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March 12, 2024

Via Electronic Filing

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

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

Dear Filing Center:

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

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

Very Truly Yours,

_s/ Matthew S. Kirkpatrick

Matthew S. Kirkpatrick
OCJ Law Senior Attorney

encl.

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UE 428

In the Matter of PACIFICORP, dba PACIFIC POWER, Advice No. 23-018 (ADV 1545), Modifications to Rule 4, Application for Electrical Service.	)	**INTERVENOR OREGON CONSUMER JUSTICE'S CROSS-ANSWERING BRIEF**

Pursuant to Administrative Law Judge (ALJ) Mapes's February 16, 2024, Ruling, intervenor Oregon Consumer Justice ("OCJ") hereby cross-answers and incorporates the opening briefs of the other intervenors in opposition to PacifiCorp dba Pacific Power's October 23, 2023, tariff amendment request (the "Petition"), except to the extent they may be inconsistent with OCJ's Opening Brief. OCJ also incorporates the arguments in PUC Staff's Opening Brief to the extent it counsels against granting the Petition. Staff's Opening Brief is generally well-reasoned and objective. However, it may occasionally sacrifice a degree of clarity for the sake of maintaining neutrality.

A. There Is No Justification for PacifiCorp's Attempt to Eliminate Its Customers' Constitutional Rights.

PUC Staff's recognition that "PacifiCorp is justifiably concerned" about the numerous and significant challenges utilities face "in operating the electric grid in the era of the climate crisis" (Staff's Op. Br., p. 2) does not capture the critical ways PacifiCorp has misdirected those concerns and, its Petition shows, has gone even farther astray. PacifiCorp's concern is justified to the extent it is acted on and directed at protecting its customers and the general public (ORS 756.040(1)) by,

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for example, achieving the wildfire system hardening, preparedness, and investments requirements of Oregon law.[1] Unfortunately, as the *James* case established, PacifiCorp's grossly negligent failures in that regard have continued even after its September 2020 wildfires and despite the legislature's resulting enactments.

PacifiCorp's Petition shows that—despite the legislature's enactments and the juries' verdicts—it remains focused on shareholder profits rather than its responsibilities to obey Oregon law and protect its customers and the general public. Instead, PacifiCorp continues to misdirect its wildfire concerns, now aiming them squarely at its customers by attempting to avoid responsibility for harming them in the future. The PUC can and should take no part in this effort.

B. PacifiCorp's Proposed Immunity Tariff Is Impermissible on Its Face.

Staff's Opening Brief states that the "extreme breadth of [PacifiCorp's proposed Limitation of Liability] provision makes it difficult to say with any certainty how a court would evaluate such provision because it would largely depend on the given set of facts and nature of the claim before a court." (Staff's Op. Br., p. 7.) To the contrary, the proposed provision's overbreadth makes it facially unlawful in three respects. First, as discussed in OCJ's Opening Brief (p. 9), other intervenors' briefs, and PUC Staff's brief (pp. 17-21), Oregon law does not permit limitations on liability for gross negligence or willful or intentional misconduct. Second, the provision's $0 cap on most categories of constitutionally-protected remedies would make it facially unconstitutional under a court's "final check to ensure that * * * the plaintiff has received

[1] One might also ask how rates kept artificially low by allowing PacifiCorp negligence could be considered "fair and reasonable" under ORS 756.040(1).

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a constitutionally sufficient remedy." *Busch*, 366 Or at 644. $0 is, by definition, insubstantial and would therefore be unconstitutional in relation to *any* award of such damages. *But see id.* ("Under *Horton*, the question of whether a damages cap survives a remedy-clause challenge is not determined solely, or even significantly, by calculating the difference between the damages awarded by a jury and the award permitted by statute and making a judicial assessment of whether the two are so disparate that some adjectival label (substantial or insubstantial, paltry or emasculated) applies."). Finally, the requested liability limitation lacks a cognizable *quid pro quo*, as further discussed below in Section D.

C. PacifiCorp's Immunity Tariff May Not Apply to Customers' Federal Claims.

Staff's Opening Brief mentions that punitive damages claims in Oregon require clear and convincing evidence of sufficiently culpable conduct. (Staff's Op. Br., p. 9.) While that is generally true under Oregon law, it does not apply to punitive damages under federal law.[2] Similarly, PacifiCorp has not addressed whether its requested immunity tariff would be effective if applied to various federal claims that an injured PacifiCorp customer might bring.

D. PacifiCorp Proposes No Cognizable *Quid Pro Quo*.

Finally, OCJ would like to clarify two aspects of PUC Staff's discussion of the *quid pro quo* required to support a legislative or Commission-enacted limitation of liability. First, the New York rate cases' consideration of a *quid pro quo* supporting certain liability limitation provisions

[2] *See* Ninth Circuit Model Civil Jury Instruction 5.5 Punitive Damages, Comment ("a preponderance of the evidence standard has been upheld for punitive damages in certain federal claims. *See, e.g., In re Exxon Valdez*, 270 F.3d 1215, 1232 (9th Cir. 2001) (holding that preponderance standard applied to punitive damages claim in maritime case, citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991))").

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(Staff's Op. Br., pp. 13-16) and the discussion, in *Garrison v. Pac. Nw. Bell*, 45 Or App 523, 531–32, 608 P2d 1206 (1980), of "the basis of the interrelationship between the limitation of liability and the rate structure" (*id.* at 17-18) predated and did not involve or address the type of *quid pro quo* required by the Remedy Clause as established by the Oregon Supreme Court in *Horton* and *Busch*.[3]

Moreover, unlike the intra-ratepayer *quid pro quo* addressed by the above cases, *Busch* subsequently made clear that a generalized purported benefit like the lower insurance rates in *Busch* or the purportedly lower utility rates PacifiCorp promises do not qualify as a *quid pro quo* under the Remedy Clause. Staff recognize that "in the *Busch* case it was clear that the statutory noneconomic damages cap was [unconstitutional because it] was intended to confer benefits [only] upon 'society in general' without offering any benefit to the 'injured person in particular'" and that it therefore ruled that cap unconstitutional "[w]ithout more" (Staff's Op. Br., p. 28). OCJ would put an even finer point on *Busch*'s *quid pro quo* requirement.

In order to pass constitutional muster, the benefit of any purported *quid pro quo* must, at a minimum, specifically accrue to the class of persons harmed by the conduct at issue and must expand or enhance *their* remedy for that harm. It is not enough that a proposed *quid pro quo* might benefit all PacifiCorp rate payers—including those PacifiCorp injures—by keeping rates low. Rather, the Remedy Clause requires that the benefit of any *quid pro quo* expand or enhance

[3] PUC Staff also note that *Busch* was not a unanimous opinion. (Staff's Op. Br., p. 28.) However, neither of the justices who dissented and/or concurred, in part, in the *Busch* opinion (Justice Balmer and Senior Judge/Justice *pro tempore* Landau) remain on the court. https://www.courts.oregon.gov/courts/appellate/supreme/pages/justices.aspx (last accessed 3/12/2024).

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the remedy for some *harmed* customers who otherwise would have had no remedy or an inadequate one.

For example, *Horton* held the Oregon Tort Claims Act to be constitutional because "the act ensures that a solvent defendant will be available to pay any damages up to $3,000,000—an assurance that would not be present if the only person left to pay an injured person's damages were an uninsured, judgment-proof state employee." *Busch v. McGinnis Waste Systems, Inc.*, 366 Or 628, 638, 468 P3d 419 (2020) (*quoting Horton v. OHSU*, 359 Or 168, 221-22, 376 P3d 998 (2016)). Likewise, Oregon courts have long upheld the Workers Compensation Act against Remedy Clause and other challenges because, "the workers' compensation system effectuates a *quid pro quo*, with injured workers giving up the right to pursue civil negligence actions against their employers and those employers assuming liability for work-related injuries without regard to fault." *See Bundy v. NuStar GP, LLC*, 371 Or 220, 229, 533 P3d 21 (2023) (discussing historical background of Workers' Compensation Law generally).

Unlike the Oregon Tort Claims Act and the Workers' Compensation Act, the immunity tariff PacifiCorp seeks would violate the Remedy Clause because it admittedly "does not expressly confer a benefit on injured persons" as required "to counterbalance the substantive right that Article I, section 10, grants." *Busch v. McGinnis Waste Systems, Inc.*, 366 Or 628, 650-51, 468 P3d 419 (2020).

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E. Conclusion.

For all of the reasons discussed above and in OCJ's, Staff's, and the other intervenors' opening briefs, the Commission should deny PacifiCorp's Petition.

Dated this 12th day of March 2024.

Respectfully submitted,

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s/ Matthew Kirkpatrick

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