BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 428

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

OPENING BRIEF

OF THE

OREGON CITIZENS' UTILITY BOARD

February 27, 2022

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I. INTRODUCTION

Pursuant to Administrative Law Judge (ALJ) Mapes' February 16, 2024 Ruling, the Oregon Citizens' Utility Board (CUB) hereby submits its Opening Brief in the above-captioned proceeding. In an innocuously titled, seven-page October 23, 2023 filing, PacifiCorp (PAC or the Company) requests Public Utility Commission of Oregon (Commission) approval to drastically and fundamentally decrease the scope of constitutionally-protected remedies available to Oregon customers for claims whose facts are not yet known. In its filing, the Company seeks to amend its General Rules and Regulations Application for Electrical Service (Rule 4) in a manner that would: (1) limit damages arising out of the Company's provision of electric services to actual damages; (2) exclude a-typical damages (including special, non-economic, punitive, incidental, indirect, or consequential); (3) only apply prospectively, and for actions arising out of

the provision of electric service; and (4) would not apply where state law otherwise disallows the limitation.[1]

PAC's requested tariff amendment (Petition) raises significant questions related to the Commission's authority to limit constitutionally-protected remedies and the equitable treatment of all electric utility customers under the Commission's protective regulatory umbrella.[2] The answers to these questions conclusively demonstrate that the Commission should exercise the significant discretion provided by its broad, legislatively-derived authority to deny the Petition at the conclusion of Phase 1[3] based on fatal legal and policy flaws. Additionally, the examples of narrow and discrete utility liability waivers that PAC significantly relies upon are readily distinguishable from the Petition. The Commission has never granted such a broad and sweeping liability waiver, and CUB respectfully requests that it not do so in this instance.

It is important to consider the context within which the Petition has been brought. While the Petition is couched as straightforward and "consistent with numerous Commission-approved tariffs[,]"[4] it comes on the heels of a historic verdict for the Oregon PAC customers who had their homes and property incinerated as a result of the Company's grossly negligent and reckless conduct.[5]

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[1] *PacifiCorp – Advice No. 23-018—Rule 4—Application for Electrical Service*, Initial Filing at 1 (Oct. 24, 2023) (Petition).

[2] ORS 756.040(1) ("In addition to the powers and duties now or hereafter transferred to or vested in the Public Utility Commission, the commission shall represent the customers of any public utility or telecommunications 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 rates*.") emphasis added.

[3] *See* UE 428 – ALJ Mapes' Prehearing Conference Memorandum at 2 ("Scope Additional Process, *if Necessary*") emphasis added. CUB submits that additional process is not necessary for the Commission to render a decision in this matter.

[4] UE 428 – PacifiCorp's Opening Brief at 1.

[5] *James, et al. v. PacifiCorp*, Final Verdict, Multnomah County Circuit Court, Case No. 20CV33885 (Jun. 9, 2023) *available at* https://wildfiretoday.com/wp-content/uploads/2023/06/PacificCorpFinalVerdict.pdf.

On June 12, 2023, the seventeen named plaintiffs in the *James* lawsuit were awarded a total of $4 million in economic damages and $68 million in non-economic damages.[6] On January 24, 2024, a Multnomah County jury awarded $6 million in economic damages and $56 million in non-economic damages for nine additional *James* class-action plaintiffs.[7] More lawsuits—including those from the incident leading to the *James* case—are still pending, with plaintiffs seeking potentially billions of dollars in damages.[8] If the Commission grants the Petition, none of the harmed plaintiffs who have not yet brought suit will be able to recover a penny in non-economic damages, despite the fact that twenty-six of their peers were able to recently recover a combined $124 *million* in non-economic damages.[9]

In the context of considering whether a liability limiting provision—like that requested in the Petition—is in contravention of the remedy clause found in Article I, section 10 of the Oregon Constitution, the Oregon Supreme Court has held that:

> 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*.[10]

The Petition would eliminate PAC customers' ability to pursue non-economic damages, which the Oregon Supreme Court has held are necessary to ensure adequate compensation for personal injuries incurred. The legal and equitable ramifications of approving the Petition are therefore readily apparent—all Oregon electric utility customers[11] should have the opportunity to pursue

[6] PacifiCorp, Information on wildfire litigation *available at* https://www.pacificorp.com/about/information-wildfire-litigation.html.
[7] *Id.*
[8] Wildfire Today, *PacifiCorp now wants protection from fire victims*, Kelly Andersson (Nov. 10, 2023) *available at* https://wildfiretoday.com/2023/11/10/pacificorp-now-wants-protection-from-fire-victims/.
[9] This is compared to $10 million in economic damages for the same subset of plaintiffs.
[10] *Busch v. McInnis Waste Systems, Inc.*, 366 Or. 628, 645 (2020) emphasis added.
[11] i.e., not just Portland General Electric Company and Idaho Power Company's customers. The Commission should not allow such a broad and sweeping change to the terms of service of one electric utility. As this Brief will detail, such an outcome would make for poor energy policy.

remedies guaranteed under the Oregon Constitution that are commensurate with personal injuries sustained.

By completely eliminating a PAC customer's ability to receive non-economic damages for personal injury resulting from the provision of electrical service, the Petition fails constitutional scrutiny. The Commission should deny the Petition since it is unlikely to survive a challenge to its constitutionality. Importantly, the Commission's authority is explicitly limited by the bounds of state and federal constitutions, and the Commission cannot approve an Order with an unconstitutional result.[12] Further, additional legal and policy rationale demonstrate the Petition should be denied and the examples that PAC relies upon are readily distinguishable.

CUB respectfully requests that the Commission exercise its authority and discretion to protect PAC's customers and deny the Petition at the conclusion of Phase 1 of this proceeding.

II. ARGUMENT

As noted by the Company, the Commission has broad regulatory authority over the rates and service terms and conditions of the public utilities under the purview of its regulatory apparatus.[13] Since 1911, the Oregon legislature has delegated the authority to regulate public utilities exclusively to the Commission.[14] A key component of this regulatory authority is the responsibility to protect public utility customers. Specifically, the Commission:

> is expressly charged with representing utility customers and the public generally 'in all controversies respecting rates, valuations, service, and all matters of which the commission has jurisdiction,' and to use those powers 'to protect such customers, and the

[12] *In re Portland General Electric Company*, OPUC Docket Nos. DR 10, UE 88, and UM 989, Order No. 08-487 at 4 (Sep. 30, 2008) [hereinafter OPUC Order No. 08-487].
[13] UE 428 – PacifiCorp's Opening Brief at 2 citing *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.").
[14] OPUC Order No. 08-487 at 4.

> public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates.'[15]

Therefore, at the core of the Commission's legislatively-delegated general powers enumerated in ORS 756.040(1) is the responsibility to protect utility customers from unreasonable practices. CUB submits that the Petition is an unreasonable alteration to standard utility terms of service that the Commission may deny using solely the broad authority—and discretion thereunder—delegated exclusively to it by the Oregon legislature in 1911 under its general powers.[16]

While the Commission may deny the Petition using solely its broad authority to protect PAC customers, an additional inquiry into the limits placed on the Commission's broad authority is dispositive in this instance. As a legislatively created body, "the Commission's authority is naturally limited by the boundaries of the legislature's delegation."[17] Like the legislature itself, "the Commission is bound to exercise its authority within the confines of both the state and federal constitutions."[18] Indeed, the Oregon Supreme Court has held that Commission does not have express statutory authority to approve a tariff that would run counter to state or federal constitutions.[19] During the review of a Commission order, the court reviews "the order to ensure that it is within the Commission's delegated authority, complies with applicable state and federal law (including constitutional law), is supported by substantial evidence, and is not arbitrary or

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[15] OPUC Order No. 08-487 at 4 citing ORS 756.040(1).

[16] *Id.*

[17] OPUC Order No. 08-487 at 4 citing *see, e.g., Pacific Northwest Bell Tel. Co. v. Katz*, 116 Or App 302, 309-10, 841 P2d 652 (1992) (an agency's authority cannot go beyond the authority expressly conferred upon it by the legislature), citing *Sabin*, 21 Or App at 213.

[18] OPUC Order No 08-487 at 4 citing *see id.* at 310, citing *Sabin*, 21 Or App at 213.

[19] *See, e.g., in re a Proposed Rulemaking, related to Open Network Architecture*, OPUC Docket No. AR 469, Order No. 04-012 at 2 (Jan. 8, 2004) ("Some of the rules were invalidated by the Oregon Supreme Court in *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or 458, 900 P2d 495 (1995) ("To the extent that the rules required that LECs open their facilities to use by ESPs, the court found that the rules were an unconstitutional taking of property under the state and federal constitutions. *The court held that the Commission 'does not have express statutory authority to promulgate rules that would effect a taking of an LEC's facilities,'* 321 Or at 468, and '[t]he challenged collocation rules effect a taking,' 321 Or at 477.") emphasis added.

capricious."[20] As explained by the Oregon Supreme Court, a Commission order "may be vacated as unreasonable if it is contrary to some provision of the federal or state Constitution or laws, or if it is beyond the power granted the commission."[21]

Here, the Commission should deny the Petition because a court is likely to find that it is contrary to the remedy clause found in Article I, Section 10 of the Oregon Constitution. Further, as this Brief will demonstrate, additional policy rationale weigh in favor of denying the Petition, as sweeping liability waivers are generally within the province of the legislature and approving the Petition would result in inequitable and improper treatment of Oregon electric utility customers. Finally, the Petition's broad and sweeping nature renders it fundamentally different than the tariff comparators the Company relies upon.

A. A Court is Likely to find the Petition Unconstitutional if Approved

According to the Company, its proposed liability limitation adopts a "reasonable approach, because it establishes a general limitation of liability" that would only be inoperative if a court determines it conflicts with Oregon law.[22] According to PAC, "this approach also avoids the need for the Commission to engage in any constitutional analysis in this proceeding."[23] However, as discussed, the Commission cannot approve a tariff filing that is likely to be found unconstitutional by a court upon judicial review. Therefore, CUB submits that—as a sophisticated administrative agency that exercises its legislative authority using quasi-judicial proceedings replete with complex legal issues[24]—the Commission should analyze whether the

[20] OPUC Order No. 08-487 at 23.
[21] OPUC Order No. 08-487 at 23 citing *Hammond Lumber Co. v. Public Serv. Comm'n*, 96 Or 595, 602, 189 P 639 (1920), quoting with approval *State v. Great Northern Ry. Co.*, 135 Minn 19, 159 NW 1089 (1916).
[22] UE 428 – PacifiCorp's Opening Brief at 12.
[23] *Id*. at 13.
[24] OPUC Order No. 08-487 at 6.

Petition withstands constitutional scrutiny. Under the current Oregon common law interpretation of the Oregon Constitution's remedy clause, the Petition must be denied.

Article I, section 10 of the Oregon Constitution includes the remedy clause, which provides:

> [n]o 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.[25]

The Oregon Supreme Court recently reviewed the construction and application of the remedy clause in the landmark case *Busch v. McGinnis Waste Systems, Inc.*, which examined the constitutionality of a statutory cap on damages that a plaintiff may recover.[26] In *Busch*, a pedestrian brought a cause of action against a garbage truck company for personal injuries sustained when the garbage truck struck the pedestrian.[27] The trial court reduced the non-economic damages that the jury awarded—$10,500,000—to the maximum amount permitted by ORS 37.710(1)—$500,000.[28] The Court of Appeals held that, as applied to plaintiff, the cap violated the remedy clause and reversed the trial court's decision.[29] The Oregon Supreme Court affirmed the decision of the Court of Appeals.

In *Busch*, the Court was clear that both economic and non-economic damages are intended to compensate a plaintiff for personal injuries, and that the remedy clause "places a substantive limit on the legislature's ability to modify the remedy for personal injuries."[30] Here, since Commission approval of the Petition's "cap" of zero dollars in non-economic damages

[25] Or. Const., Art. I § 10.
[26] *See generally Busch v. McGinnis Waste Systems, Inc.*, 366 Or. 628 (2020).
[27] *Id*. at 630-31.
[28] *Id*. at 630.
[29] *Busch v. McInnis Waste Systems, Inc.*, 292 Or. App. 820, 824, 426 P.3d 235 (2018).
[30] *Busch v. McInnis Waste Systems, Inc.*, 366 Or. 628, 645 (2020). The same limit would be placed on the Commission's ability to modify the remedy for personal injuries.

would have the same affect as a legislative cap, the Court would consider the constitutionality of Commission's role in modifying the remedy for personal injuries.

When examining the constitutionality of a statutory damages cap, the Court considers the reasons why the legislature enacted a non-economic damages cap and whether there has been a *quid pro quo*—i.e. whether the statute gives plaintiffs a benefit they otherwise would not have had.[31] In *Horton v. OHSU, Busch*'s antecedent, the Oregon Supreme Court determined that the non-economic damages cap in the Oregon Tort Claims Act (OTCA) did not violate the remedy clause because a plaintiff would not have had a valid claim against a government defendant that would have been immune from suit had the OTCA not been in place.[32] The Court's decision in *Busch* hinged in part on the consideration of a *quid pro quo*. There the Court found that ORS 31.710(1)—the statutory cap in question—did not expressly confer a benefit on injured persons.[33] Therefore, the cap considered in *Busch* was in contravention of the remedy clause.

In reaching a decision involving a statutory cap, as a final check, the Court calculates the difference between the damages awarded by a jury and the award permitted by statute and makes a judicial assessment of whether the plaintiff has received a constitutionally sufficient remedy.[34] Although the facts of a specific case will bear on the Court's decision on whether a statutory—or Commission-approved—cap on damages violates the remedy clause, the Court in *Busch* was clear "that the right to remedy is a substantive right 'ensuring the availability of a remedy for persons injured in their person, property, and reputation to remedy for injury to person.'"[35] Emphatically, the Court proclaimed that this substantive right "assures people who are injured in

[31] *Id*. at 647-49.
[32] *Id*. at 651.
[33] *Id*. at 651.
[34] *Id*. at 644.
[35] *Id*. at 650 citing *Horton v. OHSU*, 359 Or. 168, 218, 376 P.3d 998 (2016).

their person, property or reputation have a remedy for those injuries" and that "Oregon law has long recognized and protected that substantive right."[36]

Here, the Commission should uphold the substantive right to an adequate remedy that has long been recognized by Oregon law and affirmed by the Court in *Busch*. When the Petition is viewed within the framework of *Horton* and *Busch*, it is clear that PAC's proposal to completely eliminate any non-economic damages (i.e., a "cap" of zero) will not withstand constitutional scrutiny. Unlike *Horton*, where the Court determined that a *quid pro quo* existed because the OTCA enabled a cause of action that was otherwise not available, if granted, the Petition would only take away the right to non-economic damages available to PAC's customers. Recent damages awards in *James* and its progeny demonstrate that this right is not inconsequential. In two trials alone, twenty-six plaintiffs have recovered $124 million in non-economic damages and $10 million in economic damages.[37]

Unlike a statutory damages cap where the legislature has considered various public policy implications and benefits when enacting a new piece of legislation, the Petition is a heavy-handed, improper restriction on fundamental rights coming straight from a large corporation. The reasons why PAC has filed the Petition are clear—the Company is worried about wildfire as an existential threat to its business model and has made this broad and sweeping filing in most of

[36] *Id.* at 650.
[37] *Supra*, notes 6 and 7.

its jurisdictions[38] in an attempt to protect its shareholders from liability. This is the same reason why PAC, or any publicly traded company, makes any decision—because it has a legally binding fiduciary obligation to maximize profit for its shareholders.

The Company has failed to articulate any prevailing public good that the Petition may serve. Further, keeping in line with the Court's examination of the difference between the jury award and statutory cap in *Busch*, since the "cap" in the Petition is set at zero, it is clear that the "cap" will be significantly less than any meaningful non-economic damages awarded by a future court. The undoubtedly vast difference between zero and, for example, the $68 million in non-economic damages awarded to the original *James* plaintiffs renders it highly likely that a court will find the Petition to run counter to the remedy clause. The Commission should deny the Petition as an unconstitutional attempt to benefit its shareholders at the expense of its captive customers.

Further, as this Brief will address, significant policy considerations also weigh in favor of denying the Petition

[38] PacifiCorp has made identical filings in California, Washington, Idaho, and Wyoming. California Public Utilities Commission, PacifiCorp (U 901-E) Tier 3 Advice Letter No. 721-E Modification to Rule 3—Application for Electric Service *available at* https://www.pacificpower.net/content/dam/pcorp/documents/en/pacificpower/rates-regulation/california/filings/advice-721-e/Advice_721-E.pdf; Washington Utilities and Transportation Commission, Advice 23-04—Rule 4—Application for Electric Service *available at* https://www.pacificpower.net/content/dam/pcorp/documents/en/pacificpower/rates-regulation/washington/filings/advice-23-04/Advice_23-04.pdf; Wyoming Public Service Commission, IN THE MATTER OF THE APPLICATION OF ROCKY MOUNTAIN POWER FOR AUTHORITY TO REVISE ELECTRIC SERVICE RULE NO. 3 – ELECTRIC SERVICE AGREEMENTS *available at* https://www.rockymountainpower.net/content/dam/pcorp/documents/en/rockymountainpower/rates-regulation/wyoming/filings/docket-20000-652-et-23/20000-652-ET-23_Rule_3.pdf; Idaho Public Utilities Commission, COMPLIANCE FILING IN CASE NO. PAC-E-23-22 IN THE MATTER OF THE APPLICATION OF ROCKY MOUNTAIN POWER FOR AUTHORITY TO REVISE ELECTRIC SERVICE REGULATION NO. 3 – ELECTRIC SERVICE AGREEMENTS *available at* https://rockymountainpower.net/content/dam/pcorp/documents/en/rockymountainpower/rates-regulation/idaho/filings/case-no--pac-e-23-22/PAC-E-23-22_Revise_Rule_3.pdf.

B. Additional Policy Considerations

Approving the Petition will result in disparate and inequitable treatment between customers of Commission-regulated electric utilities. Customers of a single Oregon utility should not have to waive their constitutional rights as a condition of taking monopoly utility service. Rather, as seen in the litany of Oregon common law opinions[39] addressing limitations of liability, such limitations are typically enacted by the legislature as a balanced and informed means of furthering important public policies. Here, the Company wields the Petition as a cudgel—attempting to severely limit the rights of its captive customers through a blunt tariff filing that included no stakeholder outreach, considered no viable alternatives, and includes no discussion of the varied public policy outcomes that the Petition seeks to further. At a minimum, the Commission should deny the Petition and consider whether reasoned changes to utility liability are warranted in a multi-utility investigation that considers input from a wide variety of stakeholders. Such an investigation would be consistent with the Commission's mandate as a public agency tasked with protecting all Oregon-regulated utility customers.[40]

CUB recognizes that the risk profile of electric utilities in the West is changing in the face of anthropogenic climate change. This is readily apparent in the context of the court proceedings related to wildfire liability that gave rise to the Petition. While changes to utility service to mitigate the impacts of climate change will raise customer rates—such as investments in wildfire system hardening, preparedness, and the investments necessary to meet HB 2021's mandates—the issue of how corporate liability affects customer rates is nuanced. As a foundational matter, CUB maintains that customers should be completely insulated from costs

[39] *See, e.g., Busch v. McGinnis Waste Systems, Inc.*, 366 Or. 628 (2020) and *Horton v. OHSU*, 359 Or. 168, 218, 376 P.3d 998 (2016).
[40] ORS 756.040(1).

related to liability arising from grossly negligent or reckless conduct.[41] Such behavior is squarely not within the realm of prudent utility behavior, and therefore should not be passed onto customers.[42] However, there is an articulable link between the Company's elevated risk profile and customer rates. Indeed, the Company is already seeking to pass costs associated with elevated insurance premiums and a proposed Catastrophic Fire Fund—that would include costs of claims against it—in its concurrent general rate case proceeding.[43]

While CUB concedes that there is a link between the Company's overall risk profile, investment rating, ability to raise capital, and customer rates, the Petition is not the means to address these nuanced issues. The emerging risks of selling electrons in the face of a changing climate should be examined holistically, rather than in the heavy-handed Petition. The Petition would result in poor policy is inappropriately broad compared to the allegedly similar tariffs upon which the Company relies.

1. Approving the Petition would result in inequitable treatment between customers of different Oregon-regulated utilities.

As filed, the Petition would create several binding conditions in its Rule 4. It would apply to all claims "arising out of the Company's provision of electric services."[44] This means that all Pacific Power customers in Oregon would waive their right to seek "a-typical damages"

[41] Pacific Power Attempts to Open the Door to Charge Customers for Wildfire Damages, Charlotte Shuff and Bob Jenks, Oregon Citizens' Utility Board (Jun. 20, 2023) *available at* https://oregoncub.org/news/blog/pacific-power-attempts-to-open-the-door-to-charge-customers-for-wildfire-damages/2848/.

[42] *See in re PacifiCorp, dba Pacific Power, Request for a General Rate Revision*, Docket No. UE 374, OPUC Order No. 20-473 at 74 (Dec. 18, 2020) citing OPUC Order No. 12-493 at 27 ("We have described the [prudence] standard as an inquiry into 'whether the utility exercised the standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time the decision had to be made.'"). Grossly negligent and reckless conduct is definitively not within the standard of care a reasonable person would be expected to exercise under the same circumstances.

[43] *See* UE 433 – Initial Filing, PacifiCorp's Executive Summary at 1-5.

[44] UE 428 – Petition at 1.

as a condition of taking monopoly electric service.[45] A simple hypothetical example demonstrates the poor and inequitable policy that approving the Petition would create.

Both PAC and Portland General Electric Company (PGE) serve customers in the greater Portland area. Their service areas directly abut each other in many places around the city, including segmented areas in downtown Portland where PAC service territory is interspersed with PGE's.[46] Let us suppose that a PAC employee, acting within the scope of his duties to aid the Company in the provision of electrical service, operates a corporate vehicle while under the influence of alcohol. Under the doctrine of *respondeat superior*, the Company would be liable for damages caused by the employee.[47] If the employee crashed the Company's vehicle into a PGE customer's house, the PGE customer would have full recourse under the constitutionally guaranteed remedies available. However, if the employee crashed into a PAC customer's house, the Petition would limit the customer's damages to only actual damages.

This outcome would result in severe inequities between customers of Commission-regulated utilities in terms of the scope of remedies available. While the Petition is brought in the wake of a number of wildfire-related claims, it is important to consider the sweeping impact approving the Petition would have on any number of claims arising from any number of incidents whose facts are not yet known. Due in part to the inequitable treatment of varying customers under the Commission's protective regulatory umbrella, the Petition should be denied.

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[45] *Id.*
[46] *See* Pacific Power, *Areas we serve available at* https://www.pacificpower.net/community/service-area.html.
[47] *See, e.g. Guedon v. Rooney et al.*, 160 Or. 621 (Feb. 15, 1939).

2. Approving the Petition would give the Company improper leverage in future settlement negotiations with its customers.

Should the Petition be approved, it is highly likely that a court finds the Commission's relevant decision to be unconstitutional. However, until that time, the Company would be able to leverage the Petition as a tactic to decrease the settlement awards negotiated with plaintiffs bringing suit for a wide range of issues. This would significantly increase the burden on these plaintiffs and give PAC unfair bargaining power in these negotiations. Any potential plaintiff whose settlement award could potentially be decreased while the Petition is in effect would necessarily be a PAC customer. Therefore, considering this poor policy implication is squarely within the Commission's broad authority to protect customers and uphold the public interest.[48]

In addition to these compelling policy rationales, the Commission should deny the Petition since it is sufficiently different than the examples upon which the Company almost entirely relies upon.

C. The Company's Examples are Readily Distinguishable

In its Opening Brief, PAC states the Petition is similar to "proactive measures taken by several state to mitigate the impact to utility rates from catastrophic environmental disasters."[49] The Company also asserts, without citation, that its proposed amendments do not conflict with Oregon law, the Oregon Constitution, or relevant Commission regulations or orders.[50] The Company has provided an extensive list of utility tariffs and case law from Oregon and "sister states" to support its argument that the Commission has the power to eliminate utility liability for

[48] OPUC Order No. 08-487 at 4 citing ORS 756.040(1).
[49] PacifiCorp's Opening Brief at 1.
[50] *Id.*

non-economic damages, and asserts that this scope of liability protections is consistent with state law elsewhere.[51]

CUB does not dispute that the Commission has broad authority to limit a public utility's liability in a tariff. Yet, it is also within the Commission's authority to deny a utility's request for a tariff that is unlawful or not in the public interest. Here, the Petition is likely in direct contravention with Oregon law providing for a customer's private right of action for harm from the damages caused by actions or nonactions reasonably within the control of the utility. Further, as discussed, the Commission retains broad authority to deny the petition under its legislative mandate to protect Oregon utility customers from unreasonable practices.[52]

1. While the Commission has the ability to limit utility liability, the Commission has not enacted a liability limiting tariff as broad as the Petition.

The Company incorrectly parses the language of the authority it cites to assert that utility liability limitations are commonplace and that the Petition aligns with limitations of liability approved in Oregon and other jurisdictions.[53] The Commission has broad authority to supervise and regulate public utilities, a duty to ensure these utilities offer adequate service at fair and reasonable rates, and general rulemaking authority to effectuate these legislative directives.[54] Oregon law provides that the Commission must "protect [ ] customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates," balancing the interests of the utility and the consumer.[55]

[51] *Id.* at 2-13; Initial Filing at 1-2.
[52] ORS 756.040(1).
[53] UE 428 – PacifiCorp's Opening Brief at 1-2.
[54] UE 428 – PacifiCorp's Opening Brief at 2; *see* ORS 756.040, 756.060, 757.205, and 757.245.
[55] ORS 756.040.

PAC correctly notes that all rates and service levels approved by the Commission are prima facie lawful and reasonable" and "are subject to attack only in actions prosecuted against the [Commission] for that purpose."[56] In Oregon, tariff regulations lie at the core of the Commission's authority to set adequate service levels and establish reasonable rates.[57] When a lawful rate has been established that include liability limitations, its liability limitations are an inherent part of the rate,[58] and the "function of the tariff is to determine the scope of the utility's service obligation."[59] [60] Oregon courts have upheld utility limitations on liability for service interruptions resulting from circumstances beyond the utility's reasonable control,[61] but also maintain that a tariff may only "serve to limit, not eliminate," a utility's liability for service outages.[62]

CUB does not dispute this authority of the Commission. However, lawful liability limitations in tariffs have generally been limited or narrowly applied to discrete circumstances, and for good reason. Overly broad limitations, such as the Petition, as likely to be found unconstitutional. Oregon law and the law of other states are clear that public utilities are not

[56] *Simpson v. Phone Directories Co*., 82 Or.App. 582, 586, 729 P.2d 578, 580 (1986).
[57] *Id.* at 586-587.
[58] *Simpson v. Phone Directories Co*., 82 Or. App. at 586 (citing *Western Union Telegraph Co. v. Esteve Brothers & Co*., 256 U.S. 566, 571, 41 S.Ct. 584, 586, 65 L.Ed. 1094 (1921)).
[59] *Garrison v. Pacific NW Bell*, 45 Or.App. 523, 531, 608 P.2d 1206 (1980) (referencing *Holman v. Southwestern Bell Telephone Company*, 358 F.Supp. 727 (D.Kan.1973) (unless limitation of liability appearing in tariff filed by telephone company were unreasonable, it would have force and effect of law, and further, if the utility's conduct was willful and wanton, the limitation of liability provision of tariff as it pertains to interruptions of service, even if reasonable, would not apply); *Wilkinson v. New England Tel. & Tel. Co*., 327 Mass. 132, 97 N.E.2d 413 (1951) ("This regulation is not solely a limitation of damages in case of failure of service. Its purpose is rather to limit and define the duty of the defendant to supply service. It sets out what type of service the defendant will supply and the scope of the service it undertakes to furnish.").
[60] *Id.* at 3; see also *Simpson v. Phone Directories Co*., 82 Or.App. 582, 586, 729 P.2d 578, 580 (1986).
[61] *Boardmaster Corp. v. Jackson County,* 224 Or.App. 533, 536 (2008); *Citoli v. City of Seattle*, 115 Wn. App. 459, 465, 61 P.3d 1165, 1169 (2002); *National Union Ins. Co. v. Puget Power*, 94 Wash.App. 163 (1999); *Garrison v. Pacific NW Bell,* 45 Or.App. 523 (1980).
[62] *Olson*, 65 Or. App. at 427, 671 P.2d at 1188 (referencing *Southern Bell Tel. & Tel. Co. v. Ivenchek*, 130 Ga.App. 798, 204 S.E.2d 457 (1974)).

protected from *all* liability for damages caused by a utility actions or non-actions. Further, the Petition would limit liability in circumstances that are reasonably *within* the Company's control, which is a stark departure from many of the tariffs PAC relies on.[63]

All of the Oregon cases cited in the Petition demonstrate that utility limitations on liability in tariff may be lawful, except in cases where utility action or nonaction is the basis for claims of damages. Yet, PAC is indeed asking to limit its liability for any and all claims resulting from its action or inaction, including instances where it was reasonably within its control to mitigate or prevent the harm suffered. This is entirely too broad. The Commission has significant discretion to deny the Petition as unreasonable, as it is an overly broad limitation that would severely limit the rights of PAC customers to recovery from harm caused by the utility.

PacifiCorp cites five Oregon cases in support of its argument that non-economic damages can be limited through tariffs, as well as Commission-approved tariffs limiting utility liability to actual economic damages or no damages at all.[64] Both *Garrison v. Pacific NW Bell* and *Simpson v. Phone Directories Co.* relate to causes of action for plaintiffs who sought recovery of damages beyond the scope of the utility tariff that limited recovery from harm to whatever the plaintiffs paid for the directory listings in question.[65] Yet, in these cases, as well as *Olson v. Pacific*

[63] *See, e.g., supra* note 62.
[64] UE 428 – PacifiCorp's Opening Brief at 2-4.
[65] UE 428 – PacifiCorp Opening Brief at 2-3, n. 6 & 7; *Garrison v. Pacific NW Bell,* 45 Or.App. 523, 524-530 (1980); *Simpson v. Phone Directories Co.,* 729 P.2d 578, 580 (1986).

Northwest Bell Telephone Co. and *Adamson v. WorldCom Commc'ns, Inc.*,[66] courts have been consistent in their analysis that, while a utility's liability may be limited reasonably by tariffs or regulations, that does not mean a tariff insulates a public utility from *all* liability under other theories, including gross negligence, willful misconduct and breach of contract,[67] acts reasonably within the utility's control, and actions pertaining to claims under state law.[68] Whereas the plaintiffs in these cases were specifically limited to recovery of what they paid for specific services, the Petition is not limited to costs related to specific services. Rather, it requests shelter from all a-typical damages arising from the general provision of utility service. This would necessarily include, for example, grossly negligent or reckless conduct. The Petition therefore would fail under the *Garrison* Court's own analysis upon which the Company relies.

Other cases cited by PAC similarly demonstrate that courts have not extended liability limitations to the scope requested in the Petition. In the Oregon case *Boardmaster Corp. v. Jackson County,* and the Washington case *Citoli v. City of Seattle,* the utilities in question were

[66] CUB notes that PacifiCorp stated that in *Adamson,* the Oregon Court of Appeals "noted in dicta a Commission-approved limitation of liability that specifically excluded 'incidental or consequential damages' could limit utility liability when properly raised." PacifiCorp Opening Brief at 3. This statement is misleading. In judicial opinions, "dicta" commonly refers to a statement that is not necessary to the decision. PacifiCorp's reference is part of the language of the tariff at issue in *Adamson,* not a representation of the thoughts of the Oregon Court of Appeals. In fact, the *Adamson* court overturned the lower court's decision to dismiss the utility's claim based on the filed-rate doctrine given the plaintiff alleged the utility was charging the plaintiff for long-distance services and knew about it, constituting a "willful" act. *See Adamson v. WorldCom Commc'ns, Inc*., 190 Or. App. 215, 222, 78 P.3d 577 (2003).

[67] *Lee v. Consol. Edison Co. of New York*, 98 Misc. 2d 304, 306, 413 N.Y.S.2d 826, 828 (App. Term 1978).

[68] *Garrison,* 45 Or.App. at 531 ("We agree 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."); *Olson v. Pacific Northwest Bell Telephone Co.*, 65 Or.App.422, 424 ("[T]he legislature intended actions for negligence, gross negligence, or breach of contract to be appropriate when a telephone utility fails to act when it has a statutory duty to act…[i]f defendant failed to perform its statutory duty, plaintiff may recovery under negligence, gross negligence, or breach of contract theories); *Adamson v. WorldCom Commc'ns, Inc*., 190 Or. App. 215, 222, 78 P.3d 577 (2003) ("[t]he filed-rate doctrine bars only an action that seeks to vary the terms of an applicable tariff and that just because a limited liability tariff exists, does not mean a claim is barred.).

directed to shut off power under direction of government authority.[69] In both cases, the utilities had a tariff that limited their liability for any damages related to service interruption resulting from instances of force majeure, or circumstances beyond its reasonable control, notwithstanding failure of the utility to do its due diligence to prevent or mitigate the service interruption.[70] However, in its *Boardmaster* analysis, the court analyzed another case before the Washington Court of Appeals, *National Union Ins. Co. v. Puget Power,* where the court found that:

> while a windstorm could be a force majeure event otherwise protecting the utility from liability for service interruptions, the utility was not absolved of liability for a service interruption given its negligent failure to utilize its available backup equipment which could have controlled or mitigated the outage but for its "unreasonable or unexplained" failure to utilize its available backup equipment to reestablish service with minimum delay.[71]

Rather than offer support for the utilities' tariff changes, the court's analysis of *National Union* in *Boardman* shows that the Petition, arising from its liability for its grossly negligent and reckless decision not to shut off power when it was aware of conditions that posed a high risk of wildfire, is beyond the scope of lawful utility liability limitations.

The Oregon Legislature acknowledged the need to protect customers from the gross negligence or willful misconduct of a public utility:

> Any public utility which does, or causes or permits to be done, any matter, act or thing prohibited by ORS chapter 756, 757 or 758 or omits to do any act, matter or thing required to be done by such statutes, is liable to the person injured thereby in the amount of damages sustained in consequence of such violation. If the party seeking damages alleges and proves that the wrong or omission was the result of gross negligence or willful misconduct, the public utility is liable to the person injured thereby in treble the amount of damages sustained in consequence of the violation.[72]

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[69] PacifiCorp Opening Brief at 2-3, 11, n. 6 & 44;, *Boardmaster Corp. v. Jackson County*, 224 Or.App. 533, 536 (2008); *Citoli v. City of Seattle*, 115 Wash.App. 459, 468, 61 P.3d 1165, 1170 (2002), *rev. den.* 149 Wash.2d 1033, 75 P.3d 968 (2003).
[70] *Boardmaster,* 224 Or.App. at 543-544; *Citoli*, 115 Wash.App at 465.
[71] *Id.* at 543-544 (citing *National Union*, 94 Wash.App. at 175, 972 P.2d at 486).
[72] ORS 756.185.

Therefore, in the Petition, PAC is asking the Commission to circumvent state law and the clear direction of the Oregon Legislature by seeking to prevent customers from recovering damages related to gross negligence.

As demonstrated in the recent damages awards in the *James* litigation, a substantial amount of the total damages awarded were non-economic. The Petition fails for a variety of reasons, not the least of which is that it would impermissibly limit relevant damages in a manner that departs from the intent of the decisions upon which PAC relies. Further, the Oregon statutory framework is clear that utility customers have a right to treble damages if their claim arises from grossly negligent or willful misconduct.[73] If approved, the Petition would therefore run counter to clear legislative directives that the Commission is responsible to uphold.

2. Oregon-approved tariffs cited by PacifiCorp as precedent are not reflective of the larger scope of liability protection sought by the Company.

In its Opening Brief, PAC also references nine Commission-approved tariffs in support of its argument that the Commission can limit utility liability to "actual economic damages—or no damages at all."[74] The liability provisions in these tariffs limit recovery of damages to charges paid by the customer, damages caused by acts or non-acts of the customer, or circumstances reasonably outside of the utility's control.[75] Notably, *none* the tariffs cited reach to offer protections to utilities for harm caused by circumstances, including wildfire, that were reasonably under the utility's control to prevent or mitigate.

[73] ORS 756.185(1).
[74] PacifiCorp Opening Brief at 4-6.
[75] *Supra*, note 60.

PAC referenced some of its own tariffs pertaining to liability, and we offer more detail about those provisions. Most of the Company's own cited tariffs, as well as those it referenced from PGE, provide for *utility protections from customer action or nonaction*:[76]

The Wyoming tariff cited by PAC also states the utility is not liable for damages caused by customer-side causes of damage and "causes and contingencies beyond The Company's control."[77] PAC's tariff request is not related to damages related to liability arising from a customer's action or nonaction liability for damages, just the Company's.

The remainder of the Oregon tariffs pertain to the Company's limitations from liability *due to acts outside of the Company's control* to varying degrees.[78] Similarly, the Washington Water Service Company tariff cited by PAC expressly provides that it does not limit the utility's liability for gross negligence, willful misconduct, or for civil remedies for personal injury or property damage.[79] The Puget Sound Energy tariff and the other Wyoming tariff cited by the Company limit the utility's liability if the disruption is attributable to various causes including causes "beyond the Company's reasonable control," governmental authority, fire, flood, wind, and court orders,"[80] but also provide that the Company is not relieved of liability due to the utility's "concurring negligence or in the event of its failure to use due diligence to remedy the situation and remove the cause in an adequate manner and with all reasonable dispatch."[81]

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[76] PacifiCorp Initial Filing at 2-3; PacifiCorp Opening Brief at 4-6 (PAC Rule 2(P); PAC Rule 6(C); PAC Rule 4(A); PAC Rule 11(B)(II(C); PAC Rule 13(V)(A)(2); PAC OR Sch. 135, Special Conditions 13; PGE Rule K; PGE Sch. 4, Sheet No. 4-4; PGE Schedule 5, Or. Sheet No. 5-4; PGE Sch. 25, Or. Sheet No. 25-3).

[77] Initial Filing at 2, n. 3 (Cheyenne Light, Fuel, and Power Co. Wyo. PSC Tariff No. 14, Original Sheet No. R22 (accessible at https://www.blackhillsenergy.com/sites/blackhillsenergy.com/files/clfp_electric.pdf).

[78] PacifiCorp Initial Filing at 2-3; PacifiCorp Opening Brief at 4-5 (PAC PAC Rule 10(I); PAC Rule 25; PGE Rule C; IPC Rule J.)

[79] Initial Filing at 2, n. 1 (*Wash. Water Service Co*., WN U-3, Original Sheet No. 15 (Feb. 15, 2022, eff. date *Id.*; *See* RCW 19.122.070.

[80] Initial Filing at 2, n. 3 (Puget Sound Energy, WN U-60, Second Revised Sheet Nos 80e & 80f).

[81] *Id.* (Montana-Dakota utilities Co. Wyo. PSC Tariff No. 1, Rate Sch. 100, Conditions of Service).

These references to tariffs that limit liability for acts outside the utility's reasonable control or for customer action or non-action do not provide support for the Petition. Rather, since the Petition would limit its liability for claims resulting from utility action or non-action within the utility's control—like those brought by the *James* plaintiffs—the references upon which PAC lies help demonstrate that the Petition must be denied.

3. Other states have also found that utility limitations of liability cannot supersede a person's limited private right of action against a utility for damages.

PAC references a case out of New York to support its statement that the examples from Washington, California, and Wyoming highlight the limitations of liability that are inherent in the ratemaking process.[82] These states have also held that reasonable limitations on the liability of a public service corporation have been upheld by courts so long as the company has not attempted to absolve itself from its own willful misconduct or gross negligence.[83] If approved, the Petition would do just that.

One New York case referenced by PAC, *Lee v. Consolidated Edison Co.*, actually serves to demonstrate that limits are necessary when a Commission is considering tariff-based liability limitation. In *Lee,* the court concluded that a tariff's liability provision protecting the utility from liability when service was interrupted from "causes beyond its control or through ordinary negligence of employees, servants, or agents" was lawful, acknowledging that similar provisions have been repeatedly sustained by the appellate courts "as reasonable limitations on the liability of a public service corporation, so long as the company has not attempted to absolve itself from its own willful misconduct or gross negligence."[84] Rather than support the Petition, *Lee* shows

[82] Initial Filing at 2, n. 5.
[83] *Lee*,98 Misc. 2d at 306.
[84] *Id.* at 305-306.

us that the New York court would likely find a tariff as broad as the Petition—that would absolve it from damages related to gross negligence—to be unlawful.

PAC also referenced a case in California that acknowledged the regulator has the authority to limit a utility's liability to the public.[85] And in *Southern California Edison Co. v. City of Victorville*, the court found that there can still exist a statutory right to a limited private action against a utility for damages.[86] There, the appeals court acknowledged that utility liability limitations are "an equitable trade off" given that the Commission can set rates below what an unregulated provider might charge, thereby requiring "a concomitant limitation on liability."[87] The Court found that a statute providing for a private action against a utility is barred when an award of damages would directly contravene a specific order or decision of the Commission and, also, when the award would "simply have the effect of undermining a general supervisory or regulatory policy of the Commission—i.e., when it would 'hinder' or 'frustrate' or 'interfere with' or 'obstruct' that policy."[88] Here, the Petition represents no equitable tradeoff and there is no specific Commission Order that the Company can point to that the Petition would contravene. In fact, as the Brief has demonstrated, the opposite is true.

Like California, Oregon also offers a limited private right of action to give utility customers the opportunity to recover damages from a utility's egregious conduct.[89] The Petition arises directly from Oregonians exercising this right. PAC's request is unreasonable and contrary to Oregon utility law. Provisions limiting a public utility's liability are unreasonable if

[85] UE 428 – Petition at 2, n. 2 (*S. California Edison Co. v. City of Victorville*, 217 Cal. App. 4th 218, 229, 158 Cal. Rptr. 3d 204, 211 (2013)).
[86] *S. California Edison Co. v. City of Victorville*, 217 Cal. App. 4th 218, 229, 158 Cal. Rptr. 3d 204, 211 (2013).
[87] *Id.* at 228-229.
[88] *Id.*
[89] ORS 756.185(1).

they grant immunity or limit a utility's liability for negligent acts. While CUB does not dispute that the cases cited by PAC demonstrate that the Commission has the authority to limit utility liability in a general sense, they also show that the scope of that liability is not unlimited. The Petition would unlawfully limit a customer's right to recover from the utility's egregious acts and is in direct contravention with existing case and statutory law in Oregon and nationwide. As such, the Petition must be denied.

III. CONCLUSION

For the foregoing reasons, CUB respectfully recommends that the Commission deny the Petition and end its inquiry at the conclusion of Phase 1 of this proceeding.

Dated this 27th day of February, 2024.

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