BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2345

In the Matter of PACIFICORP, dba PACIFIC POWER, Continual Progress Towards House Bill 2021 Compliance.	INITIAL BRIEF OF JOINT INTERVENORS

INITIAL BRIEF OF NW ENERGY COALITION, THE GREEN ENERGY INSTITUTE AT LEWIS & CLARK LAW SCHOOL, MOBILIZING CLIMATE ACTION TOGETHER, SIERRA CLUB, AND THE OREGON CITIZENS' UTILITY BOARD

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Pursuant to the October 1, 2024 Ruling of Administrative Law Judge Grant[1], NW Energy Coalition ("NWEC"), the Green Energy Institute at Lewis & Clark Law School ("GEI"), Mobilizing Climate Action Together ("MCAT"), the Oregon Citizens' Utility Board ("CUB"), and Sierra Club (collectively, "Joint Intervenors") respectfully submit this Initial Brief.

I. Introduction

Without a rapid and decisive transition away from the burning of fossil fuels, the planet is poised to exceed 1.5 degrees Celsius warming,[2] potentially reaching upwards of 5 degrees Celsius by 2100,[3] resulting in ever worsening natural disasters and ecosystem impacts that

[1] Ruling, Disposition: Phased Schedule Adopted, Docket No. UM 2345, Or. Pub. Util. Comm'n (Oct. 1, 2024).
[2] Sophie Boehm & Clea Schumer, *10 Big Findings from the 2023 IPCC Rep. on Climate Change*, World Res. Inst. (Mar. 20, 2023), *available at* https://www.wri.org/insights/2023-ipcc-ar6-synthesis-report-climate-change-findings ("In modelled [*sic*] pathways that limit global warming to [1.5 degrees C], GHG [greenhouse gas] emissions peak immediately and before 2025 at the latest. They then drop rapidly, declining 43% by 2030 and 60% by 2035, relative to 2019 levels."); *id* ("The world must rapidly shift away from burning fossil fuels – the number one cause of the climate crisis").
[3] *Id.* ("[U]nder a high-emissions pathway … [g]lobal temperature rise … could also increase to 3.3 degrees C to 5.7 degrees C (5.9 degrees F to 10.3 degrees F) by 2100. To put this projected amount of warming into perspective, the last time global temperatures exceeded 2.5 degrees C (4.5 degrees F) above pre-industrial levels was more than 3 million years ago.").

threaten the planet's habitability.[4] This is not hyperbole; it is the overwhelming consensus of climate scientists around the world.[5]

While the transition to a low-carbon future will not be easy, there are clear steps that can, and must, be taken. Perhaps most important is the near-term decarbonization of the electric sector, which accounts for around 30 percent of global greenhouse gas ("GHG") emissions[6] and is further expected to support the decarbonization of other sectors of the economy through electrification. Although questions remain as to how to achieve complete decarbonization of the electric sector, emissions can be significantly reduced by replacing fossil resources with renewable and nonemitting energy.[7] As one of the state's most important climate laws, Oregon House Bill 2021 ("HB 2021") is designed to do just that. HB 2021 requires greenhouse gas emission reductions in line with reductions shown to be necessary to have a reasonable chance of

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[4] *Id.* ("[P]eople and ecosystems already face or are fast approaching 'hard' limits to adaptation, where climate impacts from 1.1. degrees C (2 degrees F) of global warming are becoming so frequent and severe that no existing adaptation strategies can fully avoid losses and damages."); Hans-O. Pörtner et al., *Climate Change 2022: Impacts, Adaptation and Vulnerability, Summary for Policymakers*, Intergovernmental Panel on Climate Change at C.3.3, *available at* https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf ("Many natural systems are near the hard limits of their natural adaptation capacity and additional systems will reach limits with increasing global warming (high confidence). Ecosystems already reaching or surpassing hard adaptation limits include some warmwater coral reefs, some coastal wetlands, some rainforests, and some polar and mountain ecosystems (high confidence). Above 1.5°C global warming level, some Ecosystem-based Adaptation measures will lose their effectiveness in providing benefits to people as these ecosystems will reach hard adaptation limits (high confidence).").

[5] *See, e.g.,* Intergovernmental Panel on Climate Change, *Sixth Assessment Rep.* (2023), *available at* https://www.ipcc.ch/assessment-report/ar6/.

[6] ClimateWatch, *Hist. GHG Emissions* (2024), *available at* https://www.climatewatchdata.org/ghg-emissions?breakBy=sector&chartType=percentage&end_year=2018§ors=agriculture%2Cindustrial-processes%2Cland-use-change-and-forestry%2Cbuilding%2Celectricity-heat%2Cfugitive-emissions%2Cmanufacturing-construction%2Cother-fuel-combustion%2Ctransportation%2Cwaste&start_year=1990&ap3c=AGcic0JIrVXcXvMEAGcic0Ms379Eb1urpRPTpqScT-DN3yYqAQ (electricity/heat accounting for 32 percent of greenhouse gas emissions globally in 2018).

[7] Max Roser, *The World's Energy Problem,* Our World in Data (Dec. 10, 2020), *available at* https://ourworldindata.org/worlds-energy-problem ("One sector where we *have* developed several alternatives to fossil fuels is electricity." (emphasis in original)).

keeping global warming below 1.5 degrees Celsius[8] and sets as Oregon policy that electric utilities should rely on nonemitting resources. As the Oregon Public Utility Commission ("Commission" or "PUC") is aware, electric utilities must reduce their emissions 80 percent by 2030, 90 percent by 2035, and 100 percent by 2040.[9]

With just over five years before 2030, HB 2021's first emission reduction target deadline, PacifiCorp ("Company") is not on track. Not only has the Company failed to show any signs of adjusting its planning and actions to meet Oregon law, but rather, it has doubled down on its history of preferring a continuation of "business as usual," which is readily apparent from PacifiCorp's long-standing approach to resource planning:

Time Frame	**PacifiCorp Action**
2008-present	PacifiCorp routinely presents integrated resource planning that forecasts lower emissions than are ever achieved in actual operations.[10] When promised emission reductions are not achieved, each integrated resource plan ("IRP") pushes out emission reductions to later years.
2016-2018	Despite passage of HB 4036 in 2016,[11] Oregon's law requiring the removal of coal from electric rates by 2030, PacifiCorp's 2017 IRP does not seriously evaluate the economics of its coal fleet and whether any units should be retired in favor of lower cost, cleaner alternatives.[12] PacifiCorp only meaningfully evaluates the economics of its coal fleet following an

[8] Andres Chang et al., *Setting 1.5°C-Aligned Sci.-Based Targets: Quick Start Guide for Elec. Utils*., CDP at 6 (June 2020), *available at* https://sciencebasedtargets.org/resources/files/SBTi-Power-Sector-15C-guide-FINAL.pdf.
[9] ORS 469A.410(1)(a)–(c).
[10] CUB Comments on Staff Report, Docket No. LC 82, Or. Pub. Util. Comm'n at 3 (Feb. 14, 2024), *available at* https://apps.puc.state.or.us/edockets/edocs.asp?FileType=HAC&FileName=lc82hac326772054.pdf&DocketID=23647&numSequence=145 ("CUB has examined IRPs going back to 2008 and found that they consistently over-forecast carbon reduction relative to actual operations.").
[11] ORS 757.518.
[12] *See* Sierra Club Comments, Docket No. LC 67, Or. Pub. Util. Comm'n at 3-8, *available at* https://edocs.puc.state.or.us/efdocs/HAC/lc67hac163049.pdf. As explained in these comments, Sierra Club had requested that PacifiCorp evaluate the economics of its coal fleet since *2009*. Although PacifiCorp prepared various analyses in its 2011, 2013, 2015, and 2017 IRPs, each of these analyses were shallow reviews of its coal fleet, which, even then, raised concerns about their ongoing economics, which PacifiCorp refused to take seriously. *Id.* at 5-7.

	order from this Commission to do so.[13]
2018	PacifiCorp's coal economics report shows that 60 percent of its coal fleet is uneconomic.[14] Today, the vast majority of these coal units continue to operate on coal, with only a single Naughton and two Jim Bridger units converting to methane gas.
2023-2024	PacifiCorp presents its 2023 IRP and Clean Energy Plan ("CEP") with only 70 percent emission reductions by 2030, only to quickly abandon this plan in favor of higher reliance on coal and market purchases.[15] This results in only a forecasted 52 percent reduction in emissions, with the utility never reaching any of HB 2021's emission reduction targets.[16]
2024	PacifiCorp holds public input meetings on its anticipated 2025 IRP where the Company explains that it will evaluate a range of "price-policy" scenarios, including an "MN" portfolio, which stands for "medium natural gas/No federal CO_2 regulations."[17] PacifiCorp anticipates the MN price-policy scenario will form the basis of its preferred portfolio,[18] meaning that PacifiCorp plans to select an IRP preferred portfolio that does not factor in the costs of greenhouse gas emissions.

Fortunately, the Oregon Legislature was prepared for this type of utility dereliction. Rather than relying solely on utilities' clean energy plans demonstrating "continual progress" towards the emission reduction targets, the Legislature delegated to the Commission the authority and obligation to "ensure" continual progress. As explained throughout this brief, HB 2021 fundamentally altered the Commission's relationship with regulated utilities. Rather than

[13] Order No. 18-138, Docket No. LC 67, Or. Pub. Util. Comm'n (Apr. 27, 2018) (requiring PacifiCorp to prepare a coal economics report by June 30, 2018).
[14] Iulia Gheorghiu, *PacifiCorp Shows 60% of its Coal Units are Uneconomic*, Util. Dive (Dec. 5, 2018), *available at* https://www.utilitydive.com/news/pacificorp-shows-60-of-its-coal-units-are-uneconomic/543566.
[15] *Compare* PacifiCorp 2023 IRP and CEP *with* PacifiCorp 2023 IRP Update and CEP Supplement.
[16] *Id.*
[17] PacifiCorp, 2025 IRP Pub. Input Meeting at Slide 34 (July 2024), *available at* https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/energy/integrated-resource-plan/2025-irp/PacifiCorp_2025_IRP_PIM_July_17-18_2024.pdf.
[18] PacifiCorp, 2025 IRP Pub. Input Meeting at Slide 72 (Sept. 2024), *available at* https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/energy/integrated-resource-plan/2025-irp/PacifiCorp_2025_IRP_PIM_September_25_2024.pdf (identifying "MN" as the "base" portfolio).

merely serving as an umpire calling balls and strikes, the Commission was granted the affirmative obligation to direct utility action, when needed, to ensure continual progress. Indeed, failure to do so puts the Commission in legal jeopardy, as the obligation to "ensure" continual progress and that utilities take action "as soon as practicable" to rapidly reduce greenhouse gas emissions is a mandatory duty.

This brief addresses each of the questions posed in the October 1, 2024 Ruling:

1. Does the Commission have the legal authority to direct PacifiCorp to issue an Oregon-focused Requests for Proposal ("RFP"), review bids from that RFP, and ultimately procure resources? *Yes. The Commission's broad legal authority, made broader by HB 2021, provides the Commission with the authority to direct these actions.*

2. What legally sound options exist for the Commission to ensure reliable energy supply and continual progress in event of utility inaction? *In addition to ordering the issuance of an RFP and procurement of resources, the Commission may, among other options, impose financial penalties on non-compliant utilities; improve current and adopt new programs to support the deployment of clean energy; and implement CEP process changes to promote HB 2021 compliance.*

3. If the Commission directs PacifiCorp to issue an RFP and procure resources, what are the implications on the Commission's competitive bidding rules, future ratemaking decisions, and cost allocations under PacifiCorp's Multi-State Protocol ("MSP")? *The Commission can direct the issuance of an RFP and the procurement of resources with minimal, if any, impacts upon its competitive bidding rules, future ratemaking decisions, or cost allocations under the current MSP*.

II. The Commission's Already Broad Legal Authority to Regulate Utilities Was Expanded by HB 2021's Clear Directive to Ensure That Utilities Demonstrate "Continual Progress" Towards the Emission Reduction Targets and Take Action "As Soon as Practicable" to Reduce Greenhouse Gas Emissions

Prior to addressing the Ruling's specific questions, it is necessary to review the scope of the Commission's authority to regulate utilities more generally. As explained below, the Commission enjoys broad regulatory authority over public utilities in Oregon, bound by constitutional limitations as well as its express and necessarily implied delegated powers. Traditionally, the Commission's authority allowed it to oversee utility planning and approve or

reject costs proposed for inclusion in customer rates.[19] However, with the passage of HB 2021, the Commission's authority was expressly expanded by the Legislature to proactively require specific actions from a utility, when the utility has failed in its obligations under HB 2021.

A. The Commission's Organic Statute Provides It with Broad Authority to Regulate Utilities

The Commission's powers are established in its organic statute at ORS 756.040, designating the agency with the "power and jurisdiction to supervise and regulate every public utility… in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction."[20] The Commission's authority, then, is necessarily broad, and Oregon courts have acknowledged the unique regulatory role the Commission occupies.[21] Indeed, the PUC's ratemaking and other regulatory functions are "commensurate with that of the legislature itself[.]"[22] This broad legislative grant of authority was intentional due to the need to regulate a naturally monopolistic industry, whereby close oversight by a regulatory authority with "sweeping" power was necessary.[23]

In furtherance of this generally broad scope of authority, the legislature may use delegative terms, giving the agency the "authority, responsibility and discretion for refining and executing generally expressed legislative policy."[24] Delegative terms are often used "because [the legislature] cannot foresee all the situations to which the legislation is to be applied."[25] The Oregon Attorney General instructs that "[t]he use of a delegative term reflects a legislative

[19] *Pac. Nw. Bell Tel. Co. v. Sabin*, 21 Or. App. 200, 213, rev. den. (1975).
[20] ORS 756.040(2).
[21] *See Hammond Lumber Co. v. Pub. Serv. Comm'n,* 96 Or. 595, 603 (1920) (excerpted in Ralph Hoeber, *The Role of the Courts in Pub. Util. Regul. as Exemplified in Or.*, Land Econ. (Feb. 1957)); *see also, Gearhart v. Pub. Util. Comm'n of Oregon*, 356 Or. 216, 231–32 (2014).
[22] *Bell*, 21 Or. App. at 214.
[23] *Gearhart*, 356 Or. at 219, 244.
[24] *Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 290 Or. 217, 228 (1980).
[25] *Id.*

decision to entrust policymaking responsibility to an executive agency subject to the broad policy boundaries established by the statutory scheme."[26] Delegative terms express incomplete legislative meaning that the agency is authorized to complete and examples of such terms include "good cause," "fair," "undue," "unreasonable," and "public convenience and necessity."[27] Such delegative language is present in the Commission's organic statute, granting the PUC the "power and jurisdiction to *supervise and regulate* … and *do all things necessary and convenient* in the exercise of such power and jurisdiction.[28]

The Commission must use its "jurisdiction and powers of the office to protect [] customers, and the public generally … and to obtain for them adequate service at fair and reasonable rates."[29] In so doing, the Commission must "balance the interests of the utility investor and consumer in establishing fair and reasonable rates."[30] And as the Commission has previously held, under ORS 756.040(1), (2), the Commission has authority to direct a utility "to take action to provide adequate service for its customers."[31]

When Commission decision-making is challenged, courts are typically deferential, particularly to the Commission's factual determinations and exercise of technical expertise.[32] Specifically, the legislature's delegation of authority to the Commission is "subject only to constitutional limits and those of the Commissioner's express, legislatively delegated broad

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[26] Off. of the Att'y Gen., State of Or., Op. No. 8181, 45 Or. App. Att'y Gen 98 (Nov. 4, 1986).
[27] *Springfield*, 290 Or. at 228.
[28] ORS 756.040(2) (emphasis added); *see also Diack v. City of Portland*, 306 Or. 287, 299 (1988) (concluding that the statutory requirement, applicable to the Water Resources Commission, that the free-flowing character of certain waters "be maintained in sufficient quantities *necessary* for recreation, fish and wildlife uses" delegated to the Commission the authority to determine the level of stream flow needed for those purposes, "which may themselves differ from time to time") (emphasis added).
[29] ORS 756.040(1).
[30] *Id.*
[31] Order No. 20-431, Docket No. UM 2129, Or. Pub. Util. Comm'n at App. A, p.5 (Nov. 18, 2020)
[32] *Springfield*, 290 Or. at 230.

powers."[33] As a result, the courts' role on review of a Commission decision is generally narrow, "to see that the agency's decision is within the range of discretion allowed by the more general policy of the statute."[34] Of course, the Commission's regulatory authority is not unbounded. Commission action has been restrained where the Commission has acted outside its "expressly authorized or necessarily implied" legal authority.[35] The "Commission is bound to exercise its authority within the confines of state and federal constitutions."[36]

B. HB 2021 Expands the Commission's Authority Over Regulated Utilities

The passage of HB 2021 expressly expanded the Commission's legal authority, and indeed, imposed new legal *obligations* on the Commission to act as a backstop in ensuring HB 2021's requirements are met where utilities are not on track to achieve the law's requirements. Specifically, HB 2021 requires that "[t]he commission *shall 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 to retail electricity consumers."[37] In order to make such determinations on continual progress, HB 2021 directs the Commission to "review the information supplied by an electricity service supplier … for the purposes of determining whether the electricity service supplier is making continual and reasonable progress toward compliance with the clean energy targets set forth in section 3 of this 2021 Act."[38]

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[33] *Am. Can Co. v. Lobdell*, 55 Or. App. 451, 461 (1982).
[34] *Springfield*, 290 Or. at 229; *see also* ORS 183.482(8)(b) (establishing conditions on which a reviewing court may remand an agency's order for improper exercise of discretion).
[35] *Gearhart*, 356 Or. at 231–32; *see also Pac. Nw. Bell Tel. Co. v. Davis*, 43 Or. App. 999 (1979).
[36] Order No. 08-487, Docket Nos. DR 10, UE 88, UM 989, Or. Pub. Util. Comm'n at 4 (Sep. 30, 2008) [hereinafter "Order No. 08-487"] (citing *Pac. Nw Bell Tel. Co. v. Katz*, 116 Or. App. 302, 310 (1992)) ("[T]he Commission is bound to exercise its authority within the confines of both the state and federal constitutions").
[37] H.B. 2021, 2021 Leg. Assemb., 81st Sess. § 4(6) (Or. 2021) [hereinafter "HB 2021"] (emphasis added); ORS 469A.415(6).
[38] HB 2021 § 5(3)(d); ORS 469A.420(3)(d).

Under its plain meaning dictionary definition, "shall" is "used in laws, regulations, or directives to express what is mandatory."[39] Correspondingly, Oregon courts have concluded that "'shall' is a command expressing what is mandatory."[40] Thus, the use of "shall" in HB 2021 to describe the Commission's role is that of a mandatory obligation, it *must* "ensure" that continual progress is demonstrated and that utilities take action "as soon as practicable" to rapidly reduce greenhouse gas emissions at reasonable costs. Under the plain meaning definition, "ensure" means "to make sure, certain, or safe."[41] Under Oregon law, the text and context of the statute in question are given primary weight in the *State v. Gaines* statutory interpretation process.[42] When examining a statute's text and context, the Commission gives words of common usage "their plain, natural, and ordinary meaning."[43] Therefore, the plain meaning of "shall ensure" in HB 2021 is that the Commission *must make certain* that the electric utilities demonstrate continual progress with the statute's emissions reduction targets by taking action as soon as practicable.

The Commission's authority to make compliance certain is not constrained, and given the broad language obligating the Commission to make sure compliance is achieved, it empowers the Commission to require actions that may not have traditionally fallen under the ambit of Commission authority. For instance, while the Commission has previously held that resource planning and procurement decisions are reserved for the utility,[44] HB 2021 changes this

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[39] *Shall,* Merriam-Webster Dictionary (11th ed. 2024).
[40] *Bacote v. Johnson*, 333 Or. 28, 33 (2001); *see also, State v. Little,* 326 Or. App. 788, 793 (2023) (citing cases using the term "shall" for the proposition that "[t]he legislature knows how to indicate a mandatory obligation").
[41] *Ensure,* Merriam-Webster Dictionary (11th ed. 2024).
[42] Order No. 18-054, Docket No. UM 1811, Or. Pub. Util. Comm'n at 7-8 (Feb. 16, 2018); Order No. 14-254, Docket No. DR 47, Or. Pub. Util. Comm'n at 4 (July 8, 2014) [hereinafter "OPUC Order No. 14-254"]; *State v. Gaines*, 346 Or. 160, 171 (2009).
[43] OPUC Order No. 14-254 at 4 (citing *Portland Gen. Elec. Co. v. Bureau of Lab. & Indus.*, 317 Or. 606, 611 (1993)).
[44] *See, e.g.,* Order No. 89-507, Docket No. UM 180, Or. Pub. Util. Comm'n (Apr. 20, 1989).

regulatory construct. Viewed through the lens of its expansive grant of authority to regulate monopoly utilities and protect customers, the Commission has the requisite authority to order utility action that ensures HB 2021's mandates are met. This is necessary because otherwise, the Commission would not be able to "ensure" continual progress.

The Commission has, in fact, already recognized that the scope of its authority has changed. As the Commission correctly determined, "HB 2021's direction … to 'ensure' continual progress [] give[s] us the authority to require a utility to take actions outside the context of the regulatory determination whether to acknowledge a CEP[.]"[45] Ordering an RFP and subsequent procurement is an action that occurs outside the context of resource plan acknowledgement. The Commission also acknowledged this significant change in its order finding no continual progress for PacifiCorp's CEP, finding that "[b]y entrusting the Commission to ensure continual progress, HB 2021 may alter the traditional regulatory landscape for planning and procurement where such progress is not found""[46] This interpretation of HB 2021's obligations upon the Commission aligns precisely with legislative intent, which demonstrates that in passing the law, legislators understood that HB 2021 would authorize the Commission to not only issue penalties for noncompliance but also the ability, in certain circumstances where a utility is out of compliance and seeking exemptions from HB 2021's requirements, to "direct the electric company to take specific actions to remedy the potential issue or issues identified in the order[.]"[47]

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[45] Order No. 24-002, Docket No. UM 2273, Or. Pub. Util. Comm'n at 29 (Jan. 5, 2024) [hereinafter "Order No. 24-002"].
[46] Order No. 24-297, Docket No. LC 82, Or. Pub. Util. Comm'n at 3 (Aug. 28, 2024) [hereinafter "Order No. 24-297"].
[47] House Comm. on Energy and Env't, *HB 2021 A Staff Measure Summary* at 2 (Apr. 12, 2021), *available at* https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureAnalysisDocument/59931.

This shift in utility regulation is undeniably significant; yet, it is firmly rooted in the plain language of the statute. As a result, references to the traditional regulatory paradigm and the Commission's hands-off approach toward utility resource planning and procurement decisions are not dispositive in guiding the Commission moving forward.[48]

III. The Commission Has the Legal Authority to Order PacifiCorp to Issue an Oregon-Focused RFP, to Order PacifiCorp to Review the Bids Submitted in That RFP, and Ultimately Direct PacifiCorp to Procure Resources

As discussed above, HB 2021 has fundamentally altered the Commission's previous regulatory framework and empowered the Commission to act in ways it may not have previously been authorized in order to ensure compliance with HB 2021's targets. This broadened authority includes the ability for the Commission to order PacifiCorp to issue an Oregon-focused RFP, for the Commission to direct PacifiCorp to review bids from an Oregon-focused RFP, and to order PacifiCorp to procure resources from that RFP.

A. The Commission Has the Legal Authority to Order PacifiCorp to Issue an Oregon-Focused RFP

Under HB 2021, the Commission is obligated to "ensure" that utilities are making continual progress towards the HB 2021 requirements. Additionally, the Commission has interpreted its authority to ensure continual progress under HB 2021 as empowering it to require a utility to "take actions."[49] Replacing emitting resources with clean energy is not merely aligned with HB 2021 and reducing greenhouse gas emissions, it is the primary way to do so. As a result, if not expressly authorized, it is necessarily implied that in order to "ensure" continual progress towards HB 2021's emission reduction targets, the Commission can order utilities to take the

[48] Ruling, Disposition: Phased Schedule Adopted, Docket No. UM 2345, Or. Pub. Util. Comm'n (Oct. 1, 2024) (citing Order No. 89-507, Docket No. UM 180, Or. Pub. Util. Comm'n (Apr. 20, 1989)).
[49] Order No. 24-002, Docket No. UM 2273, Or. Pub. Util. Comm'n at 29 (Jan. 5, 2024).

actions necessary to procure clean energy. Therefore, the power for the Commission to require utilities to undertake an RFP falls squarely within the ambit of the statutory directive.

Not only does the Commission have the power to require PacifiCorp to issue an RFP, but it can order that the RFP be Oregon-focused. While PacifiCorp operates a six-state service territory under a MSP[50] that typically involves issuing RFPs for resources across the entirety of its territory,[51] a narrow RFP for resources in only one of PacifiCorp's six states is within established practice. For instance, in its 2022 RFP process, following the selection of multi-state resources for its final shortlist, PacifiCorp intended to "consider additional compliance requirements for specific states with clean energy compliance obligations, and potentially add state-specific resources to ensure those compliance obligations … are met."[52] Similarly, Commission Staff recommended that PacifiCorp should "identify projects that might be well suited to help the Company demonstrate continual progress toward meeting HB 2021 goals" through "a list of non-emitting resources that could be procured in addition to the RFP [final shortlist][.]"[53] PacifiCorp did not object to this recommendation.[54] Building upon PacifiCorp's intent and the Staff's recommendation to demonstrate compliance with state-specific obligations, the Commission could require it to issue an Oregon-specific RFP aimed at listing state-specific resources that ensure compliance with HB 2021.

Importantly, ordering PacifiCorp to complete an Oregon-focused RFP is distinct from requiring procurement by the Company. As discussed below, while the Commission also has the

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[50] *In re PacifiCorp (U901E), an Or. Co., for an Ord. Authorizing A Gen. Rate Increase Effective Jan. 1, 2019. & Related Matter*, No. 17-04-019, 2020 WL 1032265, Cal. Pub. Util. Comm'n at 12 (Feb. 6, 2020).
[51] Order No. 22-178, Docket No. LC 77, Or. Pub. Util. Comm'n at 2 (May 23, 2022) [hereinafter "Order No. 22-178"].
[52] Order No. 22-130, Docket No. UM 2193, Or. Pub. Util. Comm'n at App. A, p.22 (Apr. 28, 2022).
[53] *Id.*
[54] *Id.* at 2.

authority to order such procurement if deemed necessary to comply with HB 2021, simply ordering a utility to conduct an RFP, but not actually procure resources, is a less intrusive intervention into utility decision-making when the utility has failed to comply with HB 2021. Nonetheless, requiring the issuance of an RFP would provide valuable insight into the costs of available resources that could be referenced by the Commission in future rate cases to evaluate the prudency of requested costs.

B. The Commission Has the Legal Authority to Direct PacifiCorp to Review Bids in an Oregon-Focused RFP

Just as the Commission can order PacifiCorp to conduct an RFP as part of its obligation to ensure continual progress, the Commission has the legal authority to direct PacifiCorp to review the bids in that RFP and, indeed, should do so. The Commission's authority stems not only from HB 2021 and its continual progress obligation but also from the Commission's RFP regulations as well as Senate Bill ("SB") 1547, discussed below.

To begin, both SB 1547 and HB 2021 authorize the Commission to direct PacifiCorp to review bids in an RFP. In 2016, the Oregon Legislature passed SB 1547, which dramatically increased Oregon's renewable portfolio standard requirement.[55] SB 1547 directed the Commission to adopt rules "providing for the integration of an implementation plan with the integrated resource planning guidelines … for the purpose of planning for the least-cost, least-risk acquisition of resources" as well as "[p]roviding for the evaluation of competitive bidding processes that allow for diverse ownership of renewable energy resources[.]"[56] In response, the Commission promulgated its OAR Chapter 860, Division 89 "competitive bidding" rules that

[55] Or. Dep't of Energy, *Renewable Portfolio Standard*, *available at* https://www.oregon.gov/energy/energy-oregon/pages/renewable-portfolio-standard.aspx (last visited Nov. 12, 2024).
[56] S.B. 1547, 2016 Leg. Assemb., 78th Sess. § 6(4)(c)–(d) (Or. 2016); ORS 469A.075(4)(c).

changed the utility requirements for RFPs and the bid solicitation process.[57] These regulations set forth how a utility must review bids in an RFP.[58] Using the Commission's obligation to "ensure" continual progress towards HB 2021 emission reductions, the Commission should issue an order directing PacifiCorp to comply with the regulations within Division 89 in any ordered RFP.

Once the Commission orders PacifiCorp to review bids in an RFP, the Commission can rely on its RFP rules to condition approval upon such review. The Commission's RFP regulations state that utilities must prepare an RFP "for review and approval" by the Commission.[59] That approval can be made "with *any* conditions [the Commission] deems necessary."[60] The regulations do not place a limit on the conditions that may be adopted, leaving the Commission the opportunity to exercise its broad authority, including the obligation to ensure continual progress, to require any condition it deems necessary. In other words, should the Commission require that PacifiCorp issue an RFP, it could also condition approval upon the utility reviewing the bids submitted. This could be done by requiring PacifiCorp to submit, as part of the RFP review, information on the received bids.

This would be aligned with prior Commission practice. For example, in 2020, the Commission conditionally approved PacifiCorp's RFP provided that the Company submit additional information—in that instance off-system sales sensitivities and customer rate impact analysis—that would assist the Commission in its review of the shortlist.[61] Given the expansive authority of the Commission and its RFP rules allowing it to apply "any condition" to its approval, it is possible for the Commission to incorporate the bid review itself as a condition.

[57] Order No. 18-324, Docket No. AR 600, Or. Pub. Util. Comm'n at 15 (Aug. 30, 2018) [hereinafter "Order No. 18-324"].
[58] OAR 860-089-0400.
[59] OAR 860-089-0250(1).
[60] OAR 860-089-0250(5) (emphasis added).
[61] Order No. 20-228, Docket No. UM 2059, Or. Pub. Util. Comm'n at 1 (July 16, 2020).

Additionally, such a condition would accompany the RFP approval, meaning any bid review would happen after the Commission has already completed its statutorily authorized review and granted its approval.

C. The Commission Has the Legal Authority to Order PacifiCorp to Procure Resources Identified Through an Oregon-Focused RFP

Finally, HB 2021 authorizes the Commission to order PacifiCorp to procure resources identified through an Oregon-focused RFP, as, above all else, it is the actual procurement of clean energy resources that will allow PacifiCorp, and all of Oregon's electric utilities, to reduce their emissions as required by HB 2021. While directing procurement is a change from prior Commission practice, the authority granted to, and legal obligations imposed upon, the Commission under HB 2021 reshapes the Commission's power to require utility action in order to ensure compliance with the law's targets. In order to effectuate the statutory language of HB 2021, the Commission must have the power to order procurement. To conclude otherwise means that utilities are able to continuously fail to demonstrate progress towards the decarbonization goals, yet the Commission would be handicapped from taking the most direct action that ensures progress can be made. Therefore, the Commission should read the command of HB 2021 to include the authority to order utility procurement.

The Commission has already concluded as much in Order No. 24-002 where it listed examples of actions utilities might be required to take in order to ensure continual progress including "*procur[ing] additional resources[.]*"[62] Similarly, the Commission cited with approval NWEC's arguments in UM 2225 that "if a utility appears to be falling behind on progress to the

[62] Order No. 24-002 at 29 (emphasis added).

targets, [the Commission] should be in a position to 'proactively provide additional requirements to a utility to help ensure the targets are actually met.'"[63]

Ordering a utility to procure additional resources is a broad remedy and could take several forms, including ordering a utility to issue an RFP and select resources for procurement or directing a utility to procure specific resources identified by the Commission. However, the former option may be a more prudent course of action, as by requiring a utility to issue an RFP and select a certain quantity of resources therefrom, the Commission could fulfill its obligation to ensure continual progress, while still leaving significant decision-making to the utility. Decision-making remaining with the utility would include, for instance, which resources from the RFP to procure, at what price, and with what developers, subject to compliance with RFP rules. As discussed below, the Joint Intervenors recommend that the Commission pursue this style of required clean resource procurement.

Directing a certain quantity of resource procurement but allowing the utility to select the specific projects would be aligned with actions taken by other state public utility commissions. For example, Rhode Island's Affordable Clean Energy Security Act authorized its utility commission to require electric utilities to issue RFPs for at least six hundred megawatts of newly developed offshore wind.[64] The Rhode Island Commission can review contracts entered into by the utilities and approve said contracts.[65] Similarly, the state utility commissions in Massachusetts and New York have been empowered by their legislatures to require actions from utilities to meet state climate goals.[66] The Massachusetts state legislature passed legislation

[63] *Id.* (citing Order No. 23-061, Docket No. UM 225, Or. Pub. Util. Comm'n at 6 (Feb. 24, 2023)).
[64] R.I. Gen. Laws § 39-31-10(a).
[65] R.I. Gen. Laws § 39-31-10(a)–(c).
[66] H. 4568, 189th Gen. Ct. (Ma. 2016); H. 4857, 190th Gen. Ct. (Ma. 2018); S. 6599, 2019-2020 Reg. Sess. (N.Y. 2019); *see also,* Philipp Beiter et al., *Comparing Offshore Wind Energy Procurement and Project Revenue Sources Across U.S. States*, Nat'l Renewable Energy Lab'y at 16 (June 2020).

identifying cumulative amounts of offshore capacity for utilities to solicit and procure, and New York's offshore wind procurement goals are similarly reviewed by the utility commission to ensure the contracts entered by the utility comply with state law and do not adversely impact customers and market participants. While the procurement directives in those states were explicit in the language of the legislature, here, given that the Oregon Legislature has granted the Commission with the "broadest grant of authority–'commensurate with that of legislature itself'"[67] and the command to "ensure" continual progress in HB 2021, it is within the Commission's authority to direct procurement, if necessary.

IV. The Commission Has a Wide Range of Options, Both in This Proceeding and on an Ongoing Basis, to Ensure a Reliable Energy Supply and Continual Progress Toward HB 2021 Requirements in the Event of Utility Inaction

The Commission has unambiguous and broad authority to ensure continual progress is made towards HB 2021 requirements. In exercising that authority, Joint Intervenors respectfully suggest the Commission start with its finding that PacifiCorp failed to demonstrate continual progress in Order No. 24-297.[68] The facts supporting the Commission's determination should guide the corrective actions necessary to put the Company back on track. In its order, the Commission found PacifiCorp failed to demonstrate continual progress precisely because the Company had *abandoned* near-term clean energy acquisitions and had put forward no other viable plan for complying with HB 2021's clean energy targets.[69] As a result, Joint Intervenors

[67] *Gearhart v. Pub. Util. Comm'n of Or.*, 255 Or. App. 58, 61 (2013).
[68] Order No. 24-297.
[69] *Id.* at 1-2 ("PacifiCorp cites the stay of the Ozone Transport Rule and the financial shocks associated with litigation outcomes from the 2020 wildfires as reasons why the company canceled its 2022 All-source RFP and thus far has declined to resume clean energy procurement or any other clear path toward emissions reductions … We conclude that, in the time since PacifiCorp took those actions, the company has not made a meaningful move back towards progress in meeting HB 2021's requirements.").

urge the Commission to correct this deficiency by ordering near-term clean energy acquisitions by PacifiCorp.

Nevertheless, the Commission has other tools in its regulatory toolbox to ensure a reliable energy supply and continual progress toward HB 2021 requirements both in this proceeding and on an ongoing basis. Because the Commission's authority and obligation to ensure continual progress is broad, the following options are not intended to be comprehensive. Instead, they are legally sound options that the Commission *may* pursue–i.e., these options do not violate the federal or Oregon constitutions or other Oregon law.[70]

As discussed below, the Commission can: impose financial penalties on utilities that fail to comply with HB 2021 requirements; improve current and adopt new programs that support the rapid deployment and integration of clean energy; and implement changes to CEP processes to quickly require adjustments if utility planning fails to meet basic HB 2021 requirements.

A. The Commission Can Impose Financial Penalties on Utilities That Fail to Comply with HB 2021

As noted in UM 2273,[71] ORS 756.990(2) provides the Commission authority to impose financial penalties when a utility "violates any statute administered by the Commission" or "fails to obey any lawful requirement or order made by the Commission[.]" These penalties may be between $100 and $10,000 for each time the utility violates an applicable statute or Commission order.[72] Under this statutory authority, the Commission is authorized to impose a financial

[70] *Gearhart*, 255 Or. App. at 61 ("The PUC has broad discretion in its legislative function of setting rates, subject only to statutory and constitutional constraints."). Notably, this section does not address changes to Oregon law that the Commission may wish to bring to the Legislature. Changes to current clean energy programs that would require legislative changes could assist the Commission in ensuring continual progress, such as removing the "self-serve" limitation on net metering or increasing the renewable portfolio standard.

[71] Joint Opening Br. of Sierra Club, Rogue Climate, Columbia Riverkeeper, and Coal. of Cmtys. of Color, Docket No. UM 2273, Or. Pub. Util. Comm'n at 12-13 (July 24, 2023) , *available at* https://edocs.puc.state.or.us/efdocs/HBC/um2273hbc151036.pdf.

[72] ORS 756.990(2).

penalty upon a utility that violates HB 2021, including its mandate to demonstrate continual progress in a CEP. The legislature anticipated the Commission using its authority under ORS 756.990(2) in the context of HB 2021 compliance because the law explicitly prohibits the Commission from imposing penalties when a utility has been granted an exemption from HB 2021 requirements.[73] This exception from penalties necessarily implies that, without an exemption from HB 2021 requirements, a utility may be exposed to monetary penalties for noncompliance.

Here, the Commission is well within its authority to impose a financial penalty upon PacifiCorp for failing to submit a CEP that demonstrates continual progress. The Company intentionally abandoned its long-term plans that would have set it on a course towards, at least, HB 2021's 2030 emission reduction target. Instead, PacifiCorp pivoted to a plan that it acknowledges, if followed, will not result in emission reductions aligned with HB 2021's requirements, whether in 2030 or after. Notably, PacifiCorp's 2023 IRP and CEP did not show perfect compliance with HB 2021. The original 2023 documents forecasted reducing emissions approximately 70 percent below baseline by 2030, approaching an 85 percent reduction by around 2033.[74] Nevertheless, there was a pathway to eventually reaching the 2030 target. The 2023 CEP Supplement, however, projected only a 52 percent reduction in greenhouse gas emissions by 2030 and *never* forecasted an 80 percent reduction through the 2042 planning period.[75] In other words, PacifiCorp knowingly abandoned prioritizing HB 2021 compliance in favor of other priorities, including assuming that neither the U.S. Environmental Protection

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[73] HB 2021 § 9(6); ORS 469A.440(6).

[74] *See* PacifiCorp 2023 CEP at 77, Fig. 11. The 2023 IRP and CEP did not show compliance with the 2035 and 2040 targets, resulting in PacifiCorp proposing two "compliance pathways" to further reduce emissions.

[75] PacifiCorp 2023 CEP Supplement at 7, Fig. 2.

Agency's ("EPA") Good Neighbor Plan nor any other, similar regulation would ever come into effect, even as EPA was finalizing a draft 111(d) regulation that will have similar impacts on PacifiCorp's coal fleet as the Good Neighbor Plan.[76] These facts certainly justify the Commission using its authority under ORS 756.990(2) to impose financial penalties upon PacifiCorp for failing to demonstrate continual progress.

However, perhaps more importantly, the Commission could use its authority under ORS 756.990(2) to correct ongoing utility malfeasance. The Commission could construe the failure to submit an HB 2021-compliant CEP as an ongoing violation and penalize the Company for each day that it fails to submit an adequate CEP. Penalizing a utility each day for ongoing violations is undoubtedly appropriate post-2030, should the utility's emissions exceed its allotted cap. Each day that emissions exceed the reduction targets set forth in HB 2021 results in not only a violation of state law but also tangible harm to Oregonians warranting penalties under ORS 756.990(2)

Imposing monetary penalties for ongoing utility violations aligns with prior Commission action. For instance, in 2022, the Commission directed Lumen Technologies to deploy a toll-free, 24/7 dedicated customer support line by a certain date and to resolve all reported service issues within 48 hours.[77] The Commission specified that it would level penalties for violations of the order, up to $50,000 per violation, and construe noncompliance as an ongoing violation with separate violations being issued for each day that the order was violated.[78]

[76] Strikingly, PacifiCorp and its parent corporation, Berkshire Hathaway, are aggressively fighting the Good Neighbor Plan and 111(d) regulation, even though these regulations, which internalize the full cost of operating coal plants, would make HB 2021 compliance easier. Even without these federal regulations, the Company knowingly abandoned compliance with Oregon *state* law.
[77] Order No. 22-340, Docket No. UM 1908, Or. Pub. Util. Comm'n at 1 (Sept. 23, 2022), *modified by* Order No. 22-422 and *affirmed by* Order No. 23-109.
[78] *Id.* at 1-2.

Financial penalties would not only incentivize utilities to comply with HB 2021 but could also be used to facilitate the rapid emission reductions sought by the state. Penalties levied under ORS 756.990 are "paid into the General Fund and credited to the Public Utility Commission Account." The Commission could access any penalty funds and redirect them into weatherization, energy efficiency, distributed energy incentives, or any number of programs that both reduce greenhouse gasses and promote equity and energy justice.

B. The Commission Can Both Improve Current and Adopt New Programs to Ensure Faster Clean Energy Development and Implementation

As noted, replacing fossil fuels with clean energy electricity production is one of the primary means of reducing greenhouse gas emissions from electric utilities.[79] Accordingly, in the event of utility inaction, the Commission's surest path to a reliable energy supply and continuous progress towards HB 2021's emission reduction targets is supporting the procurement and interconnection of clean resources onto the grid, whether owned by a utility or third party. The Commission is already implementing and/or overseeing a number of programs and incentives to support renewable energy sources and reduce emissions in Oregon.[80] Strategic changes to these programs can better promote clean energy adoption. At the same time, the Commission can evaluate new ways to do the same. The Commission can rely not only on its obligation to ensure

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[79] *See, e .g.,* United Nations Env't Programme, *The Sectoral Sol. to Climate Change, Energy Sys.* (2022), *available at* https://www.unep.org/interactive/sectoral-solution-climate-change/ (identifying "[r]emov[ing] barriers to the more rapid expansion of renewables" and "[s]teeply accelerat[ing] the share of zero-carbon power in electricity generation … between 65 and 92 per cent by 2030, and between 98 and 100 per cent by 2050" as key strategies to reducing greenhouse gas emissions from energy systems); Leon Clarke et al., *Chp. 6: Energy Sys.*, Contribution of Working Grp. III to the Sixth Assessment Rep. of the Intergovernmental Panel on Climate Change at Chp. 6.6 (2022), *available at* https://www.ipcc.ch/report/ar6/wg3/chapter/chapter-6/#:~:text=Reducing%20energy%20sector%20emissions%20is,is%20today%20(Figure%206.1) (identifying as "key characteristics of net-zero energy systems" the limited and targeted use of fossil fuels and the expansion of renewable energy sources, with variable renewable resources, like wind and solar, comprising "large shares of many regional generation mixes").

[80] These include, for example, net metering and community solar, addressed herein, as well as energy efficiency and demand response programs, among others.

continual progress under HB 2021 as legal authority for pursuing these changes but also the Commission's broad authority to "adopt and amend reasonable and proper rules and regulations relative to all statutes administered by the commission"[81] and specifically HB 2021's authorization to "adopt rules as necessary to implement sections 1 to 15" of the Act.[82]

As noted above, this section is not intended to be a comprehensive overview of all programs or incentive structures that the Commission could improve upon or adopt in order to facilitate clean energy integration, but meant to highlight the broad scope of possible actions that the Commission could take.

1. Improve current clean energy programs, such as net metering and community solar

As utilities work to rapidly reduce greenhouse gas emissions and transition to 100 percent clean energy, making use of all tools in the toolbox will be critical. Distributed energy, including rooftop and community solar, can be a key resource for meeting customer demand with clean energy, and the Commission can strengthen both programs to better support the implementation of distributed solar in Oregon.

Net metering, for instance, appropriately compensates owners of rooftop solar for the value that they provide to the system and makes the upfront investment of installing rooftop solar financially viable for customers. However, under ORS 757.300 and PacifiCorp's Schedule 135, net metering is limited to 25 kilowatts ("kW") for residential customers and 2 megawatts ("MW") for non-residential customers.[83] These limitations are inclusive of onsite battery

[81] ORS 756.060.
[82] HB 2021 § 14(1); ORS 469A.465(1) (referring to ORS 469A.400 to 469A.475).
[83] ORS 757.300(8); Pac. Power, *Net Metering Serv. Optional for Qualifying Customers*, Or. Schedule 125 (Oct. 7, 2015), *available at* https://www.pacificpower.net/content/dam/pcorp/documents/en/pacificpower/rates-regulation/oregon/tariffs/rates/135_Net_Metering_Service_Optional_for_Qualifying_Customers.pdf.

capacity, thereby lowering the amount of rooftop solar that qualifies for net metering. The Oregon Legislature granted the Commission discretion to increase these caps,[84] and the Commission could easily increase the amount of rooftop solar on PacifiCorp's system by immediately doubling the caps to 50 kW and 4 MW. Other changes could also be explored, such as guaranteeing that the rate available when the rooftop solar system is installed (currently PacifiCorp's retail rate) is, at a minimum, maintained for the system's warranty period, which is typically 25 years.

Similarly, the Commission could improve the community solar program, which has been plagued by delays, particularly for PacifiCorp customers. One of the most significant challenges, as the Commission is aware, has been interconnection. In the Oregon Community Solar Program's most recent "Monthly Project Progress Report," of the 49 projects that were granted certification extensions, 27 (55 percent) are in PacifiCorp's territory. Of the 49 projects, 25 cited interconnection delays as a justification for an extension, with 18 of these projects (72 percent) being in PacifiCorp's territory.[85] As interconnection of new, clean resources will be key to reducing emissions, ensuring timely interconnection is an issue not only for community solar but all new clean energy resources. Yet, there are numerous ways that a utility can slow the interconnection of disfavored projects, whether community solar or otherwise. Rather than attempting to identify and guard against all possible delay tactics, the Commission could explore setting metrics and targets for interconnection as a form of performance-based regulation, discussed further below in Section IV(B)(3). The Commission can capitalize upon dockets that are already open, such as UM 2111 on interconnection reform, to address these types of issues.

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[84] ORS 757.300(8).

[85] Or. Cmty. Solar Program, *ORCSP Monthly Project Rep. – Oct. 2024*, *available at* https://www.oregoncsp.org/monthly-reports/.

2. Set targets for virtual power plant development

In addition to updating current programs, the Commission could initiate new programs that can similarly increase renewable energy integration. One example would be directing PacifiCorp (and other Oregon utilities) to establish virtual power plant programs. Virtual power plants are aggregations of distributed energy resources, including rooftop solar, battery storage, smart thermostats, and electric vehicle chargers, that can be orchestrated to shift or reduce energy demand or send energy back to the grid during times of peak demand.[86] Virtual power plants can reduce the curtailment of utility-scale renewables, avoid fuel costs, improve resiliency, defer transmission capital expenditures, and provide compensation to utility customers, among many other benefits.[87] Importantly, virtual power plants powered by distributed clean energy can help reduce emissions by reducing reliance on fossil fueled plants, particularly gas peakers.

Solar United Neighbors recently developed model legislation that would direct utilities to develop "distributed power plant programs" and direct public utility commissions to establish annual capacity procurement and performance targets for system peak reduction services.[88] The Commission could use this model legislation as a starting point for developing its own standards for virtual power plant programs from its regulated utilities, which it could do through its rulemaking authority cited above. Notably, the model legislation includes a requirement for public utility commissions to establish financial incentives for utilities meeting performance targets and financial penalties for missing targets. This requirement aligns with Joint Intervenors'

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[86] *Five Ways States Can Unlock Virtual Power Plants for Grid Flexibility and Decarbonization*, Evergreen Action (May 10, 2024), *available at* https://collaborative.evergreenaction.com/memos/five-ways-states-can-unlock-virtual-power-plants-for-grid-flexibility-and-decarbonization.

[87] U.S. Dep't of Energy, *Pathways to Commercial Liftoff: Virtual Power Plants* (Sept. 2023), *available at* https://liftoff.energy.gov/vpp/.

[88] Solar United Neighbors, *Model Legis. for Distributed Power Plant Program*, *available at* https://solarunitedneighbors.org/wp-content/uploads/2024/08/Solar-United-Neighbors_DPP-Model-Legislation_v1-June-24.pdf (last visited Nov. 12, 2024).

recommendations, described directly below, on adopting aspects of performance-based regulation to ensure that utilities are properly incentivized to meet HB 2021 emission reduction targets.

3. Adopt performance incentive mechanisms to encourage beneficial utility behavior and penalize inaction

Performance-based regulation ("PBR") is a regulatory framework where utilities are compensated based on the company's performance against target outcomes. PBR is particularly useful where the state has set clear expectations that the utilities are not incentivized to achieve under typical cost-of-service regulation. Importantly, PBR is not a single regulatory change, but a range of regulatory tools. This menu of reforms provides state public utilities commissions with flexibility to pick and choose aspects of PBR that help it achieve its objectives and obligations. Performance incentive mechanisms ("PIMs"), Commission-established regulatory requirements that target achievement of specific outcomes,[89] are likely to be a particularly useful aspect of PBR in ensuring that utilities take action "as soon as practicable" to reduce emissions in line with HB 2021 requirements. Typically, PIMs include metrics, targets, and financial incentives.

Here, the Oregon Legislature established overarching metrics (e.g., 80 percent greenhouse gas reduction) and targets (e.g., 2030), but has delegated to the Commission the responsibility of ensuring continual progress towards these goals, including the requirement that utilities take action as soon as practicable.[90] The Commission, therefore, has the authority to establish interim metrics and targets necessary to ensure that utilities are fulfilling their

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[89] *See generally*, Melissa Whited et a., *Util. Performance Incentive Mechanisms: A Handbook for Reguls.*, Synapse Energy Econ., Inc. (Mar. 9, 2015), *available at* https://www.synapse-energy.com/sites/default/files/Utility%20Performance%20Incentive%20Mechanisms%2014-098_0.pdf.
[90] ORS 469A.415(6).

obligations. For instance, the Commission could establish interim greenhouse gas reduction metrics (e.g., 50 percent) by a pre-2030 target date (e.g., 2027) as a means of ensuring that progress is being made before the 2030, 2035, and 2040 deadlines, thus ensuring "continual progress." The Commission could also consider other metrics, like total megawatts of clean energy brought online, interconnection timelines for distributed resources, or capacity targets from virtual power plants that would support the reduction of greenhouse gasses. Similarly, the Commission could establish target deadlines for meeting these metrics. Finally, the Commission could establish financial incentives (or penalties) for meeting (or failing to meet) the established metrics and targets. Any successful implementable PBR framework should include both incentives and penalties for utility action or inaction.

While establishing a PIM framework for achieving HB 2021 compliance would require a separate docket and the devotion of Commission resources, the benefits would likely be worth the upfront effort. Not only would utilities have more clarity and certainty regarding the targets they are expected to meet to demonstrate continual progress but the Commission would have a clear "score card" against which to measure utility progress. By increasing the certainty and clarifying the objectives that the regulated entities and regulators are operating under, the Commission would streamline the process of reviewing utility progress and determining if continual progress is on track, ultimately improving the efficacy of the program.

C. The Commission Can Order CEP Process Changes to Minimize the Likelihood That a CEP Fails to Demonstrate Continual Progress or Promptly Correct Errors

The Commission could implement two straightforward CEP process changes that would better allow the Commission to ensure that a utility is fulfilling its obligations to provide safe, reliable and affordable service while also rapidly reducing its emissions. First, the Commission can promptly return facially noncompliant CEPs to the utility for revision, and second, the

Commission can allow for updated modeling or other changes to the CEP throughout the time allotted for Staff and stakeholder comments. The Commission has long recognized its authority to direct changes in deficient integrated resource plans with the goal of the utility ultimately submitting an acknowledgeable plan.[91] The same authority would apply to directing changes in CEPs. These recommended process improvements could be taken up in UM 2348, where the Commission is evaluating whether and how to update its IRP and RFP guidelines.

1. Reject and promptly return to the utility CEPs that facially do not comply with HB 2021

The Commission should reject the *filing* of CEPs that do not, on their face, demonstrate HB 2021 compliance. In other words, a CEP that does not show compliance with HB 2021 would be immediately returned to the utility for revision before the Commission engages in a months-long review process. This could be accomplished by directing Commission Staff to review the CEP immediately upon filing, and, if the CEP does not show HB 2021 compliance—i.e., the utility's projected emission reductions do not meet the 80 percent, 90 percent, and 100 percent requirements—the CEP would be rejected and returned to the utility for revision. To facilitate Staff's preliminary review of a CEP, the Commission should require all CEPs include charts or figures, similar to Figure 2 in PacifiCorp's 2023 CEP Supplement, that clearly show the anticipated emission reductions projected in the utility's CEP.

This process would mimic how EPA reviews state implementation plans ("SIPs") outlining the steps a state commits to take in order to comply with the federal Clean Air Act

[91] Order No. 89-507, Docket No. UM 180, Or. Pub. Util. Comm'n, 102 P.U.R.4th 301 (Apr. 20, 1989) ("Plans submitted by utilities will be reviewed by the Commission for adherence to the principles enunciated in this order and any supplemental orders. If further work on a plan is needed, the Commission will return it to the utility with comments. This process should eventually lead to acknowledgment of the plan.").

("CAA"). Once a state submits a SIP, EPA reviews the SIP for "completeness."[92] This is an administrative review to determine whether the state has submitted a plan that meets minimum completeness criteria,[93] which EPA has identified through regulation.[94] EPA initially reviews SIPs not only for administrative materials (e.g., "[a] formal signed, stamped, and dated letter of submittal from the Governor or his designee, requesting EPA approval of the plan or revision … "[95]) but also technical support information, including quantification of allowable emissions.[96] Once EPA deems a SIP "complete," it then engages in a year-long technical review of the plan to determine whether it meets federal requirements. As EPA has explained, "[a] finding that [a] SIP submission is complete does not necessarily mean that the submission is approvable; the completeness review only addresses whether the air agency has provided information sufficient to commence formal EPA review for approvability."[97] Importantly, SIP requirements are severable, and EPA can move forward in its substantive review of certain portions of a SIP, while returning other portions back to the state air agency. If EPA determines that a SIP or parts of a SIP are "incomplete," the CAA's requirement that EPA issue a federal implementation plan for all or part of the state's SIP within two years is triggered.[98] This ensures that the public is not deprived of its right to clean air by state inaction.

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[92] 42 U.S.C. § 7410(k)(1)(B).
[93] 42 U.S.C. § 7410(k)(1)(A)–(B).
[94] 40 C.F.R. § Pt. 51, App. V.
[95] *Id.*
[96] *Id.*
[97] U.S. Env't. Prot. Agency, *Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2)* at 10 (Sept. 13, 2013), *available at* https://www3.epa.gov/airquality/urbanair/sipstatus/docs/Guidance_on_Infrastructure_SIP_Elements_Multipollutant_FINAL_Sept_2013.pdf.
[98] 42 U.S.C. § 7410(c)(1)(A).

Adopting a similar process for CEPs, Staff would review a CEP filing for completeness and reject CEPs that do not meet certain minimal requirements.[99] Failure to submit a complete CEP would trigger the Commission's obligation to ensure continual progress in order to protect the public from utility inaction. Indeed, had the Commission previously adopted a similar process for CEPs, PacifiCorp's plan, which on its face only projects a 52 percent% reduction in greenhouse gas emissions by 2030, would have been returned to the utility prior to the Commission and stakeholders spending months conducting an in-depth technical review of a plan that facially did not meet Oregon law.

In order to ensure that the CEP review and potential refiling occurs on an expedited basis, in light of the approaching 2030 deadline, the Commission should set timeframes for which the initial Staff review will be completed and the amount of time allotted for the utility to revise its CEP, if necessary. Reasonable time frames could be three weeks (21 days) for Staff's initial "completeness" review and two months (60 days) for a refiled, revised CEP, if necessary.

2. Require updated modeling throughout the CEP review process or shortly thereafter to avoid multi-year delays

Once the Commission and stakeholders commence a substantive review of a utility's CEP, the Commission can ensure that the utility's plans are moving toward continual progress by allowing for modeling or plan modifications during the review process or shortly thereafter. In the past, the Commission has often required new or modified IRP modeling to be produced in the subsequent IRP cycle,[100] but there is no reason why the Commission must provide a utility with

[99] For an example of a regulation requiring filings to include certain minimum requirements, the Commission can look to OAR 860-025-0030(3), under which a petition for a certificate of public convenience and necessity for overhead power plans "may not be filed … unless the petitioner includes with the petition all necessary documentation" as required by the rule.
[100] Order No. 22-178 at 7 (directing PacifiCorp to produce additional analysis of fueling options for the Jim Bridger coal plant in the 2023 IRP).

such substantial time, particularly as the 2030 deadline rapidly approaches. The Commission could provide feedback during review of the CEP (i.e., before a final order has been issued) or require updated modeling shortly after issuing its final order on the CEP.

In practice, this would likely require a more hands-on approach to CEP review. Currently, the Commission typically does not weigh in on an IRP (or CEP) until after receiving multiple rounds of stakeholder and utility comments. Under this approach, the Commission may wish to hold one or more Commission workshops throughout the review process, where the Commission can consider initial party comments and potentially direct utility action in the near term—either during the current CEP cycle or directly thereafter.

Here, earlier intervention in LC 82 may have helped avoid the delay currently plaguing PacifiCorp's progress toward an 80 percent emissions reduction. For instance, the Commission could have ordered PacifiCorp to model its proposed "levers" for complying with HB 2021 while the CEP Supplement was under review. This would have provided critical information in the near term, rather than waiting for the 2025 CEP. Notably, it is still unclear if PacifiCorp will provide cost-benefit analysis of its "levers" in the 2025 CEP or not.

V. If the Commission Directs PacifiCorp to Issue, Conduct, and Procure Resources from an RFP, the Commission Can Still Minimize Impacts, if any, on the Commission's Competitive Bidding Rules, Future Ratemaking Decisions, and Allocation of Costs Under PacifiCorp's MSP

Should the Commission direct PacifiCorp to issue and conduct an RFP, or to procure resources, the Commission may use its discretion and authority to craft an order that has little to no impact on the Commission's competitive bidding requirements ("CBRs"), future ratemaking decisions, or allocations of costs under the terms of the prevailing MSP. Further, the Commission has authority and discretion to order PacifiCorp to implement a tariff that would

allocate costs across its six states while capturing the nonemitting benefits of a resource for Oregon customers, similar to PacifiCorp's existing Schedule 272.[101]

A. Ordering an RFP and Subsequent Resource Procurement Should Have No Impact on Competitive Bidding Requirements

Under a plain language review of the Commission's CBRs and associated orders, it is highly unlikely that directing PacifiCorp to issue and conduct an RFP and procure resources will have any impact on the applicability of the CBRs. The Commission's CBRs are codified at OAR 860-089-0010, *et seq.* Under OAR 860-089-0100(1):

> [a]n electric company *must* comply with the rules in this division when it seeks to acquire generating or storage resources or to contract for energy or capacity if any of the following apply:
>
> (a) The acquisition is of a resource or contract for more than an aggregate of 80 megawatts and five years in length;
>
> (b) The acquisition is of a resource or contract in which the electric company does not specify the size or duration of the resource or contract sought but may result in an acquisition described in subsection (1)(a) or (1)(c) of this rule;
>
> (c) The acquisition is of multiple resources more than five years in length that in aggregate provide the electric company with more than an aggregate of 80 megawatts, and these resources:
>
> (A) Are located on the same parcel of land, even if such parcel contains intervening railroad or public rights of way, or on two or more such parcels of land that are adjacent; and
>
> (B) The generation equipment of any of these resources is within five miles of the generation equipment of any other of these resources and construction of these resources is performed under the same contract or within two years of each other; or
>
> (d) *As directed by the Commission.*[102]

The CBRs contemplate their applicability in the event a utility is "directed by the Commission" to comply with the CBRs.[103] These rules, applied through the lens of the Commission's broad

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[101] Pac. Power, *Renewable Energy Rider Optional Bulk Purchase Option*, Or. Schedule 272 (Sept. 16, 2024), *available at* https://www.pacificpower.net/content/dam/pcorp/documents/en/pacificpower/rates-regulation/oregon/tariffs/rates/272_Renewable_Energy_Rider_Optional_Bulk_Purchase_Option.pdf.

[102] OAR 860-089-0100(1) (emphasis added).

[103] *Id.*

authority,[104] demonstrate that the Commission retains discretion to direct a utility to comply with the CBRs when conducting an RFP, regardless of whether the RFP is utility-initiated or Commission-directed. Further, the CBRs detail the process by which the rules are triggered when other resources are contemplated. As seen above, if the proposed resource acquisition in the RFP is greater than 80 megawatts and at least five years in length, or if any of the other criteria in OAR 860-089-0100 are met, the utility must similarly comply with the CBRs[105] and there is no exception to these rules depending on how the RFP is initiated.

Of course, a utility can request an exception to all or some of the CBRs, and the Commission retains authority and discretion to grant such requests. Specifically, there are four CBR exceptions: “1) emergency, 2) time-limited opportunity to acquire a resource of unique value to the electric company’s customers, 3) explicit acknowledgement by the Commission of an alternative acquisition method proposed in the IRP, and 4) exclusively acquiring transmission assets or rights.”[106] Yet, these exceptions are not guarantees that the CBRs will be waived. When considering a waiver request under these rules, “[t]he Commission will issue an order addressing the waiver request within 120 days, taking such oral and written comments as it finds appropriate under the circumstances.”[107]

Limiting the circumstances under which the CBRs may be waived makes sense, as when adopting the rules, “the Commission found that the public interest was served by a balancing of

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[104] Order No. 08-487 at 4 (Sep. 30, 2008) (citing *Pac. Nw. Bell Tel. Co. v. Sabin*, 21 Or. App. 200, 214, rev. den. (1975)) (The legislature has provided the Commission “with ‘the broadest authority—commensurate with that of the legislature itself—for the exercise of [its] regulatory function.’”); *id.* (citing *Pacific Nw. Bell Tel. Co. v. Katz*, 116 Or. App. 302, 310 (1992)) (“[T]he Commission is bound to exercise its authority within the confines of both the state and federal constitutions.”).
[105] *See generally,* OAR 860-089-0100(1).
[106] Order No. 21-328, Docket No. UM 2176, Or. Pub. Util. Comm’n at App. A, p.2 (Oct. 6, 2021) (citing OAR 860-089-0100(3)).
[107] Order No. 14-149, Docket No. UM 1182, Or. Pub. Util. Comm’n at App. A, p.2 (Apr. 30, 2014).

the private interests of utilities, their customers and competitive providers of generation resources."[108] This is consistent with the stated purpose of the CBRs, which "are intended to provide an opportunity to minimize long-term energy costs and risks, complement the [IRP] process, and establish a fair, objective, and transparent competitive bidding process[.]"[109] In order to uphold and serve the public interest and minimize long-term energy costs and risks, if the Commission directs a utility to issue and conduct an RFP—which it may under its authority to ensure continual progress towards meeting HB 2021's mandates—the Commission should direct the utility to comply with the CBRs. If the resource acquisition in question meets the size and length thresholds contemplated in OAR 860-089-0100, or is otherwise directed by the Commission, the utility *must* comply with the CBRs.[110]

Due to the binding nature of CBR-compliance triggered by Commission direction or exceeding the thresholds codified in administrative rule, the Joint Intervenors submit that a decision to direct PacifiCorp to issue and conduct an RFP would have no impact on the CBRs and process.

B. Ordering the Initiation of an RFP and Subsequent Procurement of Resources Should Not Pre-Determine Future Ratemaking Decisions

Should the Commission order PacifiCorp to both issue an RFP and procure resources from that RFP, the Commission will have the authority and discretion to issue an order ensuring there is no impact on future ratemaking decisions related to the resource procurement. This is true because, even should the Commission direct a certain level of procurement, it will remain the utility's responsibility to prudently manage the RFP and select the optimal mix of resources

[108] Order No. 08-548, Docket No. UE 200, Or. Pub. Util. Comm'n at 19 (Nov. 14, 2008) [hereinafter "Order No. 08-548"].
[109] OAR 860-089-0010(1).
[110] OAR 860-089-0100(1) (emphasis added); *see also,* Order No. 18-324 at App. A, p.1.

to meet the Commission's order, both of which are issues of prudence that should be reviewed in a rate case.

Generally, costs are only recoverable if the Commission determines they were prudently incurred. When making a prudence determination, the Commission is tasked with determining "whether the company's actions and decisions, based on what it knew or should have known at the time, were prudent in light of existing circumstances."[111] As discussed above, a Commission-ordered RFP would still be subject to the CBRs. Under the CBR administrative rules, the Commission may acknowledge an RFP's shortlist of bid responses if it appears reasonable, and this acknowledgement "has the same legal force and effect as a Commission-acknowledged IRP in any future cost recovery proceeding."[112] The Commission has been clear that "[a]cknowledgement or non-acknowledgement of an IRP or an IRP action item is relevant to the subsequent examination of whether a utility's investment is prudent."[113] However, "acknowledgement of an IRP is not definitive evidence of prudence."[114]

In an order directing PacifiCorp to conduct an RFP and to procure resources, the Commission should be clear that the costs associated with running the RFP and procuring the resource must still be prudently incurred. That is, the Company must demonstrate that it followed the CBRs when conducting its RFP. It must demonstrate that the resource or resources selected from the acknowledged shortlist are the optimal blend of cost and risk and align with the findings of the independent evaluator. As discussed, in directing a utility to issue an RFP and procurement resources, the Commission will be fulfilling its obligation to ensure continual

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[111] Order No. 20-473, Docket No. UE 374, Or. Pub. Util. Comm'n at 35 (Dec. 18, 2020) [hereinafter "Order No, 20-473"].
[112] OAR 860-089-0500(2).
[113] Order No. 20-473 at 75.
[114] *Id.*

progress. But this does not mean that the Commission must take on *all* resource decision-making, nor should it. Instead, the utility should retain the authority, obligation, and risk associated with selecting which of its RFP resources best fulfill customer need and legal requirements. For this reason, the Commission should not direct PacifiCorp to procure a *specific* resource from the final shortlist. Rather, the Commission should order PacifiCorp to procure a specific quantity of resources (e.g., in MWs), while leaving individual procurement decision-making to the utility. PacifiCorp would continue to bear the burden of demonstrating the prudence of its decision to select an individual resource in a later ratemaking proceeding. While this represents one option, the Commission has the discretion and authority to order procurement in a different manner that does not affect the traditional allocation of risk and independence in the resource procurement setting.

Joint Intervenors' proposal is consistent with clear Commission guidance indicating that "[a] utility always has the burden of proving that it acted prudently in acquiring its resources … It also bears the initial burden of producing evidence to support that proposition."[115] The Commission has noted that when the utility has followed the CBRs:

> the resulting resource acquisitions are presumed reasonable. Consequently any party that would question those decisions would carry the initial burden of producing evidence that the utility acted imprudently. Where the utility avoids the [CBRs], the burden of producing evidence remains with the utility.[116]

Here, the Commission can and should direct PacifiCorp to follow the CBRs when it orders the Company to conduct an RFP. To uphold the existing framework detailing the utility's burden of proof for a later prudence determination, the Commission should craft an order acknowledging a resource shortlist with language that makes clear the Company must still carry its burden

[115] Order No. 08-548 at 19 (citing ORS 757.210).
[116] *Id.*

regarding *which* resources are selected. This aligns with the Commission's obligation to ensure continual progress in the implementation of HB 2021, to ensure that HB 2021 is implemented in an affordable manner, and to ensure that the CBRs "provide an opportunity to minimize long-term energy costs and risks."[117]

C. A Commission-Directed RFP Would Not Impact Cost Allocation Under the Current MSP

PacifiCorp's MSP is a cost-allocation agreement between the Company's six states. The most recent agreement—the 2020 MSP—was approved by this Commission on January 20, 2020. Initially set to expire on December 31, 2023, the 2020 MSP has been extended until end-of-year 2025.[118] PacifiCorp is expected to propose a new allocation methodology sometime before the 2020 MSP's expiration, which could substantially alter how costs are currently allocated amongst the states. Since PacifiCorp ended multi-party negotiations on a future MSP agreement,[119] it is premature to speculate on what the Company may propose. The following addresses how costs of a Commission-directed RFP would likely be allocated amongst the states under the current MSP terms. As discussed, it is unlikely that cost allocation for resources flowing from a Commission-directed RFP would be treated differently from other incurred costs under the MSP. In the alternative, should the Commission find that a Commission-directed RFP would alter cost allocation under the MSP, it may be possible to structure cost recovery in a similar manner to PacifiCorp's existing Schedule 272, which would allow Oregon customers to

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[117] HB 2021 § 4(6), 4(4)(f); ORS 469A.415(6), (4)(f); OAR 860-089-0010.

[118] Order No. 23-229, Docket No. UM 1050, Or. Pub. Util. Comm'n (June 30, 2023) [hereinafter "Order No. 23-229"].

[119] PacifiCorp's Notice of Termination of the Framework Issues Workgroup Under the 2020 Protocol, Docket No. UM 1050, Or. Pub. Util. Comm'n (July 11, 2024), *available at* https://edocs.puc.state.or.us/efdocs/HNA/um1050hna330014054.pdf.

pay a slight premium for the nonemitting attributes of the resource while equitably distributing the remainder of the costs to all states.

1. Cost allocation under the current MSP agreement

Under the 2020 MSP, resource costs (and benefits) are "allocated to one of two categories for inter-jurisdictional allocation purposes: State Resources or System Resources."[120] State Resources include demand-side management programs and those acquired subsequent to a state-specific initiative or portfolio standard. State-specific initiatives, as defined under the MSP, relate mostly to state incentive programs but not to resource acquisitions that may produce resources benefitting all six states, such as those identified in the Company's IRP. As stated in the 2020 MSP: "State-specific initiatives include, but are not limited to, the costs and benefits of incentive programs, net-metering tariffs, feed-in tariffs, capacity standard programs, solar subscription programs, electric vehicle programs, and the acquisition of renewable energy certificates."[121] The costs of State Resources are "assigned on a situs basis to the State adopting the initiative."[122] Conversely, "[a]ll Interim Period Resources that are not State Resources are System Resources[,]" and their costs are allocated to all states based on agreed-upon allocation factors.[123] The plain language of the prevailing 2020 MSP, then, makes clear that the costs of a resource providing system-wide benefits are to be allocated to all states.[124]

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[120] Order No. 20-024, Docket No. UM 1050, Or. Pub. Util. Comm'n at App. B, p.2 (Jan. 23, 2020).
[121] PacifiCorp 2020 MSP at 3.1.2.1, p.8.
[122] *Id.* at 3.1.2.1, p.8; *id.* at App. B, p.3-4;
[123] *Id.* at 3.1.2.1, p.8; *id.* at App. B, p.4. Specifically, generating plants are dynamically allocated based on the system generation ("SG") factor, which currently allocates to Oregon about 26 percent of the costs of generating resources. PacifiCorp 2020 MSP at App. C, p.5.
[124] *Id.* at 3.1.10, p.13 ("PacifiCorp will plan and acquire new Interim Period Resources on a system-wide risk-adjusted, least-cost basis. Prudently incurred investments in Interim Period Resources will be reflected in rates consistent with the laws and regulations in each State, as approved by individual Commissions.").

2. Costs of resources from a Commission-directed RFP that provide a system-benefit would be shared amongst PacifiCorp's six states, whereas the costs of resources that only benefit Oregon would be situs-assigned to Oregon

Under the 2020 MSP, resources stemming from a Commission-directed RFP could either be allocated to all of PacifiCorp's states or only to Oregon, depending on whether those resources provide a benefit outside of Oregon. It is likely that at least some resources procured from a Commission-directed RFP should be allocated to all states based on prevailing allocation factors. First, if a Commission-directed RFP examines various resources in acknowledged portfolios from PacifiCorp's last IRP, Docket No. LC 82, then those resources would necessarily have system benefits and would be allocated to all states under the MSP. In other words, if a resource procured from a Commission-directed RFP was contemplated in a prior system-wide IRP, then that resource is a "System Resource" for cost allocation purposes under the MSP. In adopting Staff's Recommendation, the Commission was clear that a Commission-ordered RFP should be tied to resources identified in the LC 82 IRP Update, and it could re-use elements from its 2022 All-Source RFP, which flowed from its prior IRP.[125] There are many nonemitting resources within the 2022 All-Source RFP that would likely continue to provide system benefits while also assisting PacifiCorp in demonstrating continual progress towards HB 2021's

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[125] Order No. 24-297 at App. A, p.13-14 ("As demonstrated in PacifiCorp's two previous RFP Dockets—UM 2059 and UM 2193—PacifiCorp has a demonstrated history of developing and executing an RFP in an around an active IRP. To this end, a cursory review by Staff finds that many of the elements of PacifiCorp's 2022 AS RFP are still usable … Additionally, the launching of an RFP process by April 2025, positions PacifiCorp, the Commission, and stakeholders to understand the cost, risks, and tradeoffs between resource strategies in the 2025 IRP/CEP."); *see also,* Order 24-073, Docket No. LC 82, Or. Pub. Util. Comm'n at 5 (Mar. 19, 2024) ("PacifiCorp states its preferred portfolio includes 'substantial new renewables, facilitated by incremental transmission investments, demand-side management (DSM) resources, significant storage resources, advanced nuclear, and non-emitting peaking resources.' … **[A]s well as resource selections from the 2022 All-Source RFP.")** (emphasis added).

mandates. This would be consistent with HB 2021's requirement that Clean Energy Plans "[r]esult in an *affordable*, reliable, and clean electric system."[126]

However, given that the 2023 IRP Update, which informed the 2023 CEP Supplement, forecasted an insufficient transition from fossil fuels to clean energy resources to achieve HB 2021's mandates, a Commission-directed RFP to ensure continual progress would need to require procurements above and beyond those identified in the 2023 IRP Update. If these procurements could not be shown to have a system-wide benefit, it is likely that these resources would be situs-assigned to Oregon and Oregon customers would pay a premium above the least-cost *system-wide* portfolio in order to comply with state law. It will be crucial for PacifiCorp to clearly present the likely cost impacts of higher procurements, an analysis that will need to take into account HB 2021's cost cap.

Notably, modifications to the current MSP could result in a more optimal cost allocation to facilitate PacifiCorp's compliance with HB 2021. For instance, the current MSP does not contemplate allowing a subset of states to share in resources that are not shared system-wide. Allowing states with similar decarbonization policies, like Oregon and Washington, to share in resources that are not shared by other states may help to keep costs lower for both Oregon and Washington customers. Whenever PacifiCorp presents a new MSP proposal to the Commission, it should consider how the MSP will ensure and facilitate compliance with Oregon law.

3. For resources that are situs-assigned to Oregon, the Commission can structure cost recovery of a resource similar to PacifiCorp's Schedule 272 to protect customers and uphold the spirit of HB 2021

Regardless of treatment under the MSP, the Commission has the discretion and authority to order PacifiCorp to treat newly acquired resources from a Commission-directed RFP in a

[126] HB 2021 § 4(4)(f) (emphasis added); ORS 469A.415(4)(f).

similar manner to PacifiCorp's existing Schedule 272. Schedule 272 is a voluntary green energy tariff that enables large customers to purchase Renewable Energy Credits ("RECs") from a renewable resource while allowing the bulk of the costs to be paid for by cost-of-service customers across PacifiCorp's six states, including the large customer in question.[127] In the past, costs from certain resources procured under PacifiCorp's Schedule 272 have been allocated to all six PacifiCorp states under the MSP, even though it is an Oregon tariff that allows an Oregon-based customer to purchase its RECs. For example, PacifiCorp's Pryor Mountain wind facility was allocated in this manner, even though it was procured entirely outside of the RFP process.[128]

Similarly, here, the Commission could order that costs from a resource procured subsequent to a Commission-ordered RFP be shared amongst PacifiCorp's six states using the cost allocation methodology in the MSP, with Oregon customers paying a slight premium for the nonemitting attributes of the resource. This would align with the Commission's clear mandate to implement HB 2021 in an affordable manner and to establish just and reasonable rates that balance the interests of shareholders and customers.[129] The Joint Intervenors offer this proposal as an alternative solution to provide the Commission and stakeholders with ratemaking options.

In order to meet the standards clearly delineated in HB 2021—and the clean energy standards found in several of PacifiCorp's other jurisdictions—the Company must procure resources to reduce the emissions profile of its six-state system. It is highly likely that any

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[127] *See generally,* Pac. Power, *Renewable Energy Rider Optional Bulk Purchase Option*, Or. Schedule 272, *available at* https://www.pacificpower.net/content/dam/pcorp/documents/en/pacificpower/rates-regulation/oregon/tariffs/rates/272_Renewable_Energy_Rider_Optional_Bulk_Purchase_Option.pdf.

[128] Order No. 20-473 at 48 ("The Pryor Mountain wind project is a new 240 MW resource in Montana that PacifiCorp procured outside the RFP process."); *see also, id.* at 52, n.237 (Indicating that Pryor Mountain's costs are "[e]stimated based on Oregon's SG factor of 26.023 percent.").

[129] HB 2021 § 4(4)(f); ORS 469A.415(4)(f); *see, e.g.*, ORS 756.040 ("The commission shall balance the interests of the utility investor and the consumer in establishing fair and reasonable rates."), ORS 757.210(1)(a) ("The commission may not authorize a rate or schedule of rates that is not fair, just and reasonable.").

nonemitting resource that produces system benefits will be allocated to all states under the terms of the MSP. However, the Commission may also order PacifiCorp to treat resources procured subsequent to a Commission-directed RFP in a similar manner to its Schedule 272. PacifiCorp has demonstrated significant flexibility under its Schedule 272 to find ways to meet corporate green energy goals of a subset of its customers, and similar flexibility is available to procure resources for its second-largest state in a manner that protects its customers from significant cost increases.

VI. Conclusion

For the reasons set forth above, the Joint Intervenors urge the Commission to issue an order confirming its broad authority and obligation to ensure continual progress under HB 2021, including the authority to direct PacifiCorp to issue an RFP and produce resources from that RFP. The Commission should then move promptly to a "phase 2" of this proceeding where the Commission can issue an order directing PacifiCorp to take specific actions to remedy its failure to demonstrate continual progress.

PacifiCorp's 2023 CEP was filed 17 months ago. Since that time, the Company has squandered the available time to reduce emissions prior to 2030, instead canceling its 2022 All-Source RFP (13 months ago) and filing a legally deficient 2023 CEP Supplement (seven months ago). Time is of the essence to redirect PacifiCorp's actions if the Company is to have any chance to meet HB 2021's requirements.

Respectfully submitted,

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