March 12, 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's Cross-Answering 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 CROSS-ANSWERING BRIEF

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I. INTRODUCTION

Staff and Intervenors' opening briefs unanimously agree: PacifiCorp's ("Company") tariff revision request is unlawful.[1] Each of the parties, including the Green Energy Institute at Lewis & Clark Law School ("GEI") and Sierra Club, thoroughly explained that PacifiCorp's proposal: violates the remedy clause of the Oregon Constitution;[2] is void as against public policy;[3] unlawfully shields PacifiCorp from liability for its gross negligence and willful

[1] The sole exception was the Alliance of Western Energy Consumers' Opening Brief, which did not take position on the legality of PacifiCorp's request but suggested that approval may not be appropriate on policy grounds. *See, e.g.,* Opening Br. of the All. of W. Energy Consumers at 3 [hereinafter "AWEC Opening Br."] ("[G]iven the scope and geographic distribution of PacifiCorp's system, and the fact that the proposed limitation would only apply to PacifiCorp customers, AWEC submits that the Commission should determine if the proposed limitation would, in fact, 'better enable the Company to finance expenditures at reasonable costs' . . . [a]t the moment, the proceeding lacks an evidentiary basis to support PacifiCorp's claims.").

[2] *See* Intervenor Freres Lumber Co.'s Opening Br. at PDF pp. 2–5 [hereinafter "Freres Lumber Co. Opening Br."]; Opening Br. of the Or. Citizens' Util. Bd. at 7–11 [hereinafter "CUB Opening Br."]; Intervenor Or. Consumer Just.'s Opening Br. at 3–8 [hereinafter "OCJ Opening Br."]; Intervenor Samuel Drevo's Opening Br. at 8–11 [hereinafter "Drevo Opening Br."]; Staff's Opening Br. at 21–30 [hereinafter "Staff Opening Br."] (arguing that PacifiCorp's tariff proposal may run afoul of the Remedy Clause).

[3] *See* Freres Lumber Co. Opening Br. at PDF pp. 5–6; CUB Opening Br. at 13–15 (raising policy concerns, including inequitable treatment between customers of different Oregon-regulated utilities and improper utility leverage in settlement negotiations, as reasons to deny the tariff proposal).

misconduct;[4] and is not analogous to any other approved liability limitation for a public utility, either in Oregon or elsewhere,[5] among other defects.

Simply put, PacifiCorp's proposed tariff revision is fundamentally flawed. The request is so far outside the bounds of acceptable liability limitations for public utilities that even modifying the proposal, such as by allowing some noneconomic damages or excluding the Company's grossly negligent conduct, cannot save it. The Oregon Public Utility Commission ("Commission") should swiftly conclude this docket by rejecting PacifiCorp's tariff request and allowing the parties—particularly PacifiCorp—to turn their efforts back to decarbonizing the utility's system and improving the Company's wildfire mitigation plan.

II. THE PROPOSED TARIFF REVISION CANNOT BE APPROVED EVEN IF SOME NON-ECONOMIC DAMAGES ARE ALLOWED

Intervenors share widespread agreement that PacifiCorp's proposed tariff revision eliminating "special, noneconomic, punitive, incidental, indirect, or consequential damages" (collectively, "noneconomic damages") for customers violates the Oregon Constitution's remedy clause because available damages under the tariff proposal would be insubstantial and, moreover, there is no "quid pro quo" to justify the elimination of a large portion of available damages.[6]

Even if the proposed tariff revision was modified to allow for limited or partial recovery of noneconomic damages, it is still highly unlikely that the revision would pass constitutional muster under the framework established in both *Horton v. Oregon Health and Science University* and *Busch v. McInnis Waste Systems Inc.* because the remedy would still not be "substantial."

[4] *See* Freres Lumber Co. Opening Br. at PDF p. 8; CUB Opening Br. at 20–21; OCJ Opening Br. at 9; Staff Opening Br. at 17–19.
[5] *See* Freres Lumber Co. Opening Br. at PDF pp. 8–10; CUB Opening Br. at 17–20, 21–25; OCJ Opening Br. at 9–12; Staff Opening Br. at 19–21.
[6] *See* Freres Lumber Co. Opening Br. at PDF pp. 2–5; Drevo Opening Br. at 9–11; CUB Opening Br. at 7–11; OCJ Opening Br. at 3–8; Staff Opening Br. at 21–30 (arguing that PacifiCorp's tariff proposal may run afoul of the remedy clause).

"Substantiality" turns on three primary considerations: (1) the amount of damages available so as to not leave plaintiffs with only a "paltry fraction" of the actual damages sustained;[7] (2) the reasons for reducing a defendant's liability;[8] and (3) whether a *quid pro quo* dynamic exists.[9] These factors all cut heavily against approving PacifiCorp's request as currently presented, even in a scenario where some noneconomic damages are recoverable under the tariff.

First, the amount of damages recoverable by an injured party is a central consideration in whether a limitation on liability satisfies the remedy clause for "substantiality".[10] The damages generally must represent something beyond a "paltry fraction of the damages that the plaintiff sustained" to survive a remedy clause challenge.[11] As recently demonstrated in the *James v. PacifiCorp* class wildfire litigation, and highlighted by parties' opening briefs,[12] a jury awarded class members approximately *ten times* more noneconomic damages than economic damages for their injuries.[13] This example illustrates not only the necessity of a party's ability to recover noneconomic damages to fully compensate their losses, but also that any modified request that limits the amount of recoverable noneconomic damages may still amount to a "paltry fraction" of what a plaintiff can currently recover under the common law, in violation of the remedy clause.

Given the crucial role noneconomic damages plays in compensating wildfire victims, any modified tariff proposal that allows partial noneconomic recovery of damages needs to be carefully studied and scrutinized in order to ensure that it is capable of restoring the rights of

[7] *Horton v Or. Health and Sci. Univ.*, 359 Or. 168, 221 (2016) (citing *Clarke v. Or. Health Scis. Univ.*, 343 Or. 581, 610 (2007)).
[8] *Horton*, 359 Or. at 220, 222; *see also Busch v. McInnis Waste Sys., Inc.*, 366 Or. 628, 650 (2020) ("Under *Horton*, the legislature must act for a reason sufficient to counterbalance the substantive right that Article I, section 10, grants. That right assures that people who are injured in their person, property or reputation have a remedy for those injuries. Oregon law has long recognized and protected that substantive right").
[9] *Horton*, 359 Or. at 219, 221; *Busch*, 366 Or. at 650–52.
[10] *Horton*, 359 Or. at 177, 219–220.
[11] *Id.* at 221.
[12] *See, e.g.*, Drevo Opening Br. at 10.
[13] *Id.*

those injured in most scenarios and can continue to do so over time. The *Horton* court emphasized that where noneconomic damages are limited, the legislature's consideration of these factors and detailed supporting documentation was a central reason for its conclusion that the damages cap at issue there did not violate the remedy clause.[14] As the Alliance of Western Consumers ("AWEC") rightly raised in its brief, PacifiCorp's request lacks evidentiary support for the Company's claims regarding how the limitation will impact company financing, credit ratings and customer rates.[15] While AWEC poses this valid concern as a factor for the Commission to consider *after* making a determination regarding the legality of the proposed limitation,[16] both *Horton* and *Busch's* remedy clause analyses indicate that these questions should be addressed now, during the Commission's legal review phase. In both *Horton* and *Busch*, the Court explicitly identified that the state's reasoning for capping liability and subsequent support for that reasoning as central considerations when assessing the constitutionality of the revised terms under the remedy clause.[17] Therefore, as a threshold constitutional issue, the Commission must engage with whether the reasoning provided by PacifiCorp is not only supported, but is "sufficiently weighty" to counterbalance the loss of customer's remedial rights.[18] Based on the Oregon Supreme Court's rejection of economic factors in *Busch* and the total lack of supporting evidence provided by PacifiCorp for its claims, the answer to both counts is no.

[14] *Horton*, 359 Or. at 223–24 (explaining that the Oregon legislature extensively consulted actuarial data on different cap levels, studied tort claim caps in other states, and considered empirical data from the past several decades of Tort Claims Act litigation. Additionally, after setting the cap amount, the legislature provided for yearly increases to the caps according to a fixed percentage indexed to inflation. Based upon this detailed study, the legislature reached the conclusion that the $3,000,000 cap would provide a complete recovery in most cases, greatly expand the state's liability in the most egregious cases, and advance the purposes underlying the doctrine of sovereign immunity while ensuring that a solvent defendant is available to pay a plaintiff's damages up to the amount of the Tort Claims Act limit).
[15] AWEC Opening Br. at 3
[16] *Id.*
[17] *Horton*, 359 Or. at 223–24; *Busch*, 366 Or. at 642–43.
[18] *Busch*, 366 Or. at 642–43.

Moreover, as Drevo raised, the insufficiency of PacifiCorp's reasoning and record for enacting its proposed changes raises larger questions regarding whether this is the kind of request appropriately before the Commission.[19] Eliminating or limiting the scope of noneconomic damages recoverable under PacifiCorp's terms of service would dramatically alter the state of common law tort claims in Oregon. Instead of engaging with the Oregon Legislature–the typical body for enacting tort reform–PacifiCorp seeks to push its modifications through the Commission, thereby limiting the rights of its captive customers without engaging in any of necessary public outreach, investigation, consideration of alternatives, or even providing evidence to support its position that the proposed changes will result in beneficial economic outcomes. As such, it is the Legislature, not the Commission, best positioned to study, and if warranted, implement legislative reform that addresses PacifiCorp's concerns while balancing the interests of citizens and the requirements of the remedy clause including "provid[ing] a counterbalance for plaintiff's loss of his right to a remedy."[20]

Second, where the duty of care by the defendant is not altered, but the remedy available for an injured party is reduced, courts consider "whether the legislature's reasons for imposing those limits [are] sufficiently weighty to counterbalance the Article I, section 10, right to remedy."[21] This analysis does not change, even if the Commission considers a modification to the tariff proposal to allow some noneconomic damages. The limitations on recovery would still be justified 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

[19] Drevo Opening Br. at 15–16.
[20] *Busch*, 366 Or. at 651–52.
[21] *Id*. at 642–43.

rating.[22] The Oregon Supreme Court in *Busch* found economic justifications inadequate to support liability reductions[23] and, notably, PacifiCorp has not provided actual evidence to the Commission in its filing or briefing to support its contention that the proposed terms would improve its credit rating or reduce costs to customers.

Third, a waiver allowing limited recovery of noneconomic damages still does not contain a *quid pro quo* element granting customers "something they otherwise would not have had" under the status quo.[24] Both *Horton* and *Busch* underscore the importance of a *quid pro quo* dynamic when evaluating damages limitations, explaining that they are often present where the Oregon Supreme Court upholds a statute that limits the remedies available for breach without modifying a common-law duty.[25] Under PacifiCorp's current request, or a modified request allowing limited noneconomic damages, the Company's requested restrictions on liability are not counterbalanced by an equally compelling benefit afforded to the person losing their remedial rights, as customers receive nothing in return under the waiver that they do not currently have in status quo, but lose their remedial right to recover noneconomic damages entirely or in part.

III. THE PROPOSED TARIFF REVISION CANNOT BE APPROVED EVEN IF PACIFICORP'S GROSS NEGLIGENCE, RECKLESSNESS, AND WILLFUL MISCONDUCT ARE EXCLUDED

Nearly all the parties note that PacifiCorp's tariff proposal would unlawfully shield the Company from liability for its gross negligence, recklessness, or willful misconduct.[26] Indeed,

[22] PacifiCorp, Advice No. 23-018–Rule 4–Appl. for Elec. Serv. at 2–3 (Oct. 24, 2023) [hereinafter "PacifiCorp Initial Appl."].
[23] *Busch*, 366 Or. at 648.
[24] *Id.* at 650–51; *Horton*, 359 Or. at 219.
[25] *Busch*, 366 Or. at 649–50; *see also Horton*, 359 Or. at 225.
[26] Green Energy Institute at Lewis & Clark Law School and Sierra Club Opening Br. at 24; Freres Lumber Co. Opening Br. at PDF p. 8 (noting that other Western jurisdictions have not excused utilities from liability for their own gross negligence); CUB Opening Br. at 20–21; OCJ Opening Br. at 9; Staff Opening Br. at 17–19.

courts are unlikely to uphold a Commission action relieving the Company of its duty to the public to such a degree.[27]

However, even if the Commission were to explicitly exclude from coverage the Company's gross negligence, recklessness, and willful misconduct, the proposed tariff revision would still be unlawful because it is not narrowly tailored to circumstances reasonably beyond the Company's control. As many parties explained in opening briefs, liability protections have typically been granted in fairly narrow circumstances, for instance in unavoidable interruptions of service, actions taken at the direction of a governmental authority, or force majeure situations.[28] Indeed, liability limitations for telecommunication utilities (a common example of a liability limitation) have typically been tied to the telecommunication utility's scope of service.[29] But PacifiCorp has not drafted its tariff proposal in narrow terms and its tariff does not relate to PacifiCorp's scope of service, such as limiting liability for interruptions of service. Rather, PacifiCorp seeks liability protection *"[i]n any action between [itself and its customers] arising out of the provision of electric service[.]*"[30] This broad language could be applied to practically any dispute between a customer and the utility.

PacifiCorp has not pointed to any other approved liability protection nearly as sweeping. While utilities have benefited from some amount of liability protection in the past, there is no precedent or policy support to largely exempt a public utility from liability for its misconduct.

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[27] *See, e.g., Garrison v. Pac. Nw. Bell,* 45 Or. App. 523, 531 (1980); *see also In re the Appl. of Idaho Power Co. for Approval of a Special Cont. with J.R. Simplot Co.*, 2014 WL 2112866, at *9 (Idaho Pub. Utils. Comm'n 2014) (considering a liability limitation clause in a special contract between a utility and a large energy user and holding that "any limitations of liability regarding intentional tortious conduct or gross negligence are contrary to the public interest and, as such, are unfair and unreasonable.").

[28] *See, e.g.,* OCJ Opening Br. at 11; Staff Opening Br. at 13 (noting that liability protections have been granted for incorrect telephone listings and interruptions in service).

[29] *See, e.g., Re Caller ID & Other Custom Loc. Area Signaling Servs.,* Order No. 92-1787, 1992 WL 501198 (Or. Pub. Util. Comm'n 1992) (authorizing liability limitation for telecommunications utility relating to the utility's scope of service).

[30] PacifiCorp Initial Appl., Proposed Tariff Sheets at 3 (emphasis added).

Rather, courts have traditionally emphasized the special duty that utilities owe to the public,[31] and, as a result, have viewed liability limitations with skepticism.[32] The Commission should do the same here and reject PacifiCorp's attempt to entirely re-write its obligations to the public in a manner that benefits its shareholders enormously with no quantifiable benefit to the public.

IV. CONCLUSION

In conclusion, the Commission intentionally and rightfully bifurcated this proceeding in order to come to a decisive conclusion on the legality of PacifiCorp's liability limitation request before delving into a likely controversial and complex policy evaluation. This portion of the proceeding has demonstrated a near-unanimous opposition to PacifiCorp's proposal due to a myriad of legal problems. The Commission should thus conclude this docket by issuing an order clearly stating that PacifiCorp's tariff revision violates Oregon law and no further investigation into whether the proposal is good or bad public policy is necessary.

Respectfully submitted on this 12th day of March, 2024

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[31] *See, e.g., Milligan v. Big Valley Corp.*, 754 P.2d 1063, 1066 (Wyo. 1988) ("Types of services thought to be subject to public regulation, and therefore demanding a public duty or considered essential, have included common carriers, hospitals, and doctors . . . public utilities, innkeepers, public warehousemen, employers, and services involving extra-hazardous activities."); *Broderson v. Rainier Nat. Park. Co.*, 187 Wash. 399, 404 (1936), overruled on other grounds by *Baker v. City of Seattle*, 79 Wash.2d 198 (1971) ("[I]t is a well-recognized rule that corporations engaged in the performance of public duties [including] those engaged in the operation of public utilities, cannot by contract relieve themselves of liability for negligence in the performance of their duty to the public or the measure of care they owe their patrons under the law.").

[32] *See, e.g., Jesse v. Lindsley,* 149 Idaho 70, 75 (2008) ("[t]he general rule sustaining agreements exempting a party from liability for negligence is subject to two exceptions: '(1) one party is at an obvious disadvantage in bargaining power; or (2) a public duty is involved (public utility companies, common carriers)'").

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