

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2345

In the Matter of

PACIFICORP, dba PACIFIC POWER

Continual Progress Towards House Bill
2021.

ORDER

DISPOSITION: COMMISSION AUTHORITY CLARIFIED; PACIFICORP
DIRECTED TO SHOW CAUSE

I. INTRODUCTION

We conclude that this Commission has the authority under the present circumstances to direct PacifiCorp, dba Pacific Power, to issue a Request for Proposals (RFP) and review the bids resulting from such an RFP. While we find that our authority in this area is broad, we do not at this time address the question of whether we may, and under what circumstances we could, take the additional step of directing PacifiCorp to procure resources.

Although we reach this conclusion, we do not exercise that authority here, as PacifiCorp has indicated its plans to issue an RFP by June 1, 2025. Rather, we order PacifiCorp to show cause, should it fail to issue that RFP by that date or later decide to cancel it, why we should not (1) find the company out of compliance with House Bill (HB) 2021's requirements to demonstrate continual progress and take actions as soon as practicable that facilitate rapid reduction of greenhouse gas emissions at reasonable costs to retail electricity consumers, and (2) direct it to take steps to remedy its noncompliance by issuing an RFP consistent with the Commission's RFP guidelines by June 1, 2025.

PacifiCorp will make its show cause through an opening round of testimony and exhibits, due on June 16, 2025, should it fail to issue the RFP as indicated, or two weeks following the announcement it has cancelled the RFP. If made, that filing will initiate an expedited evidentiary phase in this contested case docket, and will include, under a schedule to be adopted by the Administrative Hearings Division, the opportunity for other parties to rebut PacifiCorp's evidence. As part of its filing, PacifiCorp may, as discussed below, present additional evidence and raise factual, legal, and policy concerns to afford due process.

II. PROCEDURAL HISTORY

This proceeding arose from docket LC 82, where we found that PacifiCorp's Clean Energy Plan (CEP) did not show continual progress towards meeting HB 2021's emissions reduction targets. We opened this contested case docket to adjudicate our legal authority to remedy PacifiCorp's lack of continual progress by requiring the company to issue a RFP by a date certain.

We directed the parties to examine the following issues:

1. Does the Commission have the legal authority to order PacifiCorp to take one or more of the following actions:
 - a. issue an Oregon-focused RFP
 - b. review bids received in an Oregon-focused RFP, and
 - c. procure resources identified through an Oregon-focused RFP?
2. What legally sound options exist for the Commission to ensure reliable energy supply and continual progress toward HB 2021 requirements in the event of utility inaction?
3. If the Commission directs PacifiCorp to issue and conduct an RFP, or to procure resources, what are the implications of such decisions on:
 - a. The Commission's competitive bidding rules and process?
 - b. Future Commission ratemaking decisions related to the resource?
 - c. Allocation of costs under PacifiCorp's Multi-State Protocol?

We held oral argument on February 2, 2025, following two rounds of legal briefing.

III. DISCUSSION

We divide our discussion of the parties' arguments by the three primary legal issues presented.

A. Does the Commission have the legal authority to order PacifiCorp to take one or more of the following actions: issue an Oregon-focused RFP, review bids received in an Oregon-focused RFP, and procure resources identified through an Oregon-focused RFP?

1. *Positions of the Parties*

PacifiCorp and AWEC contend that this Commission’s broad regulatory powers do not include the ability to direct a utility to issue an RFP, review bids, or procure resources. These parties contend that such a “state directed” procurement impermissibly trespasses on the role of management in the conduct of a privately-owned company. Relying on *Pacific Tel. & Tel. Co. v. Flagg*¹ and other cases, PacifiCorp argues that the Commission may not substitute itself for utility management to decide when and what type of resources to acquire. PacifiCorp states that neither Oregon nor any other utility commission of which PacifiCorp is aware has “engaged in State-directed procurement,” and that, without explicit statutory authorization, it would be “an unprecedented act for this Commission to direct PacifiCorp, or any utility, to issue an RFP or order the procurement of resources.”² PacifiCorp acknowledges that, given the breadth of the state’s legislative police power, the legislature could create a regulatory framework that allows a regulatory body to require utilities to procure resources but maintains that the legislature has not done so.

AWEC similarly distinguishes between the management role of the utility and the regulatory role of the Commission. AWEC explains that, if a regulated utility’s managerial decisions are unreasonable or unlawful, then the Commission may disallow investments or issue penalties, but cannot overrule and change those management decisions. Like PacifiCorp, AWEC sees no distinction among the proposed directives to issue an RFP, to review bids, and to procure a resource. Both parties contend that all three actions are so interrelated that a Commission directive to issue an RFP is synonymous with a directive to procure resources from the RFP.

All other parties—Staff, CREA, CRITFC, Joint Intervenors, NewSun, NIPPC, OSSIA, and RNW—argue that the Commission’s broad traditional authority includes the ability to direct PacifiCorp to issue an RFP under these circumstances. Staff explains that “[i]t is a logical exercise of the Commission’s supervisory authority under ORS 756.040 to specif[y] when an electric utility must conduct an RFP when the interests of customers and the public demand such action.”³ RNW states that “given both the breadth of the Commission’s authority under its organic statute and the Commission’s deep and largely

¹ *Pacific Tel. & Tel. Co. v. Flagg*, 189 Or 370 (1950).

² PacifiCorp Initial Brief at 22.

³ Staff Initial Brief at 3.

uncontested exercise of jurisdiction over utility procurement, it should be entirely uncontroversial that the Commission has the authority to direct a utility under its jurisdiction to issue an RFP.”⁴ Similarly, CRITFC argues that so long as the Commission’s orders are not unjust or unreasonable and lie within the boundaries of its broad statutory authority, the Commission has the power to regulate as necessary to achieve its public interest duties.

Joint Intervenors add that “other state commissions have directed electric utilities to procure resources to achieve state policy objectives, particularly emission reduction targets,”⁵ citing the example of the Colorado Public Utilities Commission. The Joint Intervenors state the Colorado regulator has long required electric utilities to acquire resources through an all-source, competitive solicitation, and has required utilities to procure resources needed to meet state emission-reduction targets.

Parties supporting Commission authority do, however, generally caution against the Commission ordering PacifiCorp to procure particular resources or prescribing contract terms. Staff explains that directing an RFP to understand “the availability and costs associated with the resources identified in responsive bids is essential to evaluating the reasonableness and prudence of PacifiCorp’s future action or inaction * * *,”⁶ but would not expect the Commission to tell PacifiCorp which resources to procure from the bid responses. NIPPC cautions that the Commission may not have the power to prescribe contract terms, including the price, because doing so might interfere with the utility’s management powers and the jurisdiction of the Federal Energy Regulatory Commission.

The Joint Intervenors, CRITFC, NewSun, OSSIA, and RNW contend that HB 2021 also provides stand-alone authority for Commission action to direct resource procurement.⁷ These parties argue that HB 2021 imposes specific and additional obligations on both the utilities and the Commission. According to Joint Intervenors, HB 2021 itself conveys adequate authority to support a directive to issue an RFP, review bids, or procure resources, without reference to our organic statute, because we can find that HB 2021 requires the utility to take those actions. OSSIA states that “[w]hile Commission action that directs PacifiCorp to issue an RFP would be a change in the Commission’s traditional practice, this is far from exercising ‘the power to direct utility procurement’

⁴ RNW Initial Brief at 11-12.

⁵ Joint Intervenors Reply Brief at 19.

⁶ Staff Initial Brief at 6.

⁷ Staff reads HB 2021’s directives more narrowly and contends that HB 2021 “simply added [to the Commission’s existing authority to act] further direction that the Commission must ensure electric companies like PacifiCorp are taking action as required.” Staff Reply Brief at 8.

and is entirely commensurate with the Commission’s obligations to ensure meaningful efforts towards compliance with HB 2021’s decarbonization goals.”⁸

Several of the parties emphasize that Commission authority to direct procurement under HB 2021 is required under the circumstances because the non-acknowledgement of a CEP is an insufficient remedy when faced with a utility that is failing to demonstrate continual progress or take actions as soon as practicable to reduce greenhouse gas emissions at reasonable costs. NIPPC states that it would be “nonsensical to conclude that the Commission could make a finding that PacifiCorp did not comply with laws [regarding resource acquisition], but that the Commission is powerless to require PacifiCorp to actually take actions to comply with the law,” positing that “[t]he Legislature did not intend for the Commission to simply monitor PacifiCorp’s actions and issue orders that have no more practical significance than reporting back to the Legislature about the status of PacifiCorp’s compliance with the law.”⁹

PacifiCorp rejects arguments that HB 2021 provides new stand-alone authority to direct procurement. PacifiCorp contends that the terms of HB 2021 actually confirm that procurement decisions remain with the utility alone. PacifiCorp highlights that HB 2021 explicitly requires that CEPs are to be developed by utilities,¹⁰ are to include “annual goals set by the electric company for actions that make progress towards meeting the clean energy targets set forth in ORS 469A.410, including acquisition of nonemitting generation resources,”¹¹ and that “[a]ctions and investments proposed in a clean energy plan may include the development or acquisition of clean energy resources.”¹²

PacifiCorp adds that HB 2021’s terms also confirm that ensuring continual progress is limited to Commission acknowledgment, because “[w]hen reviewing utility-created CEPs, the Legislature limited the Commission to its familiar role of acknowledging, or not, utility plans.”¹³ PacifiCorp describes the CEP review process as analogous to the Integrated Resource Plan (IRP) review process, which the Commission itself has acknowledged does not “usurp the role of utility decisionmaker. Utility management will retain full responsibility for making decisions and for accepting the consequences of the decisions. Thus, the utilities will retain their autonomy while having the benefit of the information and opinion contributed by the public and the Commission.”¹⁴ PacifiCorp and AWEC also note that numerous other statutes direct the Commission to “ensure”

⁸ OSSIA Reply Brief at 2, n 5 (citing PacifiCorp Initial Brief at 2).

⁹ NIPPC Initial Brief at 7.

¹⁰ ORS 469A.415(4).

¹¹ ORS 469A.415(4)(b).

¹² ORS 469A.415(5).

¹³ PacifiCorp Initial Brief At 6.

¹⁴ *In the Matter of the Investigation into Least-cost Planning for Resource Acquisitions by Energy Utilities in Oregon.*, Docket No. UM 180, Order No. 89-507 at 6 (Apr. 20, 1989).

various acts or outcomes and have not led the Commission to require utilities to procure resources.

PacifiCorp argues that a conclusion that the Commission is allowed to direct procurement activities under HB 2021 would mean that HB 2021 fails to contain “a full expression of legislative policy and sufficient procedural safeguards to protect against arbitrary application.”¹⁵ PacifiCorp believes that, in the absence of explicit enumeration in HB 2021 of actions the Commission may take in response to utility inaction, an inference that the statute confers the authority to direct utilities to engage in procurement activities would result in an unconstitutional delegation of the Legislature’s power to make law.

Furthermore, PacifiCorp contends that the Commission’s review of its CEP Supplement was procedurally insufficient. The company suggests that Oregon should adopt “clear statement rules * * * for an issue of this magnitude,” and argues that without a clear statement in HB 2021 regarding state-directed procurement, the Commission should conclude that the law does not allow for state-directed procurement. To do otherwise, PacifiCorp contends, would “bring about an enormous and transformative expansion in [the Commission’s] regulatory authority without clear [statutory] authorization.” The Legislature “could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”¹⁶

2. *Commission Resolution*

We find that the text and context of our broad regulatory powers, as supplemented and directed by HB 2021, provide us the authority to direct PacifiCorp to issue an RFP and review bids.

As recognized by all parties, this Commission has broad regulatory authority. Since 1911, the Oregon legislature has delegated its authority to regulate public utilities exclusively to this agency. Courts have repeatedly recognized that this delegation provides the Commission with “the broadest authority—commensurate with that of the legislature itself—for the exercise of [its] regulatory function.”¹⁷ The Commission’s broad powers are not, however, without limits. As a legislatively created body, our authority is naturally limited by the boundaries of the legislature's delegation by statute. We must

¹⁵ PacifiCorp Initial Brief at 9, n 35, (citing *City of Damascus v. Brown*, 226 Or App 416, 430 (2014), (citing *State v. Self*, 75 Or App 230 (1985)).

¹⁶ PacifiCorp Initial Brief at 22 n 94, (citing *FDA v. Brown & Williamson Tobacco*, 529 US 120, 161 (2000), *Utility Air Regulatory Group v. EPA*, 573 US 302, 325 (2014)).

¹⁷ *Gearhart*, 255 Or App 58, 61 (2013) (citing *Pacific N.W. Bell v. Sabin*, 21 Or App 200, 214, *rev den* (1975)).

also exercise our authority within the confines of both the state and federal constitutions to preserve the private rights of these for-profit businesses.

In ORS 756.040(2), the legislature expressly vests the Commission “with power and jurisdiction to supervise and regulate every public utility” and “to do all things necessary and convenient in the exercise of such power and jurisdiction.” ORS 756.160 further requires this Commission to “inquire into any neglect or violation of any law of this state * * * by any public utility * * * and enforce all laws of this state relating to public utilities and telecommunications utilities.”

The legislature also expressly clarified that the Commission’s authority must be interpreted consistent with its obligations to represent and protect utility customers and the public generally. ORS 756.062(2) provides that the laws administered by the Commission “shall be liberally construed in a manner consistent with the directives of ORS 756.040(1) to promote the public welfare, efficient facilities and substantial justice between customers and public and telecommunications utilities.”

From this foundation, the legislature, in passing HB 2021, provided specific directives to the Commission regarding implementation of the state’s requirement that electric utilities decarbonize their retail electricity sales by 2040. These directives include the provision, now codified in ORS 469A.415(6), that this Commission “shall ensure that an electric company demonstrates continual progress [towards the clean energy targets] and is taking actions as soon as practicable that facilitate rapid reduction of greenhouse gas emissions at reasonable costs to retail electricity consumers.” ORS 469A.420(2) further provides that the Commission “shall acknowledge the clean energy plan if the commission finds the plan to be in the public interest and consistent with the clean energy targets * * *.”

We previously examined the use of our broad regulatory powers as applied to carry out the HB 2021 directives in docket UM 2273. In Order No. 24-002, we concluded that, in passing HB 2021, the legislature gave the Commission significant discretion as how to use our authority to “ensure” continual progress by utilities. We also concluded that our CEP and IRP review processes were appropriate to determine whether utilities are achieving continual progress, but also found that we could initiate additional processes if we needed to direct utility action. We explained:

If we determine, in an IRP/CEP docket, that the continual progress required by HB 2021 has not been demonstrated, we may also initiate additional proceedings. We interpret HB 2021’s direction for us to “ensure” continual progress to give us the authority to require a utility to take actions outside the context of the regulatory determination whether to acknowledge a CEP (*i.e.*, to procure additional resources or make

necessary infrastructure investments). Such required actions would stand in contrast to a fundamental premise of the PUC’s IRP acknowledgment decisions—that IRP decisions do not direct a utility to take or not take specific actions, except as it relates to analysis required in future plans or regulatory filings. * * * If we conclude that utilities are not making “continual progress” or “taking actions as soon as practicable” such that we must direct additional utility actions, we may need to initiate separate proceedings because certain types of direction could require contested case adjudication subject to appellate review, rather than the more accessible proceedings we use for IRP/CEP acknowledgment review.¹⁸

Here, for reasons set forth below, we further conclude that those additional proceedings include the power to direct procurement as “necessary and convenient in the exercise of [our] power and jurisdiction” and to “enforce all laws of this state relating to public utilities.”¹⁹ Specifically, we find that the legislature’s broadest grant of authority to this Commission includes the state’s police powers, which PacifiCorp acknowledges exist, to direct resource procurement if required to carry out our regulatory responsibilities—which include HB 2021’s two-part directive to ensure that an electric company demonstrates continual progress *and* is taking actions as soon as practicable that facilitate rapid reduction of greenhouse gas emissions at reasonable costs.²⁰

We do not opine whether HB 2021 provides stand-alone authority to direct utility procurement but find that its provisions clarify the scope of purposes for which we may and, in some circumstances must, exercise our foundational authority to carry out legislative directives. The text of HB 2021 dictates that this Commission “ensure” that the electric utilities are taking action to implement the bill’s requirements. As PacifiCorp recognizes, “[e]nsure is a transitive verb, defined as ‘to make sure, certain, or safe.’”²¹ The legislature could have confined itself to directing us simply to review information to determine whether an electric utility is making continual and reasonable progress toward compliance with the clean energy targets. But the legislature went further by imposing a requirement that we make certain that each electric company demonstrates continual progress. If the legislature had intended that our authority to “ensure” continual progress be limited to CEP acknowledgement or non-acknowledgement, it would not have used the word “ensure,” because “acknowledge[ment] (or not), [of] a utility’s CEP”²²

¹⁸ *In the Matter of Public Utility Commission Of Oregon, Investigation Into House Bill 2021 Implementation Issues*, Docket No. UM 2273, Order No. 24-002 at 29-30 (Jan. 5, 2024).

¹⁹ ORS 757.485.

²⁰ ORS 469A.415(6).

²¹ PacifiCorp Initial Brief at 4, n 8 (citing “Ensure.” Merriam-Webster.com Dictionary, Merriam-Webster (available here: <https://www.merriam-webster.com/dictionary/ensure>)).

²² PacifiCorp Reply Brief at 3.

determines whether the CEP meets the statutory requirements; it does not *make certain that* the utility demonstrates continual progress and is taking actions consistent with ORS 469A.415(6).

While our authority is broad, we recognize that we must take care to exercise it in a way that maximizes long-term benefits to customers in the public interest and that avoids, to the extent possible, disruption to managerial discretion. For that reason, we reach only the conclusion that we may direct PacifiCorp to issue an RFP and to review bids resulting from the RFP to ensure continual and reasonable progress toward compliance with the clean energy targets. We do not address at this time the question of our authority to direct PacifiCorp to procure resources. As we stated in Order No. 24-297, “ordering a company to procure would require consideration of many additional issues beyond HB 2021 compliance in a thorough, holistic review of impacts to customers and the regulatory model.”²³

As Staff explains, “[u]nderstanding the availability and costs associated with the resources identified in responsive bids is essential to evaluating the reasonableness and prudence of PacifiCorp’s future action or inaction, and to inform the Commission’s understanding whether PacifiCorp will need to be directed to take further action,” and “may also inform a decision by the Commission as to whether it should open an investigation on its own motion under ORS 469A.440, where, ultimately, the Commission may find that an exemption from compliance with annual goals is warranted.” We also agree with Staff that “[p]roviding the Commission with information relevant to the exercise of its powers is a duty of every public utility subject to the Commission’s jurisdiction. Under ORS 756.105(1), PacifiCorp is required to provide ‘all information required by the commission to carry into effect the provisions of ORS Chapters 756, 757, 758 and 759,’” and “under ORS 756.070, ‘[t]he Public Utility Commission may inquire into the management of the business of all public utilities and telecommunications utilities and shall keep informed as to the manner and method in which they are conducted and has the right to obtain from any public utility or telecommunications utility all necessary information to enable the commission to perform duties.’”²⁴ In addition to authorizing the Commission to direct an RFP, these statutes also allow the Commission to direct PacifiCorp to review and analyze the resulting bids.

²³ *In the Matter of PacifiCorp, dba Pacific Power, 2023 Integrated Resource Plan*, Docket No. LC 82, Order No. 24-297 at 3 (Aug. 28, 2024).

²⁴ Staff Initial Brief at 6.

Contrary to the arguments of PacifiCorp and AWEC, directing a utility to issue an RFP and review bids does not impermissibly trespass on the utility's right to manage its enterprise. As the Joint Intervenors note, in most other industries, the power to set the rates and terms on which a product will be sold is a fundamental management authority, yet that role has lawfully been assigned to the Commission. In addition to rate setting, the Commission's regulatory powers have been used to mandate certain actions and processes related to resource procurement. These mandates include the Commission's use of its broad regulatory powers in 1989 to require energy utilities to consider both demand-side and supply-side resources to meet the electricity needs of their customers.²⁵ Later, the Commission required utilities to consider the treatment of carbon dioxide and other risks in the resource planning process,²⁶ and to use competitive bidding guidelines when procuring large resources.²⁷ While these Commission actions stopped short of directing a procurement, they all represent permissible uses of this agency's regulatory powers to prescribe actions previously reserved for utility management.

PacifiCorp's reliance on *Flagg* is misplaced, because we do not contemplate dictating either the method by which services are contracted for or the terms of utility contracts. The responsibility to determine how to comply with any directive to issue an RFP, as well as the authority to prudently determine which (if any) resources to procure, and on what terms, still rest with PacifiCorp. We would expect that PacifiCorp, if directed to issue an RFP, would follow its standard resource procurement practices in determining whether to acquire a resource identified from the RFP process. As the Joint Intervenors explain, ordering a utility to simply issue an RFP leaves the utility significant decision-making authority over questions such as which resources from the RFP to procure, at what price, and with what developers, subject to compliance with RFP rules.

For this reason, we similarly reject PacifiCorp's and AWEC's assertion that a Commission directive to issue an RFP is synonymous with a directive to procure a resource from the RFP. The directive to issue an RFP is similar to a Commission acknowledgement of an action item to acquire a resource as part of an IRP—neither constitutes a final decision on a resource procurement. PacifiCorp would be required to conduct the RFP in good faith, but fully retains the obligation to manage the procurement process and to decide whether to acquire a resource. PacifiCorp's managerial obligations may include defending a decision not to procure, potentially over the objections of disappointed bidders claiming that the company had failed to meet its HB 2021 obligations. In resolving questions regarding PacifiCorp's decision to acquire or not

²⁵ Docket No. UM 180, Order No. 89-507 at 2 (Apr. 20, 1989).

²⁶ *In the Matter of the Investigation into the Treatment of CO₂ Risk in the Integrated Resource Planning Process*, Docket No. UM 1302, Order No. 08-339 (Jun. 30, 2008).

²⁷ *In the Matter of the Investigation Regarding Competitive Bidding*, Docket No. UM 1182, Order No. 06-446.

acquire a resource, the Commission will, among other things, evaluate evidence whether bids submitted in response to the RFP would reduce greenhouse gas emissions at reasonable costs to consumers.

We acknowledge PacifiCorp's claims that it was not afforded the opportunity to submit alternative evidence or otherwise properly raise factual, legal, and policy concerns with the Staff Report recommending procurement, including any financial implications that could negatively impact PacifiCorp's customers. To provide sufficient process and PacifiCorp the opportunity to address these matters, we do not order the company to issue an RFP here. Rather, we order PacifiCorp to show cause why we should not (1) find it has failed to demonstrate continual progress and take actions as soon as practicable that facilitate rapid reduction of greenhouse gas emissions at reasonable costs to retail electricity consumers and (2) direct it to take steps to remedy its noncompliance by issuing an RFP by June 1, 2025. We believe that an all-source system-wide RFP is more likely than an Oregon-only, HB 2021-focused RFP to result in a portfolio of resources that meets the reliability and policy needs of PacifiCorp's various states on a least cost, least risk basis. We have chosen this procedural approach so that PacifiCorp has the opportunity to present relevant information to us in the context of a contested case before we determine whether to issue a directive.

We find our selected approach here to be the least invasive and most beneficial to customers available to us in the current circumstances. Although we also have the authority to penalize PacifiCorp if found to be in violation of HB 2021 or a Commission order, and we do not foreclose the possibility of using that authority, the imposition of penalties, which under ORS 756.990(7) are paid into the General Fund, has limited immediate benefit to ratepayers, whereas PacifiCorp's issuance of an RFP will provide PacifiCorp with options, and provide the Commission with information about those options, for making continual progress and "taking actions as soon as practicable that facilitate rapid reduction of greenhouse gas emissions at reasonable costs to retail electricity consumers."²⁸ PacifiCorp's *prompt* issuance of an RFP will, other things being equal, facilitate the consideration of more economic options than if PacifiCorp waited until closer to the 2030 compliance deadline to begin the procurement process.

Finally, we decline NIPPC's request that we clarify, in this order, that any RFP order—from an order mandating an RFP to an order directing a utility to procure resources—is appealable similar to a continual progress determination order. While the use of a contested case process should address NIPPC's concern, the appealability of any Commission order depends on its finality of decision.

²⁸ ORS 469A.415(6).

B. What legally sound options exist for the Commission to ensure reliable energy supply and continual progress toward HB 2021 requirements in the event of utility inaction?

1. *Positions of the Parties*

As previously discussed, PacifiCorp argues that the Commission's role regarding ensuring continual progress is confined to acknowledgment, or not, of utility CEPs, and that this power does not include the ability to engage in state-directed procurement. PacifiCorp states that any additional investigations regarding the Commission's authority to implement HB 2021 in the event of utility inaction should occur in a Commission investigation or rulemaking proceeding.

Staff states that the legally sound options available to the Commission are too numerous to list definitively, but suggests as examples that the Commission may (1) direct a utility to conduct appropriate reporting and analysis, (2) consider a utility's failure to act when conducting a prudence review or considering acknowledgment of a final shortlist; (3) consider whether conditions for acknowledgment of a final shortlist of resource acquisitions are warranted;²⁹ (4) impose civil penalties; or (5) open an investigation, either under ORS 469A.440(5) to determine whether an exemption from compliance with annual goals is warranted, or as a more general investigation under ORS 756.515.

AWEC, CREA, Joint Intervenors, NIPPC, NewSun, and RNW offer additional options, including: (1) a reduction of a utility's rate of return within the range of reasonableness in a ratemaking proceeding; (2) enactment of performance-based ratemaking that would incentivize procurement to ensure reliable energy supply and continual progress towards HB 2021 and disincentivize utility inaction; (3) revocation of a utility's exclusive service territory; (4) improving or expanding current clean energy programs, such as by increasing the net metering caps and setting metrics and targets for interconnection of community solar projects; setting targets for virtual power plant development; (5) ordering CEP process changes to minimize the likelihood that a CEP fails to demonstrate continual progress or promptly correct errors, such as by rejecting and promptly returning to the utility CEPs that facially do not comply with HB 2021 or by requiring updated modeling throughout the CEP review process or shortly thereafter to avoid multi-year delays; (6) embedding continual progress considerations in all aspects and all stages of utility regulatory oversight; and (7) encouraging energy efficiency and demand response as a way to demonstrate continual progress; and reinstating the feed-in tariff.

PacifiCorp responds that quantifying the benefits of qualifying facility, net metering, or community solar reforms raises complicated emissions accounting policy questions that

²⁹ OAR 860-089-0500.

are more appropriately addressed before the Department of Environmental Quality and in any event are beyond the scope of the current contested case proceeding. PacifiCorp states that the recommendations to disallow rate increases or deny an increase in return on equity fly in the face of Commission ratemaking oversight and lack a basis in law, arguing that the lack of any mention of cost recovery in HB 2021 demonstrates that the legislature did not intend for the Commission's continual progress determination to have cost recovery implications, and adding that PacifiCorp may need to make prudent investments that do not align with or contribute to continual progress, but are nonetheless necessary to ensure delivery of reliable, safe service to ratepayers, and set the utility up for future actions that will achieve continual progress. PacifiCorp asks that, if the Commission believes now is the time to do so, instead of reaching these issues in the current proceeding, the Commission initiate a rulemaking or investigation to define and develop guidelines for "continual progress" and clarity around the Commission's obligations to ensure continual progress. At oral argument, PacifiCorp stated that while penalties for failing to meet HB 2021's targets could be appropriate, it believes that imposing penalties for a failure to make continual progress would present due process concerns given the vagueness of the standard.

2. *Commission Resolution*

We agree with the parties that we have the authority to investigate a utility's implementation of HB 2021 using either our general investigatory power under ORS 756.515 or our authority pursuant to ORS 469A.440 to investigate whether to grant a temporary exemption from the RPS or a utility's CEP.

We agree moreover that our statutory authority to impose penalties under ORS 756.990(2) is clear where an electric company has been found in violation of a requirement of HB 2021, or of a Commission order implementing HB 2021, following adequate process in a contested case hearing. For example, should PacifiCorp fail to show cause in this contested case proceeding why we should not direct it to issue an RFP, a violation of our resulting directive to PacifiCorp to issue an RFP could subject PacifiCorp to penalties.

One interpretation of ORS 469A.440, which allows compliance exemptions and recognizes the possibility of penalties once a CEP has been acknowledged, is that the Legislature did not intend for exemptions to be needed, or penalties to be an option, prior to acknowledgement of a CEP. The more plausible interpretation in light of the overall statutory scheme, however, is that although the Legislature did not anticipate a multi-year span of time in which a utility had no acknowledged CEP, the broad grant of authority in our general statutes ensures that the Legislature is not required to foresee all possible eventualities.

All utility operations and decision-making, including its compliance with HB 2021, will be considered as part of any prudence review in a rate case. For example, evidence that a utility's intentional delay in procuring resources necessary for compliance with HB 2021 predictably resulted in increased compliance costs (due to the added expense of building and interconnecting resources on a compressed timeline) would be relevant to a determination as to those costs' prudence.³⁰ More generally, it is possible that rates that would be just and reasonable for a prudently managed utility would be excessive in the case of a utility whose management knowingly skirted noncompliance with statutory or regulatory obligations or otherwise put quality of service at risk. But we will not, as NewSun suggests, refuse all rate increase requests to a utility that has failed to demonstrate continual progress, as doing so would run counter to our obligation to set just and reasonable rates. Long-term customer interests are not served by unexamined disallowances.

We appreciate the parties' thoughtful suggestions regarding other approaches to help utilities move in the right direction, such as energy efficiency and net metering. While such approaches are beyond the scope of this docket, the proposals will be considered as the Commission moves forward.

C. If the Commission directs PacifiCorp to issue and conduct an RFP, or to procure resources, what are the implications of such decisions on: The Commission's competitive bidding rules and process; Future Commission ratemaking decisions related to the resource. Allocation of costs under PacifiCorp's Multi-State Protocol (MSP); and Other implications.

1. *Positions of the Parties*

PacifiCorp argues that a Commission decision to initiate an RFP and review RFP bids would compromise the integrity of the competitive bidding process. PacifiCorp is concerned about the implications for the impartiality of the competitive bidding process if the Commission itself takes over the review of bids in place of the Independent Evaluator. And PacifiCorp points out that the competitive bidding rules by their terms apply only where the utility "seeks to procure resources."

Staff, Joint Intervenors, RNW, and AWEC do not believe that a Commission directive to issue an RFP would affect the applicability of the Commission's competitive bidding rules and process.

³⁰ In the absence of data from an RFP, however, there could be limits to our ability to determine the appropriate level of disallowance.

Regarding future ratemaking decisions, PacifiCorp argues that a decision by the Commission to stand “in PacifiCorp’s managerial shoes” and direct resource procurement would impact cost recovery. PacifiCorp “stresses that state-directed procurement would require preapproval of all costs and expenditures incurred from these efforts.”³¹ AWEC agrees that a Commission order directing procurement would indeed be dispositive evidence of prudence in a rate case. AWEC explains that it is unrealistic to imagine a situation in which the Commission directs a utility to procure a certain amount of megawatts, the utility thereby issues an RFP for the amount of megawatts specified by the Commission, receives bids that meet the ordered volume, procures such resources, and then the Commission determines that the utility did not act prudently.

Staff states that any ratemaking decisions will be made on the basis of the evidentiary record in any future cost recovery docket. Staff states that the Commission’s exercise of its statutory authority will not change the standards for prudence or power cost recovery, but that it understands that any Commission orders directing PacifiCorp to undertake actions with respect to an RFP may be relevant to understanding the circumstances at the time PacifiCorp takes action. However, as RNW and Joint Intervenors point out, PacifiCorp would still be responsible for prudently managing the RFP and selecting the optimal mix of resources. Joint Intervenors state that “the Commission does not need to preapprove cost recovery of the resources it directs PacifiCorp to procure,” noting that “PacifiCorp confuses the issue of whether certain kinds and/or amounts of resources should be procured with the separate issues of whether the utility acted prudently in the amount of money it spent acquiring and operating specific resources.”³²

As to potential cost allocation impacts under the MSP, PacifiCorp contends that “while it appears the Commission is not considering procurement that could result in costs to other states, the Commission needs to confirm that any State-directed procurement is limited to Oregon-situs resources. For Due Process and Commerce Clause reasons, the Commission cannot direct PacifiCorp to seek recovery of any of these investments from wholesale or retail customers located outside the State of Oregon.”³³

AWEC also warns of serious risks and legal implications under the MSP of a Commission directive to PacifiCorp to issue an RFP or procure resources, stating that, for example, it is unclear how transmission upgrades associated with a Commission-directed procurement would be allocated. AWEC is also concerned that PacifiCorp could acquire a non-Oregon resource exclusively to serve Oregon load, in which case “the state’s legislature or utility commission [might] feel tempted, if not encouraged, to meddle with

³¹ PacifiCorp Initial Brief at 24.

³² Joint Intervenor Reply Brief at 17.

³³ PacifiCorp Initial Brief at 26.

it in all manner of creative ways, including, for instance, imposing taxes on the energy output that would raise costs for Oregon customers.”³⁴

Staff, Joint Intervenors, and RNW argue that the allocation among states of the costs related to any future procurement can be addressed in future proceedings.

Finally, PacifiCorp raised two other implications from Commission action here. First, PacifiCorp suggests that by “removing the Company’s ability to plan to serve its customers through resource procurement,” the Commission could convert PacifiCorp into an “instrumentality of the State” protected by sovereign immunity. PacifiCorp cites a Texas decision holding that “the Electric Reliability Council of Texas (ERCOT) is entitled to sovereign immunity as an ‘arm of the State,’ and could not be sued for damages caused by ERCOT in response to Winter Storm Uri.”³⁵ AWEC agrees with PacifiCorp that this is a concern.

Second, PacifiCorp raises a concern that the Commission may be exposed to shareholder derivative lawsuits, laying out a scenario in which “the Commission directs PacifiCorp to procure resources to reduce greenhouse gas emissions, and this procurement results in further credit downgrades or liquidity or solvency concerns,” arguing that in that scenario, the Commission “would appear to be acting as an officer or director, ostensibly or otherwise, of the corporation.”³⁶ AWEC shares PacifiCorp’s concern.

The Joint Intervenors rebut both concerns. They claim PacifiCorp’s arguments on Sovereign immunity and the Texas case are misplaced, explaining that “[t]he Texas Public Utility Commission has ‘complete authority’ over ERCOT’s operations, governance, bylaws, and protocols.” PacifiCorp, on the other hand, retains such autonomy despite being subject to regulation. Directing the issuance of an RFP, Joint Intervenors claim, would not amount to the “complete authority” necessary to convert PacifiCorp into an arm of the state. Joint Intervenors also respond that a derivative shareholder lawsuit is extremely speculative and would be highly unusual. Joint Intervenors argue that “[w]hile the Commission can certainly consider customers’ interest in the Company’s financial health when making its decisions, it is not legally obligated to act in a way to ensure the financial stability of the Company at the expense of the public.”³⁷

³⁴ AWEC Reply Brief at 15-16.

³⁵ PacifiCorp Initial Brief at 24-25.

³⁶ *Id.*

³⁷ Joint Intervenors Reply Brief at 21-22.

2. *Commission Resolution*

Our decision above to only contemplate a decision to direct PacifiCorp to issue an RFP has naturally limited the scope of the parties' arguments on the possible implications of such action. Under this narrower scope, we first conclude that a directive to issue an RFP would not affect the applicability of the Commission's competitive bidding rules and process. Although the RFP would be issued upon our direction, PacifiCorp would resume its traditional role of prudently managing the RFP and selecting the optimal mix of resources. Our competitive bidding rules would still apply as, although initiated by Commission directive, PacifiCorp "seeks to procure resources." Also, to be clear, the Commission does not intend to step into PacifiCorp's or the Independent Evaluator's shoes in reviewing bids received.

We next agree with the parties that issues of cost recovery cannot be resolved here. We acknowledge that a Commission directive to issue an RFP would eliminate the need for PacifiCorp to defend its action to do so; however, the utility will be required to justify other actions and remain responsible for the prudence of its decisions regarding what if any resources to select, and under what terms. It similarly remains responsible for sound management of any resource. We also agree with those parties that contend that questions regarding cost allocation under the MSP should be addressed if and when they arise in a more concrete way. The parties are free to raise their arguments again in that future context.

Finally, we conclude that PacifiCorp's concerns regarding sovereign immunity and shareholder derivative lawsuits are highly speculative and have no bearing on our decision regarding the extent of our authority.

IV. ORDER

IT IS ORDERED that:

1. This Commission has the authority to direct PacifiCorp, dba Pacific Power, to issue a Request for Proposals (RFP) and review the bids resulting from such an RFP.
2. PacifiCorp is ordered to show cause, should it fail to issue an RFP by June 1, 2025 or later decide to cancel the RFP, why we should not:
 - a. Find the company out of compliance with House Bill (HB) 2021's requirements to demonstrate continual progress and take actions as soon as practicable that facilitate rapid reduction of greenhouse gas emissions at reasonable costs to retail electricity consumers, and

- b. Direct it to take steps to remedy its noncompliance by issuing an RFP consistent with the Commission's RFP guidelines.
- 3. PacifiCorp's show cause will be due on June 16, 2025, should it fail to issue the RFP as indicated, or two weeks following the announcement it has cancelled the RFP.

Made, entered, and effective Mar 12 2025.



Megan W. Decker
Chair



Letha Tawney
Commissioner



Les Perkins
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.