

**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

ORDER 02

GRANTING STAFF'S MOTION FOR  
LEAVE TO FILE SURRESPONSE;  
DENYING MOTION TO DISMISS;  
DENYING MOTION TO STAY  
PENALTIES

NOTICE OF DEADLINE FOR  
RESPONSES TO MOTION TO  
CONSOLIDATE (**Set for August 10,  
2022, at 5 p.m.**)

**BACKGROUND**

- 1 On December 30, 2021, PacifiCorp filed with the Washington Utilities and Transportation Commission (Commission) its final Clean Energy Implementation Plan (CEIP) in Docket UE-210829.
- 2 On June 6, 2022, the Commission, through its staff (Staff), issued a Complaint and Notice of Prehearing Conference in Docket UE-220376 (Complaint). The Complaint alleges that PacifiCorp d/b/a Pacific Power & Light Company (PacifiCorp or Company) violated Commission Order 01 in Docket UE-210829,<sup>1</sup> Revised Code of Washington (RCW) 19.280.030(3)(a)(ii), RCW 19.280.030(3)(a)(iii), Washington Administrative Code (WAC) 480-100-640(7), and WAC 480-100-660(4) by failing to incorporate the social cost of greenhouse gases (SCGHG) in the preferred portfolio of its CEIP. The

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<sup>1</sup> *In re 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, Denying Petition for Exemption, (Dec. 13, 2021) [hereinafter Order 01, Docket UE-210829].

Complaint requested 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.

3 On June 27, 2022, PacifiCorp filed with the Commission an Answer, a Motion to Stay Penalties, and a Motion to Dismiss.

4 On June 28, 2022, the Commission issued a Notice of Opportunity to Respond to PacifiCorp's Motion to Dismiss by July 12, 2022.

5 The Commission convened a virtual prehearing conference on June 30, 2022, before Administrative Law Judge Andrew J. O'Connell.

6 On July 5, 2022, the Commission issued Order 01, granting among other things, a request from PacifiCorp to file a reply to any responses to its Motion to Dismiss.

7 On July 12, 2022, Staff and the Public Counsel Unit of the Washington Attorney General's Office (Public Counsel) each filed with the Commission responses to PacifiCorp's Motion to Dismiss.

8 On July 19, 2022, PacifiCorp filed with the Commission a reply to Staff's and Public Counsel's responses.

9 On July 26, 2022, Staff filed with the Commission a Motion for Leave to File Surreponse and a Surreponse.

## DISCUSSION

### A. Surreponse

10 A request for Commission action in the context of an adjudicative proceeding is a motion. Procedural motions request that the Commission establish or modify the process or the procedural schedule in a proceeding.<sup>2</sup> In addition, the Commission may, consistent with due process and the public interest, modify the application of its procedural rules during a particular adjudication.<sup>3</sup>

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<sup>2</sup> WAC 480-07-375(1)(b).

<sup>3</sup> WAC 480-07-110(1).

- 11 The Commission's procedural rules do not provide for replies to any responses to a motion to dismiss.<sup>4</sup> In Order 01, the Commission granted PacifiCorp's request to file a reply to any responses to its Motion to Dismiss, a modification to the process outlined in the Commission's procedural rules.
- 12 Staff requests that the Commission allow a second modification and permit a Surreponse to PacifiCorp's Reply. The Commission finds that it is fair and just to allow Staff's Surreponse for the same reasons that it allowed PacifiCorp's Reply. Considering the novel and complex legal issue presented, the Commission allows Staff's Surreponse. Accordingly, the Commission determines that it should grant Staff's Motion for Leave to File Surreponse.

### **B. Motion to Stay Penalties**

- 13 PacifiCorp's Motion to Stay Penalties cites Washington's Rules of Appellate Procedure to assert that a stay of penalties is warranted because it argues there are debatable issues that would be presented on appeal and the injury it will suffer without a stay is greater than the injury non-moving parties would suffer with a stay.<sup>5</sup> PacifiCorp's arguments are misplaced, and its motion is denied.
- 14 Staff argues that the standard cited by PacifiCorp is for the stay of enforcement of a trial court's decision – a stay in judgment – and is not applicable in this circumstance because Washington's Administrative Procedure Act and the Commission's rules apply to allow a party to stay or suspend a final order issued by the Commission.<sup>6</sup> We agree.
- 15 If the Commission ultimately determines that PacifiCorp has made no violations, then no penalty will be warranted. If, however, the Commission determines that PacifiCorp has violated statute, Commission rule, or Commission order, PacifiCorp has failed at this time to show why the Commission should exclude any continuing violations committed during the pendency of this proceeding. At the outset of a proceeding, such a determination would undermine the Commission's authority to assess appropriate penalties for ongoing violations of state law, Commission rules, and Commission orders. Accordingly, the Commission determines that PacifiCorp has failed to show that a stay of penalties is appropriate and that it should deny PacifiCorp's Motion to Stay Penalties.

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<sup>4</sup> See WAC 480-07-380(1).

<sup>5</sup> Motion to Stay Penalties at 1, ¶ 2.

<sup>6</sup> Staff's Response at 17, ¶ 48.

### C. Motion to Dismiss

16 WAC 480-07-380(1)(a) provides that “a party may move to dismiss another party’s case on the asserted basis that the opposing party’s pleading fails to state a claim upon which the Commission may grant relief.” In deciding whether to grant or deny a motion to dismiss, the Commission considers the standards applicable to a motion made under Civil Rule (CR) 12(b)(6) and CR 12(c) of the Washington Superior Court Rules.<sup>7</sup>

17 RCW 19.280.030 provides:

Each electric utility must develop a plan consistent with this section.

(3)(a) An electric utility shall consider the social cost of greenhouse gas emissions, as determined by the commission for investor-owned utilities pursuant to RCW 80.28.405 and the department for consumer-owned utilities, when developing integrated resource plans and clean energy action plans. An electric utility must incorporate the social cost of greenhouse gas emissions as a cost adder when:

- (i) Evaluating and selecting conservation policies, programs, and targets;
- (ii) Developing integrated resource plans and clean energy action plans; and
- (iii) Evaluating and selecting intermediate term and long-term resource options.

18 WAC 480-100-640(7) provides that “Each CEIP must include a projected incremental cost as outlined in WAC 480-100-660(4).”

19 WAC 480-100-660 provides, in relevant part:

(1) **Incremental cost methodology.** To determine the incremental cost of the actions a utility takes to comply with RCW 19.405.040 and 19.405.050, the utility must compare its lowest reasonable cost portfolio to the alternative lowest reasonable cost and reasonably available portfolio. The utility should use a portfolio

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<sup>7</sup> CR 12(b)(6) addresses motions to dismiss, while CR 12(c) addresses motions for judgment on the pleadings. CR 12(c) applies where the moving party alleges that no genuine issue material fact is in dispute. Because PacifiCorp makes no such allegation, we base our decision only on its claim that Staff has failed to state a claim upon which relief can be granted.

optimization model, such as the one used in its most recent integrated resource plan, as the basis for calculating the alternative lowest reasonable cost and reasonably available portfolio to show the difference in portfolio choices and investment needs between the two portfolios, and demonstrate which investments and expenses are directly attributable costs to meet the requirements of RCW 19.405.040 and 19.405.050.

...

(4) **Projected incremental cost.** The utility must file projected incremental cost estimates in each CEIP using the methodology described in subsection (1) of this section ....

- 20 In General Order 601, the Commission adopted the above quoted rules in Chapter 480-100, which includes two primary sections in Washington’s Clean Energy Transformation Act (CETA) addressing CEIPs and Integrated Resources Plans (IRP).<sup>8</sup> The Commission found that RCW 19.280.030 requires electric utilities to include the SCGHG in the baseline portfolio as a cost adder for calculating the incremental cost of compliance in RCW 19.405.060(3), and found that the baseline portfolio’s reference to “lowest reasonable cost” includes the SCGHG in the same manner required under Chapter 19.280 RCW.<sup>9</sup>
- 21 In Docket UE-210829, the Commission denied PacifiCorp’s petition for an exemption from WAC 480-100-605. The Commission rejected PacifiCorp’s argument the exemption was necessary to avoid a mismatch between its preferred portfolio and its forthcoming alternative lowest reasonable cost and reasonably available portfolio (Alternative LRCP) due to practical difficulties preventing it from including the SCGHG in its Alternative LRCP. The Commission also rejected PacifiCorp’s petition because PacifiCorp failed to present any compelling reason for the Commission to change the applicable incremental cost calculation and its statutory interpretation, provided in General Order R-601, that RCW 19.280.030 also required PacifiCorp to include the SCGHG.<sup>10</sup> Last, the Commission ordered

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<sup>8</sup> *In re Adopting Rules Relating to Clean Energy Implementation Plans and Compliance with the Clean Energy Transformation Act; in re Amending or Adopting Rules Relating to WAC 480-100-238, Relating to Integrated Resource Planning*, Dockets UE-191023 & UE-190698 (Consolidated), General Order 601, Adopting Rules Permanently (Dec. 28, 2020) [hereinafter General Order 601].

<sup>9</sup> *Id.* at 47-48, ¶¶ 127-132.

<sup>10</sup> *Id.* at 47, ¶ 131.

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). The Company must use these portfolios in its calculation of projected incremental cost, as required by WAC 480-100-640(7).<sup>11</sup>

- 22 The Complaint alleges that PacifiCorp failed to incorporate the SCGHG as a cost adder in its CEIP preferred portfolio in its Final CEIP in violation of Order 01 in Docket UE-210829. It also alleges that the failure to incorporate the SCGHG is a violation of both RCW 19.280.030(3)(a)(ii) and RCW 19.280.030(3)(a)(iii). Staff also alleges that failing to include the SCGHG is a violation of both WAC 480-100-640(7) and WAC 480-100-660(4).
- 23 The relief requested by the Complaint includes penalties of \$1,000 per violation, per day, and that PacifiCorp be ordered to comply by incorporating the social cost of greenhouse gases in its CEIP preferred portfolio, rerunning its CEIP model, and submitting a revised Final CEIP.
- 24 PacifiCorp argues that the Complaint violates PacifiCorp's due process rights, fails to allege harm or injury and is not ripe, and that the Commission lacks the power to grant the relief requested.

### **1. Due Process**

- 25 PacifiCorp argues that its due process rights have been violated because it has been denied notice and a meaningful opportunity to be heard. Regarding notice, PacifiCorp argues that the Complaint is void-for-vagueness because it did not have fair notice of the conduct proscribed by statute or, said differently, did not have any direction for how it was required to model the SCGHG.<sup>12</sup> PacifiCorp further argues that the Complaint is ambiguous because it could be read to require three different types of relief, and that Order 01 of Docket UE-210829 only required it to incorporate the SCGHG in its CEIP but did not indicate any fact-specific determination of how PacifiCorp must model the SCGHG.
- 26 Regarding a meaningful opportunity to be heard, PacifiCorp argues that it has not been afforded such opportunity because the issue of how it should model the SCGHG remains unresolved in Docket UE-210829, an ongoing docket, and that any appeal of an order

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<sup>11</sup> Order 01, Docket UE-210829 at 4-5, ¶¶ 11, 18.

<sup>12</sup> See Motion to Dismiss at 7, ¶ 21; PacifiCorp's Reply at 5, ¶ 10.

issued in this docket (UE-220376) would be dismissed for failure to exhaust administrative remedies in Docket UE-210829.<sup>13</sup>

- 27 PacifiCorp’s due process rights have not been violated, and the Complaint is not vague. It alleges specific violations of statute, Commission rules, and a Commission order. Nor does the Complaint deprive PacifiCorp of a meaningful opportunity to be heard. The Company will be afforded a meaningful opportunity to respond to the allegations made in the Complaint in this proceeding. Additionally, the Complaint’s requested relief that the Commission assess penalties and order PacifiCorp to comply with the Commission’s order, Commission’s rules, and Washington statutes is neither vague nor ambiguous.
- 28 PacifiCorp argues that “whether PacifiCorp correctly interpreted Order 01 belongs in UE-210829, not in a stand-alone complaint on the same issue” and that the issues should be “decided in the proceeding where they arise, and parties cannot prosecute that same issue until that initial proceeding has concluded.”<sup>14</sup>
- 29 PacifiCorp’s other arguments attempt to revise the history of prior decisions and actions by the Commission as well as the process afforded by the Commission. The Commission gave direction for complying with state law and Commission rules in General Order 601 and, specifically to PacifiCorp, in Order 01 in Docket UE-210829, which resolved the questions of whether PacifiCorp’s petition for exemption should be granted and how PacifiCorp must incorporate the SCGHG in its CEIP.<sup>15</sup>
- 30 No statute or rule requires a violation of Commission order to be raised in a Complaint filed in the same docket as the order that was allegedly violated. The Commission may choose to place a complaint in the same docket, but particularly for a complaint alleging violations of statute and rule in addition to those of Commission order, the Commission may determine that it should be considered in a separate docket. Here, the Complaint alleges violations not only of Order 01 in Docket UE-210829. It also alleges violations of statute and Commission rules. Whether PacifiCorp complied with state law, Commission rules, or Commission order are issues properly included in this docket for resolution in this proceeding. Thus, PacifiCorp’s arguments regarding notice and a meaningful opportunity must be rejected.

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<sup>13</sup> Motion to Dismiss at 8-10, ¶¶ 26-30; PacifiCorp’s Reply at 5, ¶ 10.

<sup>14</sup> PacifiCorp’s Reply at 6-7, ¶ 13.

<sup>15</sup> Order 01, Docket UE-210829 at 4-5, ¶¶ 11, 18, ordering 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). The Company must use these portfolios in its calculation of projected incremental cost, as required by WAC 480-100-640(7).”

## 2. Harm or Injury; Ripeness

- 31 PacifiCorp argues that the Complaint fails to allege harm or injury and presents issues that are not ripe for an agency decision because CEIPs are prospective tools and PacifiCorp has not sought “rate recovery of these yet-to-be identified or procured resources,” which may ultimately be in compliance.<sup>16</sup> PacifiCorp argues that the allegations are, therefore, based on contingent future events.
- 32 PacifiCorp’s arguments are not persuasive. The issues presented are ripe for adjudication because the Complaint alleges that PacifiCorp has already failed to comply with statute, Commission rule, and Commission order. The statutes, rules, and order pertain to PacifiCorp’s final CEIP filed with the Commission on December 31, 2021. Whether PacifiCorp, through that filing, has complied with statute, Commission rule and Commission order is thus ripe for adjudication.
- 33 Staff argues that the Commission and its Staff are governmental entities, not private litigants, and therefore have standing and authority to pursue violations of statutes, regulations, and Commission orders. Staff argues that the Complaint alleges an injury to Washington’s sovereign interest in compliance with its laws and that the Commission has been granted authority to maintain an action to vindicate that interest. Staff further argues that accepting PacifiCorp’s argument would hinder the Commission’s ability to regulate in the public interest. Public Counsel argues that, should the Commission agree with PacifiCorp that no harm or injury has been alleged, it would contradict the Commission’s authority to implement the planning requirements stated in Chapter 19.405 RCW.<sup>17</sup> We agree.
- 34 The Commission has authority to enforce its orders, rules, and statutes as granted by the legislature and to pursue any violations thereof. Accordingly, PacifiCorp’s arguments must be rejected.

## 3. Commission Authority to Grant Requested Relief; Federal Preemption

- 35 PacifiCorp argues that the Commission’s authority is constrained *if* the Complaint seeks to require it to incorporate the SCGHG into its 2021 preferred portfolio for resources that are not allocated to serve Washington.<sup>18</sup> PacifiCorp argues that the Commission lacks such authority because of federal preemption. If the Complaint does not require

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<sup>16</sup> Motion to Dismiss at 10-13, ¶¶ 31-42.

<sup>17</sup> Public Counsel’s Response at 7-8, ¶ 13.

<sup>18</sup> Motion to Dismiss at 14, ¶ 43.



PacifiCorp to model resources other than Washington-allocated resources, PacifiCorp argues, “the Commission should still dismiss the Complaint because the CEIP lawfully incorporated the SCGHG for Washington resources.”<sup>19</sup>

36 Staff argues that PacifiCorp has admitted that the Commission may permissibly grant relief under certain circumstances and the Commission should, therefore, deny the motion.<sup>20</sup> We agree. PacifiCorp’s arguments are premature. The Commission is aware of the bounds of its authority, including those stemming from federal preemption. If, however, as PacifiCorp admits, the Commission can grant relief, dismissal is not warranted. Last, at this stage of the proceeding when considering PacifiCorp’s Motion to Dismiss, we must accept all facts and reasonable inferences in the Complaint as true and must therefore reject PacifiCorp’s argument that the Complaint should be dismissed because, PacifiCorp asserts, it has lawfully incorporated the SCGHG.<sup>21</sup> Staff and its Complaint allege it has not. The issue of whether PacifiCorp has lawfully incorporated the SCGHG is, specifically, what will be resolved by this proceeding. Accordingly, PacifiCorp’s arguments must be rejected and its Motion to Dismiss must be denied.

37 **Motion to Consolidate.** In Order 01 in this Docket, the Commission granted an unopposed motion by PacifiCorp to continue the date for responses to Staff’s Motion to Consolidate, if necessary, until after ruling on its Motion to Dismiss. The Commission now sets a deadline for responses to Staff’s Motion to Consolidate. Any persons interested in this Docket or in Docket UE-210829 who intend to file a response to Staff’s Motion to Consolidate must file their response with the Commission by 5 p.m. on August 10, 2022.

38 **THE COMMISSION GIVES NOTICE that any responses to Staff’s Motion to Consolidate this Docket with Docket UE-210829 must be filed with the Commission by August 10, 2022, at 5 p.m.**

## ORDER

### THE COMMISSION

39 (1) Grants Commission Staff’s Motion for Leave to File Surreponse.

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<sup>19</sup> Motion to Dismiss at 18, ¶ 55.

<sup>20</sup> Staff’s Surreponse at 11-12, ¶ 33.

<sup>21</sup> *J.S. v. Village Voice Media Holdings, LLC*, 184 Wn. 2d 95, 100 (2015).

- 40 (2) Denies PacifiCorp d/b/a Pacific Power & Light Company's Motion for Stay of Penalties.
- 41 (3) Denies PacifiCorp d/b/a Pacific Power & Light Company's Motion to Dismiss.
- 42 (4) Provides notice that any responses to Commission Staff's Motion to Consolidate this Docket with Docket UE-210829 must be filed with the Commission by August 10, 2022, at 5 p.m.

DATED at Lacey, Washington, and effective August 1, 2022.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

/s/ *Andrew J. O'Connell*

ANDREW J. O'CONNELL

Administrative Law Judge

**NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.**