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October 2, 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 Reply Brief of the Alliance of Western Energy Consumers 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.	)
	)

REPLY BRIEF OF THE ALLIANCE OF WESTERN ENERGY CONSUMERS

October 2, 2023

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I. INTRODUCTION

Pursuant to the September 8, 2023 *Scheduling Memorandum*, issued by Administrative Law Judge ("ALJ") Mapes, the Alliance of Western Energy Consumers ("AWEC") hereby submits this Reply Brief regarding PacifiCorp's (or "Company") inclusion of a Washington Climate Commitment Act ("CCA") cost adder in its proposed 2024 Transition Adjustment Mechanism ("TAM") rates. As demonstrated by AWEC's Opening Brief on this matter, PacifiCorp's inclusion of the CCA cost adder is inappropriate because the basis for the cost violates the dormant Commerce Clause of the United States Constitution. Accordingly, the Commission should deny PacifiCorp's request to include a CCA cost adder for Chehalis in its 2024 TAM rates.

II. ARGUMENT

1. PacifiCorp's arguments about fairness and equity are misplaced in the face of unconstitutional costs it seeks to include in Oregon rates.[1]

PacifiCorp argues that the Washington CCA creates a generally applicable obligation for PacifiCorp to acquire allowances to cover emissions from Chehalis associated with serving its

[1] In testimony, Staff makes an alternative recommendation for a 50-50 sharing of the benefits derived from no-cost allowances, which appears to be similarly rooted in fairness between PacifiCorp's position that Oregon bear all CCA-related compliance costs associated with the generation from Chehalis assigned to Oregon, and Staff's position that Oregon bear none. Staff/1000, Anderson/16, line 12 to 17, line 7. This recommendation is not renewed in Staff's Opening Brief, which instead recommends, like AWEC, that the Commission disallow these costs altogether. Staff's Opening Brief at 8, line 20 to 9, line 2. To the extent that Staff is continuing to recommend, as an alternative, 50-50 sharing, AWEC's arguments in this section are similarly applicable to that proposal. Staff's alternative recommendation assumes that it is at least partially fair and equitable to allocate some CCA costs to Oregon customers; however, as discussed in this section, it is not fair and equitable to allocate unconstitutional costs to Oregon customers.

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out-of-state load, including its Oregon load[2] - load for which PacifiCorp is not allocated no-cost allowances.[3] Throughout its testimony and Opening Brief, the Company raises arguments that generally distill into arguments of equity, whether it be cost causation principles,[4] the ratemaking treatment of other environmental compliance costs,[5] or that a disallowance of CCA compliance costs is unfair to its shareholders.[6] However, PacifiCorp's arguments ignore a critical fact – that *the Company* is asking for unfair treatment by asking the Commission to approve rates inclusive of unconstitutional costs.

As has long been recognized by Oregon courts, the Commission's ratemaking authority is limited by statutory and constitutional constraints.[7] "Rates are prohibited and unlawful in three circumstances: (1) the rates are unjust and unreasonable…(2) the rates are unjustly discriminatory…or (3) the rates are confiscatory…."[8] Unlike rates that may implicate ORS chapters 756 or 757 wherein the Commission has some discretion to approve discriminatory rates so long as doing so is not unjust or unreasonable,[9] the Commission has no authority to approve rates that include known unconstitutional (i.e., unlawful) components.[10] Doing so would

[2] PacifiCorp Opening Brief at 4.
[3] *Id.* at 5.
[4] *Id.* at 6-7.
[5] *Id.* at 11-13.
[6] *Id.* at 7.
[7] *See, e.g., Gearhart v. PUC of Or.*, 255 Ore.App. 58, 61 (2013), citing to *American Can v. Lobdell*, 55 Ore.App. 451, 462-463, *rev den*, 293 Ore. 190 (1982).
[8] *Gearhart v. PUC of Or.*, 255 Ore.App. 58, 61 (2013) (internal citations omitted).
[9] *See, e.g.,* ORS 756.515(1); ORS 757.325. *See also American Can Co. v. Lobdell*, 55 Ore.App. 451, 462-463 (1982).
[10] *See, e.g., Citizens' Utility Bd. of Or. v. PUC*, 154 Ore.App. 702 (1998) (Oregon Court of Appeals remanding a Commission decision in which it approved rates inclusive of a return on PGE's defunct *Trojan* plant as contrary to Oregon law, thus meaning that rates contained an unlawful component). While subsequent court decisions in the *Trojan* litigation concluded that the Commission could determine that rates were fair, just and reasonable overall despite inclusion of an unlawful component, as is the case with *Gearheart, supra*, such a determination was made after the Commission recalculated rates without consideration of the unlawful components.

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be *per se* unjust and unreasonable.[11] AWEC's Opening Brief demonstrates the unconstitutional nature of the Washington CCA's failure to provide no-cost allowances for the benefit of similarly situated ratepayers. It will not repeat those arguments here. This means that PacifiCorp's ratemaking and equity arguments are irrelevant – rates inclusive of PacifiCorp's CCA cost adder cannot be determined to be fair, just and reasonable as those rates would include an unlawful element.

PacifiCorp further argues that the unconstitutionality of its allocation of CCA costs to Oregon customers is outside of the scope of this case.[12] This argument is absurd and plainly incorrect – it suggests the Commission has no authority to determine whether a cost is unlawful as applied to the customers it is statutorily designated to represent.[13] PacifiCorp's argument might have more weight if it had challenged the legality of the law in court. Had it done so, the CCA-related costs at issue here could have been deferred pending the result of that lawsuit (just as the parties to Portland General Electric's ("PGE") Annual Update Tariff ("AUT") case agreed to defer similar costs, albeit for different reasons).[14] As it stands, however, this option has been foreclosed because the pending litigation against the CCA brought by Invenergy Thermal LLC ("Invenergy") will not necessarily resolve the constitutional question before the Commission here.[15] While the court in that case could issue a broad ruling striking down the CCA entirely, it could also issue a narrow ruling (either against or in favor of Invenergy) applicable to

[11] AWEC's Opening Brief at 4-12.
[12] PacifiCorp Opening Brief at 16-17.
[13] ORS 756.040(1).
[14] Recent guidance from the Washington Department of Ecology raised uncertainty over whether PGE's market purchases would be covered by the CCA. *See* "Consideration of Electricity Imports and Determination of the Electricity Importer Under the Climate Commitment Act" (March 1, 2023), and "Ecology Response to March 2023 White Paper from Electric Power Sector (May 24, 2023).
[15] *Invenergy Thermal LLC v. Watson*, Case No. 3:22-cv-5967-BHS (W.D. Wash. Dec. 13, 2022).

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Invenergy's unique circumstances. If that occurs, the issue of the constitutionality of PacifiCorp's decision to assign CCA costs to its Oregon customers will remain unresolved by the courts – and that will be because of PacifiCorp's own inaction. PacifiCorp's imprudence in failing to challenge the CCA now requires the Commission to determine the constitutionality of these costs in Oregon rates as part of its obligation to ensure that these rates are just and reasonable.[16]

2. AWEC's position in this case is not contrary to its position in Portland General Electric's Annual Update Tariff.

PacifiCorp argues that AWEC's position on the constitutionality of its proposed CCA cost adder is inconsistent with the positions it took in PGE's AUT case.[17] As the record in that case clearly demonstrates, PacifiCorp is mistaken.

From a procedural standpoint, PGE's inclusion of CCA compliance costs in the AUT settled, negating the need for briefing on that matter in that case.[18] AWEC's witness, Bradley Mullins, is not an attorney and therefore appropriately did not raise specific legal arguments in his testimony in that proceeding; however, he did flag that AWEC would address PGE's assumptions regarding its compliance obligation in briefing.[19] Notably, the case settled without the inclusion of CCA compliance costs, and without an obligation on behalf of AWEC or any party to support future cost recovery associated with any such costs.[20]

[16] As noted in AWEC's Opening Brief, PacifiCorp also has the option to work with its states through the Multi-State Process to allocate all of Chehalis' generation to Washington, which would ensure that the Company is made whole. AWEC Opening Brief at 3, 14. Accordingly, PacifiCorp is not without options.
[17] PacifiCorp's Opening Brief at 13.
[18] UE 416 – Third Partial Stipulation at ¶ 5.
[19] PAC/1304 at 15, citing to UE 416 – AWEC/100, Mullins/12, fn.3.
[20] UE 416 – Third Partial Stipulation at ¶ 5.

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More substantively, PacifiCorp ignores the issues that make its CCA cost-adder distinct from the CCA costs that PGE sought to include. PacifiCorp owns emitting generation and serves load in Washington, and as a result, is allocated no-cost allowances to cover a subset of emissions from the Chehalis plant while incurring an obligation to obtain allowances to cover the rest of the emissions from the Chehalis plant. PGE's alleged CCA compliance obligation stems from its wholesale market sales, not from owned generation within the state of Washington, and PGE has no load in Washington.[21] As demonstrated by Mr. Mullins' testimony in that case, PGE's proposal to include CCA costs is factually distinct from the issues present in this case. AWEC will address legal arguments related to PGE's future cost recovery, if sought and as appropriate, in a future proceeding.

III. CONCLUSION

As demonstrated by AWEC's Opening Brief, the Washington CCA's provision of no-cost allowances for the benefit of its in-state ratepayers to the exclusion of its out-of-state ratepayers who are paying for the same generation resource is unduly discriminatory and thus violates the dormant Commerce Clause. PacifiCorp's arguments that costs for allowances to cover its non-Washington allocated retail load served from Chehalis should be recoverable as legitimate costs should be denied. Although these costs are being incurred due to Washington's Climate Commitment Act, they are nevertheless unconstitutionally discriminatory costs whose inclusion would not lead to fair, just and reasonable rates in Oregon.

[21] UE 416 – AWEC/100, Mullins/13, lines 8-15.

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Dated this 2nd day of October, 2023.

Respectfully submitted,

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