

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 428

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

I. Introduction

In compliance with Judge Mapes scoping memorandum,¹ Staff submits this cross-answering reply brief in response to the briefs submitted by the UE 428 intervenors on February 27, 2024. This brief (1) describes the two consistent legal conclusions amongst most UE 428 parties, (2) summarizes additional arguments made by intervenors, and (3) responds to AWEC’s comments regarding lack of evidentiary support.

II. Consistent Legal Conclusions

With various degrees of certainty and tone, all parties but PacifiCorp and AWEC² agree that it is unlikely a court would uphold PacifiCorp’s proposed limitation on liability. Two major themes emerge from the arguments made by the various parties. The first is that the Article I, Section 10 of the Oregon Constitution (“the remedy clause”) would likely be implicated in a court’s analysis if the Commission approved PacifiCorp’s application.³ The second is that there

¹ *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, Scoping Memorandum (Dec. 1, 2023);*

² AWEC did not take a position on the legality of PacifiCorp’s proposed liability limitation. *See 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, AWEC Opening Brief at 2-3.*

³ *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, Citizens Utility Board (CUB) Opening Brief at 7-11; Green Energy Institute at Lewis and Clark Law School (GEI) and Sierra Club Opening Brief at 2-15; Oregon Consumer Justice (OCJ) Opening Brief at 3-8; Samuel Drevo’s Opening Brief at 9-11; Freres Lumber Co.’s Opening Brief at 2-5 (February 27 2024).*

is no precedent for a utility tariff that grants such an expansive limitation on liability as PacifiCorp proposes, and none of PacifiCorp's examples provide support for a limitation that protects a utility from grossly negligent behavior.⁴

III. Summary of Additional Arguments Made in Intervenor Opening Briefs

There are a few additional legal and policy arguments intervenors make. Intervenor Samuel Drevo argues that PacifiCorp's proposed tariff provision would also violate Article I, Section 20 of the Oregon Constitution, the privileges and immunities clause, because the provision would limit remedies available to PacifiCorp customers but not anyone else.⁵ CUB makes similar arguments, stating that "customers of a single Oregon utility should not have to waive their constitutional rights as a condition of taking monopoly utility service."⁶ CUB and intervenor Oregon Consumer Justice point out that approval of PacifiCorp's petition would result in inequitable treatment between PacifiCorp customers and anyone served by a different utility.⁷ Intervenor GEI and Sierra Club and Freres Lumber Company argue that PacifiCorp's proposal would constitute an unconscionable term of a contract that is unenforceable.⁸

Intervenors also argue that questions regarding utilities' liability are a policy issue that should be decided in a larger context. Intervenor Drevo contends that these are policy questions that should be decided by the Legislature.⁹ CUB suggests that "[a]t a minimum, the Commission should deny the Petition and consider whether reasoned changes to a utility liability are warranted in a multi-utility investigation."¹⁰

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⁴ CUB Opening Brief at 15-25; GEI and Sierra Club Brief at 26-34; OCJ Opening Brief at 9-12; Freres Lumber Co.'s Opening Brief at 7-10.

⁵ Drevo Opening Brief at 11-13.

⁶ CUB Opening Brief at 12.

⁷ CUB Opening Brief at 13-14; OCJ Opening Brief at 12.

⁸ GEI and Sierra Club Opening Brief at 15-25; Freres Lumber Co.'s Opening Brief at 5-6.

⁹ Drevo Opening Brief at 14-16.

¹⁰ CUB Opening Brief at 12.

IV. Evidentiary Phase of Proceeding

AWEC did not respond to the legal questions posed by Judge Mapes in the UE 428 Scoping Memorandum.¹¹ Instead, AWEC argues that if the Commission determines it has the authority to approve PacifiCorp's liability limitation, the Commission should "determine if establishing such a limitation will in fact benefit ratepayers by reducing PacifiCorp's costs of providing electric utility services."¹² AWEC states that PacifiCorp has not provided "an evidentiary basis" to support its claims that this limitation on liability provision would enable it to maintain a good credit rating.¹³

The purpose of phase I of this docket is to address threshold legal questions before turning to an evidentiary phase of the proceeding, if necessary.¹⁴ Thus, PacifiCorp has not yet had its full opportunity to present evidence on how its proposed tariff provision would address the issue of the Company's credit downgrade. However, AWEC is correct that if this docket continues into a phase II, PacifiCorp should offer evidence that its proposal would have its intended effect. In other words, *would this liability limitation applied against only PacifiCorp customers for noneconomic damages, improve the credit rating of the Company?* Phase II of this proceeding would need to provide substantial evidence on the record that addresses this question.

V. Conclusion

The opening briefs of intervenors and Staff came to similar conclusions regarding PacifiCorp's proposed limitation on liability tariff provision. As such, Staff maintains the same conclusion made in the opening brief. A tariff provision that seeks to limit PacifiCorp's liability in situations when the Company has been found to have acted with gross negligence or willful

¹¹ Scoping Memorandum at 1.

¹² AWEC Opening Brief at 3.

¹³ *Id.*

¹⁴ Scoping Memorandum at 1.

misconduct is unlikely to be upheld by a court. Moreover, the Commission's approval of such a provision could be found to be unconstitutional.

DATED this 12th day of March 2024.

Respectfully submitted,

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