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.	)	STAFF'S OPENING BRIEF

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I. INTRODUCTION

On October 24, 2023, PacifiCorp filed an application with the Oregon Public Utility Commission ("Commission" or "PUC") requesting the Commission approve a tariff provision that would limit the Company's liability in any civil lawsuit brought by its customers to economic damages only. Stated differently, PacifiCorp wants to condition a person's ability to access electricity on their inability to sue the Company for non-economic damages, regardless of the Company's actions in any given situation.

PacifiCorp, a wholly owned subsidiary of Berkshire Hathaway Energy, is the "largest grid owner/operator" in the Western United States.[1] The Company serves two million customers across six states through its two divisions, Pacific Power and Rocky Mountain Power.[2] Its parent company Berkshire Hathway Energy includes a total of eleven "locally managed" energy companies that provide service to "more than 12 million customers and end-users throughout the U.S., Great Britain and Alberta, Canada."[3]

In June of 2023, a Multnomah County Circuit Court jury found PacifiCorp to be liable for

[1] *See* Berkshire Hathaway Energy, "Our Businesses > PacifiCorp, Connecting the West" (available at: https://www.brkenergy.com/our-businesses/pacificorp).

[2] *See* PacifiCorp, "Just the Facts," (available at: https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/about/PacifiCorp_Fact_Sheet.pdf).

[3] See Berkshire Hathaway Energy, "Our Family of Businesses," (available at: https://www.brkenergy.com/).

igniting several fires around Labor Day in 2020. This litigation has led to millions of dollars in liability for PacifiCorp that may grow into the billions. PacifiCorp states that these verdicts are negatively impacting the Company's credit rating, which will ultimately have a detrimental impact on Oregonians' electricity rates.[4] The Company seeks to curb a portion of the risk of future wildfire liability through a limitation on noneconomic damages in its tariff.

PacifiCorp is justifiably concerned. In general, utilities face numerous and significant challenges in operating the electric grid in the era of the climate crisis.[5] Wildfire risk is one of the most difficult challenges. System operators face such decisions as shutting off power to entire communities or risk igniting a fire. Power outages impact different populations of people differently. Low-income families and people with disabilities are more likely to suffer severe consequences of power outages.[6] On the other hand, conditions brought on by climate change, increasing population in wildfire-prone areas, and forest management practices have exponentially increased the risk of wildfire ignition.

It is impossible to say for certain how a court would rule on PacifiCorp's proposed tariff provision because it would depend on the specific set of facts and nature of the case before the court. However, a legal analysis of the very instance in which PacifiCorp aims this provision to apply - noneconomic damages awarded in instances of wildfire liability - demonstrates that a court might find the provision to be legally problematic.

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[4] *In the Matter of PacifiCorp*, dba Pacific Power, Docket No. UE 428, Advice No. 23-018 (ADV 1545), Modifications to Rule 4, Application for Electrical Service at 3 (October 24, 2023) ("PacifiCorp Application").

[5] Berkshire-Hathaway Energy does not intend to fully retire coal until 2049. *See* Berkshire Hathaway Energy, "The Evolution of Coal," (available at: https://www.brkenergy.com/energy/coal). Berkshire Hathaway Energy also continues to invest heavily in natural gas. (*See*, for example, Andrew Bary, "Berkshire Buys Bigger Stake in LNG Facility. It Doesn't Fear Fossil Fuels," *Barrons* (July 10, 2023) (available at: https://www.barrons.com/articles/berkshire-hathaway-warren-buffett-lng-acquisition-283abf94); Lee Brookman, "Why Berkshire Hathaway is going long on natural gas," *The Statement* (August 7, 2023) (available at: https://thestatement.bokf.com/articles/2023/08/why-berkshire-hathaway-is-going-long-on-natural-gas).

[6] *See*, for example, "California's power outages are a life-and-death issue", High Country News, Alice Wong (January 19, 2023) (available at: https://www.hcn.org/issues/55-3/ideas-social-justice-californias-power-outages-are-a-life-and-death-issue/).

In order to analyze the proposed tariff provision, this brief begins by providing background on the 2020 Labor Day fires and the *James v. PacifiCorp* litigation. The brief also breaks down PacifiCorp's proposed provision to better understand its implications. The brief then describes the history and purpose of limitations on liability in utility tariffs. The final section describes Article I, section 10 of the Oregon Constitution ("the remedy clause") and how it might be implicated in a court's analysis if the Commission approved PacifiCorp's proposed limitation on liability.

In sum, this brief makes two conclusions about PacifiCorp's proposed tariff provision. The first is that there is no precedent for a utility tariff that protects a utility from gross negligence or willful misconduct. The second is that the Commission's approval of such a provision may run afoul of the remedy clause of the Oregon Constitution.

II. BACKGROUND

A. The 2020 Labor Day fires led to unprecedented destruction of the Western Oregon Cascades, but it is indicative of the challenging conditions that utilities face in an increasingly warming world.

On Labor Day, September 7, 2020, "exceptionally strong east-to-northeast winds" developed across the Pacific Northwest, which drove "extreme fire activity."[7] The extreme wind "fanned several existing small, smoldering wildfires" previously ignited by lightning and "contributed to numerous new human-caused fires that spread rapidly."[8] These wildfires led to "over 11% of the Oregon Cascades ecoregion burned in 2020," which exceeds "the cumulative burned area in the previous 36 years . . . and very likely exceeding annual burned area in western Oregon since at least 1900."[9]

[7] Compound Extremes Drive the Western Oregon Wildfires of September 2020 –John T. Abatzoglou, David E. Rupp, Larry W. O'Neill, Mojtaba Sadegh - 2021 - Geophysical Research Letters - Wiley Online Library (First published March 22, 2021), (available at https://agupubs.onlinelibrary.wiley.com/doi/full/10.1029/2021GL092520).

[8] *Id.*

[9] *Id.*

The wildfire destroyed over 4,000 homes and forced about 40,000 people to evacuate.[10]

While these particular wildfires were more severe than has been typical in the Pacific Northwest, they are indication of the types of extreme and challenging conditions utilities will likely face in providing safe and reliable electrical service. Areas burned and areas burned by high-severity wildfires "have increased in the West about eightfold since 1985,"[11] and "[i]n parts of the Western U.S., data suggests that a 1°C increase in average annual temperature could result in up to a 600% rise in median burned areas in some forest types."[12]

B. The 2020 Labor Day Wildfires led to significant judgments against PacifiCorp.

After the Labor Day 2020 fires, in *James v. PacifiCorp*, seventeen named plaintiffs filed a lawsuit against PacifiCorp in the Multnomah County Circuit Court. The court certified the lawsuit as a class action.[13] The plaintiffs alleged that PacifiCorp failed to adequately prepare for

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[10] *Id.*

[11] Fifth National Climate Assessment, "Focus on Western Wildfires," chapter 7, sections 14, 16 (available at: https://nca2023.globalchange.gov/chapter/focus-on-2/) (citing Parks, S.A. and J.T. Abatzoglou, 2020: Warmer and drier fire seasons contribute to increases in area burned at high severity in western US forests from 1985 to 2017. Geophysical Research Letters, 47 (22), e2020GL089858 (available at: https://doi.org/10.1029/2020gl089858). *See also Fifth National Assessment*, Key Message Number 5, "Humans Are Changing Weather and Climate Extremes." (available at https://nca2023.globalchange.gov/chapter/3/#key-message-5) (citing Abatzoglou, J.T. and A.P. Williams, 2016: Impact of anthropogenic climate change on wildfire across western US forests. Proceedings of the National Academy of Sciences of the United States of America, 113 (42), 11770–11775 (available at https://doi.org/10.1073/pnas.1607171113); Abatzoglou, J.T., D.S. Battisti, A.P. Williams, W.D. Hansen, B.J. Harvey, and C.A. Kolden, 2021: Projected increases in western US forest fire despite growing fuel constraints. Communications Earth & Environment, 2 (1), 227 (available at: https://doi.org/10.1038/s43247-021-00299-0.) ("From 1984 to 2015, about half of the increase in burned area across the western United States is attributable to increases in fuel flammability caused by anthropogenic climate change. These climate change–driven increases in wildfire burned area are expected to continue into the coming decades, as fuel availability is not expected to be a limiting factor before 2050.")).

[12] Judsen Bruzgul and Neil Weisenfeld, "Wildfire risks in the US are soaring, Here's what utilities can do" *Utility Dive* (November 17, 2023) (available at: https://www.utilitydive.com/news/utility-mitigate-wildfire-risks-power-safety-shutoff-resilience/700139/ (citing *Effects of Climatic Variability and Change on Forest Ecosystems: A Comprehensive Science Synthesis for the U.S. Forest Sector*, United States Department of Agriculture, Forest Service, (December 2012).

[13] *Jeanyne James, et. al. v. PacifiCorp*, In the Circuit Court of the State Oregon for the County of Multnomah, Case No. 20CV33885, Opinion and Order Granting Plaintiff's Motion for Issues Class (May 23, 2022).

or respond to the extreme windstorm described above.[14] They argued that PacifiCorp failed to inspect its power lines, clear vegetation, and did not de-energize power lines when the Company should have due to weather conditions.[15]

On June 12, 2023, in the first phase of the trial, the jury found PacifiCorp had acted with gross negligence, recklessness, and willful misconduct.[16] The jury also found PacifiCorp's actions constituted a private nuisance, public nuisance, and trespass.[17] The jury found that PacifiCorp is liable for economic and noneconomic damages the class suffered from four fires started around Labor Day 2020, including the Santiam Canyon Fire, the Echo Mountain Complex Fire, the South Obenchain Fire, and the 242 Fire.[18] The jury awarded the seventeen named plaintiffs $4 million in economic damages, $68 million for noneconomic damages, and $18 million for punitive damages.[19] PacifiCorp is appealing these decisions.[20]

In phase II of the trial, the court set three jury trials for groups of class members to prove their damages. The first of these trials concluded on January 23, 2024. The jury awarded nine more plaintiffs $85 million, which may be slightly reduced to be consistent with prior rulings.[21] Of the $85 million, only $6 million was for economic damages.[22] The rest was for noneconomic damages including a punitive damage multiplier of .25.[23]

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[14] *Jeanyne James, et. al. v. PacifiCorp*, In the Circuit Court of the State Oregon for the County of Multnomah, Case No. 20CV33885, Class Action Complaint (September 30, 2020).

[15] *Id.*

[16] *Jeanyne James, et. al. v. PacifiCorp*, In the Circuit Court of the State Oregon for the County of Multnomah, Case No. 20CV33885, Final Verdict (June 9, 2023).

[17] *Id.*

[18] *Id.*

[19] *Id*; *Jeanyne James, et. al. v. PacifiCorp*, In the Circuit Court of the State Oregon for the County of Multnomah, Case No. 20CV33885, Verdict Form – Punitive Damages (June 9, 2023).

[20] See PacifiCorp, Information on Wildfire Litigation, (available at: https://www.pacificorp.com/about/information-wildfire-litigation.html).

[21] *Jeanyne James, et. al. v. PacifiCorp*, In the Circuit Court of the State Oregon for the County of Multnomah, Case No. 20CV33885, Final Verdict (January 24, 2024).

[22] *Id.*

[23] *Id.*

There will be two more trials similar in nature for additional class members.

PacifiCorp has also settled two other lawsuits related to the Labor Day 2020 fires. They settled for $299 million with 463 individual plaintiffs regarding the Archie Creek Fire and for $250 million with ten timber companies for the same fire in Douglas County.[24] Several wineries and Multnomah County have also filed a lawsuit against for PacifiCorp for similar claims, and the U.S. government is considering filing a lawsuit for damage to Forest Service land caused by wildfires during the same time period.

In summary, the cost of the 2020 Labor Day wildfires litigation is enormous for PacifiCorp.

C. The wildfire verdicts impact PacifiCorp's credit rating.

To mitigate the risk of future liability from similar incidences, PacifiCorp seeks to limit its liability in future lawsuits to only economic damages. PacifiCorp explains in its application, "as a result of recent wildfire litigation in Oregon, PacifiCorp's credit was downgraded from A to BBB+," which, "impacts the Company's ability to access low-cost financing necessary for the Company's operations and investments to fulfill its service obligations to customers."[25] The Company states that the downgrades to its credit rating, "will limit the Company's financial flexibility and impact its ability to more affordably invest in critical infrastructure upgrades, renewable energy projects, and other initiatives required to comply with the Company's legal and regulatory obligations."[26] PacifiCorp claims that the proposed Rule 4 language "would aid in both maintaining and potentially improving its current credit rating for the benefit of customers while retaining the ability for customers to be compensated for actual damages when appropriate."[27]

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[24] *See* PacifiCorp, "Information on wildfire litigation," (available at: https://www.pacificorp.com/about/information-wildfire-litigation.html).

[25] PacifiCorp Application at 3.

[26] *Id.*

[27] *Id.*

D. PacifiCorp Seeks to Limit Its Liability for Any Action Arising out of the Provision to Electric Service to Economic Damages Only.

PacifiCorp's Rule 4 "outlines PacifiCorp's general rules and regulations for electric service."[28] Currently, Rule 4 provides such terms as application requirements, service election, change of consumer's service or equipment, impairment of service to other customers, change of occupancy, no consumer on record, and availability of facilities.[29]

PacifiCorp now asks the Commission to approve a new limitation on liability provision that would be integrated into Rule 4 as section I. The full text of PacifiCorp's proposed provision is as follows:

> I. **Limitation of Liability:** In any action between the parties arising out of the provision of electric service, the available damages shall be limited to actual economic damages. Neither party shall be liable to the other party for special, noneconomic, punitive, incidental, indirect, or consequential damages (including, without limitation, lost profits), regardless of whether such action is based in contract, tort (including, without limitation, negligence), strict liability, warranty or otherwise. By receiving electric service, Customer agrees to waive and release Company from any and all claims for special, noneconomic, punitive, incidental, indirect, or consequential damages (including, without limitation, lost profits) as part of any claim against Company related to or arising from Company's operations or electrical facilities. This provision shall not be binding where state law disallows limitations of liability.

The intent behind this proposed modification to Rule 4 is to prevent the Company's customers from seeking noneconomic damages in *any* civil action arising out of the provision of electric service.

The extreme breadth of this provision makes it difficult to say with any certainty how a court would evaluate such provision because it would largely depend on the given set of facts and nature of the claim before a court. As such, this brief analyzes the provision through the lens of a negligence claim such as was brought in the *James v. PacifiCorp* litigation. This judgment was the impetus for this application so it makes sense to analyze whether this provision would be

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[28] *Id.* at 1.

[29] *See* PacifiCorp Rule 4, General Rules for Application for Electric Service (available at: https://www.pacificpower.net/content/dam/pcorp/documents/en/pacificpower/rates-regulation/oregon/tariffs/rules/04_Application_for_Electrical_Service.pdf).

upheld under a similar set of facts.

Before delving into the analysis, it may be helpful to break down the provision into pieces to fully understand what PacifiCorp intends to achieve.

1. The Provision Would Apply only to PacifiCorp's Customers.

PacifiCorp's proposed provision applies to "any action between the parties arising out of the provision of electric service." Here, the parties would be PacifiCorp and any customer taking electric service from PacifiCorp. Theoretically, the provision would be applied both ways. In other words, a customer would not be able to seek noneconomic damages from PacifiCorp, and PacifiCorp would not be able to seek noneconomic damages from its customers. Though, eliminating the risk of noneconomic damages likely conveys a bigger benefit on PacifiCorp than PacifiCorp's customers.

Importantly, this limitation on liability would not apply to anyone that is not a customer of PacifiCorp. This means that if this provision were to be approved and held to be valid, it still only limits PacifiCorp's liability as to its customers. Wildfires do not follow the service territory lines of utilities, and PacifiCorp's transmission lines and other equipment are not solely located within its own service territory. This could have the effect of creating two classes of plaintiffs in actions arising from a single incident - PacifiCorp's customers who would be barred from seeking noneconomic damages and everyone else who could seek noneconomic damages.

2. PacifiCorp intends for the limitation on liability to apply in any type of civil lawsuit that "arises out the provision of electric service."

ORS 756.010(11) specifies that "[s]ervice is used in its broadest and most inclusive sense and includes equipment and facilities related to providing the service or the product served." The proposed tariff provision is intended to apply to "any action and all claims . . . arising from [PacifiCorp's] operations or electrical facilities," "regardless of whether such action is based in contract, tort (including, without limitation, negligence), strict liability, warranty or otherwise."[30] In other words, the limitation on noneconomic damages would apply in *any* instance where a

[30] *Id.*

customer sued PacifiCorp in court of law, if it was related to the provision of electric service, and "provision of electric service" is broadly applied.

3. The provision would limit damages to only "actual economic damages."

PacifiCorp seeks to limit damages in any action arising from the provision of electric service to "actual economic damages."[31] The proposed rule explicitly limits liability "for special, noneconomic, punitive, incidental, indirect, or consequential damages (including, without limitation, lost profits)."[32] Damages are the "sum of money awarded to a person injured by the tort of another."[33] Oregon law defines economic damages as "objectively verifiable monetary losses," such as medical or memorial expenses, loss of income, impairment to earning capacity, or repair for damaged property.[34] Noneconomic damages are "subjective, nonmonetary losses," such as pain, mental suffering, or emotional distress.[35] Noneconomic damages are capped (or limited) at $500,000 in wrongful death cases under Oregon Law.[36] Pertinently, punitive damages are only available under verdicts where "it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others."[37]

Based on PacifiCorp's proposed language, it appears the Company intends to prohibit its customers from pursuing damages that are not "objectively verifiable" in any type of civil litigation that involves the provision of electrical service. This includes noneconomic damages

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[31] *Id.*

[32] *Id.*

[33] Restatement (Second) of Torts § 902.

[34] O.R.S. § 31.705.

[35] *Id.*

[36] O.R.S. § 31.710.

[37] O.R.S. § 31.705.

that would be awarded in cases where PacifiCorp was found to have acted with an enhanced degree of negligence.

III. ANALYSIS

The state of mind, set of facts, and specific claims would impact a court's analysis of the Commission's authority to approve PacifiCorp's proposed liability limitation. Courts have not looked favorably upon utility tariffs that would attempt to shield utilities from gross negligence, which does not bode well for PacifiCorp's proposal in circumstances under which the Company wants it to apply. Commission approval of the provision could also implicate the remedy clause of the Oregon Constitution. Before delving into the analysis, it may be useful to review the basics of negligence and damages available thereunder.

A. Overview of Tort Law and Damages: Negligence standards and the degree of fault are relevant.

Generally, there are two types of civil litigation, breach of contract claims and torts. A tort is "a civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages."[38] There are numerous types of torts, such as negligence, trespass, assault, battery, and products liability. As noted above, PacifiCorp intends for its limitation on liability to apply in any civil litigation, regardless of the claim, which makes it difficult to determine the precise legal analysis a court might undertake. However, it is worth delving into negligence claims because the degree of fault under negligence claims matter under verdicts such as those in *James v. PacifiCorp*.

The Restatement of Torts defines negligence as "conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm."[39] The four components of a cause of action for negligence are: (1) a duty owned by the defendant to the plaintiff, (2) a breach of that duty by the defendant's failure to conform to the required standard

[38] *Tort*, Black's Law Dictionary (11th ed. 2019).

[39] Restatement (Second) of Torts § 282.

of conduct, (3) a sufficient causal connection between the negligent conduct and the resulting harm, and (4) actual loss or damage of a recognized kind.

Gross negligence is a heightened degree of negligence that represents an extreme departure from the ordinary standard of care. It falls somewhere in between an intent to do a wrongful harm and ordinary negligence and "is characterized by a state of mind which indicates conscious indifference to the rights of others or to the probable consequences of one's acts.[40] Often someone who is found liable for gross negligence can be responsible for higher damages than ordinary negligence. Particularly, punitive damages can be awarded in cases where a defendant act with extreme negligence or intentional misconduct. Other types of damages are intended to compensate the estate and survivors, whereas punitive damages are meant to punish intentionally bad or grossly negligent behavior. As noted above, PacifiCorp's proposal specifically includes punitive damages among the noneconomic damages that its customers would be barred from recovering.[41] As described below, a court might find this problematic.

B. The Commission has broad authority to regulate utilities, which includes authority over the terms and conditions of utility service set forth in tariffs.

The Oregon legislature granted broad authority and substantial discretion to the Commission in all matters related to regulation of public utilities and their rates. The Commission's enabling statues set forth a broad regulatory scheme with vast responsibility in protecting the customers of public utilities:

> "The commission is vested with power and jurisdiction to supervise and regulate every public utility . . . in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction."[42]
>
> "[T]he commission shall represent the customers of any public utility . . . and the public generally in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction. In respect thereof the commission shall make use of the jurisdiction and powers of the office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable

[40] *Garrison v. Pacific NW Bell*, 45 Or.App. 523, 532, 608 P.2d 1206 (1980).

[41] PacifiCorp Application at 3.

[42] O.R.S. § 756.040(2).

rates."[43]

Oregon courts have repeatedly described the Commission's authority as "the broadest authority-commensurate with that of the legislature itself" when exercising its "regulatory function."[44] The delegation of authority to the Commission "over utility regulation is 'subject only to constitutional limits and those of the Commission[]'s express, legislatively delegated broad powers.'"[45] Of course, this authority is limited to what is lawful, and "[t]he courts, not the PUC, have the ultimate authority to decide the PUC's legal duties under the statutes that govern its actions."[46]

An integral part of the Commission's regulatory function is in the review and approval of utility tariffs. Oregon law requires every public utility to "file with the Public Utility Commission . . . schedules . . . showing all rates, tolls and charges which it has established and which are in force at the time for any service performed by it within the state . . . ."[47] The Commission may only authorize a rate or schedule that is "fair, just and reasonable."[48]

The utility tariff is the vehicle for which a utility shows its "rates, tolls, and charges."[49]

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[43] O.R.S. § 756.040(1).

[44] *Pacific N.W. Bell v. Sabin*, 21 Or. App. 200, 214 (1975). *See also Klamath Off-Project Water Users, Inc. v. PacifiCorp*, 237 Or. App. 434, 443-44 (2010), (quoting Pacific N.W. Bell v. Sabin, 21 Or. App. 200, 214 (1975))(the exercise of its regulatory function has been characterized as 'commensurate with that of the legislature itself.'"); *Multnomah Cnty. v. Davis*, 35 Or. App. 521, 526 (1978) ("The Commission[]'s power over rates constitutes a broad delegation of legislative authority. The only legislative standards for exercising that authority are that rates be 'fair and reasonable.'"); *Gearhart v. Pub. Util. Comm'n of Or.*, 255 Or. App. 58, 86 (2013), review allowed, 354 Or. 386 (2013) (quoting Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19, 290 Or. 217, 230 (1980)) (The PUC "is empowered to regulate and to set rates and, 'in so doing, to make delegated policy choices of a legislative nature within the broadly stated legislative policy.'").

[45] *Gearhart v. Pub. Util. Comm'n of Or.*, 255 Or. App. 58, 86 (2013), review allowed, 354 Or. 386 (2013) (quoting Am. Can Co. v. Lobdell, 55 Or. App. 451, 461 (1982).

[46] *Id.*

[47] O.R.S. § 757.205(1).

[48] O.R.S. § 757.210(1)(a). In determining whether "[r]ates are fair and reasonable," the Commission must also consider whether "the rates provide adequate revenue both for operating expenses of the public utility . . . and for capital costs of the utility, with a return to the equity holder that is: (a) Commensurate with the return on investments in other enterprises having corresponding risks; and (b) Sufficient to ensure confidence in the financial integrity of the utility, allowing the utility to maintain its credit and attract capital."

[49] O.R.S. § 757.205(1).

"Each utility has a tariff on file for each service that it offers."[50] The tariff acts similar to contract between a utility and its customers in that it provides, "the rates and other terms and conditions of utility service."[51] However, courts have held that conditions imposed by a tariff are binding on the utility's customers regardless of whether a contract is signed by the customer or whether the customer's is aware of the tariff and its contents.[52] Tariffs serve an essential role in ensuring uniformity in utility rates and preventing undue discrimination among utility customers.

As described in the next section, limitations on liability have commonly been included in utility tariffs and upheld by courts, but there are parameters to the liability limitations that utilities can impose on customers.

1. Limitations on liability have been included in utility tariffs since the dawn of utility regulation, but those limitations cannot be unbounded.

Utilities have long included limitations on liability in their tariffs. Limitations have included protection against common-law claims, such as limitations of liability for issues like erroneous directory listings and service failures. In one of the first United State Supreme Court cases on the subject, the Court held that "a common carrier could not limit its liability for negligence," and rejected a distinction between degrees of negligence.[53] However, the jurisprudence on tariff liability limitations evolved rather quickly to recognize differences in degrees in negligence.

While not binding precedent, a review of how limitations on liability under New York law might shed light on how Oregon courts might consider PacifiCorp's proposed liability

[50] *Citizens' Util. Bd. of Oregon v. Oregon Pub. Util. Comm'n*, 128 Or. App. 650, 661, 877 P.2d 116, 123 (1994).

[51] *Id.*

[52] *Los Angeles Cellular Tel. Co. v. Superior Ct.*, 65 Cal. App. 4th 1013, 76 Cal. Rptr. 2d 894 (1998).

[53] *Hart v. Pennsylvania Railroad Co.*, 112 U.S. 331, 343, 5 S. Ct. 151, 157 (1884).

limitation because New York has a similar regulatory structure as Oregon.[54] After New York established its Public Service Commission in 1907, it began to require electric utilities to file tariff schedules with its Commission, which took on the force of law once approved.[55] Consumers could only purchase service from one utility and were compelled to agree to the terms of the Commission-approved tariffs as a condition of receiving electricity service. In return for the "state-sanctioned monopoly over a designated franchise," the legislature granted the Commission "the power to determine 'fair and reasonable' rates."[56] Fair and reasonable rates included a rate of return on utilities' capital investments. This system, which is still the basic concept of for-profit utility regulation in most states, restricted utilities rate of return to what is "fair and reasonable" but gave the utilities the ability to earn consistent profits "free from the costs of a competitive market."[57] This regulatory structure "became one of the primary justifications for indemnity by tariff."[58]

In 1938, an early New York Public Service Commission decision considered the purpose of limitations on liability in utility tariffs and how far such provisions can extend. The New York Commission upheld the limitations for interruption of service on the basis that utilities have an obligation to serve all customers in their service territory and that without such a limitation, the liability exposure was "potentially incalculable and unbounded," and the utility would have to charge "excessive compensation for ordinary service."[59] The Commission's authorization of "the limitation of liability provision for the negligent interruption of service was a *quid pro quo* for the imposition of regulatory restrictions on the utilities" and "in the best interest of the

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[54] *See* 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, 1382-1412 (2004) for a lengthier discussion of the historical background on liability limitations in utility tariffs.

[55] *Id.*

[56] *Id.* at 1392.

[57] *Id.*

[58] *Id.* at 1393.

[59] *Id.* (citing Re Liab. Clauses in Rate Schedules of Gas and Elec. Corps., 26 P.U.R. (N.S.) 373 (1938)).

public" because "it functioned to keep the cost of service low."[60] The Commission's order also affirmed the common law rule that a utility cannot "limit its liability for damages that result from its gross negligence or willful misconduct."[61]

The Commission denied the utilities' request to limit their liability for damages that result from their negligence regarding their property. The utilities had argued that they "do not always have control of the atmospheric conditions that can affect their property, including transmission lines," but the Commission "weighed the public interest as greater than that of the utilities."[62] Importantly, the Commission found that the utilities offered no consideration in return for the liability protection, "in contrast to the regulatory restrictions *quid pro quo* for the limitation provision for interruption of service."[63]

In 1977, New York City experienced a massive blackout leaving three million people without power. A grocery store chain sued Consolidated Edison of New York (Con Edison) for food spoilages and loss of business.[64] The fire was caused by the "combination of two lightning strokes, occurring within 18 minutes of each other, causing two double circuit outages of transmission lines linking Con Edison's system with the other electrical utilities in the New York Power Pool."[65] The plaintiff claimed that Con Edison "failed to properly maintain and inspect certain relays and circuit breakers, and failed to secure proper protection against lightning for its towers and transmission lines."[66] The plaintiff also alleged that Con Edison acted grossly negligent in placing an unqualified person in "a critical position while lacking the necessary experience, knowledge, and expertise."[67]

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[60] *Id.* at 1395.

[61] *Id.* at 1394.

[62] *Id.* at 1388.

[63] *Id.* at 1395.

[64] *Food Pageant, Inc. v. Consol. Edison Co.*, 54 N.Y.2d 167, 171, 429 N.E.2d 738, 739 (1981).

[65] *Id.*

[66] *Id.*

[67] *Id.*

The trial court instructed the jury they could only "return a verdict for the plaintiff if they found the defendant acted grossly negligent" due the terms of Con Edison's rates schedule which prohibited the company for being liable for service interruption due to *ordinary* negligence.[68] The jury found Con Edison to have acted grossly negligent and thus awarded the plaintiff damages.[69]

Con Edison appealed arguing that the evidence presented at trial was insufficient to demonstrate gross negligence.[70] The court disagreed finding the jury's determination was made on the evidence before it.[71] The court therefore found Con Edison to be liable for service interruption, which seems to be a rarity among jurisprudence on tariff liability limitations. Importantly though, the court upheld the trial court's ruling specifically because the jury had found the utility had acted grossly negligent.[72]

In contrast, in 2013, a New York court refused to hold Long Island Power Authority (LIPA) responsible for power outages due to Hurricane Sandy.[73] The court reasoned that "Hurricane Sandy was a unique storm which caused an unprecedented interruption of service to LIPA customers," and the "resulting 'power outage' was 'inevitable' and was on a scale which 'would take days for restoration under optimal conditions.'"[74] In other words, the power interruption was due to a force majeure event, not a grossly negligent act on behalf of the utility.

It seems that the overarching theme throughout this jurisprudence is that utilities can limit liabilities through their tariffs, but a New York court is unlikely to uphold a provision protecting a utility for gross negligence or willful misconduct. A review of Oregon law indicates similar outcomes are likely in Oregon courts.

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[68] *Id.* at 172, 738 (emphasis added).

[69] *Id.*

[70] *Id.*

[71] *Id.* at 175, 741.

[72] *Id.*

[73] *Balacki v. Long Island Power Auth.*, 40 Misc. 3d 1220(A), 975 N.Y.S.2d 707 (Dist. Ct. 2013).

[74] *Id.*

2. It is unlikely that an Oregon court would uphold a tariff provision that limited a utility's liability in instances of gross negligence or willful misconduct.

In Oregon, there is no direct case on point regarding a tariff provision protecting an Oregon utility for gross negligence. However, court dicta indicates that the court would have an unfavorable view of a provision that limited liability for a utility's grossly negligent actions or willful misconduct.

In *Garrison v. Pac. Nw. Bell,*[75] a doctor sued a telephone company for placing her in the wrong section of the telephone directory, and the court sided with the telephone company based on a liability limitation approved by the Commission. One of the central questions in *Garrison* was "whether the Public Utility Commissioner (Commissioner) ha[d] the authority to limit by regulation the damages recoverable by a telephone service subscriber" for a directory error.[76] The court described the questions regarding the Commissioner-approved liability limitation as "fundamental" to the Commissioner's regulatory and ratemaking authority."[77]

In upholding a limitation on liability for directory errors, the court said that the ability to limit liabilities is tied to the utility's rates and thus, an inherent part of the Commission's ratemaking authority:

> Rates, service levels, and the remedy for erroneous listings or service failures are inseparable. A broadening of exposure to liability would increase the cost of furnishing telephone service and thereby result in higher rates. As Justice Brandeis stated in a similar context upholding a telegraph company's limitation of liability, "**the limitation of liability was an inherent part of the rate**."... Thus, **the regulation lies at the core of the Commissioner's authority to set adequate service levels and establish reasonable rates therefor**.
>
> **Courts are virtually unanimous that provisions limiting a public utility's liability are valid so long as they do not purport to grant immunity *or limit liability for gross negligence***.[78] (Emphasis added).

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[75] *Garrison v. Pac. Nw. Bell*, 45 Or. App. 523, 608 P.2d 1206 (1980).

[76] *Id.* at 527, 1209.

[77] *Id.*

[78] *Id. at* 531,1211 (citing *Western Union Telegraph Co. v. Esteve Brothers & Co.*, 256 U.S. 566, 571, 41 S.Ct. 584, 586, 65 L.Ed. 1094, 1097 (1921); See, e. g., *Behrend v. Bell Telephone Company*, 242 Pa.Super. 47, 363 A.2d 1152 (1976), vacated on other grounds, 473 Pa. 320, 374 A.2d 536 (1977); *Allen v. General Tel. Co. of Northwest, Inc., 20 Wash.App*. 144, 578 P.2d 1333 (1978); Annotation, 92

The court explained several rationales on which "[t]hese limitations have been justified." These include: (1) "consideration of the strict regulation of a public utility's operations and curtailment of its rights and privileges, regulation of its liabilities to some extent is necessary to strike an equitable balance of benefits and burdens,"[79] (2) "the basis of the interrelationship between the limitation of liability and the rate structure,"[80] and (3) the "technological complexity of modern telephone systems and the many ways in which service failures could occur with no human fault have been held to justify limitations of liability."[81] The court concluded by reiterating that it agreed with "the overwhelming weight of authority that the limitation of liability is reasonable ***insofar as it does not shelter defendant from liability for gross negligence.***"[82]

Similarly, in *Simpson v. Phone Directories Co.* a dentist sued three telephone directory publishers alleging gross negligence and breach of contract for omitting his name from yellow pages telephone listings.[83] The trial court dismissed the gross negligence claim and granted summary judgment for the defendant based on a limitation of liability clause.[84] The Court of Appeals upheld the lower court's ruling, citing *Garrison* that, "the PUC has the authority to limit, by tariff regulations, the damages recoverable for an erroneous listing in a telephone directory."[85] The issue was whether the plaintiff had offered any evidence of gross negligence at trial, and the court found that they had not, so the question of limited liability in instances of gross negligence was not at issue before the court. The court, however, again indicated that it decided the way it did because the underlying action was ordinary negligence.

A.L.R.2d 917 (1963); *State ex rel. Mt. States T. & T. Co. v. District Court*, 160 Mont. 443, 503 P.2d 526 (1972)) (emphasis added).

[79] *Garrison v. Pac. Nw. Bell*, 45 Or. App. 523, 531, 608 P.2d 1206, 1211 (citing *532 State ex rel. Mt. States T. & T. Co. v. District Court*, 160 Mont. 443, 503 P.2d 526 (1972)).

[80] *Id.* (citing *Waters v. Pacific Telephone Co.*, 12 Cal.3d 1, 114 Carter. 753, 523 P.2d 1161 (1974)).

[81] *Id.*

[82] *Id.* at 532, 1211.

[83] 82 Or. App. 582, 729 P.2d 578 (1986)**.**

[84] *Id.*

[85] *Id.*

3. The limitations on liability cited by PacifiCorp all specifically exempt grossly negligence and willful misconduct or apply in different contexts, such a force majeure events.

The tariffs that PacifiCorp cites all include a clause specifically excluding acts of gross negligence or willful misconduct, and in some instances, ordinary negligence as well.

- Washington Water Service Company, WN U-3, Original Sheet No. 15 ("**The Utility's liability, if any, for its gross negligence, willful misconduct or violation of RCW Chapter 19.122 is not limited by this tariff.** With respect to any other claim or suit, by a customer or by any other party, for damages associated with the installation, provision, termination, maintenance, repair or restoration of service, the Utility's liability, if any, shall not exceed an amount equal to the proportionate part of the monthly recurring charge for the service for the period during which the service was affected. THERE SHALL BE NO LIABILTY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES.)"[86]

- Cheyenne Light, Fuel and Power Company, Wyo. P.S.C. Tariff No. 14, Original Sheet No. R22 ("The Company shall not be liable for injury to persons, damage to property, monetary loss, or loss of business caused by accidents, acts of God, fires, floods, strikes, wars, authority or orders of government, or any other causes and contingencies **beyond The Company's control**."), Id. ("The customer shall hold the Company harmless and indemnify it against all claims and liability for injury to persons or damage to property when such damage or injury results from or is occasioned by the facilities located on the customer's side of the point of delivery **unless caused by the negligence or wrongful acts of the Company's agents or employees**.")[87]

- Montana-Dakota Utilities Co., Wyo. P.S.C. Tariff No. 1, Rate Schedule 100 Conditions of Service ("The Company will not be liable for any loss, injury, death or damage resulting in any way from the supply or use of electricity or from the presence or operation of the Company's structures, equipment, lines, appliances or devices on the customer's premises, **except loss, injuries, death, or damages resulting from the negligence of the Company.")[88]**

PacifiCorp also cites several cases to support its application, but none of the cases substantiate the notion that utility tariffs can limit liability for gross negligence. For example,

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[86] *See* PacifiCorp Application at 2 (citing Washington Water Service Company, WN U-3, Original Sheet No. 15, Rule 25, Limitations of Liability (available here: https://www.wawater.com/docs/rates/rates-2023-1006.pdf).

[87] *See* PacifiCorp Application at 2 (citing Cheyenne Light, Fuel and Power Company, d/b/a Black Hills Energy, Schedule of Rates (Date Issued: December 13, 2022) (available here: https://www.blackhillsenergy.com/sites/blackhillsenergy.com/files/clfp_electric.pdf).

[88] *See* PacifiCorp Application at 2, (citing Montana-Dakota Utilities Co., State of Wyoming Rate Schedules at 9 (Date Filed: January 4, 2019) (available here: https://www.montana-dakota.com/wp-content/uploads/PDFs/Rates-Tariffs/Wyoming/Electric/WYElectric100.pdf).

PacifiCorp cites *Citoli v. City of Seattle*[89] for "upholding limitation of liability." However, an examination of the facts of this case demonstrate that the liability limitation was not being applied in an instance of a utility acting grossly negligent. In November of 1999, the World Trade Organization held its conference in Seattle, which drew in large numbers of protesters. A group of protesters illegally took over the upper two floors of a building. The police and city ordered Seattle City Light and Puget Sound Energy to turn off electricity and gas service to the building. A business owner on the first floor of the building suffered economic losses and sued several entities, including Seattle City Light and Puget Sound Energy. The court dismissed the case because utilities were acting in response to an official order from a government entity directing them to turn off power. As described above, utility tariffs that limit liability for power interruption are typically upheld. And again, here there was no allegation that Seattle City Light or Puget Sound Energy acted with gross negligence.

In *Southern California Edison Co. v. City of Victorville*, the court did say that the California, "PUC has the power to control that which in " 'any manner affect[s] or relate[s] to rates . . . or service.' . . . As part of this power, the PUC may also limit the liability of the utility to the public."[90] However, in this case, the court found that limitation on liability did not apply in the instance before the court. PacifiCorp cites *State Lands Comm'n v. Plains Pipeline*[91] for the notion that one way to keep rates low is to limit utility liability, but the decisive issues before the court in that case were whether an entity must provide essential services to the general public to be considered a public utility and whether immunity applied. The court decided that where a utility transported oil to a private entity for commercial purposes, it was entitled to no more immunity from liability than any ordinary private business. And yet again, in *Lee v. Consolidated Edison Co.*, the court upheld a limitation on liability specifically because it was for

[89] 115 Wn. App. 459, 481 – 486 (2002).

[90] PacifiCorp Application at 2, footnote 2 (citing *S. California Edison Co. v. City of Victorville*, 217 Cal. App. 4th 218, 230, 158 Cal. Rptr. 3d 204, 212 (2013).

[91] PacifiCorp Application at 2, footnote 4 (citing *State Lands Com. v. Plains Pipeline, L.P.* (2020) 57 C.A.5th 582, 587, 588, 272 C.R.3d 11).

ordinary, not gross, negligence.

The cases PacifiCorp cites in its opening brief also do not provide support for a limitation on liability for gross negligence or willful misconduct. In *Adamson v. World Com Communications*,[92] the specific provision at issue limited liability "unless such damages [were] a result of [the] Company's willful misconduct."[93] *Board Corp. v. Jackson County* was another incident where a government entity ordered a utility, here Pacific Power, to shut off power to its customer, and the court did not hold the utility liable.[94]

In short, PacifiCorp has not provided any support for the notion that a tariff provision can limit liability from grossly negligence acts or willful misconduct.

C. Commission approval of PacifiCorp's proposed limitation on liability may run afoul of the Remedy Clause of the Oregon Constitution.

Courts have not considered how Article I, section 10 of the Oregon Constitution (the "remedy clause") interacts with the Commission's authority. It is therefore impossible to say with certainty how a court would analyze the Commission's approval of PacifiCorp's proposed limitation on liability for noneconomic damages under the remedy clause. As already noted, it would depend on the nature of the claims and set of facts before the court. However, we can again look through the lens of the claims in which PacifiCorp intends for this provision to apply - instances where PacifiCorp is held liable for wildfire damages - to speculate on whether a court would uphold the Commission's approval of such a provision.

Article I, section 10 of the Oregon Constitution states:

> No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and *every man shall have remedy by due course of law for injury done him in his person, property, or reputation*.[95]

The third clause is what is known as the "remedy clause." If the Commission approved

[92] 190 Or. App. 215, 222, 78 P.3d 577, 582 (2003).

[93] *Adamson v. WorldCom Commc'ns, Inc.*, 190 Or. App. 215, 221, 78 P.3d 577, 581 (2003).

[94] 224 Or. App 533, 198 P.3d 454 (2008).

[95] Or. Const. Art. I, § 10 (emphasis added).

PacifiCorp's propose limitation and events surrounding another wildfire led to litigation of the type that occurred in *James v. PacifiCorp* the court would likely receive arguments regarding the scope and applicability of the remedy clause. The Oregon Supreme Court has interpreted the remedy clause a number of ways since 1857 and recognized that, "the text of the remedy clause . . . does not provide a clear answer as to the clause's meaning."[96] The debate over what the remedy clause means, "has proved to be the great enigma," and resulted in "a body of case law that, as former Justice Landau put it, 'lacks anything resembling doctrinal coherence.'"[97] Given that the Commission's authority is legislative in nature[98], it may be illustrative to look to instances where courts have considered legislative limitations on liability. Two of the most salient cases to consider are *Horton v. Oregon Healthy & Science University (OHSU)* and *Busch v. McInnis Waste Systems, Inc.* An examination of the analysis the court undertook in these cases might help assess how the court might view the Commission's approval of a tariff provision limiting liability for noneconomic damages.

1. *Horton v. Oregon Health and Science University (OHSU)*

In *Horton v. OHSU,* a surgeon negligently severed blood vessels during an operation on a six-month-old baby, which resulted in the child's need for lifelong medical care. The child's parents filed suit against OHSU and the surgeon.[99] A jury awarded $6 million dollars in

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[96] *Horton v. Oregon Health & Sci. Univ.*, 359 Or. 168, 198, 376 P.3d 998, 1016 (2016).

[97] Susan Marmaduke, *Horton: The Remedy Clause and the Right to Jury Trial Provisions of the Oregon Constitution*, 96 Or. L. Rev. 561, 563 (2018).

[98] *Pacific N.W. Bell v. Sabin*, 21 Or. App. 200, 214 (1975). *See also Klamath Off-Project Water Users, Inc. v. PacifiCorp*, 237 Or. App. 434, 443-44 (2010), (quoting Pacific N.W. Bell v. Sabin, 21 Or. App. 200, 214 (1975)) (the exercise of its regulatory function has been characterized as 'commensurate with that of the legislature itself.'"); *Multnomah Cnty. v. Davis*, 35 Or. App. 521, 526 (1978) ("The Commission[]'s power over rates constitutes a broad delegation of legislative authority. The only legislative standards for exercising that authority are that rates be 'fair and reasonable.'"); *Gearhart v. Pub. Util. Comm'n of Or.*, 255 Or. App. 58, 86 (2013), review allowed, 354 Or. 386 (2013) (quoting *Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 290 Or. 217, 230 (1980)) (The PUC "is empowered to regulate and to set rates and, 'in so doing, to make delegated policy choices of a legislative nature within the broadly stated legislative policy.'"

[99] *Horton v. Oregon Health & Sci. Univ.*, 359 Or. 168, 171-172, 376 P.3d 998, 1001-1002.

economic damages and $6 million dollars in noneconomic damages to the plaintiff. The Oregon Tort Claims Act[100] limited claims against public bodies to $3 million, and the defendants moved to reduce the award to that amount.[101] The trial court granted the reduction to OHSU but not the surgeon, and the surgeon appealed.[102] In a split opinion, with four justices agreeing with the majority, one concurrence, and two dissents, the Supreme Court reversed and remanded, concluding the Oregon Torts Claim Act's limit to the plaintiff's claim did not violate the remedy clause in Article I.[103] In other words, the Supreme Court upheld a statutory cap on damages recoverable from state agencies and employees.

Horton is a seminal case in Oregon tort law. The Supreme Court explicitly overruled its previous decision in *Smothers v. Gresham Transfer*, which held that the remedy clause of the Oregon Constitution prevents the legislature from modifying the common law as it existed in 1857, when the Oregon Constitution was adopted.[104] However, the court explicitly did not overrule the cases that preceded *Smothers*.[105] The court provided a long and detailed history of how it interpreted the remedy clause over the years, revealing that the precedent involving the remedy clause was not exactly consistent.[106] Recognizing that the text does not provide a clear answer as to the clause's meaning,"[107] the court reviewed the history and origins of the remedy clause, along with how similar provisions have been interpreted in other states.[108] The court concluded that "the remedy clause does not protect only those causes of action that pre-existed 1857, nor does it preclude the legislature from altering either common-law duties or the remedies

[100] O.R.S. §§ 30.260 to 30.300.

[101] *Horton v. Oregon Health & Sci. Univ.*, 359 Or. 168, 171-172, 376 P.3d 998, 1001-1002.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at 188-199, 1010-1016.

[107] *Id.* at 198, 1016.

[108] *Id.* at 198-217, 1016-1026.

available for a breach of those duties."[109]

The court then identified "three general categories of legislation"[110] in which the remedy clause has been considered that may be helpful in analyzing whether the Commission has the authority to approve PacifiCorp's proposed liability limitation. The first category is "when the legislature has not altered a duty but has denied a person injured as a result of a breach of that duty any remedy."[111] In general, prior precedent held that the complete denial of a remedy violates the remedy clause.[112] The court has also found that "providing an insubstantial remedy for a breach of a recognized duty also violates the remedy clause."[113] The second category, which is likely where a court would center its analysis over the Commission's approval of PacifiCorp's proposed tariff provision, is "when the legislature has sought to adjust a person's rights and remedies as part of a larger statutory scheme that extends benefits to some while limiting benefits to others" and the court considers the "*quid pro quo* in determining whether the reduced benefit that the legislature has provided an individual plaintiff is "substantial" in light of the overall statutory scheme."[114] The third is when "the legislature has modified common-law duties and, on occasion, has eliminated common-law causes of action when the premises underlying those duties and causes of action have changed."[115]

In *Horton*, the court recognized that the Oregon Tort Claims Act "accommodates the state's constitutionally recognized interest in asserting its sovereign immunity with the need to

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[109] *Id.* at 219, 1027.

[110] *Id.*

[111] *Id.*

[112] *Id.* (citing *Noonan*, 161 Or. at 222–35, 88 P.2d 808).

[113] *Id.* (citing *Clarke*, 343 Or. at 608, 610, 175 P.3d 418 ($200,000 capped damages not substantial in light of $12,000,000 in economic damages and $17,000,000 in total damages); *Howell*, 353 Or. at 376, 298 P.3d 1 ($200,000 capped damages substantial in light of $507,500 in total damages)).

[114] *Id.* (citing Hale, 308 Or. at 523, 783 P.2d 506).

[115] *Id.* at 219–20, 1027–28 (citing Perozzi, 149 Or. at 348, 40 P.2d 1009; Norwest, 293 Or. at 563, 652 P.2d 318).

indemnify its employees for liability that they incur in carrying out state functions."[116] Crucially, the Act also "gives plaintiffs something that they would not have had if the state had not partially waived its immunity."[117] The Act allows a plaintiff to recover damages from the state, which would otherwise be immune, for damages up to $3,000,000.[118] This is "an assurance that would not be present if the only person left to pay an injured person's damages were an uninsured, judgment-proof state employee."[119] In other words, if there were no Oregon Tort Claims Act, a plaintiff could not seek recovery from the government because of sovereign immunity, but a plaintiff would be able to seek damages against a state employee. In cases involving large sums of money, a state employee might be insolvent, making it impossible for the plaintiff to recover. In addition, without the Tort Claims Act, threats of lawsuits against state employees could be deterrence for working for the government. The Oregon Tort Claims Act addresses both issues by giving the plaintiff a means to recover some portion of their damages and provides some immunity for state employees.

Thus, the court in *Horton* upheld the limitations on liability contained in the Oregon Torts Claim Act. The court explained, "the Tort Claims Act seeks to accommodate the state's constitutionally recognized interest in sovereign immunity with a plaintiff's right to a remedy."[120] The court recognized the capped amount was not sufficient to fully compensate the plaintiff for the incurred damages, but the $3 million cap amount was also not "insubstantial in light of the overall statutory scheme," and is more than a "paltry fraction of the damages."[121] However, *Horton* left open the questions of whether statutory damages caps that did not involve Oregon's sovereign immunity and did not provide some alternate avenue for recovery are constitutional.

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[116] *Id.* 359 Or. 168, 222, 376 P.3d 998, 1029.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Horton v. Oregon Health & Sci. Univ.*, 359 Or. 168, 221, 376 P.3d 998, 1028.

[121] *Id.*

2. *Busch v. McInnis Waste Systems, Inc.*

In *Busch v. McInnis Waste Systems, Inc.*,[122] the Oregon Supreme Court considered "for the first time since [the] court re-examined the remedy clause of Article I, section 10, of the Oregon Constitution in *Horton v. OHSU*, . . . the constitutionality of a statutory cap on the damages that a plaintiff may recover for injuries resulting from a breach of a common-law duty."[123] The Court held that Oregon's $500,000 cap on noneconomic damages, without more, was unconstitutional when applied to personal injury cases other than wrongful death.

In this case, a garbage truck hit a pedestrian who brought action against the garbage company for personal injuries.[124] The company admitted liability, and the case went before a jury to determine damages, which assessed $3 million in economic damages and $10.5 million in noneconomic damages.[125] The trial court granted the company's motion to reduce the jury award to the statutory cap of $500,000.[126]

At the time, ORS 31.710 limited a plaintiff's recovery for noneconomic damages arising out of "any civil action seeking damages arising out of bodily injury, including emotional injury or distress, death or property damages of any one person including claims for loss of care, comfort, companionship and society and loss of consortium" to $500,000.[127] The claim was against a private entity, so unlike *Horton*, the claims did not involve sovereign immunity or the Oregon Torts Claim Act. However, the court used the *Horton* framework to analyze the constitutionality of the limitation on liability.[128]

In applying the analysis, the court found that ORS 31.710 did "not modify the common-

[122] 366 Or. 628, 468 P.3d 419 (2020).

[123] *Id.*, 366 Or. 628, 630, 468 P.3d 419, 421.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*, 366 Or. 628, 639, 468 P.3d 419, 426.

[128] *Id.*, 366 Or. 628, 639–40, 468 P.3d 419, 426.

law duty that a defendant owes a plaintiff—to act with reasonable care."[129] Instead, it limited "without eliminating, the remedy that an injured plaintiff may recover for injuries caused by a breach of that duty."[130] Much of the court's analysis focused on the lack of a *quid pro quo*. In other words, the legislature limited the availability of damages without conferring any benefit in return. The court explained that "[s]uch an assessment is appropriate as a final check to ensure that, even if the legislature's reasons for adopting a damages cap are constitutionally sufficient, the plaintiff has received a constitutionally sufficient remedy."[131]

Relevantly, the defendant in *Busch* argued that there are inherent differences between noneconomic and economic damages, and that "noneconomic damages are of lesser constitutional import."[132] The court noted that defendant was correct to identify their differences, but those differences do not mean that the remedy clause does not apply to noneconomic damages.[133] The court said:

> Defendant is correct that economic and noneconomic damages are different in some regards. For one thing, as the legislature defines them, economic damages are objectively verifiable; noneconomic damages are not.[10] But it is what those types of damages have in common that is important for purposes of Article I, section 10. Article I, section 10, places a substantive limit on the legislature's ability to modify the remedy for personal injuries. **Both economic and noneconomic damages are intended to compensate a plaintiff for such injuries**.
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> . . . .
>
> **At the time the remedy clause was adopted, the common law allowed recovery for both tangible and intangible injuries, such as mental anguish and insult.** . . Today, Oregon law continues to permit plaintiffs to seek and to have a jury award what it deems an amount that can compensate plaintiff for both types of losses.[134]

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[129] *Id.*

[130] *Id.*

[131] *Id.*, 366 Or. 628, 644, 468 P.3d 419, 429.

[132] *Id.*, 366 Or. 628, 645, 468 P.3d 419, 429.

[133] *Id.*

[134] *Id.*, 366 Or. 628, 645, 468 P.3d 419, 429–30 (emphasis added) (citing *See, e.g.*, *Clarke*, 343 Or. at 608, 175 P.3d 418 ("There is no dispute that, when Oregon adopted its remedy guarantee, plaintiff would have been entitled to seek and, if successful, to recover both types of damages from the individual defendants."); *DeMendoza v. Huffman*, 334 Or. 425, 438, 51 P.3d 1232 (2002) (discussing the historical development of punitive damages, as compared to compensatory damages, in American courts);[11] *Oliver*

In other words, a restriction on noneconomic damages would have to survive the same constitutional scrutiny as a limitation on economic recovery.

Finally, the court also addressed the defendant's argument the legislature's rationale for adopting the statutory cap made it constitutional. The legislature had enacted the statutory cap "to reduce insurance costs and improve insurance availability."[135] However, the absence of a *quid pro quo* weighed heavily in the court's decision that the statutory cap was unconstitutional. The lack of a *quid pro quo* itself was not a violation of the remedy clause, but its absence cut in favor of a constitutional violation.[136]

In *Horton*, the *quid pro quo* was a waiver of sovereign immunity. In *Busch*, the defendant was a private company. The statute limiting noneconomic damages assessed against that company provided nothing in return to the plaintiff. The Court cautioned that "a *quid pro quo*" will not always "be necessary, or even sufficient, to sustain such a statute against a remedy-clause challenge."[137] However, in the *Busch* case it was clear that the statutory noneconomic damages cap was intended to confer benefits upon "society in general" without offering any benefit to the "injured person in particular." Without more, the Supreme Court determined that the $500,000 limitation on noneconomic damages could not withstand constitutional muster.

Finally, it is important to note that the opinion in *Busch*, like *Horton*, was not unanimous. The opinion included one concurrence that would have decided the issue on different grounds and a strongly worded dissenting opinion. As such, it is reasonable to believe that the jurisprudence on the Oregon remedy clause will continue to evolve.

It is also important to note that the Supreme Court has upheld the cap on noneconomic

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v. North Pacific Transp. Co., 3 Or. 84, 87 (1869) (explaining that when "estimating" damages for personal injury, "it is proper to consider loss of time, money necessarily paid or debts necessarily incurred in curing the bodily injury, and whatever bodily pain it may have caused to the plaintiff").

[135] *Id.*, 366 Or. 628, 648, 468 P.3d 419, 431.

[136] *Id.*, 366 Or. 628, 648-650, 468 P.3d 419, 431-432.

[137] *Id.*, 366 Or. 628, 650, 468 P.3d 419, 432.

damages for wrongful death lawsuits.[138] As noted earlier, the outcome of any litigation over PacifiCorp's proposed limitation would depend on the sets of facts and claims before the court at that time. An analysis for damages under a personal injury claim may be different than an analysis under a wrongful death claim, or any other different type of lawsuit that could be brought.

3. Analysis Under *Horton's* Framework

If a court were to review language that PacifiCorp has proposed, it seems likely that the court would find that the appropriate analysis falls within the second category in *Horton*. The second category is "when the legislature has sought to adjust a person's rights and remedies as part of a larger statutory scheme that extends benefits to some while limiting benefits to others" and the court considers the "*quid pro quo* in determining whether the reduced benefit that the legislature has provided an individual plaintiff is "substantial" in light of the overall statutory scheme."[139] Here, the Commission would be approving a provision that limits the right of individual PacifiCorp customers to seek noneconomic damages for the purported benefit of keeping rates lower for all of PacifiCorp ratepayers generally.

The Commission is granted the authority "to make delegated policy choices of a legislative nature within the broadly stated legislative policy."[140] Here, the Commission is considering whether it can and should "adjust a person's rights and remedies" as part of a larger statutory scheme, which includes "ensuring confidence in the financial integrity of the utility" and "allowing the utility to maintain its credit and attract capital."[141] The statutory scheme under which the Commission operates recognizes the connection between the financial health of utilities and obtaining "adequate service at fair and reasonable rates" for consumers.[142] Under

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[138] *See Greist v. Phillips*, 322 Or. 281, 284, 906 P.2d 789, 791 (1995) (In *Busch V. McInnis*, the court found that Greist was not controlling precedent. 366 Or. 628, 644, 468 P.3d 419, 429.).

[139] *Id.* (citing Hale, 308 Or. at 523, 783 P.2d 506).

[140] *Gearhart v. Pub. Util. Comm'n of Or.*, 255 Or. App. 58, 86 (2013), review allowed, 354 Or. 386 (2013) (quoting *Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 290 Or. 217, 230 (1980)).

[141] O.R.S. 756.040(1)(b).

[142] O.R.S. § 756.040(1).

Horton, the court's analysis focuses on the "extent to which the legislature has departed from the common-law model measured against its reasons for doing so."[143] The court explained:

> [T]he substantiality of the legislative remedy can matter in determining whether the remedy is consistent with the remedy clause. When the legislature does not limit the duty that a defendant owes a plaintiff but does limit the size or nature of the remedy, the legislative remedy need not restore all the damages that the plaintiff sustained to pass constitutional muster . . . but a remedy that is only a paltry fraction of the damages that the plaintiff sustained will unlikely be sufficient.[144]

The court will consider other factors, "such as the existence of a *quid pro quo*,"[145] The court's focus on the *quid pro quo* analysis, both in *Horton* and subsequent cases is important here. A *quid pro quo* is "an action or thing that is exchanged for another action or thing of more or less equal value."[146] In other words, does a plaintiff get something in return for having their remedies limited in some fashion? The *quid pro quo* may not be the determinative factor, but the absence of any *quid pro quo* would weigh heavily in a court's analysis.

It is unclear what an individual PacifiCorp customer receives in return for giving up their right to seek any noneconomic damages, other than the ability to purchase electricity. The court might also ask whether an award that included only economic damages is "sufficiently substantial to be constitutionally adequate?"[147] While the goal of protecting against exorbitant rate increases due to wildfire liability and declining credit ratings might be noble and within the Commission's statutory scheme, without something more, the approval of such a provision might not hold up to a court's scrutiny under the remedy clause.

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[143] *Horton v. Oregon Health & Sci. Univ*., 359 Or. 168, 220, 376 P.3d 998, 1028.

[144] *Id.*, 359 Or. 168, 220–21, 376 P.3d 998, 1028 (quoting see Howell, 353 Or. at 376, 298 P.3d 1; Clarke, 343 Or. at 610, 175 P.3d 418).

[145] *Id.*

[146] *Quid Pro Quo*, Black's Law Dictionary (11th ed. 2019).

[147] *Busch v. McInnis Waste Sys., Inc.*, 366 Or. 628, 638, 468 P.3d 419, 426.

IV. CONCLUSION

The ability to provide safe, reliable, and affordable power is becoming increasingly difficult as the climate crisis escalates. In the western United States, the proliferation of wildfires and the potential associated liability is a significant challenge for utilities. It may be understandable that PacifiCorp seeks to limit its liability in the face of mounting litigation costs. However, a tariff provision that seeks to limit PacifiCorp's liability in situations when the Company has been found to have acted with gross negligence or willful misconduct is unlikely to be upheld by a court. Moreover, the Commission's approval of such a provision could be found to be unconstitutional.

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Respectfully submitted,

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