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December 22, 2023

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
Filing Center
201 High Street SE, Suite 100
Salem, Oregon 97301-3398

Re: Docket UE 420 - In the Matter of PacifiCorp d/b/a Pacific Power, 2024 Transition Adjustment Mechanism

Attention Filing Center:

Attached for filing in the above-captioned docket, please find PacifiCorp's Motion for Reconsideration.

Please contact this office with any questions.

Sincerely,

Cole Albee

Cole Albee
Paralegal
McDowell Rackner Gibson PC

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UE 420

In the Matter of

PACIFICORP d/b/a PACIFIC POWER,

2024 Transition Adjustment Mechanism.

PACIFICORP'S MOTION FOR RECONSIDERATION

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I. INTRODUCTION

In accordance with ORS 756.561 and OAR 860-001-0720, PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) asks the Public Utility Commission of Oregon (Commission) to reconsider its decision on one issue in Order No. 23-404[1] (the Order): the disallowance of costs that PacifiCorp must incur to provide Oregon customers with power from the Chehalis gas-fired generating facility (Chehalis) in compliance with the Cap and Invest Program in the Washington Climate Commitment Act (CCA).[2]

The Commission determined that the costs PacifiCorp incurs to obtain emissions allowances necessary to provide power from Chehalis should be situs assigned to Washington under the 2020 PacifiCorp Inter-Jurisdictional Allocation Protocol (2020 Protocol).[3] The Order designates the Washington CCA as a "State-Specific initiative" under the 2020 Protocol.[4] While the Order disallows recovery from Oregon customers of CCA compliance costs associated with Chehalis, the Order envisions Oregon customers continuing to benefit from the availability and cost advantages of Chehalis power.

The Order includes the following legal errors that PacifiCorp requests the Commission reconsider: (a) the Order misapplies the 2020 Protocol and misconstrues the terms of the CCA and the Washington Clean Energy Transformation Act (CETA);[5] and (b) the misapplication of the 2020 Protocol results in discrimination against PacifiCorp as an interstate provider of electric service. PacifiCorp respectfully requests that the Commission rectify these legal errors in the Order and conclude that PacifiCorp may recover CCA Cap and Invest Program compliance costs for

[1] Docket UE 420, Order No. 23-404 at 8-10 (Oct. 27, 2023).
[2] RCW 70A.65.005 – 70A.65-901 (2023).
[3] PAC/1316, 2020 PacifiCorp Inter-Jurisdictional Allocation Protocol (2020 Protocol).
[4] Order at 9-10.
[5] RCW 19.405.010 – 19.405.901 (2023).

Oregon's share of Chehalis power. In the alternative, if the Commission does not revise the Order to include CCA costs in Oregon rates, PacifiCorp renews its request made in testimony that the Commission remove the Chehalis plant as a resource allocated to Oregon.[6]

II. BACKGROUND

PacifiCorp's initial filing delineated the CCA costs it must pay to make Chehalis power available to Oregon customers, and explained that "[f]or all energy exported out of Washington from the Chehalis plant, there is an associated [greenhouse gas (GHG)] cost proportionate to the energy exported."[7] Ultimately, there was no dispute in the record over the mandatory nature of these costs or their amount.[8] Nor was there any dispute that Oregon customers receive significant benefits from having Chehalis in their generation mix, even with the additional CCA compliance costs.[9]

Two parties, Commission Staff and the Alliance of Western Energy Consumers (AWEC), objected to including CCA costs in Oregon rates. Staff's position on CCA cost recovery shifted throughout the case:

- In direct testimony, Staff recommended that Chehalis be treated as "System Generation" under the 2020 Protocol, with CCA no-cost allowances allocated to Oregon customers "on a System Generation (SG) basis." This adjustment reduced Oregon-allocated net power costs (NPC) by approximately $1.65 million.[10]

- In rebuttal testimony, Staff testified that "[u]nder normal circumstances in PacifiCorp ratemaking, the value of [CCA no-cost] permits given to Chehalis would be allocated equally between all of the states that pay for the Chehalis plant. That would be an equitable approach." Recognizing that Washington law precludes such allocation of CCA no-cost allowances, Staff said it "would be

[6] *See* PAC/1000, McVee/3.
[7] PAC/100, Mitchell/20; PAC/1000, McVee/2-3.
[8] Vitesse did not object to recovery of PacifiCorp's CCA compliance costs but proposed that PacifiCorp model Chehalis's emissions costs on a variable cost basis. Vitesse acknowledged this would increase CCA costs in the Transition Adjustment Mechanism (TAM). Vitesse/200, Johnson/27-29.
[9] PAC/100, Mitchell/20-21.
[10] Staff/400, Anderson/14.

open to a 50-50 sharing agreement[.]" This adjustment reduced Oregon-allocated NPC by approximately $825,000.[11]

- In the last sentence of its rebuttal testimony, without including any analysis or evidence, Staff's witness added: "Further, staff finds this issue to be a state energy policy and as such should be entirely born[e] by Washington per [2020 Protocol] guidelines."[12] Staff relied on section 5.8 of the 2020 Protocol for this position. This sentence was then edited in an Errata filing on the eve of hearing to change the word "Further" to "Alternatively," and to value the associated disallowance at $21 million Oregon-allocated.[13]

- At hearing, PacifiCorp witness Matt McVee explained that Section 5.8 of the 2020 Protocol was not currently in effect.[14] Staff conceded the inapplicability of Section 5.8 in its Opening Brief, but persisted in asking the Commission to situs assign CCA costs as a State-Specific Initiative, citing Section 3.1.2.1 of the 2020 Protocol.[15] Instead of relying on its primary arguments in testimony for a partial disallowance of CCA costs, Staff's post-hearing briefs argued for a full disallowance of CCA costs (while maintaining the current share of Chehalis power in Oregon's generation portfolio).[16]

AWEC urged the Commission to disallow the recovery of CCA costs as unjust and unreasonable, based on its contention that the CCA is unconstitutional as a violation of the U.S. Constitution's dormant Commerce Clause.[17] AWEC expressly disagreed with Staff's position that CCA costs be entirely borne by Washington customers, arguing that this "would violate the 2020 Protocol, an allocation method that staff agreed to and the Commission adopted, and would put PacifiCorp in the 'untenable' position of having to comply with two different and inconsistent state agency directives."[18] AWEC also agreed with PacifiCorp that the CCA is similar to a generation tax, highlighting that "such taxes should be borne by the customers that receive the benefits of that

[11] Staff/1000, Anderson/16-17.
[12] Staff/1000, Anderson/17.
[13] Staff's Errata to Rebuttal Testimony (Staff/1000, Anderson/17)(filed August 31, 2023).
[14] Evidentiary Hearing Transcript 16:16-20 (Sept. 7, 2023) ("Section 5.8 is . . . not applicable to setting rates in 2024 or allocating costs of the Washington cap-and-invest program.") [hereinafter "Evid. Tr."].
[15] Staff Opening Brief at 7-8 (Sept. 22, 2023).
[16] *Id*. at 8-9.
[17] Opening Brief of the Alliance of Western Energy Consumers at 3-8 (Sept. 22, 2023) [hereinafter "AWEC Opening Brief"].
[18] *Id.* at 13 (internal footnotes omitted).

generation, which is what the 2020 Protocol does."[19] Indeed, AWEC argued that it "would be unjust and unreasonable for Washington customers to pay for allowances associated with generation when they do not receive the benefits."[20] Instead, AWEC claimed that PacifiCorp should challenge the legality of the CCA in court or seek a solution within the Multi-State Process.[21]

III. LEGAL STANDARD

Reconsideration is appropriate where there is either (1) an error of law or fact in the order that was essential to the decision, or (2) good cause for further examination of an issue essential to the decision.[22] The Commission's orders must be "supported by substantial evidence in the record."[23] Substantial evidence exists "when the record, viewed as a whole, would permit a reasonable person to make that finding."[24] The Commission's orders must also be supported by "substantial reason," which "connects the facts found to the ultimate conclusion."[25] In addition, the Commission "may not authorize a rate or schedule of rates that is not fair, just and reasonable."[26]

IV. ARGUMENT

The Order includes errors of law and fact essential to the Commission's decision to disallow recovery of CCA Cap and Invest Program compliance costs necessary to provide the benefits of Chehalis power to Oregon customers. The Order relies for its ultimate decision on the

[19] *Id.*
[20] *Id.* at 14.
[21] *Id.*
[22] OAR 860-001-0720(3)(c), (d).
[23] ORS 183.482(8)(c); *see also Calpine Energy Sols. LLC v. Pub. Util. Comm'n of Or.*, 298 Or App 143, 163 (2019) (overturning Commission order for lack of substantial evidence).
[24] ORS 183.482(8)(c).
[25] *Calpine*, 298 Or App at 159; *see also Util. Reform Project v. Pub. Util. Comm'n of Or.*, 277 Or App 325, 344-45 (2016) (affirming that a Commission order was supported by substantial reason because it "adequately set[] forth the [Commission's] basis for concluding that [a utility's] costs were reasonably incurred").
[26] ORS 757.210(1)(a).

2020 Protocol but fails to apply the 2020 Protocol as written, reaching conclusions that have no support in its text.[27] The decisions based on the 2020 Protocol rely on interpretations of the CCA and CETA that are not supported by either statute. In addition, there is good cause to reconsider the Order due to its departure from fundamental ratemaking principles, and to avoid violations of constitutional dormant Commerce Clause principles.

A. The Commission should reconsider the Order's interpretation and application of the 2020 Protocol.

The Order disallows PacifiCorp's Chehalis CCA Cap and Invest Program allowance costs by concluding those costs should be situs assigned to Washington under the 2020 Protocol. The Order reaches this conclusion in two steps. First, it characterizes separate Washington statutes, CETA and CCA, as "a program that implements a state-specific initiative by creating portfolio standards under CETA and then distributing allowances to CETA-obligated utilities under the CCA."[28] Based on this novel interpretation of CCA and CETA, the Order finds that "the costs of CCA compliance from which the interaction with CETA shields Washington customers should be situs-assigned under the [2020 Protocol]," as a "State-Specific Initiative."[29] This approach treats Chehalis as a "State Resource" under the 2020 Protocol (contrary to its historical treatment as a "System Resource"), with its CCA compliance costs assigned to Washington. This results in a disallowance of approximately $13.8 million for PacifiCorp's costs to comply with CCA for the

[27] The 2020 Protocol "describes the way all components of PacifiCorp's regulated service, including costs, revenues, and benefits associated with generation, transmission, distribution, and wholesale transactions, should be allocated and assigned among the six States during the Interim Period." PAC/1316 at 5 (, Section 1). The "Interim Period" refers to January 1, 2020, to December 31, 2025, the period during which the approved 2020 Protocol remains in effect. *Id*. at 4 (2020 Protocol, Section 1). *See In the Matter of PacifiCorp, dba Pacific Power, Extension of the 2020 Protocol*, Docket UM 1050, Order No. 23-229 (June 30, 2023) (extending the effective date of 2020 Protocol through December 31, 2025).
[28] Order at 10.
[29] *Id.*

share of Chehalis that is Oregon-allocated.[30] Contrary to the terms of the 2020 Protocol, however, the Order does not remove the benefits of Chehalis from Oregon rates. As the Order stands, Oregon customers would receive the substantial benefits of power from Chehalis without paying their share of the compliance costs mandated by the CCA Cap and Invest Program.

1. Chehalis is a "System Resource" rather than a "State Resource" for purposes of 2020 Protocol cost allocation and assignment.

Under the 2020 Protocol, "Resources [are] allocated to one of two categories for inter-jurisdictional allocation purposes: System Resources or State Resources."[31] The 2020 Protocol defines a "Resource" as including "a Company-owned generating unit, plant, mine, long-term Wholesale Contract, Short-Term Purchase and Sale, Non-firm Purchase and Sale, or [Qualifying Facility] contract."[32] The 2020 Protocol provides the governing criteria for how to allocate a given Resource among PacifiCorp's six states. In this case, the Resource in question, Chehalis, is a "Company-owned generating unit."

For "System" resources used by Oregon customers, the Commission stated in its order approving the 2020 Protocol that the 2020 Protocol's cost allocation criteria require that "existing and new generation and transmission resources (online before 2024) [are] treated as system resources and allocated to Oregon based on our use of the PacifiCorp system."[33] Chehalis started commercial operations in October 2003, and PacifiCorp acquired the plant in 2008.[34] There is no

[30] In the TAM Initial Filing, the Company estimated CCA compliance costs at $73 million total-company or $20.4 million Oregon-allocated. PAC/100, Mitchell/21. In the TAM Final Update, PacifiCorp's CCA compliance costs decreased to $47.9 million total-company, or $13.8 million Oregon-allocated. *See* Docket UE 420, Advice 23-301, Transition Adjustment Mechanism Compliance Tariff Sheets, Attachment 2 at 2 (Nov. 15, 2023) (Final Update).
[31] PAC/1316 at 10 (2020 Protocol, Section 3.1.2).
[32] PAC/1316 at 74 (2020 Protocol, Appendix A).
[33] *In the Matter of PacifiCorp, dba Pacific Power, Request to Initiate an Investigation of Multi-Jurisdictional Issues and Approve an Inter-Jurisdictional Cost Allocation Protocol*, Docket UM 1050, Order No. 20-024 at 5 (Jan. 23, 2020) (2020 Protocol Order) ("Oregon's use will continue to be measured with the System Generation (SG) factor.")
[34] State of Washington Energy Facility Site Evaluation Council, "Chehalis Generation Facility," *available at*, https://www.efsec.wa.gov/energy-facilities/chehalis-generation-facility (last visited December 7, 2023).

dispute that Chehalis is an existing Resource that was online before 2024. The terms of the 2020 Protocol and the Commission's Order approving it categorize Chehalis as a System Resource for cost allocation purposes.[35] Moreover, the 2020 Protocol provides that "[g]eneration-related dispatch costs and associated plant will be" system allocated.[36] This makes sense because, among other reasons, it is difficult to quantify and situs assign the impact that incremental generation costs, such as taxes or environmental compliance costs, have on system plant dispatch.

To be categorized as a "State Resource" under the 2020 Protocol, the Resource must fit into one of three categories identified in Section 3.1.2.1: "Demand-Side Management Programs," "Portfolio Standards," or "State-Specific Initiatives."[37] The analysis in the Order includes references to "Portfolio Standards" and "State-Specific Initiatives," which are defined terms in the 2020 Protocol.

- "Portfolio Standard" is defined in the 2020 Protocol to mean "a law or regulation that requires PacifiCorp to acquire: (a) a particular type of Resource, (b) a particular quantity of Resources, (c) Resources in a prescribed manner or (d) Resources located in a particular geographic area."[38] The "portion of costs associated with Interim Period Resources acquired to comply with a State's Portfolio Standard . . . that exceed[s] the costs PacifiCorp would have otherwise incurred, will be allocated on a situs basis to the Jurisdiction adopting the Portfolio Standard."[39]

- "State-Specific Initiatives" include "Resource[s] acquired in accordance with a State-specific initiative," which may include, but are not limited to, Resources acquired to comply with "incentive programs, net-metering tariffs, feed-in tariffs, capacity standard programs, solar subscription programs, electric vehicle programs, and the acquisition of renewable energy certificates."[40] The 2020 Protocol notes that "[h]istorically, [State-Specific Initiatives] . . . have not included local fees or taxes related to the ongoing operation of existing transmission and generation facilities

[35] Staff's (later abandoned) initial recommendation was based on the understanding that Chehalis is allocated as a System Resource: "Since all states are allocated the costs of Chehalis, both operation and fixed, for allocation purposes, it seems reasonable to allocate the benefit of the permits across PacifiCorp's jurisdictional states." Staff/400, Anderson/14.
[36] PAC/1000, McVee/5; PAC/1316 at 13 (2020 Protocol, Section 3.1.7).
[37] PAC/1316 at 11 (2020 Protocol, Section 3.1.2.1). If Resources do not fit in one of the three "State" categories, they "are System Resources, which constitute the substantial majority of PacifiCorp's Resources." *Id.*
[38] PAC/1316 at 73 (2020 Protocol, Appendix A).
[39] *Id*. at 11 (2020 Protocol, Section 3.1.2.1).
[40] *Id.*

within a State."[41] The allocation and assignment rule for these Resources is clear: "Costs and benefits associated with Interim Period Resources acquired in accordance with a State-specific initiative will be allocated and assigned on a situs basis to the State adopting the initiative."[42]

The 2020 Protocol speaks to acquisition of the Resource whose costs and benefits are being allocated. It is only when PacifiCorp acquires the Resource as part of a state policy initiative that Section 3.1.2.1 and the "State Resources" category (with its attendant cost allocation and situs assignment criteria) come into play. Specifically, to qualify as a State Resource, PacifiCorp must have acquired the Resource because of a state-imposed requirement to procure specific types of resources.[43] For example, this could include renewable generation procured by PacifiCorp to comply with a state's Portfolio Standard, capacity standard, or incentive program.

There is no evidence that Chehalis, as the Resource subject to allocation in the Order, was "acquired to comply with" a Portfolio Standard or was "acquired in accordance with" a State-Specific Initiative program, including CCA and CETA. While Chehalis is certainly impacted by Washington's state mandates, under the terms of the 2020 Protocol, the imposition of new state-imposed costs or surcharges on an existing Resource does not convert that Resource into a "State Resource." The criteria for designating a Resource in the Portfolio Standard or State-Specific Initiative category focus on "Resources acquired in accordance with" the initiative. There is no evidence that Chehalis, as a Resource subject to the 2020 Protocol, was acquired to satisfy any of the types of programmatic state policy identified in the definition of Portfolio Standard or State-Specific Initiatives.[44] In fact, testimony from the Oregon general rate case where the inclusion of

[41] *Id.* at 40 (2020 Protocol, Section 5.8).
[42] *Id*. at 11.
[43] *Id*.
[44] *Id.* (The non-exhaustive list of examples includes "the costs and benefits of incentive programs, net-metering tariffs, feed-in tariffs, capacity standard programs, solar subscription programs, electric vehicle programs, and the acquisition of renewable energy certificates.")

Chehalis was approved for Oregon rates specifically identified the plant as a resource that was necessary to help meet an identified system deficit.[45]

2. The legal requirement that PacifiCorp incur CCA Cap and Invest Program allowance costs to enable Chehalis to serve Oregon customers does not constitute a "State-Specific Initiative" subject to situs assignment.

The Order finds that CCA and CETA should be viewed together as "a program that implements a state-specific initiative by creating portfolio standards under CETA and then distributing allowances to CETA-obligated utilities under the CCA."[46] Despite the fact that CCA and CETA are different statutes passed years apart, the Order concludes that the CCA and CETA "program" is a "state-specific initiative," and that CCA allowance costs necessary to provide Chehalis power to Oregon customers should be situs assigned to Washington under the 2020 Protocol.[47] The Order erroneously interprets the terms of CCA, CETA, and the 2020 Protocol, and disregards the record evidence regarding the compliance requirements associated with providing Chehalis power to Oregon customers.

PacifiCorp agrees that CETA is a State-Specific Initiative under the 2020 Protocol, with all incremental costs of CETA compliance appropriately situs assigned to Washington. As a State-Specific Initiative, all "benefits" of CETA are also situs assigned.[48] On the benefit side of the equation, Washington has decided to "distribute no-cost allowances to qualifying electric utilities to mitigate the cost burden of the program to electric customers who are also subject to [CETA]."[49] The situs-assigned Resources used to comply with CETA, along with calculations of the

[45] *In the Matter of PacifiCorp, d/b/a Pacific Power, Request for a General Rate Revision*, Docket UE 210, PPL/500, Bird/8 (Apr. 2, 2009) ("The acquisition of the [Chehalis] Plant provides a favorably-priced, flexible resource that the Company is now using to meet the resource needs for customers. The Plant satisfies a portion of the deficit identified in the 2007 IRP Update.")
[46] Order at 10.
[47] *Id*.
[48] PAC/1316 at 11 (2020 Protocol, Section 3.1.2.1)
[49] PAC/600, Shahumyan/4.

Company's Washington retail load, are used to determine the amount of no-cost allowances that PacifiCorp receives.[50]

In this way, the costs and benefits of CETA are fully allocated and assigned to Washington. Customers in Oregon and other states are not required to pay for PacifiCorp's incremental costs to comply with CETA, and the Company is not permitted to share the benefits associated with CETA compliance with its non-Washington customers.[51] The provisions that make no-cost allowances available to CETA-eligible utilities are included in the CCA, but CETA's status as a State-Specific Initiative under the 2020 Protocol does not convert independent CCA Cap and Invest Program compliance obligations into a State-Specific Initiative. PacifiCorp's obligations under the CCA Cap and Invest Program go well beyond any costs and benefits that can be plausibly linked to CETA.

The CCA Cap and Invest Program requires that PacifiCorp secure an allowance for each metric ton of carbon dioxide equivalent emitted from Chehalis; allowance costs are directly tied to the level of generation at the plant.[52] Compliance is demonstrated by retiring allowances for any GHG output from Chehalis within the State of Washington.[53] For energy from Chehalis allocated to serve customers outside Washington, the CCA imposes an obligation to obtain allowances proportionate to the cost-allocated share of Chehalis.[54]

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[50] PAC/1000, McVee/5.
[51] As noted in the Order, "the Company was given guidance by [Washington Department of Ecology (Ecology)] Ecology stating that the no-cost allowances must be allocated only to Washington customers." Order at 10. PacifiCorp attempted to persuade Ecology to permit PacifiCorp to share the benefits of no-cost allowances with customers in other states that receive power from Chehalis, but Ecology required that no-cost allowances be used exclusively to benefit Washington customers. *See* PAC/600, Shahumyan/5-6.
[52] PAC/600, Shahumyan/3; PAC/400, Mitchell/91 ("The costs associated with the Washington Cap and Invest Program represent incremental and actual costs of generating at the Chehalis plant[.]"); PAC/1000, McVee/5 ("[T]here is no compliance obligation if there is no generation and the amount of the compliance obligation is determined by the amount of generation.").
[53] PAC/600, Shahumyan/3.
[54] *Id.* at 3-4.

In practice, the Cap and Invest Program requirements are functionally equivalent to the California Cap and Trade program and other state programs and taxes that increase dispatch costs—none of which are treated by the Commission as State-Specific Initiatives for cost allocation purposes.[55] Ultimately, the requirements applicable to Chehalis are driven by the levels of GHG emissions the CCA aims to reduce within and beyond the electric industry; they are unrelated to the generation portfolio mandates that drive CETA.

The Order finds that CCA compliance costs might "constitute a tax or could be characterized as generation-dispatch costs," but for its linkage to CETA and no-cost allowances.[56] The record demonstrates, however, that the Company's CCA obligations, viewed as a whole, have a very limited, as the Order describes it, "interaction with CETA."[57] The connection that does exist is completely accounted for by situs assignment of the costs and benefits attributable to CETA. The limited interaction of the two statutes does not justify mischaracterizing PacifiCorp's obligations to procure allowances to serve Oregon customers as a cost that is appropriately situs assigned to Washington.

3. There is no legal or factual support for designating Chehalis CCA costs as associated with a Resource "acquired to comply with a Portfolio Standard."

The Order concludes that CETA and CCA interact to result in a "state-specific initiative,"[58] which under the 2020 Protocol would result in costs and benefits being situs assigned. The Order

[55] PAC/1000, McVee/6; PAC/100, Mitchell/21 ("From a cost perspective, the impact of [CCA] on the Company's service territory is identical to: 1) the impact of the current [Energy Imbalance Market (EIM)] GHG benefits received as a result of California's Cap and Trade program; 2) the impact of the current EIM inter-regional transfer benefits received from the [California Independent System Operator's] EIM, which reduces EIM export benefits by assessing a GHG related energy tax … and 3) Wyoming's wind tax."). Staff has acknowledged "the similarities between the California GHG emissions program and Washington's CETA and CCA." Staff Reply Brief at 6 (Oct. 2, 2023).
[56] Order at 9.
[57] *Id.* at 10.
[58] *Id.* ("The end result is a program that implements a state-specific initiative by creating portfolio standards under CETA and then distributing allowances to CETA-obligated utilities under the CCA.").

does not assert that CCA creates a Portfolio Standard or that Chehalis is an "Interim Period Resource[] acquired to comply" with a Portfolio Standard, and there is no record support for either of those contentions.

In briefs and in the Order, however, there are references that could be read to blend or confuse the State-Specific Initiatives and Portfolio Standard cost allocation categories,[59] so PacifiCorp briefly addresses the issue.

In the 2020 Protocol, cost allocation is treated differently under the Portfolio Standard and State-Specific Initiative classifications. Section 3.1.2.1 provides that "[t]he portion of costs associated with Interim Period[60] Resources acquired to comply with a State's Portfolio Standard . . . that exceed[s] the costs PacifiCorp would have otherwise incurred, will be allocated on a situs basis to the Jurisdiction adopting the Portfolio Standard."[61] The language does not eliminate the need to match allocation of costs and benefits, but provides a specific limit bounded by the "portion of costs" associated with a Portfolio Standard.

The Order characterizes CETA (rather than CCA) as creating the Portfolio Standard relevant to the Commission's approach.[62] As discussed above, any "costs associated with Interim Period Resources acquired to comply" with CETA are already situs assigned to Washington. This would include any costs "that exceed the costs PacifiCorp would have otherwise incurred" (*i.e.*, all incremental costs associated with Resources acquired to comply with CETA are situs assigned to Washington). In fact, this would be the case whether CETA is characterized as a Portfolio Standard or a State-Specific Initiative. As with State-Specific Initiatives, the 2020 Protocol

[59] *See id.* at 9-10.
[60] As discussed in footnote 27, the "Interim Period" refers to January 1, 2020, to December 31, 2025, the period during which the approved 2020 Protocol remains in effect. *Id*. at 4 (2020 Protocol, Section 1). *See* Docket UM 1050, Order No. 23-229 (extending the effective date of 2020 Protocol through December 31, 2025).
[61] PAC/1316 at 11 (2020 Protocol, Section 3.1.2.1).
[62] Order at 10.

contemplates that, consistent with standard ratemaking principles, costs and benefits associated with a State Resource should not be disconnected.[63] Thus, the designation of CCA as a Portfolio Standard (which it is not) would not result in any substantive change to the proper allocation of the Oregon share of Chehalis costs and benefits.

4. The Order impermissibly disconnects allocation of Chehalis "costs and benefits."

Assuming for argument that Chehalis qualifies for treatment as a situs-assigned State-Specific Initiative Resource, the 2020 Protocol requires that both the "*costs and benefits* associated with Interim Period Resources acquired in accordance with a State-specific initiative" be "assigned on a situs basis to the State adopting the initiative."[64] Consistent with fundamental ratemaking principles, the 2020 Protocol provisions designating State Resources do not permit assignment of costs to be disconnected from assignment of benefits.

The record identifies the costs PacifiCorp incurs to comply with CCA Cap and Invest Program requirements, which "assesses a charge per megawatt-hour (MWh) of energy produced" from Chehalis.[65] The Company's CCA compliance costs are approximately $47.9 million on a total-company basis, or $13.8 million Oregon-allocated.[66] The substantial benefits of Chehalis power to Oregon customers are also documented in the record. Without Chehalis, forecast NPC increases by approximately $131 million total-company, or $37 million Oregon-allocated.[67] Even accounting for CCA compliance costs, generation from Chehalis results in significant net benefits to Oregon customers.

[63] PAC/1316 at 11 (2020 Protocol, Section 3.1.2.1).
[64] *Id.* (emphasis supplied).
[65] PAC/100, Mitchell/20-21.
[66] Final Update, *supra* note 30.
[67] PAC/800, Mitchell/74.

The 2020 Protocol requires that both the "costs and benefits" of a Resource classified as a State-Specific Initiative be situs assigned if either is situs assigned.[68] The Order does not comply with this requirement of the 2020 Protocol and the Commission's order approving it. Rather, the Order situs assigns the CCA costs required to provide power to Oregon customers entirely to Washington but maintains the benefits Oregon customers receive from their share of the power generated at Chehalis.[69]

In its reply brief, Staff "acknowledges that costs associated with the production of energy are typically allocated to those who are served by the energy."[70] Nevertheless, Staff's reply brief asserts—without record support and for the first time in its testimony or briefs—that the "benefit associated with the CCA" is not energy production but GHG emissions reduction.[71] This argument posits that the relevant "benefit" to be allocated is not the one that causes PacifiCorp to incur the "cost" in question. Using this reasoning, any tax or other compliance cost would not be recoverable in rates. For example, federal income taxes incurred by a utility would not be a recoverable cost, because the benefit of paying those taxes could be declared to be national defense or Medicare (rather than the relevant benefit: the provision of electric service that would not be available if the utility did not pay its income taxes).

While the Order does not explicitly accept Staff's theory of CCA "benefits," the Order shares that argument's failure to observe the basic ratemaking principle that costs should be

[68] PAC/1316 at 11 (2020 Protocol, Section 3.1.2.1).
[69] Notably, AWEC indicates it would agree that the approach to allocating costs and benefits taken by the Commission is an erroneous application of the 2020 Protocol. *See* AWEC Opening Brief at 13 ("AWEC does not disagree with PacifiCorp that, in general, generation taxes should be borne by the customers that receive the benefits of that generation, *which is what the 2020 Protocol does*.") (emphasis supplied).
[70] Staff Reply Brief at 2.
[71] *Id*.

recovered from those who benefit from a service.[72] In setting rates, the Commission must examine a utility's actual costs in providing service; a "utility is entitled to have rates set to recover those costs: actual costs equal authorized revenues."[73] From the earliest days of utility regulation, Oregon courts have held that when a utility "gives to the public the right or option to demand its service or the use of its property," the exchange for that public benefit is "the condition of just compensation[.]"[74]

Staff acknowledges the principle that costs should match benefits in Oregon ratemaking but argues that "those principles are superseded in this case by the allocation methodology in the 2020 Protocol."[75] This argument has it exactly backward: the 2020 Protocol cost allocation structure tracks traditional cost causation. When the 2020 Protocol situs assigns a Resource acquired in accordance with a State-Specific Initiative, it assigns the "[c]osts and benefits associated with" that Resource.[76] The 2020 Protocol's cost allocation methodology demands that costs not be disconnected from benefits—and that the benefits are those that arise from use of the Resource in question.

The Order holds that the 2020 Protocol "is designed to isolate state-specific electricity policy costs like this one."[77] As detailed above, the 2020 Protocol provides the State Resources category for identifying Resources that are attributable to "state-specific electricity policy costs."

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[72] "In ratemaking, utilities and regulators strive to allocate costs according to causation … [t]he cost-causation principle compares 'the costs assessed against a party to the . . . benefits drawn by that party." *In the Matter of J.M.G. v. PacifiCorp, dba Pacific Power*, Docket UCR 191, Order No. 18-430 (Nov. 5, 2018) (*quoting S.C. Pub. Serv. Auth. v. FERC*, 762 F3d 41, 48 (DC Cir 2014)).

[73] *American Can Co. v. Lobdell*, 55 Or App 451, 454 (1982). If "actual costs will exceed actual revenues under the existing rate structure, the utility is entitled to increase its revenues, by increasing rates, to recover that excess." *Id.* at 454-55.

[74] *Hammond Lumber Co. v. Pub. Serv. Comm'n*, 96 Or 595, 604 (1920).

[75] Staff Reply Brief at 3.

[76] PAC/1316 at 11 (2020 Protocol, Section 3.1.2.1).

[77] Order at 10. *See also* Staff Opening Brief at 4 ("The CETA is a portfolio standard by name and the CCA is a portfolio standard in effect. Under the 2020 Protocol, the treatment of costs associated with a state-specific initiative such a [sic] portfolio standard is clear; the costs are situs assigned.").

If the Resource satisfies the criteria for State Resources that constitute State-Specific Initiatives, that appropriately results in situs assignment of those costs. Even in such cases, however, allocation and assignment of costs pursuant to the 2020 Protocol are not "isolated" from allocation and assignment of the benefits a state's customers receive from the Resource.

The Order contravenes that basic allocation rule, enabling Oregon customers to continue to benefit from Chehalis generation while disallowing costs required to provide it to them. This outcome is entirely at odds with the plain language of the 2020 Protocol and should be reconsidered by the Commission.

5. The Order applies the 2020 Protocol in a manner that discriminates against PacifiCorp as a utility providing interstate services.

The Commission appropriately determined in the Order that it did not "need to decide the merits of AWEC's dormant commerce clause argument" regarding the constitutionality of the CCA Cap and Invest Program.[78] Following the dismissal of Invenergy's legal challenge to the CCA in November 2023,[79] PacifiCorp filed a complaint in federal district court in Tacoma, Washington, raising concerns regarding the constitutionality of certain provisions of the CCA under the dormant Commerce Clause.[80] But, as PacifiCorp noted in its briefs in this case, unless and until a court rules on the issues that have been raised, PacifiCorp must comply with the law.[81]

Whatever the merits of dormant Commerce Clause challenges to the CCA, the Commission's application of the 2020 Protocol creates an outcome that itself offends dormant Commerce Clause principles. The Commission's Order misapplies the neutral, non-discriminatory

[78] Order at 10.
[79] *Invenergy Thermal LLC, and Grays Harbor Energy LLC v. Watson*, Case No. 3:22-cv-05967-BHS, Order (WD Wash, Nov. 3, 2023).
[80] *PacifiCorp v. Watson*, Case No. 3:23-cv-6155, Complaint (WD Wash, Dec. 15, 2023).
[81] PacifiCorp's Opening Brief at 17 (Sept. 22, 2023).

terms of the 2020 Protocol to create an outcome that, in practical effect, results in "purposeful discrimination against out-of-state economic interests."[82]

PacifiCorp witnesses identified the ways in which CCA costs are similar to other inter-regional taxes and transfer costs resulting from the California Cap and Trade program, the Energy Imbalance Market, and the Wyoming wind tax.[83] The Order denies PacifiCorp recovery of costs that are functionally the same as other state assessments that PacifiCorp is authorized to recover in its rates. The basis for the disparate treatment appears to be the Commission's determination that, due to its dissatisfaction with the way Washington distributes in-state CCA allowances, certain interstate power transmitted from Washington will be treated differently than interstate power that PacifiCorp produces in the other states, including Oregon. The result of the Commission's decision is to protect Oregon consumers from added costs in their rates, while leaving PacifiCorp unable to recover $13.8 million in legal compliance costs that it cannot avoid. In this way, the Order converts the 2020 Protocol from a reasonable cost allocation methodology into a means of discriminating against PacifiCorp as an interstate electric utility.

In the Commerce Clause context, "discrimination" means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[84] A decision in 2023 summarized interstate commerce discrimination, overturning a Kentucky law favoring locally produced coal, noting that "[t]he real question . . . is not whether [the state law] *differentiates* between in-state and out-of-state coal but whether it impermissibly *discriminates*. . .

[82] *Nat'l Pork Producers Council v. Ross*, 598 US 356, 143 S Ct 1142, 1154 (2023). The U.S. Supreme Court has overturned state administrative agency decisions, as well as state statutes and regulations, based on violations of the dormant Commerce Clause. *See, e.g., New England Power Co. v. New Hampshire*, 455 US 331 (1982) (overturning an order of the New Hampshire Public Utilities Commission); *West Lynn Creamery, Inc. v. Healy*, 512 US 186 (1994) (invalidating a pricing order issued by the Massachusetts Department of Food and Agriculture).
[83] PAC/100, Mitchell/21; PAC/1000, McVee/3-4, 6 (highlighting the disparate treatment of CCA costs adopted by the Order compared to Oregon's allocation of "costs like the Wyoming wind tax, Portland Harbor remediation costs, [and] upgrades at generation facilities that are necessary to comply with environmental requirements")
[84] *Or. Waste Systems, Inc. v. Dep't of Env't Quality of Or.*, 511 US 93, 99 (1994).

. That is, does the law benefit in-staters and burden outsiders?"[85] Impermissible discrimination "is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States."[86]

This "antidiscrimination principle lies at the 'very core' of . . . dormant Commerce Clause jurisprudence."[87] Even if a state law, regulation, or order does not discriminate on its face, its "practical effects may also disclose the presence of a discriminatory purpose."[88] In examining state actions impacting interstate commerce, U.S. Supreme Court cases often find discriminatory practical effects in the cases of "state laws that impose burdens on the arteries of commerce, on trucks, trains, and the like."[89]

Here, the Commission interprets the 2020 Protocol, which was approved by a Commission order and which, on its face, is neutral and serves a legitimate purpose. The 2020 Protocol is, in fact, a methodology for managing the "arteries of commerce" among the states served by PacifiCorp.[90] The Commission's interpretation of the 2020 Protocol, however, results in discriminatory practical effects—allocating the benefits but not the costs of Chehalis power to Oregon customers.

The misapplication of the 2020 Protocol gives Oregon consumers an advantage to the detriment of the provision of interstate electricity by PacifiCorp. The outcome stems from the

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[85] *Foresight Coal Sales, LLC v. Chandler*, 60 F4th 288, 297-98 (6th Cir 2023), *cert den sub nom Chandler v. Foresight Coal Sales, LLC*, __ U.S. __ (Oct. 2, 2023) (emphases in original).
[86] *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 US 564, 577-78 (1997) (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 US 573, 580 (1986)).
[87] *Nat'l Pork Producers*, 143 S Ct at 1153.
[88] *Id.* at 1157.
[89] *Id.* at 1166 (Sotomayor, J., concurring).
[90] *See NextEra Cap. Holdings, Inc. v. Lake*, 48 F4th 306, (5th Cir 2022) (The "interstate grid [is] much closer to the heartland of interstate commerce than the wine stores, dairies, or waste processing facilities that have faced dormant Commerce Clause scrutiny. The Supreme Court recognized the interstate character of the electricity market a decade before it recognized that Congress could regulate factories because of their effect on interstate commerce.") (internal citations omitted).

Commission's disapproval of Washington's provision of cost-free CCA allowances to in-state Washington retail utility customers.[91] As the Order acknowledges, PacifiCorp cannot recover from its Washington customers the CCA costs for Chehalis power used to serve Oregon.[92] Nevertheless, the Order disallows PacifiCorp's CCA costs when it sells Chehalis power in interstate commerce to Oregon customers—sales that require PacifiCorp to incur the costs of securing CCA allowances.

PacifiCorp urges the Commission to reconsider the Order to ensure its compliance with the dormant Commerce Clause. The Commission could achieve this by: (a) applying the neutral and non-discriminatory 2020 Protocol provisions as written and finding that Chehalis remains a "System Resource"; or (b) maintaining the Commission's position that Chehalis is a "State Resource" but removing the benefits of Chehalis from Oregon NPC.

B. If the Commission will not reconsider its disallowance of CCA compliance costs, it should revise the Order to remove Chehalis power from Oregon rates.

For the reasons discussed herein, if the Commission applies the 2020 Protocol according to its terms, Chehalis should be designated as a System Resource, with Oregon paying its share of CCA compliance costs commensurate with its share of all other generation-related costs. This outcome is consistent with the terms of the 2020 Protocol, the applicable provisions of CCA and CETA, and sound public policy.[93] Otherwise, the Commission "would shift the costs of complying" with the Washington CCA "to the Company, essentially creating a disallowance for compliance with state law."[94]

[91] The Order states that the CETA and CCA "program viewed as a whole goes beyond [constituting a tax] by providing cost-free allowances to Washington retail customers alone during the path to full CETA compliance in 2045[,]" and "the costs of CCA compliance from which the interaction with CETA shields Washington customers should be situs-assigned." Order at 9-10.
[92] *Id.* at 10 ("We understand the position that this conclusion puts PacifiCorp in; and the Company was given guidance by Ecology stating that the no-cost allowances must be allocated only to Washington customers.").
[93] PAC/1000, McVee/1.
[94] *Id.* at McVee/3.

If the Commission will not reconsider its determination regarding situs assignment of CCA Cap and Invest Program compliance costs, PacifiCorp renews its request made in testimony that Oregon customers forgo the benefits of Chehalis's generation.[95] This outcome is reasonable and consistent with governing law if Oregon customers do not pay compliance costs for Chehalis.

As it made clear in its testimony, PacifiCorp does not favor this outcome. It would increase Oregon rates: The removal of Chehalis from Oregon rates would result in a forecast NPC increase of approximately $37 million Oregon-allocated.[96] It would also "set[] a poor precedent for other existing and future environmental compliance costs imposed by other states on generating resources located in those states."[97] In addition, it could lead other states to impose situs assignment of Oregon's environmental policies that impact System Resources located in Oregon.[98]

If the Commission remains determined to designate Chehalis CCA compliance costs as part of a State-Specific Initiative, the Commission should act consistently with the terms of the 2020 Protocol and remove both the costs and benefits of Chehalis from Oregon rates. Otherwise, PacifiCorp will be required to subsidize Oregon rates in a manner that is inconsistent with the approved cost allocation methodology, contrary to established ratemaking principles, and results in rates that are not just and reasonable.

V. CONCLUSION

The Commission should reconsider its decision to situs assign CCA Cap and Invest Program compliance costs to Washington, apply the 2020 Protocol provisions as written, and find that Chehalis remains a "System Resource" for cost allocation purposes. Alternatively, if the Commission maintains its position that Chehalis is a "State Resource" under the 2020 Protocol, it

[95] *Id.*
[96] PAC/800, Mitchell/74.
[97] PAC/1000, McVee/4.
[98] *Id.*

should revise the Order to remove both the costs and benefits of Chehalis generation from Oregon NPC.

Respectfully submitted this 22nd day of December 2023.

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