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

January 12, 2024

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 PacifiCorp's Motion for Reconsideration 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	)
	)
PACIFICORP, dba PACIFIC POWER	)
	)
2024 Transition Adjustment Mechanism.	)
	)

RESPONSE TO PACIFICORP'S MOTION FOR RECONSIDERATION OF THE ALLIANCE OF WESTERN ENERGY CONSUMERS

January 12, 2024

TABLE OF CONTENTS

DAVISON VAN CLEVE, P.C.
107 SE Washington St., Suite 430
Portland, OR 97214
Telephone: (503) 241-7242

I. INTRODUCTION

Pursuant to the December 29, 2023 *Memorandum* issued by Administrative Law Judge ("ALJ") Mapes, the Alliance of Western Energy Consumers ("AWEC") hereby submits this Response regarding PacifiCorp d/b/a Pacific Power's ("PacifiCorp" or "Company") Motion for Reconsideration ("Motion") filed in the above-captioned proceeding. As detailed below, AWEC agrees with the Commission's conclusion to exclude costs associated with Washington's Climate Commitment Act ("CCA") Cap and Invest Program for power generated by the Chehalis gas-fired generating facility ("Chehalis"). Although the Commission reached this conclusion based on different grounds than those advocated by AWEC, the fact remains that inclusion of an unconstitutional cost in Oregon rates would not result in rates that are fair, just and reasonable in accordance with Oregon law. Accordingly, if the Commission grants PacifiCorp's Motion, it should nevertheless affirm its conclusion to exclude the CCA cost adder for the Chehalis gas plant in its 2024 Transition Adjugment Mechanism ("TAM") rates. Moreover, if the Commission does not revise its Order to include CCA costs in Oregon rates, it should also deny PacifiCorp's alternative request to remove the Chehalis plant as a system resource allocated to Oregon.

II. BACKGROUND

PacifiCorp's proposed 2024 TAM rates included CCA costs the Company forecasted would be incurred to purchase allowances for emissions from Chehalis associated with serving Oregon retail load. Commission Staff and AWEC opposed inclusion of these costs in Oregon

DAVISON VAN CLEVE, P.C.
107 SE Washington St., Suite 430
Portland, OR 97214
Telephone: (503) 241-7242

rates – although for different reasons. Generally speaking, Staff relied on its interpretation of the 2020 Protocol and provisions related to State-Specific initiatives in support of its recommendation to the Commission. AWEC concluded that CCA costs could not be included in Oregon rates because the CCA's failure to provide no-cost allowances to Oregon customers similarly situated to PacifiCorp's Washington customers was a violation of the dormant Commerce Clause of the United States Constitution.

On October 27, 2023, in Order No. 23-404, the Commission denied PacifiCorp's request to recover its proposed CCA costs in 2024 TAM rates based on its interpretation of the 2020 Protocol. In response, PacifiCorp filed its Motion for Reconsideration on December 22, 2023. The Company asserts that the Commission made two legal errors – (1) a misapplication of the 2020 Protocol and erroneous construction of the terms of the CCA and the Washington Clean Energy Transformation Act ("CETA"), and (2) a misapplication of the 2020 Protocol resulting in discrimination against PacifiCorp as an interstate provider of electric service. PacifiCorp requests that the Commission reconsider its decision and allow PacifiCorp to recover CCA costs in 2024 TAM rates, or in the alternative, remove the Chehalis plant as a resource allocated to Oregon.

III. ARGUMENT

1. The Commission reached the correct conclusion not to include CCA costs in 2024 TAM rates.

In testimony and briefing related to CCA costs, AWEC raised legal arguments related to the constitutionality of certain provisions of the CCA. Specifically, AWEC argued that

DAVISON VAN CLEVE, P.C.
107 SE Washington St., Suite 430
Portland, OR 97214
Telephone: (503) 241-7242

including CCA costs in rates would be unjust and unreasonable because the CCA's failure to provide no-cost allowances to similarly situated ratepayers in Oregon violates the dormant Commerce Clause.[1] AWEC's Opening and Reply Briefs present detailed argument on this issue, so AWEC will not repeat those arguments here. Although the Commission did not reach the merits of AWEC's legal argument, the Commission's conclusion to exclude CCA costs from 2024 TAM rates is correct. As such, if the Commission is persuaded by PacifiCorp's arguments that it has misinterpreted or misapplied the 2020 Protocol, the Climate Commitment Act and Clean Energy Transformation Act, the Commission should nevertheless affirm its conclusion to exclude CCA costs from 2024 TAM rates based on the legal and policy arguments raised by AWEC.

Notably, PacifiCorp now shares AWEC's legal concerns with the CCA as demonstrated by the Company's decision to file its own complaint in federal district court, which (correctly) alleges that "[t]he CCA's allocation of no-cost allowances harms PacifiCorp's non-Washington customers and PacifiCorp in direct proportion to the amount of Chehalis generation that crosses Washington's border" and that, as a consequence, "the CCA discriminates against PacifiCorp by increasing the cost of electricity for PacifiCorp's out-of-state customers, compared to PacifiCorp's Washington customers, for electricity produced by the same generation facility."[2] This fact weighs in favor of the Commission affirming its conclusion to remove CCA costs from 2024 TAM rates. PacifiCorp's motives are predictable and clear – it wants ratepayers to take on the burden of CCA costs that are unconstitutional because "unless and until a court rules on the

[1] AWEC's Opening Brief; AWEC's Reply Brief.
[2] *PacifiCorp v. Watson*, Case No. 3:23-cv-6155, Complaint ¶¶ 9, 12 (W.D. Wash. Dec. 15, 2023).

DAVISON VAN CLEVE, P.C.
107 SE Washington St., Suite 430
Portland, OR 97214
Telephone: (503) 241-7242

issues that have been raised, PacifiCorp must comply with the law."[3] However, as AWEC noted in its Opening Brief, PacifiCorp had the opportunity, but did not take advantage, of avoiding this outcome.[4] The CCA went into effect nearly two and a half years ago, and the Washington Department of Ecology finalized its rules implementing the CCA in September of 2022.[5] Yet, PacifiCorp waited until December 2023 to challenge the CCA and Ecology's implementing regulations. Ratepayers should not bear unconstitutional costs because of PacifiCorp's business decision not to pursue other options in a timely manner.

2. The Commission's Order does not violate the dormant Commerce Clause of the United States Constitution.

Despite previously arguing that the Commission should avoid ruling on AWEC's dormant Commerce Clause arguments,[6] PacifiCorp itself now argues that the Commission's Order violates the dormant Commerce Clause.[7] As recently clarified by the United States Supreme Court, the dormant Commerce Clause is "concern[ed] with preventing purposeful discrimination against out of state interests."[8] "Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities."[9] PacifiCorp argues that "the Commission's application of the 2020 Protocol creates an outcome that itself offends dormant Commerce Clause principles"[10] because it "misapplies the neutral, non-discriminatory

[3] PacifiCorp's Motion for Reconsideration at 16:14-15.
[4] *See* AWEC's Opening Brief at 14.
[5] Wash. Laws of 2021, Chapter 316; Washington Dept. of Ecology Rule Adoption Notice, *available at*: https://ecology.wa.gov/getattachment/a7856781-d9d6-4479-88be-dc5a400dbde7/WSR-22-20-056.pdf.
[6] PacifiCorp Reply Brief at 10-16.
[7] PacifiCorp Motion for Reconsideration at 16-19.
[8] *Nat'l Pork Producers Council v. Ross*, 598 US 356, 371 (2023).
[9] *GMC v. Tracy*, 519 US 278, 298 (1977).
[10] PacifiCorp's Motion for Reconsideration at 16:16-18.

DAVISON VAN CLEVE, P.C.
107 SE Washington St., Suite 430
Portland, OR 97214
Telephone: (503) 241-7242

terms of the 2020 Protocol to create an outcome that, in practical effect, results in 'purposeful discrimination against out-of-state economic interests.'"[11] PacifiCorp is mistaken.

First, the 2020 Protocol is factually distinct from the statutes, regulations and orders that have been overturned by reviewing courts for running afoul of the dormant Commerce Clause. For example, in every case cited by PacifiCorp in its Motion, the reviewing court is determining whether a statute or regulation, or a state administrative agency's decision implementing a statute or regulation, runs afoul of either the Commerce Clause or the dormant Commerce Clause. The 2020 Protocol is neither a statute nor a regulation. It is a settlement agreement among PacifiCorp and its retail jurisdictions intended to provide a reasonable basis for cost allocations among the Company's six states, and it explicitly states that "[t]he proposed allocation of a particular expense or investment to a State under the 2020 Protocol is not intended to and will not prejudge the prudence of that cost *or the extent to which any particular cost may be reflected in rates*."[12] Indeed, the 2020 Protocol is just one in a series of PacifiCorp interjurisdictional allocation agreements that have each changed how such allocations are applied, and it could be changed again in the future, for instance by allocating all of Chehalis' generation to Washington State, which would solve PacifiCorp's under-recovery of CCA-related costs.

Second, even if the Commission's interpretation of the 2020 Protocol is grounds for a challenge under the dormant Commerce Clause, PacifiCorp has not asserted that substantially similar entities are subject to impermissible discrimination as a result of the Order. PacifiCorp's Motion is vague on this point, but it appears to argue both that Oregon ratepayers have an

[11] *Id.* at 16:18-17:2.
[12] PacifiCorp/1316 at 6 (2020 Protocol at Introduction) (emphasis added).

DAVISON VAN CLEVE, P.C.
107 SE Washington St., Suite 430
Portland, OR 97214
Telephone: (503) 241-7242

advantage over consumers in other states because they are not paying the full costs to generate the Chehalis power allocated to them, and that PacifiCorp is subject to discriminatory treatment "as an interstate electric utility"[13] because "the Order disallows PacifiCorp's CCA costs when it sells Chehalis power in interstate commerce to Oregon customers – sales that require PacifiCorp to incur the costs of securing CCA allowances."[14]

As discussed in its briefs in this case, AWEC agrees that impermissible discrimination "may include attempts to give local consumers an advantage over consumers in other States."[15] The Commission's decision, however, does not give Oregon ratepayers an advantage over similarly situated consumers in other states. The "advantage" to ratepayers is lower costs relative to costs that include CCA allowances, which lead to lower rates all else considered equal. Washington customers also do not pay for CCA allowances to cover Chehalis emissions because PacifiCorp receives no-cost allowances to cover emissions associated with serving Washington retail load due to its obligations under CETA, meaning that relative to Oregon ratepayers, Washington customers also avoid the cost for CCA allowances associated with the same electricity generated from Chehalis. The effect of the Commission's Order is to place PacifiCorp's Oregon ratepayers on equal footing with its Washington ratepayers given that ratepayers in each state are paying for reduced emissions through other state policies.[16] The effect of the Commission's decision avoids a discriminatory outcome. For that matter, AWEC is unaware of any other PacifiCorp jurisdiction that has agreed to assume CCA allowance costs.

[13] PacifiCorp's Motion for Reconsideration at 17:14.
[14] *Id.* at 19:3-5.
[15] *Id.* at 18:2-3, citing *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 US 564, 577-78 (1997).
[16] AWEC's Opening Brief at 4-12.

DAVISON VAN CLEVE, P.C.
107 SE Washington St., Suite 430
Portland, OR 97214
Telephone: (503) 241-7242

Wyoming also recently rejected PacifiCorp's attempt to include CCA allowance costs in that state's rates. [17]

As to PacifiCorp's claim that the Commission's interpretation of the 2020 Protocol discriminates against it as an interstate electric utility, the Company has not asserted how the Commission's Order treats it differently than a substantially similar entity. It is not even clear what would constitute a substantially similar entity in this case. No other utility is subject to the 2020 Protocol, and no other utility subject to the Commission's jurisdiction is a multi-state utility that owns a generating resource in Washington.

Third, PacifiCorp has not asserted a valid burden on "the arteries of commerce."[18] PacifiCorp attempts to meet this requirement by asserting that the Commission is treating "certain interstate power transmitted from Washington…differently than interstate power that PacifiCorp produces in the other states, including Oregon"[19] because it did not allow recovery of CCA costs for Chehalis in Oregon rates. But the Commission's Order does not treat power generated from Chehalis differently than power generated in Oregon. Unlike the *New England Power Co. v. New Hampshire*[20] case cited by PacifiCorp, wherein the New Hampshire Public Utilities Commission prohibited power companies from exporting hydroelectric energy, this Commission has not ordered PacifiCorp to change its proposed sale of energy from Chehalis – in fact, it approved what PacifiCorp requested (to allocate Chehalis output in accordance with the

[17] Wyoming Public Service Comm'n Docket No. 20000-633-ER-23, Memorandum Option, Findings and Order ¶ 211 (Jan. 2, 2024)
[18] PacifiCorp's Motion for Reconsideration at 18:8, citing to *Nat'l Pork Producers Council v. Ross*, 598 US 356, 362 (2023) (Sotomayor, J., concurring).
[19] PacifiCorp's Motion for Reconsideration at 17:9-10.
[20] *Id.* at n. 82, citing to *New England Power Co. v. New Hampshire*, 455 US 331 (1982).

DAVISON VAN CLEVE, P.C.
107 SE Washington St., Suite 430
Portland, OR 97214
Telephone: (503) 241-7242

2020 Protocol to Oregon ratepayers). Nothing in the Commission's decision prevents or otherwise impedes PacifiCorp's ability to generate electricity at the Chehalis plant and to sell that output outside of Washington, including to PacifiCorp's Oregon retail customers.

The real crux of the issue – that the Commission's decision "leave[s] PacifiCorp unable to recover $13.8 million in legal compliance costs that it cannot avoid"[21] – simply does not implicate the dormant Commerce Clause. Nothing in the 2020 Protocol curtails the Commission's authority to disallow costs, nor could it. The effect of the Commission's decision is simply to shift the risk of a lower rate of return to PacifiCorp's shareholders.[22] That is not a burden to interstate commerce. And, as previously stated, this is an outcome that PacifiCorp could have avoided by acting more quickly to either address issues through the MSP process or by challenging the CCA in court.

3. The Commission should decline to unilaterally remove the Chehalis plant as a resource allocated to Oregon in the present proceeding.

In the event that the Commission declines to revise its Order to include CCA costs in 2024 TAM rates, the Company "renews its request made in testimony that the Commission remove the Chehalis plant as a resource allocated to Oregon."[23] PacifiCorp's request is, by its own admission, contrary to the 2020 Protocol and should be denied.

As PacifiCorp explicitly states, "if the Commission applies the 2020 Protocol according to its terms, Chehalis should be designated as a System Resource…"[24] There is no disagreement

[21] PacifiCorp's Motion for Reconsideration at 17:10-12.
[22] *See id.* at 17:10-12.
[23] *Id.* at 2:2-3.
[24] *Id.* at 19:11-12.

DAVISON VAN CLEVE, P.C.
107 SE Washington St., Suite 430
Portland, OR 97214
Telephone: (503) 241-7242

that Chehalis is a System Resource that should be allocated to Oregon customers. There is no provision in the 2020 Protocol that would allow for a Commission, absent a determination of imprudence, to simply remove a System Resource from rates because of an alleged misalignment between costs and benefits associated with that resource. PacifiCorp has not argued that Chehalis' inclusion in Oregon rates is imprudent. To the contrary, PacifiCorp testifies that Oregon customers benefit from the inclusion of Chehalis in Oregon rates to the tune of $37 million.[25] For all of its arguments about how the Commission's Order in this case "misapplies the 2020 Protocol," that result would also come to pass if the Commission unilaterally removed Chehalis from Oregon rates.

PacifiCorp's argument to remove Chehalis from Oregon rates is also concerning given that it is bound to support the 2020 Protocol, including its provisions for proposed changes.[26] While PacifiCorp may argue that it is not advocating for a change to the 2020 Protocol by advocating for the removal of Chehalis from Oregon rates, at the very least its proposal violates the spirit of the 2020 Protocol. Realignment of resources to address the specific issue here – specific state regulatory requirements – is expressly contemplated in Section 6.4. This section discusses an investigation of Limited Realignment of Interim Period Resources (which include Chehalis) as an action item to address, in part, Washington's CETA. This is the appropriate pathway under the 2020 Protocol to consider a change in resource allocation to Oregon customers.

[25] PacifiCorp's Motion for Reconsideration at 13:16.
[26] PacifiCorp/1316 at 47-48 (2020 Protocol Section 8.4).

DAVISON VAN CLEVE, P.C.
107 SE Washington St., Suite 430
Portland, OR 97214
Telephone: (503) 241-7242

AWEC notes that, while the Commission's Order results in under-recovery of costs for PacifiCorp, treating Chehalis as a Washington situs-assigned resource for Oregon ratemaking purposes would result in a windfall for PacifiCorp. This is because PacifiCorp's Washington rates do not include the costs and benefits of Chehalis that are currently assigned to Oregon. Thus, under this scenario, the net benefits of Oregon's share of Chehalis would inure to PacifiCorp's shareholders, not to Washington customers.

Finally, PacifiCorp notes, removing Chehalis from Oregon rates would be "poor precedent" and could lead to further complications under the 2020 Protocol.[27] AWEC agrees. Given these risks, and PacifiCorp's decision not to timely pursue other paths to avoid this problem, the Commission should not circumvent the 2020 Protocol or disadvantage Oregon ratepayers by removing Chehalis from Oregon rates. As AWEC noted in its Opening Brief and above, PacifiCorp has a viable path to address this issue *through* the MSP process and in so doing, can work with states to allocate all of Chehalis' generation to Washington.[28]

IV. CONCLUSION

For the reasons stated above, if the Commission grants PacifiCorp's Motion, it should nevertheless affirm its conclusion to exclude the CCA cost adder for the Chehalis gas plant in its 2024 TAM rates based on the rationale offered by AWEC and deny PacifiCorp's alternative request to remove the Chehalis plant as a resource allocated to Oregon in the event that the Commission does not revise its Order to include CCA costs in Oregon rates.

[27] PacifiCorp's Motion for Reconsideration at 20:5-10.
[28] AWEC's Opening Brief at 14.

DAVISON VAN CLEVE, P.C.
107 SE Washington St., Suite 430
Portland, OR 97214
Telephone: (503) 241-7242

Dated this 12th day of January, 2024.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Tyler C. Pepple
Tyler C. Pepple
107 SE Washington St., Suite 430
Portland, Oregon 97214
(503) 241-7242 (phone)
(503) 241-8160 (facsimile)
tcp@dvclaw.com

Attorney for Alliance of Western Energy Consumers