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February 27, 2024

Via Electronic Filing

Public Utility Commission of Oregon
Attn: Filing Center
201 High St. SE, Suite 100
Salem OR 97301

Re: In the Matter of PACIFICORP, dba PACIFIC POWER,
Modifications to Rule 4, Application for Electrical Service
Docket No. UE 428

Dear Filing Center:

Please find enclosed Oregon Consumer Justice's Opening Brief in the above-referenced docket.

Thank you for your assistance. If you have any questions, please do not hesitate to call.

Very Truly Yours,

_s/ Matthew S. Kirkpatrick

Matthew S. Kirkpatrick
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encl.

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.	)	**INTERVENOR OREGON CONSUMER JUSTICE'S OPENING BRIEF**

I. INTRODUCTION

Pursuant to Administrative Law Judge (ALJ) Mapes's February 16, 2024, Ruling, intervenor Oregon Consumer Justice ("OCJ") opposes PacifiCorp dba Pacific Power's October 23, 2023, tariff amendment request (the "Petition") for all of the reasons discussed below. PacifiCorp asks the Oregon Public Utility Commission (the "Commission") to do what even the Oregon Legislature could not: Flatly deny 600,000 Oregonians their fundamental rights under Oregon law. Remarkably, in inviting the Commission to violate Article I, section 10 of the Oregon Constitution, PacifiCorp's Opening Brief does not even mention the Oregon Supreme Court's recent, controlling opinion—*Busch v. McGinnis Waste Systems, Inc.*, 366 Or 628, 468 P3d 419 (2020)—which confirms that not even the Oregon Legislature could do what PacifiCorp asks the Commission to do.

Instead, PacifiCorp relies on numerous Oregon cases that address sub-constitutional constraints on public utility company liability limitations, but PacifiCorp's Petition even violates the law announced in those cases, on its face, because PacifiCorp seeks to immunize itself even from liability for its own reckless, grossly negligent, willful, and intentional misconduct.

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PacifiCorp also identifies numerous inapposite cases that upheld narrowly-tailored liability limitation statutes and tariffs, from Oregon and other jurisdictions, that provide no support for its Petition. None involved the type of broad power company immunity PacifiCorp seeks. To the contrary, the cited statutes and tariffs sought to address specific circumstances or involved business relationships that justified specific limitations on liability. The cases on which PacifiCorp relies are not only inapposite to the near-blanket immunity their Petition requests, but many also literally involve the circumstance opposite to that which prompted PacifiCorp to seek immunity. Whereas many of the cases, statutes, and tariffs PacifiCorp cites involved liability limitations when power gets *shut off* due to forces beyond a utility's control, such as a hurricane that knocks out power or a utility that shuts off power due to the risk of starting a wildfire, PacifiCorp's Petition was prompted by and seeks immunity for its *failure to shut off power* in the face of an oncoming extreme wind storm, a force entirely within PacifiCorp's control, which predictably ignited the wildfires that resulted in the jury verdicts PacifiCorp wants to avoid in the future; not by vegetation management, or infrastructure hardening, or shutting off power, all of which were required or recommended but effectively ignored by PacifiCorp even before September 2020, wildfires, but by stripping away customer rights.

Finally, the blanket liability limitation PacifiCorp seeks is grossly inequitable. It incentivizes PacifiCorp shareholders to continue putting their own profits above public safety—by, for example, continuing to cut corners on the mandated vegetation management and other wildfire prevention measures the lack of which caused the September 2020, wildfires in the first place—and to forego the insurance and other risk-mitigation measures that would enable PacifiCorp to take responsibility for its actions while protecting both its shareholders and ratepayers. Instead,

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PacifiCorp seeks to heap harm on the very people it should be protecting the most: its own ratepayers, who would be left to fend for themselves while their PGE-customer neighbors retain all the remedies Oregon law requires. The only people who could not hold PacifiCorp responsible would be its customers.

The Commission should therefore deny PacifiCorp's Petition.

II. ARGUMENT

PacifiCorp ignores controlling Oregon law that requires denial of its Petition, relies on other authorities that strongly counsel such denial, and fails to consider the inequities its anti-customer Petition attempts to enshrine in its tariff.

A. The Immunity PacifiCorp Seeks Would Violate the Remedy Clause.

PacifiCorp's Opening Brief ignores the Oregon Supreme Court's less-than-three-year-old opinion in *Busch*, in favor of its 2016 opinion in *Horton*, even though *Busch* controls PacifiCorp's immunity tariff request. *Busch* applied *Horton*'s Remedy Clause analysis (which had upheld the Oregon Tort Claims Act's ("OTCA") then $3,000,000 damages limitation) to the $500,000 non-economic damages cap in *former* ORS 31.710(1). The *Busch* court's analysis is much more instructive for the Commission's consideration of PacifiCorp's Petition than is *Horton*'s. Indeed, as next discussed, PacifiCorp's requested immunity is far more offensive to the Oregon Constitution's Remedy Clause than was the non-economic damages cap *Busch* held unconstitutional.[1]

[1] In response to *Busch*, the Oregon Legislature amended ORS 31.710(1) to remove the offending provisions. 2021 Or Laws, c. 478, § 1 (S.B. 193).

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"Under the common law, all persons owe a duty of reasonable care and persons who are injured as a result of breach of that duty have a right to bring a claim for their injuries." *Busch*, 366 Or at 650. "[T]he 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.'" *Id.* (quoting *Horton*, 359 Or at 218).

> "[C]ommon-law causes of action and remedies provide a baseline for measuring the extent to which subsequent legislation conforms to the basic principles of the remedy clause." [*Horton*, 359 Or] at 218-19, 376 P.3d 998. We erred when we concluded in *Smothers* that the remedy clause prohibits the legislature from eliminating any common-law remedy that existed in 1857, but we also would err if we were to decide, at the other extreme, that the legislature is entitled to modify common-law remedies for any reason it deems sufficient. Under *Horton*, the legislature must act for a reason sufficient to counterbalance the substantive right that Article I, section 10, grants. That right assures that people who are injured in their person, property or reputation have a remedy for those injuries. Oregon law has long recognized and protected that substantive right.

Busch, 366 Or at 650. Thus, "when this court has upheld statutes that do not modify a common-law duty but limit the remedies available for their breach, a ***quid pro quo*** has often been present." *Id.* (emphasis added).

In *Horton*, a clear *quid pro quo* was present—indeed, two were present—which strongly supported the tort claim limit against that plaintiff's Remedy Clause challenge. First, at the same time it enacted the OTCA liability limits, the legislature abrogated the state's "constitutionally recognized interest in sovereign immunity" (*Busch*, 366 Or at 637 (citing *Horton*, 359 Or at 221)), which had previously precluded *any* tort claim against the State of Oregon.

Second, the OTCA required the state to indemnify negligent state employees up to the liability limit, which not only helps ensure that the state will be able to hire and retain qualified employees, but also "ensures that a solvent defendant will be available to pay any damages up to

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$3,000,000—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." *Id.* (quoting *Horton*, 359 Or at 222).

Third, "in setting the cap on state liability, the 2009 Legislative Assembly had made a studied and data-driven decision to provide a complete recovery in many cases and greatly expand the state's liability in the most egregious cases, by both significantly increasing the caps and providing for additional, annual, increases indexed for inflation. As a result, in light of the legislature's efforts to accommodate both the state's interests and plaintiffs' remedy-clause rights, we could not say that the $3,000,000 tort claims limit on damages against state employees is insubstantial in light of the overall statutory scheme, which extends an assurance of benefits to some while limiting benefits to others." *Id.* at 638 (citing *Horton*, 359 Or at 224) (internal quotation marks, alteration marks, and citations omitted).

> But that was not the end of our analysis. As a final check on the constitutionality of the limited remedy as applied to the plaintiff in *Horton*, we considered whether the size of the award to the plaintiff that remained was sufficiently "substantial" to be constitutionally adequate. [359 Or at 224.] We recognized that the remedy the legislature provided, when considered next to the particular facts of the case, was "not sufficient to compensate plaintiff for the full extent of the injuries that her son suffered." *Id.* But we decided that the cap was constitutional as applied to the plaintiff, saying that "the remedy that the legislature has provided represents a far more substantial remedy than a paltry fraction" of the remedy that the jury had determined was appropriate. *Id.*

Id. at 638-39 (internal alteration marks omitted).

Horton emphasized that its holding was "limited to the circumstances that this case presents, and it turns on the presence of the state's constitutionally recognized interest in sovereign immunity, the *quid pro quo* that the Tort Claims Act provides, and the tort claims limits in this case."

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Turning to the $500,000 non-economic damages cap in ORS 31.710(1), the court in *Busch* had no difficulty concluding that it violated the Remedy Clause. Applying the *Horton* framework, the court noted that "the reasons for the legislature's actions in enacting a damages cap are critical under *Horton*. Therefore, we turn to the reasons that defendant cites for the cap in ORS 31.710(1): (1) the legislature sought to address the availability and affordability of insurance; and (2) the legislature adopted the cap as a tradeoff to the 'broadening' of tort liability that had occurred in the 1960s and 1970s." *Busch*, 366 Or at 647-48. While the court had "no doubt that ORS 31.710(1) was intended to reduce insurance costs and improve insurance availability" (*id.* at 648), it held that that provided no *quid pro quo* relevant to whether the cap passed muster under the Remedy Clause.

> Instead, when the legislature enacted ORS 31.710(1), it required a trial court to override the jury's verdict and enter judgment for a specified amount that is not tied to the extent of the plaintiff's injuries. When it did so, the legislature did not provide injured persons with a *quid pro quo* as that term is used in *Horton*—something they otherwise would not have had. Unlike the Oregon Tort Claims Act, which gives injured persons the ability to bring a claim against a solvent defendant that otherwise would have been immune from suit, *id.* at 221-22, 376 P.3d 998, ORS 31.710(1) does not expressly confer a benefit on injured persons. The benefits that ORS 31.710(1) is intended to confer are benefits that are intended to inure to society in general as opposed to injured persons in particular.

Id. at 651. While the court in *Busch* did not need to determine whether the lack of a legislative *quid pro quo* alone was fatal to ORS 31.710(1)'s non-economic damages cap in personal injury cases (because, unlike the OTCA, it also involved no state constitutional interests and failed to cap damages "at a sum capable of restoring the right that had been injured in many, if not all, instances, and would remain capable of doing so over time"), the court made clear the failure to provide a *quid quo pro* "strikes a real blow to the defense of ORS 31.710(1)." *Id.* at 651.

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That blow is fatal to PacifiCorp's Petition. The immunity tariff PacifiCorp seeks fails under each relevant factor; far more so than did the non-economic damages cap at issue in *Busch*. First, there is no *quid pro quo*. Similar to the legislature's attempt, in enacting ORS 30.710(1), to keep insurance rates down, PacifiCorp's purported attempt to justify its immunity tariff in order to keep utility rates down "does not expressly confer a benefit on injured persons. The benefits [it purportedly] is intended to confer are benefits that are intended to inure to [ratepayers] in general as opposed to injured persons in particular." *Id.* at 651. More likely, since PacifiCorp cannot re-coop from ratepayers litigation costs and judgments like those in the wildfire cases that prompted its pursuit of the immunity tariff in the first place, the benefit would not inure to its ratepayers at all; only to its shareholders.

PacifiCorp's Petition also fails under the second *Busch* and *Horton* consideration, because PacifiCorp has no constitutional interest at stake, like the state's waiver of sovereign immunity in enacting the OTCA. *Busch*, 361 Or at 651.

Likewise, PacifiCorp fails under the third relevant consideration because it does not even attempt to determine, let alone provide the level of damages necessary to "restor[e] the right that has been injured" as did the legislature in enacting the OTCA. *Busch*, 361 Or at 651. The proposed tariff would instead grant PacifiCorp total immunity from liability—a damages cap of $0—as to most of the core remedies the Constitution has protected and Oregonians have enjoyed for the 165 years since statehood. That PacifiCorp calls these well-established remedies "atypical" merely confirms the crassness of its effort. *Busch* flatly rejected that defendant's attempt to denigrate non-economic damages in attempting to support capping them even at $500,000 under *former* ORS 31.710(1) because, "[a]t the time the remedy clause was adopted, the common law allowed recovery

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for both tangible and intangible injuries, such as mental anguish and insult." *Id.* at 646. "We reject defendant's argument that any statute that limits a plaintiff's recovery of noneconomic damages, while permitting the plaintiff to fully recover economic damages meets the requirements of Article I, section 10, 'in and of itself.'" *Id.* at 647. Here, PacifiCorp asks the PUC to go even further than the legislature unconstitutionally did in *former* ORS 31.710(1). Its tariff would not only cap non-economic damages at $0 (rather than the $500,000 held unconstitutional in *Busch*), it also would cap most economic damages at $0, "including but not limited to reasonable charges necessarily incurred for medical, hospital, nursing and rehabilitative services and other health care services, burial and memorial expenses, loss of income and past and future impairment of earning capacity, reasonable and necessary expenses incurred for substitute domestic services, recurring loss to an estate, damage to reputation that is economically verifiable, reasonable and necessarily incurred costs due to loss of use of property and reasonable costs incurred for repair or for replacement of damaged property, whichever is less." *Id.* at 645 n.10 (quoting *former* ORS 31.710(2)(a), now ORS 31.705(2)(a)).[2]

The Commission should deny PacifiCorp's Petition for an immunity tariff with no redeeming features under the Remedy Clause analysis Oregon law requires. The Supreme Court's decision in *Busch* prompted the Oregon legislature to amend ORS 31.710(1) to remove its offending provisions. The Commission should reject PacifiCorp's invitation to establish a far more unconstitutional tariff in this proceeding.

[2] PacifiCorp's proposed tariff would vaguely limit its liability to "actual economic damages", which is not defined except to make clear that it does not permit recovery of "special, noneconomic, punitive, incidental, indirect, or consequential damages (including, without limitation, lost profits) * * *." (Proposed Tariff Sheet, p. 3.)

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B. The Immunity PacifiCorp Seeks Would Violate Oregon Liability-Limitation Caselaw.

PacifiCorp's Petition and Opening Brief cite Oregon case law that prohibits the very tariff it seeks. For example, *Garrison v. Pac. Nw. Bell*, 45 Or App 523, 531–32, 608 P2d 1206 (1980) discussed various cases that upheld liability limitations "so long as they do not purport to grant immunity or limit liability for gross negligence." *See also Adamson v. WorldCom Commc'ns, Inc.*, 190 Or App 215, 222, 78 P3d 577 (2003) (tariff's liability limitation provision excluded willful misconduct). Despite Oregon law's clear prohibition of limitations on a utility's liability for its own gross negligence, PacifiCorp's proposed tariff would do exactly that. Thus, the Commission should deny PacifiCorp's Petition because it requests a facially unlawful liability limitation provision.

C. The Authorities PacifiCorp Cites Do Not Support Its Petition.

Oregon Consumer Justice hereby incorporates other intervenors' arguments for why the cases, tariffs, and statutes cited in PacifiCorp's Petition and Opening Brief are inapposite and fail to support its Petition. In short, most of the cases, tariffs, and statutes PacifiCorp cites address limitations on liability for service interruptions or other events that provide no support for the all-encompassing, nearly complete immunity PacifiCorp seeks.[3] In fact, many of the cited authorities

[3] Puget Sound Energy, WN U-60, Second Revised Sheet Nos. 80-e, 80-f (limiting liability "for any disruption in service or for any loss or damage caused thereby"); *S. California Edison Co. v. City of Victorville*, 217 Cal App 4th 218, 226 (2013) (no liability for placing street lights where City directed); *Simpson v. Phone Directories Co.*, 82 Or App 582, 586–87, 729 P2d 578 (1986) (tariff limited liability "for erroneous directory listings and service failures"); *W. Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 568–69 (1921) (limiting liability "for mistakes in transmission of any unrepeated message") (internal alteration marks omitted); *Olson v. Pac. Nw. Bell Tel. Co.*, 65 Or App 422, 426 n.4, 671 P2d 1185 (1983) (tariff limited "Company's liability, if any, for any failure or interruption to service"); *Boardmaster Corp. v. Jackson Cnty.*, 224 Or App 533, 541, 198 P3d 454 (2008) (no liability "for any interruption, suspension, curtailment or fluctuation in electric service"); *Adamson*, 190 Or App at 221 (no liability for damages from telephone services absent

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involved tariff provisions that limited liability for utilities shutting off power in the face of wildfires or other events beyond their control. *See* footnote 3, *supra*. In contrast, PacifiCorp seeks immunity under any and all circumstances, including its *failure to shut off the power* in the face of known

willful misconduct); PGE Rule C—Governing Customer Attachment to Facilities, 2(C) (no liability for "any interruption, suspension, curtailment or fluctuation in Electricity Service"); PGE Schedule 88, Or. Sheet No. 88-4 (no liability for damage from participation in load reduction programs); PGE Schedule 4, Or. Sheet No. 4-4 (not liable for damages from Direct Load Control Events); PGE Schedule 5, Or. Sheet No. 5-4; PGE Schedule 25, Or. Sheet No. 25-3 (not liable for damages from AC Cycling or changing thermostat set points) PGE Schedule 13, Or. Sheet No. 13-5 (not liable for performing direct load control on participating appliances); Idaho Power Company Rule J(1) (not liable for "any interruption, suspension, curtailment, or fluctuation in service"); *Keogh v. Chicago & N.R. Co.*, 260 U.S. 156, 163 (1922) (shipper claimed excessive rates); *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 217 (2002) (tariff limited liability for damages from power outages or service interruptions); *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 267 Kan 760, 768, 986 P2d 377 (1999) (tariff limited liability for electric disturbance by cause beyond utility's control); *Houston Lighting & Power Co. v. Auchan USA, Inc.*, 995 SW2d 668, 670 (Tex 1999) (limiting liability "occasioned by fluctuations or interruptions unless * * * Company has not made reasonable provisions to supply steady and continuous electric service"); *Lee v. Consol. Edison Co. of New York*, 413 NYS2d 826, 827 (App. Term 1978) (limiting liability "in case the supply of service shall be interrupted * * * from causes beyond its control or through ordinary negligence of employees"); Con.Ed. PSC Electricity Tariff Rule 21.1 Continuity of Supply; Lawrence Berkeley National Laboratory, "Case Studies of the Economic Impacts of Power Interruptions and Damage to Electricity System Infrastructure from Extreme Events," 19-21, 35-39 (November 25, 2020); Fla. Stat. Ann. § 366.98(1) (no liability for damages based in whole or in part on "the reliability, continuity, or quality of utility services which arise in any way out of an emergency or disaster"); *Allen v. Gen. Tel. Co. of Nw.*, 20 Wash App 144, 147, 578 P2d 1333 (1978) (limiting liability for errors in phone directory); *Nat'l Union Ins. Co. of Pittsburgh, Pa. v. Puget Sound Power & Light*, 94 Wash App 163, 168, 972 P2d 481 (1999) (no liability for damage from power outage due to causes beyond utility's control); *Cole v. Pac. Tel. & Tel. Co.*, 112 Cal App 2d 416, 417, 246 P2d 686 (1952) (limiting liability for error in advertisement in phone directory); *Wheeler Stuckey, Inc. v. Sw. Bell Tel. Co.*, 279 F Supp 712 (W.D. Okla. 1967) (same); *Warner v. Sw. Bell Tel. Co.*, 428 SW2d 596 (Mo. 1968) (same); *Citoli v. City of Seattle*, 115 Wash App 459, 477, 61 P3d 1165 (2002) (no liability for damages "from the interruption of electrical service from any cause beyond the control of the [utility]"); *Gantner v. PG&E Corp.*, 15 Cal 5th 396, 538 P3d 676, 684 (2023) (not reaching tariff issue but noting California PUC's determination that **"proactively de-energizing power lines can save lives" given "the growing threat of wildfire"**) (emphasis added).

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dangerous wind events, like its grossly negligent failures that caused the September 2020, wildfires that prompted its Petition.

Other cases, tariffs, and statutes that PacifiCorp cites are inapposite because they involve limitations of liability between or among utility companies and/or their business partners or vendors.[4] Such tariffs among voluntary business partners with much more equal bargaining power have no bearing on tariffs, like PacifiCorp's proposed tariff, in adhesion contracts between a massive, diversified, monopoly utility like PacifiCorp, on the one hand, and its captive individual and small business customers, on the other.

Still other cases, tariffs, and statutes that PacifiCorp cites are inapposite because, unlike its proposed tariff, they only exclude liability for damages from events beyond the utility's control.[5]

Finally, several of the authorities PacifiCorp cites do not support tariffs at all, contrary to the suggestions in PacifiCorp's Petition and Opening Brief.[6]

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[4] *MCI Telecommunications Corp. v. GTE Nw., Inc.*, 41 FSupp2d 1157, 1183–84 (D Or 1999); *Pac. Nw. Bell Tel. Co. v. Sabin*, 21 Or App 200, 213–14, 534 P2d 984 (1975); PGE Rule K—Requirements Relating to Electric Service Suppliers; PacifiCorp PPA for various Qualifying Facilities; PGE Schedule 201 Standard In-System Non-Variable PPA; Community Solar Program Purchase Agreement, § 12.4.

[5] Cheyenne Light, Fuel and Power Company, Wyo. P.S.C. Tariff No. 14, Original Sheet No. R22; *CenterPoint Energy Res. Corp. v. Ramirez*, 640 SW3d 205, 211 (Tex 2022) (utility not liable for damages from gas while on customer side of meter).

[6] *State Lands Comm'n v. Plains Pipeline, L.P.*, 57 Cal App 5th 582, 588-91 (2020), *as modif.* (Nov. 20, 2020) (pipeline operator not immune to liability for environmental damage); Montana-Dakota Utilities Co., Wyo. P.S.C. Tariff No. 1, Rate Schedule 100 Conditions of Service, at 9 (company not liable "except [for] loss, injuries, death, or damages resulting from the negligence of the Company"); *Olson*, 65 Or App at 426 ("Assuming, arguendo, that the extent of defendant's liability may be limited reasonably by tariffs or regulations, we do not agree that this tariff insulates defendant from all liability under other theories."); *Wildish Sand & Gravel Co. v. Nw. Nat. Gas Co.*, 103 Or App 215, 220 n.3, 796 P2d 1237 (1990) (general reference to utility regulations); Idaho Power Company Rule J(2) ("The provisions of this rule do not affect any person's rights in tort.").

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The Commission should deny PacifiCorp's Petition because the cases, statutes, and tariffs it cites do not support granting the immunity it seeks.

D. The Immunity PacifiCorp Seeks Would Discriminate Against Its Own Customers.

Beyond its violations of the Oregon Constitution and case law, perhaps the most repugnant aspect of PacifiCorp's requested immunity tariff is its inequitable treatment of PacifiCorp's own ratepayers. Rather than attempting to protect ratepayers, whom PacifiCorp should and the Commission must put first, PacifiCorp would instead single them out as the only Oregonians subject to its unconstitutional, unlawful immunity tariff. Imagine what could well take place during the next extreme wind event. If PacifiCorp—emboldened by the immunity this tariff would provide—chooses to continue its years-long failure to meet its vegetation management, infrastructure hardening, and other fire prevention obligations, ignores all advance warnings, and once again refuses to shut off its powerlines, next time there could well be fatalities and almost certainly will be more homes lost and lives destroyed. Then a family that is a PacifiCorp customer, that paid PacifiCorp's bills for decades, maybe even for generations, when that family loses their lives or their home due to PacifiCorp's negligence they would have no meaningful remedy; a paltry remedy; an unconstitutional remedy. Meanwhile, their PGE ratepayer neighbor would have the full panoply of remedies Oregonians have enjoyed since statehood. The guest staying in their home would have all the remedies to which all other Oregonians are entitled. Even the burglar killed or injured while looting their home during the wildfire PacifiCorp caused would enjoy all the remedies and protections of other Oregonians.

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PacifiCorp's ratepayers are the last people whose constitutional rights it should be trying to strip away in favor of its shareholders' profits.

III. CONCLUSION

For all of the reasons discussed above, the Commission should deny PacifiCorp's Petition.

Dated this 27th day of February 2024.

Respectfully submitted,

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s/ Matthew Kirkpatrick

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