

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON  
UE 428**

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

**INTERVENORS' CROSS-ANSWERING  
BRIEF**

**I. INTRODUCTION.**

Intervenors Freres Lumber Co., Inc. and Freres Timber, Inc. (collectively "Freres Lumber") respectfully submit this brief in answer to the opening brief filed by Commission Staff ("Staff") before the Oregon Public Utility Commission ("PUC" or "The Commission") on February 27, 2024.

**II. ARGUMENT.**

On October 24, 2023, PacifiCorp petitioned the PUC for an unprecedented tariff amendment that would prospectively limit the utility's liability to "actual economic damages" under all circumstances, even for injuries resulting from its own negligent, grossly negligent, or willful misconduct. In response, Freres Lumber filed an opening brief arguing that PacifiCorp's petition violates Oregon's Constitution and well-established principles of Oregon tort law and is unprecedented, not only in Oregon, but also in the western states that PacifiCorp relies on.

In its opening brief, PacifiCorp expands on the arguments that it put forth in its petition. PacifiCorp argues – wrongly – that the petition is consistent with Commission and sister-state precedent. PacifiCorp also argues – again wrongly – that the Commission need not engage in any pre-enforcement analysis of the legality of its petition because the amended tariff would only apply to the extent allowable under Oregon law. Staff, for its part, generally aligns with the positions of Freres Lumber. However, Staff appears to endorse an *ad hoc*, case-by-case analysis of the constitutionality of the proposed liability waiver. Staff also focuses exclusively on the petition’s limitation on noneconomic damages for PacifiCorp’s residential customers, at the expense of Oregon businesses.

This brief addresses Staff’s arguments, which echo those of PacifiCorp, to the extent they are contrary to Oregon law. The Commission’s authority is not as limited as Staff and PacifiCorp contend. It is required to consider the constitutionality of this tariff prior to enactment. It should exercise that authority to find PacifiCorp’s petition unconstitutional on its face, regardless of “the nature of the claims and set of facts.” The Commission should also recognize the impact of the proposed tariff on Oregon businesses, which would be disproportionately impacted by a limitation on consequential damages.

**A. The Commission Should Reject PacifiCorp’s Facially Unconstitutional Petition.**

Staff takes the position that it is “impossible to say . . . how a court would analyze the Commission’s approval of PacifiCorp’s proposed limitation of liability . . . [because] it would depend on the nature of the claims and set of facts before the court.” Staff ultimately agrees that the petition would violate the Remedy Clause, but only “through the lens” of *James v. PacifiCorp* because, according to Staff, it is to that kind of case that PacifiCorp intends its petition to apply. PacifiCorp similarly argues that the remedy clause requires a case-by-case

analysis because, according to PacifiCorp, there is “no single unifying principle” with which to analyze “the varied ways that the legislature can and has gone about achieving its goals.” Thus, according to PacifiCorp, the Commission should avoid “all pre-enforcement constitutional discussions about how the tariff provision *could* be applied in *hypothetical* future circumstances.”

On these points, both Staff and PacifiCorp are mistaken; PacifiCorp’s proposed tariff is unconstitutional on its face. Contrary to the position of both Staff and PacifiCorp, the proposal does not need to be challenged on an *ad hoc*, as applied basis. Not only does the Commission have the authority to engage in pre-enforcement constitutional analysis, it is obligated to do so. It should exercise that authority to dismiss PacifiCorp’s petition, rather than pass an unconstitutional tariff and await a decision from the courts to confirm that it is unconstitutional. That would not only be contrary to the Commission’s obligations to the Oregon Constitution, it would also be contrary to its obligation to protect the public because PacifiCorp would utilize an unconstitutional limitation as an additional barrier to potential claimants, regardless of the merits of their claim.

**1. The Commission is obligated to engage in pre-enforcement legal analysis.**

Public utility commissioners are obligated to “consider the meaning of the state . . . constitution[] when executing [their] official duties.”<sup>1</sup> As intervenors in this case point out, that obligation includes the authority to declare the statutes and rules that the Commission enforces as unconstitutional.<sup>2</sup> The same principle applies to contested cases,<sup>3</sup> where a Commission’s order

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<sup>1</sup> ORS 756.022.

<sup>2</sup> *Eppler v. Bd. of Tax Serv. Exam’rs*, 189 Or App 216, 221–222, 75 P3d 900 (2003); *Nutbrown v. Munn*, 311 Or 328, 346, 811 P2d 131 (1991).

<sup>3</sup> *Cooper v. Eugene School Dist. No. 4J*, 301 Or 358, 723 P2d 298 (1986). In *Cooper*, the Court held that a state official has an independent duty to consider the constitution during a contested case, particularly when the official is

can be set aside by the Court of Appeals if the Commission “erroneously interpreted a provision of law” or its order otherwise violates the provisions of the Oregon Constitution.<sup>4</sup> Thus, “the constitution does not contemplate that . . . officials will act as they think best and leave the constitutionality of their acts to the courts.”<sup>5</sup> Read together, these authorities show that the Commission must engage in constitutional analysis during a contested case.

**2. The Commission should find that PacifiCorp’s petition is unconstitutional.**

The Supreme Court recognizes two categories of legislation that implicate the Remedy Clause when a defendant’s common law duty remains intact. PacifiCorp’s proposal violates both.

First, PacifiCorp and Commission Staff ignore the first category of legislation identified by *Horton v. Oregon Health and Science University* that invariably violates the remedy clause because it leaves a defendant’s common law duty of care intact but *denies* an injured plaintiff the right to recover for the defendant’s breach of that duty.<sup>6</sup> Here, PacifiCorp’s petition would not alter its common law duty to safely provide reliable service to its customers. It would, however, eliminate entire classes of damages that plaintiffs are entitled to recover under traditional tort principles, including “special, noneconomic, punitive, incidental, indirect, [and] consequential damages (including . . . lost profits).”<sup>7</sup> Therefore, the Commission should find that PacifiCorp’s petition is unconstitutional on its face.

In the second category, a rule or statute violates the Remedy Clause when it leaves the defendant’s common law duty intact but *modifies* a plaintiff’s remedy without providing a “sufficiently weighty” constitutional justification for doing so or offering injured plaintiffs

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“authorized by statute to exercise quasi-judicial authority to resolve a legal dispute between . . . parties.” *Li v. State*, 338 Or 376, 395, 110 P3d 91 (2005) (discussing *Cooper*), *abrogated on other grounds by Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>4</sup> ORS183.482(8).

<sup>5</sup> *Li*, 338 Or at 395.

<sup>6</sup> *Horton v. Oregon Health and Science Univ.*, 359 Or 168, 219, 376 P3d 998 (2016).

<sup>7</sup> PacifiCorp, Advice 23-018, Oregon Rule 4—Application for Electric Service I, Limitation of Liability.

anything in return.<sup>8</sup> One such constitutionally sufficient justification is the State’s sovereign immunity.<sup>9</sup> Conversely, damages caps that only reduce the impact of personal injury claims on the cost and availability of insurance are not.<sup>10</sup> A substituted remedy that does not have a sufficient constitutional basis is unconstitutional with respect to *all* potential plaintiffs.<sup>11</sup>

The Remedy Clause analysis under the second category does not end with the reasons for enacting a modified remedy. An additional factor is whether the class of potential plaintiffs receives something in return – a *quid pro quo*.<sup>12</sup> In *Horton*, the Oregon Tort Claims Act (“OTCA”) waived sovereign immunity, while limiting damages to \$3 million, an amount that would continue to increase over time to “provide a complete recovery in many cases” and “greatly expand the state’s liability in the most egregious cases.”<sup>13</sup> Thus, in addition to having sufficiently “weighty” constitutional underpinnings, the OTCA also granted injured plaintiffs something they otherwise would not have had – a cause of action against the state and a solvent defendant in state employees.<sup>14</sup> On the other hand, the statutory cap in *Busch v. McInnis Waste Systems, Inc.* did not provide a constitutionally sufficient *quid pro quo* because the benefits of reducing the impact of personal injury claims on the cost and availability of insurance “inure to society in general as opposed to injured plaintiffs in particular.”<sup>15</sup> Under *Busch*, the substantiality of the modified remedy is a “final check on the constitutionality of the cap as

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<sup>8</sup> *Busch v. McInnis Waste Systems, Inc.*, 366 Or 628, 642–643, 468 P3d 419 (2020).

<sup>9</sup> *Horton*, 359 Or at 224; *Busch*, 366 Or at 643, 645.

<sup>10</sup> *Id.* at 648.

<sup>11</sup> *Id.* at 652.

<sup>12</sup> *Id.* at 643.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 650.

*applied to the plaintiff.*”<sup>16</sup> Thus, where the modified remedy is a “paltry fraction” of the jury’s award, the modified remedy is unconstitutional as applied.<sup>17</sup>

PacifiCorp’s petition fails at each stage of the remedy clause analysis under *Horton* and *Busch*. First, like *Busch*, PacifiCorp’s proposal has no constitutional basis. Rather, it is couched solely in economic terms – the utility seeks to waive entire classes of damages to which its customers would otherwise be legally entitled in order to maintain a favorable credit rating and continue to access low-cost financing. PacifiCorp’s petition also limits the utility’s liability without providing injured plaintiffs *anything* in return. As in *Busch*, the benefit of affordable rates “inures” to PacifiCorp’s ratepayers in general, not injured plaintiffs “in particular.” Finally, as applied, the proposal offers a “paltry fraction” of a potential jury award. Using *James v. PacifiCorp* as an example, class plaintiffs have been awarded tens of millions of dollars in noneconomic damages. Freres Lumber suffered millions of dollars in “consequential damages” – including lost profits.<sup>18</sup> Eliminating these damages would result in plaintiffs recovering an unconstitutional “paltry fraction” of the damages to which they would otherwise be entitled. PacifiCorp’s petition violates the Remedy Clause of the Oregon Constitution, and the Commission should reject it.

**B. Commission Staff Overfocuses on Noneconomic Damages at the Expense of Oregon Businesses that Would be Disproportionately Impacted by a Limitation on Consequential Damages.**

Staff must represent all classes of a utility’s customers in controversies before the Public Utility Commission.<sup>19</sup> However, to the detriment of Oregon businesses, Commission Staff focuses exclusively on the noneconomic damages that PacifiCorp’s petition would waive on

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<sup>16</sup> *Id.* at 643 (emphasis added).

<sup>17</sup> *Id.* at 643.

<sup>18</sup> *In the Matter of PacifiCorp dba Pacific Power*, UE 428, Freres Lumber Co’s Opening Brief at 5.

<sup>19</sup> ORS 756.040.

behalf of its residential customers.<sup>20</sup> As shown by the language in the petition, PacifiCorp’s proposal is far broader:

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), . . . or otherwise.<sup>21</sup>

Clearly, PacifiCorp’s petition does more than foreclose residential customers from recovering their noneconomic damages. For example, consequential damages are available in tort for the foreseeable harm that flows from injury to person or property and in cases of public and private nuisance when a plaintiff suffers a “special injury.”<sup>22</sup> For example, Freres Timber Co., Inc., the timberland owning sister company of Freres Lumber Co., Inc., suffered millions of dollars in damages when hundreds of acres of its timberland burned in the Santiam Canyon Fire caused by PacifiCorp. In addition, Freres Lumber Co., Inc., suffered millions of dollars in business interruption losses when the company’s veneer and plywood plants were shut down due to a two-week closure of Highway 22 in the aftermath of that wildfire. PacifiCorp’s proposal clearly waives entire classes of damages for residential customers *and* businesses that are traditionally available in tort under Oregon common law. The Commission should not ignore the impact that PacifiCorp’s proposal would have on businesses like Freres Lumber, who are major employers in Oregon and should have recourse against PacifiCorp in the form of consequential

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<sup>20</sup> *In the Matter of PacifiCorp dba Pacific Power*, UE 428, Staff’s Opening Brief at 1 (summarizing PacifiCorp’s petition as “condition[ing] a person’s ability to access electricity on their inability to sue the Company for non-economic damages.”); *Id.* at 7, 9 (stating that PacifiCorp’s intent is to prevent its customers from seeking noneconomic damages).

<sup>21</sup> PacifiCorp, Advice 23-018, Oregon Rule 4—Application for Electric Service I, Limitation of Liability.

<sup>22</sup> *Wilson v. City of Portland*, 153 Or 679, 58 P2d 257 (1936) (public nuisance); *Spencer Creek Pollution Control Ass’n v. Organic Fertilizer*, 264 Or 557, 505 P2d 919 (1973) (private nuisance).

damages available under both Oregon tort law and this state's wildfire statute, ORS 477.089, which specifically allows for recovery of all objectively veritable monetary losses.

### **III. CONCLUSION.**

For the foregoing reasons, Freres Lumber Co., Inc. and Freres Timber Co., Inc., respectfully request that the Commission reject PacifiCorp's proposed tariff revision.

DATED this 12<sup>th</sup> day of March 2024.

Respectfully submitted,

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