

1 **BEFORE THE PUBLIC UTILITY COMMISSION**  
2 **OF OREGON**

3 UM 1810

4  
5 In the Matter of  
6 PACIFICORP, dba PACIFIC POWER,  
7 Application for Transportation  
8 Electrification Programs.

STAFF'S REPLY BRIEF

9 **I. INTRODUCTION**

10 The seven stipulating parties (Stipulating Parties) ask the Commission to adopt the  
11 collaborative settlement agreement (Stipulation) reached in this docket that tests three  
12 transportation electrification approaches, including installation of a limited number of utility-  
13 owned public DC Fast Chargers (DCFCs) in PacifiCorp's service territory, targeted outreach and  
14 education services, and grant funding for electric vehicle service equipment (EVSE), including  
15 workplace and fleet vehicle charging.

16 Although it was filed over five months ago, the Stipulation has yet to reach the  
17 Commission for review because ChargePoint has objected to a single component of the  
18 Stipulation—the design of the Public Charging Pilot. Despite ChargePoint's long-winded brief,  
19 its objections boil down to a nonnegotiable position against PacifiCorp ownership of any public  
20 charging infrastructure based on an assumption that electric company ownership cannot  
21 stimulate competition, innovation, and customer choice. These objections are easily dispelled by  
22 two points. First, the legislature unequivocally expected electric companies to own and operate  
23 electric vehicle (EV) charging infrastructure: the bill “allows electric companies to apply to the  
24 PUC for installing and ownership of electric vehicle charging stations.”<sup>1</sup> Second, the evidence in  
25 the record, including testimony from EVSE market competitors, shows that the Public Charging

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<sup>1</sup> House Chamber, 2016 Leg., 78<sup>th</sup> Sess. (Or. Mar. 1, 2016) (comments by Rep. Vega Pederson at 01:05:00).

1 Pilot is reasonably expected to stimulate innovation, competition, and customer choice. In fact,  
2 one of ChargePoint’s competitors sums it up succinctly: “the Stipulation will enhance  
3 competition in the electric vehicle (“EV”) charging market. Siemens has seen utility ownership  
4 of charging stations grow the overall EV market and, with it, the opportunity for all participating  
5 companies to sell their products and services, including charging equipment and services. In our  
6 testimony in this proceeding, we provided actual evidence that utility ownership grows the EV  
7 market . . . ChargePoint has provided no actual evidence that any EV charging vendor has been  
8 harmed by utility participation in any EV charging program.”<sup>2</sup>

9 ChargePoint expressly supports two of the three pilot programs in the Stipulation,<sup>3</sup> while  
10 the third pilot to which it objects falls squarely within the Commission’s discretion to approve,  
11 and is supported by unrebutted evidence presented by the seven Stipulating Parties and Siemens.  
12 Therefore, the decision before the Commission is whether or not to adopt a Stipulation that tests  
13 three modest approaches to transportation electrification, is supported by a wide range of experts,  
14 and complies with the law.

## 15 II. DISCUSSION

16 **1. The law requires the Commission to consider six factors when evaluating a**  
17 **program; it does not impose a mandatory set of criteria, each of which must be**  
18 **met to gain approval.**

19 The Oregon legislature passed SB 1547 in March of 2016, directing electric companies to  
20 accelerate transportation electrification in their service territories and allowing electric company  
21 ownership of EV charging and related infrastructure.<sup>4</sup> The predominant legal dispute between  
22 the Stipulating Parties and ChargePoint is over the meaning of the term “consider.”

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24 <sup>2</sup> Siemens’s Opening Brief at 1-2.

25 <sup>3</sup> ChargePoint supports the Demonstration and Development and Outreach and Education pilots as modified by the  
Stipulation. ChargePoint/200, Packard/5, lines 1-2.

26 <sup>4</sup> Oregon Laws 2016, Chapter 28, Section 20(3) (“A program proposed by an electric company may include prudent  
investments in . . . electric vehicle charging and related infrastructure.”) and Section 20(5)(a) (“Tariff schedules and  
rates allowed pursuant to subsection (3) of this section: (A) May allow a return of and a return on an investment  
made by an electric company . . .”).

1 Subsection (4) of the transportation electrification law governs transportation  
2 electrification program approval. It delineates six factors for the Commission to “consider”  
3 when deciding whether to approve a utility-proposed transportation electrification program. As  
4 discussed in greater detail in Staff’s Opening Brief, when examining the text of a statute, courts  
5 presume that the legislature intended words of common usage, such as “consider,” to have their  
6 plain, natural, and ordinary meaning.<sup>5</sup> “Consider” means “to think about carefully”; “to think of  
7 especially with regard to taking some action”; and “to take into account.”<sup>6</sup> Therefore, the  
8 legislature intended for the Commissioners to *take into account* and *think carefully about* the six  
9 factors (a)-(f) in their decision-making process, but left the decision to approve a particular  
10 program well within the Commission’s discretion.<sup>7</sup>

11 Moreover, a review of the broader context of the statute bolsters the conclusion that  
12 ample discretion has been delegated to the Commission. For example, five of the six factors say  
13 “*as determined by the commission,*” and “*are reasonably expected.*” Likewise, the legislature  
14 delegated to the Commission the *authority to prescribe* the form and manner of applications for  
15 programs, as well as the responsibility to *make determinations* regarding the effect of market  
16 barriers on actual utilization of charging infrastructure.<sup>8</sup>

17 Despite this unambiguous textual evidence, ChargePoint clings to select parts of so-called  
18 legislative history to prop up its theory that a program must “meet” every individual factor<sup>9</sup> by  
19 emphasizing that “Ms. Smart’s testimony regarding SB 1547’s history stands un rebutted in this  
20 proceeding.”<sup>10</sup> This argument also fails. First, Ms. Smart is not an attorney, yet she offered  
21 testimony on legislative intent that goes well beyond the scope of her expertise, and technically

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<sup>5</sup> *PGE*, 317 Or at 611; *State v. Ziska*, 355 Or 799, 804-05 (2014) (the plain meaning of the text at issue can be found  
23 in its dictionary definition).

<sup>6</sup> Webster’s Third New International Dictionary, Unabridged, “*Consider*” (2016).

24 <sup>7</sup> Staff testified that the programs could also be approved pursuant to the Commission’s authority to approve pilot  
programs—SB 1547 did not remove that authority from the Commission. See Staff’s Opening Brief at 9-10.

25 <sup>8</sup> Oregon Laws 2016, Chapter 28, Section 20(3) and Section 20(7).

26 <sup>9</sup> ChargePoint’s Reply Brief at 1-2, 22 (“the Legislative Assembly directed the Commission to approve such a  
proposal only if it found that the proposal could reasonably be expected to meet six listed criteria.” and “expect each  
TE program to meet each criterion.”).

<sup>10</sup> ChargePoint Response Brief at 14.

1 should be stricken from the record.<sup>11</sup> Second, her testimony was offered nearly a year-and-a-half  
2 post-enactment of SB 1547. Any cursory review of Oregon law reveals that post-enactment  
3 testimony is *not* evidence of legislative intent.<sup>12</sup> Oregon courts do not even consider post-  
4 enactment statements of legislators as evidence of legislative intent, let alone the post-enactment  
5 testimony of a non-legislator witness.<sup>13</sup> In sum, there is no indication in the text, context, or  
6 legislative history that “consider” means anything other than its plain meaning. ChargePoint is  
7 grasping at straws. There are no legal concerns with adopting the Stipulation as filed.

8           **2. The Public Charging Pilot is reasonably expected to stimulate innovation,**  
9           **competition, and customer choice.**

10           The Public Charging Pilot is an opportunity for PacifiCorp, over the course of three  
11 years, to construct up to seven charging pods (synonymous with locations or sites) that feature  
12 multiple dual-standard DC fast chargers (DCFCs) and at least one Level 2 port, at a cost to  
13 ratepayers of no more than \$1.85 million. Despite the fact that a transportation electrification  
14 program does not need to “meet” each of the six factors, the Stipulating Parties did consider  
15 whether the Electric Avenue Pilot is “reasonably expected to stimulate innovation, competition  
16 and customer choice in electric vehicle charging and related infrastructure and services.”<sup>14</sup>

17           With regard to stimulating innovation, PacifiCorp, CUB, Forth, and Greenlots explained  
18 that the RFP process will be used to encourage bidders to propose innovative approaches to  
19 integrating advanced technologies, mitigating grid impacts, future-proofing investments, and  
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21 <sup>11</sup> Staff’s Opening Brief at 9 (citing Staff/201, Klotz/14).

22 <sup>12</sup> *Salem-Keizer Assn. v. Salem Sch. Dist. 24J*, 186 Or App 19, 26-28 (2003) (the rule that post-enactment statements  
23 by legislators are not probative legislative intent of statutes already in effect “is a rule that appears to have been  
24 adopted by nearly every other court that has addressed the issue.”) (citing *Bread Political Action Committee v.*  
*FEC*, 455 U.S. 577, 582 n. 3 (1982); *United Telephone Employees PAC v. Secretary of State*, 138 Or App. 135, 139  
(1995) (rule in Oregon is that “[s]ubsequent statements by legislators are not probative of the intent of statutes  
already in effect.”).

25 <sup>13</sup> *Id.* It is true that Ms. Smart offered testimony on the bill during the 2016 regular session when HB 4036/SB 1547  
26 was working its way through the legislature, and therefore, limited parts of her testimony in this docket could  
technically be *offered* as evidence of legislative intent, but non-legislator witness testimony ranks low on the  
established hierarchy of probative legislative history items and is the most debated type of legislative history on  
which courts sometimes rely.

<sup>14</sup> Factor (f) at Oregon Laws 2016, Chapter 28, Section 20(4).

1 addressing interoperability barriers.<sup>15</sup> Specifically, the non-cost factors will include pod design,  
2 deployment plan, equipment specifications, maintenance plan, visibility, data, and future  
3 proofing (i.e. adapting to changing charging technology).<sup>16</sup> Siemens, an EVSE market  
4 competitor, agrees that the RFP process stimulates innovation.<sup>17</sup>

5 Similarly, PacifiCorp's RFP process, by its very nature, is reasonably expected to  
6 stimulate competition.<sup>18</sup> To that end, Eluminocity, EV Connect, ABB Inc., OpConnect,  
7 SemaConnect, Control Module Inc., Efacec USA, Inc., Shorepower Technologies, and  
8 Greenlots—eight companies that compete in the same market as ChargePoint—confidently state  
9 that “PacifiCorp is proposing an open and competitive RFP process that will ensure innovation,  
10 competition, and customer choice.”<sup>19</sup> Siemens also testified that the Stipulation would  
11 “stimulat[e] the overall growth of the electric vehicle (EV) market by reducing barriers to  
12 ownership and operation for EV owners.”<sup>20</sup>

13 Interestingly, in its thirty-five-page brief, not once did ChargePoint attempt to refute the  
14 positions offered by its market competitors. Instead, ChargePoint clamored that approval of  
15 PacifiCorp's Public Charging Pilot will “allow a monopoly to take over the entire market”<sup>21</sup> and  
16 cause “massive market distortion.”<sup>22</sup> However, in reality, the modest scale of the Public  
17 Charging Pilot, adding a footprint of up to seven charging pods (locations) throughout  
18 PacifiCorp's service territory, garnered zero concern from the nine market participants noted  
19 above, with the exception of ChargePoint—the company offering the largest charging network in  
20 North America.<sup>23</sup> ChargePoint goes on to claim that PacifiCorp will quickly outpace the number  
21 of DCFCs that ChargePoint *owns* in Oregon.<sup>24</sup> However, ChargePoint is in the business of

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<sup>15</sup> Joint Opening Brief of PacifiCorp, CUB, Forth, and Greenlots at 12.

<sup>16</sup> PAC/300, Morris/7-8, lines 19-22 and 1-2.

<sup>17</sup> Siemens/100, King/8.

<sup>18</sup> Joint Opening Brief of PacifiCorp, CUB, Forth, and Greenlots at 12-13.

<sup>19</sup> Forth/102, Allen/1-3.

<sup>20</sup> Siemens/100, King/4 and 6.

<sup>21</sup> ChargePoint's Objections at 15.

<sup>22</sup> ChargePoint's Objections at 12; *see also* ChargePoint/200, Packard/22.

<sup>23</sup> Staff/200, Klotz/10.

<sup>24</sup> ChargePoint's Reply Brief at 4.

1 selling EVSE, meaning that generally the site-host becomes the owner of the charging  
2 equipment, not ChargePoint. In other words, the number of DCFC that ChargePoint “owns” is  
3 not indicative of its actual market share. Moreover, the visible “footprint” of the Public  
4 Charging Pilot is smaller than ChargePoint portrays. Because several chargers will be co-located  
5 together at one site, the Public Charging Pilot will have seven visible locations to site-hosts and  
6 EV drivers, not twenty-eight. Finally, when asked to provide evidence supporting its claim that  
7 28 DCFCs will cause PacifiCorp to dominate and control the public charging market,  
8 ChargePoint again came up empty handed, responding: “it is ChargePoint’s contention that  
9 Pacific Power would dominate and control the public charging market . . . .”<sup>25</sup>

10 Finally, with regard to stimulating customer choice, the Public Charging Pilot will offer  
11 up to seven charging pods (locations) throughout PacifiCorp’s service territory that will feature  
12 multiple dual-standard DCFC, at least one Level 2 port, and visible signage.<sup>26</sup> The innovative  
13 design of the Pilot alone will help reduce range anxiety and provide EV drivers with increased  
14 charging options beyond home charging and public Level 2 charging.<sup>27</sup> Not only do the new  
15 pods increase the number of charging locations, they also offer the latest in EV quick charging  
16 technology, especially in more remote areas where access to charging infrastructure remains  
17 extremely limited. Further, the DCFCs will have dual heads, meaning that the DCFCs are  
18 compatible with all makes and models of electric vehicles, which is not true of most installed  
19 public charging infrastructure today.

20 **3. ChargePoint offers no evidence to support its claims.**

21 ChargePoint makes sweeping claims in this docket, backed by the assurance that the  
22 statements are based on Mr. Packard’s numerous years of experience in the EV charging  
23 industry. What draws skepticism from customer advocates and industry experts alike is Mr.  
24 Packard’s inability to offer any data, studies, analyses, workpapers, or other concrete evidence to  
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26 <sup>25</sup> PAC/415 (ChargePoint Response to PacifiCorp DR No. 17).

<sup>26</sup> Supplemental Application at 36.

<sup>27</sup> Supplemental Application at 37.

1 support the outlier claims he has made in this docket. To mention just a few of many examples,  
2 Mr. Packard could produce *no evidence* to support his claim that: (1) “Pacific Power’s  
3 participation in the publically available charging station market would severely distort and  
4 hamper the market over the medium- and long-term”<sup>28</sup>; (2) “Pacific Power does not have the  
5 experience to define the necessary features for the network of DCFC stations it proposes to  
6 deploy in Oregon”<sup>29</sup>; and (3) “(EVSE) vendors would also be less likely to invest in their own  
7 publically available charging stations when they learned that Pacific Power was providing  
8 charging stations.”<sup>30</sup> Further, when Staff asked why PacifiCorp could not simply work  
9 collaboratively with a site-host to learn about the site-host’s customers and needs, ChargePoint  
10 responded: “Mr. Packard did not assert that ‘a utility could not gain information regarding  
11 customer preferences of the site-host by working [sic] collaboratively with the site-host” and  
12 “Mr. Packard did not state that site hosts know EV drivers’ needs and preferences best.”<sup>31</sup>  
13 ChargePoint either has no evidence, or contradicts its prior line of argument.

14 **4. The multi-party Stipulation is a reasonable resolution of all issues in this docket**  
15 **and provides the opportunity to pilot two different ownership models for EV**  
16 **charging infrastructure.**

17 The Stipulation before the Commission is supported by the utility, consumer advocates,  
18 EV advocates, and numerous competitors in the EV charging market. Beyond the three pilots  
19 that test different transportation electrification approaches, including the opportunity for both  
20 utility owned and site-host owned public charging, the Stipulation requires the collection of data,  
21 completion of a system impact study, and regular reporting and evaluation deadlines. No party  
22 doubts the importance of gathering EV charging data relevant to PacifiCorp’s service territory,  
23 including ChargePoint: “additional data will doubtless improve the value and effectiveness of TE  
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25 <sup>28</sup> PAC/414 (ChargePoint Response to PacifiCorp DR No. 16); *see* Staff 201/Klotz/2 (ChargePoint Response to Staff  
DR No. 4).

26 <sup>29</sup> Staff 201/Klotz/3 (ChargePoint Response to Staff DR No. 6).

<sup>30</sup> PAC/412 (ChargePoint Response to PacifiCorp DR No. 14).

<sup>31</sup> Staff 201/Klotz/5 (ChargePoint Response to Staff DR No. 13).

1 programs.”<sup>32</sup> However, ChargePoint argues that PacifiCorp does not have to own the charging  
2 stations to gain the data sought by the parties, rather, it could require the site-host and charging  
3 station vendor to provide the data. But ChargePoint’s assurances are hollow. In discovery,  
4 ChargePoint explained that it is “unable to provide Staff with actual data from its existing DC  
5 fast chargers in Oregon because its existing customer agreements prevent it from doing so.”<sup>33</sup>  
6 Further, ChargePoint objected to parties’ requests for ChargePoint’s investment plans in  
7 PacifiCorp’s Oregon service territory, exclaiming: “This proceeding does not concern  
8 ChargePoint’s investment plans, and regardless, ChargePoint is not subject to regulation by the  
9 Oregon Public Utilities Commission.”<sup>34</sup> This response precisely illustrates the Stipulating  
10 Parties’ concern—under the site-host ownership model, the Commission would have limited to  
11 no oversight over ratepayer-subsidized-charging stations, including the pricing used and the data  
12 collected, nor would there be a public forum for review of the data collected, and opportunities  
13 for evaluation and redirection, as exists with a regulated utility.

### 14 III. CONCLUSION

15 There is no doubt that private investment in publically available fast charging has been  
16 exceedingly slow to develop in PacifiCorp’s service territory, particularly outside highway  
17 corridors and Portland,<sup>35</sup> where many communities lack public charging infrastructure entirely.<sup>36</sup>  
18 The multi-party Stipulation aims to change this fact and drives us closer toward electrifying  
19 Oregon’s transportation sector in a manner consistent with the legislature’s directive, balances  
20 the interests of Oregon ratepayers with cost caps and offsetting Clean Fuels Program credits,  
21 supports installation of public charging by both PacifiCorp and site-hosts, and requires regular

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23 <sup>32</sup> ChargePoint’s Reply Brief at 26.

24 <sup>33</sup> See ChargePoint’s Reply Brief at 13 and 28.

25 <sup>34</sup> Staff/201, Klotz/7 (ChargePoint Response to Staff DR No. 14). This information was sought to analyze  
26 ChargePoint’s *future* market presence as compared to PacifiCorp’s *future* market presence.

<sup>35</sup> Supplemental Application at 36; PAC/300, Morris/3, lines 15-20 (“the proposed Public Charging Pilot program  
develops new publically available charging locations, including in areas of the state that have not attracted private  
investment to date. Importantly, the Public Charging Pilot does not preclude other parties from entering the market,  
a fact that ChargePoint does not dispute.”).

<sup>36</sup> Joint Opening Brief of PacifiCorp, CUB, Forth, and Greenlots at 12 (citing PAC/100, Morris/8).

1 reporting to the Commission. It is well within the Commission's discretion to adopt the three  
2 pilots, all of which are modest in cost and scale, but are expected to produce new data to assist  
3 with the development of attribution and cost-effectiveness methodologies essential for future,  
4 more robust programs. Staff, PacifiCorp, Oregon Citizens' Utility Board, Industrial Consumers  
5 of Northwest Utilities, Oregon Department of Energy, Forth, and Greenlots are eager to offer the  
6 collaborative agreement reached in this inaugural docket and respectfully request that the  
7 Commission approve the Stipulation.

8 DATED this 24<sup>th</sup> day of January 2018.

9 Respectfully submitted,

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