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	Intervenor Freres Lumber Co.'s Opening Brief

I. INTRODUCTION

On October 24, 2023, PacifiCorp petitioned the Oregon Public Utility Commission (PUC or The Commission) 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 conduct. PacifiCorp's proposed limitation violates the Oregon Constitution and well-established common law, is bad public policy, and is unprecedented in utility regulation. Accordingly, the PUC should reject it.

II. ARGUMENT

Under PacifiCorp's proposal, as a condition of service, customers would be forced to "waive and release" PacifiCorp from "any and all claims for special, noneconomic, punitive, incidental, indirect, or consequential damages (including, without limitation, lost profits)" arising from "*any claim*" against PacifiCorp "related to or arising from [its] operations or electrical

facilities."[1] If approved, the tariff would limit recovery to actual economic damages for *every* potential plaintiff, regardless of PacifiCorp's culpability. Such a drastic liability waiver violates Oregon's Constitution and well-established principles of Oregon tort law.

PacifiCorp's proposed tariff is unprecedented not only in Oregon, but in the Western states it cites. While the PUC has the authority to narrowly limit a utility's liability, the waiver sought by PacifiCorp is all-but limitless, and it would leave injured Oregon individuals and businesses without any remedy – let alone an adequate remedy – for damages caused by PacifiCorp's culpable conduct. It would also eliminate punitive damages and other statutorily enhanced damages designed to prevent reckless, willful and similarly culpable conduct. As such, it violates the Remedy Clause of the Oregon Constitution and well-established Oregon tort law. PacifiCorp cannot escape these fatal shortcomings by citing narrow waivers in other states that do not limit a utility's liability for its culpable acts. The PUC should reject the proposed tariff amendment as it is contrary to Oregon law and sound public policy.

A. <u>PacifiCorp's Proposed Tariff Amendment Violates the Remedy Clause of the Oregon Constitution</u>.

In Oregon, every person "shall have remedy by due course of law for injury done" to them in their "person, property, or reputation."[2] The Remedy Clause limits a regulatory body's authority to modify remedies that were traditionally available at common law.[3] The central inquiry is "whether a plaintiff's remedy is constitutionally sufficient," considering the extent to

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[1] PacifiCorp, Advice 23-018, Oregon Rule 4—Application for Electric Service I, Limitation of Liability (emphasis added).

[2] OR. CONST. Article I, section 10.

[3] Although the Remedy Clause traditionally places a substantive limit on the legislature's ability to modify remedies, it applies equally to the PUC that acts legislatively when it exercises its regulatory function. *Pacific Northwest Bell Tel. Co. v. Sabin*, 21 Or App 200, 214 (1975) ("The Commissioner appears, therefore, to have been granted the broadest authority—commensurate with that of the legislature itself—for the exercise of his regulatory function."). Therefore, limitations of liability in a tariff must pass constitutional muster. The limitation that PacifiCorp proposes cannot.

which the regulatory body "has departed from the common law model, and its reasons for doing so."[4]

Absent sufficient cause, limiting a plaintiff's remedies to "actual economic damages" does not satisfy constitutional requirements under the Remedy Clause.[5] This is because tort law aims to make a plaintiff whole, which necessarily includes noneconomic damages for a plaintiff's pain and suffering.[6] PacifiCorp's tariff revision would eliminate its liability for anything other than "actual economic damages." However, it fails to provide anything to potentially injured plaintiffs that would justify such a drastic departure from basic tort principles.

Such a mandated limitation is justified only if the class of plaintiffs receives something in return.[7] A "bare reduction in a plaintiff's noneconomic damages without any identifiable *quid pro quo* . . . violates the remedy clause."[8] A *quid pro quo* exists when the proposed limitation confers a benefit on the potential plaintiffs in exchange for a modified remedy – it is not constitutionally sufficient for the benefits to "inure to society in general."[9] Here, PacifiCorp seeks a broad limitation of liability without providing anything to its customers in exchange. The Oregon courts have already determined this is unconstitutional.[10]

The justifications PacifiCorp cites for its proposal fare no better than those found insufficient in *Busch* and *Vasquez*. PacifiCorp offers nothing to its injured customers in exchange for the limitation of liability. Rather, it argues that plaintiffs should only be allowed to

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[4] *Busch v. McInnis Waste System, Inc.*, 366 Or 628, 647 (2020) (internal quotation omitted).
[5] *Id* at 646–647.
[6] *Id.*
[7] *Busch*, 366 Or at 649.
[8] *Vasquez v. Double Press Mfg., Inc.*, 288 Or App 503, 526 (2017).
[9] *Busch*, 366 Or at 651.
[10] *Busch*, 366 Or at 648 (holding that there was no constitutionally sufficient *quid pro quo* when the legislature capped noneconomic damages "to make insurance awards more predictable and lead to a reduction in claim severity, reducing insurance costs and thereby increasing availability."); *Vasquez*, 288 Or App at 525 (holding that there was not a constitutionally sufficient *quid pro quo* where cap was intended to "put a lid on litigation costs, which in turn would help control rising insurance premium costs in Oregon.")

recover actual economic damages because the utility might otherwise be unable to maintain investment-grade credit, thereby increasing rates for its customer base and risking PacifiCorp's ability to comply with renewable energy obligations. This is identical to *Busch* and *Vasquez*, where the potential benefits of PacifiCorp's petition would "inure to society in general" rather than to the potential plaintiffs injured by PacifiCorp's culpable conduct.

Additionally, even if there were a constitutionally appropriate *quid pro quo*, PacifiCorp's proposal eliminates entire classes of remedies, including noneconomic damages. This is far worse than the "emasculated remedy" that was condemned by the Oregon Supreme Court in *Clarke v. Oregon Health Sciences University*, which invalidated the Oregon Tort Claims Act where it capped noneconomic damages against publicly employed physicians at $200,000.[11] Similarly, the *Vasquez* court invalidated the statutory cap of $500,000 in noneconomic damages, which was approximately 30% of the jury's award.[12]

PacifiCorp's petition fares much worse. For example, the jury in *James v. PacifiCorp* awarded plaintiffs roughly $90,000,000 in damages from PacifiCorp's gross negligence and willful misconduct in causing the Labor Day 2020 Oregon fires,[13] only $4.4 million – roughly 5% of the total award – was for economic losses. The second *James* jury awarded the plaintiffs $6,292,933 in economic damages and $56 million in noneconomic damages. Clearly, eliminating the noneconomic damages would have been constitutionally insufficient, resulting in an unconstitutional "emasculated remedy" without any sort of constitutionally adequate *quid pro quo*.[14] Further, PacifiCorp's proposal extends beyond noneconomic damages, but also seeks to

[11] 348 Or. 581, 607-610 (2007).
[12] *Vasquez*, 288 Or App at 525–526.
[13] *James v. PacifiCorp*, Case No. 20-cv-33885 (2023).
[14] *Vasquez*, 288 Or App at 525–526; *see also*, *Clarke v. Oregon Health & Science University*, 348 Or. 581, 606-10 (2007); *Horton v. Oregon Health & Sciences University*, 359 Or. 168, 220-24 (2016).

eliminate entirely "incidental, indirect, or consequential damages (including, without limitation, lost profits)." Freres Lumber Co. suffered more than $3.3 million in "consequential damages" – including lost profits – as a result of the Santiam Canyon fire caused by PacifiCorp's willful and reckless refusal to shut off its power. Under the new tariff proposal, those damages otherwise recoverable under the common law would be unrecoverable, with *no* substitute remedy.

The sort of catastrophic wildfires caused by PacifiCorp's culpable conduct in *James* are typical of the sort of fires that could be caused by PacifiCorp in the future (absent a dramatic improvement in its wildfire preparedness). Far more drastically than in *Clarke* or *Vasquez*, PacifiCorp proposes eliminating entire classes of damages, including "special, noneconomic, punitive, incidental, indirect, or consequential damages (including, without limitation, lost profits)." Under the foregoing authorities, PacifiCorp's proposal violates the Remedy Clause of Article I, Section 10 of the Oregon Constitution.

B. <u>PacifiCorp's Waiver is Void as Against Public Policy</u>.

In Oregon, an exculpatory clause is void on public policy grounds when it is procedurally unconscionable – *i.e*., where there is unequal bargaining power between the parties and the agreement is offered on a take-it-or-leave-it basis.[15] The agreement must be "part of a bargain in fact between business concerns that have dealt with one another at arm's length in a commercial setting."[16] A limitation of liability can also be void where it is substantively unconscionable, such as where its substantive terms violate a recognized public policy.[17] In *Bagley v. Mt. Bachelor, Inc.*, Mt. Bachelor ski resort could not exculpate itself from its own negligence in part because its "superior bargaining strength" forced patrons to sign an anticipatory release on a

[15] *Bagley v. Mt. Batchelor, Inc.,* 356 Or. 543, 555 (2014).
[16] *Atlas Mut. Ins. Co. v. Moore Dry Kiln Co.*, 38 Or App 111, 114 (1979); *Bagley*, 356 Or at 570.
[17] *Bagley*, 356 Or. at 556-57.

take-it-or-leave-it basis as a condition of using its facilities.[18] Here, PacifiCorp similarly provides power to its customers on a take-it-or-leave-it basis, especially to residential customers who have no direct access option under Oregon law.[19] It is thus procedurally unconscionable. It is substantively unconscionable because it seeks to eliminate liability for *all* culpable conduct. This violates Oregon's strong public policy of protecting the public from the culpable conduct of service providers such as PacifiCorp who are uniquely positioned to both ensure that their activities are undertaken safely and to protect the public from the dangers their service may create.[20]

The exculpatory clause in PacifiCorp's proposal would be imposed by a regulatory process, not as the result of an arms-length negotiation between the utility and its customers. As PacifiCorp points out, limiting a utility's liability is part of the ratemaking process – a process that requires the PUC to balance the interest of the customer against the utility's interest in maintaining credit and attracting capital.[21] Clearly, this proposed tariff revision offers nothing to the customer. It is, rather, void against well-established public policy because it would allow PacifiCorp to avoid liability for its own culpability, even where such culpability was at the heightened level required to impose punitive damages. The PUC should reject the proposed revision.

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[18] *Id.* at 561–563.
[19] ORS 757.622.
[20] *Bageley*, 356 Or. at 565-66; *see also*, ORS 31.370 (authorizing punitive damages where a defendant has acted with "malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.").
[21] ORS 756.040.

C. **The Broad Waiver of Liability Sought by PacifiCorp is Unprecedented.**

i. The liability waiver in PacifiCorp's petition does not complement existing limitations of liability that have been approved by the PUC.

First, the PUC has never approved a liability waiver that shielded an electric utility from its own negligent conduct. Instead, existing waivers center on third party conduct, acts of God or customer conduct that occurs on the customer's side of the point of delivery. For example, PacifiCorp is not liable for any loss or damage arising from equipment owned or leased by the customer or for any damages arising from the customer's resale of service.[22] Portland General Electric's (PGE) tariff similarly requires Electric Service Suppliers (ESS) that deliver power directly to customers via the utility's transmission lines to indemnify the PGE against claims arising from ESS conduct.[23] Finally, PacifiCorp's tariff includes a number of force majeure clauses that limit liability for unforeseeable and unavoidable catastrophes,[24] which, by their very nature, do not implicate negligence (or other culpable conduct) on the part of the utility. PacifiCorp's proposed waiver of liability is unprecedented in Oregon.

PacifiCorp's petition is also unsupported by the narrow waivers of liability that only apply to demand response (DR) programs. Under DR programs, customers are incentivized to opt into an agreement where the utility automatically curtails power delivery to a predetermined level during peak demand. In exchange, customers also agree not hold the company liable for

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[22] PacifiCorp, Oregon Rule 2(P)—Types of Service; PacifiCorp, Oregon Rule 6(C)—Consumer Responsibilities; *see also* PacifiCorp, Oregon Rule 11B(II)(C)—Discontinuance of Service for Other Causes (PacifiCorp not liable for unauthorized reconnection and tampering); PacifiCorp, Oregon Rule 11C(III)(B)—Charges for Collection Activity (no duty to inspect or repair customer lines); PacifiCorp, Oregon Rule 13VI(A)(2)—Line Extensions, page 10 (waiving PacifiCorp's liability for an applicant's built line extensions); PacifiCorp, Oregon Schedule 135—Special Condition 13 (PacifiCorp not liable for permitting or continuing to allow an attachment of net metering facility or for the acts or omission of a customer-generator).

[23] PGE, P.U.C. Oregon No. E-19, Orig. Sheet No. K-8, Customer Enrollment 6B (requirements relating to ESSs).

[24] PacifiCorp, Oregon Rule 10(I)—Billing; PacifiCorp, Oregon Rule 14—Continuity of Electric Service and Interruption and Service Restoration; PacifiCorp, Oregon Rule 25—Customer Guarantees, General Exception 9.

any property damage resulting from the customer's participation in the program.[25] Thus, liability waivers in DR programs are part of a voluntary exchange of benefits and burdens between the utility and its customers, which is distinguishable from PacifiCorp's proposal that would unilaterally waive the utility's liability for entire classes of damages to all customers pursuant to its provision of services.

ii. The liability waiver in PacifiCorp's petition does not align with precedent from other western states.

PacifiCorp argues that its proposal would "generally align[]" utility regulation in Oregon with precedent from several western states. That is false. Liability waivers across the West are much narrower in scope.

First, regulators in the West routinely impose liability on utilities for their own negligence, gross negligence, and willful misconduct. For example, customers of Cheyenne Light, Fuel and Power Company in Wyoming must hold the utility harmless and indemnify it against all claims unless caused by the negligence or wrongful acts of the Company's agents or employees.[26] Similarly, Xcel Energy in Colorado is liable under its tariff for damage caused by its own negligence on the customer's side of the point of delivery.[27] Finally, Washington Water Service Co. is liable under its tariff for its gross negligence and willful misconduct.[28] Therefore, PacifiCorp's proposal is unsupported by Wyoming, Colorado, and Washington Regulations.

It is worth noting that PacifiCorp filed similar petitions to the one at issue here in California, Washington, Idaho, and Wyoming. Although regulators in Washington and California

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[25] *See, e.g.*, PGE, P.U.C. Oregon No. E-19, Orig. Sheet No. 88-4 (waiving PGE's liability for damage to customer property when the damage flows from the customer's participation in a load reduction program).
[26] Cheyenne Light, Fuel and Power Company, Wyo. P.S.C. Tariff No. 14, Original Sheet No. R22 (emphasis added); *see also*, Montana-Dakota Utilities Co., Wyo. P.S.C. Tariff No. 1, Rate Schedule 100 Conditions of Service, at 9 (same).
[27] Xcel Energy, Colo. PUC No. 8 Electric, Or. Sheet No. R87 (emphasis added).
[28] Washington Water Serv. Co., WN U-3, Or. Sheet No. 15.

have not taken a position on PacifiCorp's proposal, Commission staff in Idaho and Wyoming have recommended that the petition be denied.[29]

Next, PacifiCorp cites two California appellate decisions, claiming that the California PUC has unqualified discretion to limit a public utility's liability.[30] Again, that is false. The California Public Utility Code creates a private right of action against a public utility for "all loss, damage, or injury" caused by a violation of the "Constitution, any law of this State, or any order or decision from the commission."[31] Even if the California PUC had unqualified discretion, it has narrowly limited electric utility liability consistent with other western states. For example, PG&E is not liable for unforeseeable service interruptions, damages arising from the actions of an Electric Service Provider that uses PG&E transmission lines, or damages arising from any release of customer information to a third party pursuant to a customer's written authorization.[32] None of these narrow waivers limit PG&E's liability for its own negligence or other culpable conduct.

Finally, PacifiCorp's claim that its petition would align Oregon utility regulation with that of Washington based on Puget Sound Energy's liability waiver for service interruptions is, again, false.[33] First, like Puget Sound Energy, the tariffs for PacifiCorp, Idaho Power, and PGE already limit liability for service interruptions.[34] Second, PacifiCorp's proposal is not limited to service

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[29] Comments of the Commission Staff, *In re Rocky Mountain Power's Application to Revise Electric Service Regulation No. 3-Electric Service Agreements*, Case No. PAC-E-23-22; Memorandum, *In re Application of Rocky Mountain Power for Authority to Revise Rule 3 to Provide for Updated Provisions Regarding Liability for Damages*, Docket No. 20000-652-ET-23 (Record No. 17434).
[30] PacifiCorp, Advice 23-018, page 2 n.2, n.4.
[31] Cal. Pub. Util. Code § 2106.
[32] PG&E, Electric Rule No. 14, Shortage of Supply and Interruption of Delivery, Sheet 1; PG&E, Electric Rule No. 22, Direct Access, Sheets 6, 9, and 10; PG&E, Electric Rule No. 25, Release of Customer Data to Third Parties, Sheet 5.
[33] PacifiCorp, Advice 23-018, page 2 n.1 (citing Puget Sound Energy, WN U-60, Second Revised Sheet Nos. 80-e, 80-f).
[34] PacifiCorp, Oregon Rule 14—Continuity of Electric Service and Interruption and Service Restoration, page 1; Idaho Power Co., Rule J—Continuity, Curtailment, and Interruption of Electric Service, Orig. Sheet No. J-1; PGE, Rule C—Conditions governing Customer Attachment to Facilities, Orig. Sheet No. C-2.

interruptions. Rather, it limits recovery to "actual economic damages" regardless of PacifiCorp's culpability and the facts underlying a plaintiff's claim. If adopted, PacifiCorp's proposed tariff revision would make Oregon unique in the West by preventing recovery of entire classes of otherwise validly sought damages, regardless of PacifiCorp's level of culpability. The PUC should reject PacifiCorp's invitation to do so.

III. CONCLUSION

For the foregoing reasons, the Commission should reject PacifiCorp's petition.

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Respectfully submitted,

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