UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corporation	**)** **)** **)**	**Docket No. ER23-474-000**

STATE OF WASHINGTON'S MOTION TO INTERVENE OUT OF TIME AND ANSWER PROTEST OF UTAH DIVISION OF PUBLIC UTILITIES

Pursuant to Rules 212 and 214 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, .214, the State of Washington, by and through Attorney General Robert W. Ferguson, hereby seeks to intervene out if time in Docket No. ER23-474-000, concerning the California Independent System Operator Corporation's (CAISO) application for a tariff amendment to implement reference level changes for Washington resources to reflect compliance costs associated with Washington's Climate Commitment Act. Washington also moves to submit the incorporated answer to the Utah Division of Public Utilities (UDPU) December 8, 2022, proposed protest to CAISO's tariff amendment application, pursuant to Commission Rule 213, 18 C.F.R. § 385.213(a)(2).

I. MOTION TO INTERVENE

Washington respectfully requests that the Commission grant its motion to intervene out of time and requests that the Commission grant it full rights as a party to this proceeding. There is good cause to waive the time limitation for intervention. While Washington has tracked and supports CAISO's proposed tariff amendment, Washington only recently learned that a

proposed intervenor to this proceeding, UDPU, asserts constitutional arguments against Washington's Climate Commitment Act as a basis to deny the tariff amendment. Washington began preparing this motion immediately upon learning of these arguments, and Washington's proposed answer to UPDU's protest is filed within the 15-day period under which the Commission by practice allows for such answers. Washington also satisfies other elements supporting intervention. Under normal circumstances, Washington has an express right to intervene pursuant to 18 C.F.R. § 385.214(a)(2). And, while filed out of time in this case, Washington notes that at this early point in the proceeding Washington's intervention would cause no disruption or prejudice to existing parties. Moreover, Washington has a clear interest in explaining the parameters, and defending the constitutionality, of its own statute to the extent the Commission engages in such an analysis. That interest is not adequately represented by any existing parties.

II. MOTION TO ANSWER PROTEST

Washington respectfully requests that the Commission, pursuant to Rules 212 and 213 (18 C.F.R. §§ 385.212, .213) waives Rule 213(a)(2) (18 C.F.R. § 385.213(a)(2), and accepts Washington's below answer to UDPU's December 8, 2022, protest to CAISO's tariff amendment. Good cause exists for waiver. Because UDPU's protest expressly concerns the operation of a Washington statute, Washington's answer and perspective will aid the Commission's understanding of the issues, inform its decision-making, and ensure a complete and accurate record.[1]

[1] *See, e.g., Equitrans, L.P.*, 134 FERC ¶ 61,250 at p. 6 (2011).

A. The Commission Is Not Empowered to Deny the Tariff Amendment Based on Constitutional Arguments.

As noted, Washington recently learned that UDPU has raised allegations over the constitutionality of Washington's Climate Commitment Act in its protest to CAISO's tariff amendment petition. Washington vigorously disagrees with UDPU's Supremacy Clause and "dormant" Commerce Clause arguments and asserts that the Climate Commitment Act is fully consistent with all relevant constitutional limitations.

More critically, however, UDPU fails to establish how its constitutional arguments are relevant to CAISO's tariff application or how the Commission has jurisdiction to opine on the constitutionality of a duly enacted state law as a basis to determine the reasonableness of a tariff amendment. Specifically, it is well settled—both among federal courts and the Commission's own rulings—that the constitutionality of legislative enactments is beyond the scope of administrative agencies, including the Commission.[2] This is not just true of direct constitutional claims. Even constitutional questions that are merely "implicated" by a petition are inappropriate for the Commission to consider unless strictly necessary for a particular decision.[3]

Opining on the constitutionality of the Climate Commitment Act is not "strictly" necessary here, and the Commission should reject UDPU's Supremacy Clause and Commerce Clause arguments. Such arguments have nothing to do with the reasonableness of the tariff

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[2] *See, e.g., Ostereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); *see also PennEast Pipeline Company*, *LLC*, 170 FERC P 61064 at 61499 (Jan. 30, 2020) *citing Osterich*.

[3] *PennEast Pipeline* at 61499; *see also*, *Bayport Refining Company and Malcom M. Turner*, 51 FERC P 63011 at 65051 (May 15, 1990) (finding that separation of powers concerns make constitutional issues "out of the agency's jurisdiction" as a basis of imposing liability).

amendment itself, and indeed do not address the amendment in any way. As a result, the Commission should: (1) disregard those arguments as it considers CAISO's proposed tariff amendment; (2) presume that the Washington Climate Commitment Act satisfies constitutional requirements; and (3) approve CAISO's tariff amendment if the Commission finds that it is "just and reasonable" consistent with the Federal Power Act.

B. Even If the Commission Could Review the Climate Commitment Act, UDPU Fails to Raise a Cognizable Constitutional Violation.

Even if the Commission did possess jurisdiction to opine on the constitutionality of the Climate Commitment Act, UDPU's protest fails to identify a cognizable deficiency. With regard to the Commerce Clause, UDPU fails to recognize that no cost allowances are only provided to utilities that are already subject to the cost burdens of energy transition requirements imposed under a separate state law that applies only to those serving Washington customers.[4] That law, the Clean Energy Transformation Act (CETA)[5], requires utilities serving Washington customers to reduce their greenhouse gas emissions to neutral by 2030 and to zero by 2045. Critically, these requirements do not apply to generation for out-of-state customers. Thus, the function of the no cost allowances in the Climate Commitment Act is to avoid double-charging Washington customers for the costs of the energy transition to non-emitting generation. This policy applies to *all* utilities serving Washington customers, regardless of whether they are in-state or out-of-state entities.

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[4] RCW 80A.65.120(1). This statute provides, "[t]he legislature intends by this section to allow all consumer-owned electric utilities and investor-owned electric utilities subject to the requirements of Chapter 19.405 RCW, the Washington clean energy transformation act, to be eligible for allowance allocation as provided in this section in order to mitigate the cost burden of the program on electricity customers." *Id*.

[5] Chapter 19.405 RCW.

Additionally, UDPU also fails to point out that PacificCorp's Chehalis generating facility (the sole out-of-state facility UDPU asserts is mandatorily subject to the Climate Commitment Act) may receive and use "no cost" allowances under the statute because PacifiCorp's subsidiary utility, Pacific Power, serves Washington customers and can transfer those allowances to the Chehalis facility in *exactly* the same manner as all utilities serving Washington customers. Finally, UDPU fails to address the fact that Washington's rules implementing the Climate Commitment Act expressly allow utilities to transfer allowances to *any* generating facility delivering power to the Washington grid, including out-of-state facilities, rendering UDPU's facial arguments a nullity and any as-applied challenges unripe.[6] Any one of these facts is fatal to UDPU's Commerce Clause arguments.

UDPU's Supremacy Clause arguments are similarly unpersuasive. For one, UDPU's argument that the CAISO adders interfere with the Commission's authority to regulate wholesale electricity sales ring especially hollow within the context of a proceeding whereby the Commission is, in fact, exercising its exclusive authority to approve those adders. But UDPU also fails to properly delineate the bounds of the Federal Power Act in this context. The Supreme Court has made clear that the Federal Power Act "leaves to the States alone" the regulation of retail sales of electricity.[7] To the extent UDPU's Supremacy Clause argument even stretches to the Climate Commitment Act, UDPU itself points out that the purpose of the "no cost" allowances provided to utilities serving Washington ratepayers in the early years of the Act's compliance period are aimed at ensuring utilities have the flexibility to avoid an initial

[6] *See* Washington Administrative Code §§ 173-446-425 and -230 (6).
[7] *Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150, 154 (2016).

spike in energy costs to ratepayers.[8] In other words, the allowances are intended to address the retail sale of power, not the wholesale market. That policy choice remains fully within the scope of authority expressly reserved to state legislatures.

III. CONCLUSION

Washington respectfully requests that the Commission grant its motion to intervene, making Washington a full party participant, and further requests that the Commission grant its motion to submit the included answer to UPUD's protest.

Respectfully Submitted,

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Dated: December 20, 2022

[8] Motion to Intervene and Protest of the Utah Division of Public Utilities at 5; Rev. Code Wash. § 70A.65.120 (1); Wash. Admin. Code § WAC 173-446-230.