations.

5 PacifiCorp claims that it was deprived reasonable notice of the issues in the Complaint regarding inclusion of SCGHG in the CEIP, that PacifiCorp lacked a "meaningful opportunity to be heard," and that the Staff should have raised these issues in the separate CEIP, Docket UE-210829.[6] However, PacifiCorp itself raised the issue of whether it must include SCGHG in resource acquisition decisions in connection with its CEIP filing in its Petition for Exemption from WAC 480-100-605.[7] The Commission may look to PacifiCorp's own filing in that Petition to find that PacifiCorp was well aware of the issue almost two months ahead of the final CEIP filing date of December 30, 2022, and several months ahead of the June 6, 2022, Complaint.

6 Furthermore, PacifiCorp need only look to the effective CETA statutes and Commission rules, with which PacifiCorp is familiar, to understand the Commission's enforcement authority with regard to this issue.[8] As Staff sets forth in the Complaint, the Commission has authority under WAC 480-100-665(1) to "take enforcement action in response to a utility's failure to comply with the provisions of chapter 19.405 RCW, this chapter of the commission's rules, or a commission order implementing those requirements."[9] WAC 480-100-665(3) establishes the Commission's authority to impose penalties for those violations, clarifying that the "commission

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[6] Motion to Dismiss ¶ 20.
[7] *See* Motion to Dismiss ¶¶ 6–8; PacifiCorp's Petition for Exemption of WAC 480-100-605, *In re: PacifiCorp Seeking Exemptions from the Provisions of WAC 480-100-605*, Docket UE-210829 (filed Nov. 1, 2021) (henceforth referred to as "Petition for Exemption").
[8] *See* RCW Chapters 19.405, 19.280, 80.28; *In re Adopting Rules Relating to Clean Energy Implementation Plans and Compliance with the Clean Energy Transformation Act*, Dockets UE-191023 & UE-190698 (*consolidated*), General Order R-601) (Dec. 28, 2020); *see also* WAC 480-100-665(1).
[9] WAC 480-100-665(1).

may impose any one or a combination of the following remedies."[10] PacifiCorp references a list of statutes and regulations, and yet it fails to point to a requirement stated in statute, rule, or otherwise, that the Commission must resolve or exhaust enforcement issues in the UE-210829 policy docket before taking action under WAC 480-100-665.[11]

7 As a WUTC-regulated investor-owned utility providing service in Washington, PacifiCorp has previously participated in numerous proceedings before the WUTC including general rate cases, rulemakings, and policy dockets, and has demonstrated a sophisticated understanding of Commission process and jurisdiction therein. It is surprising, then, that PacifiCorp appears in this Docket not to understand the Commission's plainly-stated regulatory authority to take the enforcement action in the Complaint.

8 PacifiCorp also claims that after the Commission clarified the requirement to incorporate SCGHGs in PacifiCorp's CEIP preferred portfolio in Order 01, Docket UE-210829, PacifiCorp "diligently incorporated the SCGHG in its CEIP" which "resulted in 212,431 MWh of increased energy efficiency targets to comply with CETA's SCGHG requirement."[12] PacifiCorp argues that the Complaint is unclear on what else PacifiCorp might possibly do to comply with the SCGHG inclusion requirement.[13]

9 PacifiCorp contradicts itself on this point in its own December 30, 2021, CEIP filing. PacifiCorp provided a "CEIP Portfolio run with SCGHG cost assumptions" that included "the

[10] *See* WAC 480-100-665(3)(a)-(d).
[11] *See* Motion to Dismiss ¶¶ 27–29.
[12] Motion to Dismiss ¶ 24 (citing PacifiCorp Clean Energy Implementation Plan at 7-23).
[13] Motion to Dismiss ¶ 22.

SCGHG dispatch adder as an operations cost driver."[14] However, PacifiCorp states that it included this analysis only because it "may be valuable for some stake holders." PacifiCorp instead used its 2021 Integrated Resource Plan (IRP) portfolio as the basis for its incremental cost calculation for purposes of RCW 19.405.060(5) and WAC 480-100-660.[15] PacifiCorp also stated in the CEIP that the 2021 IRP "serves as the basis for this CEIP and plans for the bulk of renewable and non-emitting resource acquisitions that will be necessary to comply with CETA directives."[16] PacifiCorp's own statements in the CEIP and in its Petition for Exemption show that it knew it was required to include SCGHG in its CEIP and yet failed to do so.

10 It is thus absurd to suggest that PacifiCorp was unaware of Commission rules and the CETA statute, such that it had insufficient notice of the SCGHG issue in the Complaint. By failing to include SCGHG in its CEIP preferred portfolio, PacifiCorp blatantly disregarded Commission Order 01, Commission rules in WAC 480-100-640(7) and 480-100-660(4), and the directive of the Washington legislature in RCW 19.280.030(3)(a)(ii) regarding incorporation of SCGHG in CEIPs. PacifiCorp's suggestion that it had insufficient notice regarding the requirement to incorporate SCGHG in its CEIP is simply baseless and the Commission should disregard it.

B. Staff's Complaint Does Not Fail to Allege Sufficient Harm or Injury.

11 PacifiCorp alleges there is no actual, concrete, or tangible harm demonstrated in Staff's complaint. However, Staff states sufficient injury in the Complaint by referencing PacifiCorp's

[14] PacifiCorp Clean Energy Implementation Plan at 94.
[15] PacifiCorp Clean Energy Implementation Plan at 95.
[16] PacifiCorp Clean Energy Implementation Plan at 4.

violations of statute, rule, and Commission Order through PacifiCorp's failure to incorporate SCGHG in its CEIP. PacifiCorp's CEIP is required to lay out PacifiCorp's plans to comply with the ambitious requirements of CETA.[17] The Complaint details how PacifiCorp failed to incorporate SCGHG in its CEIP, and thereby flagrantly disobeyed the Commission ruling in Order 01.

12 PacifiCorp argues that there is "no actual harm" in its "alleged modelling error" that blatantly violates statute, Commission rule, and Commission order requiring the inclusion of SCGHG in CEIPs.[18] Staff on the other hand points to the Commission's clarifications in General Order R-601 in Dockets UE-191023 and UE-190698, which adopted Commission rules to implement the Clean Energy Transformation Act in RCW Chapters 19.405, 19.280, and 80.28.[19] The Commission explains that RCW.280.030(a)(ii) confirms the requirement to include SCGHG in "actual investing decisions" and not "merely . . . planning requirements."[20]

13 Notwithstanding its violation of Commission Order, rule, and statute, PacifiCorp alleges that there must be some other tangible concrete harm other than violating CETA requirements before the Staff may exercise its enforcement authority under WAC 480-100-665(1) and (3). If the Commission were to agree with PacifiCorp on this point, utility companies would be free to violate the CETA statutes and Commission rules and orders that address planning requirements that by PacifiCorp's assessment are not "tangible." Such an outcome would contradict the Commission's clear authority to implement the planning requirements stated in RCW 19.405 and

[17] *See id.*
[18] Motion to Dismiss ¶ 18.
[19] Complaint ¶ 5.
[20] *Id.*

reduce to almost nothing the Commission's ability to implement CETA directives in any effective or meaningful fashion.

C. The Commission is Not Imposing its Requirements on Other State Jurisdictions in the Complaint.

14 PacifiCorp's final argument in support of its Motion to Dismiss is that the Staff's Complaint against PacifiCorp's for its failure to include the SCGHG in its CEIP imposes requirements on resources allocated to serve PacifiCorp customers outside Washington, where the WUTC lacks regulatory authority. PacifiCorp states, "the Complaint appears to request PacifiCorp to include the SCGHG in the 2021 IRP preferred portfolio, even for resources that are not allocated to, nor serve, Washington customers."[21]

15 If this were the case, PacifiCorp would not be able to calculate incremental cost with SCGHG cost assumptions. However, PacifiCorp has done exactly this sort of calculation for the SCGHG in its discussion of incremental cost in Chapter 4 of its CEIP.[22] The Washington requirements for electric utilities to include the SCGHG in its CEIP nowhere state that utilities must also do so for resources allocations for use in other states.

16 PacifiCorp even acknowledges in its Motion to Dismiss that this argument regarding state jurisdiction is conditional — "*If* Staff's Complaint seeks to require PacifiCorp to incorporate the SCGHG in PacifiCorp's 2021 preferred portfolio for resources that are not allocated to serve Washington . . . *If* this is Staff's aim, the Commission should dismiss the Complaint."[23]

[21] Motion to Dismiss ¶ 19.
[22] PacifiCorp Clean Energy Implementation Plan at 94.
[23] Motion to Dismiss ¶¶ 43, 54 (emphasis added).

17 PacifiCorp finally admits that:

> [o]f course, the Commission can require PacifiCorp to model and analyze the SCGHG in various IRP scenarios. But that is a separate question than requiring PacifiCorp to incorporate an adder for out-of-state resources. To avoid further confusion, the Commission should clarify that RCW 19.280.030(3)(a) requires utilities to incorporate the SCGHG in IRPs, CEAPs, and CEIPs, but only for Washington-allocated resources and utility planning decisions.[24]

PacifiCorp states that the Commision's rulemaking on the issue of SCGHG inclusion did not address this specific issue. Yet, PacifiCorp discusses at length how the Commission's jurisdiction applies only to Washington-allocated resources. It would seem obvious, then, that the Commission's regulations do not apply beyond its authority to regulate rates for Washington customers.

18 Accordingly, the Commission should disregard PacifiCorp's hypothetical argument to dismiss the Complaint "if" the Complaint is imposing requirements on other state jurisdictions, because the Complaint is not attempting to do so. The Staff's Complaint is punishing PacifiCorp for violating Washington statutes, WUTC rules, and WUTC Order, which all require PacifiCorp to include SCGHG for Washington allocations.

D. PacifiCorp fails to demonstrate sufficient injury for a stay of penalties.

19 PacifiCorp fails to demonstrate that it would suffer irreparable harm resulting from the penalties, and the public interest warrants imposition of the penalties to ensure compliance with CETA. Given PacifiCorp's blatant disregard for statute, Commission rules, and Commission order on the issue of inclusion of SCGHG in the CEIP, the penalties assessed in the Staff's

[24] Motion to Dismiss ¶ 54.

Complaint are warranted to deter PacifiCorp and other regulated utilities from repeating the same indifference toward the CETA statute and Commission rules and orders. Such penalties are within the Commission's authority to assess given the facts at issue in this Docket. It is also in the public interest for the Commission to exercise its enforcement authority where regulated utilities are in blatant or flagrant violation of statute, rule and order, as is the case for PacifiCorp in the instant Docket.

20 PacifiCorp had several months' worth of notice to have avoided the violation of failing to include SCGHG appropriately in its CEIP. PacifiCorp also had the advantage of having a specific adjudication on the issue when it requested an exemption from the Commission rules on this very issue of inclusion of the SCGHG. The penalties in the Complaint are indeed punitive, and with good reason to avoid similar instances of disrespect for Commission directives in orders and rules in the future.

21 PacifiCorp also fails to show how it would suffer irreparable harm from the $12.25 million in potential penalties in comparison to its annual operating revenue of approximately $1.3 billion and net income of $130 million from Washington customers alone, as provided in its SEC Form 10-Q for PacifiCorp and Subsidiaries.[25] The public interest also warrants enforcement action here, where a major electric utility providing service in Washington, such as PacifiCorp, attempts to sidestep CETA requirements in statute, rule, and Commission order. The Commission should deny PacifiCorp's Motion to Stay Penalties for these reasons.

[25] *See* Motion to Stay ¶¶ 6, 14–17; SEC Form 10-Q at 49 (*available at* Berkshire Hathaway Energy, Investors, Regulatory Filings, https://www.brkenergy.com/assets/upload/financial-filing/PAC%203.31.22%20Form%2010-Q_Final.pdf).

IV. CONCLUSION

22 Public Counsel respectfully requests that the Commission enter an order denying PacifiCorp's Motion to Dismiss and denying PacifiCorp's Motion for Stay.

Dated this 12th day of July, 2022.

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