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September 22, 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 Opening 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**

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| In the Matter of | ) |
| | ) |
| PACIFICORP, dba PACIFIC POWER | ) |
| | ) |
| Request for a General Rate Revision. | ) |
| | ) |

**OPENING BRIEF OF THE**

**ALLIANCE OF WESTERN ENERGY CONSUMERS**

**September 22, 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 Opening Brief regarding PacifiCorp d/b/a Pacific Power's ("PacifiCorp" or "Company") inclusion of a Washington Climate Commitment Act ("CCA") cost adder in rates in its proposed 2024 Transition Adjustment Mechanism ("TAM"). As detailed below, 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. 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, the Commission should deny PacifiCorp's request to include a CCA cost adder for the Chehalis gas plant in its 2024 TAM rates.

# II. LEGAL STANDARD

PacifiCorp has the burden of proof to establish that its proposed rate increase is just and reasonable.[1] The Commission also has the independent responsibility to ensure that PacifiCorp's customers are only charged just and reasonable rates.[2] The burden of proof and persuasion is borne by the Company throughout the proceeding and does not shift to any other party.[3] It is axiomatic that fair, just and reasonable rates cannot be unjustly discriminatory.[4]

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[1] ORS § 757.210(1); *Pac. Nw. Bell Tel. Co. v. Sabin,* 21 Or App 200, 213-14 (1975).
[2] ORS § 756.040(1); *Pac. Nw. Bell Tel. Co.*, 21 Or App at 213.
[3] *Re PGE*, Docket No. UE 228, Order No. 11-432 at 3 (Nov. 2, 2011).
[4] *See e.g. Gearhart v. PUC of Or.*, 255 Ore. App. 58, 87 (2013) ("Ratemaking is a legislative act, and the Commission is given broad discretion in setting rates, subject only to statutory and constitutional constraints.").



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## III. BACKGROUND

As relevant to this case, the CCA creates a compliance obligation for greenhouse gas ("GHG") emissions from certain facilities located within the state of Washington,[5] which includes the Chehalis gas-fired power plant.[6] In order to comply with CCA requirements, owners and operators of GHG emissions-producing facilities must obtain "allowances" to cover these emissions.[7] However, PacifiCorp, as an investor-owned utility also subject to Washington's Clean Energy Transformation Act ("CETA"),[8] is allocated no-cost allowances in an amount generally intended to cover the emissions associated with serving its Washington retail load.[9] This means that PacifiCorp is allocated no-cost allowances to cover the Chehalis emissions attributable to its Washington retail load, thereby lowering the cost of electricity generated from Chehalis for its Washington customers. PacifiCorp does not receive no-cost allowances to cover its retail load outside of Washington, meaning PacifiCorp must procure allowances to cover those emissions or face being out of compliance with the CCA.[10] In this case, PacifiCorp proposes to allocate the allowance costs associated with procuring no-cost allowances for Chehalis' emissions proportional to the electricity generated at Chehalis to serve its Oregon retail load.[11] The impact of this adder, along with the changed dispatch to the Chehalis plant due to

[5] RCW 70A.65.080(1).
[6] PAC/100, Mitchell/20-21.
[7] RCW 70A.65.060.
[8] CETA requires Washington utilities to: (1) eliminate coal-fired resources from their allocation of electricity on or before December 31, 2025 (exclusive of decommissioning and remediation costs); RCW 19.405.030, (2) serve its Washington retail load with greenhouse gas neutral resources between January 1, 2030 and December 31, 2044 (subject to some alternative compliance provisions); RCW 19.405.040, and (3) achieve a 100% carbon-free standard by January 1, 2045, meaning they must serve 100% of their retail load from renewable or zero-carbon emitting resources. RCW 19.405.050.
[9] *See* WAC 173-466-230 and RCW 70A.65.120.
[10] PAC/100, Mitchell/20, lines 4-11.
[11] PAC/100, Mitchell/20, lines 12-19.



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CCA compliance costs, is a $20,867,785 increase in Net Power Costs ("NPC") for PacifiCorp's Oregon customers.[12]

## IV. ARGUMENT

PacifiCorp's proposal to include a CCA cost adder for Chehalis is unreasonable, as it requires the Oregon Commission to approve rates reflective of a cost that is unconstitutionally discriminatory. As such, the Commission should approve 2024 TAM rates in this case that exclude the CCA cost adder for Chehalis.[13] While PacifiCorp will undoubtedly continue to argue that doing so is effectively a disallowance for compliance with Washington state law,[14] this argument fails to acknowledge that the Company retains the option to challenge the constitutionality of the CCA, thereby providing it with an opportunity to advocate that additional no-cost allowances be allocated to PacifiCorp that effectively exempt certain Chehalis emissions from incurring a compliance obligation – specifically, emissions associated with electricity allocated to serve the load of customers in other states (such as Oregon) subject to substantially similar state GHG emissions reduction policies. Alternatively, PacifiCorp can work with its other states through the Multi-State Process ("MSP") to allocate all of Chehalis' generation to its Washington customers, which would allow PacifiCorp to receive free allowances for the entirety of Chehalis' emissions.

[12] AWEC/200, Mullins/35, lines 5-7.
[13] AWEC also recommends that the Commission reject the partial stipulation in this case to adopt further reductions based on AWEC's testimony, which AWEC is addressing in a separate brief.
[14] PAC/1000, McVee/3, lines 5-7.



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### 1. Inclusion of a cost adder in Oregon rates due to PacifiCorp's compliance with the CCA is unjust and unreasonable because the CCA's provisions for allocation of no-cost allowances violate the dormant Commerce Clause.

The dormant Commerce Clause prohibits states from both adopting and enforcing laws that either "discriminate[] against out-of-state entities on [their] face, in [their] purpose, or in [their] practical effect,"[15] or place a significant burden on interstate commerce that is "clearly excessive in relation to putative local benefits."[16] In this case, the CCA is facially discriminatory in that it explicitly favors in-state interests over out-of-state interests by providing free allowances to PacifiCorp for in-state emissions associated with its Washington retail load but allocates no free allowances for in-state emissions associated with the retail load of its other jurisdictions. Furthermore, it is discriminatory in its practical effect because the allocation of free allowances to Washington customers materially reduces their power costs relative to the costs borne by PacifiCorp's other jurisdictions for CCA compliance.

#### *A. The CCA's failure to allocate no-cost allowances for the benefit of Oregon ratepayers is facially discriminatory.*

State statutes that facially discriminate against interstate commerce are unlawful, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.[17] Courts finding facial discrimination apply a strict scrutiny analysis to the

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[15] *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013).
[16] *Id.*, citing to *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
[17] *New Energy Co. v. Limbach*, 486 U.S. 269, 274 (1988) (internal citations omitted).



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program, thereby creating a presumption against constitutionality.[18] The objective in doing so is to prevent economic protectionism.

By its plain language, the CCA is facially discriminatory. The CCA explicitly requires the Washington State Department of Ecology ("Ecology") to allocate no-cost allowances to Washington utilities "in order to mitigate the cost burden of the program on electricity customers."[19] The CCA defines "cost burden" as "the impact on rates or charges to customers of electric utilities *in Washington state* for the incremental cost of electricity service to serve load due to the compliance cost for greenhouse gas emissions caused by the program."[20] Ecology has emphasized that "*the plain language of the law and legislative intent is clear* that the concept of cost burden relates to how the costs associated with covered emissions are passed on to customers in the State of Washington."[21]

Consequently, the CCA allows a Washington utility (and thereby, its customers) to avoid Washington's carbon tax for emissions from facilities used to serve the utility's Washington retail load. There is no equivalent CCA provision that provides a multi-state utility with no-cost allowances for the same facility to cover emissions associated with serving its ratepayers in other jurisdictions, even when those ratepayers are similarly situated to Washington ratepayers. This results in PacifiCorp's Oregon and Washington ratepayers paying the exact same generating costs for Chehalis, but with an economic offset for Washington customers that is not available to PacifiCorp's Oregon customers. Such disparate treatment in the CCA is facially discriminatory.

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[18] *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).
[19] RCW 70A.65.120(1).
[20] RCW 70A.65.010(21) (emphasis added).
[21] Washington Department of Ecology, *Concise Explanatory Statement Chapter 173-446 WAC Climate Commitment Act program*, Publication No. 22-02-046 at 239 (Sept. 2022) (emphasis added).



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Furthermore, this discrimination is not justified by a valid factor unrelated to economic protectionism. The CCA's creation of disparate economic realities for in-state versus out-of-state electric ratepayers through the provision of no-cost allowances is, by design, not intended to reduce, or tied to reducing, emissions through CCA compliance. Rather, PacifiCorp's Washington customers pay for reduced emissions through PacifiCorp's compliance with CETA, which requires PacifiCorp to: (1) eliminate coal-fired resources from its Washington customers' allocation of power by December 31, 2025; (2) to meet Washington retail load with greenhouse gas neutral resources from 2030 through 2044; and (3) beginning in 2045, to meet its Washington retail load with 100% emissions-free resources.[22] The provision of no-cost allowances only to Washington's electric ratepayers in and of itself does nothing to reduce Chehalis emissions attributable to PacifiCorp's Washington customers. Rather, Washington electric customers benefitting from no-cost allowances are reducing emissions through their compliance with CETA. Oregon customers face similar state policy mandates to reduce emissions, which they comply with in their own rates without placing a direct cost onto Washington customers. Specifically, Oregon ratepayers pay for their investor-owned utilities, including PacifiCorp, to comply with similar policies aimed at reducing GHG emissions.[23] HB 2021 creates clean energy targets applicable to investor-owned utilities and requires them to reduce greenhouse gas emissions associated with electricity sold to Oregon consumers to 100

[22] *See* footnote 8, *supra*.
[23] AWEC/100, Mullins/14, lines 1-10.



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percent below baseline emissions levels by 2040.[24] In fact, Oregon's requirements under HB 2021 are more aggressive than those in CETA.[25]

The CCA's disparate treatment of similarly situated out-of-state ratepayers only serves the purpose of economically benefiting Washington (through allowance revenues) at the expense of out-of-state entities, including PacifiCorp's Oregon retail customers, without overall emissions reductions. As AWEC demonstrates, the addition of CCA costs for Chehalis results in increased dispatch (and emissions) of other gas plants, thus not introducing carbon savings for Oregon customers.[26] When it comes to the disparate treatment between providing no-cost allowances for the benefit of Washington ratepayers without similar directives for Oregon ratepayers, the result is a higher cost for Oregon customers with the financial benefits going to Washington, without a net savings in greenhouse gas emissions.

The CCA's creation of a framework that results in utilities charging their out-of-state customers a CCA premium for the same exact commodity (i.e., generated at a single cost) directly implicates commerce. AWEC's Oregon members compete in a global economy, including potentially with facilities in Washington, and many are also typically considered Emissions Intensive Trade Exposed, meaning they are particularly sensitive to energy costs. Thus, if PacifiCorp is allowed to pass CCA costs onto its Oregon customers, it will directly impact the ability of Oregon customers – and industrial customers in particular – to compete with Washington facilities operating in the same market. This constitutes a direct harm to customers operating in interstate commerce due to the CCA's discriminatory treatment.

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[24] *Id.*
[25] *Id.*
[26] AWEC/200, Mullins/35, lines 11-13.



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*B. The CCA's failure to allocate no-cost allowances for the benefit of Oregon ratepayers is discriminatory in effect.*

State actions – be it regulations or taxes – have a discriminatory effect when they treat in-state entities differently from out-of-state entities, the differential treatment disfavors out-of-state entities and favors in-state entities, and the affected in-state and out-of-state entities are similarly situated.[27] The discrimination will be held unconstitutional unless there is a "legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means."[28] Related to taxes specifically, the United States Supreme Court upheld a severance tax on coal mined in Montana, despite the fact that the vast majority of the coal was shipped out of Montana, thereby shifting the tax-burden to those out-of-state purchasers.[29] The Court concluded that no dormant Commerce Clause violation existed, even in the face of a substantial shift of tax burden out-of-state, because the regulation took an "evenhanded" approach in that all consumers were charged the same tax rate according to the amount of coal consumed regardless of the destination of the product.[30] Unlike Montana's severance tax, the CCA's allocation of no-cost allowances treats PacifiCorp's Washington ratepayers differently than its Oregon ratepayers based on the destination of the product (electricity allocations to Oregon), as opposed to the amount of electricity consumed from Chehalis. Such treatment disfavors Oregon customers and favors Washington customers, despite the two being similarly situated. The result is discrimination in effect.

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[27] *Am. Fuel & Petrochemical Mfrs. V. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018).
[28] *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013).
[29] *Commonwealth Edison Co. v. Mont*, 453 U.S. 609, 617-618 (1981).
[30] *Id.* at 618.



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i. The CCA treats in-state and out-of-state ratepayers differently.

The CCA treats PacifiCorp's Washington ratepayers differently than its Oregon ratepayers through the provision of no-cost allowances to mitigate Washington ratepayers' cost burden for complying with the CCA, but does not contain similar requirements for the provision of no-cost allowances to Oregon ratepayers (or any PacifiCorp ratepayers outside of Washington).

ii. The CCA's disparate allocation of no-cost allowances disadvantages Oregon ratepayers and advantages Washington ratepayers.

The CCA's disparate treatment places substantial economic disadvantages on PacifiCorp's Oregon retail ratepayers relative to PacifiCorp's Washington retail ratepayers. The CCA effectively raises the cost of electricity generated from Chehalis for Oregon retail ratepayers, who must pay for allowances to cover emissions for their allocation of electricity, while insulating Washington retail ratepayers from those same costs through the provision of no-cost allowances. AWEC estimates the economic difference between the same electricity generated on behalf of Washington customers versus on behalf of Oregon customers, when factoring in the volume of no-cost allowances at recent auction prices, to be $431,229,335 for the first compliance period of the CCA (2023-2026).[31] PacifiCorp's compliance with the CCA also affects Chehalis dispatch, which is less efficient, and raises total-Company net power costs by $7,428,063,[32] without even introducing carbon savings for Oregon customers.[33] Washington is

[31] AWEC/200, Mullins/36, line 14 to 37, line 2.
[32] AWEC/200, Mullins/35, lines 10-11.
[33] AWEC/200, Mullins/35, lines 11-12 (noting that the addition of CCA costs for Chehalis resulted in increases to the dispatch of other gas plants (not located in Washington), and thus did not result in carbon savings for Oregon customers.).



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on track to generate proceeds of approximately $1.97 billion in the first year of the CCA's operation, none of which will be used to benefit Oregon, including PacifiCorp's Oregon customers.[34]

iii. Washington ratepayers and Oregon ratepayers are similarly situated.

At its core, the dormant Commerce Clause is intended to protect markets and participants in markets, meaning that those facing discrimination must also face some type of competitive disadvantage.[35] Here, all of PacifiCorp's ratepayers are in the same market – that is, to obtain safe and reliable power from a regulated entity (PacifiCorp) in both Oregon and Washington, which necessarily includes the delivery of electricity from PacifiCorp's generating assets at just and reasonable rates. In that sense, Oregon ratepayers and Washington ratepayers are identically situated. And as described above, electricity is also a fundamental commodity for businesses – some even use it as a direct input for industrial processes. The price of electricity is of paramount importance for some industries and makes or breaks whether a business can operate profitably. Individual businesses (small and large) also often compete regionally, such as between Oregon and Washington. Those businesses are directly impacted by the CCA's discriminatory effect of having out-of-state ratepayers, including Oregon ratepayers, pay more than Washington customers for the same exact electricity generated from Chehalis. Again, such treatment is discriminatory and puts Washington ratepayers at a competitive advantage over out-of-state businesses using the exact same commodity.

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[34] AWEC/200, Mullins/35, line 1.
[35] *See e.g. General Motors Corp. v. Tracy*, 519 U.S. 278 (1997).



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PacifiCorp's ratepayers in Washington and Oregon are similarly situated in a number of other relevant ways. First, Oregon and Washington ratepayers are on equal footing in that they are both generally considered responsible for the Company's prudent costs to operate the Chehalis plant for the benefit of its customers. Additionally, as described above, PacifiCorp's Oregon and Washington retail customers both face cost responsibility for complying with substantially similar clean energy requirements in their respective states.

PacifiCorp is allocated free allowances for its Washington customers because it is required to comply with CETA.[36] Indeed, the Washington Legislature explicitly stated that the allocation of free allowances to electric utilities was intended to "mitigate the cost burden … on electricity customers" due to the fact that electric utilities like PacifiCorp were already required to be 100% carbon-free by 2045 under CETA.[37] Yet, Oregon customers are subject to even more stringent carbon-free requirements under HB 2021 and, thus, may face even greater cost burdens than their Washington counterparts. Accordingly, the CCA's discriminatory treatment between PacifiCorp's Oregon ratepayers and Washington ratepayers serves no legitimate local purpose that could not be served as well by available nondiscriminatory means. Both states are on track to achieve a carbon-free electricity sector by 2045 or earlier at the expense of their utilities' customers. The CCA could have provided additional allowances for Chehalis emissions associated with that plant's dispatch to Oregon without compromising the CCA's and CETA's purposes. By failing to do so, the CCA unconstitutionally discriminates against Oregon customers.

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[36] RCW 70A.65.120(1).
[37] *Id.*



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iv. Any legitimate local purpose, if it exists, could be served as well by available non-discriminatory means.

As noted above, the purpose of allocating no-cost allowances to PacifiCorp's Washington customers is to prevent these customers from paying twice for carbon reductions – once through the CCA and again through CETA. Whether this purpose is legitimate or not, allocating no-cost allowances *only* to PacifiCorp's Washington customers does not further this purpose, particularly when, as in Oregon, ratepayers will be required to pay for similar, if not more stringent, clean energy requirements when compared to CETA. Allocating free allowances to PacifiCorp for its Oregon load would have furthered the CCA's purposes just as well and would have done so in a non-discriminatory manner. That the CCA did not do this means that it violates the Commerce Clause of the U.S. Constitution. Including the costs of CCA compliance in Oregon rates, therefore, is *per se* unjust and unreasonable.

**2. Staff's proposal that no-cost allowances should be allocated across PacifiCorp's jurisdictional states should be rejected.**

In testimony, Staff's primary position is that PacifiCorp should be required to allocate the benefits from no-cost allowances to all of its jurisdictional customers, as opposed to PacifiCorp's current treatment of allocating no-cost allowances to its Washington customers,[38] because "there does not appear to be a requirement that the [no-cost allowances] should be provided only to customers located in Washington"[39] and that, as a matter of equity, the costs and benefits of Chehalis should be allocated on a [System Generation] Factor across all of PacifiCorp's

[38] Staff/400, Anderson/13-14; Staff/1000, Anderson/16, lines 2-11.
[39] Staff/400, Anderson/13, lines 18-20.



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jurisdictional states.[40] In its Rebuttal Testimony, Staff indicated that it would be open to a 50-50 sharing agreement wherein Oregon ratepayers would receive the benefit of half of the no-cost allowances, and PacifiCorp's shareholders would bear the other half,[41] but also argued that this is an issue of "a state energy policy and as such should be entirely borne by Washington per MSP guidelines."[42]

As explained above, Staff's statutory conclusions are incorrect – the "cost burden" of the CCA applies only to Washington customers, as interpreted and confirmed by Ecology.[43] Moreover, none of Staff's proposed remedies appear to contemplate the real, fundamental issue – that the CCA's disparate treatment of similarly situated ratepayers is unconstitutional. Even PacifiCorp acknowledges the CCA's disparate treatment between Washington retail electric customers and out-of-state retail electric customers.[44] Instead of remedying this legal issue, Staff's proposals would violate the 2020 Protocol, an allocation method that Staff agreed to and the Commission adopted,[45] and would put PacifiCorp in the "untenable" position of having to comply with two different and inconsistent state agency directives.[46]

AWEC does not disagree with PacifiCorp that, in general, generation taxes should be borne by the customers that receive the benefits of that generation, which is what the 2020 Protocol does.[47] The issue here, though, is that the 2020 Protocol's allocation method assumes the legality of the generation tax in the first place. With respect to the CCA, the generation tax is

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[40] Staff/400, Anderson/14, lines 5-14.
[41] Staff/1000, Anderson/16, line 22 to 17, line 4.
[42] Staff/1000, Anderson/17, lines 4-7.
[43] *Supra* at 5.
[44] PAC/1000, McVee/5, line 18 to 6, line 3.
[45] Docket No. UM 1050, Order No. 20-024 (Jan. 23, 2020).
[46] PAC/600, Shahumyan/6, line 22.
[47] PAC/1000, McVee/3:20-4:13.



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not legal because Washington has chosen to effectively exempt its electricity customers from paying that tax while imposing it on all out-of-state customers, including those that are similarly situated to Washington customers. This is the very definition of a dormant Commerce Clause violation.

To be clear, AWEC does not advocate that Washington customers should bear the cost of allowances associated with Chehalis' dispatch to other states. It would be unjust and unreasonable for Washington customers to pay for allowances associated with generation when they do not receive the benefits. While PacifiCorp may argue that this effectively renders a disallowance on the Company for the costs of CCA compliance associated with Chehalis' dispatch to Oregon, that is a problem of the Company's own making. PacifiCorp has standing to challenge the legality of the CCA but has chosen not to. Simply because PacifiCorp thinks it can pass CCA compliance costs through to its customers should not also impose upon its customers the obligation to challenge a law applicable to the Company. PacifiCorp has an obligation to act in the best interests of its customers and it has not done so. Further, as mentioned above, regardless of the merits of PacifiCorp's decision not to mount a legal challenge to the CCA, it has a viable path through the MSP process to avoid an under-recovery of CCA allowance costs by working with its states to allocate all of Chehalis' generation to Washington. If that occurs, PacifiCorp will receive allowances for 100% of Chehalis' emissions because all of its generation will serve its Washington retail load.[48]

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[48] WAC 173-446-230.



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## V. **CONCLUSION**

Because the Washington CCA requires that no-cost allowances be provided to utilities for the benefit of Washington ratepayers, but does not contain similar requirements for the provision of no-cost allowances to similarly situated ratepayers facing CCA compliance costs through retail rates in other states, such as Oregon, it violates the dormant Commerce Clause of the United States Constitution. 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, the Commission should deny PacifiCorp's request to include a CCA cost adder for Chehalis in its 2024 TAM rates. PacifiCorp retains the option to challenge the constitutionality of the CCA, thereby providing it with the ability to avoid incurring CCA compliance costs associated with Oregon's allocation of electricity from Chehalis.

Dated this 22nd day of September, 2023.

Respectfully submitted,

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