ORDER NO. 24-155

ENTERED May 30 2024

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.	ORDER

DISPOSITION: ADVICE NO. 23-018 REJECTED AND PERMANENTLY SUSPENDED

I. INTRODUCTION

In this order, we reject and permanently suspend PacifiCorp, dba Pacific Power's tariff filed as Advice No. 23-018. We reach this decision primarily because, on its face, the tariff purports to eliminate noneconomic damages in cases of gross negligence and willful misconduct, something Oregon courts have suggested is impermissible. While the tariff does contain a savings clause, we are not inclined to accept an overly broad tariff that we expect the courts will narrow. We also are concerned that the regulatory compact as generically described in this record is not a sufficient quid pro quo to support PacifiCorp's proposed total elimination of non-economic damages for its customers.

We recognize and share PacifiCorp's concerns about maintaining its financial health in the face of mounting wildfire liability. Oregonians have an interest in the solvency of their electric utilities, and unbounded wildfire verdicts can threaten that interest. A utility that cannot effectively secure financing or capital may struggle to meet growing demand, implement legislative mandates, maintain reliable service, and even make good on compensation owed to wildfire victims. Public policy and regulatory solutions to the problem of unbounded wildfire liability are urgently needed. We are not, however, persuaded that accepting PacifiCorp's tariff, at this time and in this form, is a reasonable first step to solving that problem.

II. BACKGROUND

On October 24, 2023, PacifiCorp filed Advice No. 23-018, which would limit its liability to customers for damages arising out of the provision of electric service. Staff of the Oregon Public Utility Commission recommended that the tariff be suspended for the full

period; the Commission adopted Staff's recommendation and suspended the tariff for up to 9 months.[1]

Numerous parties subsequently intervened in this case, and it was set for briefing on the legal issues. Opening briefs were filed on February 27, 2024, and reply and cross-answering briefs were filed on March 12, 2024.

III. POSITIONS OF THE PARTIES

A. PacifiCorp's Tariff

PacifiCorp filed an amendment to its Rule 4, which outlines its general rules and regulations for electric service. The amendment contains a limitation of liability provision, which PacifiCorp states would "(1) limit damages arising out of the Company's provision of electric service to actual damages" and "(2) exclude a-typical damages including special, noneconomic, punitive, incidental, indirect, or consequential damages." The provision reads in full:

> 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. Neither party shall be liable to the other party 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. By receiving electric service, Customer agrees to waive 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.

On January 23, 2024, PacifiCorp filed its opening brief in support of its new tariff. In that brief, PacifiCorp argued that it is consistent with Oregon law and that the Commission has previously approved tariffs limiting regulated utilities from liability. It also points to tariffs adopted in other states that it argues are similar efforts to mitigate the impact to utility rates from natural disasters. Finally, it notes that the limitation of liability is only applicable where allowed by Oregon law so "avoids the need for the Commission to engage in any constitutional analysis in this proceeding."[2]

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[1] Order No. 23-460 (Nov. 28, 2023).
[2] PacifiCorp Brief at 13.

B. Staff and Intervenors

Briefs were filed in this proceeding by Staff, Freres Lumber Company, Samuel Drevo,[3] the Alliance of Western Energy Consumers (AWEC), the Oregon Citizens' Utility Board (CUB), Oregon Consumer Justice, and the Green Energy Institute (GEI) and Sierra Club.

With the exception of AWEC, whose brief was limited to urging additional factual development if the Commission chooses not to find the tariff invalid as a matter of law, each of the intervenors argues that PacifiCorp's tariff is in violation of the remedies clause of the Oregon Constitution. That clause reads:

> No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.

Intervenors in particular point to *Busch v. McGinnis Waste Systems, Inc.*[4] In that case, the trial judge had reduced a jury award for personal injury from over $10 million to $500,000, the maximum permitted by ORS 31.710(1). The Court found the limitation on damages unconstitutional under the remedies clause.

Mr. Drevo's brief discusses the proposed tariff waiver in light of the *James* litigation, and in particular that juries in that case have awarded class members "approximately ten times more in non-economic 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."[5] Non-economic damages include "pain, mental suffering, emotional distress, humiliation, injury to reputation, loss of care, comfort, companionship, and society, inconvenience, and interference with normal and usual activities other than gainful employment."

CUB's and Staff's brief also note the fact that PacifiCorp's tariff would seek to prohibit noneconomic damages even for actions based in gross negligence or willful misconduct. Staff's brief argues that there are dicta from Oregon courts suggesting that limitations on liability in utility tariffs can be acceptable so long as they do not limit the utility's liability for gross negligence.[6] It also points out that the limitations on liability cited by PacifiCorp all carve out gross negligence or willful misconduct, or else they apply in a different context such as *force majeure* events.

The GEI/Sierra Club brief argues that PacifiCorp's tariff is both procedurally and substantively unconscionable and should be struck down on that ground. They argue that

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[3] Mr. Drevo intervened on behalf of himself and the class in *James, et al. v. PacifiCorp et al.,* in which the class brought suit against PacifiCorp for its role in the Labor Day fires of 2020.
[4] 468 P3d 419 (2020).
[5] Drevo Opening Brief at 10.
[6] *See Garrison v. Pac. Nw. Bell*, 45 Or App 523, 608 P2d 1206 (1980).

Oregon courts will enforce waivers for tortious conduct only in "limited circumstances,"[7] especially where a party is "charged with a duty of public service."[8] When it comes to procedural unconscionability, the courts look particularly at whether there is a power imbalance between customer and service provider and whether the service provider has a monopoly "so that plaintiff has no alternative possibility of obtaining service without the clause."[9] The Freres brief points specifically to the fact that the waiver is imposed in a tariff rather than through an arms-length bargain. In examining substantive unconscionability, the courts "whether enforcement of the release would cause a harsh or inequitable result to befall the releasing party; whether the release serves an important public interest or function; and whether the release purported to disclaim liability for more serious misconduct than ordinary negligence."[10]

Mr. Drevo's brief argues that that PacifiCorp's proposed tariff violates Article I, Section 20 of the Oregon Constitution, which reads "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 the provision, the class argues, a "government 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."[11] Here, customers of PacifiCorp would be subject to the limitation on liability whereas non-customers would not.

C. PacifiCorp's Response

PacifiCorp first argues that intervenors cannot demonstrate that the liability waiver is unconstitutional in any given circumstance, and thus that a facial constitutional challenge cannot succeed. Second, it argues that the regulatory compact is an adequate quid pro quo for the limitation of liability. Next, it argues that the Commission's approval of a tariff supersedes common law duties and responsibilities, and thus that the tariff could not be found unconscionable by courts. It also runs through policy arguments in support of its petition—the financial health of the company, that fact that PacifiCorp is taking measures to harden its system, and customer impacts from credit downgrades.

Finally, PacifiCorp notes ways the limitation of liability could be narrowed if the Commission deems it necessary.

IV. ANALYSIS

A. PacifiCorp's Tariff is Rejected as Filed.

We reject PacifiCorp's tariff as overly broad. In making this determination, we are particularly guided by Oregon courts' statements regarding gross negligence and willful

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[7] *Nat'l Union Fire Ins. Co. of Pittsburgh Pa. v. Starplex Corp.,* 220 Or App 560, 576 (2008).
[8] *Real Good Food Store, Inc. v. First Nat'l Bank of Or.,* 276 Or 1057, 1061 (1976).
[9] *Bagley v. Mt. Bachelor, Inc.,* 356 Or 543, 562 (2014).
[10] *Id.* at 560.
[11] *State v. Savastano*, 354 Or 64, 96, 309 P3d 1083, 1102 (2013).

misconduct. We note that most limitations of liability discussed by the company are limited to ordinary negligence, at most. As one Oregon court stated, "[c]ourts are virtually unanimous that provisions limiting a public utility's liability are valid so long as they do not purport to grant immunity or limit liability for gross negligence."[12] Even PacifiCorp agrees in its reply brief that "Oregon courts have declined to uphold limitations of liability for gross negligence or willful actions," but stated in defense of its provision that the company "does not believe it would be possible to draft a comprehensive utility liability waiver that incorporated all of these authorities."[13] As a result, it is not clear to us that this limitation on liability would survive any court challenge where the company was found grossly negligent or guilty of willful misconduct.[14]

We find this sufficient reason to reject PacifiCorp's tariff, even though we recognize that the tariff contains a savings clause stating that it is not binding where state law disallows liability. We are not inclined to approve a tariff we consider overly broad on the theory that the courts would likely strike it down later. Even though we recognize constitutional analysis as the primary domain of the court system, we are responsible for oversight of the policies reflected in utility tariffs, which ideally should help utility customers navigate their rights and obligations. Pointing to as yet undefined limits of state law that may permit more access to relief than the tariff itself is, at best, unhelpful to customers; at worst, it could discourage them from seeking noneconomic damages where courts have been reasonably clear that the constitution requires those damages remain available at some level.

We also are not inclined to redraft the tariff ourselves to make it narrower, as PacifiCorp encourages us to do. We generally prefer for the utility to draft its own tariffs and to consider them as filed, and this preference is particularly strong in areas outside our natural expertise, like tort liability. PacifiCorp protests that it will be difficult to draft a narrower provision that captures all the relevant Oregon legal precedent, but the company is surely better positioned than we are to carve out categories in which overreach is clear, such as willful misconduct. Doing so, in combination with a more general savings clause, will give more clarity and direction to customers.

[12] *Garrison* 608 P2d 1206 (1980) ("We agree with the overwhelming weight of authority that the limitation of liability is reasonable insofar as it does not shelter defendant from liability for gross negligence."); *see also Olson v. Pacific Northwest Bell Telephone Co.*, 65 Or App 422, 424 ("[T]he legislature intended actions for negligence, gross negligence, or breach of contract to be appropriate when a telephone utility fails to act when it has a statutory duty to act…[i]f defendant failed to perform its statutory duty, plaintiff may recovery under negligence, gross negligence, or breach of contract theories.").

[13] PacifiCorp Reply Brief at 22.

[14] Our analysis is focused narrowly on the Commission's authority to approve utility tariffs that seek to limit the tort liability the utility is exposed to from its customers. We are aware that courts are also considering the application of tort and tort damages statutes, including potential limitations, to wildfire-related claims and judgments. We do not take a position on the interpretation or application of those statutes.

Should PacifiCorp choose to file a new tariff with a narrowed scope, we note several other legal concerns presented in briefing that we consider material enough to warrant PacifiCorp's further consideration and potentially modification prior to our review.

B. Regulatory Compact as Justification for Complete Elimination of Non-Economic Damages

Oregon courts, in assessing whether damages limitations survive constitutional scrutiny, have considered whether a reduction in damages is so significant as to effectively deprive injured plaintiffs a remedy and, also, whether any benefit to plaintiffs accompanies the limitation. We are not yet prepared to endorse PacifiCorp's view that the "regulatory compact," as generically defined on this record, is a sufficient benefit to justify its proposal to completely eliminate noneconomic damages for customers.

We are guided in our understanding of the relevant constitutional analysis by Oregon Supreme Court's precedent in *Horton v. OHSU*[15] and *Busch v. McInnis Waste Systems, Inc.*[16] In *Horton,* the Court upheld a limitation on liability, but found there to be a quid pro quo—a waiver of sovereign immunity that allowed the plaintiff to file the action in the first place. In *Busch,* the court found no such quid pro quo and struck down a limitation that dramatically reduced a damages award.[17] Here, we are presented with complete elimination of a category of compensatory damages (non-economic), which the recent judgments against PacifiCorp in the *James* cases have shown us may be significant, justified by PacifiCorp's general discussion of the regulatory compact as its quid pro quo.

The regulatory compact, indeed, is in some ways a series of quid pro quos between customers and the regulated utility. Perhaps more crucially in this context, the regulated monopoly structure prevents the utility from denying service in high-risk locations of its franchised service territory or, alternatively, from earning the rate of return on capital investment that a competitive market might deliver for high-risk service. The monopoly utility must have its rates reviewed and approved by the regulator rather than rely on competition to result in fair and reasonable rates. PacifiCorp argues that the regulatory compact "provides the Commission with the power to determine the appropriate balance of risks and responsibilities between customers and utilities."[18]

Customers also certainly do have an interest in the financial health of the company, and there are real risks to the affordability and reliability utility customers may experience after very large wildfire verdicts. A utility that cannot effectively secure financing or capital may struggle to meet growing demand, implement legislative mandates, or

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[15] 376 P3d 998 (2016).

[16] 468 P3d 419 (Or 2020).

[17] The court in *Busch* did not distinguish between economic and non-economic damages for purposes of its remedy clause analysis, as both are compensatory damages. *Id.* at 433.

[18] PacifiCorp Reply Brief at 7.

maintain reliability. Nevertheless, we are not yet convinced that the generically described regulatory compact is a sufficient quid pro quo to support this particularly broad limitation on liability. Were PacifiCorp to file a new tariff, we would grant AWEC's request for an evidentiary proceeding to examine the level of limitation sought in comparison with the specific level of regulatory support the company requires.

C. Issues with Customer Status Defining Limitation

A tariff governs only the relationship between a utility and its customers. Thus, although customers and non-customers may suffer identical injury in a utility-involved fire, the tariff would eliminate access to noneconomic damages only for utility customers. Whether or not a property is damaged in a utility-sparked electric fire is unrelated to whether the owner of the property in question takes utility service from the utility whose ignition caused the fire. This is different from many of the limitations of liability cited by PacifiCorp that are directly connected to provision of electric service, like tariffs preventing customers from recovering damages for harm caused by electrical outages or participation in a demand response program. PacifiCorp's tariff, as filed, would create two classes of Oregonians—those who are PacifiCorp customers and those who are not—and then create different remedies for identical harms caused by the same utility action.

We recognize that it may be appropriate in some cases for the law to provide different remedies for similar harms. *Horton* upheld a law limiting damages for harms caused by public entities, but that would not have limited damages for similar actions by private entities. Though the distinction between customers and non-customers is different than the distinction between public and private health care, it is not arbitrary in relation to the constitutional analysis: non-customers do not have the same interest in PacifiCorp's financial health as its customers do. However, we find there are practical concerns and significant potential for confusion associated with eliminating a category of damages by the plaintiff's status as a customer. We are uncertain, for instance, what the effect of the tariff would be when an individual moves into or out of PacifiCorp's service territory during the pendency of litigation, when one individual in a household has their name on the service account while another does not, or when property is being rented.

We would prefer to see a consistent policy framework apply to all potential plaintiffs. However, if we must consider a regulatory solution—which, by definition, can only impact customers subject to the tariff—then we expect PacifiCorp to reduce customer confusion and define more clearly the tariff's intended application.

In closing, while we reject PacifiCorp's tariff as filed, we emphasize that Oregon needs to find appropriate policy and regulatory solutions to the serious problems wildfire liability creates for PacifiCorp and, indeed, all utilities and their customers. The *James* verdicts are an example of the risk utilities may face in adjudication of wildfire actions in civil courts, where juries evaluate whether the company met an unclear and rapidly changing duty of care and engaged in willful misconduct. It may be impossible for a utility to avoid a civil court finding of gross negligence, regardless of actions the utility took. Additionally, we agree with PacifiCorp that it is fundamentally impossible to shield

customers from all of the negative consequences of a verdict such as that in the *James* case; these significant costs could raise the cost of capital and debt for both the utility involved in the suit and similarly situated utilities that are perceived to share a common risk profile. Beyond these utility-centered issues, how catastrophic a fire becomes, and thus the scale of liability, is a function of landscape level risk, including building codes, forest management practices and other public and private decisions well outside the utility's control. Maintaining affordable electric service in the face of mounting liability is a problem with which the state as a whole will need to reckon. In doing so, the state must grapple with the appropriate balance between affordability, reliability and reducing—but not completely eliminating—the risk of utility wildfire ignitions, which are just one source among many sources of wildfire ignition.

We are not persuaded that accepting PacifiCorp's tariff, at this time and in this form, is a reasonable first step to solving the very real problem facing our state. Although we will remain open to evaluating a modified proposal from PacifiCorp, we believe that a broader policy solution will better serve Oregon customers, utilities, and wildfire victims alike.

V. ORDER

IT IS ORDERED that Advice No. 23-018, filed by PacifiCorp, dba Pacific Power, is rejected and permanently suspended.

Made, entered, and effective May 30 2024.

Megan W. Decker
Chair

Letha Tawney
Commissioner

Les Perkins
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.