

Davison Van Cleve PC

Attorneys at Law

TEL (503) 241-7242 • FAX (503) 241-8160 • jog@dvclaw.com
107 SE Washington St., Suite 430
Portland, OR 97214

September 26, 2023

Via Electronic Filing

Public Utility Commission of Oregon
Attn: Filing Center
201 High St. SE, Suite 100
Salem OR 97301

Re: In the Matter of PACIFICORP, dba PACIFIC POWER,
2024 Transition Adjustment Mechanism
Docket No. UE 420

Dear Filing Center:

Please find enclosed the Alliance of Western Energy Consumers' Response to the Stipulating Parties' Joint Brief in Support of Stipulation in the above-referenced docket.

Thank you for your assistance. Please do not hesitate to contact me if you have any questions.

Sincerely,

/s/ Jesse O. Gorsuch
Jesse O. Gorsuch

Enclosure

**BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON**

UE 420

In the Matter of)	ALLIANCE OF WESTERN ENERGY
)	CONSUMERS' RESPONSE TO
PacifiCorp, dba Pacific Power,)	STIPULATING PARTIES' JOINT
)	BRIEF IN SUPPORT OF
2024 Transition Adjustment Mechanism.)	STIPULATION
_____)	

I. INTRODUCTION

Pursuant to Oregon Administrative Rule (“OAR”) 860-001-0350(8) and the Scheduling Memorandum issued September 8, 2023, by Administrative Law Judge (“ALJ”) Mapes, the Alliance of Western Energy Consumers (“AWEC”) hereby submits this Response to the Stipulating Parties’ Joint Brief in Support of Stipulation (“Brief”) submitted in the above-entitled docket. As detailed below, the Stipulating Parties have failed to carry their burden to demonstrate that the rates proposed to result from the Stipulation will result in just and reasonable rates. Specifically, while OAR 860-001-0350(7) does permit the Stipulating Parties to submit a brief in support of the Stipulation, it does not relieve the parties proposing and supporting a settlement from meeting their burden of proof with evidence upon which the Commission can rely to make a determination of just and reasonable rates.

The Stipulating Parties elected to present argument in support of the Stipulation, but failed to present evidence to the Commission demonstrating as a factual matter that the rates resulting from the Stipulation would be just and reasonable. As discussed below, argument is not evidence and cannot stand as the foundation of the Commission’s decision. Evidence presented to the

Commission regarding PacifiCorp’s (or “Company”) initial Application does not address the details of the Stipulation.

Indeed, the evidence in the record demonstrates that the Stipulation would result in unjust and unreasonable rates by implementing 2024 power costs that are higher than even Commission Staff (“Staff”) agrees is reasonable. As detailed below, both AWEC and Staff objected to a \$61 million increase PacifiCorp implemented in its rebuttal testimony due to a modeling change it implemented for the day-ahead/real-time (“DA/RT”) adjustment in violation of the TAM Guidelines. On an Oregon-allocated basis, this modeling change alone increased net power costs (“NPC”) by approximately \$17.5 million, which is worth more than the entire black box reduction in the Stipulation. If the Commission simply agrees with Staff and AWEC that this modeling change violates the TAM Guidelines, then it must reject the Stipulation. Further, PacifiCorp modeled market caps in a manner that is inconsistent with prior Commission orders implementing a “third quartile of averages” modeling of market caps. Staff and AWEC also objected to this deviation from Commission precedent, which is worth another \$5.7 million according to Staff’s testimony.¹ Accordingly, at a minimum the Commission should reduce PacifiCorp’s NPC by \$28.7 million to account for these two issues and the Ozone Transport Rule (“OTR”) already included in the Stipulation.

II. BACKGROUND

As noted in the Brief, PacifiCorp’s 2024 Transition Adjustment Mechanism (“TAM”) is intended to update the Company’s NPC for inclusion in rates and to establish the transition

¹ AWEC’s witness, Bradley Mullins, identified this adjustment as an increase to NPC, but noted that this was likely an error due to the AURORA model’s optimization producing unintended results. AWEC/200, Mullins/21:22-22:2.

adjustments for customers electing direct access services in the November open enrollment period. On April 3, 2023, PacifiCorp filed its 2024 TAM and supporting testimony, identifying a total-Company NPC of approximately \$2.62 billion, and approximately \$754.7 million Oregon-allocated, for the calendar year ending December 31, 2024.² On June 23, 2023, AWEC, along with other intervenor parties, filed Opening Testimony, identifying numerous monetary and non-monetary adjustment recommendations for the Commission’s consideration.

On July 24, 2023, PacifiCorp filed Reply Testimony along with an updated NPC forecast, which indicated an updated total-Company NPC of approximately \$2.53 billion, with approximately \$722.1 million as Oregon-allocated (“Reply Update”).³ On August 16, 2023, AWEC and additional intervenors filed Rebuttal Testimony addressing PacifiCorp’s Reply Update and supporting testimony. Specifically, AWEC and Staff filed testimony regarding a change in modeling of the DA/RT adjustment included in the Reply Update, which PacifiCorp identified as a correction. PacifiCorp identified this amount as an increase to its NPC forecast of approximately \$61 million, which equates to approximately \$17.5 million Oregon-allocated.⁴ Both AWEC and Staff also argued that PacifiCorp should model market caps (also known as hub demands) using the methodology approved by the Commission in the 2022 TAM, which uses a “third quartile of averages” approach and eliminates market caps from liquid market hubs.⁵ Staff identified this adjustment to be worth \$5.7 million.⁶ AWEC also identified additional adjustments related to

² PAC/101 Mitchell/1, lines 35, 38.

³ PAC/402 Mitchell/1, lines 35, 38.

⁴ PAC/800, Mitchell/17:17-19 (Oregon-allocated amount derived by multiplying \$61 million by the SG Factor of 28.701%); *See also* Staff/800 Jent/8:1-4. Due to the impact of other modeling changes, AWEC identified the total-Company increase as approximately \$80 million. *See* AWEC/200, Mullins/27:15-17.

⁵ AWEC/200, Mullins/16:4-5; Staff/900, Dlouhy/2:4-13.

⁶ Staff/700, Kim/3:12-14.

PacifiCorp’s coal costs (\$31.8 million Oregon-allocated) and simplifying the DA/RT model (\$7 million Oregon-allocated).⁷

On August 30, 2023, PacifiCorp filed its Surrebuttal testimony, which, *inter alia*, removed costs associated with the OTR from the 2024 TAM. This adjustment reduced the Oregon-allocated NPC by approximately \$5.5 million.

On September 6, 2023, one day before the evidentiary hearing scheduled by the Commission in this matter, PacifiCorp, Staff, the Oregon Citizens’ Utility Board (“CUB”), Calpine Energy Solutions, LLC (“Calpine”), Vitesse, LLC (“Vitesse”) and the Klamath Water Users Association (“KWUA”) (collectively “Stipulating Parties”) notified AWEC that the Stipulating Parties had reached a settlement in principle on all issues in this Docket, with the exception of the treatment of Washington Cap and Invest program costs. The Stipulating Parties notified the Commission of the settlement at the beginning of the previously scheduled September 7, 2023 hearing. The Stipulation reduces PacifiCorp’s 2024 power costs by \$18.5 million Oregon-allocated. OTR costs account for \$5.5 million of this amount, meaning that the Stipulating Parties settled all other issues in this docket for a black box amount of \$13 million. This is less than the value of the DA/RT modeling change alone that both Staff and AWEC objected to.

III. BURDEN OF PROOF

The Commission reviews a Stipulation “for reasonableness and accord with the public interest,” and reviews a settlement “to determine whether, on a holistic basis, [it] serve[s] the public

⁷ AWEC/200, Mullins/2 (Table 1).

interest and result[s] in just and reasonable rates.”⁸ As the sponsors of the Stipulation, the Stipulating Parties have the burden of proof.⁹ “The phrase ‘burden of proof’ has two meanings: one to refer to a party’s burden of producing evidence; the other to a party’s obligation to establish a given proposition in order to succeed. To distinguish these two meanings, [the Commission] refer[s] to the burden of production and the burden of persuasion.”¹⁰

ORS § 757.210(1)(a) sets forth the burden of proof and establishes that the proponent of a rate “shall bear the burden of showing that the rate or schedule of rates proposed to be...increased or changed is fair, just and reasonable.” Moreover, §757.210 proscribes the Commission from authorizing a rate that is not fair, just and reasonable. Additionally, the proponent of a rate change that is disputed by another party “must show, by a preponderance of evidence, that the change is just and reasonable.”¹¹ “If the [proponent] fails to meet that burden, either because the opposing party presented persuasive evidence in opposition to the proposal, or because [the proponent] failed to present adequate information in the first place, then [the proponent] does not prevail because it has not carried its burden of proof.”¹² Specifically regarding settlements,

Where a party opposes a settlement, [the Commission] will review the issues pursued by that party, and consider whether the information and argument submitted by the party (which may be technical, legal, or policy information and argument) suggests that the settlement is not in the public interest, will not produce rates that are just and reasonable, or otherwise is not in accordance with the law. **To support the adoption of a settlement, the stipulating parties must present evidence that the stipulation is in accord with the public interest, and results in just and**

⁸ Docket No. UE 394, Order No. 22-129 at 16 (April 25, 2022).

⁹ *Id.* at 4.

¹⁰ *Id.* (internal citations omitted).

¹¹ *Id.* at 5.

¹² *Id.* (internal citations omitted).

reasonable rates.¹³

IV. DISCUSSION

1. PacifiCorp has failed to carry its burden of proof to demonstrate that the Stipulation results in just and reasonable rates.

The Stipulating Parties assert that the settlement is “supported by the record and reflects a reasonable resolution of the issues....”¹⁴ The Stipulating Parties further contend that the pre-filed testimonies of PacifiCorp, Staff, Vitesse and Calpine Solutions “create[] a comprehensive evidentiary record supporting the Stipulation,”¹⁵ that the “hundreds of data requests”¹⁶ submitted to the Company, the Company’s “own discovery into the testimony filed by Staff and intervenors”¹⁷ and the evidentiary hearing conducted September 7 and 8, 2023, “allowing additional development of the evidentiary record”¹⁸ combine to demonstrate that the Stipulating Parties have met their burden of proof and provide the Commission with sufficient evidence upon which it can base a decision. The Stipulating Parties are wrong, and their claims are belied by the very evidentiary record they tout for support.

First, the “hundreds of data requests” propounded upon PacifiCorp by intervenors are not in the record and do not stand as evidence to the Commission. Moreover, not a single one of these data requests relates to the Stipulation and its resolution of contested issues. While PacifiCorp did provide 16 Cross-Examination Exhibits, five of those were testimony from AWEC’s witness, Mr.

¹³ *Id.* at 16-17 (emphasis added).

¹⁴ Brief at 6.

¹⁵ *Id.* at 7.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

Mullins, from other dockets; one is a transcript of testimony from Mr. Mullins' testimony in another docket; two are pre-filed testimony from various Staff witnesses in other dockets; and four are Commission Orders from other dockets.¹⁹ None of these pieces of evidence support the Stipulation. Moreover, the Stipulating Parties have failed to demonstrate, discuss, or even reference the remaining Cross-Examination Exhibits identified by PacifiCorp. This evidence does not support the Stipulation and does not demonstrate how the proposed rates will be just, reasonable and in the public interest.

Next, the Stipulating Parties' reference to the September 7 and 8, 2023 evidentiary hearing is feckless. As noted above, the Stipulating Parties did not arrive at a settlement in principle until September 6, 2023, and only notified the Commission of the potential settlement at the opening of the September 7, 2023 hearing. Indeed, the Stipulation was not presented to the Commission and AWEC until September 12, 2023, when it was filed contemporaneously with the Brief. The "additional development of the evidentiary record"²⁰ accomplished at the September 7 and 8, 2023 hearing specifically did not address the Stipulation. Indeed, the Commission has established a separate hearing on the Stipulation for October 13, 2023.²¹

The evidentiary record cited by the Stipulating Parties as support for the settlement simply does not exist. As such, the Stipulating Parties have failed to carry their burden of proof and have failed to meet the Commission's requirement that "the stipulating parties **must present evidence** that the stipulation is in accord with the public interest, and results in just and reasonable rates."²²

¹⁹ See PacifiCorp's Exhibit List and Cross-Examination Exhibits, dated September 1, 2023.

²⁰ Brief at 7.

²¹ See *Scheduling Memorandum*, dated September 8, 2023.

²² Order No. 22-129 at 30 (emphasis added).

2. The evidence in the record unequivocally supports further reductions to PacifiCorp’s NPC beyond what is included in the Stipulation.

The Stipulating Parties’ reliance on the evidentiary record developed regarding PacifiCorp’s initial and updated TAM proposals for support of the Stipulation and settlement further fails, as the record cited outlines oppositional positions taken by select Stipulating Parties and the Stipulating Parties have not attempted to reconcile these differences.

By way of example, in Rebuttal Testimony, AWEC identified a change made by PacifiCorp to the modeling of the DA/RT Adjustment as compared with prior modeling presented in this Docket.²³ This change, which PacifiCorp characterized as a “correction”²⁴ resulted in an NPC increase of approximately \$61 million on a total-Company basis, or approximately \$17.5 million Oregon-allocated.²⁵ The TAM Guidelines are clear that methodological changes in a stand-alone TAM filing are only allowed in the Initial Filing and only after PacifiCorp provides notice of such changes by March 1st.²⁶ Parties to TAM proceedings have previously identified modeling changes proposed by PacifiCorp as inappropriate for “the narrowly focused and limited evaluation that happens in a TAM filing.”²⁷ Similarly, in Staff’s Rebuttal Testimony, Staff/800, Staff witness Ms. Jent testified provided the following exchange:

Q. Was the NPC impact of the DA/RT adjustment updated in the Company’s Reply Testimony?

A. Yes, there was a \$61M additional increase that accompanied the DA/RT adjustment in PAC’s Reply Testimony. The Company stated that they corrected an error in the DA/RT adjustment by removing unsupported artificial arbitrage revenue from the DA/RT

²³ See Hearing Exhibit AWEC/200, Mullins/25-29.

²⁴ PAC/400, Mitchell/11:3-4.

²⁵ *Supra* n. 4

²⁶ Docket No. UE 207, Order No. 09-432, Appen. A ¶ 13 (Oct. 30, 2009).

²⁷ See Docket No. UE 227, Staff/100 Durrenberger/5:10-12.

volume component. Staff is skeptical that this is a correction. Instead, Staff believes this is a *change* to the modeling that should not have been labeled as a correction.

Q. Does Staff have issues with the Company's recent change to the DA/RT that resulted in a \$61M addition to NPC?

A. Yes. As Staff currently understands, the Company used to go back and look at historical DA/RT adjustments and make a corresponding adjustment in its NPC report spreadsheets to tie back to historical values. Staff assumes that the Company was not in agreement with what historical values were showing so the Company's "correction" takes out that portion of the adjustment. As a result, Staff is also skeptical of the other "corrections" discussed on pages 10-13 of its' Reply Testimony.²⁸

AWEC's conclusions were similar to Staff's. Mr. Mullins noted that, "[i]n its July Update, PacifiCorp added an entirely new modeling adjustment to the DA/RT method. After applying the price adjustment and after applying the historical adjustment, PacifiCorp made an entirely new, third DA/RT adjustment."²⁹ Indeed, PacifiCorp itself testifies that it implemented a new methodological change because it believed the "the volume component of the DA/RT adjustment was not functioning as the Commission intended"³⁰ Accordingly, PacifiCorp fundamentally changed how the DA/RT adjustment is modeled in its Rebuttal Testimony, in clear violation of the TAM Guidelines. Moreover, even if this modeling change could be characterized as a "correction," the TAM Guidelines require PacifiCorp "to provide notice of any impending correction promptly after the discovery of the error," which the Company did not do.³¹

There is no evidence in the record explaining how Staff has reconciled the \$61 million

²⁸ Staff/800, Jent/8 (emphasis in original; internal citations omitted).

²⁹ AWEC/200, Mullins/27:10-12.

³⁰ PAC/400, Mitchell/47:9-10.

³¹ Docket No. UE 199, Order No. 09-274, Appen. A at 11 (July 16, 2009).

“change” to actually be a “correction” as claimed by the Company. The value to Oregon ratepayers of this issue alone, approximately \$17.5 million, overwhelms the “unspecified” adjustment of \$13 million and its dismissal within the Stipulation is wholly unsupported in the record. While AWEC understands that the settlement process represents compromises by all parties involved, this “give and take” process does not obviate the requirement of the Stipulating Parties’ obligation to “present evidence that the stipulation is in accord with the public interest, and results in just and reasonable rates.”³² Moreover, AWEC has presented evidence in opposition to this specific modeling adjustment, demonstrating that this increase resulting from a modeling change in violation of the TAM Guidelines results in rates that are not just and reasonable.

As another example, Staff objected to PacifiCorp’s proposal to use the “average of averages” method to identify proposed market caps within the AURORA modeling and the development of the NPC forecast. Specifically, Staff witness Dlouhy testified that he disagreed with the Company’s intention to use the “average of averages” approach, and “recommend[ed] that the Company adopt the ‘third quartile of averages’ approach used on a non-precedential basis in the 2022 TAM.”³³ Witness Dlouhy testified that “[t]he ‘third quartile of averages’ approach better aligns with the operational realities of transacting on the open market...” and that “[t]here is still insufficient evidence to show that the ‘average of averages’ approach produces a more accurate forecast than the ‘third quartile of averages’ approach in AURORA.”³⁴ Witness Dlouhy further provided extensive testimony reciting Staff’s repeated and consistent opposition to the “average of averages” approach, noting Staff’s objections to this modeling technique dating back

³² Order No. 22-129 at 17.

³³ Staff/300, Dlouhy/6:9-10.

³⁴ Staff/300, Dlouhy/6:16-22.

to 2013.³⁵ In Rebuttal Testimony, Mr. Dlouhy retained his opposition to the “average of averages” approach even after reviewing PacifiCorp’s Reply Testimony.³⁶ Specifically, Mr. Dlouhy testified that “the ‘third quartile of averages’ method is just as able to capture declining average sales as the ‘average of averages’ method.”³⁷ Mr. Dlouhy testified that “[i]mplementing the ‘third quartile of averages’ approach reduces Oregon-allocated [NPC] by \$5.69 million.”³⁸

Notwithstanding this opposition in evidence, the Stipulation specifies that “[a]ny adjustment to PacifiCorp’s Initial or Reply Filing not incorporated into [the] Stipulation directly or by reference is resolved among the Stipulating Parties without an adjustment or recommendation for the purposes of this proceeding....”³⁹ Thus, at best, the value of the market cap modeling approach is included within the \$13 million “unspecified monetary adjustment,” though this inclusion would further dilute any value received for the DA/RT modeling change discussed above. At worst, Staff abandoned its advocacy for this Commission-approved modeling method entirely. Given the lack of testimony and evidence presented to support the Stipulation, the Commission is left to speculate. Crucially, this speculation demonstrates that the Stipulating Parties have provided no evidence to demonstrate the reasonableness of deviating from the Commission’s most recently approved modeling method. The Stipulating Parties have failed to carry their burden of proof that the resulting rates are just and reasonable, and the Stipulation must be rejected.

As the Stipulation is silent in identifying evidence supporting the resolution of contested

³⁵ See Staff/300, Dlouhy/3-6.

³⁶ See Staff/900, Dlouhy/4:22-5:1.

³⁷ Staff/900, Dlouhy/5:17-18.

³⁸ Staff/900, Dlouhy/2:11-13.

³⁹ Stipulation, ¶ 20.

issues such as the examples above – issues contested by various Stipulating Parties and supported by specific evidence in the record – the Stipulating Parties have failed to carry their burden of proof and have failed to provide the Commission with evidence that can stand as a foundation to approve the Stipulation and the resulting 6.5% increase in overall rates. The Commission should, at a minimum, modify the Stipulation to reject the proposed resolution of these specific contested issues and their related values. Evidence in the record demonstrates that the value of the two issues discussed herein alone represents a \$23.2 million Oregon-allocated reduction to the Company’s NPC - \$17.5 million for the improper DA/RT modeling change and \$5.7 million to implement the “third quartile of averages” approach to market caps. Combined with the removal of OTR-related costs as proposed by PacifiCorp in its Surrebuttal Testimony, PacifiCorp’s 2024 NPC should be reduced by at least \$28.7 million.

V. CONCLUSION

For the reasons outlined above, the Commission should find the Stipulating Parties have failed to meet their burden of proof regarding the Stipulation and proposed settlement and have failed to demonstrate the resulting rates will be just and reasonable. The Commission should modify the Stipulation and reduce PacifiCorp’s NPC forecast by at least \$28.7 million, in line with the evidence in the record establishing the effect of employing the Commission-approved method of modeling for market cap activity and the evidence demonstrating the effect of eliminating PacifiCorp’s untimely change to the AURORA modeling regarding the DA/RT adjustment.

Dated this 26th day of September, 2023.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Brent L. Coleman

Brent L. Coleman

107 SE Washington St., Suite 430

Portland, Oregon 97214

(503) 241-7242 (phone)

(503) 241-8160 (facsimile)

bkc@dvclaw.com

Attorney for Alliance of Western Energy Consumers