PACIFIC POWER
A DIVISION OF PACIFICORP

825 NE Multnomah Street, Suite 2000
Portland, Oregon 97232

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VIA ELECTRONIC FILING

Public Utility Commission of Oregon
Attn: Filing Center
201 High Street SE, Suite 100
Salem, OR 97301-3398

Re: UM 2345—PacifiCorp's Initial Brief

PacifiCorp d/b/a Pacific Power encloses for filing its Initial Brief in the above referenced proceeding.

Informal inquiries may be directed to Cathie Allen, Regulatory Affairs Manager, at (503) 813-5934.

Sincerely,

Matthew McVee
Vice President, Regulatory Policy and Operations

Enclosure

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2345

In the Matter of PACIFICORP, d/b/a PACIFIC POWER Continual Progress Towards House Bill 2021	PACIFICORP INITIAL BRIEF

PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) respectfully submits this initial brief in response to the Public Utility Commission of Oregon's (Commission) October 1, 2024 Ruling in this proceeding.

I. INTRODUCTION

For well over a century, the Commission has regulated utility rates and services. It has not engaged in State-directed procurement, an activity that has been reserved for the management of privately owned businesses. House Bill (HB) 2021 reflects this tradition and vests the Commission with its familiar powers of acknowledging—or not—utility resource plans (here, Clean Energy Plans (CEP)).

This conclusion of law is confirmed by the text, context, and legislative history of HB 2021, as well as several canons of statutory construction. It would be imaginative indeed to read HB 2021's mandate that the Commission "shall ensure" continual progress towards reducing emissions in a utility planning document, as instead "the power to direct utility resource procurement" to reduce emissions.

PacifiCorp represents that HB 2021 does not provide the Commission with this extralegislative power, and requests the Commission issue a final decision to that effect and close this proceeding without further process. Otherwise, this issue will upend utility procurement across the West. Developers are already using this issue as a wedge in other states—if Oregon can require PacifiCorp to procure clean energy resources, why not Washington?[1]

[1] *In re PacifiCorp's 2023 CEIP Update,* Docket UE-210829, RNW-NWEC Initial Brief, ¶ 51, n. 91 (Nov. 12, 2024) ("In Order No. 24-297 discussed above, the Oregon Commission indicated that a Commission-ordered RFP may be the correct remedy for PacifiCorp's failure to demonstrate continual progress and directed the opening of a new docket to 'adjudicate our legal authority to order PacifiCorp to issue an RFP, establish a date certain by which PacifiCorp must issue an RFP to market, and address the volume and nature of resources PacifiCorp seeks in the RFP.'"); *Id.* ¶ 4 ("For all of these reasons, Renewable Northwest and NW Energy

The Commission must unring this bell. PacifiCorp's arguments follow.

II. THE COMMISSION LACKS THE POWER TO ENGAGE IN STATE-DIRECTED PROCUREMENT.

Determining what HB 2021 requires is a question of statutory interpretation, and the Commission's role is "simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions of particulars such construction is, if possible, to be adopted as will give effect to all."[2]

Oregon applies a three-part analysis when engaging in this analysis.[3] The Commission should: (1) examine the "text and context of the statute" to determine its meaning; (2) "only if" the legislature's intent is not clear from the text and context, the Commission should "then move to the second level, which is to consider legislative history"; and (3) if still unclear, the Commission "may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty."[4]

On each analysis, the Commission lacks the power to engage in State-directed procurement.

A. The text and context of HB 2021 confirm that the Commission lacks the power to engage in State-directed procurement.

While ORS 469A.415(6) is reasonably ambiguous regarding whether the Commission has the power to engage in State-directed procurement, the context of HB 2021 and additional Commission authorities confirm that the legislature has not provided the

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Coalition ("RNW-NWEC") respectfully request that the Commission . . . in furtherance of attaining these goals, it use its existing and broad discretion to order PacifiCorp to release an all-source request for proposals ("RFP") to the market at the time of its 2025 IRP filing next spring, ideally following an accelerated schedule to allow for additional procurement ahead of CETA's 2030 mandate.").

[2] ORS 174.010.

[3] *State v. Gaines,* 346 Or. 160, 164, 206 P.3d 1042 (2009).

[4] *Id.*

Commission the power to do so.

i. ORS 469A.415(6) is reasonably ambiguous regarding whether the Commission can order PacifiCorp to procure resources.

ORS 469A.415(6) is reasonably ambiguous regarding what powers the Commission has to ensure continual progress.

The Commission "shall ensure" that PacifiCorp "demonstrates continual progress as described in subsection (4)(e) of this section and is taking actions as soon as practicable that facilitate rapid reduction of greenhouse gas emissions at reasonable costs to retail electricity consumers."[5] PacifiCorp's CEP must demonstrate it "is making continual progress within the planning period towards meeting the clean energy targets set forth in ORS 469A.410, including demonstrating a projected reduction of annual greenhouse gas emissions."[6]

Oregon has interpreted "shall," as an "obligation or a command."[7] "Ensure" is a transitive verb, defined as "to make sure, certain, or safe."[8] Together, the Commission is obligated or commanded to make certain or make sure that PacifiCorp and its CEPs are "making continual progress" towards complying with HB 2021's greenhouse gas emissions reductions.

When reviewing only ORS 469A.415(6), it is unclear what these statutory terms require. The Commission must "obligate" or "command" something if PacifiCorp is not "making continual progress" in planning to reduce its emissions reductions. Yet the law is silent regarding what actions the Commission should take to command continual progress. The central question is whether the phrase "shall ensure" grants the Commission additional

[5] ORS 469A.415(6).
[6] ORS 469A.415(4)(e).
[7] *In re Nolin Hills Wind Power Project,* 372 Or. 194, 213, 547 P.3d 804, 815 (2024).
[8] "Ensure." Merriam-Webster.com Dictionary, Merriam-Webster (available here: https://www.merriam-webster.com/dictionary/ensure

regulatory powers beyond those delegated by the Legislature: In other words, does this open-ended delegation in ORS 469A.415(6) allow the Commission to engage in State-directed procurement as supported by several parties in LC 82?

The additional statutory provisions of HB 2021 prove that the Commission must reject that invitation.

ii. ORS 469A.415 confirms that only utilities can propose acquisition strategies.

The Commission cannot omit what was inserted in ORS 469A.415,[9] which confirms that HB 2021 leaves procurement decisions to the utility.

"An electric company," and not the Commission, "shall develop a clean energy plan" for complying with HB 2021.[10] The law refers to CEPs in nineteen separate instances, with detailed instructions for what a CEP must include,[11] and how both the Department of Environmental Quality (DEQ) and the Commission should evaluate CEPs to determine compliance with the law's emissions reduction requirements.[12]

Relevant here, CEPs must include specific actions, "including acquisition of nonemitting resources, energy efficiency measures and acquisition and use of demand response resources," that are, fundamentally, "set by the electric company."[13] Further, CEP "actions and investments," again as developed by PacifiCorp and not ordered by the Commission, "may include the development or acquisition of clean energy resources, acquisition of energy efficiency and demand response, including an acquisition required by ORS 757.054, development of new transmission and other supporting infrastructure,

[9] ORS 174.010.
[10] ORS 469A.415(1)
[11] ORS 469A.415(3)-(5).
[12] ORS 469A.420.
[13] ORS 469A.415(4)(b).

retirement of existing generating facilities, changes in system operation and any other necessary action."[14]

Together the Legislature directed utilities—not the Commission—to propose plans to comply with HB 2021. And in at least two separate instances, the Legislature concluded that it was up to PacifiCorp to propose specific actions regarding "acquisition of nonemitting generation resources"[15] and the "development or acquisition of clean energy resources."[16]

The Commission cannot omit this language, which supports the conclusion that only utilities can propose specific procurement efforts to comply with the law.

iii. ORS 469A.420 confirms that ensuring continual progress is limited to Commission acknowledgment.

The Commission cannot omit what was inserted in ORS 469A.420,[17] which confirms that the Commission's role in reviewing CEPs is limited to acknowledgement.

When reviewing utility-created CEPs, the Legislature limited the Commission to its familiar role of acknowledging, or not, utility plans. After considering various factors, the Commission "shall acknowledge" a utility's CEP.[18] This mirrors the Legislature's similar command regarding utility integrated resource plans (IRPs) that include plans and costs for complying with Oregon's renewable portfolio standard,[19] as well as costs from long-term financial commitments subject to Oregon's greenhouse gas emissions standard.[20] Noticeably

[14] ORS 469A.415(5).
[15] ORS 469A.415(4)(b).
[16] ORS 469A.415(5).
[17] ORS 174.010.
[18] ORS 469A.420(2).
[19] ORS 469A.075(3) ("The commission shall review a plan for meeting the requirements of the renewable portfolio standard and take appropriate action as part of the procedure for acknowledgment of an electric company's integrated resource plan.").
[20] ORS 757.536(1)(a) ("The Public Utility Commission may not acknowledge in an integrated resource plan, or allow in customer rates, the costs of a long-term financial commitment by an electric company or by an electricity service supplier unless the baseload electricity proposed to be acquired under the commitment is produced by a generating facility that complies with the greenhouse gas emissions standard established under ORS 757.524.").

absent in HB 2021 are any references to, or mentions of, concurrent Commission powers when reviewing utility-created CEPs.

The Commission's acknowledgement standards are well-worn.[21] Acknowledgement means the Commission "would either acknowledge the plan or return it to the utility with comments."[22] "With some refinements," the Commission continues, "this approach to utility planning has been used since 1989."[23] IRP proceedings were never intended to result in substantive requirements: "The Commission does not intend to usurp the role of utility decisionmaker. Utility management will retain full responsibility for making decisions and for accepting the consequences of the decisions. Thus, the utilities will retain their autonomy while having the benefit of the information and opinion contributed by the public and the Commission."[24] And as recently as PacifiCorp's last IRP, the Commission took pains to reiterate: "We take seriously our role in informing PacifiCorp's direction, but also reinforce that we do not control PacifiCorp's resource decisions and that any risks associated with

[21] *E.g., In re PacifiCorp's 2021 IRP,* Docket No. LC 77, Order No. 22-178 ("In reviewing an IRP, we examine the resource activities in the Action Plan and determine, given the information available at the time, whether to acknowledge them based on the reasonableness of those actions. Our decision to acknowledge or not acknowledge an action item does not constitute ratemaking. The question of whether a specific investment made by a utility in its planning process was prudent will be independently examined in a subsequent rate proceeding. Acknowledgment, or non-acknowledgment, of an IRP is a relevant but not exclusive consideration in our subsequent examination of whether the utility's resource investment is prudent and should be recovered from customers.").

[22] *In re Commission IRP Investigations,* UM 1056, Order No. 07-002 at 1 (Jan. 8, 2007) (internal citations removed).

[23] *Id.*

[24] *In Regards to Least-cost Planning for Resource Acquisitions*, Docket No. UM 180, Order No. 89-507 at 6, 10 (Apr. 20, 1989) ("The establishment of Least-Cost Planning in Oregon is not intended to alter the basic roles of the Commission and the utility in the regulatory process. The Commission does not intend to usurp the role of utility decisionmaker. Utility management will retain full responsibility for making decisions and for accepting the consequences of the decisions. Thus, the utilities will retain their autonomy while having the benefit of the information and opinion contributed by the public and the Commission. . .. 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. Acknowledgment of a plan means only that the plan seems reasonable to the Commission at the time the acknowledgment is given.").

carrying out even acknowledged actions rest with the company."[25]

These standards are reflected in Commission regulations,[26] internal operating guidelines,[27] and HB 2021 policies regarding continual progress.[28]

Because IRP and CEP acknowledgment does not result in substantive requirements, and because ORS 469A.420 incorporates this familiar standard, it follows that ORS 469A.420 does not imply new substantive powers like directing utilities to procure resources.

Applied here, the Commission "shall ensure" continual progress through acknowledgement of PacifiCorp's CEP. If a CEP does not meet the standards incorporated throughout HB 2021, then the Company has not demonstrated continual progress, and consistent with OAR 860-027-0400(9) already codified on this issue, it is the Commission's duty to not acknowledge that CEP and require the Company to "revise and resubmit all or certain elements of the CEP." This acknowledgment decision, or lack thereof, would then inform future rate proceedings.

The Commission cannot omit this language, which supports the conclusion that the Commission's role is limited to acknowledgement of CEPs.

iv. State-directed procurement would be unconstitutional.

In a vacuum, it is at least plausible that ORS 469A.415(6)'s obligation that the Commission "shall ensure" continual progress allows for the Commission to conclude it has

[25] Order 22-178, at 2.
[26] OAR 860-027-0400(9) (allowing for the Commission to acknowledge a CEP, acknowledge a CEP with conditions, or not acknowledge a CEP and require a utility to revise and resubmit all or certain elements of the CEP.).
[27] *In re Commission Internal Operating Guidelines,* Order No. 20-386, Appendix A at 25 ("Commission acknowledgement of an IRP means only that the Commission finds that the utility's proposed actions are reasonable at the time acknowledgment and does not constitute ratemaking."); *Id.* (the Commission "does not finally determine the individual rights, duties, or privileges of any party during the IRP process . . .").
[28] *E.g.,* Order No. 24-002 at 1, 9 ("our existing CEP and IRP review processes are appropriate for making regular determinations that utilities are achieving continual progress" and "we will use IRP/CEP review processes and their timelines to assess whether utilities are making 'continual progress'").

the power to engage in State-directed procurement.

Yet that is not how legislative delegation operates.

Oregon's Constitution prevents the Legislature from enacting any law that "shall be made to depend upon any authority, except as provided in this Constitution."[29] Oregon has interpreted this provision to hold that the Legislature cannot "confer upon any person, officer, agency or tribunal the power to determine what the law shall be."[30] This is because the "power to make and declare laws is vested exclusively in the Oregon Legislative Assembly, subject only to the initiative and referendum powers reserved to the people."[31]

While the Legislature can delegate this lawmaking function to agencies, the enactment must be "complete when it leaves the legislative halls."[32] It must contain "a full expression of legislative policy and sufficient procedural safeguards to protect against arbitrary application."[33]

A conclusion that "shall ensure" in HB 2021 allows for State-directed procurement would provide neither.

Start with the requirement for a full expression of legislative policy. It would be reasonable to conclude, and PacifiCorp does not contest, that HB 2021 establishes binding emissions reductions requirements,[34] and that utility-created CEPs are the mechanisms to evaluate a utility's plan to meet these requirements. These are fully expressed legislative policies that have been constitutionally delegated under *Ford Motor*.

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[29] Or. Const. Art. I, § 21.
[30] *Miller v. Ford Motor Company,* 363 Or. 105, 116, 419 P.3d 392 (2018) (*citing Van Winkle v. Fred Meyer, Inc.,* 151 Or. 455, 462, 49 P.2d 1140 (1935)).
[31] *Id.*
[32] *City of Damascus v. Brown*, 337 P.3d 1019, 1033 (Or. App. 2014) (*citing State v. Self,* 706 P.2d 975 (Or. App. 1985).
[33] *Id.*
[34] Though subject to the law's reliability and cost cap provisions in ORS 469A.440 and .445.

The question presented in UM 2345 is slightly different: What role should the Commission play in this scheme? Specifically, is there an express delegation of legislative policy or standard regarding State-directed procurement to ensure continual progress? Said from the other direction, are there any policies or standards in the law that provide guidance for what actions the Commission should take (other than acknowledgement as discussed in ORS 469A.420)?

Clearly not in the text of HB 2021. This leaves the Commission with only the inference that HB 2021 provides the Commission with the power to do so. Yet inferences regarding delegations of legislative power do not withstand constitutional scrutiny. If they could, then what would stop the Commission from pursuing other remedial schemes? Would the Commission have the power to close emitting resources over utility protest, or require the sale of emitting resources to third-parties, or into wholesale markets? These additional remedies would seem to better align with the purpose of HB 2021 which is focused on reducing emissions, and not increasing clean energy generation like what would result from State-directed procurement.

It is not that the Commission should consider these alternatives. It is that if the Commission infers it has the power to engage in State-directed procurement, without any express delegation of standard or policy to do so, then the Legislature would have delegated its "power to make law" to the Commission in violation of Oregon's separation of powers.[35] If there was ever an unconstitutional delegation of legislative power, that should be it.

Next consider adequate procedural safeguards to protect against arbitrary application

[35] *Van Winkle,* 151 Or. at 461; *City of Damascus,* 266 Or. at 441.

of the law.[36] In contrast with PacifiCorp's 2023 CEP proceeding, which included multiple rounds of public comment and workshops spanning almost an entire year, the Commission provided only a single round of public comment on PacifiCorp's CEP Supplement, and one opportunity for PacifiCorp to respond. This comment period concluded with a Staff Report on PacifiCorp's filing (issued August 1, 2024), and a Commission decision based on that Staff Report less than three business days later (during an August 8, 2024, public meeting). The Staff Report was the first mention of the possibility of State-directed procurement due to a perceived failure to demonstrate continual progress.

Yet PacifiCorp was not afforded the opportunity to submit alternative evidence, cross-examine Commission Staff on its Staff Report, nor brief any of the Company's factual, legal, and policy concerns with the Staff Report, including any financial implications that could result from these recommendations, including harm to PacifiCorp's credit profile, balance sheet, cash flow, load obligations, and reliability requirements, all of which could significantly impact PacifiCorp's customers. The Commission only provided the Company with a limited opportunity to offer public comment during the Commission's August 8 deliberations on the Staff Report—again only three business days after the Staff Report was issued.

The point is not that the Commission should have provided these opportunities (it should have), or that it should defer making a decision on this issue to a contested case (which it was correct to do); the point is that HB 2021, as discussed above, was built around the Commission's acknowledgment processes which do not result in substantive

[36] *City of Damascus,* 266 Or.App at 441 ("Later delegation cases shifted focus away from objective legislative standards and emphasized "that any delegation be accompanied by procedural safeguards to protect against ("arbitrariness") (quoting *Corvallis Lodge v. Oregon Liquor Control Commission,* 67 Or.App. 15, 677 P.2d 76 (1984).

requirements. A conclusion that HB 2021 allows for State-directed procurement would require adequate procedural protections to ensure adequate due process of law. Yet HB 2021 is silent on any of these protections.

Respectfully, PacifiCorp represents it would violate the Oregon Constitution's separation of powers if the Commission determined that a single verb phrase from ORS 469A.415(6) ("shall ensure") provided the power to direct investor-owned utilities to procure resources to demonstrate continual progress.[37] This would also just so happen to fall outside the scope of authority delegated to the Commission.[38]

This is not a novel conclusion. It simply aligns with longstanding Oregon precedent that holds that the Commission's powers as an economic regulator do not extend to management of utilities—like directing utilities to issue requests for proposals (RFPs) and procure resources. "If the commission is empowered to prescribe the terms of contracts and the practices of utilities and thus substitute its judgment as to what is reasonable for that of the management, it is empowered to undertake the management of all utilities subject to its jurisdiction. It has been repeatedly held, however, that the commission does not have such power."[39] Rather, "In the absence of express statutory authority it has generally been held that a commission's control over contracts between affiliated corporations is limited to disallowance of excessive payments for the purpose of fixing rates."[40]

The Commission agrees. Its role "is not to manage the utility, but to consider the

[37] Or. Const. Art. I, § 21.
[38] *E.g., Penn v. Oregon Bd. of Parole*, 365 Or. 607, 638, 451 P.3d 589, 607 (2019) (finding agency action exceeded its statutory authority); *Planned Parenthood Ass'n, Inc. v. Oregon Dep't of Hum. Res.,* 297 Or. 562, 574, 687 P.2d 785, 792 (1984) (same).
[39] *Pac. Tel. & Tel. Co. v. Flagg*, 189 Or. 370, 396, 220 P.2d 522, 533 (1950).
[40] *Id.*

utility's management and its effect on rates."[41]

PacifiCorp submits that (a) directing a private investor-owned utility to issue an RFP; (b) reviewing which bids the utility should procure from that RFP; and (c) procuring resources from those efforts are each managerial function. If correct, this would violate this bright line that has always limited the Commission's role to that of economic regulation and would further support the unconstitutionality of the Commission's action.

v. The Commission cannot backfill any lingering ambiguities with the power to engage in State-directed procurement.

HB 2021 was the result of a months-long collaboration between the leading utilities and utility advocates in the State. It is a comprehensive bill that was meant to complement the Commission's and DEQ's existing statutory authorities and practices; it includes no less than one dozen citations to additional Oregon authorities.[42]

Yet despite this intentional folding-in of existing Commission and DEQ authorities, there are no references to Oregon statutes that would be impacted by the Commission directing utilities to procure HB 2021-compliant resources.

This contrast is important. Why would the law materially revise Oregon labor standards,[43] standards that specifically apply to the construction of large-scale renewable energy generation projects,[44] yet say nothing about how the Commission has the power to direct utilities to procure these same projects? Why would the law take the time to create a

[41] *City of Portland v. PGE,* Docket No. UM 1262, Order No. 06-636 (Nov. 17, 2006) (*citing Flagg,* 189 Or. at 396).
[42] *E.g.,* ORS 469A.400(1)(a) (citing ORS 468A.280); ORS 469A.400(1)(c) (citing ORS 757.649); ORS 469A.400(3) (citing ORS 757.600); ORS 469A.100(6) (citing ORS 468A.210); ORS 469A.100(8) (citing ORS 757.600); ORS 469A.405(3) (citing ORS 469.300 and ORS 358.905); ORS 469A.410 (citing ORS 468A.280); ORS 469A.415(5) (citing ORS 757.054); ORS 469A.420(1)(b) (citing ORS 468A.280); ORS 469A.435(3) (citing ORS 468A.280); ORS 469A.435(4)(a) (citing ORS 469A.052); ORS 469A.440(1) (citing ORS 756.515).
[43] HB 2021, §§ 26-27
[44] HB 2021, § 26(1)(c)-(d).

separate grant program for community renewable energy projects,[45] to in part offset the costs of planning and developing community renewable energy projects,[46] including performance agreements for these projects,[47] yet not provide even cursory requirements for State-directed procurement? Why would the law amend Oregon's small-scale renewable energy procurement standard,[48] an actual procurement mandate,[49] yet remain silent regarding any details on an assumed power to require utilities to procure resources?

This contrast is even more apparent when reviewing other Commission statutes that would be impacted by State-directed procurement. The Legislature has created a comprehensive statutory scheme that regulates how PacifiCorp should issue securities to fund operations, with almost 20 distinct statutes.[50] When discussing affiliated transactions and certain transactions between utilities, the Legislature detailed how utilities should engage in these types of transactions.[51] When creating the opportunity for community solar procurement, the Legislature detailed its policy preferences for these resources,[52] and outlined how community solar procurement should proceed.[53] When discussing renewable natural gas procurement, the Legislature thought it appropriate to detail how it expected these procurements should proceed.[54]

If HB 2021 was meant to provide the Commission with the power to direct utilities to enter into renewable energy transactions, which would require some degree of contracting,

[45] HB 2021, §§ 29-32.
[46] HB 2021, § 30(1)(a).
[47] HB 2021, § 31.
[48] HB 2021, § 37.
[49] *E.g.,* ORS 469A.210(2).
[50] ORS 757.400 through 757.467.
[51] ORS 757.480 through 757.516.
[52] ORS 757.357(2)(d)
[53] ORS 757.357(3)-(11).
[54] ORS 757.390 through 398.

financing, and procurement processes, why would it omit any reference to these long-standing and reasonably related statutes, much less provide any detail around State-directed procurement that it has otherwise provided for these similar concerns?

Finally, long-standing Commission statutes, that similarly direct the Commission to "ensure" or "shall ensure" specific actions, confirm the Commission lacks the power to require utilities to procure resources. The Oregon Legislature has tasked the Commission with "ensuring" specific utility actions in well over two dozen statutes. For example: the Commission is required to establish costs of capital that are sufficient "to ensure confidence in the financial strength of the utility;"[55] alternative forms of regulation must "ensure that the plan operates in the interests of utility customers and the public generally . . ."[56]; the Commission shall adopt ratemaking mechanisms "that ensure the recovery of all prudently incurred costs" regarding procurement of renewable natural gas;[57] the Commission may adopt rules "to ensure" that obligations and costs with net metering apply to all power suppliers within a given service territory;[58] the Commission is required to adopt just and reasonable rates that "shall ensure" recovery of the full costs for pole attachments;[59] the Commission "shall ensure" that direct access programs satisfy several conditions,[60] and that utilities offer direct access programs to the extent permitted under federal law; [61] the Commission "shall ensure" that its policies to eliminate barriers to competitive retail markets do not interfere with other utility obligations, like greenhouse gas reductions under HB

[55] ORS 756.040(1)(a).
[56] ORS 757.210(2)(b).
[57] ORS 757.396(2).
[58] ORS 757.300(7).
[59] ORS 757.282(1).
[60] ORS 757.607.
[61] ORS 757.637.

2021;[62] and the Commission shall "reasonably ensure" that the "costs, risks, and benefits" of certain cost-of-service rate options are reflected in each rate option.[63]

This language is not new to the Commission. If the Commission has had the broadest power to "ensure" or "shall ensure" specific utility actions all along, it should follow that the Commission would have at least considered State-directed procurement in the past. Yet that has not occurred.

The Commission's regulatory powers are plenary.[64] As often observed in other jurisdictions, this is because the regulation of utilities "is one of the most important of the functions traditionally associated with the police power of the states."[65] Indeed, the right of a State to regulate a public utility "may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a rational basis for adopting."[66]

Yet it is one thing to discuss these powers in the abstract. It is another to conclude that these general powers, in contrast with the two short sentences in ORS 469A.415(4)(e) and (6), somehow provide the Commission with the power to engage in State-directed procurement.

The Commission's powers "are limited to those conferred by statute, either expressly or by necessary implication,"[67] and the Commission cannot otherwise insert what was omitted.[68] This silence speaks, and the Commission should decline to read into the statute

[62] ORS 757.646(4).
[63] ORS 757.603(4)(a).
[64] *E.g.,* ORS 756.040(2) ("The Commission is vested with power and jurisdiction to supervise and regulate every public utility and telecommunications utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.").
[65] *Arkansas Electric Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).
[66] *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 639 (1943) (quotation omitted).
[67] *Tom Lee, Inc., v Pac.Tel. & Teleg. Co.,* 154 Or. 272, 279, 59 P.2d 683 (1936).
[68] ORS 174.010.

that it has the power to direct PacifiCorp to procure resources.

B. Legislative history is silent regarding State-directed procurement.

Even assuming that the text and context of HB 2021 is ambiguous,[69] to PacifiCorp's knowledge there is no legislative history, nor instances from the Stakeholder discussions leading up to the passage of HB 2021, that support a conclusion that the Legislature intended for the language "shall ensure" to allow for State-directed procurement.

The Commission confirmed the opposite. In comments to the House Committee on Energy and Environment on HB-2021-1, the Commission noted that utilities would continue to procure resources "under existing PUC processes."[70] This means that CEPs would be "included in or closely linked to the IRP Process," which "assesses resource needs over the next 20 years and includes an Action Plan of least cost, least risk investments over the next 4 years," and delays may be required so that "utilities"—not the Commission—"can identify additional near-term investments" to comply with HB 2021.[71]

The Commission noted that its role would follow traditional acknowledgment processes: "Acknowledgement of the plans will occur within 6 months of filing, followed by a resource procurement process and any other investment activities acknowledged," and that for utilities, "this typically involves an RFP that follows the PUC's competitive bidding rules."[72] Further: "PUC acknowledgement of the IRP Action Plan requires a demonstration

[69] *Gaines,* 346 Or. at 164 (the Commission should examine legislative history "only if" the legislative intent is not clear from the text or context of the law).
[70] House Committee on Energy and Environment Comments, OPUC Comments on HB 2021-1 Implementation, at 1 (Mar. 26, 2021) ("Utility procurement under existing PUC processes would generally continue (and accelerate) under HB 2021-1 without delay, given the fact that the utilities are currently seeking to acquire least-cost carbon-free renewable resources.") (available here: https://olis.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/236918).
[71] *Id.* at 3 ("Clean Energy Plans will be included in or closely linked to the IRP process. The IRP process assesses resource needs over the next 20 years and includes an Action Plan of least cost, least risk investments over the next 4 years. Delays to the next IRP cycle may be required so that utilities can identify additional near-term investments needed to meet the targets in HB 2021-1.").
[72] *Id.* at 2-3.

that the actions are a least-cost, least-risk strategy to serve customers in the public interest. *The utilities may seek to procure resources in advance of need and have done so to take advantage of economic activities*. Although accelerated procurement is not prohibited, the utility bears the burden to justify the early action."[73]

The Legislature agreed. While the Commission is the "regulator of new clean energy requirements" and must "ensure ongoing compliance,"[74] the Commission can do so by ensuring that CEPs "are submitted to the PUC and sync with existing integrated resource plan (IRP) filings by the utilities every 2 years," and the Commission "acknowledges the clean energy plan if it meets GHG reductions, reliability, resiliency of the system, costs, technical feasibility, and other factors."[75] This aligns with the Legislative Staff's analysis of what HB 2021 would require, which is silent regarding any discussion of Commission-directed procurement.[76]

Renewable Northwest agreed. "While planning can mean different things at different agencies, at the PUC planning directly flows through to utility resource procurement and ultimately to utility rate recovery. Specifically, for investor-owned utilities ("IOUs"), HB 2021-1 would link implementation of the emission targets to a utility's integrated resource plan ("IRP") process."[77] Renewable Northwest continued: "In other words, when an IOU concludes in its IRP that it should buy new renewables, and the PUC acknowledges that IRP,

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[73] *Id.* at 3 (original Commission emphasis).
[74] "House Bill 2021A: 100% Clean Energy Section-By-Section Bill Summary," at 1 (May 12, 2021) (available here: https://olis.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/242406).
[75] *Id.*
[76] *E.g.* HB 2021 A and B Staff Measure Summaries (available here: https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureAnalysisDocument/59931; https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureAnalysisDocument/61706).
[77] House Committee on Energy and Environment Comments, Renewable Northwest Conditional Support for HB 2021, at 1 (Mar. 23, 2021) (available here: https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/19840).

then it is easier for the IOU to recover the cost of those new renewables in customer rates."[78]

This is not news to those involved with the passage of HB 2021. The discussion around enactment was not focused on somehow vesting the Commission with the power to direct utilities to procure resources. Instead, one of the primary legislative debates focused on whether HB 2021 should be *strengthened* to create stronger procurement mandates (which the Legislature ultimately declined to do). Yet this debate was not focused on State-directed procurement; it was focused on expanding Oregon's renewable portfolio standard. For example, the developer community initially opposed HB 2021 as an emissions-reduction standard, in part because they sought greater procurement mandates.[79] The Legislature rejected this request for a stronger procurement mandate, and ultimately settled on an emissions-reduction standard.

Yet regardless which approach the Legislature would ultimately take, from the Commission's perspective, HB 2021 would "not significantly impact current utility procurement activities under existing process due to the fact that renewable resources are

[78] *Id.*; *see also* House Committee on Energy and Environment Comments, Renewable Northwest Support for HB 2021, at n. 2. (Apr. 7, 2021) ("When discussing how it "will elaborate on how Oregon resources are well-position to win" HB 2021-procurement decisions, Renewable Northwest noted that "inclusion of a resource in an IRP preferred portfolio does not guarantee procurement; it is, however, an indication that the resource appears well positioned to be a least-cost, least-risk resource for the company based on all available information.") (available here: https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/24294).

[79] House Committee on Energy and Environment Comments, NIPPC Comments, at 4 (Mar. 22, 2021) ("Finally, I note that a key part of any clean energy bill has to be a clear procurement signal to investors and developers of new clean energy. Perhaps the emissions standards proposed here would lead to prompt procurement by load-serving entities of new clean energy. But an alternative bill with a procurement compliance requirement, such as an increase of the existing renewable portfolio standard and expansion to cover all non-emitting technology, could accomplish this goal as well.") (available here: https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/19538); House Committee on Energy and Environment Comments, NewSun at 2 (Mar. 23, 2021) (when discussing how procurement under an emissions standard in HB 2021 would lead to delays due to "The normal OPUC workings: Rules-*then*-IRPs-*then*-RFPs-*then*-PPAs-*then*-Construction.") (available here: https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/19846).

least cost options that would help meet either emission reduction or enhanced RPS targets."[80]

While Oregon only examines legislative history "for what it's worth,"[81] it should mean something that neither the Legislature, Commission, Renewable Northwest, Northwest and Intermountain Power Producers Coalition (NIPPC), nor NewSun Energy LLC (NewSun) discuss State-directed procurement during the passage of HB 2021. Especially when each confirmed that procurement would follow a demonstration of need in an IRP, followed by Commission acknowledgement, and utility procurement under the Commission's competitive bidding requirements.

NewSun's remarks to the Legislature said it best. Procurement under HB 2021 would follow "normal OPUC workings: Rules-*then*-IRPs-*then*-RFPs-*then*-PPAs-*then*-Construction."[82]

C. Several maxims of statutory construction support the conclusion that the Commission lacks the power to engage in State-directed procurement.

While maxims of statutory construction can generally be wielded to support or oppose any interpretation of a text,[83] at least two support the conclusion that the Commission lacks the power to engage in State-directed procurement.

i. The Commission should avoid absurd results.

The Commission should avoid "absurd results" when interpreting genuinely

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[80] House Committee on Energy and Environment Comments, OPUC Comments on HB 2021-1 Implementation, at 6 (Mar. 26, 2021) (discussing whether an emissions reduction or increase to Oregon's renewable portfolio standards would impact procurement).
[81] *Portfolio Recovery Associates, LLC v. Sanders,* 366 Or. 355, at 364, 462. 263 (2020) (*citing Gaines,* 346 Or. at 171).
[82] House Committee on Energy and Environment Comments, NewSun at 2 (Mar. 23, 2021) (original emphasis).
[83] Karl N. Llwellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed," 3 Vanderbilt Law Review 395 (1950) ("When it comes to presenting a proposed construction in court, there is an accepted conventional vocabulary. As in argument over points of case-law, the accepted convention still, unhappily requires discussion as if only one single correct meaning could exist. Hence there are two opposing canons on almost every point.") (available here: https://scholarship.law.vanderbilt.edu/vlr/vol3/iss3/24).

ambiguous statutory terms.[84] The question here should be framed as: If the Commission can read in the ability to require utilities to procure clean energy resources under HB 2021, what exactly can the Commission not do?

As the Commission's decision in docket UM 2273 confirms, HB 2021 is not a clean energy standard,[85] it is an emissions reduction standard.[86] The Commission confirmed this in its comments to the legislature when considering what form HB 2021 should take: "An emissions-based approach may result in near-term investment in renewables given the utilities' current resource strategies, but is not designed to drive investment in a specific resource type within a specific timeframe."[87] Instead, "an emissions-based policy will drive utilities [to] consider a range of near-term investments, including demand response, energy efficiency, and non-emitting capacity resources such as storage technology or optimally-sited renewables."[88]

If the law and the Commission's prior comments confirm that HB 2021 does not require PacifiCorp to procure clean energy—and instead just reduce emissions—why would the Commission revert course and now conclude that the law provides the opposite? If there were any residual powers provided by HB 2021,[89] wouldn't a more reasonable interpretation vest the Commission with the power to direct PacifiCorp to reduce emissions through the curtailment or accelerated depreciation of emitting resources allocated to serve Oregon retail customers? Yet that is not the action that the Commission is currently contemplating.

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[84] *Folkers v. Lincoln County School Dist.,* 135 P.3d 373 (2006); *Fleetwood Homes of Oregon v. Vanwechel*, 993 P.2d 171, 173 (Or. App. 1999).
[85] *In re Commission HB 2021 Investigation,* Docket No. UM 2273, Order No. 24-002 (Jan. 5, 2024).
[86] *E.g.,* ORS 469A.410 (requiring 80, 90, and 1000 percent reductions in emissions from baseline percentages).
[87] House Committee on Energy and Environment Comments, OPUC Comments on HB 2021-1 Implementation, at 5 (Mar. 26, 2021).
[88] *Id.*
[89] Which PacifiCorp believes the Commission lacks given the language in ORS 469A.420 that limits the Commission's role to acknowledgement of utility CEPs.

A conclusion that HB 2021 permits State-directed procurement would be absurd given the law is focused on reducing emissions, not increasing clean energy generation.[90]

ii. Neither Oregon—nor any other utility commission PacifiCorp is aware of—have engaged in State-directed procurement.

It would be an unprecedented act for this Commission to direct PacifiCorp, or any utility, to issue an RFP or order the procurement of resources.

While Oregon has not adopted clear statement rules outside the criminal justice context,[91] it should consider doing so for an issue of this magnitude. The Legislature "does not . . . hide elephants in mouseholes."[92] And without a clear statement in HB 2021 regarding State-directed procurement, indeed any statement regarding procurement, the Commission should conclude that the law does not allow for State-directed procurement. To do otherwise would "bring about an enormous and transformative expansion in [the Commission's] regulatory authority without clear [statutory] authorization."[93] The Legislature "could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[94]

This is an important issue that should be left for Oregon's legislative assembly to resolve.

III. THE COMMISSION SHOULD RESERVE FURTHER REVIEW OF ITS POWERS UNDER HB 2021 FOR FUTURE INVESTIGATIONS OR RULEMAKING PROCEEDINGS.

Consistent with the Company's discussion above, the Commission's role regarding

[90] *Folkers,* 135 P.3d at 377.
[91] *E.g., Soderstrom v. Premo,* 274 Or.App. 624, 360 P.3d 1272 (2015).
[92] *Whitman v. American Trucking Associations,* 531 U.S. 457, 468 (2001).
[93] *Utility Air Regulatory Group v. EPA,* 573 U.S. 302, 325 (2014).
[94] *FDA v. Brown & Williamson Tobacco,* 529 U.S. 120, 161 (2000).

ensuring continual progress is confined to acknowledgment, or not, of utility CEPs.[95] This power does not include the ability to engage in State-directed procurement. Any additional investigations regarding the Commission's authority to implement HB 2021 in the event of utility inaction should occur in a Commission investigation or rulemaking proceeding.

IV. THERE ARE PROFOUND IMPLICATIONS THAT WOULD RESULT FROM STATE-DIRECTED PROCUREMENT.

State-directed procurement would fundamentally rewrite the Commission's century-long role as economic regulator. Consider the consequences that would result from this decision.

Start with impacts to the Commission and PacifiCorp's traditional responsibilities.

Would the Commission now be a manager of utility operations, and no longer an economic regulator? As the Commission has long held, its role "is not to manage the utility, but to consider the utility's management and its effect on rates."[96] Yet directing procurement would appear to fall squarely within the managerial role of the utility. Every treatise on economic regulation has cautioned against legislative bodies providing, or utility commissions assuming, that the State has or should be provided this power.[97] The

[95] ORS 469A.420(2) ("The Public Utility Commission shall acknowledge the clean energy plan if the commission finds the plan to be in the public interest and consistent with the clean energy targets set forth in ORS 469A.410.").

[96] *Portland v. PGE,* Docket UM 1262, Order No. 06-636 (Nov. 17, 2006) (*citing Pac. Tel. & Tel. Co. v. Flagg,* 189 Or. 370, 396, 220 P.2d 522, 533 (1950)).

[97] *E.g.,* Regulation and its Reform, Stephen G. Breyer, at 185 (1984) ("Classical regulation ought to be looked upon as a weapon of last resort. The problems accompanying classical regulation would seem sufficiently serious to warrant adopting a least restrictive alternative approach to regulation. Such an approach would view regulation through a procompetitive lens. It would urge reliance upon an unregulated market in the absence of a significant market defect. Then, when the harm produced by the unregulated market is serious, it would suggest first examining incentive-based intervention, such as taxes or marketable rights, or disclosure regulation, bargaining, or other less restrictive forms of intervention before turning to classical regulation itself. It would urge the adoption of classical regulatory methods only where less restrictive methods will not work."); Lee Loevinger, "Regulation and Competition as Alternatives," 11 The Antitrust Bulletin 101, 125 (1966) ("The difficultly is that no regulatory agency can acquire or utilize effectively the range of data which influence a competitive market. Consequently, the ability of regulation to substitute for competition has an inherent limitation which cannot be wholly overcome by any improvement in the regulatory structure or process.").

Commission should not disregard this long-standing division of labor due to the unintended consequences that could result.

Consider one example. Would State-directed procurement remove the Commission's ability to engage in fulsome prudency evaluations of resources that PacifiCorp procured from any RFP? The Commission's prudency standard reviews utility investments "from the point in time of the utility's actions and reach our decision without the advantage of hindsight."[98] The Commission employs a reasonableness test when doing so.[99] Yet if the Commission's reasonableness test asks "whether the utility exercised the standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time the decision had to be made,"[100] yet here the Commission stood in PacifiCorp's managerial shoes when it directed PacifiCorp to issue an RFP to procure resources, there would have to be some impact. As further discussed below, PacifiCorp stresses that State-directed procurement would require preapproval of all costs and expenditures incurred from these efforts. Customer groups have already raised this point on similar issues before the Washington Commission.[101]

There are also liability implications for PacifiCorp from State-directed procurement. Would PacifiCorp's procurement efforts be protected by the State's sovereign immunity? Oregon has held that not only are the state and its agencies protected by sovereign immunity,

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[98] *In re PacifiCorp's 2020 Rate Case,* UE 374, Order No. 20-473, at 69 (Dec. 18, 2020).
[99] *Id.*
[100] *Id.*
[101] *In re PacifiCorp's CEIP Update,* Docket No. UE-210829, AWEC Post-Hearing Brief, ¶ 21 (Nov. 12, 2024) ("Legal authority aside, [State-directed procurement] is not consistent with sound regulatory policy. Utilities are compensated for the risk associated with providing service through the rate of return authorized by the Commission. When a commission steps in the shoes of the utility, it disrupts the balance of risk allocated between ratepayers and shareholders. *Further, if the Commission directs a specific action and the outcomes proves to disadvantage customers, a prudence disallowance is effectively precluded because the utility is acting in accordance with Commission direction*.") (available here: https://apiproxy.utc.wa.gov/cases/GetDocument?docID=1301&year=2021&docketNumber=210829).

so are "instrumentalities" of the state.[102] An instrumentality of the state "performs a function traditionally performed by the state," the state "generally outlines the powers and duties of its instrumentalities, either via statutory enactment or some other method," and instrumentalities are "subject, at least in part, to the control of the state in some way."[103] If the Commission has always held plenary authority of utility rates and services,[104] and now that power under HB 2021 would extend to resource procurement, what would be left of PacifiCorp's private affairs that would no longer be subject to state control? As an instrumentality of the State, PacifiCorp's procurement efforts could only be subject to liability to the limited extent permitted by the Constitution and Oregon Tort Claims Act.

This is not hyperbole. Last year Texas held exactly that: the Electric Reliability Council of Texas (ERCOT) is entitled to sovereign immunity as an "arm of the State," and could not be sued for damages caused by ERCOT in response to Winter Storm Uri.[105] While a traditional investor-owned utility could never claim these protections, removing the Company's ability to plan to serve its customers through resource procurement, and instead have that function controlled by a state agency (in addition to the Commission's other regulatory powers), is a different question.

There are also liability implications for the Commission itself. Would the Commission be exposing itself to derivative lawsuits? Consider the following scenario. PacifiCorp has recently had its credit downgraded by two credit ratings agencies.[106]

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[102] *Clarke v. OHSU,* 175 P.4d 418, 426 (2007) (emphasis added).
[103] *Id.* at 427 (2007).
[104] *E.g.,* ORS 756.040(2) ("The Commission is vested with power and jurisdiction to supervise and regulate every public utility and telecommunications utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.").
[105] *CPS v. ERCOT,* 671 S.W.3d 605, 623-629 (2023).
[106] *E.g., "PacifiCorp Downgraded to BBB+, Outlook Revised to Negative; Berkshire Hathaway Energy Co. Outlook Also Negative*," S&P Global Ratings (June 20, 2023) (available here:

PacifiCorp has material cash outlays due to ongoing litigation expenses, which has limited the Company's liquidity.[107] As a result of this proceeding, assume the Commission directs PacifiCorp to procure resources to reduce greenhouse gas emissions, and this procurement results in further credit downgrades or liquidity or solvency concerns. Would PacifiCorp's shareholders have standing to bring a derivative lawsuit against the Commission, who would appear to be acting as an officer or director, ostensibly or otherwise, of the corporation?

There are too many unintended consequences that could result from State-directed procurement. Given that no commission has done so (at least not to PacifiCorp's knowledge), and the long-standing practice against interfering with the management of investor-owned utilities, the Commission should be cautious in how it proceeds.

If the Commission nonetheless decides to require PacifiCorp to procure resources to comply with HB 2021, PacifiCorp believes there are at least five issues that the Commission must address.

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

Second, the Commission must preapprove cost recovery of all resources that it directs PacifiCorp to procure (including all necessary distribution and transmission network

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https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/3009376); *"Moody's Rating Action: Moody's downgrades PacifiCorp to Baa1, outlook stable"* (Nov. 21, 2023) (available here: https://www.moodys.com/research/Moodys-downgrades-PacifiCorp-to-Baa1-outlook-stable--PR_482643?cy=centraleur&lang=en).

[107] *E.g.,* Berkshire Hathaway Energy Company 2023 Form 10-K, at 77-78 (Dec. 31, 2023) (available here: https://bit.ly/3wyWQw6).

upgrades required for these resources). This includes typical costs and expenditures of these resources, but also financing costs.

Starting with costs and expenditures, the Company would be subject to material disallowance risk if the Commission does not preapprove cost recovery of these purchases. For example, PacifiCorp's current long-term resource plans (the 2023 IRP Update and CEP Supplement), do not support the need for, nor call for the issuance of an RFP to procure, HB 2021-compliant resources at this time. While this may change with the 2025 IRP and CEP, it is not currently the case. If PacifiCorp procured these resources without a demonstrated need to do so, customer groups could reasonably argue that the Company was imprudent for moving forward with these purchases and seek to disallow these investments in future rate proceedings. The Commission's decision in this case must ensure that result cannot happen.

Moving to financing costs, because of the scale of resources needed to reduce PacifiCorp's greenhouse gas emissions, PacifiCorp would issue securities to finance these expenditures. Because the Commission lacks the power to direct PacifiCorp's financing methods,[108] nor the ability to influence the cost of these activities, PacifiCorp would have to secure financing at then-available rates. This would impact PacifiCorp's already weakened financial condition. Because PacifiCorp does not have an Oregon-specific credit profile, it would impact the Company's borrowing costs in each state where it operates. The Company would need to be made whole for any impacts caused by these Oregon-specific financing activities, including the increased costs to finance expenditures that would otherwise not be allocated to Oregon.

Third, the Commission must exclude all net power costs that would result from these

[108] *E.g.,* ORS 757.400 through 757.467 (discussing the Commission's authority to approve certain PacifiCorp security issuances).

resources from PacifiCorp's net power cost proceedings. State-directed procurement that results in new generation resources will impact PacifiCorp's net power costs. Yet Oregon has performance incentives that are based on the assumption that the Company has sole managerial responsibility for how it procures resources and operates its system to reasonably maximize net power costs for its customers.[109] To the extent State-directed procurement increases net power costs, for example due to variability in the assumed or actual capacity factors of these resources that requires PacifiCorp to offset this lowered generation with other resources or market purchases, these costs must be specifically excluded from PacifiCorp's net power cost proceedings.

Following directly from above, *fourth,* the Commission should establish a mechanism to track the costs incurred from State-directed procurement and monitor the impact that these resources have on PacifiCorp's operations. HB 2021 does not require compliance at any cost, or under all scenarios. There are short-term exemptions from compliance with HB 2021's emissions reductions based on unplanned emissions, excessive costs, impacts to system reliability, or if compliance would compromise the power quality or integrity of the system.[110] These requirements could be triggered in any number of scenarios, but relevant here, they can only be triggered after a review of PacifiCorp's then-current emissions, actual or forecast costs, or system reliability, power quality, or integrity. A deferred accounting order or similar mechanism needs to be established to determine if any of these exemptions would be triggered by State-directed procurement.

Fifth, depending on the scope of any Commission decision, there could be a number

[109] *E.g., In re PacifiCorp's 2012 Rate Case and Request for a PCAM,* Docket No. UE 246, Order No. 12-493, at 13 ("the PCAM should provide an incentive to the utility to manage its costs effectively.").
[110] ORS 469A.435 through .445.

of unintended consequences or implementation concerns that arise. For example, while it is likely that a decision in this proceeding that requires PacifiCorp to procure resources could require the waiver of various Commission competitive bidding regulations, it is unclear exactly what would be required at this time. If the Commission proceeds down this path, the Company respectfully requests additional opportunities to inform the Commission on the most appropriate path forward.

V. CONCLUSION

The Company requests the Commission conclude it lacks the power to engage in State-directed procurement under HB 2021. To the extent the Commission has any lingering questions regarding the implementation of the law, these issues are more appropriately addressed in future Commission investigations or rulemakings.

Respectfully submitted November 13, 2024,

/s/ Zachary Rogala

Zachary Rogala OSB #222814
Senior Attorney
PacifiCorp
825 NE Multnomah Street
Suite 2000
Portland, OR 97232
(435) 319-5010
zachary.rogala@pacificorp.com