PACIFIC POWER
A DIVISION OF PACIFICORP

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January 23, 2024

VIA ELECTRONIC FILING

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

Re: UE 428—PacifiCorp's Advice No. 23-018 (ADV 1545), Modifications to Rule 4, Application for Electrical Service

PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) submits for filing its Opening Brief in the above referenced docket.

If you have any questions, please contact Cathie Allen, Regulatory Affairs Manager, at (503) 813-5934.

Sincerely,

Matthew McVee
Vice President, Regulatory Policy and Operations

Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 428

In the Matter of PACIFICORP, dba PACIFIC POWER Advice No. 23-018 (ADV 1545), Modifications to Rule 4, Application for Electrical Service	PacifiCorp's Opening Brief

I. INTRODUCTION

PacifiCorp d/b/a Pacific Power (PacifiCorp or the Company) respectfully requests the Public Utility Commission of Oregon (Commission) approve the Company's request to amend Rule 4 (Petition), which would prospectively limit the Company's liability from injuries that result from providing electrical services to only economic damages.

II. ARGUMENT

The Commission should approve the Company's Petition. The request is permitted under Oregon law, and is consistent with numerous Commission-approved tariffs that limit liability to economic damages—or preclude any damages at all—for various utility services. The Petition is also similar to proactive measures taken by several states to mitigate the impact to utility rates from catastrophic environmental disasters. And because the proposed revisions can only be applied when consistent with Oregon law, it does not conflict with any Oregon authorities, including the state constitution, statutes, or relevant Commission regulations or orders.

A. The Commission has the power to limit utility liability to economic damages arising from the provision of electric services.

The Commission has broad authority over public utilities.[1] This power includes the review and approval of limitations of liability, because tariff provisions "lie at the core of the Commission's authority," and the Oregon Supreme Court has held that utility limitations of liability specifically are "an inherent part of the rate." [2] Without liability limits, Oregon utilities could be "exposed to almost unlimited liability, the cost of providing service might increase and rates would as a consequence also increase."[3] Once approved, these limitations of liability, like all tariff terms and conditions, are "prima facie lawful and reasonable."[4]

In operation, Commission-approved limitations of liability supersede the utility's duties and liabilities under the common law.[5] Oregon Courts uniformly support this conclusion. For example:

- In *Boardmaster Corp. v. Jackson County,* the Court applied a Commission-approved PacifiCorp limitation of liability to limit *all* damages—

[1] *See, e.g.,* ORS 756.040(1); ORS 756.062(2); *P. N.W. Bell Tel. Co. v. Sabin*, 534 P.2d 984, 991 (Or. App. 1975) ("The Commissioner appears, therefore, to have been granted the broadest authority—commensurate with that of the legislature itself—for the exercise of his regulatory function.").
[2] *Simpson v. Phone Directories Co.,* 729 P.2d 578, 580-581 (Or. 1986).
[3] *Id.* (*citing Esteve Brothers,* 256 U.S. at 571).
[4] ORS 756.565; *see also* ORS 757.225 ("The rates named therein are the lawful rates until they are changed . . .").
[5] *See, e.g.,* ORS 756.200(3) ("The duties and liabilities of the public utilities or telecommunications utilities shall be the same as are prescribed by the common law, and the remedies against them the same, *except where otherwise provided by the Constitution or statutes of this state, and the provisions of ORS chapters 756, 757, 758 and 759 are cumulative thereto*.") (emphasis added); *Wildish Sand & Gravel Co. v. Nw. Nat'l Gas Co.,* 103 Or. App. 215, 220, n.3 (1990) ("Plaintiff also argues that, under ORS 756.200, the court should have permitted it to prove common law theories of liability. ORS 756.200 specifies that a utility's duties are the same as prescribed by the common law, except where otherwise provided by statute. Plaintiff was free to prove common law theories of liability but had to show that defendant breached a common law duty that had not been modified by the regulatory statutes.").

economic and noneconomic—caused by suspension of electrical services beyond PacifiCorp's control.[6]

- In *Simpson v. Phone Directories Co.* and *Garrison v. Pacific Northwest Bell,* the Court applied Commission-approved tariffs that limited any alleged damages for failure to include business information in the utility's white and yellow page directories to the prices paid for those directory listings.[7]
- In *Olson v. Pacific Northwest Bell,* the Court affirmed that a Commission-approved tariff that limited damages to a billing credit for the time a customer's service was interrupted, provided a sufficient defense against liability in civil suits unless the plaintiff proved gross negligence.[8]
- In *Adamson v. WorldCom Communications, Inc.,* the Court noted in dicta that a Commission-approved limitation of liability that specifically excluded "incidental or consequential damages" could limit utility liability when properly raised.[9]

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[6] 198 P.3d 454, 461 (Or. 2008) ("the applicable tariff in this case, Rule 14, limits Pacific Power's liability for suspending electrical service if such suspension is solely attributed to causes beyond Pacific Power's reasonable control, including "governmental authority.") (PacifiCorp's tariff provided: "The Company . . shall have no liability . . . for any . . . suspension . . . in electrical service or for any loss or damage caused thereby if such . . . suspension . . . results from the following: (a) Causes beyond the Company's reasonable control including, but not limited to . . . governmental authority . . .").

[7] 729 P.2d 578 (Or. 1986); 608 P.2d 1206, 1208–1211 (1980) (Pacific Northwest's tariff provided: "The Company is liable for errors or omissions in listings of its subscribers in its telephone directories in accordance with the following: 1. Listing furnished without additional charge: In amount not in excess of the charge for exchange service (excluding additional message charges) during the effective life of the directory in which the error or omission is made. 2. Listing furnished at additional charge: In amount not in excess of the charge for that listing during the effective life of the directory in which the error or omission is made.").

[8] 671 P.2d 1185, 1187 (1983); *Id.* n.4 ("Pacific Northwest Bell Telephone Company tariff, Schedule No. E–41, 4th Revised Sheet 54, Rule and Regulation No. 22, provides: 'XXII. CREDIT ALLOWANCES FOR INTERRUPTION TO SERVICE. . . . In no case will the credit allowance for any period exceed the total fixed charges for exchange service for that period. The Company's liability, if any, for any failure or interruption to service, partial or total, incoming or outgoing, and of whatever duration, *shall be limited to the credit allowance provided for in the Rule and Regulation No. 22*.'") (italics added).

[9] 78 P.3d 577, 581 (2003) (Qwest's tariff provided: "The Company shall not be liable for any incidental or consequential damages, including but not limited to loss, damage, or expense directly or indirectly arising out of the services covered in the tariffs filed with the Oregon Public Utility Commission, unless such damages are a result of Company's willful misconduct.").

Consistent with these authorities, PacifiCorp represents that the Commission has the authority to approve the Company's Tariff.

B. The Petition is consistent with numerous Commission precedents that limit utility liability to actual economic damages—or no damages at all.

The Commission has previously limited damages for various utility services to actual economic damages, and in some circumstances, eliminated the recovery of any damages at all. Beyond the nine PacifiCorp examples included in the Company's initial petition and the five court decisions above, consider the following from other Oregon utilities:

- Portland General Electric Company (PGE) is "not liable to Customers, ESS [Electric Service Suppliers] or any other person or entity for any interruption, suspension, curtailment or fluctuation in Electricity Service, *or for any loss or damage* caused thereby," from four categories of interruptions, including causes beyond PGE's control and actions taken to curtail electricity.[10]
- PGE is "not liable for *any* damage to Customer's property" from participation in load reduction programs.[11]
- PGE requires ESSs to "defend, indemnify and hold the Company harmless *against all claims* of loss made by any Customer arising from claims of inappropriate switching from the Company or another ESS in violation of the solicitation or verification provisions of the Commission, regardless of whether the person or entity doing the marketing or solicitation was an independent contractor of the ESS."[12]

[10] PGE Rule C—Governing Customer Attachment to Facilities, 2(C) (emphasis added).
[11] PGE Schedule 88, Or. Sheet No. 88-4 (emphasis added).
[12] PGE Rule K—Requirements Relating to ESSs, 6(B) (emphasis added).

- PGE "is not responsible for any direct, consequential, incidental, punitive, exemplary, or indirect damages" to customers or third parties that result from: Direct Load Control Events,[13] AC Cycling or changing thermostat set points in multiple tariffs,[14] or performing direct load control on a participating appliance.[15]

Idaho Power Company (Idaho Power) Oregon tariffs include similar examples.[16] And there are additional examples for services provided by Qualifying Facilities (QFs) that specifically disclaim consequential damages for either party,[17] in addition to multiple liquidated damages provisions.[18] PGE and Idaho Power's QF tariffs include the same or

[13] PGE Schedule 4, Or. Sheet No. 4-4.
[14] PGE Schedule 5, Or. Sheet No. 5-4; PGE Schedule 25, Or. Sheet No. 25-3.
[15] PGE Schedule 13, Or. Sheet No. 13-5
[16] *See, e.g.,* Idaho Power Company Rule J(1) ("The Company *will have no liability* to its Customers or any other persons for any interruption, suspension, curtailment, or fluctuation in service or *for any loss or dama*ges" caused by various circumstances, including among many others, fires or actions taken by IPC to protect the reliability or integrity of its system.) (emphasis added); Idaho Power Company Rule D(1)(d)(i) (requiring vendors of surge protection devices indemnify IPC against "any claims, suits, or losses").
[17] PacifiCorp PPA for Existing Firm QF Not an Intermittent Resource, § 12.3 ("EXCEPT TO THE EXTENT SUCH DAMAGES ARE INCLUDED IN THE LIQUIDATED DAMAGES, DELAY DAMAGES, COST TO COVER DAMAGES OR OTHER SPECIFIED MEASURE OF DAMAGES EXPRESSLY PROVIDED FOR IN THIS AGREEMENT, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR SPECIAL, PUNITIVE, INDIRECT, EXEMPLARY OR CONSEQUENTIAL DAMAGES, WHETHER SUCH DAMAGES ARE ALLOWED OR PROVIDED BY CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, STATUTE OR OTHERWISE."); PacifiCorp PPA for Firm Off System QF, § 12.3 (same); PacifiCorp PPA for New Firm QF and Intermittent Resource with MAG, § 12.3 (same); PacifiCorp PPA for New Oregon Non Firm QF,§ 10.3;
[18] *See, e.g.,* PacifiCorp PPA for Existing Firm QF Not an Intermittent Resource, § 11.4.1 (capping damages for failure to deliver net output to actual economic damages).

similar provisions.[19] And there are similar provisions in PacifiCorp's community solar program power purchase agreement and interconnection agreements.[20]

These examples, which similarly disclaim non-economic damages (or any liability at all), provide adequate precedent to support the Company's proposal.

C. The Petition is consistent with sister-state utility commission precedent.

Over a century of experience supports utility limitations on liability.[21] Courts have historically interpreted these limitations in accordance with the Filed Rate Doctrine, which provides that filed tariffs govern a utility's relationship with its customers and have the full force and effect of law until suspended or set aside.[22] The public policy justifications supporting tariffed liability limitations are well summarized in a Texas Supreme Court decision:

> [A] tariff's limitations on liability for economic damages is reasonable because a utility: (1) must provide nondiscriminatory service to all customers within its area; (2) must maintain uniform rates and reduce costs; (3) cannot accurately estimate its exposure to damages or efficiently insure against risks; (4) cannot increase rates for all customers based on losses one specific class of customers incurs; and (5) must comply with PUC regulations.[23]

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[19] *See, e.g.,* PGE Schedule 201 Standard In-System Non-Variable PPA § 10.4 ("NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR SPECIAL, PUNITIVE, INDIRECT OR CONSEQUENTIAL DAMAGES, WHETHER ARISING FROM CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE."); IPC Schedule 85(4)(c) ("The Company and the QF should negotiate security, default, damage and termination provisions that keep the Company and its ratepayers whole in the event the QF fails to meet obligations under the contract.");

[20] Community Solar Program Purchase Agreement, § 12.4 ("Disclaimer of Consequential Damages. NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR SPECIAL, PUNITIVE, INDIRECT OR CONSEQUENTIAL DAMAGES UNDER OR IN RESPECT OF THIS AGREEMENT, WHETHER ARISING FROM CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE."); Community Solar Project Interconnection Agreement, Art. 5.2 ("Limitation of Liability and Consequential Damages . . . Neither Party will seek redress from the other Party in an amount greater than the amount of direct damage actually incurred.").

[21] *See, e.g., Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571 (1921) (when included in a telegraph company's tariff, "[t]he limitation of liability was an inherent part of the rate. The company could no more depart from it than it could depart form the amount charged for the service rendered.").

[22] *See, e.g., Keogh v. Chicago & N.R. Co.*, 260 U.S. 156, 163 (1922) ("The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.").

[23] *Southwestern Elec. Power Co. v. Grant*, 73 S.W.2d 211, 217 (2002).

Thus, liability limitations serve as a *quid quo pro* for economic regulation: "in return for serving the public interest through a fixed rate of return and reliability standards," courts and state commissions have found that tariffed liability limitations serve the public interest by keeping "the cost of service low."[24]

To that end, state courts have generally held that "rules promulgated by public utilities which absolve them from liability for simple negligence in the delivery of their services will be upheld."[25] In decisions both issued in 1999, the Kansas and Texas Supreme Courts identified multiple state precedents consistent with this view of liability limitations, including Arizona, California, Delaware, the District of Columbia, Florida, Georgia, Illinois, Kansas, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nevada, New York, Oregon, Pennsylvania, South Carolina, Texas, and Washington.[26]

Due to the catastrophic damages caused by increasingly severe and more frequent natural disasters in recent years, these tariff provisions have taken on more importance and have faced more exacting scrutiny.

For instance, New York City was impacted by Superstorm Sandy and Tropical Storm Isaias in the past dozen years, resulting in billions of dollars in damages caused in part by utility outages. The primary utility impacted by the storm, Consolidated Edison Company

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[24] John L. Rudy, *Limitation of Liability Clauses in Public Utility Tariffs: Is the Rationale for State-Sponsored Indemnity Still Valid?*, 52 Buff. L. Rev. 1379. 1394 (2004) (discussing the New York Public Service Commission decision *In Re Liab. Clauses in Rate Schedules of Gas and Elec. Corps.*, 26 P.U.R. (N.S.) 373 (1938)).

[25] *Danisco Ingredients v. Kansas City Power & Light Co.*, 267 Kan. 760, 769 (1999); *Id.* at 771 ("A public utility's liability exposure has a direct effect on its rates, and this court, as well as the majority of jurisdictions addressing the question … has concluded that it is reasonable to allow some limitation of liability such as that for ordinary negligence in connection with the delivery of the services.").

[26] *Id.* at 769-70; *Houston Lighting & Power Co. v. Auchan United States*, 995 S.W.2d 668, 672 (Tex. 1999). The Company's Advice Letter in docket UE 428 cites additional consistent precedent from state courts in PacifiCorp service territory. *See* Pacific Power Advice No. 23-018 – Rule 4 – Application for Electrical Service, Docket UE 428, at 2 (Oct. 24, 2023).

(ConEd), had limitations of liability that excluded all damages arising from ConEd's actions, even if based on utility negligence, which were consistently enforced for several decades.[27] Only actions against utilities for gross negligence are recoverable in that state.[28]

After a New York court dismissed several lawsuits for failure to prove ConEd was grossly negligent (and finding that simple negligence claims were barred by tariff),[29] the New York legislature and utility commission adopted additional caps on utility liability, and also established additional protections for customers. For example, ConEd liability is now limited to $15 million for each instance where electricity supply is interrupted by the utility's negligence or other events beyond the utility's control (and individual customer recovery "will be adjusted downward on a pro rata basis to the extent required to hold payments to a total of $15,000,000."), while also requiring ConEd to specifically reimburse customers for certain damages (a credit for loss of electricity generally, and specific amounts for loss of foods, perishable medicine, etc.).[30] Additionally, the New York commission embarked on material grid hardening proceedings and addressed cost recovery for infrastructure storm damage in specific utility rate proceedings.[31]

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[27] *See, e.g., Lee v. ConEd,* 413 N.Y.S.2d 826 (1978) ("Once accepted by the Commission, the tariff schedule (including the limitation of liability provision) takes on the force and effect of law and governs every aspect of the utility's rates and practices; neither party can depart from the measure of compensation or standard of liability contained therein.").
[28] *Food Pageant v. ConEd,* 54 N.Y.2d 167 (1981).
[29] *Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. v. Trumbull Ins. Co. & ConEd*., 2016 N.Y.Misc. LEXIS 5093 (Sup Ct, NY County 2016).
[30] Con.Ed. PSC Electricity Tariff Rule 21.1 Continuity of Supply; "PSC Approves New Rules for Customer Credits and Reimbursements," (Jul. 14, 2022) (available here: https://dps.ny.gov/system/files/documents/2022/10/psc-approves-new-rules-for-customer-credits-and-reimbursements.pdf).
[31] Lawrence Berkeley National Laboratory, "Case Studies of the Economic Impacts of Power Interruptions and Damage to Electricity System Infrastructure from Extreme Events," at 35—39 (November 25, 2020) (available here: https://eta-publications.lbl.gov/sites/default/files/impacts_case_studies_final_30nov2020.pdf).

To the south, Florida has been impacted by frequent hurricanes over the past two decades that have resulted in billions of dollars in damage caused in part by utility outages. These hurricanes "prompted a comprehensive re-evaluation of utility rules and practices in Florida, including both the engineering and economic aspects of hurricane preparation and response."[32] These efforts included revising cost recovery standards (in both rate cases as well as through authorized surcharges), convening of multi-stakeholder workshops to revise storm-hardening rules and procedures, requiring Florida utilities to file forward-looking storm protection and system hardening plans, and authorizing the issuance of storm recovery bonds to finance the massive reconstruction costs caused by successive major storms.[33]

In addition to these efforts, in 2023, Florida passed a new statutory cap on utility liability, which provides that utilities are "not liable for damages based in whole or in part on changes in the reliability, continuity, or quality of utility services which arise in any way out of an emergency or disaster, including, but not limited to, a state of emergency . . .".[34] This statute also vests the state commission with exclusive jurisdiction over resolving these issues going forward, which allows the agency to rely on its expertise and discretion to strike a reasonable balance on appropriate tariff conditions.[35]

Texas has also experienced winter storms causing tremendous electric outages and economic impacts in the last decade. In 2021, Winter Storm Uri caused millions of outages, several hundred deaths, and direct and indirect losses to the Texas economy of $80 to

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[32] *Id.* at 19.
[33] *See*, *e.g., Id.* at 19-21 (discussing § 366.96 Fla. Statutes (2023) (utility storm protection plans and cost recovery), § 366.97 Florida Statutes (2023) (redundant poles and pole attachment rules), § 366.8260 Fla. Statutes (2023) (Storm recovery financing)).
[34] 2023 Fla. Laws Ch. 304 § 10(1) (codified at Fl. Code Ann.§ 366.98(1)).
[35] *Id.* ("Consistent with the commission's jurisdiction over public utility rates and service, issues relating to the sufficiency of a public utility's disaster preparedness and response shall be resolved by the commission.").

$130 billion.[36] After Uri, the Texas Legislature passed laws and the Texas utility commission implemented regulations aimed at preventing a recurrence of the winter storm outages.[37] The new laws addressed issues such as generator winterization requirements, changes in Electric Reliability Council of Texas market design, and securitization to finance payment of energy costs incurred during Uri. These authorities complement the state's judicial opinions that uphold utility limitations of liability in a variety of circumstances,[38] and reflect the Texas Supreme Court's decision that "one need only consider a power outage in the commercial district of a major Texas city to realize the potential liability of an electric utility. . . . Absent a limitation of liability, the risk of staggering loss could be borne by ordinary utility customers."[39]

Focusing on the West specifically, two sister-state utility commissions have upheld similar tariff provisions that limit damages to economic damages (or no liability whatsoever).

For example, Washington courts have concluded that "Virtually all jurisdictions have enforced such limitations and disclaimers of liability, whether contained in a filed tariff or a private contract, unless the company's negligence is willful or gross."[40] "Limitation of liability provisions are an inherent part of the ratemaking process."[41] And where Washington

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[36] *See, e.g.,* FERC-NERC-Regional Entity Staff Report, *The February 2021 Cold Weather Outages in Texas and the South Central United States,* at 11-12 (Nov. 2023) (available here: https://www.ferc.gov/media/february-2021-cold-weather-outages-texas-and-south-central-united-states-ferc-nerc-and).

[37] For a high-level description of the 2021 legislative and PUC actions, *see* Texas Comptroller of Public Accounts, *Fiscal Notes: Winter Storm Uri 2021*, at 11-13 (Oct. 2021), *available at*: https://comptroller.texas.gov/economy/fiscal-notes/2021/oct/winter-storm-impact.php.

[38] *See, e.g., CenterPoint Energy Res. Corp. v. Ramirez*, 640 S.W.3d 205 (Tex. 2022); *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 217 (Tex. 2002).

[39] *Houston Lighting & Power Co. v. Auchan United States*, 995 S.W.2d 668, at 674 (Tex. 1999).

[40] *Allen v. Gen. Tel. Co.,* 20 Wn. App. 144, 148 (1978) (applying a telephone utility tariff where the company "shall not be liable to the Advertiser for damages resulting from failure to include any time of advertising specified in [the agreement] . . .").

[41] *National Union Ins. Co. of Pittsburgh, Pa, v. Puget Sound Power,* 972 P.2d 481 (1999) (*citing Lee v. Consolidated Edison Co.,* 98 Misc.2d 304, 413 N.Y.S.2d 826, 828 (N.Y.Sup.App.1978)).

statutes vest the responsibility to approve liability limitations with that state commission, once a tariff becomes effective, limitations are "part of the law" and are "binding upon the customer whether he actually knows of the limitation or not."[42] This is because without the commission exercising its authority to review and approve reasonable customer and utility protections, a utility "would have to raise its rates commensurate to its increased liability risk."[43] Washington has applied limitations of liability to limit damages to economic damages, or no damages at all,[44] and Oregon Courts have adopted this same reasoning.[45]

Similarly, the California Supreme Court recently upheld state commission determinations on liability limitations in a decision that preempted a customer's ability to recover civil damages against utilities resulting from public safety power shutoff events. The Court was asked whether a statute that holds utilities liable for "all loss, damages, or injury" caused by utility acts or omissions would nonetheless be preempted by another statute that "bars actions that would interfere with the California Public Utilities Commission [CPUC] in the performance of its official duties."[46] The Court concluded that yes—even though the plaintiffs were "seeking billions of dollars in alleged damages resulting directly from power shutoffs"—the suit should be preempted as a matter of law because it would "hinder or

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[42] *Allen,* 20 Wn. App. at 151 (string-citing *Cole v. Pacific Tel. & Tel. Co*., 112 Cal.App.2d 416, 246 P.2d 686 (1952), *aff'd Hall v. Pacific Tel. & Tel.,* 20 Cal.App.3d 953, 98 Cal.Rptr. 128 (1971); *Wheeler Stuckey, Inc. v. Southwestern Bell Tel*. Co., 279 F.Supp. 712 (W.D.Okl.1967); *Warner v. Southwestern Bell Tel. Co*., 428 S.W.2d 596 (Mo.1968)).

[43] *Id.*

[44] *Citoli v. City of Seattle,* 61 P.3d 1165 (2002).

[45] *Boardmaster Corp.,* 198 P.3d at 461 ("The Washington Court of Appeals' reasoning in *Citoli* is compelling, and we adopt it here. As in *Citoli*, the applicable tariff in this case, Rule 14, limits Pacific Power's liability for suspending electrical service if such suspension is solely attributed to causes beyond Pacific Power's reasonable control, including 'governmental authority.' In discontinuing service to BoardMaster's property, Pacific Power acted—as plaintiffs' complaint alleges—pursuant to Jackson County's June 13, 2003, directive. That order from Jackson County constituted 'governmental authority' and, as such, was beyond Pacific Power's 'reasonable control.'").

[46] *Gantner v. PG&E Corporation,* 538 P.3d 676, 677 (Cal. 2023)

frustrate the PUC's carefully designed implementation calculus" regarding utility wildfire mitigation plans and tariff provisions regarding public safety power shutoff events.[47] "To hold otherwise," the Court noted, "would be to invite interference with a 'broad and continuing supervisory or regulatory program' of the PUC."[48]

The Company represents that these examples, which similarly disclaim non-economic damages (or any liability at all), provide adequate persuasive authority to support the Company's proposal.

D. The liability limitation can only be applied as allowed by Oregon law.

Given the broad scope of utility duties and obligations under the common law and Oregon statutes, it is likely not possible to draft a comprehensive (or comprehensible) liability limitation that incorporates all Oregon authorities. For example, ORS 477.089(2)(a) excludes punitive damages for certain events, and caps damages for gross negligence at double the amount of economic damages; while ORS 756.185(1) caps damages for gross negligence for other events at treble the amount of economic damages. The Company would need to propose separate tariff conditions to address just these two statutes, and it illustrates that drafting a unified limitation of liability that covered all utility duties and obligations would become unwieldy.

Instead, the Company's proposed limitation adopts a more reasonable approach, because it establishes a general limitation of liability for the provision of utility services that, based on the facts and circumstances of a given case, will only be inoperative if a Court of proper jurisdiction determines that it conflicts with Oregon law.

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[47] *Id.* at 683 (cleaned up).
[48] *Id.* (citing *Hartwell Corp. v. Superior Court*, 27 Cal.4th 256, 266 (2002)); *Id*. at 678 (*citing San Diego Gas & Electric Co. v. Superior Court*, 13 Cal.4th 893, 918 (1996) (same).

This approach also avoids the need for the Commission to engage in any constitutional analysis in this proceeding. Oregon's Constitution guarantees Oregonians a "remedy by due course of law for injury done him in his person, property, or reputation."[49] *Horton v. OHSU* establishes the test to determine whether state statutes that limit damages (or utility tariffs that reflect state statutes that do the same) violate this constitutional provision.[50] In that case, the Court upheld a statute that capped all damages for certain personal injuries caused by state employees at $3 million.[51] This resulted in a substantial reduction to an initial jury verdict of $6.07 million in economic and $6 million in noneconomic damages. Yet as *Horton* notes: "Attempts to articulate a single unifying principle," to analyze issues under Oregon's Remedy Clause would "fail to comprehend the varied ways that the legislature can and has gone about achieving its goals."[52] Instead, Oregon requires a case-by-case analysis to determine the constitutionality on any cap or exclusion of damages.[53]

A carve-out that limits utility liability only as allowed by Oregon law (which necessarily includes Oregon's Remedy Clause), allows the Commission to avoid all pre-enforcement constitutional discussions about how the tariff provision *could* be applied in *hypothetical* future circumstances. Those issues, only if or when they arise, are best left to the relevant judicial forum.

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[49] Or. Const. Art. 1, § 10.
[50] 376 P.3d 998 (2016).
[51] *Id.* at 1030.
[52] *Id.* at 1028.
[53] *Id.* ("It follows from our cases that, in deciding whether the legislature's actions impair a person's right to a remedy under Article I, section 10, we must consider the extent to which the legislature has departed from the common-law model measured against its reasons for doing so.").

III. CONCLUSION

The Company's request is consistent with Oregon law and previous Commission and sister-state commission precedent that have limited utility liability to economic damages—or preclude any damages at all—for various utility services. And PacifiCorp's proposed limitation is similar to other proactive measures taken by several states to mitigate the impact to utility rates from catastrophic environmental disasters in those states. PacifiCorp respectfully requests the Commission approve the Company's Petition.

Respectfully submitted January 23, 2024,

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