PACIFIC POWER
A DIVISION OF PACIFICORP

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March 12, 2024

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
Attn: Filing Center
201 High Street SE, Suite 100
Salem, OR 97301-3398

RE: UE 428—PacifiCorp's Advice No. 23-018 (ADV 1545), Modifications to Rule 4 Application for Electrical Service

PacifiCorp, dba Pacific Power submits for filing its Reply Brief in the above referenced proceeding.

Informal inquiries may be directed to Cathie Allen, Regulatory Affairs Manager, at (503) 813-5934.

Sincerely,

Matthew McVee
Vice President, Regulatory Policy and Operations

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	PacifiCorp's Reply Brief and Request for Oral Argument

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I. ARGUMENT

The Company acknowledges that its Petition requests a *broader* liability limitation than what this Commission has previously approved, because it would apply to the provision of all electric services. But there is no question that the Commission has approved *the same or stronger* limitation of liability for all three Oregon investor-owned utilities, though for a narrower sub-set of electric services. These include examples where the Commission has excluded liability for non-economic damages, or for any utility liability whatsoever.

These examples confirm that the Commission has the statutory power to approve the Company's request. And no party questions these powers. Rather, Intervenors focus on three primary arguments: the waiver is unconstitutional, unconscionable, or not good policy.

To start, the constitutional arguments are misplaced. Intervenors have failed to satisfy their exceedingly high burden to demonstrate that PacifiCorp's request is facially unconstitutional, which requires arguing that the Petition is unconstitutional in all circumstances. Because Oregon's Remedy Clause does not apply to punitive damages, and because the waiver does not apply to economic damages, every lawsuit that seeks either of these categories of damages would not trigger the Remedy Clause. This defeats Intervenors' pre-enforcement facial challenge.

Yet even if the Commission reaches the merits, the request is constitutional because the regulatory compact—where PacifiCorp has lost the ability to freely contract with customers (or not), in exchange for the requirement to provide state-sanctioned monopoly utility services—provides an appropriate *quid pro quo* under the Remedy Clause that withstands constitutional scrutiny. This is supported by the various Oregon precedents that have upheld utility limitations of liability in the past, with no discussion or apparent conflict with the Remedy Clause.

Second, it is not possible for Commission-approved tariffs to be unconscionable, because when the Commission exercises its statutory powers under ORS § 756.200 it preempts the common law doctrine of unconscionability. And if the Commission concludes otherwise (that the waiver is unconstitutional or unconscionable), it calls into question other utility waivers that have the same or similar exclusion of liability.

Finally, and more front and centered, the Company's waiver is constructive policy: It would establish a regulatory mechanism that helps address the challenge presented by increasing wildfire risks and associated liabilities from a changing climate, and would support PacifiCorp's financial health and ability to provide reliable and affordable utility services. And if the Commission has concerns with the scope of PacifiCorp's proposal, this Reply proposes three modifications to inform the Commission's deliberations.

The Company's arguments follow.

A. No parties question the Commission's statutory power to approve the Petition.

The Commission has broad regulatory powers,[1] and these powers include the ability to adopt limitations of liability.[2] PacifiCorp provided multiple examples where the

[1] *See, e.g.,* ORS § 756.040(1); ORS § 756.062(2); P. *N.W. Bell Tel. Co. v. Sabin*, 534 P.2d 984, 991 (Or. App. 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.").
[2] *See, e.g., Simpson v. Phone Directories Co.,* 729 P.2d 758, 580-591 (1986).

Commission has exercised this power and approved tariffs that limit utility liability to actual damages—and in some cases no damages at all.[3]

After review of Intervenor and Staff briefing, it appears that no party disagrees that the Commission has the statutory power to approve limitations of liability. Instead, each argues that: (1) the waiver is unconstitutional; (2) the doctrine of unconscionability restrains the Commission's statutory powers; or (3) policy arguments support the Commission either declining to adopt a limitation of liability broader in scope than what it has previously adopted, or leaving the issue to the Legislative Assembly to resolve.

This narrows and focuses the scope of contested issues that need to be resolved.

B. The Petition is constitutional.

Intervenor's primary argument for denying PacifiCorp's Petition is that it would violate the Remedy Clause in Oregon's Constitution. This argument is not compelling.

i. Intervenors cannot demonstrate that PacifiCorp's waiver is facially unconstitutional in all circumstances.

Constitutional challenges are either facial, which challenge the constitutionality of a state action in all instances, or as-applied, which focuses on fact-specific circumstances. Facial challenges are only successful if the challenged law "is incapable of constitutional application in any circumstance."[4] For example, if a statute is constitutional under at least one set of facts or circumstances, "it is not unconstitutional simply because there may be

[3] *See, e.g.,* Portland General Electric Schedule 4, Or. Sheet No. 4-4 (PGE is "not responsible for any direct, consequential, incidental, punitive, exemplary, or indirect damages" to customers or third parties that result from Direct Load Control Events) (providing an example where the Commission has excluded a-typical damages); PGE Schedule 88, Or. Sheet No. 88-4 (PGE is "not liable for any damage to Customer's property" from participation in load reduction program) (providing an example where the Commission has excluded all damages).
[4] *Jensen v. Whitlow*, 334 Or. 412, 421 (2002).

persons or cases to whom it constitutionally cannot apply."[5] This is because the constitutionality of government actions "ought not be decided except in an actual factual setting that makes such a decision necessary."[6]

This is especially true for Remedy Clause cases, which require a fact-specific review because "[a]ttempts to articulate a single unifying principle fail to comprehend the varied ways that the legislature [or Commission] can and has gone about achieving its goals."[7] Rather, Oregon courts "consider the extent to which the legislature [or Commission] has departed from the common-law model measured against its reasons for doing so," in case-by-case analyses.[8]

Here, Intervenors raise a facial challenge to PacifiCorp's proposal, because a regulatory proceeding to implement a prospective tariff condition necessarily lacks specific facts to constitute an as-applied challenge. Thus, Intervenor's have "an uphill battle in making a facial attack" on the Commission's potential approval of PacifiCorp's Petition.[9]

Similar to *Whitlow*, Intervenors' arguments are not persuasive. In that case, Oregon rejected a facial challenge to the constitutionality of an Oregon Tort Claims damages cap under the Remedy Clause, because the cap is "not implicated in every case," and also because a "damages award has yet to be determined" in the underlying case.[10]

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[5] *Id.* (parenthetical citing and paraphrasing *Northup v. Hoyt,* 31 Or. 524, 529 (1897)).
[6] *Stevens v. City of Cannon Beach,* 317 Or. 131, 147 (1993) (*citing Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.,* 452 U.S. 264, 294 (1981).
[7] *Horton v. Oregon Health & Science University,* 359 Or. 168, 220 (2016).
[8] *Id.*
[9] *Stevens,* 317 Or. at 147.
[10] 344 Or. at 421.

The same circumstances apply here. Oregon's Remedy Clause does not apply to punitive damages,[11] and PacifiCorp's tariff would not limit any economic damages, which are broadly defined.[12] This means that in every case where a plaintiff alleges economic damages, punitive damages, or a combination of both in a future lawsuit against the Company under this Tariff, the provisions that exclude noneconomic damages would not be relevant. The Tariff does not leave plaintiffs "without remedy" or "remediless."[13]

Because Intervenors cannot demonstrate that PacifiCorp's waiver is unconstitutional in all instances, their facial challenge lacks merit. There is no constitutional basis for the Commission to reject an otherwise lawful tariff based on a concern that a plaintiff may someday raise an as-applied challenge in a future lawsuit. Especially when the Commission must exercise its constitutional powers "infrequently, and always with care,"[14] and when Oregon Courts "avoid reaching constitutional questions in advance of the necessity of deciding them."[15]

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[11] *Busch v. McInnis Waste Sys*., 366 Or. 628, n. 11 (2020) ("Because punitive damages are not a 'remedy' for an injured person, the remedy clause of Article I, section 10, does not protect a plaintiff's right to receive such damages.").

[12] ORS 31.705(2)(a) ("'Economic damages' means objectively verifiable monetary losses including but not limited to reasonable charges necessarily incurred for medical, hospital, nursing and rehabilitative services and other health care services, burial and memorial expenses, loss of income and past and future impairment of earning capacity, reasonable and necessary expenses incurred for substitute domestic services, recurring loss to an estate, damage to reputation that is economically verifiable, reasonable and necessarily incurred costs due to loss of use of property and reasonable costs incurred for repair or for replacement of damaged property, whichever is less.").

[13] *Neher v. Chartier,* 319 Or. 417 (1994) (*Neher* was upheld by *Horton*, as discussed in *Crandall*, "the Supreme Court re-affirmed its pre-Smothers case law in *Horton*. *Horton*, 359 Or at 218. As the parties recognize in their arguments to us, one such case necessarily reaffirmed was Neher." *Crandall*, 328 Or App at 464)).

[14] *Nutbrown v. Munn,* 311 Or. 328, 346 (1991).

[15] *Vasquez v. Double Press Mfg., Inc.* 364 Or. 609 (2019) (declining to address Remedy Clause arguments, and deciding the case on statutory grounds).

ii. Even assuming Intervenors raise an as-applied challenge, the regulatory compact presents a constitutionally adequate quid pro quo.

As an initial matter (and it bears repeating), PacifiCorp's proposed tariff allows for any Court to determine whether it applies in a given case, because the proposal is not valid "where state law disallows limitations of liability."[16] This ensures that the provision, in cases where the Oregon Remedy Clause is triggered, can be found inoperative (as opposed to unconstitutional). This ensures that the provision avoids any conflict with Oregon's Constitution.

Turning to the merits, Intervenors' constitutional arguments are unavailing. Assuming that PacifiCorp's proposal is a second-category Remedy Clause case (as Commission Staff has in its brief),[17] and should include a constitutionally adequate *quid pro quo*,[18] the Company represents that its proposal is more similar to *Horton* than *McInnis*, and would be found constitutional.

This conclusion is based on the principal argument that the *quid pro quo* of regulated utility monopolies—the regulatory compact—provides the Commission with the power to determine the appropriate balance of risks and responsibilities between customers and utilities.[19] This includes the power to determine what limitations of damages or liabilities are in the public interest, because these limitations of liabilities are "at the core of the Commission's authority to set adequate service levels and establish reasonable rates therefor."[20]

[16] Proposed Tariff Sheet, at 3.
[17] *Horton,* 359 Or. at 220-21 (this category includes cases where the legislature "does not limit the duty that a defendant owes a plaintiff but does limit the size or nature of the remedy").
[18] *McInnis,* at 432 (Oregon cases "do not establish that a *quid pro quo* always will be necessary, or even sufficient," to sustain a Remedy Clause challenge.).
[19] *See, e.g.,* ORS § 756.040.
[20] *Garrison v. Pacific Northwest Bell,* 45 Or. App. 523, 531 (1980).

When PacifiCorp became an Oregon utility, it lost the right to freely contract (or not), with its Oregon customers.[21] This includes the rights to negotiate specific terms and conditions to protect either party to the contract. This statutory bargain, implemented and enforced by the Commission for over a century, establishes the rates and scope of services that utilities are required to provide. This includes the familiar features of utility regulation:

- Regulatory decisions that establish utility-specific just, reasonable, and non-confiscatory rates and services;
- Statutorily-defined or Commission-approved exclusive service territories, with prohibitions against serving customers within another utility's service area without special agreement;
- Nondiscriminatory service to similarly-situated customers within a utility's service area, with limitations on when a utility can refuse service;
- Provision of utility service based on approved tariffs that apply to all similarly-situated customers, without regard to risks a utility could contract around in a non-regulated context;
- Performance subject to safety and reliability standards established by federal and state regulators;
- Service consistent with public policy requirements, including compliance with state decarbonization goals and wildfire mitigation plans.

In all cases, however, the regulatory compact impacts not only society at large (as in *Busch*), but each utility and the individual customers it serves (as in *Horton*). Tariffs are the

[21] *See e.g.,* John L. Rudy, *Limitation of Liability Clauses in Public Utility Tariffs: Is the Rationale for State-Sponsored Indemnity Still Valid?*, 52 Buff. L. Rev. 1379. 1382-88 (2004).

equivalent of a contract between the utility and its customer.[22] Customer rights and duties are established by the Commission, and are balanced with the utility's business needs. Regardless how this balance changes over the years (or any given proceeding), the Commission's decisions govern the relationship between the utility and each customer—not the utility and society at large.

For this reason, PacifiCorp's proposed limitation is more similar to the damages cap that was constitutional in *Horton,* than the cap that was unconstitutional in *McGinnis*: the *quid pro quo* here is not what customers gain in the Company's specific Tariff in exchange for a waiver of the right to claim noneconomic damages; rather it is what customers gain from the continued provision of low-cost electric services from a cost-of-service state-regulated monopoly, that is required to continue serving all customers and with all services required by that state in its exclusive service territory.[23]

This conclusion is consistent with Oregon precedents that have upheld caps on noneconomic damages or limited liability entirely when there are adequate public objectives. For example, in *Crandall v. State,* the Court upheld a statute that granted state employees and agents full immunity from "any claim" for injury or death to another person covered by Oregon's Workmen's Compensation Act.[24] In *Lawson v. Hoke,* the Court upheld a statutory exclusion of non-economic damages in motor vehicle accidents if the driver had violated

[22] *See, e.g., Keogh v. Chicago & N.R. Co.*, 260 U.S. 156, 163 (1922) ("The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.")
[23] *McInnis,* at 432.
[24] 328 Or.App. 452 (2023).

certain provisions of Oregon's penal code.[25] And of course, *Horton* upheld the cap on noneconomic damages in suits against state actors under Oregon's Tort Claims Act.[26]

If Oregon's Workmen's Compensation Act can constitutionally cap damages and exclude liability, because the purpose of the Act is "to afford workers protection in the form of work-related injuries while at the same time protecting employers from costly litigation,"[27] and at-fault policy justifications can exclude damages of any kind in motor vehicle accidents, and Oregon can cap noneconomic damages for all state actors in a nod to the importance of a state relinquishing its sovereign immunity, then a similar argument supports the constitutionality of limitations of liability in the public utility space.

If this was not the case, and utility limitations of liability that excluded liability for certain damages were unconstitutional, it would follow that Oregon courts would have recognized this constitutional deficiency, or litigants would have at least raised this issue in previous cases. Yet notably, none of Oregon's judicial precedents that have addressed Commission-approved utility limitations of liability have discussed or examined implications from Oregon's Remedy Clause.

While history can never justify unconstitutional state actions, this lack of Oregon precedent is notable. If anything, these arguments should give the Commission substantial pause when considering the unequivocal and frothy arguments that PacifiCorp's proposal is

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[25] 339 Or. 253, 216 (2005) ("We think that the foregoing examples are illustrative of a common theme: Early in our nation's (and our state's) history, a plaintiff who would not have suffered the injury complained of had he or she obeyed the law could be denied the right to recover damages for his or her injuries. In light of that common theme, and in the absence of any case law or other authority to the contrary that is more persuasive, we conclude that no "absolute common-law right" that existed when the Oregon Constitution was drafted in 1857 would have guaranteed plaintiff a remedy for her injuries—either economic or noneconomic—under the circumstances of this case.").
[26] *Horton,* 359 Or. at 255.
[27] *Bundy v. NuStar GP, LLC,* 317 Or. 220, 229 (2023).

"patently unconstitutional."[28] Particularly when those arguments flatten important and well-worn policy discussions around the appropriate recovery of non-economic damages that are occurring across the country, and within Oregon specifically.[29]

Together, PacifiCorp's proposal is constitutional: Intervenors' facial challenges fall flat, and if the Commission reaches the merits, PacifiCorp's proposed liability limitation presents a constitutionally adequate *quid pro quo*.

C. Commission-approved tariffs cannot be unconscionable.

Both Green Energy Institute/Sierra Club (GEI) and Freres Lumber (Freres) argue that the Petition is procedurally and substantively unconscionable, and that even if the Commission were to approve, Oregon courts would strike this limitation of liability as a violation of a utility's common law duty that prohibits unconscionable contracts.[30]

This argument is incorrect. As noted in PacifiCorp's Initial Brief, Commission-approved limitations of liability supersede utility common law duties and liabilities.[31] This is because these obligations are preempted in each instance where the Commission has

[28] GEI In. Br., at 8; OCJ In. Br., at 8 (indicating PacifiCorp's proposal has "no redeeming features under the Remedy Clause analysis Oregon law requires."); Drevo In. Br., at 11 ("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."); CUB In. Br. at 10 (PacifiCorp's petition is "a heavy-handed, improper restriction on fundamental rights coming straight from a large corporation.").

[29] *See, e.g., McInnis,* 366 Or. at 672 ("My point is not that a cap on noneconomic damages is a bad idea or a good one. Rather, it is that the nature of noneconomic damages, as outlined above, makes them quite different from economic damages. Courts are particularly ill-equipped to review or set limits on noneconomic damages, and we should not do so. And those realities, I think, should be recognized in our remedy-clause analysis by giving the legislature more leeway to regulate noneconomic damages than we have given it in limiting economic damages, which are inherently limited to objective evidence of monetary losses presented at trial.") (Balmer, J., and Landau, S.J., dissenting).

[30] GEI In. Br., at 15-25; Freres In. Br., at 5-6.

[31] PacifiCorp In. Br. at 2.

exercised its statutory powers.[32] And while not addressed in party briefs, the Oregon Unfair Trade Protections Act's prohibition against unconscionable practices in ORS § 646.607 similarly does not apply to Commission-approved utility tariffs.[33]

Because no party questions the Commission's statutory powers to approve utility limitations of liability (including GEI and Freres), no party can argue these same powers do not also allow the Commission to preempt a utility's common law duties and remedies as authorized by ORS § 756.200(3). Either the Commission has the statutory power to approve utility limitations of liability, which preempts common law duties, or the Commission does not. GEI and Freres's lack of arguments against the Commission's statutory power to approve limitations of liability prevents both from arguing that the doctrine of unconscionability is relevant in this proceeding.

Applied here, once the Commission exercises its regulatory powers and approves a utility tariff that limits liability in certain circumstances, the Commission's decision on the matter is not subject to collateral attacks of procedural or substantive unconscionability after approved. This conclusion makes sense, and is consistent with prior legislative actions that have provided Oregon utilities with full immunity "from any civil liability" for certain vegetation management practices, which includes common law liabilities.[34]

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[32] *See, e.g.,* ORS 756.200(3) ("The duties and liabilities of the public utilities or telecommunications utilities shall be the same as are prescribed by the common law, and the remedies against them the same, *except where otherwise provided by the Constitution or statutes of this state, and the provisions of ORS chapters 756, 757, 758 and 759 are cumulative thereto*.") (emphasis added); *Wildish Sand & Gravel Co. v. Nw. Nat'l Gas Co.,* 103 Or. App. 215, 220, n.3 (1990) ("Plaintiff also argues that, under ORS 756.200, the court should have permitted it to prove common law theories of liability. ORS 756.200 specifies that a utility's duties are the same as prescribed by the common law, except where otherwise provided by statute. Plaintiff was free to prove common law theories of liability but had to show that defendant breached a common law duty that had not been modified by the regulatory statutes.").
[33] ORS 646.612(1) (the UTPA does not apply to conduct "in compliance with the orders or rules of, or a statute administered by a federal, state or local governmental agency.").
[34] ORS 758.282

More to the point, it aligns with Commission precedent which is generally silent on common law contractual disputes. PacifiCorp can only identify one Commission proceeding where the doctrine of unconscionability has even been raised as a contested issue.[35] The complainant in that proceeding, similar to GEI and Freres in this proceeding, argued that it "is black letter law that contracts may be reformed for many reasons," including "for modification of unconscionable or impractical contract provisions."[36]

The Commission ignored this collateral attack, because the doctrine of unconscionability has no place in regulatory proceedings.[37] Similarly here, the Commission should decline to address GEI and Frere's argument.

D. Strong policy arguments support the Company's Petition.

Consistent with the Commission's scoping memorandum, PacifiCorp's Initial Brief focused on the discrete issues of law that underlie the proposal.[38] This Initial Brief did not provide factual or policy support for the proposal, because the Commission noted that following this initial phase, the Commission "will consider remaining legal, factual, and policy arguments, and during which it will conduct an evidentiary hearing if necessary."[39]

Nonetheless, GEI and CUB criticize PacifiCorp for lack of factual support or policy discussions.[40] Consistent with the Commission's Scoping Memorandum, the Commission

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[35] *In re PaTu Wind Farm QF Complaint,* Docket No. UM 1566.
[36] Order No. 12-316, at 4 (May 21, 2012).
[37] *Id.* at 4-5.
[38] Scoping Memorandum, at 1 (Dec. 1, 2023) (". . .we are establishing Phase 1 of this proceeding to take briefing on legal issues arising under PacifiCorp's filing.").
[39] *Id.* at 2.
[40] GEI In. Br., at 12 ("The Company has not provided any evidence to the Commission in its filing or briefing that a limitation of liability would improve its credit ratings or reduce costs to customers."); *Id.* at 13 ("Here, PacifiCorp ask that the Commission approve its waiver, entirely eliminating the rights of those injured to recover constitutionally protected damages, does so on flimsy economic grounds, and with no research or consideration in its filing or briefing about how the change in terms of service will impact those injured by wildfires."); CUB In. Br., at 12-15.

should decline to address these arguments. Yet if the Commission is inclined to do so in this phase of the docket, the Company provides the following policy arguments for why approval is in the public interest. Mainly, doing so would support PacifiCorp's financial health and ensure continued low-cost electric services for our Oregon customers, and the revised tariff cannot preempt any claims from the 2020 Oregon Wildfires.

i. Approval would support PacifiCorp's financial health and continued low-cost electric services for its Oregon customers.

1. PacifiCorp's Financial Health

To appreciate PacifiCorp's concern, consider the environment that utilities currently face regarding uncapped liability and the financial impact to customers. Western utilities like Pacific Gas and Electric (PG&E), Southern California Edison,[41] Xcel Energy in both Colorado[42] and Texas,[43] Hawaiian Electric Co.,[44] and PacifiCorp have been subject to significant financial pressures from catastrophic wildfire litigation. PG&E's legal battles have been acute, with litigation from the catastrophic 2018 Camp Fire resulting in a $13.5 billion settlement and PG&E filing for Chapter 11 bankruptcy to manage its liabilities.[45]

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[41] "Southern California Edison to pay $80 mln to US over 2017 wildfire," Reuters (Feb. 26, 2024) (available here: https://www.reuters.com/world/us/southern-california-edison-pay-80-mln-us-over-2017-wildfire-2024-02-26/).

[42] "Xcel Energy faces legal firestorm: Understanding the Marshall Fire lawsuits," Boulder Reporting Lab (Aug. 3, 2023) (available here: https://boulderreportinglab.org/2023/08/03/xcel-energy-faces-legal-firestorm-understanding-the-marshall-fire-lawsuits/).

[43] "Xcel Energy utility equipment started Texas wildfire, homeowner says in lawsuit," Reuters (Mar. 1, 2024) (available here: https://www.reuters.com/world/us/xcel-energy-utility-equipment-started-texas-wildfire-homeowner-says-lawsuit-2024-03-02/).

[44] "Maui County sues Hawaiian Electric Co. for damages from disastrous fires," National Public radio (Aug. 24, 2023) (available here: https://www.npr.org/2023/08/24/1195777967/maui-county-sues-hawaiian-electric-companyfor-damages-from-disastrous-fires).

[45] *See e.g.,* "PG&E Announces 13.5 Billion Settlement of Claims Linked to California Wildfires," National Public Radio (Dec. 7, 2019) (available here: https://www.npr.org/2019/12/07/785775074/pg-e-announces-13-5-billion-settlement-of-claims-linked-to-california-wildfires).

PacifiCorp faces similar financial pressures from recent Oregon jury verdicts and settlements related to devastating wildfires. Last year, a jury ruled that the Company must compensate 17 plaintiffs with damages exceeding $90 million, including approximately $4.5 million of economic damages and $85.5 million of a-typical damages—nineteen times the amount of economic loss.[46] More recently, a jury ordered the Company to pay $62 million to nine plaintiffs, with economic losses at approximately $6.3 million, and a-typical damages of to $56 million—nearly nine times the amount of economic loss.[47]

These are staggering a-typical damages. Yet they represent just two judgements. The Company has *several dozen additional lawsuits* in Oregon and California from wildfires that occurred in those states that similarly seek typical and a-typical damages.[48]

These financial impacts have not gone unnoticed. Following the initial $90 million judgment, and after specifically discussing the $85.5 million in a-typical damages, S&P Global Ratings (S&P) lowered the Company's credit rating from A to BBB+ with a "negative outlook."[49] In November 2023, Moody's Investors Service (Moody's) followed course, and downgraded PacifiCorp's senior unsecured issuer rating to Baa1 from A3.[50]

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[46] "PacifiCorp Downgraded to BBB+, Outlook Revised to Negative; Berkshire Hathaway Energy Co. Outlook Also Negative," S&P Global Ratings (June 20, 2023), available at: https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/3009376.

[47] "Berkshire's PacifiCorp Ordered to Pay At Least $62 Million to Homeowners for 2020 Oregon Wildfire Damage," Reuters (January 23, 2024), available at: https://www.reuters.com/world/us/berkshires-pacificorp-ordered-pay-least-62-million-homeowners-2020-oregon-2024-01-23/

[48] *See, e.g.,* Berkshire Hathaway Energy Company, Form 10-K, at 91-99 (Dec. 31, 2023) (providing a general discussion of each of these wildfire-related lawsuits) (available here: https://bit.ly/3wyWQw6).

[49] "PacifiCorp Downgraded to BBB+, Outlook Revised to Negative; Berkshire Hathaway Energy Co. Outlook Also Negative," S&P Global Ratings (June 20, 2023) (available here: https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/3009376).

[50] "Moody's Rating Action: Moody's downgrades PacifiCorp to Baa1, outlook stable" (Nov. 21, 2023) (available here: https://www.moodys.com/research/Moodys-downgrades-PacifiCorp-to-Baa1-outlook-stable--PR_482643?cy=centraleur&lang=en).

In December 2023, Moody's noted that wildfire risk was a significant risk for the Company and has a substantial impact on its credit quality.[51]

As noted in Berkshire Hathaway Energy's (BHE) 2023 Annual Report, these credit downgrades "have and are expected to continue to have a material impact on PacifiCorp's liquidity and may result in, among other things, PacifiCorp being unable to maintain sufficient levels of cash or to obtain necessary short- and long-term financing to fund its operations and financial obligations, capital investments and potential future settlements associated with the Wildfires."[52]

Beyond liquidity concerns, there are impacts to the Company's ability to procure insurance at reasonable costs. As this Commission noted in a recent decision, when PacifiCorp renewed its commercial liability insurance policies in August 2023, the Company experienced an "increase from the $29 million currently in rates to $125 million (a $96 million increase) for the policy period starting August 15, 2023."[53] This finding is consistent with BHE's Annual Report that similarly discusses these cost impacts:

> PacifiCorp has experienced material increases in the cost of third-party liability insurance as a result of worsening damage claims in the utility industry associated with catastrophic wildfires in the geographic regions in which PacifiCorp operates. Such costs may continue to increase materially to the point of being prohibitively expensive, and it is possible that PacifiCorp may be unable to obtain third-party liability insurance. Increases in the cost of insurance may be challenged when PacifiCorp seeks cost recovery and such amounts may not be recoverable in customer rates. To the extent third-party liability insurance costs continue to increase, becomes cost prohibitive or is unavailable and such increased costs are not recoverable in customer rates,

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[51] "Moody's Investors Services, Credit Opinion, PacifiCorp, Update following a downgrade to Baa1" (Dec. 4, 2023) (available here: https://www.moodys.com/research/PacifiCorp-Update-following-a-downgrade-to-Baa1-Credit-Opinion--PBC_1389798?cy=centraleur&lang=en).
[52] Berkshire Hathaway Energy Company, Form 10-K, at 77 (Dec. 31, 2023) (available here: https://bit.ly/3wyWQw6).
[53] *In re PacifiCorp's Wildfire Insurance Deferral*, Docket No. UM 2301, Order No. 24-021, Appendix A, at 4-5 (Jan. 24, 2024).

> PacifiCorp's financial condition and results of operations could be materially adversely affected and its liquidity position further negatively impacted.[54]

2. Remedial Measures

PacifiCorp has not been a passive observer in response to the risks, and is aggressively hardening its system against wildfire risks and taking steps to protect its financial health.

Despite these measures, PacifiCorp is still vulnerable to financial pressures because of the lack of reasonable limits for a-typical damages in Oregon. This is a concern, because the complexity of today's electrical grid can give rise to lawsuits that are not reasonably attributable to simple human error or negligence. This presents jurors with the unenviable task of navigating technical details to justly assign fault and evaluate damages. Even in the best circumstances, jury verdicts are risky for both plaintiffs and defendants.

PacifiCorp's Petition seeks to address one aspect of this concern. By limiting liability to economic damages from the provision of electric services, the Company is protected against the material threat from disproportionate a-typical damages. This ensures that while plaintiffs are entitled to fully recover their tangible, measurable losses, the Company is shielded from the uncertainty of speculative a-typical damage.

Reasonable limitations on liability are essential for all businesses. As the Texas Supreme Court has cautioned: "Absent a limitation of liability, the risk of staggering loss could be borne by ordinary utility customers."[55] Liability limitations play a critical role in protecting customers from the potential for dramatic rate increases caused by uncapped damage awards, and supports approval of the Company's request.

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[54] BHE 2023 Annual Report, at 78.

[55] *Houston Lighting & Power Co. v. Auchan United States*, 995 S.W.2d 668, at 674 (Tex. 1999).

3. Customer Impacts

It will take time for the financial markets to respond to PacifiCorp's remedial actions, and whether they will positively impact the Company's risk profile. The Commission's decision on this Petition will factor into that response.

Yet while the future is uncertain, the Company's current credit rating will continue to negatively impact customers. Begin with S&P's initial credit downgrade. Their "negative outlook" for PacifiCorp contemplates additional downgrades if the Company has more adverse legal judgments, and noted that limitations on liability could lead to a revision of its outlook to "stable."[56] This outlook was issued prior to the Company's second jury verdict of $62 million which included a nine-fold increase of a-typical damages to economic damages.

Yet even without further action, this initial downgrade has already impacted the Company's ability to raise capital. Many institutional investors are not permitted to purchase non-investment grade (i.e., rated below Baa3/BBB-) securities, or in some cases even securities rated below a single A rating. As a result, the Company will encounter increased borrowing costs which will constrain its financial flexibility and affect its capacity to economically invest in infrastructure, renewable energy projects, and other projects to fulfill its legal and regulatory commitments and further Oregon state policy objectives.

To highlight the issue, PacifiCorp plans to spend over $10 billion in the next three years on capital projects. However, PacifiCorp reduced its planned expenditures in 2024 through 2026 based on its credit downgrade. This capital spending will require PacifiCorp to raise funds by issuing new long-term debt in the capital markets. In PacifiCorp's recent

[56] Sloan Millman & Gabe Grosberg, PacifiCorp Downgraded to BBB+, Outlook Revised to Negative; Berkshire Hathaway Energy Co. Outlook Also Negative, S&P Global Ratings (June 20, 2023), available at: https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/3009376 ("We could affirm our ratings on PacifiCorp and revise the outlook to stable if its wildfire liabilities remain limited.").

January 2024 long-term debt offering, PacifiCorp spent a significant amount of time in discussions with investors to provide them a detailed update on its plans to mitigate further liability risks. Although PacifiCorp's 2024 offering was successful, several traditional investors declined to participate in the offering.

These increased borrowing costs will be passed on to customers in the appropriate rate proceeding. And S&P's warning demonstrates the impact that substantial, uncapped legal awards can have on the Company's financial health.

But these are not just PacifiCorp concerns. S&P has provided broader analyses that underscore the critical importance of maintaining a robust credit rating in the face of increased damages.[57] As S&P notes, it "has downgraded more IOUs due to physical events (e.g., hurricanes, storms, and wildfires) over the past six years by nearly 10 times compared with the previous 13 years."[58] Yet utilities are not without remedies, and S&P notes that it expects utilities to "develop a three-pronged strategy toward reducing risk" that includes "reducing damages from physical events, minimizing litigation risk, and expanding capabilities for cost recovery."[59] Regarding limiting damages specifically, S&P notes that caps on non-economic damages are credit positive: "The maximum amounts for non-economic, and punitive damages are sometimes capped by state statutes, and we view these caps as supportive of credit quality, limiting the total potential damages."[60] And regarding expanding cost recovery capabilities:

[57] "A Storm Is Brewing: Extreme Weather Events Pressure North American Utilities' Credit Quality," S&P Global Ratings (Nov. 9, 2023) (available at: https://www.spglobal.com/ratings/en/research/articles/231109-a-storm-is-brewing-extreme-weather-events-pressure-north-american-utilities-credit-quality-12892106).
[58] *Id.*
[59] *Id.*
[60] *Id.*

> After a utility experiences damages from a physical event or after being found liable for a wildfire, the utility must pay for these costs. We expect that IOUs and POUs will recover most of these costs from ratepayers, which has generally supported the industry's credit quality. However, when the costs become unusually large, regulatory lag—the timing difference between when a utility incurs costs and when it's recovered from ratepayers—increases, the balance sheet leverages, and utilities have even experienced significant disallowances that weaken credit quality. In these instances, we believe the industry hasn't contained the credit risk and the industry is short of protective credit capabilities. As such we believe it's important for the IOU industry to significantly increase and broaden recovery capabilities. This includes implementing storm reserves, increasing commercial insurance levels, incorporating self-insurance, participating in a special wildfire fund, and securitization. *While expanding cost recovery capabilities would support credit quality, we believe this alone without reducing damages from physical events or minimizing litigation risk, would likely not be sufficient to reduce credit risks*.[61]

Thus, strong credit ratings are imperative for the financial stability of the utility industry generally, and for PacifiCorp specifically, in its ability to continue providing services at reasonable rates for its Oregon customers. PacifiCorp represents that these public and well-documented risks to PacifiCorp's financial health support approval of the Company's request.

ii. The Petition does not preempt any claims from the 2020 Wildfires.

The Company's filings were clear that its waiver could only apply prospectively.[62] This relief is consistent with the Commission's quasi-legislative powers and long-standing policy that disfavors retroactive ratemaking.[63] In Oregon this principle "serves the important

[61] *Id.* (emphasis added).
[62] *See, e.g.,* Advice Filing, at 1 ("The proposed tariff amendment would . . . only apply prospectively, and for actions arising out of the provision of electric service;"); PacifiCorp Partial Objection to Intervention, at 3-4 (Dec. 28, 2023) ("Mr. Drevo's interest in intervening would unreasonably broaden the scope of this proceeding. The Company filed its tariff filing on October 24, 2023. The 2020 wildfires that resulted in the *James* litigation occurred several years prior. The Company has not asked for any retroactive amendment to Rule 4 or any retroactive application of any amendment.").
[63] *See, e.g., Gearhart v. Pub. Util. Comm'n. of Oregon*, 339 P.3d 904, 917 (Or. 2014) ("Although the rule against retroactive ratemaking has been defined and applied in many different ways, the rule can be described generally as 'prohibit[ing] a public utility commission from setting future rates to allow a utility to recoup past losses or to refund to consumers excess utility profits.'").

function of providing stability in the regulatory process—parties can reasonably rely on the fact that rates will not be changed after they have been set and paid."[64]

Nonetheless, Drevo and CUB seek to unreasonably broaden the scope of this proceeding, and imply that the Company's actual motive is to block non-economic damages from litigants that have either not received a judgment from the 2020 Wildfires, or from plaintiffs that have yet to file a lawsuit from those same wildfires.[65] In an attempt to further cast doubt on PacifiCorp's prior representations that its waiver only applies prospectively, Drevo goes so far as to reveal confidential settlement discussions.[66]

The Company does not believe that the Commission has the power to approve tariff conditions *today* that could preempt causes of action or damages *from over four years ago*. The Company's Petition is not a sharp-elbow litigation tactic to defeat noneconomic damages from the 2020 Wildfires. The Tariff would only apply prospectively, and as discussed above, its primary purpose is to help improve the Company's financial health.

E. If the Commission has concerns with the Petition, it could consider several reasonable alternatives to narrow its scope.

The Company understands that, while its proposal is *narrower* than prior Commission-approved tariffs in terms of damages (previous decisions have excluded utility liability for all damages in certain circumstances), the proposal is nonetheless *broader* in the range of utility services that would be covered by the liability limitation (extending to all actions in the provisions of electrical services). As a result, if the Commission has concerns

[64] *Id.* at 920.
[65] Drevo In. Br., at 3-8; CUB In. Br., at 4 ("If the Commission grants this petition, none of the harmed plaintiffs who have not yet brought suit will be able to recover a penny in non-economic damages, despite the fact that twenty-six of their peers were able to recently recover a combined $124 *million* in non-economic damages.") (original emphasis).
[66] Drevo In. Br. at 5.

with PacifiCorp's initial proposal, the Company offers several alternatives for the Commission's consideration.

First*,* the Company agrees with Intervenors that Oregon courts have declined to uphold limitations of liability for gross negligence or willful actions. The Company was aware of this case law when it drafted the Petition, as well as the various Commission statutes that establish diverging requirements on what damages are permitted in various circumstances. Yet as discussed in the Company's Initial Brief, the Company does not believe it would be possible to draft a comprehensive utility liability waiver that incorporated all of these authorities, and instead provided a work-around where the waiver would not be operative if it conflicted with Oregon law.[67] This avoided the need for a convoluted Rube Goldberg-styled liability of limitation that could be triggered in a variety of facts of circumstances. Yet if the Commission wanted to address any of these specific causes of action, it could simply narrow the Company's proposed tariff language. For example, the Petition could be amended with the following underlined language: "This provision shall not be binding <u>in cases involving gross negligence, willful misconduct, violation of law,</u> or where state law disallows limitations of liability."

Second*,* as discussed above, the Company disagrees that its proposal is unconstitutional (on both procedural and substantive grounds). However to the extent the Commission has concerns with the constitutionality of PacifiCorp's proposal, and believes it should reach the issue in this proceeding, it could consider replacing the absolute ban on a-typical damages with a cap that includes a specific amount-in-controversy.

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[67] PacifiCorp In. Br. at 12-13.

For example, the Commission could include a cap similar to what was found constitutional in *Horton*: a cap on non-economic damages equal to the amount of economic damages that were available in a given action. Applied to PacifiCorp's tariff, the Commission could specify a dollar amount (for example, allowing for $3 million in economic and a similar amount of non-economic damages per incident), or just require symmetrical damages (no specific cap in economic damages per incident, yet require that non-economic damages cannot exceed the amount of economic damages).

Third, while the Company disagrees with CUB that its request is "heavy-handed,"[68] the Company is sensitive to CUB's argument that this issue could also be addressed in a rulemaking proceeding. This would allow the Commission to consider input from the broader regulated community, and determine how the policies in PacifiCorp's Petition could also be addressed on a state-wide basis, as opposed to a utility-specific proceeding. If the Commission has concerns with PacifiCorp's Petition, it could deny the Petition without prejudice, and initiate a broader rulemaking to continue discussions of these issues.

The Company stands by its initial Petition, yet given the importance of the issues, offers these suggestions to inform the Commission's deliberations.

II. REQUEST FOR ORAL ARGUMENT

Consistent with the Commission's prior notice, the Company requests oral argument on the discrete issues raised in briefing, though only if the Commission determines that it would be helpful or necessary.[69]

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[68] CUB In. Br., at 10-13.
[69] Prehearing Conference Memorandum, at 2 (Dec. 20, 2023).

III. CONCLUSION

The Company respectfully requests the Commission approve the Company's request, and if helpful, schedule oral argument to inform the Commission's deliberations.

Respectfully submitted March 12, 2024,

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