BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PACIFICORP, d/b/a PACIFIC POWER & LIGHT COMPANY, Respondent.	Docket UE-220376 PACIFICORP COMBINED REPLY

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1 PacifiCorp d/b/a Pacific Power & Light Company (PacifiCorp or the Company) respectfully requests the Washington Utilities and Transportation Commission (Commission) exercise its broad discretion and dismiss Staff's Complaint without prejudice. At minimum, the Commission must partially dismiss any aspect of the Complaint that seeks to extend the Commission's jurisdiction to out-of-state resources. If the Commission denies PacifiCorp's motion to dismiss, it should nonetheless stay daily penalties pending resolution of the Complaint on the merits.

I. Introduction

2 PacifiCorp has diligently worked with the Commission over the past three years to implement Washington's Clean Energy Transformation Act (CETA). This has included bi-weekly discussions with Commission Staff regarding the Company's Clean Energy Implementation Plan (CEIP) and integrated resource plan (IRP) strategy and decision-making processes. Staff did not raise its concerns with the Company during any of these meetings over these past six months, and instead summarily concluded that the Company's CEIP warranted prosecution and administrative penalties. This is disappointing and entirely avoidable. No one—especially PacifiCorp's customers—benefits from a complaint proceeding.

3 PacifiCorp is neither flouting the law nor ignoring the Commission. PacifiCorp in good faith incorporated the social cost of greenhouse gases (SCGHG) in its CEIP. These efforts resulted in a material increase to the Company's Washington-specific energy efficiency targets compared to the Company's 2019 IRP.

4 This significant energy efficiency target is in addition to the Company's removal of coal resources from Washington by 2023, and procuring almost 4 gigawatts of new

wind, solar, and storage resources in the next five years—a nameplate capacity greater than the combined summer peak load of the entirety of Puget Sound Energy and Avista's Washington operations. PacifiCorp's CEIP will result in a 26 percent decline in emissions by 2026, and the Company's targets "are well-aligned with Washington's ambitious, but achievable goal of 100 percent clean energy by 2045."[1]

5 PacifiCorp's 2021 IRP and CEIP are watershed documents that will firmly cement PacifiCorp as a national and global leader in renewable and non-emitting resources. Yet Staff disagrees with PacifiCorp's SCGHG modeling. This is despite Staff retaining the ability to address the exact same issue in PacifiCorp's CEIP docket where Staff has already raised the issue, and where PacifiCorp remains committed to proactively addressing stakeholder concerns.

6 This proceeding is not normal, nor is it a well-reasoned approach to the first look at PacifiCorp's CEIP. The Commission has always valued non-adversarial and collaborative efforts, and has consistently chosen to exhaust informal and administrative processes before turning to adjudication. Yet Staff ignores this traditional approach and explicit Commission direction where the Commission has stated that CETA penalties are not "adversarial."[2] A Complaint is not the proper venue to resolve whether PacifiCorp correctly incorporated the SCGHG in its CEIP. The CEIP docket is where all stakeholders can evaluate how PacifiCorp incorporated the SCGHG and whether the

[1] CEIP at 8.
[2] *In re CETA Rulemaking*, Dkts. UE-191023 & UE-190698 (Consolidated), General Order R-601, at 16 (Dec. 28, 2020) ("In adopting these rules, the Commission retains its discretion to determine, on a case-by-case basis, if it should issue a penalty for violating a Commission order based on the specific circumstances. Commissioner Balasbas opposes adopting proposed WAC 480-100-665 because, in his view, 'Although many of the enforcement tools listed in the rule are restatements of existing Commission authority, by including explicit provisions in this package of rules, right out of the gate the Commission is taking an aggressive and unnecessary adversarial stance on utility compliance with CETA.' Dissent P 19. We disagree that this provision is adversarial.").

CEIP faithfully adheres to CETA. Staff conceded as much when it noted that PacifiCorp's CEIP *"may"* already comply.

7 Staff's Complaint is fundamentally unfair. PacifiCorp's motion to dismiss, motion to stay, and this combined reply explain why.

II. The Commission should dismiss Staff's Complaint.

8 It is imperative that the Commission dismiss this Complaint, without prejudice, and direct PacifiCorp to collaborate with stakeholders on this issue in the CEIP docket.[3] The Complaint fails to provide adequate due process because it unconstitutionally advances fact-specific issues from Commission authorities that were silent on how to incorporate the SCGHG, and deprives PacifiCorp of the right to be heard in docket UE-210829. The Complaint also does not present a ripe issue because Order 01 is an interim agency decision, and the issue presented in docket UE-210829 is contingent on future events—a final decision in that docket. At minimum, consistent with Public Counsel and PacifiCorp's arguments, the Commission should conclude that it lacks subject matter jurisdiction to regulate out-of-state resources and dismiss Staff's Complaint on this issue.

A. The Complaint violates PacifiCorp's due process rights.

9 Staff and Public Counsel argue that the Complaint provides PacifiCorp with adequate notice because PacifiCorp was well aware of the SCGHG issue for several months, PacifiCorp will receive a meaningful opportunity to respond over the course of the Complaint, and that void-for-vagueness challenges are not available for complaints. These are derivative arguments that PacifiCorp did not advance.

[3] The Commission could also convert PacifiCorp's motion to dismiss to a motion for summary determination without prejudice under WAC 480-07-380.

10 PacifiCorp is not alleging that Staff failed to serve its Complaint or committed some other scrivener error that violated Commission statutes or regulations. Those are statutory due process concerns that are not relevant here.[4] Rather PacifiCorp alleges that the Complaint commits two constitutional due process violations: (1) the Complaint is unconstitutionally vague because it advances fact-specific claims (PacifiCorp should have modeled the SCGHG differently) from Commission conclusions of law that have not provided any direction for how PacifiCorp is required to model the SCGHG; and (2) it deprives PacifiCorp of the right to meaningfully respond to the merits of the SCGHG issue in the pending case where the issue is already before the Commission (the CEIP docket).

11 The Complaint is the vehicle that seeks to enforce an unconstitutionally vague interpretation of Commission authorities (Order 01 and underlying regulations and statutes) against the Company. Just like the parties in *Sessions v. Dimaya* properly attacked the vehicle that leveled an unconstitutionally vague authority against them (the Board of Immigration Appeal's decision to deport them under the Immigration and Nationality Act),[5] similarly it is proper for the Company to raise a constitutional due process challenge to the vehicle here (Staff's Complaint).

12 After refocusing on the proper issue, the due process concerns are striking. First, penalizing PacifiCorp "based on one of several reasonable interpretations of Order 01 contradicts 'ordinary notions of fair play,' and violates PacifiCorp's due process right to adequate notice."[6] Order 01 is subject to various reasonable and competing fact-specific

[4] *See State of California ex rel. Lockyer v. FERC*, 329 F.3d 700, 708 (9th Cir. 2003) (differentiating statutory and constitutional due process).
[5] 138 S.Ct. 1204 (2018).
[6] PacifiCorp Mot. to Dismiss ¶ 25.

interpretations because it only directed PacifiCorp to 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)."[7] This conclusion of law—consistent with the other Commission authorities regarding the SCGHG—does not dictate how PacifiCorp must incorporate the adder. Just like the Commission does not fault utilities when they propose different mechanisms to implement Commission conclusions of law (for example, how utilities should refund tax savings that resulted from the 2017 Tax Cuts and Jobs Act), similarly here PacifiCorp cannot be subject to administrative penalties when it made a good faith effort to incorporate the SCGHG adder. This is exactly the "more than ambiguity" that is required for a successful constitutional vagueness claim.[8]

13 Second the argument is not, as Public Counsel argues, that PacifiCorp "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."[9] That is also statutory due process concern. Staff's Complaint provides adequate notice (PacifiCorp was served), and the Commission will assuredly provide PacifiCorp the opportunity to appear and defend itself in the Complaint (like all Commission adjudications). The point is that whether PacifiCorp correctly interpreted Order 01 belongs in UE-210829, not in a stand-alone complaint on the same issue. There are no statutes or regulations that prevent these types of collateral attacks because the due process problem is self-evident: Issues are decided in the proceeding

[7] Order 01, ¶ 11.
[8] Staff Resp. ¶ 30 (citing *Mumad v. Garland*, 11 F.4th 834 (8th Cir. 2021)).
[9] Pub. Co. Resp. ¶ 6.

where they arise, and parties cannot prosecute that same issue until that initial proceeding has concluded.

14 Due Process guards against these types of procedural mouse traps. The Commission should dismiss Staff's Complaint.

B. The Complaint is not ripe.

15 PacifiCorp concedes that Staff does not need to allege adequate harm for its Complaint to survive a motion to dismiss,[10] although it is noteworthy that Staff seeks maximum penalties under a non-adversarial enforcement statute without pointing to any actual harm. However, whether Staff has standing to sue is a separate issue from whether the Complaint is ripe. Staff argues that the Complaint is ripe for resolution because, by definition, an alleged violation of a statute, rule, or Commission Order presents a dispute that is ripe for adjudication.[11]

16 This type of interim, collateral attack would be illogical in other contexts. For example, assume a utility files a rate case and fails to include a capital structure as required by WAC 480-07-510(3)(b). Or assume a utility files its next IRP and fails to include an energy efficiency or conservation assessment as required by WAC 480-100-620(3)(b)(i). Stakeholders, instead of resolving the issue in the pending rate case or IRP docket, file complaints with the Commission and request administrative penalties for the omissions, while continuing to contest the same issue in the rate case and IRP dockets. The Commission would dismiss both complaints out-of-hand. This makes sense because alleged utility errors and omissions (large, small, or ministerial) are

[10] *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592 (1982) (Washington's sovereign state jurisdiction includes "the power to create and enforce a legal code, both civil and criminal").
[11] Staff Resp. ¶ 43 ("Again, those allegations involved completed violations of the law, meaning that Staff's complaint presents the Commission with an actual, existing, mature dispute.").

routinely corrected in any given proceeding. This reality aligns with the almost uniform ripeness authorities that prevent the judicial power from extending to interim agency decisions,[12] or decisions that are dependent on contingent future events.[13] A complaint against PacifiCorp for noncompliance with CETA in its first CEIP—filed while Commission review of that CEIP is still pending—is materially indistinguishable from these scenarios.

17 More sharply, the Commission has broad discretion over PacifiCorp's SCGHG modeling in UE-210829. Staff cannot credibly argue that the Company's CEIP violated CETA, when in UE-210829 the Commission could very well conclude that PacifiCorp's CEIP modeling was correct, or even require an alternative SCGHG modeling that is not contemplated by Staff's Complaint. The Commission should be wary of the fundamental problems raised by this type of premature second-rail attack. The Commission should dismiss this Complaint.

C. The Commission must dismiss any argument that encroaches on federal jurisdiction.

18 Public Counsel confirms that the Commission lacks the power to require PacifiCorp to incorporate the SCGHG for out-of-state resources that are not allocated to serve Washington retail customers: "The Washington requirements for electric utilities to include the SCGHG in its CEIP nowhere state that utilities must also do so for resource[]

[12] *Administrative Law and Practice*, Charles H. Koch Jr., "Ripeness" § 14.21[4] (2nd Ed. 1997) (discussing cases that were dismissed as unripe because they arose from interim agency actions, including *Phillips Petroleum Co. v. Lujan*, 963 F.2d 1380 (10th Cir. 1992); *Abbs v. Sullivan*, 963 F.2d 918 (7th Cir. 1992); *Amalgamated Clothing v. SEC*, 15 F.3d 254 (2d Cir. 1994); *Pub. Citizen v. U.S. Trade Rep*., 970 F.2d 916 (D.C.Cir. 1992); *Foundations on Economic Trends v. Lyng*, 943, F.2d 79 (D.C.Cir. 1991); *US v. Durham*, 963 F.2d 185 (8th Cir. 1992); and *Pub. Citizen v. U.S. Trade Rep*., 5 F.3d 549 (D.C.Cir. 1993)).

[13] *Trump v. New York*, 141 S.Ct. 530, 535 (2020) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

allocations for use in other states,"[14] and "It would seem obvious, then, that the Commission's regulations do not apply beyond its authority to regulate rates for Washington customers."[15] For its part, Staff does not refute that the Commission lacks that power.[16]

19 Consistent with Public Counsel and PacifiCorp arguments, it is imperative that the Commission dismiss the Complaint, even if only on this issue. The Commission lacks subject matter jurisdiction to require utilities to incorporate the SCGHG for out-of-state resources that are not allocated to serve Washington retail customers.[17] A partial dismissal would appropriately limit the scope of the Complaint to only state-jurisdictional concerns,[18] and would significantly improve the ability for parties to reach agreement on the contested issues.[19] PacifiCorp remains committed to resolving how to correctly incorporate the SCGHG for Washington-allocated resources. However, it is a much larger and concerning issue if the Commission allows the Complaint to proceed with a much broader application to out-of-state resources.

III. In the alternative, the Commission should stay daily penalties.

20 If the Commission denies PacifiCorp's motion to dismiss, it should grant PacifiCorp's motion to stay the accrual of daily penalties. Staff's Complaint presents

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[14] Pub. Co. Resp. ¶ 15.
[15] *Id.* ¶ 17.
[16] Staff Resp. ¶¶ 44–46.
[17] 16 U.S.C. § 824(b)(1); *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 279 (2016); *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).
[18] *See e.g., In re Railroad Point Protection Rulemaking,* Dkt. TR-040151, GO R-517, at 11 (Jan 21. 2005) ("Without clear state authority and considering the question of federal preemption, we find it more appropriate and defensible to focus our efforts in regulating those areas of railroad company safety and operations over which the Commission has clear authority, than to focus our efforts in likely litigation over a proposed rule with an effect far more narrow than the scope of the problem to be addressed. For these reasons, we direct the Secretary to withdraw the proposed rule from consideration.").
[19] PacifiCorp Mot. to Dismiss ¶ 55 ("Staff and PacifiCorp may debate the marginally more-correct way to incorporate the SCGHG, but those minor issues are more appropriately resolved in Docket UE-210829, where PacifiCorp remains committed to proactively resolving stakeholder concerns.").

debatable issues of fact and law, and the balance of the equities support maintaining the status quo while the Commission resolves these important issues. The public interest does not support $730,000 in current penalties, much less an additional $1.52 million in additional penalties if the Complaint proceeds to the merits.

A. PacifiCorp requested the Commission stay daily penalties.

21 The Commission has not incorporated the Washington Rules of Appellate Procedure in its procedural regulations. Consistent with this truism, PacifiCorp's motion was premised on the Commission's broad discretionary powers to "to regulate the mode and manner of all investigations and hearings,"[20] and the power to draw from persuasive authorities including Commission regulations, Washington statutes, and Rules of Appellate Procedure, to conduct its proceedings.[21] While staff suggests PacifiCorp did "not ask for a stay at all," the motion clearly requested the Commission to "suspend . . . a part of a judicial proceeding," the part of the proceeding that could result in daily penalties.[22]

22 In any event Staff's arguments are misplaced. Of course Staff is the master of its Complaint.[23] But the power to frame and prosecute issues is different in kind than PacifiCorp's right to respond to a Complaint and preserve the status quo pending final resolution on the merits. That is exactly the kind of reasoned argument that Staff and stakeholders engage in—especially in rate cases—where parties advocate for reductions to utility-filed revenue requirements. Staff is not in danger of losing its ability to sue

[20] RCW 80.04.160.
[21] Mot. to Dismiss, ¶ 5 (citing RCW 80.04.160, RCW 34.05.467, WAC 480-07-860, and Wa. R. App. Pr. 8.1(b)(3)).
[22] Staff Resp. ¶ 48 (citing Black's Law Dictionary (11th ed. 2019).
[23] Staff Resp. ¶ 49.

PacifiCorp for daily penalties, rather PacifiCorp is in danger of accruing $1.52 in additional penalties on top of the estimated $730,000 in maximum penalties while the case is being resolved.

23 It is further unclear, as Staff suggests, that the Company's motion is inappropriately arguing the merits, when PacifiCorp explicitly limited the issue to the accrual of daily penalties.[24] The Commission should disregard this misdirection.

B. PacifiCorp has raised debatable issues of fact and law.

24 Moving to the merits, neither Staff nor Public Counsel refute PacifiCorp's specific arguments that the Complaint raises several contested issues of fact, including (1) Staff provides no evidence to demonstrate how PacifiCorp incorrectly modeled the SCGHG in violation of Order 01, when the Order only provided conclusions of law, and was silent on how to specifically implement the adder; (2) Staff has not provided any evidence to discredit PacifiCorp's 212,431 MWh energy efficiency target that was driven by SCGHG modeling, nor PacifiCorp's removal of coal from electricity utilized to serve Washington retail load by 2025; and (3) Staff goes so far to summarily conclude that PacifiCorp's CEIP "*may*" comply with CETA, which would render the Complaint moot.[25] PacifiCorp rests on these initial arguments as support for granting the stay.

25 Rather, Staff presents an alternative argument; that the Complaint is based on PacifiCorp's verified statements that cannot be factually refuted. PacifiCorp agrees it cannot create a disputed issue of fact from prior sworn statements.[26] But that it not what

[24] Mot. to Stay ¶ 5 ("PacifiCorp disagrees that any penalties are warranted, and reserves the right to address this issue in due course if the Complaint proceeds. However, this Motion focuses on whether the Commission should permit daily penalties to accrue while the Complaint is resolved.").
[25] Mot. to Stay ¶ 11.
[26] Staff Resp. ¶ 53 (citing *Marshall v. AC & S Inc.,* 56 Wn. App. 181, 185, 782, P.2d 1107 (1989)).

PacifiCorp argued, nor are those statements relevant. The Company argued that Staff's Complaint presents fact disputes based on how PacifiCorp modeled the SCGHG in its CEIP, and that the Complaint lacks any evidence to support the conclusion that PacifiCorp's approach violates the law.

26 These are serious factual disputes that Staff, in order to carry its burden of proof, will need to support with pre-filed direct testimony if the Complaint proceeds to the merits, and issues that PacifiCorp represents are ultimately fatal to the Complaint. But for present purposes, these issues indicate that PacifiCorp has demonstrated sufficiently "debatable issues" to support PacifiCorp's motion to stay daily penalties.[27]

C. The public interest will not be harmed by a stay.

27 Neither Staff nor Public Counsel responded to PacifiCorp's various factors that support granting a stay (no corrupt or malicious conduct alleged, lack of electric utility precedent and *de minimis* penalty amounts, the lack of urgency, and considerations of suitability and proportionality).[28] PacifiCorp rests on these initial arguments as support for granting the stay.

28 Instead, Staff argues that the balance of equities support denying the stay because Staff would lose any opportunity to seek additional daily penalties from the date the Complaint was filed until the Complaint is resolved.[29] Effectively, in "monetary terms, the two sides of the ledger net out to zero."[30] Respectfully, that is a false equivalency. Staff's ability to request an additional $1.52 million in daily penalties on top of $730,000, against PacifiCorp's ability to stay the $1.52 million in additional daily penalties, do not

[27] *Purser*, 702 P.2d at 1204; *Boeing*, 716 P.2d at 958.
[28] Mot. to Stay ¶¶ 13–22.
[29] Staff Resp. ¶¶ 55–56.
[30] *Id.* ¶ 55.

cancel each other out. Subjecting PacifiCorp to a potential 208 percent increase in daily penalties while the proceeding is resolved on the merits weighs in favor of granting PacifiCorp's stay.[31]

29 Additionally, Public Counsel argues that principles of deterrence and punishment weigh against granting PacifiCorp's motion, especially when comparing an additional $1.52 million in potential penalties to PacifiCorp's annual operating revenues.[32] PacifiCorp agrees that the Commission's penalty policy is primarily grounded in principles of deterrence and punishment.[33] However, PacifiCorp represents that both principles are adequately protected by Staff's Complaint: (1) the current $730,000 in potential penalties is $725,000 greater what the Commission has levied against any Washington utility in the past three decades, and (2) this is the first time the Commission has considered penalties against an electric utility.

30 This case is already an outlier with respect to Commission complaint precedent. An additional $1.52 million in daily penalties only adds to that irregularity. Principles of deterrence and punishment are adequately protected by the current $730,000 in potential penalties, and the balance of equities supports granting PacifiCorp's stay.

IV. Conclusion

31 For the foregoing reasons, PacifiCorp respectfully requests the Commission dismiss Staff's Complaint in whole, or partially dismiss any issue that encroaches on federal jurisdiction. If the Commission disagrees, the Commission should nonetheless

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[31] *Purser*, 702 P.2d at 1204; *Boeing*, 716 P.2d at 958.
[32] Pub. Co. Resp. ¶¶ 19–21.
[33] *MCIMetro Access v. U.S. West,* Dkt. No. UT-971063, ¶ 292 ("The small number of cases in which the Commission has spoken of the policies underlying penalties, as well as the language of the decisions, demonstrate that the Commission's general policy . . . is to impose penalties not principally as 'punishment.' Instead, the Commission relies on penalties for their value as an incentive to the malefactor and others to comply with laws and regulations, and as a deterrent to future violations.") (concurrence).

stay the accrual of additionally penalties pending resolution of the Complaint on the merits.

Dated this 19th day of July, 2022.

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