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October 2, 2023

VIA ELECTRONIC FILING

Attention: Filing Center
Public Utility Commission of Oregon
201 High Street SE, Suite 100
Salem, Oregon 97308-1088

Re: UE 420 – *In the Matter of PACIFICORP, dba PACIFIC POWER, 2024 Transition Adjustment Mechanism.*

Attention Filing Center:

Attached for filing in the above-referenced docket is PacifiCorp dba Pacific Power's Reply Brief. Confidential material in support of this filing has been provided to parties under Order No. 16-128. Highly confidential material in support of this filing has been provided to parties under Order No. 23-211.

Please contact this office with any questions.

Sincerely,

Adam Lowney

Attachment

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 REPLY BRIEF

Redacted

October 2, 2023

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I. INTRODUCTION

In accordance with the Scheduling Memorandum issued by Administrative Law Judge Katharine Mapes on September 8, 2023, PacifiCorp d/b/a Pacific Power (PacifiCorp or the Company) submits this Reply Brief in the 2024 Transition Adjustment Mechanism (TAM) responding to the Opening Briefs filed on September 22, 2023, by Staff, the Alliance of Western Energy Consumers (AWEC), and Sierra Club. This reply brief addresses the appropriate treatment of costs resulting from the Washington Cap and Invest Program created by the Climate Commitment Act (CCA) and Sierra Club's coal-related adjustments and recommendations.

The Public Utility Commission of Oregon (Commission) should approve recovery of the compliance costs imposed by the Washington Cap and Invest Program on the Chehalis gas-fired generation plant (Chehalis). Chehalis provides significant net power cost (NPC) benefits to Oregon customers even accounting for the Cap and Invest Program costs—without Chehalis NPC increases by $37 million. Denying recovery of CCA compliance costs would allow Oregon customers to take the benefits without paying the costs, in contravention of the 2020 PacifiCorp Inter-Jurisdictional Allocation Protocol (2020 Protocol). The Commission should also reject AWEC's request to rule the CCA unconstitutional and allow the constitutionality to be determined by Washington courts. Adopting AWEC's argument would require the Commission to make a series of far-reaching factual findings that the record in this case does not support. Unless and until a court of competent jurisdiction invalidates the CCA, the Company is required to comply with Washington law and should recover the reasonable costs to do so.

As for Sierra Club's issues, its Opening Brief addresses only the Jim Bridger Long-Term Fuel Supply Plan (2023 Fuel Plan). By failing to support its proposed disallowance of the Hunter/Gentry coal supply agreement (CSA), Sierra Club has conceded the issue and the Commission should reject the adjustment. Further, in urging adoption of Scenario 4 in the 2023 Fuel Plan, Sierra Club ignores the evidence in support of the Company's Preferred Scenario, Scenarios 5/6. Scenario 4 would increase NPC in the short-term [REDACTED] total company in

the 2024 TAM) and in the long-term [redacted] total company during the full planning horizon) and is higher risk than the Preferred Scenario. Finally, to align with the purpose of the long-term fuel plan process, the Commission should continue the current biennial schedule for future fuel plans and reject Sierra Club's recommendation for annual fuel plans.

II. WASHINGTON CAP AND INVEST PROGRAM

The Washington Cap and Invest Program imposes a generally applicable requirement to acquire greenhouse gas (GHG) emission allowances for all generating facilities located in Washington state, which means that PacifiCorp must acquire GHG emission allowances for Chehalis generation.[1] The CCA also calls for the Washington Department of Ecology (Ecology) to allocate a certain number of no-cost allowances, but only to utilities subject to Washington's Clean Energy Transformation Act (CETA); the amount of no-cost allowances are calculated based on the Company's retail load and CETA-compliant resources used to serve that load.[2]

Here, Staff's position on the treatment of Cap and Investment Program costs has continually evolved. In opening testimony, Staff recommended the Commission system allocate the value of all the no-cost allowances provided to PacifiCorp.[3] In rebuttal testimony, Staff alternatively recommended the Commission system allocate 50 percent of the value of the no-cost allowances provided to PacifiCorp.[4] Then, in errata testimony filed after the Company's surrebuttal testimony, Staff added another alternative to remove all Cap and Invest Program costs from the TAM.[5]

In its Opening Brief, Staff's primary recommendation is to remove all Cap and Invest Compliance Costs from the TAM, relegating its initial recommendations to a footnote.[6] Staff now argues that the 2020 Protocol requires that Oregon customers receive the benefits of

[1] PAC/600, Shahumyan/3; RCW 70A.65.080(1)(b).
[2] RCW 70A.65.120(1); WAC 173-446-230(2)(a)-(b).
[3] Staff/400, Anderson/14.
[4] Staff/1000, Anderson/16-17.
[5] Staff's Errata to Rebuttal Testimony (Staff/1000, Anderson/17).
[6] Staff Opening Brief at 1 (Sept. 22, 2023) (Staff recommends removing $21 million in CCA compliance costs from the TAM, which represents the value of its errata testimony adjustment); *see also id.* at 6 n.15.

Chehalis generation, while Washington customers bear all the CCA compliance costs required to generate those benefits because, according to Staff, the CCA is a "state-specific initiative" under the 2020 Protocol.[7] Contrary to Staff's understanding of the 2020 Protocol, the emission allowances for Chehalis are a generation-related tax or dispatch cost and are therefore system allocated, including a share to Oregon customers. Notably, Staff is the only party in this case that interprets the 2020 Protocol to require situs assignment of the CCA compliance costs to Washington; even AWEC disagrees with Staff's argument.[8]

AWEC's argument is more straightforward—AWEC generally agrees with PacifiCorp that the 2020 Protocol would allocate the costs of the Cap and Invest Program to Oregon as a generation tax.[9] Therefore, if the 2020 Protocol governs the CCA, then AWEC's adjustment must be rejected. To get around this inconvenient fact, AWEC claims that the Washington CCA is unconstitutional under the dormant Commerce Clause and therefore the 2020 Protocol does not apply.[10] To adopt AWEC's recommendation, therefore, requires the Commission to make a positive determination that the CCA is unconstitutional; otherwise, there is no basis to exclude the Cap and Invest Program costs from the TAM under the 2020 Protocol. Determining the constitutionality of a Washington law, however, is far outside the scope of the TAM, where the Commission cannot on its own relieve the Company of its CCA compliance obligations and where the record is insufficient for the Commission to make such a far-reaching constitutional determination. Moreover, the constitutionality of the CCA is currently pending in a Washington federal court and to the extent AWEC believes the CCA is unenforceable, AWEC can challenge the law in a Washington court that can provide the relief AWEC seeks.

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[7] *Id.* at 4-5.
[8] AWEC Opening Brief at 13 (Sept. 22, 2023) ("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.").
[9] *Id.*
[10] *Id.* at 13-14.

A. Neither Staff nor AWEC dispute the customer benefits received from Chehalis generation.

There is no dispute that Chehalis provides NPC benefits to Oregon customers even after accounting for the Cap and Invest Program compliance costs.[11] Neither AWEC nor Staff acknowledge these customer benefits, except tangentially when AWEC argues, without irony, that it would be improper to situs assign CCA compliance costs to Washington because "[i]t would be unjust and unreasonable for Washington customers to pay for allowances associated with generation when they do not receive the benefits."[12] Similarly, it would be unjust and unreasonable for Oregon customers to receive NPC benefits without paying for the allowances necessary to produce the benefits.[13] AWEC's argument supports allocation of CCA compliance costs to Oregon customers, or, conversely, removal of Chehalis from the TAM forecast if the compliance costs are disallowed. Without Chehalis, Oregon NPC increases by $37 million.[14]

B. Allocating CCA compliance costs to Oregon is consistent with the 2020 Protocol.

1. The Cap and Invest Program compliance costs are appropriately system allocated as generation-related taxes or dispatch costs.

Staff concedes that "generation-related dispatch costs" and "generation and fuel-related taxes" are system allocated under the 2020 Protocol.[15] However, without explanation, Staff summarily claims that the Cap and Invest Program costs are not "properly characterized" as a generation or fuel-related tax.[16] Instead of explaining its position, Staff simply points out that Staff agrees the Wyoming wind tax is appropriately system allocated because it is a tax of $1.00 per megawatt-hour for production of electricity from wind resources in Wyoming.[17] This description perfectly matches the costs imposed by the Cap and Invest Program—the Company is required to pay for allowances based on the megawatt-hour production level at Chehalis, just

[11] PAC/800, Mitchell/74.
[12] AWEC Opening Brief at 14.
[13] PAC/1000, McVee/3.
[14] PAC/800, Mitchell/74.
[15] Staff Opening Brief at 4-5.
[16] *Id.* at 5.
[17] *Id.*

like the Wyoming wind tax.[18] Because there is no meaningful distinction between the Wyoming wind tax and the Cap and Invest Program compliance costs, there is no reason to treat these generation taxes (or dispatch costs) differently under the 2020 Protocol.

Staff's understanding of generation taxes under the 2020 Protocol is not only unexplained and inconsistently applied, but also opposed by AWEC. Indeed, AWEC agrees 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."[19] But AWEC argues that the Cap and Invest Program costs are unconstitutional so the 2020 Protocol does not apply.[20] This means that AWEC appears to concede that the Cap and Invest Program compliance costs are appropriately system allocated under the 2020 Protocol as a generation tax, absent the Commission ruling that the CCA is unconstitutional (which is discussed below).

2. The generally applicable generation tax created by the Cap and Invest Program is not a state-specific initiative under the 2020 Protocol.

Staff originally recommended removal of all Cap and Invest Program costs from Oregon rates because the Cap and Invest Program was a "state-specific initiative" under Section 5.8 of the 2020 Protocol.[21] Staff now concedes its reliance on Section 5.8 was in error because that provision is not binding, but that error did not change Staff's recommendation.[22] Instead, Staff now relies on Section 3.1.2.1 of the 2020 Protocol and continues to argue that all CCA costs must be situs-assigned to Washington as a "state-specific initiative."[23] Although Staff has now cited the correct provision of the 2020 Protocol for state-specific initiatives, Staff's recommendation remains contrary to the text and intent of the 2020 Protocol.

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[18] The Cap and Invest Program requires the Company to secure an allowance for each metric ton of carbon dioxide equivalent emitted from Chehalis. RCW 70A.65.010(1). Emissions are tied directly to generation levels because emissions increase as generation increases.
[19] AWEC Opening Brief at 13.
[20] *Id.* at 13-14.
[21] Staff/400, Anderson/14.
[22] Staff Opening Brief at 7.
[23] *Id*.

Section 3.1.2.1 of the 2020 Protocol provides that the costs and benefits of three types of resources are situs-assigned—demand response programs, portfolio standards, and state-specific initiatives.[24] For portfolio standards, the 2020 Protocol states the "portion of costs associated with [resources] acquired to comply with a State's Portfolio Standard . . . that exceed the costs PacifiCorp would have otherwise incurred, will be allocated on a situs basis to the Jurisdiction adopting the Portfolio Standard."[25] For state-specific initiatives, the 2020 Protocol states that "[r]esources acquired in accordance with a State-specific initiative will be allocated and assigned on a situs basis to the State adopting the initiative."[26] The 2020 Protocol lists examples of state-specific initiatives, which include incentive programs, net-metering tariffs, feed-in tariffs, capacity standard programs, solar subscription programs, electric vehicle programs, and the acquisition of renewable energy certificates.[27] Generally, Section 3.1.2.1 of the 2020 Protocol is applicable to incremental resources acquired because of a state-imposed requirement to procure specific resource types, not generation taxes or dispatch costs imposed by a state on an existing resource within that state, which is what Washington has done by requiring emission allowances for Chehalis generation.[28] Indeed, the 2020 Protocol itself explains that state-specific initiatives typically do not include taxes related to the ongoing operation of existing generation facilities within a state.[29]

Staff claims that because Washington provides no-cost allowances only to utilities subject to CETA and because CETA is a portfolio standard, the CCA is also a portfolio standard that must be situs-assigned to Washington.[30] Staff's argument improperly conflates two different programs. CETA imposes requirements on PacifiCorp to serve its Washington retail customers with a specific mix of resources, and that obligation will likely require PacifiCorp

[24] PAC/1316 at 11.
[25] PAC/1316 at 11.
[26] PAC/1316 at 11.
[27] PAC/1316 at 11-12.
[28] PAC/600, Shahumyan/3-4.
[29] PAC/1316 at 40.
[30] Staff Opening Brief at 5-6.

incur incremental resource costs specifically to meet CETA's requirements.[31] For this reason, CETA compliance costs are situs-assigned to Washington. While the CCA also imposes costs and has the same general goal of reducing GHG emissions, it is structured in a fundamentally different way because it imposes generally applicable emission allowance requirements on all generators located in Washington.[32] Because the CCA imposes a generally applicable generation tax,[33] not a requirement that PacifiCorp serve Washington customers with a specific portfolio of resources, the CCA costs are appropriately system-allocated, while CETA costs are situs-assigned. Notably, Staff is the only party in this case that argues that the CCA is a state-specific initiative that requires situs-assignment under the 2020 Protocol. Both PacifiCorp and AWEC reject Staff's interpretation of the 2020 Protocol.[34]

Staff also argues that it is "unfair to require Oregon to absorb costs of achieving Washington's zero-emission targets because Washington structured its program as a cap-and-trade program rather than a portfolio standard."[35] However, the structure of the program is precisely what determines its allocation under the 2020 Protocol, not the program goals. Here, the Cap and Invest Program imposes a generally applicable generation tax just like the Wyoming wind tax.[36] That the generation tax created by the CCA seeks to reduce GHG emissions does not mean it must be situs assigned to Washington. Indeed, Staff's position here would create a policy where Oregon would pay only taxes that incent higher GHG emissions (the Wyoming wind tax), while rejecting taxes designed to reduce GHG emission (Cap and Invest Program).

Moreover, Staff's position on the CCA is inconsistent with Staff's position on the comparable California cap and trade program. Staff has not proposed situs assigning the costs and benefits of California's cap and trade program, even though it too is structured as a cap-and-

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[31] *See, e.g.*, RCW 19.405.030(1)(a) ("On or before December 31, 2025, each electric utility must eliminate coal-fired resources from its allocation of electricity.").
[32] RCW 70A.65.080(1)(b).
[33] RCW 70A.65.060(1).
[34] AWEC Opening Brief at 13.
[35] Staff Opening Brief at 7.
[36] PAC/1000, McVee/3-4.

trade program rather than a portfolio standard.[37] Through the California cap and trade program, the Company generated GHG benefits that reduced total-company NPC by [REDACTED], which is a benefit received by Oregon because of the system allocation of costs and benefits of the California cap and trade program.[38]

Staff further argues it is unfair for Oregon customers to pay the CCA generation tax while also paying for Oregon's state-specific initiatives.[39] To the extent such treatment is unfair, it is a result of how Oregon has structured its programs. More importantly, however, Staff's equity argument falls flat when Staff insists that Oregon customers receive the NPC benefits of Chehalis—which reduce NPC by $37 million—while refusing to pay the costs to generate those benefits or when Staff takes the *benefits* of the California cap and trade program while refusing the *costs* of the Washington Cap and Invest Program or when Staff insists that the Commission disallow recovery of costs required by Washington thereby punishing the Company for following the law.

3. System allocating the generally applicable CCA generation tax, while situs assigning the no-cost allowances, is consistent with the 2020 Protocol and not unfair or discriminatory.

As an alternative to Staff's primary recommendation, Staff argues that if "paying for CETA is not the same as paying for the CCA," then providing no-cost allowances to Washington customers is discriminatory and the Commission should therefore system allocate the value of the no-cost allowances so that Oregon customers receive a share.[40] Staff's argument improperly conflates different provisions of the 2020 Protocol.

First, generally applicable generation taxes or dispatch-related costs, like the GHG emission allowances applicable to Chehalis, are system allocated under the 2020 Protocol,[41] as discussed above. Second, the no-cost allowances are situs assigned to Washington as a state-

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[37] PAC/1000, McVee/6.
[38] PAC/400, Mitchell/13.
[39] Staff Opening Brief at 7.
[40] *Id.* at 6 n.15.
[41] PAC/1316 at 13-14.

specific initiative because they are provided to PacifiCorp only because PacifiCorp is subject to CETA, which is also situs-assigned to Washington.[42] Notably, when addressing Staff's recommendation to system allocate a portion of the no-cost allowances to Oregon, AWEC argued doing so "would violate the 2020 Protocol, an allocation method 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."[43]

Finally, Staff argues it is "unfair to require Oregon to absorb costs of . . . Washington's climate protection program because Washington has adopted legislation to statutorily preclude PacifiCorp from passing the costs of the Washington program to its Washington customers."[44] To be clear, the Cap and Invest Program costs paid by Oregon customers are unaffected by the no-cost allowances provided by Ecology, i.e., Oregon is not absorbing costs that would otherwise have been paid by Washington but for the no-cost allowances. Under the 2020 Protocol, Oregon customers pay for their allocated share of Chehalis generation and pay their allocated share of the generation tax imposed by the CCA, resulting in net customer benefits in the TAM.[45]

4. PacifiCorp and stakeholders continue to work toward a replacement for the 2020 Protocol, which will presumably address the treatment of the CCA.

AWEC argues that CCA costs should be excluded from the TAM because "PacifiCorp can work with its other states through the Multi-State Process ('MSP') to allocate all of Chehalis' generation to its Washington customers, which would allow PacifiCorp to receive free allowances for the entirety of Chehalis' emissions."[46] Contrary to AWEC's implication, the Company cannot unilaterally impose on stakeholders an allocation methodology that assigns all the costs and benefits of Chehalis to Washington. To reach that result, Washington must accept

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[42] Evidentiary Hearing Transcript 19:23-25, 20:1-3 (Sept. 7, 2023) [hereinafter Evid. Tr.]; *see also* PacifiCorp Opening Brief at 14-16.
[43] AWEC Opening Brief at 13 (internal footnotes omitted).
[44] Staff Opening Brief at 7.
[45] PAC/1000, McVee/3; PAC/800, Mitchell/74.
[46] AWEC Opening Brief at 3.

all the costs and benefits of Chehalis and every other state must agree to forgo the costs and benefits of Chehalis, which in this case would increase Oregon-allocated NPC by $37 million.[47] While such an outcome may occur, such realignment is under negotiation in the MSP Framework Issues Workgroup and there is no basis for the Commission to preemptively impose a new allocation framework in this TAM that deviates from the Commission-approved 2020 Protocol—which both AWEC and Staff signed.[48]

C. The constitutionality of the CCA is far outside the scope of the TAM.

AWEC recommends the Commission disallow recovery of all Cap and Invest Program costs.[49] AWEC's *only* basis for this recommendation is its argument that the provision of no-cost allowances for Washington customers subject to CETA violates the dormant Commerce Clause.[50] Indeed, AWEC concedes that a generation tax like the CCA would generally be borne by Oregon customers under the 2020 Protocol, except in this case AWEC claims the CCA's generation tax is "not legal."[51] AWEC is therefore seeking extraordinary relief by asking the Commission to declare a Washington law unconstitutional, even as the constitutionality of that law is currently pending before a Washington court. The Commission should decline to rule on the constitutionality of the CCA because doing so is unnecessary in this case.

1. The Commission is not charged with enforcing the CCA and should therefore decline to rule on its constitutionality.

Oregon administrative agencies can "determine the constitutionality of the statutes *they are charged with enforcing*."[52] That authority, however, must "be exercised infrequently, and always with care[.]"[53] Here, the Commission should not consider arguments regarding the constitutionality of Washington's Cap and Invest Program.

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[47] PAC/800, Mitchell/74.
[48] PAC/1316 at 50, 57.
[49] AWEC Opening Brief at 3.
[50] *Id.* at 4-12.
[51] *Id.* at 13-14.
[52] *Eppler v. Bd. of Tax Serv. Exam'rs*, 189 Or App 216, 221 (2003) (emphasis added).
[53] *Nutbrown v. Munn*, 311 Or 328, 346 (1991).

First, the Commission is not "charged with enforcing" the CCA because it is a Washington statute administered by a Washington agency.[54] This fact alone strongly supports the Commission declining to address the constitutionality of the CCA in this case. Indeed, the Company could locate no precedent where the Commission ruled on the constitutionality of another state's law.

Second, because a Commission ruling cannot affect the Company's compliance obligations under the CCA, adopting AWEC's argument would create a conflict of laws. When addressing Staff's recommendation to allocate a portion of the no-cost allowances to Oregon, AWEC argued doing so "would violate the 2020 Protocol, an allocation method 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."[55] The same untenable position would be created if the Commission were to adopt AWEC's argument that the CCA is unconstitutional.

Third, the Commission need not rule on the constitutionality of the CCA for purposes of setting rates in this TAM. Regardless of whether the Cap and Invest Program is subsequently determined to be unconstitutional, the Company has incurred costs complying with that program and will do so in 2024 and the Commission must determine whether those costs are appropriate to include in the NPC forecast. The Commission can determine that compliance with Washington law is reasonable even if there is a question around the constitutionality of the Washington law. This approach is particularly sound given that complying with Washington law still produces significant net customer benefits.[56]

The Company's recommendation here is consistent with the approach taken by the Federal Energy Regulatory Commission (FERC) when the constitutionality of the CCA was

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[54] *See* RCW 70A.65.060(1) (requiring the Washington Department of Ecology to "implement a cap on greenhouse gas emissions from covered entities and a program to track, verify, and enforce compliance through the use of compliance instruments"); *see also* RCW 70A.65.010(26) ("'Department' means the department of ecology.").
[55] AWEC Opening Brief at 13.
[56] PAC/800, Mitchell/74.

challenged in a docket addressing whether to allow resources located in Washington and participating in the Energy Imbalance Market to reflect the costs of GHG compliance associated with Washington's Cap and Invest Program in their default energy bids and commitment costs.[57] In that case, FERC considered only whether the proposed tariff revisions were just and reasonable, "not the legality of the underlying state law that motivated the revisions."[58] FERC concluded that its "proceeding is not the appropriate procedural vehicle to address the constitutionality of the Washington statute and that [the constitutional] arguments are properly brought in a federal court, which, unlike [FERC], has the authority to review and enjoin the enforcement of unconstitutional state statutes."[59]

FERC also addressed the adverse consequences that would have arisen had it ruled on the constitutionality of the CCA—"if [FERC] were to reject [the tariff revisions] based on constitutional grounds, and if Washington's cap-and-invest program were not ultimately enjoined by a federal court, generators would be deprived of the opportunity to recover costs that they are legally obligated to incur."[60] FERC concluded that "[a]s long as the tariff revisions at issue apply to the mandatory compliance costs incurred by generators within the borders of Washington and which are subject to Washington's jurisdiction, we are required to allow the opportunity for their recovery."[61]

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[57] *Cal. Indep. Sys. Operator Corp.*, 182 FERC ¶ 61,067 (2023).
[58] *Id.* at ¶ 28.
[59] *Id.* at ¶ 29.
[60] *Id.* (citing *FPC v. Hope Nat. Gas Co.*, 320 US 591, 603 (1944) (regulated utilities are entitled to a reasonable opportunity to recover their prudently incurred costs); *see also Mkt.-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, 119 FERC ¶ 61,295, Order No. 697 (2007), *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, 123 FERC ¶ 61,055, at P 409, Order No. 697-A (2008), *clarified*, 124 FERC ¶ 61,055 (2008), *order on reh'g*, 125 FERC ¶ 61,326, Order No. 697-B (2008), *order on reh'g*, 127 FERC ¶ 61,284, Order No. 697-C (2009), *order on reh'g*, 130 FERC ¶ 61,206, Order No. 697-D (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F3d 910 (9th Cir 2011).
[61] *Id.*

2. The constitutionality of the CCA is currently pending before a Washington federal court.

In December 2022, an independent power producer with a generation plant located in Washington, Invenergy Thermal LLC (Invenergy), filed a complaint against Ecology in the federal district court for the Western District of Washington.[62] Invenergy's complaint specifically challenges the CCA's allocation of no-cost allowances to only utilities that serve retail load in Washington and are subject to CETA.[63] Invenergy asks the court to determine that the "CCA as applied is invalid and unenforceable under the Commerce Clause of the United States Constitution[.]"[64] Invenergy further asks the court to "provide no-cost allowances to [Invenergy], or require [Ecology] to re-allocate no-cost allowances or require electric utilities to transfer no-cost allowances to [Invenergy]; or otherwise enjoin [Ecology] from enforcing the CCA to disadvantage [Invenergy]."[65] In response to the complaint, Ecology filed a Motion to Dismiss on February 13, 2023, arguing, *inter alia*, that providing no-cost allowances to only utilities in Washington that are subject to CETA does not violate the dormant Commerce Clause because it is not discriminatory in effect.[66] Ecology's Motion to Dismiss has been fully briefed and is pending before the court.

While the pending litigation focuses on the permissibility of not providing no-cost allowances to Invenergy, as opposed to retail customers in other states, many of the principal arguments raised by AWEC here are implicated in the case. For example, like AWEC, Invenergy argues that the CCA's provision of no-cost allowances is discriminatory in effect against similarly situated in-state and out-of-state interests and therefore subject to heightened scrutiny.[67] And like AWEC, Invenergy argues granting no-cost allowances only to utilities

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[62] *Invenergy Thermal LLC v. Watson*, Case No. 3:22-cv-5967-BHS, Complaint at 4-5 (WD Wash Dec. 13, 2022) [hereinafter *Invenergy* Complaint].
[63] *Invenergy* Complaint at ¶ 119.
[64] *Invenergy* Complaint at ¶ 194.
[65] *Invenergy* Complaint at ¶ 195.
[66] *Invenergy Thermal LLC*, Case No. 3:22-cv-5967-BHS, Defendant's FRCP 12(c) Motion to Dismiss at 12-15 (WD Wash Feb. 16, 2023) [hereinafter *Invenergy* Motion to Dismiss].
[67] *Invenergy* Complaint at ¶ 15 ("[The CCA] impermissibly discriminates against out-of-state business in violation of the dormant Commerce Clause[.]").

subject to CETA provides no defense for discrimination.[68] Given the overlap of issues and similarity of arguments, resolution of the pending Washington litigation may squarely resolve the issues raised by AWEC in this case or provide meaningful guidance on the constitutionality of the CCA's allocation of no-cost allowances to only in-state retail customers. The Commission should therefore not prematurely decide the constitutionality of the CCA given the pending federal litigation.

Importantly, despite the litigation, the Washington federal court has not stayed the CCA. Without a stay, PacifiCorp must comply with the law and will therefore incur compliance costs in 2024. The Company should be authorized to recover those costs regardless of whether the program is eventually determined to be unconstitutional.[69]

3. The record here is insufficient to rule on the constitutionality of the CCA.

Determining the constitutionality of the CCA is a fact-intensive inquiry that requires development of a sufficient record that is beyond the scope of the TAM's annual update on forecast NPC. For example, despite moving to dismiss the case on the pleadings, Ecology conceded that "establishing discriminatory effect requires the production of substantial evidence showing both that the law discriminates in practice and that it does so for reasons of in-state economic protectionism."[70] Invenergy similarly argued that dormant Commerce Clause claims require "a sensitive, case-by-case analysis of purposes and effects[,]" and that the "[t]his analysis is fact dependent and requires factual development," and therefore "many courts have recognized that a developed factual record is necessary to determine the validity of such plausible claims."[71]

Here, the evidentiary record is devoted to the reasonableness of the NPC forecast for 2024. The parties have not developed a sufficient factual record on which the Commission can rule that a Washington statute is unconstitutional under the dormant Commerce Clause. The lack

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[68] *Invenergy Thermal LLC*, Case No. 3:22-cv-5967-BHS, Plaintiff's Opposition to Defendant's FRCP 12(C) Motion to Dismiss at 17 (Apr. 7, 2023) [hereinafter *Invenergy* Response to Motion to Dismiss].
[69] *See* PAC/100, Mitchell/21 (summarizing costs incurred resulting from compliance with the CCA).
[70] *Invenergy* Motion to Dismiss at 8.
[71] *Invenergy* Response to Motion to Dismiss at 2 (internal citations omitted).

of a sufficient factual record is apparent by examining the factual allegations AWEC makes to demonstrate that the CCA is unconstitutional.

In support of its claim that the CCA is facially discriminatory, AWEC contends that Washington and Oregon customers are "similarly situated" and therefore the CCA is discriminatory.[72] Based on that factual conclusion, AWEC alleges that the discrimination "is not justified by a valid factor unrelated to economic protectionism" because the "CCA's creation of disparate economic realities for in-state versus out-of-state electric ratepayers through the provision of no-cost allowances is, by design, not intended to reduce, or tied to reducing, emissions through CCA compliance."[73] AWEC further claims the CCA is facially discriminatory because the allocation of no-cost allowances to Washington "*only* serves the purpose of economically benefitting Washington (through allowance revenues) at the expense of out-of-state entities, including PacifiCorp's Oregon retail customers, without overall emissions reductions."[74] AWEC speculates that if Oregon customers are required to pay CCA compliance costs, then "it will directly impact the ability of Oregon customers—and industrial customers in particular—to compete with Washington facilities operating in the same market."[75]

In support of its argument that the CCA is discriminatory in effect, AWEC alleges that the CCA "serves no legitimate local purpose that could not be served as well by available nondiscriminatory means."[76] According to AWEC, Washington could have provided no-cost allowances for Oregon and Washington customers "without compromising the CCA's and CETA's purposes."[77]

AWEC's broad and sweeping factual allegations presented in brief find little to no evidentiary support in the record, which is particularly troublesome given that the Commission

[72] AWEC Opening Brief at 5.
[73] *Id.* at 6.
[74] *Id.* at 7 (emphasis added).
[75] *Id*.
[76] *Id.* at 11.
[77] *Id*.

would be required to make factual findings supported by substantial evidence on each of these critical points in order to accept AWEC's argument that the CCA is unconstitutional. Given the "lack of a sufficient record in this proceeding on this constitutional issue" the Commission should decline to address it.[78]

4. AWEC can challenge the constitutionality of the no-cost allowances before a court of competent jurisdiction.

AWEC argues that the Commission should penalize the Company for complying with Washington law because "the Company retains the option to challenge the constitutionality of the CCA, thereby providing it with an opportunity to advocate that additional no-cost allowances be allocated to PacifiCorp[.]"[79] First, contrary to AWEC's argument, PacifiCorp has not sat idly by while Washington allocated no-cost allowances to only Washington customers. In fact, the Company specifically requested that Ecology adopt rules providing no-cost allowances for all of PacifiCorp's customers, including those outside of Washington.[80] Ecology refused to do so.

Second, AWEC ignores its own ability to challenge the constitutionality of the CCA in a court of competent jurisdiction—a court that could provide AWEC the relief it seeks here. If AWEC is confident that the CCA violates the dormant Commerce Clause, then AWEC is capable of filing a lawsuit, just as Invenergy has done. The Commission should not require the Company to sue state regulators on behalf of customer groups when those customer groups believe a state law is unconstitutional and are capable of filing suit on their own.

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[78] *See The Dayton Power & Light Co.*, 176 FERC ¶ 61,025 at ¶ 71 (2021) ("Given the facts before us, the lack of a sufficient record in this proceeding on this constitutional issue, and the fact that the ultimate determination on that issue would need to be made by a federal court, we will exercise our discretion to decline to further address the preemption issue as presented[.]") (emphasis added).

[79] AWEC Opening Brief at 3.

[80] PAC/600, Shahumyan/5 (quoting State of Washington, Dep't. of Ecology, Publication 22-02-046, Concise Explanatory Statement Chapter 173-446 WAC Climate Commitment Act Program, (Sept. 2022) (available at: https://apps.ecology.wa.gov/publications/documents/2202046.pdf) (last visited Sept 26, 2023).

D. The Commission need not address Vitesse's CCA modeling adjustment.

In testimony, Vitesse had recommended an adjustment to how the Company modeled its CCA compliance costs, which the Company addressed in its Opening Brief.[81] However, Vitesse did not file an Opening Brief supporting that adjustment. The Company now understands that Vitesse is no longer pursuing its adjustment on the understanding that it was resolved as part of the Stipulation filed in this case. Therefore, the Commission need not address Vitesse's modeling adjustment in this case.

III. REPLY TO SIERRA CLUB ADJUSTMENTS

A. Sierra Club's Opening Brief is silent on its Hunter/Gentry CSA adjustment, which constitutes a concession of the issue.

In its opening testimony, Sierra Club sought disallowance of all costs associated with the Company's Hunter/Gentry CSA.[82] Sierra Club did not rebut the Company's reply testimony on this adjustment, nor does Sierra Club discuss the adjustment in its Opening Brief.[83] In the 2014 TAM, docket UE 264, the Commission declined to adopt an adjustment that an intervenor failed to include in its brief, stating, "Parties must clearly present all proposed adjustments in their briefs."[84] Because such legal arguments were absent from the intervening party's Opening Brief, the Commission considered the proposed adjustment to be "abandoned."[85]

Similarly, Sierra Club abandoned the Hunter/Gentry CSA adjustment by omitting it from Sierra Club's Opening Brief. The Company has demonstrated the reasonableness of the Hunter/Gentry CSA and the Commission should allow its costs in the 2024 TAM.

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[81] PacifiCorp Opening Brief at 17.
[82] Sierra Club/100, Burgess and Roumpani/2; Sierra Club/200, Burgess/1 ("While my Rebuttal does not specifically address Mr. Owen's Reply on [coal supply agreements], I still support my initial findings and recommendations.").
[83] *See, generally*, Sierra Club's Opening Brief.
[84] *In the Matter of PacifiCorp, dba Pac. Power, 2014 Transition Adjustment Mechanism*, Docket No. UE 264, Order No. 13-387 at 10 (Oct. 28, 2013) (making clear that the Company must have the opportunity to respond to legal arguments relating to adjustments in its briefs).
[85] Order No. 13-387 at 10.

B. PacifiCorp's Preferred Scenario in the 2023 Fuel Plan is the least-cost, least-risk fueling option for the Jim Bridger plant.

In its 2023 Fuel Plan, the Company presented six fueling scenarios for the Jim Bridger plant.[86]

[86] PAC/500, Owen/30.
[87] PAC/500, Owen/31.
[88] PAC/500, Owen/32.
[89] PAC/902, Owen/14.
[90] PAC/902, Owen/14.
[91] PAC/902, Owen/14.
[92] PAC/902, Owen/14.
[93] PAC/902, Owen/15.
[94] PAC/902, Owen/15.

Despite the Company's thorough analysis of cost and risk, Sierra Club urges the Commission to adopt Scenario 4 for fueling the Jim Bridger plant and disallow the costs associated with the Preferred Scenario.[95] Sierra Club argues that Scenario 4 costs the same or only slightly more than the Preferred Scenario—contradicting its own testimony acknowledging that Scenario 4 will increase the Company's 2024 NPC by [REDACTED] total company.[96] Given the undisputed fact that Scenario 4 is higher cost than the Preferred Scenario, Sierra Club now posits that Scenario 4 is lower risk for Oregon customers and aligns with Oregon's stated emission reduction goals because it is a low-production scenario.[97] The record in this case clearly demonstrates, however, that the Preferred Scenario is the most reasonable approach to fueling the Jim Bridger plant considering both costs and risks.

1. Sierra Club has failed to show that Scenario 4 is the least-cost fueling option.

Sierra Club maintains that the Preferred Scenario and Scenario 4 have the same cost profile, attempting to collapse the [REDACTED] total company differential by claiming the existence of unsubstantiated, unquantified "errors and inconsistencies" in the Company's economic analysis.[98] To support its position, however, Sierra Club has the duty of coming forward with evidence.[99] Conjecture about potential analytical errors does not meet this standard. This is especially true given PacifiCorp's thorough rebuttal of Sierra Club's alleged "errors," including the inclusion of 2023 in the analysis,[100] and the existence of "unexplained"

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[95] Sierra Club Opening Brief at 3.
[96] *Id.* at 4; Sierra Club/200, Burgess/5.
[97] *Id.* at 3-4.
[98] *Id.* at 7.
[99] *In the Matter of PacifiCorp, dba Pac. Power, Request for a Gen. Rate Revision*, Docket No. UE 374, Order No. 20-473 at 5 (Dec. 18, 2020) ("Once the company has presented its evidence, the burden of going forward (burden of production) then shifts to the party or parties who oppose including the costs . . .").
[100] *See* PAC/900, Owen/19. The 2023 Fuel Plan was prepared in tandem with the Company's 2023 Integrated Resource Plan (IRP). The 2023 IRP planning horizon begins in 2023, so the 2023 Fuel Plan planning horizon also begins in 2023. Additionally, as Sierra Club recognizes, the 2023 costs make up only [REDACTED] of the [REDACTED] differential between the Preferred Scenario and Scenario 4.

generation from renewable resources assumed in the Preferred Scenario (which the Company explained in its surrebuttal testimony).[101]

Sierra Club incorrectly claims that the costs of BCC coal in the Preferred Scenario was "significantly less" than BCC coal in a previous compliance filing made under Order No. 22-389.[102] There is only a small difference in the BCC costs per ton, which is due to the methodology used to determine the incremental cost. In the Preferred Scenario, the Company appropriately calculated the incremental cost based on several years of data to average production volume variances among years. The compliance filing made under Order No. 22-389 was a more limited analysis and showed only the high production mine plan to present the fixed and variable costs.[103] As PacifiCorp made clear in its testimony, the coal pricing differentials that Sierra Club challenges appropriately reflect changes in assumptions and scope among the different studies.[104]

Sierra Club raises a new argument in its brief, claiming that the Company failed to explain the decrease in BCC incremental costs in the Preferred Scenario from approximately [REDACTED] per ton in the years 2025 and 2026 to [REDACTED] per ton in the years 2027 and 2028.[105] But, as is clear from both the 2023 Fuel Plan and the supporting workpapers, the decrease in incremental costs is related to the planned change in mining methods.[106] [REDACTED]

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[101] *See* PAC/900, Owen/20. The fueling scenarios have differing assumptions underlying their available generation, which results in varied results. In addition, Sierra Club overstates the importance of the "other generation" in the PVRR analysis. [REDACTED] *See also* PAC/902, Owen/23-24 [REDACTED]

[102] Sierra Club Opening Brief at 8.

[103] Sierra Club claims that aligning the dollar per ton in the Preferred Scenario with PacifiCorp's Compliance Filing would increase the costs of the Preferred Scenario by [REDACTED]. Sierra Club fails to apply a net present value analysis, which reduces this increase to [REDACTED].

[104] PAC/500, Owen/38.

[105] Sierra Club Opening Brief at 8.

[106] PAC/902, Owen/36.

[107] The Preferred Scenario here is specifically referring to Scenario 5 in response to Sierra Club's arguments.

[109]

Finally, Sierra Club attempts to discount the differential between the Preferred Scenario and Scenario 4 by arguing that of the benefits are attributable to years after 2024.[110] Sierra Club admits, however, that "a long-term fuel supply plan should consider costs over the long-term," effectively negating its argument that post-2024 benefits should be given less weight.[111] In any event, the Preferred Scenario provides in benefits in 2024 compared to Scenario 4. While Sierra Club claims that is "not significant compared to PacifiCorp's entire NPC," this cavalier argument is entirely inconsistent with the least-cost, least-risk principles PacifiCorp followed in preparing the 2023 Fuel Plan.

2. Sierra Club has failed to show that Scenario 4 is the least-risk fueling option.

Sierra Club has not demonstrated that Scenario 4 is lower risk than the Preferred Scenario. First, Sierra Club argues that BCC coal costs have risen significantly and that the expense justifies selecting Scenario 4, a .[112] Despite its position that BCC coal is too expensive, Sierra Club supports a scenario that leads to a higher cost per ton of coal.[113] Scenario 4 leads to more expensive BCC coal, though less of it. Further, Scenario 4

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[108] Refer to the Confidential workpapers for Scenario 4 and Scenario 5 in the 2023 Fuel Plan, "FUELLIGHTS-ALL 2023LTFP5.xlsx", "FUELLIGHTS-ALL 2023LTFP4.xlsx", "01 OpsCostSchedules.xlsx" and "2023 JB Plant LTFP – Incremental BCC Apr. 2023.xlsx".
[109] PAC/902, Owen/8-9.
[110] Sierra Club Opening Brief at 9.
[111] *Id.* at 9.
[112] *Id.* at 4.
[113] PAC/500, Owen/37 (explaining that "Scenario 4 (BCC's low production scenario) . . . will increase [costs] because these same fixed [operating] costs are spread over fewer tons").

increases the risk associated with reliance on the market to serve Oregon customers. The reduction in BCC coal under Scenario 4 simply reduces the overall generation the Company can provide from the Jim Bridger plant; it does not reduce the demand for generation. This reduction in coal volume results in a need to replace those megawatt-hours (MWh) sacrificed for a lower production scenario.[114] As the Company testified, if the Company reduces BCC coal deliveries by [REDACTED] tons, it would need to replace approximately [REDACTED] MWh in Jim Bridger generation from other sources, such as market purchases.[115]

Second, without any evidence, Sierra Club maintains that the Company selected the Preferred Scenario to serve its own interests.[116] Sierra Club argues that the Company prioritized a [REDACTED] to avoid "jeopardiz[ing] the Company's authorized regulated rate of return . . . [and] additional pressure on the Company to retire the Jim Bridger plant."[117] Sierra Club further argues that the Company acted in its own best interest in order to minimize the "risk the Company [would] not collect[] sufficient revenue to support mine reclamation, and/or create negative repercussions with the Company's Wyoming stakeholders."[118]

As Mr. James Owen made clear in his reply testimony, "PacifiCorp's interests are best served by operating BCC in the most cost-effective manner possible, which aligns with its customers' interest in maintaining low-cost, reliable service."[119] The long-term fuel planning process is designed to ensure the least-cost, least-risk level of production from BCC to benefit customers. The planning process—and the rigorous regulatory review that follows—ensures against the kind of self-dealing about which Sierra Club speculates.

Third, Sierra Club claims that Scenario 4 permits the same level of "flexibility"—and resulting benefits to customers—as the Preferred Scenario [REDACTED]

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[114] PAC/500, Owen/36-37.
[115] PAC/500, Owen/36-37.
[116] Sierra Club Opening Brief at 5.
[117] *Id.*
[118] *Id.*
[119] PAC/500, Owen/38.

[120] Sierra Club states that the Company

Sierra Club points to Mr. Owen's hearing testimony to support this assertion.

Finally, Sierra Club advocates for Scenario 4 by raising the issue of GHG emissions, stating that it "questions the prudency" of in light of Oregon's GHG

[120] Sierra Club Opening Brief at 6.
[121] Sierra Club Opening Brief at 6.
[122] *Id.*
[123] *Id.*
[124] *See* Highly Confidential Evidentiary Hearing Transcript 53:4-20 [hereinafter Highly Conf. Evid. Tr.].
[125] Highly Conf. Evid. Tr. 53:18-20 (emphasis added).
[126] Highly Conf. Evid. Tr. 52:18-20, 52:10-13.

emission reduction goals.[127] As Sierra Club is aware, the Company has taken broad strides toward emissions reduction and reducing coal dependency, including conversion of Units 1 and 2 of the Jim Bridger plant to natural gas in 2024.[128] The Preferred Scenario was developed in the context of the Company's plans to comply with its emissions reduction requirements and is fully consistent with them.

C. Sierra Club has not demonstrated the need for an annual long-term fuel supply plan.

Sierra Club argues that the fuel plan is an intermittent filing that does not go far enough in considering the annual changes that affect generation at the Jim Bridger plant.[129] In particular, Sierra Club argues that the Company should submit an annual fuel plan to provide information on how changing regulations affecting the energy industry will affect the Jim Bridger plant.[130]

Despite Sierra Club's insistence that "years go by without an updated [Fuel Plan],"[131] the Company has agreed to file every other year in accordance with Commission direction.[132] As demonstrated by the 2023 Fuel Plan, the Commission's current practice of requiring a biennial fuel plan is sufficient to address Sierra Club's concerns regarding changes across the energy regulatory landscape.

The 2023 Fuel Plan evaluates how PacifiCorp can best meet the fueling needs of the Jim Bridger plant throughout the operational life of the plant, given the natural gas conversion of Jim Bridger Units 1 and 2 in 2024, reductions to coal generation as a result of increased renewable generation in the Company's portfolio, the OTR, and other changing circumstances affecting the plant over the next several years.[133] Stated differently, the 2023 Fuel Plan evidences a long-term outlook that considers the changing landscape surrounding coal generation and how the Jim

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[127] Sierra Club Opening Brief at 10.
[128] PAC/500, Owen/31.
[129] Sierra Club Opening Brief at 11-12.
[130] *Id.* at 11.
[131] *Id.* at 12.
[132] PAC/500, Owen/29.
[133] PAC/500, Owen/29.

Bridger plant will continue to contribute to the Company's ability to serve customers. The Commission should adhere to its previous decision requiring a fuel plan update every two years, ensuring alignment with the Company's IRP.

IV. CONCLUSION

PacifiCorp respectfully requests that the Commission approve cost recovery of GHG compliance costs imposed by the Washington Cap and Invest Program and approve situs assignment of no-cost allowances to Washington customers. The Company's treatment of Cap and Invest Program costs is consistent with general ratemaking principles, the 2020 Protocol, Washington law, and sound regulatory policy.

PacifiCorp also requests that the Commission: (1) approve all costs associated with the Hunter/Gentry CSA; (2) approve recovery of costs arising from the Preferred Scenario under the Company's 2023 Fuel Plan; and (3) reject Sierra Club's recommendation to convert Jim Bridger's biennial, long-term fuel plan process into an annual filing.

Dated this 2nd day of October 2023.

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CERTIFICATE OF SERVICE

I certify that I delivered a true and correct copy of the confidential and highly confidential pages of **PacifiCorp's Reply Brief** on the parties listed below that have signed the protective order(s) via electronic mail in compliance with OAR 860-001-0180.

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