

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of PACIFICORP, d/b/a PACIFIC POWER & LIGHT COMPANY’S Clean Energy Implementation Plan	Docket UE-210829 PACIFICORP RESPONSE TO MOTION TO CONSOLIDATE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PACIFICORP, d/b/a PACIFIC POWER & LIGHT COMPANY, <u>Respondent.</u>	Docket UE-220376 PACIFICORP RESPONSE TO MOTION TO CONSOLIDATE

1 PacifiCorp d/b/a Pacific Power & Light Company (PacifiCorp) files this response to the Washington Utilities and Transportation Commission (Commission) Staff’s Motion to Consolidate dockets UE-220376 (Complaint Docket) and UE-210806 (CEIP Docket) (Motion). PacifiCorp supports consolidating the two Dockets, provided it is clear that Staff retains its burden of proof regarding issues raised in the Complaint Docket.

I. Argument

2 On June 27, 2022, Staff moved the Commission to consolidate the Complaint and CEIP Dockets. Staff noted that while the Commission can consolidate proceedings where the dockets contain related principles of law, that “the principles in these dockets are not

the same, but they are highly correlated.”¹ For example, the Commission must determine in both Dockets whether PacifiCorp correctly incorporated the social cost of greenhouse gases in its 2021 Clean Energy Implementation Plan.²

3 PacifiCorp agrees that the CEIP and Complaint Dockets are governed by similar legal principles (*i.e.*, a decision on whether PacifiCorp correctly incorporated the social cost of greenhouse gases). However, there is at least one important difference that needs to be observed if the Commission consolidates the two Dockets: the burdens of proof and persuasion are markedly different between complaint and CEIP proceedings.

4 While the Commission has not had the opportunity to opine on which party retains the burden of proof in a CEIP proceeding, the Commission has consistently concluded that the moving party retains the burdens of proof and persuasion—especially for complaint proceedings. The Commission follows “the rule of law that the proponent of change bear the burden of persuasion.”³ To that end, utilities have the burden of proof for rate proceedings,⁴ petitioners other than utilities have the burden of proof to initiate rate proceedings,⁵ private parties have the burden of proof when they file complaints,⁶

¹ Staff Mot. to Cons. ¶ 8.

² *Id.*

³ *WUTC v. Inland Telephone Co.*, UT-050606, Final Order Affirming Initial Order, at 4 (Nov. 30, 2006) (citing *Wilder v. Nolte*, 195 Wash. 1, 14, 79 P.2d 682 (1938) (“[H]e who affirms always has the burden”); *State v. Anderson*, 72 Wn. App. 253, 260, 863 P.2d 1370 (1993) (“[A] claimant generally has the burden of proving the facts necessary to sustain his or her claim”)).

⁴ WAC 480-07-540.

⁵ *Id.*

⁶ *GTE v. Whidbey Telephone*, Dkt. UT-950277, Fifth Supplemental Order, at 6–7 (Apr. 2, 1996) (“GTE chose to bring a complaint cause under RCW 80.04.110. In making this choice, GTE assumed the burdens of the moving party in a complaint proceeding. It was the responsibility of GTE to analyze and determine what it believed to be the elements of a prima facie case. It was the responsibility of GTE to determine what proof would establish each of those elements, and to proffer the requisite evidence in its direct case. If data were required, it was GTE’s responsibility to obtain those data. If studies were required, it was GTE’s responsibility to perform those studies. We would expect GTE, and any other company filing a complaint against another company in a proceeding before the Commission, to evaluate its responsibilities and have a strategy for fulfilling them before a complaint is ever filed.”); *Metro-Net Services v. US West*, Dkt. U-88-2417-F, Third Supplemental Order (May 8, 1990).

Public Counsel has the burden of proof when it files a complaint,⁷ and Staff has the burden of proof when it moves for summary determination in a complaint proceeding.⁸ Because Staff “chose to bring a complaint,” Staff has “assumed the burdens of the moving party in a complaint proceeding.”⁹

5 This distinction is important because the Commission utilizes different powers for complaint and CEIP proceedings. Complaints initiated by the Attorney General’s office are prosecutorial.¹⁰ CEIP dockets are planning dockets, and are presumably investigative.¹¹ These are different powers that aim at different goals. One aims at correcting past actions through the potential deprivation of utility property by administrative penalties, the other at ensuring future utility compliance. Washington has concluded that the mere “combination of investigatory, prosecutory, and adjudicatory functions” does not prevent an agency from fairly deciding a case.¹² However the Commission must always maintain the appearance of fairness, that “a reasonably prudent

⁷ *Public Counsel v. PacifiCorp*, Dkt. UE-110070, Order 01, at 15 (Apr. 27, 2011) (“Even if penalties were an available remedy when a private party brings a complaint under the Commission’s complaint statutes, the Complainants would have the burden of going forward. That is, they would be required at the outset [to] establish by more than bare assertions that there is some set of facts that would, if fully developed, convince the Commission to take action against the Company or its employees.”).

⁸ *WUTC v. Inland Telephone Co.*, UT-050606, Order 05 Denying Motion for Summary Determination, at 6–7 (Feb. 16, 2006) (“Staff bears the initial burden of showing that there are no issues of material fact with regard to its motion for summary determination. The burden then shifts to Inland to demonstrate that material facts exist which require Commission consideration.”).

⁹ *GTE v. Whidbey Telephone*, Dkt. UT-950277, Fifth Supplemental Order, at 6–7.

¹⁰ RCW 80.01.100 (“It shall be the duty of the attorney general to represent and appear for the people of the state of Washington and . . . to that end he or she is authorized to institute, prosecute, and defend all necessary actions and proceedings.”)

¹¹ WAC 481-100-600 through -665 (CEIP dockets fall within the Commission’s “Planning” regulations, and only become prosecutorial if the Commission initiates a separate complaint under WAC 480-100-665(2)(a), or initiates enforcement action within the broad scope of proceedings discussed in WAC 480-100-665(3)).

¹² *Nationscapital Mortg. Corp. v. State Dep’t of Fin. Institutions*, 133 Wash. App. 723, ¶ 124, 137 P.3d 78 (2006).

and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.”¹³

6 If the two Dockets are consolidated, Staff must retain its burden for the issues raised in the Complaint Docket. Staff has raised serious factual disputes. Consistent with Commission precedent, and to ensure that PacifiCorp receives a “fair, impartial, and neutral hearing,”¹⁴ Staff must be required to support those claims with pre-filed direct testimony or other appropriate evidence, and PacifiCorp must be provided the opportunity for discovery and the ability to respond to Staff’s evidence.¹⁵

II. Conclusion

7 PacifiCorp supports Staff’s Motion, provided Staff retains its burdens of proof and persuasion regarding issues raised in the Complaint Docket, and those burdens are not inappropriately shifted to PacifiCorp.

Dated this 5th day of August, 2022.

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¹³ *Nationscapital*, ¶ 100; *In re Matter of Johnston*, 99 Wash. 2d 466, 478–481, 663 P.2d 457, 464–466 (1983).

¹⁴ *Nationscapital*, ¶ 100.

¹⁵ *WUTC v CenturyLink, et al.*, Dkt. UT-210902, Order 01, Appendix B (May 24, 2022) (establishing procedural schedule where Staff provides initial direct testimony to support its case-in-chief).