
February 27, 2024

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Public Utility Commission of Oregon
Attn: Filing Center
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Re: Docket No. UE 428 – Samuel Drevo’s Opening Brief

Attention Filing Center,

Please find attached for filing in the above-referenced proceeding Samuel Drevo’s Opening Brief.

Thank you for your assistance. Please do not hesitate to contact me with any questions regarding this filing. Mr. Drevo can be contacted via his attorney, listed in the petition below.

Thank you,

/s/ Matthew J. Preusch

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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.

**INTERVENOR SAMUEL DREVO'S
OPENING BRIEF**

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I. INTRODUCTION

Intervenor Samuel Drevo appreciates the opportunity to provide the perspective of fire survivors in this proceeding. As explained below, PacifiCorp has recently found liable to thousands of survivors like Mr. Drevo. His primary concern is that PacifiCorp is not permitted to use the Commission's authority to skirt that authority. Doing so would interfere with ongoing litigation, Part III.A below. The proposed tariff is unconstitutional as it would violate both the Privileges and Immunities and Remedies clauses, Part III.B below. Finally, the proposed tariff would usurp the province of the legislature by enacting a sweeping limitation on liability, Part III.C below.

II. FACTUAL BACKGROUND

Intervenor Samuel Drevo is one of the court-appointed class representatives in *James, et al. v. PacifiCorp, et al.*. Last summer, a Multnomah County jury in that case heard how PacifiCorp ignored repeated warnings from regulators, largely ignored the risk of catastrophic fire during an east wind event, and then failed to deactivate power lines to prevent further fires even after it had already set multiple fires on Labor Day 2020. After seven weeks of evidence, the jury found that PacifiCorp's grossly negligent, reckless, and willful conduct harmed thousands of Oregonians, it determined that there was clear and convincing evidence that PacifiCorp showed a reckless and outrageous indifference to a highly unreasonable risk of harm, and it imposed substantial punitive damages to punish and deter PacifiCorp's misconduct.

While the mountain of evidence supporting PacifiCorp's liability and resulting damages need not be repeated here, Mr. Drevo respectfully requests that the Commission take five minutes to view a portion of his trial testimony, which is illustrative of harms suffered by the

James class members.¹ In that video, Mr. Drevo explains why his experience escaping from PacifiCorp’s fires was “terrifying” and “one of the scariest moments of [his] life.” (Exhibit A, excerpt from May 11, 2023 Transcript at 3728.). The recording will also allow the Commission to view a video of the actual PacifiCorp fire from which Mr. Drevo escaped and that burned down nearly his entire town.

As the judge overseeing the case explained, PacifiCorp’s legal responsibility for that fire has now been conclusively established, and future juries cannot question it. (Exhibit B, excerpt from Jan. 8, 2024 Transcript at 33.) The *James* trial that took place over the summer was a “class action with respect to particular * * * issues,” as permitted by ORCP 32 G. Only the question of PacifiCorp’s *liability* was resolved as to the entire class of people who lived or owned property in the areas PacifiCorp’s fires burned down. *Damages*, by contrast, were tried only as to a group of seventeen named plaintiffs, who obtained judgment in the total amount of about \$6.8 million in economic damages, \$67.5 million in non-economic damages, and \$17.9 million in punitive damages (of which 70% goes to the State of Oregon).

Now, the rest of the class members—thousands more injured people—can each have their own damages claims heard by juries, with liability already determined. One such trial has already taken place. The jury in that trial awarded approximately \$6 million in economic and \$56 million in non-economic damages to ten class members, which translates to an award of more than \$84 million after the doubling of economic damages and the addition of punitive damages. Another trial is underway today, and further trials are scheduled throughout the year. PacifiCorp has already appealed the judgment in favor of Mr. Drevo, and it has given every indication that it will appeal every other judgment obtained by *James* class members.

¹ The video can be viewed at <https://storage.googleapis.com/sdtestimony/DrevoExcerpt.mp4>.

Now, having been found liable by a jury, PacifiCorp is looking outside the court system for help. Facing the overwhelming likelihood of having to compensate Oregonians for the vast majority of the actual damages caused by PacifiCorp's fires, PacifiCorp asks the Commission to shift the cost of those damages onto the victims of PacifiCorp's fires, people like Mr. Drevo and other ratepayers. Mr. Drevo strongly opposes this request.

III. ARGUMENT

Mr. Drevo's primary concern is that PacifiCorp intends to use the new tariff to block or reduce recovery for *James* class members who do not yet have judgments in their hands (or even for himself, should the Court of Appeals vacate his own judgment). PacifiCorp has steadfastly refused to make any enforceable commitment not to use the tariff to try to reduce its liability to him and to the other Oregonians injured by PacifiCorp's fires. Beyond that, however, Mr. Drevo is also concerned that PacifiCorp is continuing its pattern of disregard for the law by urging the Commission to ignore its constitutional responsibilities by declining to even *examine* the meaning and the ramifications of the unconstitutional tariff it is asking for. While PacifiCorp may be comfortable abdicating its own responsibility to thousands of Oregonians, the Commission should not follow its lead.

A. Granting PacifiCorp's petition risks interfering in ongoing litigation and preventing injured Oregonians from recovering for their losses caused by PacifiCorp's fires.

The most pernicious problem with PacifiCorp's requested tariff is that it appears to be designed specifically to allow PacifiCorp to escape liability for harm that it has already caused, despite PacifiCorp's present protests to the contrary.

To start, consider the plain language of the modified tariff PacifiCorp requests:

Limitation of Liability: In any action between the parties arising out of the provision of electric service, the available damages shall be limited to actual economic damages. * * * By receiving electric service, Customer agrees to *wave*

and release Company from any and all claims for special, noneconomic, punitive, incidental, indirect, or consequential damages (including, without limitation, lost profits) as part of *any claim* against Company related to or arising from Company's operations or electrical facilities. This provision shall not be binding where state law disallows limitations of liability.

Advice No. 23-018, Proposed Tariff Sheets at 3 (emphasis added.) This provision contains no express language limiting its application to future occurrences or exempting pending litigation from its scope. In fact, it seems tailor-made to fit the claims at issue in *James*.

The *James* class action arises out of the provision of electric service and seeks, in addition to economic damages, noneconomic and punitive damages. The key here is noneconomic damages, which in Oregon includes damages for pain and suffering. ORS 31.705(2)(b). The noneconomic damages so far awarded in the *James* trials are an order of magnitude greater than the economic damages. The juries' opinions are entirely consistent with the trauma inflicted upon victims who had to run for their lives to escape PacifiCorp's fires—fires that laid waste to entire communities.

Assuming that the tariff is enforceable as written, it would limit ratepayers' damages to out-of-pocket losses such as property damage and medical bills, with no compensation whatsoever for the trauma inflicted by PacifiCorp's fires. A fire victim who suffered burns all over her body would, if a ratepayer, be able to recover \$0 for the pain of the burns, \$0 for the suffering occasioned by the burns, \$0 for the emotional trauma of having a disfigured body, and \$0 for loss of the ability to engage in non-employment activities such as walking or using the bathroom unassisted.

PacifiCorp has repeatedly insisted that the tariff modification is "prospective" only, and that it will not affect the *James* class members. At first blush, its statements to that effect carry the veneer of legitimacy. For example, it asserted "unequivocally" that the tariff

cannot threaten Mr. Drevo or other class members’ potential recovery from issues related to the *James* litigation, because the Company’s request only seeks prospective relief. * * * Their interests as a certified class under Oregon Rule of Civil Procedure 32 to a pre-existing civil lawsuit cannot be implicated by the Company’s proposed tariff language that only seeks prospective relief, and that was filed several years after the *James* litigation began.

(PacifiCorp’s Partial Objection to Samuel Drevo’s Petition to Intervene (“Objection”) at 4-5.)

But PacifiCorp refuses to take the steps that would legally bind it to that position in a meaningful way: entering a stipulation both here, before the Commission, and in the pending litigation regarding those fires. Mr. Drevo provided a draft stipulation to PacifiCorp under which it would waive “any and all defenses, arguments, and contentions that its liability or potential liability” to *James* class members “is in any way reduced, modified, or otherwise affected by any tariff or tariff modification approved by the PUC after September 7, 2020,” the date of the Labor Day fires (Exhibit C, Email from M. Preusch to Z. Rogala and M. McVee dated Jan. 4, 2024 at 1). PacifiCorp refused to agree to this proposal. And it did not counter with another stipulation that it would be comfortable with. Instead, it categorically stated that it was not willing to file a stipulation. (Exhibit D, Email from Z. Rogala to M. Preusch dated Jan. 8, 2024 at 1).

More alarming is what PacifiCorp *has* said in the litigation. The plaintiffs in the *James* case requested that PacifiCorp admit, pursuant to ORCP 45, that it has asked this Commission to authorize a tariff “that would prevent *James* class members from recovering special, noneconomic, punitive, incidental, indirect, and consequential damages arising from any of the Labor Day 2020 Fires.” (Exhibit E, Defendant’s Responses and Objections to Phase II Plaintiffs’ First Set of Requests for Admission, Request No. 17) If what PacifiCorp was “unequivocally represent[ing]” to the Commission were true, the answer would have been to deny this request, “unequivocally.” (See Objection at 4-5.) Instead, it said, after some boilerplate objections:

Defendant further objects that while Defendant has proposed certain amendments to its tariffs, the Public Utility Commission has not determined whether to accept

those amendments, and their legal effect has not been determined by any Court. To that end, **reasonably [sic] inquiry has been made and the information known or readily obtainable is insufficient to enable Defendant to admit or deny whether any tariff amendments, if permitted by the Public Utility Commission, would have any effect as to James class members**; Defendant accordingly lacks knowledge or information necessary to respond to this request and on that basis denies the same.

(Exhibit E, Response No. 17) (emphasis added). This response is dated December 13, 2023, only two weeks before PacifiCorp’s supposedly “unequivocal[]” statement to the Commission.

From these inconsistent words and actions, Mr. Drevo can only surmise that PacifiCorp is trying to preserve the opportunity to advance arguments that it has suggested—but not quite promised—to the Commission that it will not make. *Cf. Mozilla Corp. v. FCC*, 940 F3d 1, 95 (DC Cir 2019) (Williams, J., concurring in part and dissenting in part) (“And be these juggling fiends no more believed, That palter with us in a double sense; That keep the word of promise to our ear, And break it to our hope.”) (quoting WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 8, ll. 23-26).

To see how this maneuver would work, consider the following scenario, which is plausible based on the manner in which PacifiCorp has conducted itself in the *James* litigation to date. First, PacifiCorp blocks Mr. Drevo from intervening on behalf of the class in this proceeding, cutting off his ability to assert the class’s position. Then, the Commission permits the new tariff to come into effect, which forces class members who are presently PacifiCorp customers—or who thereafter become PacifiCorp customers by moving into its service territory—to agree to the limitation on liability. Armed with its new tariff, PacifiCorp goes back to the court, whereupon it argues that the tariff limits its liability to anyone who does not yet have a money judgment against PacifiCorp. Then, when class members point to PacifiCorp’s statements to the Commission that this new limitation of liability provision is only “prospective,” PacifiCorp will argue that no such limitation appears in the text of the tariff itself, and that it

expressly told the Commission that it is “not within the scope of the Commission’s statutory authority” to “make rulings directly relating to ongoing litigation.” (Objection at 4.) It will argue that the court should therefore consider the plain text of the tariff on its own, without considering any parol evidence about what effect the Commission might have thought it would have on the litigation. In the alternative, PacifiCorp will explain that it is asking for a “prospective” application of the tariff, just as it promised the Commission, because the new tariff applies “prospectively” to limit liability to any ratepayer who does not yet have a money judgment against PacifiCorp. A *retroactive* application, PacifiCorp will tell the court, would be one that affects a judgment that has already been entered.

By approving the tariff language, the Commission would be forcing *James* class members who are also PacifiCorp ratepayers to accept the added expense and uncertainty of addressing these arguments as a condition of having electricity delivered to their homes. Even a small possibility that these arguments might succeed would have enormous consequences for *James* class members. It is no exaggeration that it might be an economically rational decision for a class member to move to another part of the state rather than risk being subject to the new tariff, even though these arguments are wrong in many ways, and even though class members would certainly have a good chance to defeat them in court.

PacifiCorp’s conduct here leads to one conclusion: that it is attempting to enlist the Commission’s authority to impose tariffs on utility consumers for the purpose of improving its position in pending litigation. By entering the requested tariff, the Commission would effectively be interfering with pending litigation. Not only is that inefficient, but it is imprudent, because it risks unnecessarily encroaching on the authority of the Oregon judiciary. In the *James* case, the court twice rejected PacifiCorp’s argument that the Commission has exclusive jurisdiction over

key liability issues in the case, and it has since held two jury trials with a third presently in progress. As a matter of respect for the Court's orders and the efficiency of the judicial process, the Commission should refrain from permitting a tariff modification that PacifiCorp is nearly certain to use as an attempt to limit its liability in pending litigation.

B. PacifiCorp's requested tariff is unconstitutional.

Because ratemaking is a "legislative function" delegated to the Commission, the Commission is subject to the same "constitutional limits" that would apply if the legislature passed a statute. *See Am. Can Co. v. Lobdell*, 55 Or App 451, 461, 638 P2d 1152, 1158 (1982). Every member of this Commission takes an oath to "support the Constitution of the United States and of this state[.]" ORS 7656.022. As the Oregon Supreme Court has explained, "the constitution does not contemplate that legislators and officials will act as they think best and leave the constitutionality of their acts to the courts." *Li v. State*, 338 Or 376, 395, 110 P3d 91, 101 (2005). *abrogated on other grounds by Obergefell v. Hodges*, 576 US 644 (2015). Rather, "a governmental official must, within the scope of that official's otherwise lawfully delegated authority, take care to consider the meaning of the state and federal constitutions when executing official duties." *Li*, 338 Or at 396. Accordingly, the Commission has an obligation to ensure that its actions comply with the Oregon Constitution.

By its submission, PacifiCorp asks the Commission to abdicate its oath and commensurate responsibility to follow the law. PacifiCorp's addition of a sentence to its tariff that says the liability limitation does not apply if it is unconstitutional is insufficient. The Commission does not meet its constitutional obligations by sidestepping the constitutional issues.

Moreover, sidestepping the constitutional issues cause real harm to the victims of PacifiCorp's fires. There can be no doubt, if this tariff is adopted, that PacifiCorp's first line of defense when a consumer tries to recover for damages will be to point to the tariff and say that

there is no clear state law saying that the limitation on liability is disallowed in this particular case. Until the courts strike down the unconstitutional tariff, PacifiCorp will be able to use a patently unconstitutional provision to overwhelm consumers into accepting settlements that are far lower than what they should actually be entitled to. Consumers will be faced with an added layer of uncertainty in their cases and PacifiCorp will have yet another meritless defense at their disposal to indefinitely prolong litigation.

Under Oregon law and their oaths of office, Commissioners must meaningfully consider whether their actions are Constitutional before taking them. As discussed in detail below, approving this tariff would violate the rights secured to Oregonians under the Oregon Constitution.

1. PacifiCorp’s proposed tariff violates the Remedy Clause.

The Remedy Clause, of Article I, Section 10 of the Constitution, requires that “every man shall have remedy by due course of law for injury done him in his person, property, or reputation.” To understand how PacifiCorp’s requested liability waiver offends this clause, a brief explanation of the usual rules of tort liability is helpful. The basic principle of negligence is that a defendant is liable to a plaintiff if its negligent “conduct created foreseeable risk of ‘the kind of harm that befell the plaintiff.’” *Scott v. Kesselring*, 370 Or 1, 17, 513 P3d 581, 592 (2022). “The general rule—and the rule in Oregon—is that when a defendant is liable for the *type* of harm that a plaintiff suffers, the defendant is liable for the entirety of that harm[.]” *Id.* “If the plaintiff establishes a negligence claim based on physical injury, then, generally speaking, the pain for which recovery is allowed includes virtually any form of conscious suffering, both emotional and physical.” *See id.* at 17-18 (alterations omitted).

PacifiCorp’s proposed tariff changes that rule by barring recovery 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), strict liability, warranty or otherwise.” As discussed above, the key word—buried in the middle—is “noneconomic” damages. In Oregon, that includes “pain, mental suffering, emotional distress, humiliation, injury to reputation, loss of care, comfort, companionship and society, loss of consortium, inconvenience and interference with normal and usual activities apart from gainful employment.” ORS 31.705(2)(b). Under PacifiCorp’s proposed tariff, it would never be liable to any ratepayer for any pain and suffering damages caused by its negligent actions.

Returning to the Remedy Clause, when the legislature—or the Commission exercising a legislative function—“adjust[s] the duties that one person owes another and the remedies for a breach of that duty as societal conditions change,” courts must consider the extent to which the Commission “has departed from the common-law model measured against its reasons for doing so.” *Horton v. Oregon Health & Sci. Univ.*, 359 Or 168, 220, 376 P3d 998, 1028 (2016). If the remedy that remains after the adjustment is “only a paltry fraction of the damages that the plaintiff sustained,” then a limitation of remedy is likely to violate the Remedy Clause. Here, Oregon juries have awarded *James* class members approximately ten times more noneconomic damages than economic damages, which makes clear that eliminating noneconomic damages would leave them with no more than a paltry fraction of what the common law entitles them to. To be clear, those noneconomic damages numbers are not punitive damages designed to punish PacifiCorp for its wrongdoing. Those are separate. These are *compensatory* damages in amounts that juries decided were necessary to compensate the plaintiffs for the actual physical and emotional harm caused PacifiCorp’s fires. By reducing that amount to \$0 for future similar cases,

the Commission would almost certainly violate the Remedy Clause by providing only a paltry fraction of the remedy for harm inflicted by negligently caused fires.

At the very least, the Commission must give reasons for departing from the common-law damages model so that a court examining its actions later can determine whether the justifications for absolving PacifiCorp from all liability for noneconomic damages to ratepayers are constitutionally sufficient. Mr. Drevo respectfully submits that there can be no sufficient justification for handing a get-out-of-jail free card to a utility that has just been adjudicated to have acted with reckless disregard for his own life, limb, and property.

2. PacifiCorp’s proposed tariff violates the Privileges and Immunities Clause.

Article I, Section 20 of the Oregon Constitution, requires that “No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.” In order to comply with that provision, a “government[al] decision-maker” must have a “rational explanation for the differential treatment that is reasonably related to his or her official task or to the person’s individual situation.” *State v. Savastano*, 354 Or 64, 96, 309 P3d 1083, 1102 (2013). If, in setting rates, the Commission’s disparate treatment of similarly situated persons cannot be explained rationally in a way that is related to the setting of rates, then its action is unconstitutional.

To understand where the constitutional problem arises here, it is necessary to examine exactly *who* the limitation of liability in the proposed tariff applies to. According to the language of the tariff, the limitation applies to disputes between “the parties,” which isn’t defined specifically. However, the remainder of the paragraph makes clear that “parties” refers to the “Customer” on the one hand and the “Company” on the other. Those two terms are defined in Rule 1 of PacifiCorp’s rate sheet as follows:

Company: PacifiCorp d.b.a. Pacific Power, acting in its capacity as an electric company as defined in ORS 757.600(11)

Customer: Any individual, partnership, corporation, firm, other organization or government agency who has applied for, been accepted and is currently receiving service from the Company at one location and at one point of delivery unless otherwise expressly provided in these rules, or in a rate schedule or contract. Any individual requesting service who has been a Customer within the last 20 days and voluntarily closed their account at the same or prior address. A Customer may not resell Electricity Services provided by the Company except as provided for in Company Tariffs.

The limitation on liability therefore would apply to any person who has personally applied for *and* been accepted to receive *and* is currently receiving electric service from PacifiCorp. *See Dreyer v. Portland Gen. Elec. Co.*, 341 Or 262, 279, 142 P3d 1010, 1019 (2006) (explaining that the state’s regulatory scheme is “not aimed ... at conclusively and permanently binding the entire world to the rate decisions of the PUC”). By contrast, the limitation on liability would *not* apply to anyone who is not a PacifiCorp ratepayer, such as someone who happens to live in the ratepayer’s house, or someone who has a different electric utility.

A hypothetical will help explain the problem that this approach creates (and to avoid irrelevant disputes about the facts of the *James* litigation, the hypothetical will have nothing to do with PacifiCorp’s fires). Imagine that PacifiCorp negligently fails to maintain a transformer in a residential neighborhood. The transformer explodes, injuring several innocent bystanders. Assuming that the explosion is PacifiCorp’s fault and the bystanders were all just in the wrong place at the wrong time, common sense and basic fairness tell us that PacifiCorp should have the same liability to all of them. Under the normal rules of tort law discussed above, if the explosion burned one of the victims, PacifiCorp would be liable for not only out-of-pocket medical bills and lost wages from having to miss work while recovering, but also the pain and suffering resulting from the burn and the emotional distress of being permanently disfigured, because those are all types of harm that are reasonably foreseeable from failing to maintain a transformer.

But if the Commission approves PacifiCorp's tariff, then matters could turn out very differently. Consider three hypothetical injured victims, all of whom were badly burned in the explosion, resulting in terrible pain and permanent disfigurement:

- The first victim was standing outside her own house, which was supplied by the transformer, and is the person named on the electric bill. Under the proposed tariff, she will be subject to the liability limitation, because her injury was "related to or arising from Company's operations or electrical facilities" and she is the "Customer." The tariff waives "noneconomic" damages. That means even though she suffers immense pain all of the time and cannot recognize her own face in the mirror, she will receive no compensation whatsoever for the pain, suffering, or emotional toll, because all of those are noneconomic damages. The tariff also waives damages for lost profits, so if she runs her own business, she won't even be able to recover the profits she would have made if she hadn't been injured.
- The second victim is the first victim's son, who lives in the same house was standing right next to her. But because his name isn't on the electric bill, he isn't the "Customer" who waived liability. Accordingly, he *might* be able to recover damages for pain and suffering, unless a court determines that he's bound by the tariff by virtue of living in the house and using the electricity. His ability to recover, therefore, may depend on questions such as whether he was mentally and legally competent enough to know that he was accepting the benefits of the electrical service. *See Drury v. Assisted Living Concepts, Inc.*, 245 Or App 217, 224, 262 P3d 1162, 1166 (2011).

- The third victim was walking her dog though the neighborhood but lives in a different neighborhood, a few blocks away, that is served by a different electric utility. She has no connection to PacifiCorp whatsoever. PacifiCorp will be liable to her for the full range of compensable damages, as there is no possibility for the liability waiver to apply to someone who has no relationship with PacifiCorp.

There can be no rational explanation for the disparate treatment among the three categories of people discussed above. People who suffer grievous burns because of someone else's negligence and no fault of their own should be able to recover for the pain and suffering they experience. And whether three identically situated victims can recover should not depend on whether their name is on the electric bill, what their mental state was when they used electricity, or who the electric supplier in their home happens to be.

Not only is the distinction among these three victims fully irrational, it has nothing to do with the Commission's official task, which is to "establish[] fair and reasonable rates" for electric service ORS 756.040(1).

C. The Policy Considerations of Liability Limitations Should Be Resolved by the Legislature.

Finally, Mr. Drevo understands that the Commission might be concerned about the effect that liability might have on PacifiCorp's financial status or on the rates it requests in the future. However, the Commission is not authorized to enact the solution that PacifiCorp is asking for, and ratemaking is the wrong vehicle to try to enact tort reform. If PacifiCorp believes that Oregon law needs to be modified to change the scope of liability for electric utilities, then it should address that request to the Legislature where the elected representatives of the people can debate and decide whether that is appropriate.

In support of its position that the Commission can unilaterally impose sweeping liability waivers on customers of a single electric utility, PacifiCorp tells the Commission that “the Oregon Supreme Court has held that utility limitations of liability specifically are ‘an inherent part of the rate’” (Opening Brief at 2). However, the Oregon Supreme Court has never said such a thing. PacifiCorp’s citation is to a decision of the Oregon Court of Appeals, *Simpson v. Phone Directories Co.*, 82 Or App. 582, 587, 729 P2d 578, 581 (1986), not the Oregon Supreme Court.

Looking at the facts of *Simpson*, the comparison that PacifiCorp draws is nonsensical. In *Simpson*, the phone company failed to list a dentist in the Yellow Pages after promising it would. *Id.* at 584. Plaintiff’s tort claims were dispensed with for failure to state a claim, not based upon any liability waiver. *Id.* at 585. The only issues that the court reached on the merits were contract issues. *Id.* The Court of Appeals thus considered the validity of a “limitation of liability for erroneous directory listings and service failures” in contract, not the broadest possible liability limitation for any possible injury that is even related to the utility service. *See id.* at 586-87.

It’s one thing to consider limiting a telephone company’s liability in contract for business losses for a failure to perform a service contemplated by the rate. It’s quite another to limit the electric company’s common law tort liability for recklessly burning down the dentist’s office and killing the dentist. Neither *Simpson* nor any other Oregon authority suggests that the Commission has the power to force ratepayers to accept the burden of waiving nearly all potential liability for any injury they might suffer at the hands of a negligent electric utility.

What PacifiCorp is really looking for here is “tort reform.” There may be a constitutional manner in which the Oregon Legislature can limit electric utilities’ liability in tort, but the Legislature has authorized the Commission to set rates, not to enact a policy of tort reform for damages caused by electric utilities. The Commission only has as much authority as the

Legislature has provided, *PNW Metal Recycling, Inc. v. Dep't of Env't Quality*, 371 Or 673, 676, 540 P3d 523, 527 (2023), and even the Legislature cannot “modify common-law remedies for any reason it deems sufficient,” *Busch v. McInnis Waste Sys., Inc.*, 366 Or 628, 650, 468 P3d 419, 432 (2020). When the Legislature impairs a common-law right to recovery, it must “provide[] a counterbalance for plaintiff’s loss of his right to a remedy.” *Id.* at 652. Even if some liability limitations might pose closer questions, the Legislature plainly has not given the Commission the power to provide a sufficient counterbalance to taking away the right to sue the electric company for noneconomic damages resulting from grievous personal injury or property damage. Accordingly, the Commission should reasonably conclude that the Legislature has not given it the power to impair the right to such recovery either.

The Legislature is best position to implement, if warranted, a remedial system that provides the counterbalance required by the Remedy Clause, as it endeavored to do in a wildfire-specific property damages statute, ORS 477.089 (providing for the recoverable damages “in a civil action for property damage caused by a wildfire”). Of course, the Legislature might also decide that the current common-law and statutory system is working well, and that electric utilities ought to remain liable for their own negligent or reckless actions. At the very least, the Legislature may have some difficult questions for PacifiCorp about whether a utility that has been adjudicated to have acted recklessly should be rewarded with a limitation on liability that reduces its exposure for the next time it acts that way. In any case, that question has almost nothing to do with the Commission’s primary task of setting how much Oregonians should have to pay for electricity, and there is no indication that the Legislature intended to give the Commission the authority to upend the existing framework of common law and statutory liability that utilities are subject to.

IV. CONCLUSION

The Commission should not approve the tariff modification.

RESPECTFULLY SUBMITTED this 27th day of February, 2024.

KELLER ROHRBACK L.L.P.

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EXHIBIT A

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
2 FOR THE COUNTY OF MULTNOMAH

3 JEANYNE JAMES; ROBIN COLBERT;)
4 JANE DREVO; SAM DREVO; BROOKE)
5 EDGE AND BILL EDGE, SR.; LORI) Case No.: 20CV33885
6 FOWLER; IRIS HAMPTON; JAMES) (Lead)
7 HOLLAND; RACHELLE MCMASTER;) 21CV33595
8 KRISTINA MONTOYA; NORTHWEST RIVER) 20CV37430
9 GUIDES, LLC; SHARIENE STOCKTON) 22CV26326
10 AND KEVIN STOCKTON; VICTOR) 22CV29976
11 PALFREYMAN; PALFREYMAN FAMILY) 22CV30450
12 TRUST; AND DUANE BRUNN,) 22CV29694
13 individually and on behalf of all) 22CV29187
14 others similarly situated,) 22CV13946
15 Plaintiffs,) 22CV29859
16) 22CV41640

17 vs.)

18 PACIFICORP, an Oregon corporation;)
19 AND PACIFIC POWER, an Oregon)
20 registered electric utility and)
21 assumed business name of)
22 PACIFICORP,)
23 Defendants.)

24 _____
25 AND ALL RELATED CASES.)
26 _____)

27 TRANSCRIPT OF TRIAL PROCEEDINGS
28 Volume 14, pages 3668 through 3979
29 Thursday, May 11, 2023
30 8:45 a.m.

31 Multnomah County Courthouse
32 1200 Southwest 1st Avenue
33 Portland, Oregon

34 BEFORE: Hon. Steffan Alexander

35 REPORTED BY: VICTORIA A. GUERRERO, CSR, RDR, RMR, CRR
 Oregon CSR No. 14-0428 (exp. 6-30-2023)

* * *

1 mean, you know, my mom was there, you know, her new
2 puppy. I had Tyler there, you know. I was
3 responsible for them being there. And I just have
4 never had to run from a fire before. I've never
5 seen a fire of great significance in front of me
6 that was, you know, absolutely going to threaten,
7 potentially, our exit.

8 That's why we had to make it up to Gates
9 Bridge East before, you know, I realized okay, we
10 might have another few minutes, like, maybe we go
11 back real quick and see if we can find a few more
12 things.

13 Anyway, it was a massive fire. It was
14 terrifying. And it was one of the scariest moments
15 of my life.

16 Q I want to talk about that decision to leave
17 and then go back. Because your mom was
18 cross-examined by PacifiCorp about how she could
19 have made a decision like that.

20 So again, what's going on in your mind?

21 Is this an orderly, well-put together, I'm
22 going to flee for my life; or what's happening?

23 A No. I didn't -- we would have left hours
24 earlier if, you know, there was an active fire
25 coming our way. There was no fire in the area

1 STATE OF OREGON)
)ss
2 COUNTY OF WASHINGTON)
3


4 I, VICTORIA A. GUERRERO, Certified Shorthand
5 Reporter, Registered Diplomate Reporter, Registered Merit
6 Reporter, Certified Realtime Reporter, do hereby certify
7 that I reported in stenotype the testimony and proceedings
8 had upon the hearing of this matter, previously captioned
9 herein, before the Hon. Steffan Alexander,

10 that I transcribed my stenotype notes through
11 computer-aided transcription; and that the foregoing
12 transcript, pages 3668 through 3978, constitutes a full,
13 true and accurate record of all testimony adduced and
14 proceedings had during the hearing of said matter, and of
15 the whole thereof.

16 WITNESS MY HAND AND DIGITAL SIGNATURE this Friday,
17 May 12, 2023.

18
19

20



21 Victoria A. Guerrero, CSR, RDR, RMR, CRR
22 Oregon CSR No. 14-0428 (exp. 6-30-2023)
23 Washington CCR No. 3293 (exp. 3-15-2024)
24 California CSR No. 8370 (exp. 3-15-2024)
25 Hawaii CSR No. 490 (exp. 12-31-2023)

Page 3979

EXHIBIT B

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
2 FOR THE COUNTY OF MULTNOMAH

3 JEANYNE JAMES; ROBIN COLBERT;)
4 JANE DREVO; SAM DREVO; BROOKE)
5 EDGE AND BILL EDGE, SR.; LORI) Case No.: 20CV33885
6 FOWLER; IRIS HAMPTON; JAMES) (Lead)
7 HOLLAND; RACHELLE MCMASTER;) 21CV33595
8 KRISTINA MONTOYA; NORTHWEST RIVER) 20CV37430
9 GUIDES, LLC; SHARIENE STOCKTON) 22CV26326
10 AND KEVIN STOCKTON; VICTOR) 22CV29976
11 PALFREYMAN; PALFREYMAN FAMILY) 22CV30450
12 TRUST; AND DUANE BRUNN,) 22CV29694
13 individually and on behalf of all) 22CV29187
14 others similarly situated,) 22CV13946
15 Plaintiffs,) 22CV29859
16) 22CV41640

17 vs.)
18 PACIFICORP, an Oregon corporation,)
19 et al.,)
20 Defendants.)

21 _____
22 AND ALL RELATED CASES.)
23 _____

24 JANUARY 2024, PHASE II, DAMAGES TRIAL 1
25 (Re: Cuozzo, Fawcett, Giller, Jensen,
26 Johnson, King, Nielsen, Staniforth, and Tank)

27 TRANSCRIPT OF TRIAL PROCEEDINGS

28 Volume 1, Pages 1 through 251

29 Monday, January 8, 2024; 9:15 a.m.

30 Multnomah County Courthouse

31 1200 Southwest 1st Avenue

32 Portland, Oregon

33 BEFORE: Hon. Steffan Alexander

34 REPORTED BY: VICTORIA A. GUERRERO, CSR, RDR, RMR, CRR
35 Oregon CSR No. 14-0428 (exp. 9-30-2024)

36 JOB NO: 6357697

37 * * *

1 This case is a civil class action
2 related to three fires that are at issue in
3 this trial. The fires started in Oregon on
4 September 7th and 8th, 2020. This is the
5 second phase of this class action.

6 In the first phase a jury made the
7 following findings: One, the defendant was
8 negligent in one or more ways the plaintiffs
9 claim as to the entire class within the
10 boundaries of the fire areas at issue in this
11 trial: One, the Echo Mountain Complex which
12 includes the Echo Mountain Fire and the
13 Kimberling fire; two, the South Obenchain Fire;
14 and, three, the Santiam Canyon Fire.

15 Two, the defendant's negligence was
16 the cause of harm to the entire class within
17 the boundaries of fire areas at issue in this
18 trial.

19 Three, the defendant was grossly
20 negligent in one or more ways the plaintiffs
21 claim as to the entire class within the
22 boundaries of the fire areas at issue in this
23 trial: One, the Echo Mountain Complex which
24 includes the Echo Mountain Fire and the
25 Kimberling fire; two, the South Obenchain Fire;

1 and, three, the Santiam Canyon Fire.

2 Four, the defendant's gross
3 negligence was the cause of harm to the entire
4 class within the boundaries of the fire areas
5 at issue in this trial.

6 Five, the defendant's conduct was
7 reckless as to the entire class within the
8 boundaries of the fire areas at issue in this
9 trial.

10 Six, the defendant's conduct was
11 willful as to the entire class within the
12 boundaries of the fire areas at issue in this
13 trial.

14 Seven, the defendant's conduct
15 constituted a private nuisance as to the entire
16 class within the boundaries of the fire areas
17 at issue in this trial: One, the Echo Mountain
18 Complex which includes the Echo Mountain Fire
19 and the Kimberling fire; two, the South
20 Obenchain Fire; and, three, the Santiam Canyon
21 Fire.

22 Eight, the defendant's private
23 nuisance was the cause of harm to the entire
24 class within the boundaries of the fire areas
25 at issue in this trial.

1 Nine, the defendant's conduct
2 constituted a public nuisance as to the entire
3 class within the boundaries of the fire areas
4 at issue in this trial: One, the Echo Mountain
5 Complex, which includes the Echo Mountain Fire
6 and the Kimberling fire; two, the South
7 Obenchain Fire; and, three, the Santiam Canyon
8 Fire.

9 Ten, the defendant's public nuisance
10 was the cause of harm to the entire class
11 within the boundaries of the fire areas at
12 issue in this trial.

13 Eleven, the defendant's conduct
14 constituted a trespass as to the entire class
15 within the boundaries of the fire areas at
16 issue in this trial: One, the Echo Mountain
17 Complex, which includes the Echo Mountain Fire
18 and the Kimberling fire; two, the South
19 Obenchain Fire; and, three, the Santiam Canyon
20 Fire.

21 Twelve, the defendant's trespass was
22 the cause of harm to the entire class within
23 the boundaries of the fire areas at issue in
24 this trial.

25 The Rules of Evidence allow the Court

1 to take judicial notice of certain adjudicated
2 facts. I instruct you to accept the above
3 findings made by the jury in Phase I as
4 conclusive. This means that although no party
5 has offered or will offer evidence to prove the
6 above findings in this trial, you must accept
7 the findings as conclusive. Conclusive means
8 that you may not question the above findings
9 made in Phase I and must treat them as
10 established in this trial.

11 The jury in the first phase was not
12 asked -- excuse me. The jury in the first
13 phase was not tasked with determining the
14 damages, if any, for the plaintiffs in this
15 trial.

16 Next I will read a summary of the
17 pleadings in this trial.

18 In this trial plaintiffs claim they
19 are members of the class who owned real and/or
20 personal property that experienced fire
21 activity during the three fires at issue in
22 this trial and within the class definition.

23 Plaintiffs seek damages and
24 compensation from PacifiCorp for harms
25 plaintiffs claim they suffered as a result of

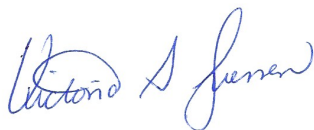
1 STATE OF OREGON)
)ss
2 COUNTY OF WASHINGTON)
3

4 I, VICTORIA A. GUERRERO, Certified Shorthand
5 Reporter, Registered Diplomate Reporter, Registered Merit
6 Reporter, Certified Realtime Reporter, do hereby certify
7 that I reported in stenotype the testimony and proceedings
8 had upon the hearing of this matter, previously captioned
9 herein, before the Hon. Steffan Alexander,

10 that I transcribed my stenotype notes through
11 computer-aided transcription; and that the foregoing
12 transcript, 1 through 250, constitutes a full, true and
13 accurate record of all testimony adduced and proceedings had
14 during the hearing of said matter, and of the whole thereof.

15 WITNESS MY HAND AND DIGITAL SIGNATURE this
16 Tuesday, January 9, 2024.

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Victoria A. Guerrero, CSR, RDR, RMR, CRR
Oregon CSR No. 14-0428 (exp. 9-30-2024)
Washington CCR No. 3293 (exp. 3-15-2024)
California CSR No. 8370 (exp. 3-15-2024)
Hawaii CSR No. 490 (exp. 12-31-2024)

EXHIBIT C

From: Matthew Preusch
Sent: Thursday, January 4, 2024 8:15 AM
To: Rogala, Zachary (PacifiCorp); McVee, Matthew (PacifiCorp)
Cc: Cody Berne; Sarah R. Osborn; Tim DeJong; Emily Johnson
Subject: RE: [INTERNET] FW: UE 428: Position Needed - Samuel Drevo Request for Extension

Zachary and Matthew, as a starting point for the conversation today, here's some proposed language for a stipulation to be entered in both the *James* and *Dietrich* cases that we think should address this issue.

James

With respect to every member of the class currently certified in this action, PacifiCorp hereby knowingly, voluntarily, and irrevocably waives any and all defenses, arguments, and contentions that its liability or potential liability for damages arising out of the Echo Mountain Complex (including the Echo Mountain and Kimberling Fires), South Obenchain Fire, 242 Fire, or Santiam Canyon Fire is in any way reduced, modified, or otherwise affected by any tariff or tariff modification approved by the PUC after September 7, 2020. This irrevocable waiver will continue to apply to every member of the class currently certified indefinitely, even if the class is later modified or decertified. This stipulation is binding on PacifiCorp in this action and any other action or proceeding in any forum. This stipulation will merge into all judgments entered in this action and will become part of such judgments.

Dietrich

With respect to every member of the proposed class in this action, PacifiCorp hereby knowingly, voluntarily, and irrevocably waives any and all defenses, arguments, and contentions that its liability or potential liability for damages arising out of the Echo Mountain Complex (including the Echo Mountain and Kimberling Fires), South Obenchain Fire, 242 Fire, or Santiam Canyon Fire is in any way reduced, modified, or otherwise affected by any tariff or tariff modification approved by the PUC after September 7, 2020. This irrevocable waiver will continue to apply to every member of the proposed class indefinitely, even if a different class is certified or if no class is ever certified. This stipulation is binding on PacifiCorp in this action and any other action in any forum. This stipulation will merge into all judgments entered in this action and will become part of such judgments.

EXHIBIT D

From: Rogala, Zachary (PacifiCorp) <zachary.rogala@pacificorp.com>
Sent: Monday, January 8, 2024 9:14 AM
To: Matthew Preusch <mpreusch@KellerRohrback.com>
Cc: McVee, Matthew (PacifiCorp) <Matthew.McVee@pacificorp.com>; Cody Berne <cberne@stollberne.com>; Sarah R. Osborn <sosborn@kellerrohrback.com>; Tim DeJong <TDeJong@stollberne.com>; Emily Johnson <ejohnson@stollberne.com>; Todd Logan <tlogan@edelson.com>
Subject: RE: [INTERNET] FW: UE 428: Position Needed - Samuel Drevo Request for Extension

Morning Matt,

We had the opportunity to discuss your proposal, and we aren't willing to file stipulations in the *James* and *Dietrich* cases, in addition to UE 428. And after additional discussions on UE 428, given our filing only seeks prospective relief (indicated in both the initial filing and our response to Drevo's petition to intervene), we don't think there is much value at this point in continuing settlement discussions on the scope of Mr. Drevo's petition.

That said, we're happy to discuss other issues going forward in the Commission proceeding. Thanks again for the call last week to try and reach resolution.

ZTR

EXHIBIT E

12/13/2023 7:47 PM
20CV33885

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STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000, Portland, OR 97205
Main 503.224.3380 Fax 503.220.2480

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

JEANYNE JAMES, ROBIN COLBERT,
JANE DREVO, SAM DREVO, BROOKE
EDGE AND BILL EDGE, SR., LORI
FOWLER, IRIS HAMPTON, JAMES
HOLLAND, RACHELLE MCMASTER,
KRISTINA MONTOYA, NORTHWEST
RIVER GUIDES, LLC, SHARIENE
STOCKTON AND KEVIN STOCKTON,
VICTOR PALFREYMAN, PALFREYMAN
FAMILY TRUST, and DUANE BRUNN,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

PACIFICORP, an Oregon corporation; and
PACIFIC POWER, an Oregon registered
electric utility and assumed business name of
PACIFICORP,

Defendants.

Nos. 20CV33885 (*Lead*)
20CV37430 (*Consolidated*)
21CV33595 (*Consolidated*)
22CV26326 (*Consolidated*)
22CV29694 (*Consolidated*)
22CV29976 (*Consolidated*)
22CV30450 (*Consolidated*)

DEFENDANTS' RESPONSES AND
OBJECTIONS TO PHASE II
PLAINTIFFS' FIRST SET OF
REQUESTS FOR ADMISSION

Assigned to: Hon. Steffan Alexander

Trial Date: January 8, 2024

PROPOUNDING PARTIES: Plaintiffs Mary Becherer, Alfred Cuozzo, Deborah
Fawcett, David Giller, Richard Jensen, Scott Johnson,
Frank King, the King Revocable Trust, Stephen Nielsen,
Cory Staniforth, and Deborah Tank

RESPONDING PARTIES: Defendants PacifiCorp and Pacific Power

SET ONE: One (1-30)

Pursuant to Oregon Rule of Civil Procedure 45, Defendants PacifiCorp and Pacific
Power ("PacifiCorp" or "Defendant") hereby submit the following responses and objections

STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000, Portland, OR 97205
Main 503.224.3380 Fax 503.220.2480

1 recovery relating to the Labor Day Fires is irrelevant to the issues in this case. If Plaintiffs
2 object to cost recovery, they're free to file objections before the Public Utility Commission.
3 Defendant objects that this request is harassing and argumentative. Defendant objects that
4 argument or reference to "passing costs" is prejudicial and meant to inflame and manipulate
5 the jury's emotions, and bears no responsibility to any issue any Phase II jury will be asked
6 to determine. Subject to and without waiving the foregoing objections, Defendant states that
7 reasonably inquiry has been made and that the information known or readily obtainable is
8 insufficient to enable the answering party to admit or deny; Defendant accordingly lacks
9 knowledge or information necessary to respond to this request and on that basis denies the
10 same.

11 **REQUEST FOR ADMISSION NO. 17:**

12 PacifiCorp has asked the Oregon Public Utilities Commission to authorize a modified
13 tariff for PacifiCorp's Oregon customers that would prevent James class members from
14 recovering special, noneconomic, punitive, incidental, indirect, and consequential damages
15 arising from any of the Labor Day 2020 Fires.

16 **RESPONSE TO REQUEST FOR ADMISSION NO. 17:**

17 Defendant restates its Preliminary Statement and General Objections. Defendant
18 objects that this request is vague and ambiguous. Defendant objects that this issue is
19 irrelevant to the Phase II proceedings because the parties have stipulated to avoid reference to
20 any of Defendant's post-fire regulatory filings in the Phase II trials relevant to propounding
21 parties. Defendant objects that this request is harassing, argumentative, and prejudicial.
22 Defendant further objects that while Defendant has proposed certain amendments to its
23 tariffs, the Public Utility Commission has not determined whether to accept those
24 amendments, and their legal effect has not been determined by any Court. To that end,
25 reasonably inquiry has been made and the information known or readily obtainable is
26 insufficient to enable Defendant to admit or deny whether any tariff amendments, if

1 permitted by the Public Utility Commission, would have any effect as to James class
2 members; Defendant accordingly lacks knowledge or information necessary to respond to
3 this request and on that basis denies the same.

4 **REQUEST FOR ADMISSION NO. 18:**

5 PacifiCorp has asked the Oregon Public Utilities Commission to authorize a modified
6 tariff for PacifiCorp's Oregon customers that would prevent fire victims from recovering
7 special, noneconomic, punitive, incidental, indirect, and consequential damages arising from
8 any of the Labor Day 2020 Fires.

9 **RESPONSE TO REQUEST FOR ADMISSION NO. 18:**

10 Defendant restates its Preliminary Statement and General Objections. Defendant
11 objects that this request is vague and ambiguous. Defendant objects that this issue is
12 irrelevant to the Phase II proceedings because the parties have stipulated to avoid reference to
13 any of Defendant's post-fire regulatory filings in the Phase II trials relevant to propounding
14 parties. Defendant objects that this request is harassing, argumentative, and prejudicial.
15 Defendant further objects that while Defendant has proposed certain amendments to its
16 tariffs, the Public Utility Commission has not determined whether to accept those
17 amendments, and their legal effect has not been determined by any Court. To that end,
18 reasonably inquiry has been made and the information known or readily obtainable is
19 insufficient to enable Defendant to admit or deny whether any tariff amendments, if
20 permitted by the Public Utility Commission, would have any effect as to James class
21 members; Defendant accordingly lacks knowledge or information necessary to respond to
22 this request and on that basis denies the same.

23 **REQUEST FOR ADMISSION NO. 19:**

24 The jury's verdict dated June 9, 2023, found PacifiCorp's negligence was a cause of
25 harm to the entire class within the boundaries of the Echo Mountain Complex Fire, the
26 Santiam Canyon Fire, the South Obenchain Fire, and the 242 Fire.

STOEL RIVES LLP
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Main 503.224.3380 Fax 503.220.2480