February 27, 2024

Via Electronic Filing

Public Utility Commission of Oregon
Attn: Filing Center
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Re: In the Matter of PACIFICORP, dba PACIFIC POWER,
Advice No. 23-018 (ADV 1545), Modifications to Rule 4,
Application for Electrical Service.
Docket No. UE 428

Dear Filing Center:

Please find enclosed the Green Energy Institute at Lewis & Clark Law School and Sierra Club Opening Brief in the above-referenced docket.

Thank you for your assistance. If you have any questions or require additional information, please do not hesitate to contact me.

Sincerely,

/s/ Leah Bahramipour

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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.	GREEN ENERGY INSTITUTE AT LEWIS & CLARK LAW SCHOOL AND SIERRA CLUB OPENING BRIEF

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GREEN ENERGY INSTITUTE AT LEWIS & CLARK LAW SCHOOL AND SIERRA CLUB OPENING BRIEF

I. INTRODUCTION

Green Energy Institute ("GEI") and Sierra Club respectfully request the Public Utility Commission of Oregon ("PUC" or "Commission") deny PacifiCorp's ("Company") request to amend Rule 4 ("Petition"), which would prospectively limit the Company's liability from injuries that result from providing electrical services to solely economic damages.

Specifically, the Company asks the Commission to modify Rule 4 of its General Rules and Regulations, Application for Electrical Service to read:

> 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 claims 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.

Summarized, PacifiCorp is asking this Commission to limit its liability, in any action raising out of its provision of electric service, to only actual damages, regardless of the utility's conduct or level of fault. This incredibly broad waiver of liability is without precedent. Not only does the request violate Oregon's Constitution and other applicable case law—which PacifiCorp makes no attempt to justify—but it is also starkly different from any other example of liability limitation either in this state or elsewhere. PacifiCorp's Opening Brief is peppered with non-analogous examples of prior liability limitations, essentially attempting to broaden the scope of acceptable limits on liability from unavoidable interruptions of service to any action that the Company may undertake in the furtherance of its business, no matter how negligently or willfully the Company breached its duty of care to the public.

For all of these reasons, the Commission should reject the Company's tariff revision and swiftly redirect PacifiCorp's attention to fulfilling its Wildfire Management Plan,[1] amending its inadequate Clean Energy Plan, and completing its All-Source Requests for Proposals, all of which are necessary to the rapid and equitable decarbonization of Oregon's electric system.

II. COMMISSION AUTHORITY TO LIMIT PUBLIC UTILITY LIABILITY IS CONSTRAINED BY THE OREGON CONSTITUTION'S REMEDY CLAUSE AND OREGON PRECEDENT REGARDING LIMITATIONS ON LIABILITY, NEITHER OF WHICH PERMIT PACIFICORP'S PROPOSED BROAD WAIVER OF LIABILITY

State public utility commissions function as an instrumentality of their respective state legislatures for the performance of ratemaking and the regulation of utilities.[2] The legislative delegation of authority to public utility commissions typically includes a range of legislative discretion; however, that authority is ultimately subject to several constraints.[3] First, a state

[1] Or. Pub. Util. Comm'n, Order No. 23-220, UM 2207 (June 26, 2023) (adopting Staff's 29 separate recommendations for PacifiCorp's 2024 Wildfire Mitigation Plan).
[2] *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989) (citing *Minn. Rate Cases*, 230 U.S. 352, 433 (1913)).
[3] *Gearhart v. Pub. Util. Comm'n of Or.*, 255 Or. App. 58, 61 (2013) (explaining that "PUC has broad discretion in its legislative function of setting rates, subject only to statutory and constitutional constraints," and that rates are prohibited and unlawful where they are (1) unjust and unreasonable, (2) unjustly discriminatory, or (3) confiscatory.

utility commission's legislative authority is bound by the United States Constitution.[4] Similarly, the Oregon Public Utility Commission's authority is constrained by the limits of the Oregon Constitution.[5]

Not only is the Commission constrained by the Oregon and United States' constitutions when exercising its authority, but, contrary to the arguments raised by PacifiCorp, the Commission has the authority to affirmatively review the constitutionality of its actions and the statutes it is administering.[6] While such authority should be exercised "with care," Oregon administrative agencies have the power to declare statutes and rules unconstitutional.[7]

Finally, the Commission should, at a minimum, consider prior precedent from Oregon courts, particularly where the Oregon judiciary has previously opined on the same or similar topic, as this will help inform how the judiciary is likely to rule in the future. The Commission is not bound by the principles of *stare decisis* when there is good reason to deviate from prior precedent, but adherence to these principles supports the "undeniable importance of stability in legal rules and decisions."[8] And while under ORS 756.060, the Commission may adopt and amend reasonable and proper rules and regulations under its authority, rules and regulations that

(citing *Am. Can v. Lobdell*, 55 Or. App. 451, 462–63, 638 P.2d 1152, rev. den., 293 Or. 190, 648 P.2d 851 (1982), *Pac. Tel. & Tel. Co. v. Wallace*, 158 Or. 210, 297, 75 P.2d 942 (1938), ORS 756.010(1)).

[4] *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968).

[5] *GTE Nw., Inc. v. Pub. Util. Comm'n of Or.*, 321 Or. 458, 461 n. 1, 463 (1995); *Pac. Nw. Bell Tel. Co. v. Sabin*, 21 Or. App. 200, 213 (1975) ("[l]ike the legislature itself, a regulatory agency is bound to exercise its authority within the confines of both the state and federal constitutions"); *see also York Rys. Co. v. Driscoll*, 331 Pa. 193, 197 (1938) (concluding that a Commission had no authority to act where the legislative authority granted to it extended beyond the bounds of the state constitution).

[6] *Nutbrown v. Munn*, 311 Or. 328, 346 (1991); *see also In re Crooked River Ranch Water Co.*, 2006 WL 3616455, *1 (Or. Pub. Util. Comm'n 2006).

[7] *Nutbrown*, 311 Or. at 346; *see also Cooper v. Eugene School Dist. No. 4J*, 301 Or. 358 (1986) (*abrogated on other grounds by Kellas v. Dep't of Corr.*, 341 Or. 471 (2006)) ("[a]n agency ordinarily can interpret a statute so as to exclude unconstitutional applications").

[8] C*ent. Lincoln People's Util. Dist. v. Verizon Nw., Inc.*, 2005 WL 2365897, *3 (Or. Pub. Util. Comm'n 2005); *see also I-L Logging Co. v. Mfrs. & Wholesalers Indem. Exch.*, 202 Or. 277, 333 (1954).

would be unenforceable in the state courts of Oregon are not reasonable or proper.[9] Thus the Commission should not approve any changes to PacifiCorp's terms of service that are likely to be unenforceable at Oregon common law.

In sum, the Commission has both the authority and obligation to evaluate whether PacifiCorp's requested waiver of liability runs afoul of the United States or Oregon constitutions, as well as whether it is enforceable under Oregon law. As detailed below, PacifiCorp's request violates the Oregon constitution and is unenforceable under Oregon law. Accordingly, the Commission must reject it.

A. The Liability Limitation Requested by PacifiCorp Contravenes the Oregon Constitution's Remedy Clause.

In 1857, Oregon adopted the Bill of Rights of the Oregon Constitution, which included Article I, section 10, known as the "remedy clause." This sections 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*. OR. CONST. art. I, § 10 (emphasis added).

Since its adoption, the third provision of the remedy clause has served as a limitation on the state legislature's substantive authority to alter or adjust a person's remedy for injuries to person, property, and reputation.[10]

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[9] *See* ORS 183.484 (Judicial review of agency orders may reverse or remand agency orders where the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action. The court may remand the order to the agency if the agency's exercise of discretion is inconsistent with an agency rule, prior practice or stated position); *see also Qwest Corp. v. Pub. Util. Comm'n*, 205 Or. App. 370, 378–79 (2006) ("In the proper sequence of analyzing the legality of action taken by officials under delegated authority, the first question is whether the action fell within the reach of their authority, the question which is described as jurisdiction. If that is not in issue, the question is whether the substance of the action, though within the scope of the agency's or official's general authority, departed from a legal standard expressed or implied in the particular law being administered, or contravened some other applicable statute." (citing *Planned Parenthood Ass'n. v. Dep't of Hum. Res.*, 297 Or 562, 565 (1984)).

[10] *Horton v. Or. Health and Sci. Univ.*, 359 Or. 168, 173, 179 (2016); *see also State ex rel Oregonian Publ'g Co. v. Deiz*, 289 Or. 277, 288 (1980) (Linde, J., concurring) (Article I, section 10, serves not as a protection against the exercise of governmental power, but rather it prescribes how the functions of government shall be conducted).

1. Limitations on damages that allow the recovery for an "insubstantial" fraction of the injury sustained by plaintiffs are unconstitutional under the remedy clause.

The leading Oregon Supreme Court decision grappling with the meaning and scope of the Oregon Constitution's remedy clause came in *Horton v. Oregon Health and Science University*, where the Court ultimately concluded that the remedy clause does not protect only those causes of action that pre-existed the constitution's adoption.[11] In overruling its earlier precedent, the Court reasoned that the remedy clause's focus on providing remedies for specified kinds of injuries implied that it was intended to guarantee some remedy for those injuries, and not merely a procedural guarantee of access to the courts.[12] The Court explained that contrary to its earlier precedent, there is nothing in the remedy clause to suggest that at the time of its drafting and adoption, the framers intended to tie the protections of the clause to the common law as it existed in 1857.[13] However, the Court did not divorce its decision entirely from relying on the common law as a guide. It explained that "common-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—ensuring the availability of a remedy for persons injured in their person, property, and reputation."[14]

Additionally, the *Horton* Court examined whether the Tort Claims Act violated the remedy clause by capping the total amount of damages plaintiffs could recover against the state and its employees at $3,000,000.[15] There, the defendants had admitted liability and, following a trial on the issue of damages, the jury awarded the plaintiff economic damages of $6,071,190 and

[11] *Id.* at 179–188.
[12] *Id.* at 180.
[13] *Id.* at 183.
[14] *Id.* at 218.
[15] *Id.* at 173.

noneconomic damages of $6,000,000.[16] In its analysis, the Court noted that the Oregon Tort Claims Act did not modify the duty that the defendant owed to the plaintiff, in that case doctor to patient, but instead limited the remedy plaintiff could recover for injuries resulting from a breach of that duty.[17] The Court explained that the statute, while limiting damages plaintiffs could recover, gave them something in return, *i.e. a quid pro quo*, the ability to sue state actors for amounts up to the damages cap via a partial waiver of sovereign immunity.[18] Absent the Act's waiver, an injured plaintiff would not be able to recover from a judgment-proof state employee.[19]

Under this framework, the Court reasoned that the "substantiality of the legislative remedy can matter in determining whether the remedy is consistent with the remedy clause."[20] In order to pass constitutional muster, the remedy imposed by the legislature need not restore all damages that the plaintiff sustained so long as the damages available are "substantial."[21] However, the Court reiterated that where a remedy is only a "paltry fraction of the damages that the plaintiff sustained," such a remedy is unlikely to be sufficiently substantial to satisfy the remedy clause.[22] Moreover, and as noted above, the Court explained that relevant to the substantiality analysis was whether a *quid pro quo* dynamic existed, i.e., whether the legislative narrowing of a remedy was counterbalanced by factors such as widening the class of plaintiffs who can seek a remedy or reducing the burden plaintiffs must establish to recover.[23]

Ultimately, the *Horton* Court held that although the injured plaintiff would not be able to recover the full extent of their damages under the cap, the limited recovery was still substantial

[16] *Horton*, 359 Or. at 171.
[17] *Id.* at 221.
[18] *Id.* at 222.
[19] *Id.*
[20] *Id.* at 220.
[21] *Id.* at 221 (citing *Howell v. Boyle*, 353 Or. 359, 376 (2013).
[22] *Horton*, 359 Or. at 221 (citing *Clarke v. Or. Health Sci. Univ.*, 343 Or. 581, 610 (2007).
[23] *Id.* at 194, 221 (citing *Hale v. Port of Portland*, 308 Or. 508, 521–23 (1989).

as applied to the facts of the case.[24] The Court emphasized that its holding was "limited to the circumstances that this case presents, and it turn[ed] on the presence of the state's constitutionally recognized interest in sovereign immunity, the *quid pro quo* that the Tort Claims Act provide[d], and the tort claims limits in this case."[25]

Since *Horton*, the Oregon Supreme Court has clarified the extent to which statutory caps on noneconomic damages caused by private actors are permissible under the remedy clause. The leading case, *Busch v. McInnis Waste Systems Inc.*, addressed ORS 31.710(1)'s cap of noneconomic damages for injuries to a person to $500,000.[26] There, a jury awarded plaintiff $10,500,000 in noneconomic damages for injuries sustained after being hit by a negligently driven garbage truck, resulting in the amputation of his leg.[27] However, the trial court would ultimately reduce the noneconomic damages awarded to $500,000 in compliance with ORS 31.710(1), which plaintiff subsequently challenged as a violation of Oregon's remedy clause.[28] The Court explained that like the Oregon Tort Claims Act at issue in *Horton*, ORS 31.710 does not modify the common-law duty that a defendant owes a plaintiff—to act with reasonable care.[29] Instead, it limits, *without eliminating*, the remedy that an injured plaintiff may recover for injuries caused by a breach of that duty.[30]

At the outset, the *Busch* Court rejected defendant's argument that noneconomic damages were less protected under the remedy clause, which places a substantive limit on the legislature's ability to modify the remedy for personal injuries.[31] Despite there being differences in

[24] *Id.* at 224.
[25] *Id.* at 225.
[26] *Busch v. McInnis Waste Sys, Inc.*, 366 Or. 628, 639 (2020).
[27] *Id.* at 630.
[28] *Id.*
[29] *Id.* at 639–40.
[30] *Id.* at 640.
[31] *Id.* at 645–46.

verifiability between economic and noneconomic damages, the Court recognized that *both* are intended to compensate a plaintiff for their injuries.[32] In fact, the Court went so far as to explicitly 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."[33] This conclusion finds support in the common law, because, as the Court noted, at the time the remedy clause was adopted, the common law allowed recovery for both tangible and intangible injuries.[34]

While not bound by *Horton*, the *Busch* Court applied the *Horton* framework for assessing whether the damages cap violated the remedy clause. It began by recognizing that a common-law duty of care existed between the parties in the case and that the injured party had a right to bring the claim for its injuries.[35] In enacting ORS 31.710(1), the legislature did not alter the common-law duty of reasonable care nor did it bar a grievously injured plaintiff from seeking an award that a jury determined necessary to compensate them for their economic and noneconomic injury.[36]

The Court then inquired whether the legislature's reasons for imposing limits on recovery were sufficiently weighty to counterbalance the Article I, section 10, right to remedy.[37] There, the justification was in reducing insurance costs and improving insurance availability.[38] Not only was this concern less persuasive to the Court than the justification in *Horton*, it noted that unlike the Tort Claims Act, which gives injured persons the ability to bring a claim against a solvent

[32] *Busch*, 366 Or. at 645-46.; *see also* ORS 31.710(1)(a)–(b) (defining both economic and noneconomic damages as "losses"); Black's Law Dictionary 489 (11th ed. 2019) (defining "compensatory damages" as "[d]amages sufficient in amount to indemnify the injured person for the loss suffered").
[33] *Busch*, 366 Or. at 647.
[34] *Id.* at 646.
[35] *Id.* at 650 (citing *Fazzolari v. Portland School Dist. No. 1J*, 303 Or. 1, 16 (1987)).
[36] *Id.* at 650–51.
[37] *Id.*
[38] *Id.* at 647–48.

defendant that otherwise would have been immune from suit, ORS 31.710(1) does not expressly confer a benefit on injured persons.[39] While not dispositive, the Court found the lack of a *quid pro quo* to counterbalance the right to a remedy under Article I, section 10, makes the limitation on damages far less likely to pass constitutional muster.[40]

Ultimately, the Oregon Supreme Court concluded that in enacting the damages cap in ORS 31.710(1) of $500,000, the legislature left the defendants' common-law duty of care intact, but in doing so, deprived injured plaintiffs of the right to recover damages assessed for breach of that duty.[41] This deprivation of rights, the Court found, lacked any *quid pro quo* dynamic, and was not supported by an equally sufficient reasoning to counterbalance that loss.[42] As a result, the Court concluded that application of ORS 31.710(1), as a limit on the noneconomic damages that a court can award to a plaintiff, violates Article I, section 10.[43]

2. PacifiCorp's requested waiver of liability leaves customers with an insubstantial remedy in violation of Oregon's remedy clause.

Horton and *Busch* provide the framework for the Commission to assess whether PacifiCorp's requested waiver of liability is constitutional under Article 1, section 10. Under this framework, PacifiCorp's proposed terms of service limiting customers to solely economic damages are patently unconstitutional. At the outset, it is important to recognize the unprecedented scope of PacifiCorp's waiver of liability, *a total bar on all noneconomic damages*. Neither *Horton* or *Busch* dealt with a total restriction on noneconomic damages, and instead, merely dealt with caps of liability.[44] By barring injured customers from seeking

[39] *Busch,* 366 Or. at 651.
[40] *Id.*
[41] *Id.* at 652.
[42] *Id.*
[43] *Id.*
[44] Noneconomic damages were capped at $3,000,000 under the Oregon Tort Claims Act in *Horton* and $500,000 under ORS 31.710(1) in *Busch*. *Horton,* 359 Or. 168, 173; *Busch,* 366 Or. 628, 630.

noneconomic damages entirely, PacifiCorp ignores the Oregon Supreme Court's detailed discussion in *Busch* of the purpose and history of noneconomic damages in Oregon law.[45]

The Court's analysis in *Busch* and *Horton* provides the Commission ample support to reject PacifiCorp's request outright. The utility does not seek to modify or cap the amount of noneconomic damages it may be liable for; instead, it requests the Commission entirely eliminate a category of damages that are substantively protected under the remedy clause. In fact, PacifiCorp's request goes even further, excluding all damages it refers to as "a-typical" from recovery.[46] These "a-typical" damages include not only noneconomic damages, but also special damages, punitive damages, incidental damages, indirect damages, and consequential damages.[47] Under Oregon law, the total bar on noneconomic damages is enough to run afoul of the remedy clause, and when taken together with the other types of damages that would not be recoverable, the waiver is plainly unconstitutional.

However, even if the Commission chooses not to reject the request for the facial violation of the remedy clause, the application of the framework established and applied in *Busch* and *Horton* yields the same conclusion: PacifiCorp's liability waiver is an unconstitutional infringement of the Oregon remedy clause. First, PacifiCorp's waiver of liability does not—and could not—alter the common-law duty that a defendant owes a plaintiff: to act with reasonable care. Similarly, under Oregon statute, every public utility has a duty to furnish adequate and safe service to its customers; this duty to exercise ordinary and reasonable care remains unchanged.[48]

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[45] *Busch*, 366 Or. 628, 644–47.
[46] PacifiCorp, Advice No. 23-018–Rule 4–Appl. for Elec. Serv. at 1 (Oct. 24, 2023) [hereinafter "PacifiCorp Initial Appl."].
[47] *Id.*
[48] ORS 757.020; *see also* 64 Am. Jur. 2d Pub. Utils. § 13 (2024) (Explaining that public utilities "owe a duty of care to the general public. Generally, a public utility has the duty, as an element of negligence, to exercise ordinary and reasonable care, but the degree of care required must be commensurate with the danger. Thus, if a utility company recognizes that its conduct under certain circumstances creates an unreasonable risk of harm to another, it has a duty to take reasonable precautions to prevent that risk of harm from occurring") (citing *Hanson v. Union Elec. Co.*, 963

Where a duty of care is not altered, but the remedy available for an injured party is reduced, the court considers "whether the legislature's reasons for imposing those limits are sufficiently weighty to counterbalance the Article I, section 10, right to remedy."[49]

Here, the facts of *Horton* and *Busch* are particularly insightful examples given the cases' contrasting results. In *Horton*, where the damages cap was upheld, the Court noted that the justification for the cap—the doctrine of sovereign immunity—was dispositive. The Court recognized the state's "constitutionally recognized interest in sovereign immunity" and the fact that the Tort Claims Act included a partial waiver of that immunity, provided plaintiffs with access to a remedy that they otherwise would not have.[50]

The reasons underpinning the *Horton* decision stand in stark contrast with those analyzed in *Busch*. There, the cap imposed by ORS 31.710(1) was justified under economic terms, specifically, the goal of reducing insurance costs and increasing insurance availability,[51] similar to what PacifiCorp has argued here. The *Busch* Court found that these reasons were insufficient to justify the cap on noneconomic damages, especially compared to the interests at stake in *Horton*.[52]

PacifiCorp's request mirrors the facts of *Busch.* In its filing, the Company justifies the bar on damages in purely economic terms, specifically that limitations on liability keep rates low for customers, allowing the Company to more easily finance expenditures and protect its credit rating.[53] Not only has the Oregon Supreme Court previously found economic justifications for

S.W.2d 2 (Mo. App. Ct. E.D. 1998); *City of Austin v. Membreno Lopez as Next Friend of Lopez*, 632 S.W.3d 200 (Tex. App. Ct. Austin 2021), petition for review filed, (Oct. 29, 2021); *Lajaunie v. Cent. La. Elec. Co., Inc.*, 552 So. 2d 746 (La. App. Ct. 1st Cir. 1989), writ denied, 558 So. 2d 1130 (1990)).

[49] *Busch*, 366 Or. at 642–43.

[50] *Horton*, 359 Or. at 225.

[51] *Busch*, 366 Or. at 648.

[52] *Id.*

[53] PacifiCorp Initial Appl. at 2–3.

remedy reductions inadequate, but PacifiCorp's assertions of economic necessity are just that—assertions lacking factual backing. The Company has not provided any evidence to the Commission in its filing or briefing that a limitation on liability would improve its credit ratings or reduce costs to customers. It is asking the Commission to blindly trust its conclusions as justification for massive reductions in the status quo's remedial scheme rooted in centuries old common law doctrines.

Notably, the costs PacifiCorp describes are not eliminated under its proposal; rather, they are shifted away from the Company—a multi-billion-dollar corporation with the resources and sophistication to reduce the wildfire risk associate with operating its system—onto individual customers who may bear large unrecoverable losses from risks they cannot control. Consequently, even if PacifiCorp's economic assertions are accurate, Oregon Supreme Court precedent establishes that the Company's economic interest fails to rise to the level of significance necessary to justify such a dramatic reduction in injured persons right to recover damages. Just as the *Busch* Court found that the economic goal of decreasing insurance prices was insufficient to support capping noneconomic damages, a private company's bottom-line is not adequate to justify the elimination of recovery from the entire realm of noneconomic damages. Accordingly, it is not necessary to further evaluate whether PacifiCorp's economic claims are valid or invalid—they do not and cannot outweigh the public's interest under the remedy clause.

Similarly, part of the reason the *Horton* court upheld the Oregon Tort Claims Act was that the legislature, in adopting the statute, made readily apparent in the legislative history that the $3,000,000 noneconomic damages cap was researched, adjusted for inflation, represented a sum capable of restoring the right that had been injured in most scenarios, and would be able to

do so over time.[54] Meanwhile in *Busch,* no such counterbalancing factors were present in the statute's goals, justification, or history.[55] Here, PacifiCorp ask that the Commission approve its waiver, entirely eliminating the rights of those injured to recover constitutionally protected damages, does so on flimsy economic grounds, and with no research or consideration in its filing or briefing about how the change in terms of service will impact those injured by wildfires. PacifiCorp customers may suffer numerous kinds of injuries and harms in the future and to foreclose their ability to be made whole via a-typical damages is not only unconstitutional, it is poor public policy. Again, this factor cuts heavily against the approval of PacifiCorp's waiver and is unconstitutional.

Finally, both *Horton* and *Busch* underscore the importance of a *quid pro quo* dynamic when assessing the constitutionality of damages limitations. Under this line of reasoning, where the legislature provides injured persons with "something they otherwise would not have had," the cap on damages is more likely to survive constitutional inquiry under Article I, section 10.[56] For example, *Horton* highlights that under the Tort Claims Act, plaintiffs received the ability to recover damages from the state, something not available had it not partially waived its immunity.[57] Similarly, in *Hale v. Port of Portland,* the court noted that the challenged statute expanded the class of plaintiffs who can seek a remedy by removing the requirement that an injured party show the defendants activity that led to the injury was a proprietary one.[58] Conversely, in *Busch*, the court rejected ORS 31.710(1)'s damages cap, noting that the purported *quid pro quo* of lowered insurances prices was merely a benefit intended for "society in general

[54] *Horton,* 359 Or. at 223.
[55] *Busch,* 366 Or. at 651–52.
[56] *Id.* at 650–51; *Horton,* 359 Or. at 219.
[57] *Busch,* 366 Or. at 637-638, 651; *Horton,* 359 Or. at 222.
[58] *Hale v. Port of Portland,* 308 Or. 508, 523 (1989).

as opposed to injured persons in particular."[59] Thus, the *quid pro quo* factors turns on whether, the limitation of plaintiffs remedial rights is counterbalanced by providing the injured parties with an additional benefit they would not have otherwise have had, such as a reduced burden for establishing liability, or the ability to seek recovery from an otherwise immune defendant.

While a *quid pro quo* is not *per se* necessary to survive a remedy clause challenge, it "has often been present" where the Oregon Supreme Court upholds a statute that limits the remedies available for breach without modifying a common-law duty.[60] Therefore, the failure to provide a tradeoff to counterbalance plaintiffs' right to a remedy "strikes a real blow" to the legitimacy of a damages cap.[61]

Here, there is no *quid pro quo* present to tip the substantiality analysis in PacifiCorp's favor. The Company's request does not ask the Commission to grant injured customers any right they would not have previously had under the terms of service. Instead, it entirely eliminates a substantively protected right to seek noneconomic damages without granting anything in return. PacifiCorp's argument that liability limitations serve as a *quid pro quo* in exchange for the "economic regulation" of utilities is a fundamental misunderstanding of Oregon law on the subject.[62] Under *Horton* and *Busch*, the crux of the *quid pro quo* analysis is whether the restriction on liability is counterbalanced by an equally compelling benefit afforded to the person losing their remedial rights.[63] Here, injured customers are losing their ability to recover noneconomic damages, yet, receive nothing in return under the waiver that they do not already

[59] *Busch,* 366 Or. at 651
[60] *Id.* at 649–50; *see also Horton*, 359 Or. at 225 (explaining that decision turns in part on the "*quid pro quo* that the Tort Claims Act provides"); *Howell v. Boyle*, 353 Or. 359, 376 (2013) (explaining that a "*quid pro quo* may be seen to apply"); *Hale,* 308 Or. at 523 (explaining that "[a] benefit has been conferred, but a counterbalancing burden has been imposed").
[61] *Horton,* 359 Or. at 225; *Busch,* 366 Or. at 651.
[62] PacifiCorp's Opening Br. at 7.
[63] *Busch,* 366 Or. at 649–50; *Horton,* 359 Or. at 225.

have under the status quo. As such, PacifiCorp's attempts to frame the *quid pro quo* discussion purely in terms of what the Company is giving up and gaining is misguided.

PacifiCorp's request before the Commission represents an unprecedented change to the rights of Oregonians to seek damages when the Company violates its duty of care to them. PacifiCorp fails in its filing or briefing to grapple with the clear Oregon Supreme Court precedent addressing when such damages limitations are constitutional under the remedy clause. When the Oregon Supreme Court's framework is applied to the Company's proposed waiver of liability, it fails every element. The requested waiver is unconstitutional and the Commission should reject it as such.

B. The Liability Limitation Requested by PacifiCorp is Unenforceable Under Oregon Law.

Even if the proposed tariff revision is not strictly unconstitutional, it is not enforceable under Oregon law. Under PacifiCorp's proposed tariff terms, by receiving electric service, customers would be entering into a contract with the Company wherein their rights to all a-typical damages suffered due to the operation or provision of electricity would be waived. As a binding contract, the Commission should take care to ensure the proposed terms are enforceable under Oregon law before it approves PacifiCorp's revisions. While agreements that exonerate a party from liability for tortious conduct are not automatically voided under state law, the Oregon Supreme Court, as a general practice, views such terms unfavorably.[64] When analyzing the validity of an agreement, courts consider the "subject and terms of the agreement and the relationship of the parties."[65] Here, these considerations tip heavily against approval of the Company's request and are unconscionable under Oregon law.

[64] *K-Lines, Inc. v. Roberts Motor Co.*, 273 Or. 242, 248 (1975).
[65] *Id.*

1. Contracts with unconscionable terms are unenforceable at Oregon law.

Oregon courts have recognized their authority to refuse to enforce unconscionable contracts since the nineteenth century.[66] Unconscionability is "assessed as of the time of contract formation," and the doctrine "applies to contract terms rather than to contract performance."[67]

Under Oregon law, unconscionability of contract terms can be procedural or substantive.[68] For procedural unconscionability, courts look to the degree of oppression and surprise present in the formation of the contract.[69] Oppression considers whether there was inequality in bargaining power between the parties and insufficient opportunity for one party to negotiate, or "the absence of meaningful choice."[70] The degree of oppression involves weighing whether the agreement was between two equals, such as that of a commercial bargain, or between a commercial enterprise (or other knowledgeable entity) and an individual, such as a consumer transaction.[71] To the degree that the agreement unreasonably favors the side with greater power,[72] the court will consider both the disparity between the parties' ability to negotiate and whether the result is clearly one-sided.[73] Surprise arises when a party did not know of the contested terms in the agreement, or when the knowledgeable party did not "meaningfully

[66] *See Balfour v. Davis*, 14 Or. 47, 53 (1886) (refusing to award attorney fees because amount specified in contract was unconscionable); *see also Caples v. Steel*, 7 Or. 491 (1879) (court may refuse specific performance if bargain is unconscionable).
[67] *Best v. U.S. Nat'l Bank of Or.,* 303 Or. 557, 560 (1987).
[68] *Bagley v. Mt. Bachelor, Inc.*, 356 Or. 543, 555-56 (2014); *see also AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 340 (2011).
[69] *Motsinger v. Lithia Rose-FT, Inc*., 211 Or. App. 610, 614–15 (2007).
[70] *Id.* at 614.
[71] *Becker v. Hoodoo Ski Bowl Devs., Inc*., 269 Or. App. 877 (2015) (finding that a liability waiver between a ski resort aka commercial enterprise and patron contains a superior bargaining strength on a take-it-or-leave-it basis, making it unconscionable).
[72] *Vasquez-Lopez v. Beneficial Or., Inc.*, 210 Or. App. 553, 566–67 (2007).
[73] *See Tapley v. Cracker Barrel Old Country Store, Inc.*, 448 F. Supp. 3d 1143, 1150 (D. Or. 2020) (citing some examples such as one-sided discovery, coverage, and payment of fees).

communicate" a limitation included in the agreement.[74] Overall, the inquiry requires consideration of the conditions under which the parties entered the contract.[75]

Taking these principles into account, in *Carey v. Lincoln Loan Co.*, the Court of Appeals held that a land sale contract that restricted the vendees ability to sell the property was procedurally unconscionable.[76] The provision in question prohibited assignment of the contract without the landlord's consent, allowing it to impose absolute restrictions on assignment, such as a $13,000 payment requirement.[77] The plaintiffs entered into the contract at a time when they had no other options for suitable housing, had no experience in buying a home, and did not understand the provisions in the contract restricting assignment.[78] The seller had the assistance of an attorney and had extensive business experience.[79] The court held that although there was no "evidence of trickery or deceit," there was a substantial difference in power and knowledge between the parties and the landlord included the provision solely for its own benefit.[80] This significant power imbalance between the contracting parties, paired with materially unfair terms to the detriment of the less-advantaged party was sufficient for a finding of procedural unconscionability.[81]

To determine substantive unconscionability, the court will consider the results of the terms of the agreement and whether they contravene the public interest or public policy.[82] The

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[74] *Motsinger*, 211 Or. App. at 614–16; *see also Tokyo Ohka Kogyo Am., Inc. v. Huntsman Propylene Oxide LLC*, 35 F. Supp. 3d 1316, 1334 (D. Or. 2014) (holding that a Limitation Clause to avoid paying damages for harm that only the knowing party could have avoided is procedurally unconscionable where a knowing party did not establish negotiation or meaningful communication with the unknowing party).
[75] *Motsinger*, 211 Or. App. at 614; *Carey v. Lincoln Loan Co.*, 203 Or. App. 399, 425 (2005).
[76] *Carey*, 203 Or. App. 399, 425–27.
[77] *Id*. at 426-28.
[78] *Id*. at 425-26.
[79] *Id*.
[80] *Id*.
[81] *Id*.
[82] *Bagley*, 356 Or. at 556.

"essential issue" in courts analysis here, is "[t]he substantive fairness of the challenged terms."[83] The court will at minimum, consider whether the enforcement of the release would cause "overly harsh" or "one-sided" results favoring the side with greater bargaining power,[84] whether defendant's business operation serves an important public interest or function, and whether the release purported to disclaim liability for more serious misconduct than ordinary negligence.[85]

In this light, Oregon courts will enforce liability waivers for a party's tortious conduct only in "limited circumstances."[86] Courts will analyze the intent of the parties and the scope of the waiver, disfavoring language that is "broad but indefinite," (for example, "any and all claims or any and all liability,"[87] but not referencing specific risks and conduct) along with the difference in status between the parties and the allocation of benefits from the contract.[88] Further, Oregon courts "disfavor" enforcing contracts releasing parties with unequal power from liability, where "the risks of harm posed by operator negligence are appreciable."[89] In *Owens v. Mt. Hood Ski Bowl, LLC*, the court held that a release in the defendant's contract was unconscionable because the defendant was in a "better position" to control risks of harm that could result from its maintenance of the premises.[90]

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[83] *Vasquez-Lopez*, 210 Or. App. at 567 (quoting *Carey*, 203 Or. App. at 422–23).
[84] *Id.* at 567; *AT&T Mobility LLC*, 563 U.S. at 340.
[85] *AT&T Mobility LLC*, 563 U.S. at 340; *see also Bagley*, 356 Or. at 559-60, 570–71 (finding that a harsh and inequitable result would follow if defendant were immunized from negligence liability, "in light of (1) defendant's superior ability to guard against the risk of harm to its patrons arising from its own negligence in designing, creating, and maintaining its …. facilities; and (2) defendant's superior ability to absorb and spread the costs associated with insuring against those risks").
[86] *Nat'l Union Fire Ins. Co. of Pittsburgh Pa. v. Starplex Corp*., 220 Or. App. 560, 576 (2008).
[87] *Id.*
[88] *Id.*; *see also Siggelkow v. Nw. Grp., Inc.*, 2019 WL 294759, at *7 (D. Or. 2019) (Employment related arbitration agreement is found to be unconscionable where "[t]aken together, the one-sided nature of the Agreement, the one-year limitations provision, and the cost-sharing requirement combine to effectively deprive Plaintiff of the full opportunity to vindicate his legal rights.").
[89] *Owens v. Mt. Hood Ski Bowl, LLC*, 2020 WL 10758243, at *9 (Or. Cir. Mult. Cnty. 2020) (citing to *Bagley*, 356 Or. at 573).
[90] *Id.*

Oregon courts are especially skeptical of agreements waiving liability for a party where that party is "charged with a duty of public service."[91] In *Real Good Food*, the court held a bank's liability release for lost deposits caused by negligence of one of its employees was unconscionable.[92] It noted that, like common carriers and *public utilities*, banks serve an "important public service" and thus cannot limit its responsibility for the negligence of its employees.[93] The court explained that it is "well settled" under Oregon law that where a defendant is charged with a duty of public service, "and the agreement to assume the risk relates to the defendant's performance of any part of that duty, . . . it will not be given effect."[94] Because utilities are charged with a duty to the public, "which includes the obligation of reasonable care, such defendants are not free to rid themselves of their public obligation by contract, or by any other agreement."[95]

In *Bagley*, citing to *Real Good Food* and other previous decisions, the court summarized the several factors to consider in determining whether a contractual liability release is unenforceable, both procedurally and substantively.[96] For procedural unconscionability, the court considered whether the clause was conspicuous and unambiguous, the disparity between the bargaining power of the parties, whether it was take-it-or-leave-it, and whether it involved a consumer transaction.[97] For substantive unconscionability, these included whether it would produce an inequitable result, whether the party asking for the release serves an important or public function, and whether it intends to release liability for "more serious misconduct than

[91] *Real Good Food Store, Inc. v. First Nat'l Bank of Or.*, 276 Or. 1057, 1061 (1976).
[92] *Id*. at 1064.
[93] *Id*. at 1060–61.
[94] *Id.*
[95] *Id.*
[96] *Bagley*, 356 Or. at 559–60.
[97] *Id*.

ordinary negligence."[98] The court also noted that the factors were of equal importance and the determination was fact-specific.[99]

2. PacifiCorp's requested waiver of liability is unconscionable.

Under this well-established case law, PacifiCorp's requested limitation of liability is unconscionable and thus unenforceable under *both* procedural and substantive grounds. Staggeringly, all four of the grounds for procedural unconscionability discussed in *Bagley* are present in PacifiCorp's waiver, making it a straightforward example of an unlawfully unconscionable agreement provision.

Beginning with the parties' relative bargaining power, there is a substantial disparity in almost every regard between a multi-billion-dollar utility and the average residential electricity customer. PacifiCorp is the more sophisticated entity, with greater financial backing, legal support, and, of course, the actual power to control the electrical system at issue. As the *Bagley* court pointed out, where such a disparity in bargaining power exists between the parties, "the agreement does not represent a free choice on the part of the plaintiff."[100] Notably, the bargaining disparity sufficient for unconscionability in *Bagley* was between a ski resort operator (defendant) and a snowboarder customer (plaintiff). Here, PacifiCorp's status as an electrical utility operating in six western states far exceeds the sophistication and power imbalance identified as sufficient in *Bagley*.

Closely tied to the bargaining power factor is whether the liability waiver was offered on a take-it-or-leave-it basis, leaving the plaintiff no meaningful choice. Here, the *Bagley* court offers particularly illuminating insight, explaining that where the defendant has a "monopoly of a particular field of service," and uses general provisions "insisting upon assumption of risk . . . so

[98] *Id.*
[99] *Id.*
[100] *Id.* at 561 (quoting *Restatement (Second) of Torts* § 496B (1965)).

that plaintiff has no alternative possibility of obtaining service without the clause" those factors tip in favor of a finding of procedural unconscionability.[101] Again, PacifiCorp epitomizes this type of defendant: the utility is an actual monopoly and seeks to impose the waiver via its general terms of service, leaving customers no choice but to assent if they wish to receive electricity. Like the plaintiff in *Bagley*, PacifiCorp customers have no opportunity to negotiate for different terms or even pay an additional fee for protection against defendant's negligence.[102]

Given that the *Bagley* court found it "significant" that the limited number of areas providing downhill winter sports opportunities in Oregon left the plaintiff with no meaningful alternative than to assent to the terms proposed by the defendant, electric utilities, operating as monopolies, satisfy this condition. Ultimately, it is the responsibility of the party in the superior bargaining position when offering a take-it-or-leave-it contract to ensure that the provisions are not so one-sided as to be unconscionable.[103] PacifiCorp has failed to meet this burden in proposing its expansive liability waiver to everyday customers who have no meaningful choice about whether to enter the transaction or its terms.

Incorporated into *Bagley's* analysis of the above two factors is the court's discussion of the third indicia of procedural unconscionability: whether the agreement is a consumer transaction or a commercial bargain.[104] The court contrasts commercial agreements, where both entities have equal bargaining power and sophistication, with consumer transactions, where the everyday consumer is unlikely to have the knowledge or power necessary to make the agreement procedurally fair in any meaningful sense.[105] This element is again present in PacifiCorp's

[101] *Id.* at 562 (quoting *Restatement (Second) of Torts* § 496B (1965)).
[102] *Bagley*, 356 Or. at 562.
[103] *Id.* (quoting *Strand v. U.S. Bank Nat'l Ass'n,* 693 N.W. 2d 918, 925 (N.D. 2005)).
[104] *Id.* at 555, 560.
[105] *Id.; see also Becker v. Hoodoo Ski Bowl Devs., Inc.,* 269 Or. App. 877 (2015).

proposed waiver of liability, given that it applies to *all* customers, including the everyday residential electricity consumer.

The final factor, whether the terms of the agreement are conspicuous and unambiguous, may be the least egregious in PacifiCorp's proposal, but still cuts against approving the request. While the proposed language is arguably unambiguous in alerting customers as to their waiver, it is not conspicuous. PacifiCorp imposes the burden on customers to affirmatively seek this information out in PacifiCorp's tariff sheets, and they are presumed to assent to the tariff's terms by accepting electricity service even when they possess no knowledge of the terms. This is notably different from the liability waiver at issue in *Bagley*, which was highlighted, underlined, and placed at the beginning of the agreement,[106] yet still found to be unconscionable. Given that all four procedural unconscionability factors are met here, the Commission should adhere to the well-established body of Oregon law and deny PacifiCorp's request.

In addition to problems of procedural unconscionability, the proposed tariff is also substantively unconscionable. Under *Bagley*, the relevant considerations for substantive unconscionability include "whether enforcement of the release would cause a harsh or inequitable result to befall the releasing party; whether the release serves an important public interest or function; and whether the release purported to disclaim liability for more serious misconduct than ordinary negligence."[107] These factors are all present in this proceeding, cementing the unconscionable character of PacifiCorp's waiver terms.

First, the enforcement of the release would undoubtedly cause a harsh or inequitable result on the releasing party. Relieving the utility of all noneconomic liability would mean that its customers would be unable to recover a potentially significant portion of the damages they

[106] *Bagley*, 258 Or. App. 390, 408 (2013).
[107] *Bagley*, 356 Or. at 560.

suffer as a result of wildfires caused by PacifiCorp. As *Bagley* explained, such a result is unfairly harsh where a plaintiff would not have been injured had defendant exercised reasonable care in the design, maintenance, and operation of its facilities.[108] Such a harsh result is also inequitable because the business, *not the customers*, holds the expertise and opportunity to foresee and control risks of its own creation, as well as guard against the negligence of its employees, and yet such a release effectively relieves the duty of the business to control such risks while leaving customers to suffer the consequences.[109] That discussion maps seamlessly onto this dispute. PacifiCorp seeks to disclaim all liability for noneconomic damages suffered by customers, including those that are suffered as a result of the Company's failure to exercise reasonable care in the design, maintenance, and operation of its electrical systems.

Similarly, it is the utility, not the consumers, who have the power, knowledge, money, and control to foresee the risks of wildfire and take steps to mitigate those risks. Forcing customers, with no other meaningful choice in electrical providers, to assume that risk is deeply unfair and inequitable. The unduly harsh outcomes that approval of the waiver may yield become all the more apparent when one considers the example of neighbors, who, due to the noncontiguous nature of electric utility territory in Oregon, are served by different utilities, one by PacifiCorp, and the other by a different utility. In the event of a wildfire caused by PacifiCorp's operations, scenarios could arise where both neighbors' homes are destroyed and significant economic and noneconomic damages are suffered. Yet, under the terms of the proposed liability waiver, only the non-PacifiCorp customer would be able to seek noneconomic damages from PacifiCorp for its contribution to the fire, while the PacifiCorp customer, through

[108] *Id.* at 563.
[109] *Id.*; *see also Chalk v. T-Mobile USA, Inc.*, 560 F. 3d 1087, 1095 (9th Cir. 2009) (finding a harsh and inequitable result where a class action waiver removed the incentive for defendant to not act fraudulently).

no fault of their own, would be left with significantly limited recourse to recover for the full extent of their injuries. These kinds of patently unfair and harsh results are to be avoided under the doctrine of unconscionability and, again, tip in favor of denying PacifiCorp's request.

Next, courts consider whether the defendant's business operation serves an important public interest or function.[110] Courts are more likely to find waivers of liability unconscionable when the defendant's business operation involves serving a compelling public interest.[111] This outcome is deeply rooted in the common law understanding that where businesses are public accommodations or render services in the public interest, they owe a heightened level of responsibility to the public which they serve and, thus, should not be permitted to waive their duty of care and subsequent liability for a breach of that duty.[112] *Real Good Food* specifically identifies public utilities as one sector where a defendant is charged with a duty of public service, and where "the agreement to assume the risk relates to the defendant's performance of any part of that duty, . . . it will not be given effect."[113] Therefore, PacifiCorp's effort to shirk its responsibility as a business providing a public service directly cuts against the enforcement of the waiver as substantively unconscionable and bad public policy.

Finally, courts consider the nature of the conduct to which the release of liability would apply. The Oregon Supreme Court has held that an anticipatory release of liability violates public policy where it immunizes the releasee from liability for gross negligence, reckless or intentional conduct.[114] As the court reiterated in *Bagley*, "[i]t is axiomatic that public policy favors the

[110] *Bagley*, 356 Or. at 565.
[111] *Id.* at 565–69.
[112] *Id.* at 568; *see also Lombard v. La.*, 373 U.S. 267, 279 (1963).
[113] *Real Good Food*, 276 Or. at 1061; *see also Bagley*, 356 Or. at 559–60 (agreeing with *Real Good Food's* conclusion that utility companies and other public service providers owe a heightened responsibility to the public and are not free to rid themselves of that obligation via release clauses).
[114] *K-Lines*, 273 Or. at 249.

deterrence of negligent conduct.[115] This is especially true, according to the Court, where the immunized party's activities involve considerable risks to life and limb.[116] Without the potential exposure to liability for their own negligence, defendants "lack a commensurate legal incentive to avoid creating unreasonable risks of harm."[117]

These considerations are directly applicable to PacifiCorp's requested provision and are strong indicators that the Commission should deny the request. As a threshold matter, the Company's proposed waiver of liability extends beyond mere acts of negligence, which is grounds alone under *K-Lines* to presume it substantively unconscionable.[118] The waiver is worded so broadly as to release the company from "*any and all claims*" for noneconomic damages.[119] This would include instances where the Company or its employees are grossly negligent, reckless, or intentional in their acts that damage customers. As the Oregon Court of Appeals noted in *National Union Fire Insurance Co. of Pittsburgh Pennsylvania v. Starplex Corp.*, where broad but indefinite language such as the phrase "any and all claims" is used in disclaimers of liability without reference to particular risks or to the indemnitee's own conduct, courts need to review the contextual dynamics of the agreement with greater scrutiny.[120]

Such a broad disclaimer of all claims is especially egregious where there is considerable danger to the public, as is the case here, as wildfires pose grave human and economic risks to Oregonians. As the court recognized in *Bagley*, granting PacifiCorp its expansive waiver of liability could disincentivize the Company from upholding its duty of care and taking reasonable steps to reduce the potential hazards to the public and minimizing the risks of wildfire. In this

[115] *Bagley*, 356 Or. at 572 (citing 2 *Farnsworth on Contracts* § 5.2, 9–12).
[116] *Id.*
[117] *Id.* at 572–73; *see also Ala. Great S. R.R. Co. v. Sumter Plywood Corp.*, 359 So. 2d 1140, 1145 (Ala. 1978) (human experience shows that exculpatory agreements induce a lack of care).
[118] 273 Or. at 249.
[119] PacifiCorp Initial Appl., Proposed Tariff Sheets at 3.
[120] *Nat'l Union Fire Ins. Co. of Pittsburg Pa.,* 220 Or. App. at 576–77.

way, liability functions as a stick to promote the public interest by incentivizing business to affirmatively act to minimize appreciable risks of its operations. Given the substantial threat posed by wildfires and PacifiCorp's ability to foresee and mitigate those risks by fire-hardening its system, the Commission should not eliminate an important tool for motivating the Company to take such measures in accordance with its duty of care.

III. PACIFICORP'S PROPOSED TARIFF REVISION IS NOT SIMILAR TO OTHER LIABILITY LIMITATIONS EITHER IN OREGON OR IN OTHER STATES

As described above, PacifiCorp's tariff proposal violates Oregon law. The Company's claim that its request nevertheless aligns with other liability protections previously granted by this and other Commissions is simply inaccurate. Indeed, the Company fails to identify a single example analogous to its request in this proceeding precisely because the scope of PacifiCorp's liability protection request is truly unprecedented.

A. PacifiCorp's Examples of Oregon Liability Limitations Do Not Support the Company's Request.

None of the five cases principally relied upon by PacifiCorp support the Company's theory that the Commission may insulate PacifiCorp from all liability (aside from actual damages) for any of its actions, regardless of its standard of care.[121] In *Boardmaster Corp. v. Jackson County*, PacifiCorp was shielded from liability arising from the suspension of electrical services to a lumber mill, Boardmaster Corporation, because the suspension had been ordered by Jackson County. PacifiCorp relied on a tariff protecting it from liability for service suspensions when the suspension was done in reliance on government authority.[122] This narrow liability exemption was specifically designed to protect utilities from service interruption liability when

[121] PacifiCorp's Opening Br. at 2–4 (relying upon *Boardmaster Corp. v. Jackson Cnty.*, 224 Or. App. 533 (2008); *Simpson v. Phone Directories Co.*, 82 Or. App. 582 (1986); *Garrison v. Pac. Nw. Bell*, 45 Or. App. 523 (1980); *Olson v. Pac. Nw. Bell*, 65 Or. App. 422 (1983); and *Adamson v. WorldCom. Commc'ns, Inc.*, 190 Or. App. 215 (2003)).
[122] *Boardmaster Corp.*, 224 Or. App. at 537–38.

the interruptions occur through no fault of the utility. In other words, in these situations, the utility's actions do not amount to negligence (or worse), making the liability shield entirely different in kind from what PacifiCorp proposes here.

Both *Garrison v. Pacific Northwest Bell* and *Simpson v. Phone Directories Co.* are equally unpersuasive in supporting PacifiCorp's proposed tariff revision. In both of these cases, the Oregon Court of Appeals enforced utility tariffs limiting damages available to plaintiffs for defendant-utilities' failure to include plaintiffs' directory listings in the yellow and white pages.[123] In *Garrison*, the court considered the Commission's ratemaking authority and the scope of a utility's service obligation, concluding that "[r]ates, service levels, and the remedy for erroneous listings or service failures are inseparable."[124] Similarly, in *Simpson*, the court confirmed that the Commission has extensive authority over setting rates and that "[t]he overall statutory scheme inextricably links rates and service levels."[125] In this way, both courts' holdings were limited to liability protections pertaining to *quality and continuity of service*, which carries some logic because a utility cannot be expected to provide uninterrupted and perfect service 100 percent of the time. This is why liability limitation provisions "typically limit the liability exposure of an electric utility company . . . for interruptions of service to instances of willful negligence or wanton misconduct."[126] In other words, liability limitations are typically only authorized for damages arising from disruptions in service (not more broadly to any action taken by the utility) and for ordinary negligence (not when the utility is grossly negligent or engages in

[123] *Garrison*, 45 Or. App. at 525-26; *see also Simpson*, 92 Or. App. at 584.
[124] *Garrison*, 45 Or. App. at 531.
[125] *Simpson*, 82 Or. App. at 586.
[126] John L. Rudy, *Limitation of Liability Clauses in Pub. Util. Tariffs: Is the Rationale for State-Sponsored Indemnity Still Valid?*, 52 Buff. L. Rev. 1379, 1379 n. 2 (2004), *available at* https://digitalcommons.law.buffalo.edu/buffalolawreview/vol52/iss4/8?utm_source=digitalcommons.law.buffalo.edu%2Fbuffalolawreview%2Fvol52%2Fiss4%2F8&utm_medium=PDF&utm_campaign=PDFCoverPages (discussing why, although liability limitations for interruptions of service resulting from ordinary negligence have been historically accepted as necessary, deregulation questions the continued validity of liability limitations).

wanton misconduct).[127] Yet, the liability protection that PacifiCorp asks the Commission to grant in this proceeding is not limited to interruptions or suspension of service. Rather, PacifiCorp would be significantly protected from liability for any damages that it or its employees cause in the course of their operations, regardless of their standard of care.

Next, and contrary to PacifiCorp's assertions, *Olson v. Pacific Northwest Bell* decidedly did *not "*affirm[] that a Commission-approved tariff that limited damages to a billing credit for the time a customer's service was interrupted [] provided a sufficient defense against liability in civil suits unless the plaintiff proved gross negligence."[128] In *Olson*, the Oregon Court of Appeals evaluated whether the plaintiff's complaint, alleging negligence, gross negligence, and breach of contract, could survive a motion to dismiss. The defendant-utility alleged that plaintiff's claims were barred under any theory aside from gross negligence due to the defendant-utility's tariff limiting damages recoverable for ordinary negligence. The court *denied* the defendant's motion to dismiss, finding that "[d]efendant seeks to avoid all liability for its alleged negligence and breach of contract by arguing that the tariff precludes plaintiff from recovering under these theories . . . the tariff may only serve to limit, not eliminate, defendant's liability for service outages."[129] The court did not opine on whether the defendant-utility's tariff was constitutional or otherwise lawful, only noting that the defendant could raise its tariff, and any limitation that it might provide, at a later time but not at the motion to dismiss stage.[130] In other words, the legality of the utility's tariff was not decided in *Olson v. Pacific Northwest Bell*.[131]

[127] *Garrison,* 45 Or. App. 523 (finding a limitation of liability was reasonable insofar as it did not shelter company from liability for gross negligence).
[128] PacifiCorp's Opening Br. at 3.
[129] *Olson,* 65 Or. App. at 427 (emphasis removed).
[130] *Id*.
[131] Sierra Club and GEI did not identify any subsequent case law in *Olson v. Pacific Northwest Bell*, suggesting that the case may have settled following the court's opinion on Pacific Northwest Bell's motion to dismiss.

Finally, the Oregon Court of Appeals decision in *Adamson v. WorldCom Communications, Inc.* similarly reversed a trial court's decision granting a motion to dismiss based on the theory that the claim was barred by a utility tariff.[132] In that case, the plaintiff's complaint alleged willful misconduct by the defendant-utility, a claim that was not implicated by the defendant-utility's tariffs.[133] Accordingly, the court found that the claim could not be dismissed on the basis of the tariff. For purposes of analysis, the court assumed that the tariff applied[134] and it was not necessary for the court to grapple with whether the tariff permissibly limited the defendant-utility's liability. Even if the court would have reached the legality of the tariff, it is notable that the tariff pertained to the availability of services—namely long-distance telephone service—and not more broadly to any actions that the utility may take in order to effectuate service. To read into *Adamson* that all tariffs limiting liability for any actions taken by a utility will be automatically applied and upheld by Oregon courts strains the court's opinion past recognition.

B. Portland General Electric Liability Protections Previously Granted by this Commission Are Not Similar to PacifiCorp's Proposed Liability Limitation.

PacifiCorp's reliance on liability limitations approved for Portland General Electric ("PGE") provides no further support for the liability waiver requested here, as each of these examples are readily distinguishable from PacifiCorp's proposed tariff revision. In PGE Rule C, 2(C)—Governing Customer Attachment to Facilities—liability limitations are included for damages arising from the continuity of service. As discussed above, this type of liability protection is materially different from PacifiCorp's proposal, which would not only encompass

[132] 190 Or. App. at 219.
[133] *Id.* at 222.
[134] *Id.* ("In this case, the tariff on which Qwest relies provides that its limitation of liability is conditional: 'unless such damages are a result of Company's willful misconduct.' Plaintiff alleged that Qwest willfully engaged in an unlawful trade practice. By the terms of the tariff, therefore, the claim is not barred").

continuity of service but all actions that PacifiCorp might take to maintain and operate its electric system. In PGE Schedule 88, Or. Sheet No. 88-4—Load Reduction Program—PGE is protected from liability arising from an optional service for large, nonresidential customers, where these customers voluntarily reduce their electricity use during emergency curtailments in exchange for being partially exempt from the curtailment. PGE is not liable for damages to participating customers' property resulting from their voluntary reduction of electricity use. This liability protection is akin to protecting utilities from liability when damages are incurred due to no fault of the utility, as the customer retains control over whether or not to reduce electricity use. Here, PacifiCorp asks for liability protection even when it is in the best (and at times only) position to manage risk or potential harm to customers. Similarly, PGE Rule K, 6(B)—Requirements Relating to Electric Service Suppliers—requires an Electric Service Supplier ("ESS") to indemnify PGE against claims arising from *actions taken by the ESS*. Again, this liability protection is akin to protecting utilities from liability when damages are incurred due to no fault of the utility. Finally, PGE Schedules 4, 5, 13, and 25, all cited by PacifiCorp, pertain to voluntary pilot programs, making any liability protection included within these Schedules materially different from a broadly applicable liability waiver that customers could not decide whether or not to opt into.

C. Other Commission Staffs Agree that PacifiCorp's Tariff Proposal is More Expansive than Previously Approved Liability Limitations.

PacifiCorp's liberal application of Oregon law to support its proposed tariff revision has been repeated in its identical liability protection requests in its other jurisdictions. While these requests are still pending, other commission Staffs have raised concerns with PacifiCorp's tariff

revision,[135] and Idaho Public Utilities Commission Staff ("Idaho Staff") specifically echoed concerns raised here that PacifiCorp's purported examples of similar liability limitations are, in fact, starkly different from the Company's request. Specifically, Idaho Staff noted that although PacifiCorp claimed that its proposal "generally aligns with precedent from several western states where limitations on utility liability have been approved" (as PacifiCorp claims here), the examples provided either did not limit the utility's liability for negligence or contained exceptions for gross negligence or willful misconduct.[136] For instance, Idaho Staff highlighted that liability limitations for Cheyenne Light, Fuel, and Power Company (also cited in PacifiCorp's application in this docket) shields the utility from liability only in circumstances beyond the Company's control and not "caused by the negligence or wrongful acts of the Company's agents or employees."[137] Similarly, a tariff for the Washington Water Service Company granted by the Washington Utilities and Transportation Commission, again cited by PacifiCorp, does not shield that utility from liability for its gross negligence or willful misconduct.[138] Based on these and other examples, Idaho Staff concluded that "the Company's proposed limitation on liability is [not] supported by other provisions of liability limitations."[139]

[135] *See, e.g.,* Wash. Utils. and Transp. Comm'n v. PacifiCorp, d/b/a Pac. Power & Light Co., Wash. Utls. Transp. Comm'n Docket UE-230877, Open Meeting Memo for Dec. 21, 2023 Open Meeting, From Comm'n to Staff (Dec. 21, 2023) (noting that the Company's liability limitation request is counter to RCW 80.04.440, which holds public utilities liable for any unlawful actions taken); In re Appl. of Rocky Mountain Power for Authority to Revise Rule 3 to Provide for Updated Provisions Regarding Liab. for Damages, Wyo. Pub. Serv. Comm'n, Docket 20000-652-ET-23 (Record No. 17434), Memo from Comm'n Staff to Comm'r (Feb. 7, 2024) (noting that Wyoming law does not support liability waivers for public utilities).
[136] *See* In re Rocky Mountain Power's Appl. to Revise Elec. Serv. Regul. No. 3-Elec. Serv. Agreements, Idaho Pub. Utils. Comm'n Docket No. PAC-E-23-22, Comments of the Comm'n Staff at 4–6 (Jan. 23, 2024).
[137] *Id.* at 4 (citing to *Cheyenne Light, Fuel and Power Co.*, Wyo. P.S.C. Tariff No. 14, Original Sheet No. R22)
[138] *Id.* at 5 (citing *Wash. Water Serv. Co.*, WN U-3, Original Sheet No. 15).
[139] *Id.* at 6.

D. Liability Risks for Extreme Weather Events faced by Utilities in Other Parts of the Country Are Materially Different from PacifiCorp's Wildfire Liability Risk.

PacifiCorp's attempt to compare its exposure to wildfire liability to other utilities' liability following natural disasters similarly falls flat. As a threshold matter, *none* of the examples cited by PacifiCorp involve natural disasters that were immediately caused by utility operations: Consolidated Edison Company's ("ConEd") operations did not cause Superstorm Sandy or Tropical Storm Isaias; nor did Florida utility operations initiate hurricanes in the state; nor did Texas utility operations spark Winter Storm Uri.[140] Conversely, the potential wildfire liability that PacifiCorp faces is based upon the Company's direct management of its operations that, if done prudently, could avoid sparking wildfires in the first place. In essence, comparing PacifiCorp's wildfire liability to a utility's potential liability in the wake of a hurricane or winter storm event is comparing apples to oranges.

Even if PacifiCorp was making a valid comparison between its responsibility to reduce wildfire risk and other utilities' responsibility to reduce winter storm and hurricane risk, the facts do not establish that other parts of the country are shielding their utilities from liability or expanding the scope of current liability protections. In fact, PacifiCorp's own brief highlights that New York *expanded* its utilities' liability exposure. Whereas New York utilities, such as ConEd, had been shielded from liability arising from interruptions in service due to the utilities' ordinary negligence,[141] New York passed legislation in 2022 providing that utilities would be liable, within specified cost caps, for damages that customers experienced as a result of prolonged service interruptions. The legislation, New York Public Service Law § 73, squarely

[140] Of course, these weather events are made more likely due to climate change (as are wildfires), which utility operations contribute to through their reliance on fossil fuels, but there was no near-term action that utilities in New York, Florida, or Texas could have taken that would have avoided the natural disasters in their states.
[141] *See, e.g.*, Consol. Edison Co. of N.Y., Inc., PSC No: 10 – Elec. at Leaf No. 171 (Aug. 1, 2023), *available at* https://lite.coned.com/_external/cerates/documents/elecPSC10/electric-tariff.pdf.

puts these costs on the utility and its shareholders by stating that "[a]ny costs incurred by a utility company pursuant to this section *shall not* be recoverable from ratepayers."[142]

PacifiCorp's assertion that New York courts have upheld utility tariffs limiting liability to gross negligence in the wake of extreme storm events is not only an inaccurate characterization, but actually refuted by the cases the Company cites in its brief. In *Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. v. Trumbull Ins. Co. & ConEd*,[143] the New York Superior Court provided no opinion on whether a utility could be liable for its ordinary negligence, despite PacifiCorp's assertion to the contrary.[144] In that case, the plaintiffs' only claim against the utility, ConEd, was based on gross negligence. The court concluded that gross negligence had not been established because the plaintiffs had not presented an expert witness to rebut the utility witness' testimony regarding the steps it had taken during a winter storm event to prevent outages. But, as in the Oregon examples above, the court *did not* opine on whether a utility could be held liable for negligence *because the claim was not brought*.

In Florida, while the state legislature passed a bill shielding utilities from liability arising out of an emergency or disaster, the law specifically limits the liability waiver to damages "based in whole or in part on changes in the reliability, continuity, or quality of utility services…"[145] In other words, the liability protection extends *only to damages connected with an interruption in service*, which, as described above, is well within the realm of previously approved, reasonable liability limitations. The damages that PacifiCorp seeks to protect itself from extend far beyond continuity of service to include any noneconomic damages arising from PacifiCorp's negligence

[142] *Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. v. Trumbull Ins. Co. & ConEd*, N.Y. Pub. Serv. Law § 73 (emphasis added).
[143] 2016 N.Y. Misc. LEXIS 5093 (Sup. Ct. N.Y. Cnty. 2016).
[144] PacifiCorp's Opening Br. at 8.
[145] Fla. Stat. § 366.98.

in sparking a wildfire. The practical public policy supporting limited waivers of liability for interruptions of service is not present or analogous to PacifiCorp's expansive request, and finds no support or analogy in existing waivers.

Finally, in referring to Texas, PacifiCorp's brief provides no evidence that utilities have been granted broader liability protection following Winter Storm Uri. PacifiCorp points to grid hardening and severe weather preparedness requirements—commitments that are notably absent from PacifiCorp's liability limitation request here—but no evidence that exposure to extreme weather events has resulted in more expanded liability protections. In the two cases cited by the Company, both pertain to damages sustained by a customer *after* delivery of service and thus after leaving the control of the provider.[146] GEI and Sierra Club do not dispute that utilities have been protected from some liability for actions taken or events occurring after the delivery of service, largely because utilities have no control over the use of energy after the point of delivery. For instance, in *CenterPoint Energy Resource Corp.*, the Texas Supreme Court applied a tariff stating that "Company shall not be liable for any damage or injury resulting from gas or its use after such gas leaves the point of delivery *other than damage caused by the Company*"[147] to protect a utility from liability for damages resulting from a gas leak coming from internal piping,[148] over which the utility could obviously not control maintenance. In *Southwestern Electric Power Co. v. Grant*, the Texas Supreme Court upheld a tariff provision shielding the company from liability for damages caused by interruption of service or voltage fluctuations, among other things. While the Company's ordinary negligence was exempted from liability, the

[146] *See CenterPoint Energy Res. Corp. v. Ramirez*, 640 S.W.3d 205 (Tex. 2022) (holding utility harmless for damages sustained by customer due to gas leak occurring after the point of delivery).
[147] *CenterPoint Energy Res. Corp.*, 640 S.W.3d at 211 (emphasis added).
[148] *Id.* at 216.

Company's gross negligence or willful misconduct was not.[149] These cases are yet another example of PacifiCorp using reasonable and limited limitations on utility liability in support of an unprecedented expansion of the protection into areas that are not analogous and not supported by the same underlying public policy.

IV. PACIFICORP'S EXPANSIVE AND UNPRECEDENTED LIABILITY LIMITATION REQUEST SHOULD NOT BE APPROVED WITHOUT CONFIRMING ITS LEGALITY SIMPLY BECAUSE A REVIEWING COURT COULD LATER STRIKE IT DOWN

In a final attempt to convince the Commission that it should grant the Company broad and unprecedented liability protection, PacifiCorp posits that because its proposed tariff revision would not be binding "where state law disallows limitations of liability[,]"[150] the Commission need not grapple with whether the tariff revision is legally valid. Instead, PacifiCorp urges the Commission to allow a court to decide this question on a case-by-case basis.[151] This argument should be unequivocally rejected.

As already addressed in Section II, the Commission has both the authority and the obligation to engage in legal analysis necessary to confirm the constitutionality of a utility proposal. Indeed, whenever "the Commission has determined to use trial-like procedures to investigate a particular matter[,]" as it has done here, the Commission "acts in a quasi-judicial capacity."[152] As such, the Commission must consider the legality, including the constitutionality, of tariffs that, once approved, are "prima facie lawful and reasonable."[153]

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[149] *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 214–15 (Tex. 2002)
[150] PacifiCorp Initial Appl. at 1.
[151] PacifiCorp's Opening Br. at 13 ("A carve-out that limits utility liability only as allowed by Oregon law (which necessarily includes Oregon's Remedy Clause), allows the Commission to avoid all pre-enforcement constitutional discussions about how the tariff provision *could* be applied in *hypothetical* future circumstances. Those issues, only if or when they arise, are best left to the relevant judicial forum") (emphasis in original).
[152] In re Pub. Util. Comm'n of Or., Internal Operating Guidelines, No. 14 358, 2014 WL 5361915, at *1 (Oct. 17, 2014).
[153] ORS 756.565.

Just as importantly, legally complex utility requests do not lend themselves to default approval, with questions of legality pushed off until a later date, before a different court. Such requests deserve heightened scrutiny from the Commission because, if such proposals are later overturned by a reviewing court, the public is likely to have been harmed in the interim. Take, for instance, the likely impacts if the Commission approves PacifiCorp's proposed tariff revision but it is later found to violate Oregon law. Prior to the issuance of a judicial opinion on the tariff, unknown numbers of wildfire victims, or any other person harmed by PacifiCorp's operations, are likely to have voluntarily relinquished their legal right to damages by not pursuing those damages in the first place. Potential claimants will be reluctant to spend the time and resources pursuing a claim or attempting to collect damages that will first need to overcome the hurdle of a Commission-approved tariff barring such claims or damages. Similarly, in entering settlement negotiations with a utility, an approved Commission tariff—even one that is constitutionally invalid—could be used to convince potential claimants to abandon their claims. As noted above, individuals already face unequal bargaining power when negotiating with large, sophisticated utilities. An adopted tariff curtailing an individual's legal rights would only increase this disparity. Put simply, should this Commission adopt PacifiCorp's proposed tariff revision, it is likely to strip unknown numbers of their legal rights, even if, at some later point, a litigant successfully challenges the tariff in state court.

V. CONCLUSION

PacifiCorp's request is inconsistent with the Oregon Constitution and established Oregon law. The examples provided by the Company regarding sister-state commission precedent are overstated, not analogous, or contradictory to the assertions made in its brief. Additionally, PacifiCorp's proposed limitation is dissimilar to measures in other states to limit liability as a

result of natural disasters. GEI and Sierra Club respectfully request the Commission deny the Company's Petition.

Respectfully submitted on this 27th day of February, 2024

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