BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UE 420

In the Matter of

PACIFICORP d/b/a PACIFIC POWER,

2024 Transition Adjustment Mechanism.

STAFF'S RESPONSE TO PACIFICORP'S MOTION FOR RECONSIDERATION

I. Introduction.

This docket concerns PacifiCorp's annual Transition Adjustment Mechanism (TAM) updating net power costs (NPC). The Oregon Public Utility Commission (Commission) issued a Final Order in this docket on October 27, 2023. Among the issues resolved in the Final Order is the appropriate treatment of PacifiCorp's forecasted costs to comply with the State of Washington's Climate Control Act (CCA). Relying on the previously adopted jurisdictional allocation methodology, the 2020 Protocol, the Commission concluded the costs incurred to comply with the Washington CCA should be situs assigned to ratepayers in Washington. Consequently, the Commission disallowed the Washington CCA costs from PacifiCorp's forecast of 2024 NPC.

Oregon is not alone in concluding the costs to comply with the CCA are appropriately classified as costs for a state-specific initiative and must be situs assigned to Washington. The Wyoming Public Service Commission reached this conclusion in its Final Order in the 2023 Rocky Mountain Power general rate case recently concluded in Wyoming. The Wyoming Commission held:

> [Rocky Mountain Power] RMP shall not recover any costs associated with the WC&IP in any rates charged to Wyoming customers. The Commission rejects the Company's argument that these costs are analogous to the Wyoming wind tax and therefore, subject to allocation to all states under the 2020 Protocol. The Commission is persuaded by the intervening parties' argument, as well as its own interpretation of the 2020 Protocol, that the WC&IP is a "State-Specific Initiative." If the WC&IP is akin to any concept in the 2020 Protocol, it is akin to a renewable portfolio standard since the explicit legislative objective of the WC&IP is to reduce the use of fossil fuel generation. There is no dispute that a resource procurement standard is situs under the 2020 Protocol. Indeed, the character of the WC&IP clearly indicates it is not a tax. Specifically, the rate of GHG allowances is not set by the Washington Legislature; they are set at an auction. Finally, the Washington consumers do not pay for the GHG allowances. As such, the WC&IP is appropriately situs-assigned to Washington.[1]

[1] *In the Matter of the Application of Rocky Mountain Power for Authority to Increase its Retail Electric Service Rates by Approximately $140.2 million per year or 21.6 percent and to Revise the Energy Cost Adjustment Mechanism*, Docket No. 2000-63-3-ER-23, Record No. 17252, p. 43 (January 2, 2024, Wyo. PSC.).

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PacifiCorp now seeks reconsideration under ORS 756.561 of the Commission's decision that PacifiCorp's costs to comply with Washington's CCA should be situs assigned to ratepayers in Washington and disallowing such costs from PacifiCorp's rates in Oregon. PacifiCorp argues reconsideration is warranted because the Commission erred by misapplying the 2020 Protocol and because there is good cause to reconsider the order due to the Commission's departure from fundamental ratemaking principles and to avoid violations of dormant Commerce Clause principles.[2]

Contrary to PacifiCorp's arguments, the Commission did not misapply the 2020 Protocol. Costs incurred by PacifiCorp to meet Washington's climate policy are situs assigned under the 2020 Protocol. Further, the Commission's application of the 2020 Protocol does not violate the dormant Commerce Clause provision of the Constitution.

II. Argument

A. The costs at issue.

The costs at issue are PacifiCorp's costs to acquire "Compliance Instruments" to meet requirements of the Washington CCA.[3] The CCA establishes "a declining cap on [green-house gas (GHG)] emissions from covered entities consistent with the limits established in RCW 70A.45.020 and a program to track, verify, and enforce compliance with the cap through compliance instruments."[4] Covered entities must obtain compliance instruments to cover their GHG emissions. Compliance instruments are allowances or offsets.[5] An allowance is an authorization to emit up to one metric ton of carbon dioxide equivalent.[6] Allowances are

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[2] PacifiCorp's Motion for Reconsideration, pp. 4-5.

[3] PacifiCorp's Motion for Reconsideration, p. 1 (PacifiCorp seeks reconsideration of Commission's order disallowing costs PacifiCorp incurs to provide Oregon customers with power from Chehalis gas-fired generating facility.).

[4] Washington Administrative Code (WAC) 173-446-010.

[5] WAC 173-446-210.

[6] WAC 173-446-020.

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purchased at auctions held by the Washington Department of Ecology (Ecology).[7] Ecology is required to hold at least four annual auctions and to adopt rules to prevent market manipulation and bidder collusion. The auction prices are not administratively set by the State.

Offsets are emission reduction projects that provide direct environmental benefits to Washington.[8] Offsets must be real, permanent, quantifiable, verifiable, and enforceable. They must be additional and certified by a recognized registry.[9]

PacifiCorp's only green-house gas emitting plant in Washington is the Chehalis gas generating plant. PacifiCorp forecast the cost to acquire compliance instruments for its Chehalis GHG (Chehalis) emissions in the 2024 TAM. These are the costs the Commission disallowed.

B. The Commission did not misapply the 2020 Protocol.

1. The costs at issue are for a state-specific initiative.

PacifiCorp argues the Commission misapplied the 2020 Protocol because the section of 2020 Protocol on which the Commission relies for the disallowance, Section 3.1.2.1., addresses only the cost allocation for costs to acquire "Resources." "Resources" are defined in the 2020 Protocol as "a Company-owned generating unit, plant, mine, long-term Wholesale Contract, short-term Purchase and Sale, non-firm Purchase and Sale, or QF Contract."[10] PacifiCorp argues that to the extent costs are appropriately treated as state-specific initiative costs, the costs must be for a "Resource" as that term is defined in the 2020 Protocol. PacifiCorp asserts that because the costs at issue are not costs to acquire a Resource they cannot be costs of a state-specific initiative as follows:

The 2020 Protocol speaks to acquisition of the Resource whose costs and benefits

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[7] WAC 173-446-300.

[8] WAC 173-446-0510.

[9] Id.

[10] PAC/1316, p. 74 (2020 Protocol, Appendix A).

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> are being allocated. It is only when PacifiCorp acquires the Resource as part of a state policy initiative that Section 3.1.2.1. and the "State Resources" category (with its attendant cost allocation and situs assignment criteria) come into play. Specifically, to qualify as a State Resource, PacifiCorp must have acquired the Resource because of a state-imposed requirement to procure specific types of resources. For example, this could include renewable generation procured by PacifiCorp to comply with a state's Portfolio Standard, capacity standard, or incentive program."[11]

PacifiCorp argues that because PacifiCorp did not acquire Chehalis to comply with a state-specific initiative, the state-specific initiative allocation in Section 3.1.2.1. does not apply. Consequently, PacifiCorp argues that because Chehalis is a system resource and because the emissions covered by the CCA are emissions from Chehalis, costs to comply with the CCA must be allocated on a system basis.

PacifiCorp's argument Section 3.1.2.1. of the 2020 Protocol only addresses costs of "Resources," as defined in Appendix A, meaning Company-owned generating units, plants, mines, long-term Wholesale Contracts, short-term Purchase and Sale, non-firm Purchase and Sale, or QF Contracts, is not supported by the actual language in Section 3.1.2.1. Instead, the language makes clear that costs allocated as "State Resources" can include costs of programs in addition to costs of "Resources. Section 3.1.2.1. provides:

> **Section 3.1.2.1. Interim Period State Resources**
>
> Benefits and costs associated with three types of State Resources will be assigned or allocated as follows:
>
> - Demand-Side Management (DSM) Programs: Costs associated with DSM Programs, including Class I DSM Programs, will be allocated on a situs basis to the State in which the investment is made. Benefits from these programs, in the form of reduced consumption and contribution to Coincident Peak, will be reflected in the Load-Based Dynamic Allocation Factors.
>
> - Portfolio Standards: The portion of costs associated with Interim Period Resources acquired to comply with a State's Portfolio Standard adopted, either through legislative enactment or by a State's commission, that exceed the costs PacifiCorp would have otherwise incurred, will be allocated on a situs basis to the Jurisdiction adopting the Portfolio Standard.

[11] PacifiCorp Request for Reconsideration, p. 8.

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- State-Specific Initiatives: Costs and benefits associated with Interim Period Resources acquired in accordance with a State-specific initiative will be allocated and assigned on a situs basis to the State adopting the initiative. State-specific initiatives include, but are not limited to, the costs and benefits of incentive programs, net-metering tariffs, feed-in tariffs, capacity demand programs, solar subscription programs, electric vehicle programs, and the acquisition of renewable energy certificates.[12]

DSM Programs are a State Resource under 3.1.2.1. DSM Programs are not a Company-owned generating resource, plant, mine, or purchase and sales agreement, and therefore are not a "Resource" as that term is defined in the 2020 Protocol. Nonetheless, DSM Programs are treated as a State Resource under Section 3.1.2.1. and costs and benefits of these programs are situs assigned.

Similarly, costs allocated under the heading "State-Specific Initiatives" include costs and benefits of programs. The first sentence after the heading State-Specific Initiatives does specify that Interim Period Resources acquired in accordance with a State-specific initiative will be situs assigned. However, the second sentence goes beyond that, specifying that state-specific initiatives "include, but are not limited to, the costs and benefits of incentive programs, net metering tariffs, feed-in tariffs, capacity demand programs, solar subscription programs, and the acquisition of renewable energy certificates." This specific inclusion of the "costs and benefits" of State programs as "State-specific initiatives" is inconsistent with PacifiCorp's contention that the section contemplates that only costs of "Resources" will be assigned under that section.

Rather than attempting to engage with the actual description of state-specific initiatives to explain how the language is consistent with PacifiCorp's interpretation, PacifiCorp relies on a paraphrasing of the section as follows:

> "State-Specific Initiatives" include "Resource[s] acquired in accordance with a State-specific initiative," which may include, but are not limited to, Resources acquired to comply with "incentive programs, net-metering tariffs, feed-in tariffs, capacity standard programs, solar subscription programs, electric vehicle programs,

[12] PAC/1361, Cross-Examination Exhibit/11-12 (2020 Protocol).

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and the acquisition of renewable energy certificates."[13]

If the missing text is reintroduced into PacifiCorp's paraphrasing, the section would read like this "Costs and benefits associated with Interim Period Resources acquired in accordance with [the costs and benefits of incentive programs, et al.], are assigned on a situs basis." This reading does not make sense.

Furthermore, PacifiCorp's interpretation is bewildering. Why would PacifiCorp acquire Resources, as that term is defined in the 2020 Protocol Appendix A, for a net metering program or a solar subscription program? Net-metering agreements are, by definition, not purchase and sales agreements. Neither are agreements for solar subscription programs. Further, why is acquisition of Renewable Energy Credits included as a State-specific initiative when RECs do not fit within the definition of Resource?

The two sentences in the section of the 2020 Protocol regarding state-specific initiatives make sense if read together to mean costs situs assigned as state-specific initiatives include 1) costs and benefits of Interim-Period Resources acquired to comply with state-specific initiatives; and 2) costs and benefits of certain types of state programs and the acquisition of Renewable Energy Credits.

A review of previous protocols adopted by the Commission reflect that State and other types of "Resources" described in the protocols have not always fit within the definition Resource in the Protocol Appendix A, further contradicting PacifiCorp's argument that only the allocation of Resources is at issue in Section 3.1.2.1. The Revised Protocol adopted in 2004 included four categories of "Resources," with Resources defined much as they are now.[14] The

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[13] PacifiCorp Motion for Reconsideration, p. 7.

[14] *In the Matter of PacifiCorp, Request to Initiate an Investigation of Multi-Jurisdictional Issues and Approve and Inter-Jurisdictional Cost Allocation Protocol*, UM 1050, Order No. 05-021, App. A (Revised Protocol, App. A., p. 4) (January 12, 2005) ("Resources" means Company-owned and leased generating plants and mines, Wholesale Contracts, Seasonal Contracts, Short-Term Purchases and Sales and Non-firm Purchases and Sales.")

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categories of Resources were Seasonal, Regional, State, and System. All the "Seasonal Resources" fit within the definition of Resource, as they were contracts and generating plants, but the "Regional Resources" did not. Instead, the Regional Resources were adjustment amounts, the Owned-Hydro Embedded Cost Differential Adjustment and Mid-Columbia Embedded Cost Differential, allocated among states pursuant to a specific formula.[15] Meaning, although the term "Regional Resource" was used to describe what was being allocated, what was being allocated was not a "Resource."

The next category, State Resources, included three types of resources, one of which was DSM Programs. DSM Programs, as previously discussed, are not "Resources" as that term was defined in the Protocol Appendix A.

The 2010 Protocol adopted in 2011 included the four categories mentioned above.[16] Again, the category of "Regional Resources" included the embedded cost differential adjustment amount, which is not a "Resource" as that term was defined in the 2010 Protocol Appendix A. Additionally, "Regional Resources" included the "Klamath Hydroelectric Settlement Agreement (KHSA)" and the "Klamath Dam Surcharge Adjustment," neither of which fit the Appendix A definition of "Resource."

The KHSA was allocated on a system basis and included the following costs for PacifiCorp's hydroelectric generating facilities on the Klamath River in California, called the "Klamath Project": 1) return on investment and return of investment in the Klamath Project; 2) capital improvements required by a Federal or State agency for the continued operation of the Facility until Facility removal; 3) amounts spent by PacifiCorp in seeking relicensing of the Klamath Project; 4) amounts spent by PacifiCorp for settlement of issues relating to relicensing or removal of the Facilities; and 5) amounts spent by PacifiCorp for the Decommissioning of the

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[15] *Id.*, Order No. 05-021, App. A (Revised Protocol, pp. 4-5) (January 12, 2005).

[16] *In the Matter of PacifiCorp, dba Pacific Power Petition for Approval of Amendments to Revised Protocol Allocation Methodology*, Docket No. UM 1050, Order No. 11-244, Appendix A, p. 13 (July 5, 2011).

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Facilities in anticipation of Facilities Removal.[17] In contrast, the Klamath Dam Surcharge Adjustment, which covered the cost of actual dam removal, was allocated to only California and Oregon.

Notably, the treatment of Klamath Project costs under the 2010 Protocol is inconsistent with PacifiCorp's argument that all costs related to a Resource must be allocated or assigned the same way, either as System Resource costs or State Resource costs. Costs related to the operation of the Klamath Project were treated as System Costs and allocated to all jurisdictions. Costs incurred by PacifiCorp as it went through the FERC relicensing process and process to determine whether to relicense or stop using the Klamath Project were also treated as system costs.[18] Notwithstanding, the allocation of Klamath Project costs on a system basis, the costs to remove the Klamath Project were not system allocated. Instead, they were allocated to only Oregon and California under the 2020 Protocol, with Oregon absorbing 92 percent of the costs.[19] The rationale underlying this allocation of costs was that the removal of the Klamath Project was a state policy initiative that should be paid for the by the states adopting the policy supporting dam removal.

The circumstances here are very similar. Chehalis is undeniably a system resource and costs and benefits of the resource are properly allocated across PacifiCorp's jurisdictions. However, to the extent PacifiCorp incurs costs that are related to Chehalis, but that are the result of a State-specific initiative by Washington to eliminate GHG emissions, those costs and benefits must be situs assigned to Washington.

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[17] *In the Matter of PacifiCorp Application to Implement the Provisions of Senate Bill 76*, Docket No. UE 219, Order No. 10-364, Appendix A (Klamath Hydroelectric Settlement Agreement) (September 26, 2010).

[18] *In the Matter of PacifiCorp Application to Implement the Provisions of Senate Bill 76*, Docket No. UE 219, Order No. 10-364, Appendix A (September 26, 2010).

[19] *In the Matter of PacifiCorp Petition for Approval of Amendments to the Revised Protocol Methodology*, Docket No. UM 1050, Order No. 11-244, Appendix A, p. 14 (July 5, 2011).

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2. CCA costs are not system costs.

Even assuming PacifiCorp is correct 3.1.2.1. is intended to provide for the allocation of state-specific initiatives only if the costs at issue are for acquisition of a Resource, the costs to comply with the CCA still are not appropriately allocated as system costs because costs to comply with the CCA do not fit within any of the category of system costs included in the 2020 Protocol. PacifiCorp attempts to portray costs to comply with the CCA as generation-dispatch costs, asserting the Washington CCA Cap and Invest Program "assesses a charge per megawatt-hour (MWh) of energy produced" from Chehalis.[20] This is not true. The CCA does not "assess" a particular charge per megawatt-hour. Instead, the CCA requires covered entities to acquire and retire compliance instruments, which may be either an allowance purchased at an auction with a successful bid, or an actual offset project that directly benefits residents of the State of Washington.

Further, PacifiCorp's assertion the CCA is like a "local tax or fee" is without merit. The stated purpose of the CCA is to reduce state GHG emissions to almost zero. The cost of the program to all covered will be in the hundreds of millions of dollars. If Oregon's allocated share of the CCA compliance cost for Chehalis was to be $13 million for 2024, PacifiCorp's total costs for just one year must exceed $50 million. These costs are not similar to costs treated as local taxes and fees.

As discussed in the Commission's order, the CCA is intended to achieve the same emissions reductions goal as another state initiative adopted by Washington, the Climate Energy Transformation Act (CETA). The CETA is a Portfolio Standard and PacifiCorp concedes the above-market costs to comply with CETA must be situs assigned to Washington. It makes no sense that two state initiatives with the same GHG emission reduction goals would be treated as differently under the 2020 Protocol as PacifiCorp contends.

As the Commission stated, "[w]e agree with Staff that the costs of the Washington CCA

[20] PacifiCorp Request for Reconsideration, p. 13.

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should be situs assigned under the MSP. PacifiCorp's argument to the contrary is overly formalistic—it argues that Staff improperly conflates CETA, a portfolio standard, with the CCA, not a portfolio standard. PacifiCorp does not address the interplay between the two statutes, and that interplay makes clear that the costs in question should be situs assigned."

C. PacifiCorp's assertion costs of Washington's Climate Policy legislation should be allocated to all jurisdictions is inconsistent with the jurisdictional allocation methodology negotiated and adopted by Oregon and other states.

As stated by the Commission, "[t]he MSP is designed to isolate state-specific electricity policy costs like [CCA costs]." In 2017, "State Resources" in the Protocol were modified with the addition of "Jurisdiction-specific initiatives." That provision is carried over into the 2020 Protocol as "State-specific initiatives." It is reasonable to conclude states adopting the 2017 and 2020 Protocols included new language regarding costs of "State-specific initiatives" to further ensure that one state would not be allowed to spread costs of all state initiatives to other states, not just those related to the acquisition of resources under a Portfolio Standard. In fact, the Utah Public Service Commission (UPSC) made its intent to limit the system-wide allocation of costs of state policies in its order extending the 2017 Protocol through 2019:

> Additionally, we respect principles of interstate comity and the right of each state legislature and utility commission to pursue the policy interests of their respective states as they see fit. However, one state does not have the power to dictate or impose its policy priorities on another.
>
> More pointedly, the Oregon legislature has no authority to dictate how electricity is produced in Utah or any other state, and the PSC will not allow Utah ratepayers to absorb costs that stem from Oregon's policy choices. Indeed, we have concerns about the constitutionality of Oregon's legislative effort to affect coal fired generation in other states. *See, e.g. North Dakota v. Heydinger*, 825 F.3d 912 (8th Cir. 2016) (affirming district court's invalidation of Minnesota statute that purported to regulate how electricity was produced in other states with circuit judges concurring in judgment but disagreeing as to whether Minnesota statute was unlawful as violative of the dormant commerce clause or preempted by the Federal Power Act).
>
> Regardless of whether a federal court would uphold its statute, Oregon must bear the cost of its policy choices. To the extent Oregon legislative policy proscriptions increase system costs for any state, those costs should be passed onto Oregon

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ratepayers.[21]

Similarly, the Wyoming Public Service Commission made clear its support for the 2020 Protocol was based at least in part on its conclusion that "continuation of the key cost allocation features of the 2017 Protocol requiring states to bear incremental costs resulting from their unique state policies is in the public interest."[22]

D. The Commission's order does not violate the dormant Commerce Clause.

PacifiCorp argues that the Commission's application of the 2020 Protocol creates an outcome that "offends dormant Commerce Clause principles" because the Commission has denied PacifiCorp recovery of costs that are functionally the same as other state assessments that PacifiCorp is authorized to recover in rates.[23] Because the costs of compliance with the Washington CCA are not the same as other state charges that are system allocated, PacifiCorp's argument is without merit. The costs at issue here are costs for Compliance Instruments to offset emissions from PacifiCorp's thermal plant. PacifiCorp does not have a thermal generating plant in California and therefore is not assigned costs related to GHG plant emissions. Instead, PacifiCorp's costs related to California's Cap and Trade program arise because of wholesale sales transactions. Notably, Staff has not recommended disallowance of CCA cost impacts on wholesale sales transactions.

Similarly, PacifiCorp's suggestion the CCA is like Wyoming's wind tax is not persuasive. As explained above, Washington enacted the CCA for the purpose of reaching its State policy target of almost zero GHG emissions. In contrast, Wyoming did not enact the wind tax for the purpose of eliminating wind energy production or any other expressly stated state policy. Further, the wind tax is directly tied to the production of energy, whereas the CCA is not.

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[21] *In the Matter of the Application of Rocky Mountain Power to Extend the 2017 Protocol through December 31, 2019*, Docket No. 17-035-06 (March 23, 2017), 2017 WL 1196148 (Utah P.S.C.) (emphasis added).

[22] Wyoming Public Service Comm. Docket No. 2000-572-EA-19, Nov. 30, 2020 (2020 WL 7409821).

[23] PacifiCorp Request for Reconsideration, p. 16.

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As PacifiCorp notes, historically, State-Specific Initiatives . . . have not included local fees or taxes related to the ongoing operation of existing transmission and generation facilities.[24]

E. Oregon should not forego the benefits of Chehalis.

PacifiCorp's argument Oregon should forego the benefits of Chehalis because it is not accepting the costs of Washington's CCA is without merit. As discussed above, Oregon was required to assume the entire cost of its state initiative relating to the removal of the Klamath Project even though the costs and benefits of the Klamath Project were assigned on a system basis. Similarly in this case, the fact the costs of Washington's policy initiative are related to a system resource does not mean other states must absorb the costs. If it did, a unifying understanding of the 2020 Protocol, that it will prevent states from absorbing costs related to policies of one state, is contravened.

III. Conclusion.

PacifiCorp's request for reconsideration should be denied.

DATED this 12th day of January 2024.

Respectfully submitted,

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[24] PacifiCorp Request for Reconsideration, p. 7-8.

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