

BEFORE THE WASHINGTON

UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,
Complainant,

v.

PacifiCorp, d/b/a Pacific Power & Light
Company, Respondent.

DOCKET NO. UE-230877

Joint Advocates' Amicus Brief

AMICUS BRIEF OF

NW ENERGY COALITION, THE ENERGY PROJECT, AND SIERRA CLUB

June 18, 2024

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Attachment B: ID Pub. Util. Comm., Dkt. PAC-E-23-22, Order No. 36175, In the Matter of Rocky Mountain Power’s Application to Revise Electric Service Regulation No. 3-Electric Service Agreements (May 14, 2024).

Attachment C: CA Pub. Util. Comm., Staff Disposition of PacifiCorp Tier 3 Advice Letter No. 721-E Modification to Rule 3 – Application for Electric Service (March 21, 2024).

Attachment D: WY Pub. Service Comm., Dkt. 20000-652-ET-23, Record No. 17434, Application of Rocky Mountain Power for Authority to Revise Electric Service Rule 3, Electric Service Agreements (Oct. 24, 2023).

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Company, Respondent.

I. INTRODUCTION

1. Pursuant to Administrative Law Judge Brown’s June 4, 2024 Notice for Opportunity for Amicus Briefing and Notice of Revised Procedural Schedule, the NW Energy Coalition, The Energy Project, and Sierra Club (Joint Advocates) hereby respectfully submit this Amicus Brief to the Washington Utilities and Transportation Commission (UTC or Commission) in the above-captioned proceeding.
2. In an innocuously titled, seven-page October 24, 2023 filing, PacifiCorp (Company) requests Commission approval to drastically and fundamentally decrease the scope of statutorily-protected remedies available to customers for claims whose facts are not yet known. In this proceeding, the Company proposes to amend its General Rules and Regulations Application for Electrical Service (Rule 4) in a manner that it claims would: (1) limit damages arising out of the Company’s provision of electric services to actual damages; (2) exclude atypical damages (including special, non-economic, punitive, incidental, indirect, or consequential); (3) only apply prospectively, and for actions arising out of the

provision of electric service; and (4) would not apply where state law otherwise disallows the limitation (“the Filing”).¹

3. The Commission invited interested persons to “submit amicus briefs on the legal question of whether a proposed tariff is authorized by statute and, if so, whether such a proposed tariff is consistent with the public interest.”² While we did not plan to intervene in this proceeding, at the Commission’s request we offer this amicus brief. The Joint Advocates support of the sound conclusions reached by both Public Counsel and Staff of the Washington Utilities and Transportation Commission (“Staff”) that the Filing is neither authorized by state statute nor consistent with the public interest.³

4. The Joint Advocates submit that the Filing is impermissibly broad and respectfully requests that the Commission deny it, in part, based on its failure to withstand basic scrutiny under the Commission’s statutory authority. The Joint Advocates agree with the sound reasoning of Staff and Public Counsel that a threshold question is whether the Filing comports with RCW 80.04.440. On its face, the Filing runs directly counter to RCW 80.04.440, and therefore the Commission may deny the petition after this threshold legal phase. No further inquiry is needed.

5. However, should the Commission extend its inquiry beyond what is legally necessary, additional compelling legal and policy rationale weigh in favor of denying the

¹ Pacific Power, Advice 23-04—Rule 4—Application for Electric Service, Initial Filing, Washington Utilities and Transportation Commission (Oct. 24, 2023).

² Notice of Opportunity for Amicus Briefing and Notice of Revised Procedural Schedule (Jun. 4, 2024).

³ Response Brief of Commission Staff, at 1-2 (May 3, 2024); Initial Brief of Public Counsel, at 1 (May 3, 2024).

Filing. First, the narrow and discrete tariffs of other utilities that PacifiCorp relies upon to justify its unlawful request are readily distinguishable from the Filing. The Commission has never authorized such a broad and sweeping liability waiver, and the Joint Advocates respectfully request that it not do so now. Further, the Commission has broad authority to regulate utilities and protect customers under its duty to regulate in the public interest.⁴ Approving the Filing would result in inequitable treatment of Commission-regulated utility customers, contrary to the Commission’s regulatory duties.

6. Additionally, the Company’s claims regarding the Filing’s financial impact are speculative and premature at best. While there may be financial impacts to the Company’s shareholders and customers resulting from liability generally, the Filing is not the proper venue to address these nuanced issues. A holistic examination of the impacts of shifting liability regimes on the Company’s financial outlook would be better undertaken in a general rate case where the Commission and parties can account for the shifting of risk from PacifiCorp to its customers.⁵

7. It is important to consider the context within which the Filing has been brought. While the Filing is couched as straightforward and “consistent with numerous Commission-approved tariffs[,]”⁶ it comes on the heels of a historic verdict for the Oregonians—including PacifiCorp customers—who had their homes and property incinerated as a result of the

⁴ RCW 80.01.040(3).

⁵ Response Brief of Commission Staff, at 1.

⁶ PacifiCorp Initial Brief, at 2 (March 8, 2024).

Company’s grossly negligent and reckless conduct.⁷ Importantly, the Commission has never approved a tariff that would allow a utility to avoid liability for injuries stemming from its grossly negligent or reckless conduct, nor a tariff that would completely eliminate a court’s ability to award any non-economic damages.⁸ The Filing, however, would allow just that.

8. On June 12, 2023, the seventeen named plaintiffs in the *James* lawsuit were awarded a total of \$4 million in economic damages and \$68 million in non-economic damages.⁹ On January 24, 2024, a Multnomah County jury awarded \$6 million in economic damages and \$56 million in non-economic damages to nine additional *James* class-action plaintiffs.¹⁰ These damages were awarded after a jury found that PacifiCorp’s conduct was grossly negligent, reckless, and willful, and were meant to compensate victims for the full scope of injuries incurred. In Oregon,¹¹ as in Washington,¹² courts recognize that plaintiffs are

⁷ *James, et al. v. PacifiCorp*, Final Verdict, Multnomah County Circuit Court, Case No. 20CV33885 (Jun. 9, 2023), <https://wildfiretoday.com/wp-content/uploads/2023/06/PacificCorpFinalVerdict.pdf>.

⁸ Response Brief of Commission Staff, at 13, *citing* Sierra Club Comments at 2 (Dec. 21, 2023).

⁹ PacifiCorp, Information on wildfire litigation, <https://www.pacificorp.com/about/information-wildfire-litigation.html>.

¹⁰ *Id.*

¹¹ *See, e.g., Busch v. McInnis Waste Systems, Inc.*, 366 Or. 628, 645 (2020) (“Both economic and noneconomic damages are intended to compensate a plaintiff for such injuries.”); *Horton v. Oregon Health and Science University*, 359 Or. 168 (2016) (upholding cap on noneconomic damages that could be sought against the state under the Oregon Tort Claims Act, but only because the Act partially waived sovereign immunity, thus creating a *quid pro quo*: the ability to sue state actors for amounts up to the statutory damages cap).

¹² *See, e.g., Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 645-647 (1989) (emphasizing that the right to a jury trial includes the right of the jury to determine damages, both economic and noneconomic).

generally entitled to both economic and noneconomic damages to make them whole.¹³ Yet, PacifiCorp seeks to deny potential Washington plaintiffs their fundamental right to recover full damages when they have been harmed. The Commission can eliminate the possibility of this inequity by denying the Filing.

9. Indeed, four state Commissions have rejected identically-worded tariffs from PacifiCorp. Oregon,¹⁴ Idaho,¹⁵ and Wyoming¹⁶ denied PacifiCorp's tariffs on the basis that they were impermissibly broad, would result in unjust and unreasonable rates, and are contrary to the public interest. California rejected the filing without prejudice for procedural reasons¹⁷ and to our knowledge PacifiCorp has not refiled its request.¹⁸ The decisions of

¹³ One difference is that where Oregon allows for punitive damages where a defendant has been found grossly negligent (or worse), Washington only permits punitive damages in cases identified by statute. *Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wash. 2d 692, 697, (1981), *amended*, 96 Wash. 2d 692, 649 P.2d 827 (1982).

¹⁴ Attachment A, OR Pub. Util. Comm., Dkt. UE 428, Order No. 24-155, Advice No. 23-018 Rejected and Permanently Suspended (May 30, 2024), <https://apps.puc.state.or.us/orders/2024ords/24-155.pdf>.

¹⁵ Attachment B, ID Pub. Util. Comm., Dkt. PAC-E-23-22, Order No. 36175, In the Matter of Rocky Mountain Power's Application to Revise Electric Service Regulation No. 3-Electric Service Agreements (May 14, 2024), https://puc.idaho.gov/Fileroom/PublicFiles/ELEC/PAC/PACE2322/OrdNote/20240514Final_Order_No_36175.pdf.

¹⁶ WY Pub. Service Comm., Dkt. 20000-652-ET-23, Record No. 17434, In the Matter of the Application of Rocky Mountain Power for Authority to Revise Rule 3 to Provide for Updated Provisions Regarding Liability for Damages, Open Meeting (May 28, 2024), <https://drive.google.com/file/d/1jb1b9auV8jdeSxPochLOkyoCkwogMaB3/view>.

¹⁷ Attachment C, CA Pub. Util. Comm., Staff Disposition of PacifiCorp Tier 3 Advice Letter No. 721-E Modification to Rule 3 – Application for Electric Service (March 21, 2024).

¹⁸ PacifiCorp, California regulatory filings, <https://www.pacificpower.net/about/rates-regulation/california-regulatory-filings.html> (accessed June 17, 2024).

Oregon, Idaho, and California rejecting PacifiCorp's filing are provided as attachments to this brief.¹⁹

10. The Joint Advocates' respectfully request that the Commission deny the Filing because:
- A. It is in direct contravention of RCW 80.04.440;
 - B. The tariff comparators PacifiCorp relies upon are readily distinguishable from the instant case; and
 - C. Additional legal and policy rationale weigh heavily in favor of denying the Filing.

II. DISCUSSION

A. The Filing is in Direct Contravention of RCW 80.04.440

11. The Joint Advocates' respectfully urge the Commission to deny the Filing as it runs counter to Washington law. Approval of such a broad and baseless tariff would therefore be beyond the scope of the Commission's legislatively delegated authority. As an administrative agency, the Commission's authority is limited by the boundaries of the legislature's delegation. While the Commission has broad authority to regulate jurisdictional utilities in the public interest, this authority must align with the provisions of applicable public service laws, such as RCW 80.04.440.²⁰ Here, as noted by the Commission's Prehearing Conference Order, the Filing is counter to RCW 80.04.440, which provides:

In case any public service company shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by any law of this state, by this title or by any order or rule of the commission, such public service company shall

¹⁹ Wyoming voted to reject the tariff at its May 28, 2024 Open Meeting but has not yet issued a written order. See footnote 16, above, for a recording of the open meeting.

²⁰ RCW 80.01.040.

be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom, and in case of recovery if the court shall find that such act or omission was willful, it may, in its discretion, fix a reasonable counsel or attorney's fee, which shall be taxed and collected as part of the costs in the case. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any person or corporation.

12. The Joint Advocates agree with the compelling arguments provided by Staff and Public Counsel in support of their determination that the Filing runs directly counter to RCW 80.04.440. As seen in the statute's clear and unambiguous language, a public service company—like PacifiCorp—“shall be liable to the persons...affected thereby for *all* loss, damage, or injury caused” by the utility's own action or omission of a duty it holds.²¹ If approved, the Filing would eliminate potential recovery of *any* non-economic damages for future plaintiffs whose facts and claims are not yet known. As can be seen by the damages awarded to the *James* plaintiffs in Oregon, these damages may be substantial and are designed to compensate victims for the injuries and damages they have incurred. Importantly, liability under the statute is “predicated upon a violation of law or safety regulation.”²² As Public Counsel notes, in *National Union v. Puget Sound Power & Light*, the Court of Appeals held that such predicate violations may include claims for negligence, gross negligence, and breach of contract.²³

13. Here, if approved, the Filing would allow PacifiCorp to avoid all non-economic damages—damages that are meant to compensate a plaintiff for their injuries—even if the Company acted grossly negligent or in a manner that violated laws or safety regulations. The

²¹ RCW 80.04.440 (emphasis added).

²² *Markoff v. Puget Sound Energy, Inc.*, 9 Wn. App. 2d 833, 848, 447 P.3d 577 (2019).

²³ Initial Brief of Public Counsel, at 4, citing *Nat'l Union Ins. v. Puget Sound Power*, 94 Wn. App. 163, 174-75, 972 P.2d 481 (1999).

Filing is impermissibly broad and must be rejected since it directly contradicts RCW 80.04.440. As a legislatively created body, the Commission’s authority “is limited to that which is expressly granted by statute or necessarily implied therein.”²⁴ Since the Filing runs directly counter to RCW 80.04.440—a statute that expressly confers a duty on the Commission—approving the Filing would therefore exceed the Commission’s express statutory authority. The Commission should give little credence to PacifiCorp’s argument that its tariff may preempt a statute because the law works the other way: statutes define the scope of the Commission’s delegated authority.

14. In its Reply Brief, PacifiCorp asserts that Staff argues that the Commission can limit utility liability, but not damages, and that Public Counsel argues the Commission can limit liability and damages, but only for violations of Commission orders or rules.²⁵ The Company’s attempt to seed doubt in the positions of Staff and Public Counsel by distinguishing the analytical routes each pursued to reach the same conclusion—that the Filing runs counter to RCW 80.04.440—must fail. A plain reading of RCW 80.04.440—as well as a review of relevant Commission-approved liability limitations—makes it clear that the Filing runs counter to Washington law, and approving it would be outside the scope of the Commission’s delegated authority.

²⁴ *Wash. Indep. Tel. Ass’n v. Telecomm. Ratepayers Ass’n for Cost-Based & Equitable Rates*, 75 Wn. App. 356, 363, 880 P.2d 50 (1994).

²⁵ PacifiCorp Reply Brief, at 2 (May 23, 2024).

15. RCW 80.04.440 is clear that liability cannot be limited for injury that accrues due to a utility’s own action or failure to act when it has an affirmative duty.²⁶ The Filing would broadly allow PacifiCorp to “limit damages arising out of the Company’s provision of electric services[,]” which would include its own acts or omissions.²⁷ The fatal legal flaw in the Filing is apparent—it would allow PacifiCorp to limit liability even if injury was by its own affirmative action or failure to act. If PacifiCorp failed to maintain equipment, like a transformer, in a grossly negligent manner that led to a customer’s death by electrocution, that customer’s estate would be limited to recovering economic damages. If a PacifiCorp employee, acting within the scope of his duties, ran a red light and killed a pedestrian who happened to be a PacifiCorp customer, that customer’s estate would also be limited to recovering economic damages.

16. The difference between PacifiCorp’s Filing and the liability limits in approved tariffs today is readily apparent: the Filing would allow the Company to limit liability caused by its *own* action or inaction. These actions could be criminal, grossly negligent, willful, or even an abdication of its duty to ensure a safe and reliable system. PacifiCorp would have the Commission deny customers damages for causes of action brought against the utility *for something it did or didn’t do* as a broad condition of taking monopoly utility service. No other Commission-approved tariff includes such a broad and sweeping waiver of liability. Each Commission-approved tariff that PacifiCorp cites allows for a reasonable limitation of

²⁶ RCW 80.04.440 (“*In case any public service company shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act . . .*” emphasis added).

²⁷ Pacific Power, Advice 23-04—Rule 4—Application for Electric Service, Initial Filing, Washington Utilities and Transportation Commission (Oct. 24, 2023).

liability when a cause of action accrues for an injury caused by a third party or by an event outside the utility’s reasonable control—such as a natural disaster. These other tariffs have been carefully crafted to fit within the contours of Washington law.

17. The Filing before the Commission today was not designed to benefit Washingtonians or to fit Washington’s statutes. PacifiCorp likely crafted generic tariff language for use in multiple states, then filed tariffs with identical language in five of the six jurisdictions in which it operates.²⁸ While we normally applaud the Company when it leverages efficiencies provided by its multi-state service territory, here the Company goes too far by proposing tariff language that was crafted without regard to the specifics of Washington statute or law. The Commission should not be persuaded by the Company’s attempt to fit a square peg into the round hole that allows for liability limitations in Washington. The Joint Advocates respectfully urge the Commission to reject the Filing, which the Commission may do at the end of this threshold legal inquiry.

B. The Tariff Comparators the Company Relies Upon are Readily Distinguishable

18. In support of the Filing, the Company points to several Commission precedents that have limited damages for various utility services.²⁹ However, all of the examples PacifiCorp

²⁸ Compare OR Pub. Util. Comm., Dkt. UE 428, Order No. 24-155, Initial Utility Filing (Oct. 24, 2023), <https://edocs.puc.state.or.us/efdocs/UAA/uaa153525.pdf>; ID Pub. Util. Comm., Dkt. PAC-E-23-22, Rocky Mountain Power Application to Revise Electric Service Regulation No. 3-Electric Service Agreements (Oct. 24, 2023), <https://puc.idaho.gov/Fileroom/PublicFiles/ELEC/PAC/PACE2322/CaseFiles/20231024Application.pdf>; Attachment D, WY Pub. Service Comm., Dkt. 20000-652-ET-23, Application of Rocky Mountain Power for Authority to Revise Electric Service Rule 3, Electric Service Agreements (Oct. 24, 2023); Attachment C, CA Pub. Util. Comm., Staff Disposition of PacifiCorp Tier 3 Advice Letter No. 721-E Modification to Rule 3 – Application for Electric Service (March 21, 2024).

²⁹ PacifiCorp Initial Brief, at 13 (March 8, 2024).

relies on are much narrower than the Filing—a fact the Company concedes.³⁰ PacifiCorp cites to a Puget Sound Energy (PSE) tariff that limits the utility’s liability to interconnection customers, for damages arising from the use of customer equipment, for damages beyond the Company’s reasonable control, and for any Company performed maintenance, among others.³¹ Similarly, PacifiCorp points to examples from Avista Utilities, as well as examples for services provided by Qualifying Facilities (QFs) that specifically disclaim consequential damages for either party.³² None of these examples provide “adequate support” for the Filing as the Company claims.³³

19. First, none of the Commission-approved tariffs would allow for a limitation of liability when a utility has acted in a grossly negligent, willful, or reckless manner—such as the events that gave rise to the *James* litigation in Oregon which precipitated the Filing. Second, these examples are all readily distinguishable because they generally apply to action from a third party or instances in which customer equipment is being used. Here, the Filing would allow PacifiCorp to require that all of its customers waive their right to all noneconomic damages as a condition of taking monopoly utility service. The Filing makes no attempt to narrow the scope of potential causes of action or circumstances in which the Company’s liability would be limited—it is for the “provision of electric service.”³⁴ The

³⁰ *Id.*

³¹ *Id.* at 13-14.

³² *Id.* at 14.

³³ *Id.* at 15.

³⁴ Pacific Power, *Advice 23-04—Rule 4—Application for Electric Service*, Initial Filing, Washington Utilities and Transportation Commission (Oct. 24, 2023).

Company's inappropriately broad Filing finds no apt comparators with any of the Commission-approved tariffs upon which it relies to bolster its position.

20. Similarly, examples cited by PacifiCorp from sister-state utility commissions do little to help the Company's arguments. One New York case referenced by PacifiCorp, *Lee v. Consolidated Edison Co.*, actually serves to demonstrate that limits are necessary when a Commission is considering tariff-based liability limitation. In *Lee*, the court concluded that a tariff's liability provision protecting the utility from liability when service was interrupted from "causes beyond its control or through ordinary negligence of employees, servants, or agents" was lawful, acknowledging that similar provisions have been repeatedly sustained by the appellate courts "as reasonable limitations on the liability of a public service corporation, so long as the company has not attempted to absolve itself from its own willful misconduct or gross negligence."³⁵ Rather than support the Filing, *Lee* shows us that the New York court would likely find a tariff as broad as the Filing—that would absolve it from damages related to gross negligence—to be unlawful.

21. Indeed, the states that PacifiCorp cites to have largely held that reasonable limitations on the liability of a public service corporation have been upheld by courts so long as the company has not attempted to absolve itself from its own willful misconduct or gross negligence.³⁶ If approved, the Filing would absolve the Company from damages associated

³⁵ *Lee v. Consolidated Edison Co.*, 98 Misc. 2d 304, 305-306, 413 N.Y.S.2d 826 (N.Y.Sup.App.1978).

³⁶ *Id.* at 306. We stress here that even when liability limitations have been granted, they have been narrow, generally limited to circumstances beyond the utility's control or limited to damages arising from an interruption of service. They have not broadly applied to "the provision of electric service" as the Company seeks here.

with its own willful misconduct or gross negligence. This fact was paramount to the decisions in Oregon and Idaho to deny the filing. As the Idaho Public Utility Commission found:

While the Company presents case citations and examples from other jurisdictions in support of its argument, the Commission finds them unpersuasive. The Company heavily relies on examples of limitations on liability for conduct outside a company's control, or instances in which a state legislature has enacted statutory limitations on liability for natural disaster or other emergencies; situations that are not present here.³⁷

The Oregon Commission reached a similar conclusion:

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 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." 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." 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.

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.³⁸

22. The Joint Advocates respectfully urge the Commission to follow the compelling rationale of its counterparts in Oregon and Idaho when evaluating the

³⁷ Attachment B, ID Pub. Util. Comm., Dkt. PAC-E-23-22, Order No. 36175, at 7.

³⁸ Attachment A, OR Pub. Util. Comm., Dkt. UE 428, Order No. 24-155, Advice No. 23-018 Rejected and Permanently Suspended, at 4-5.

exact same tariff language and conclude that the tariffs PacifiCorp relies upon to justify the filing do little to help its case. Although state law determining the permissible scope of utility liability waivers varies, no state Commission has found that the speculative benefits or costs that PacifiCorp asserts may exist have outweighed the threshold legal questions related to PacifiCorp’s improperly broad tariff waiver filing. State utility commissions—and state legislatures—uniformly require utilities to accept liability for acts of gross negligence, recklessness, or willful misconduct. The Commission should do the same and reject the Filing.

C. Additional Policy and Legal Rationale Justify Denying the Filing

23. In addition to the compelling rationale detailed in the submissions of Staff and Public Counsel, additional legal and policy rationale dictate that the Commission should deny the Filing. The Commission should not require customers of a single Washington utility to waive their rights as a condition of taking monopoly utility service. The Company wields the Filing as a cudgel—attempting to severely limit the rights of its captive customers through a blunt tariff filing that included no stakeholder outreach, considered no viable alternatives, and includes no discussion of the varied public policy outcomes that the Filing seeks to further beyond warnings about the speculative damage to the Company’s financial wellbeing. The Company makes the latter argument despite the fact that none of its peer utilities have similar broad and sweeping tariffs in effect.

24. While the Joint Advocates appreciate the Company’s efforts to give the Commission various options by which to consider the Filing in its Reply Brief, they should be rejected.³⁹

³⁹ PacifiCorp Reply Brief, at 3 (“If the Commission has concerns with PacifiCorp’s proposal, it could narrow its scope with one of several reasonable options: by excluding willful or

The Filing is improperly broad, and it is not a reasonable starting point with which to initiate a rulemaking or begin a redline examination. As the Oregon Commission astutely noted, utility Commissions are not experts in tort liability, and the Company is best suited to attempt to tailor a different tariff more narrowly to align with applicable state law.⁴⁰ However, if the Commission disagrees and is inclined to allow a more narrow limitation of liability in tariff, it should instruct the Company that it will only consider such a proposal in the context of a general rate case where the Company's testimony describes how such a reallocation of risk between customers and shareholders is reflected and apportioned. It is unjust and unreasonable for the Commission to shift this risk from shareholders to customers without also considering all the other elements of the Company's finances.

25. The Joint Advocates recognize that the risk profile of electric utilities in the West is changing in the face of anthropogenic climate change. This is readily apparent in the context of the court proceedings related to wildfire liability that gave rise to the Filing, but receives

gross negligence; by amending the language to reflect the overlapping consensus of Staff and Public Counsel's view of the Commission's authority; or by rejecting the proposal without prejudice, and open a rulemaking proceeding to consider the policy issues implicated by PacifiCorp's proposal.").

⁴⁰ Attachment A, OR Pub. Util. Comm., Dkt. UE 428, Order No. 24-155, Advice No. 23-018 Rejected and Permanently Suspended, at 5 ("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.").

scant discussion in the Company's filings.⁴¹ While changes to utility service to mitigate the impacts of climate change could raise customer rates—such as investments in wildfire system hardening, preparedness, and the investments necessary to meet clean energy mandates—the issue of how corporate liability affects customer rates is nuanced. As a foundational matter, the Joint Advocates maintain that customers should be completely insulated from costs related to liability arising from grossly negligent or reckless conduct. Such behavior is squarely not within the realm of prudent utility behavior, and therefore should not be passed onto customers.

26. Further, approving the Petition will result in disparate and inequitable treatment between customers of Commission-regulated electric utilities. A simple hypothetical example demonstrates the poor and inequitable policy that approving the Petition would create. Both PacifiCorp and Puget Sound Energy serve customers in Washington state. Suppose that a PacifiCorp employee, acting within the scope of his duties to aid the Company in the provision of electrical service, operates a corporate vehicle while under the influence of alcohol. Under the doctrine of *respondeat superior*, the Company would be liable for damages caused by the employee.⁴² If a Puget Sound Energy employee crashed the Company's vehicle into a Puget Sound Energy customer's house, the customer would have full recourse under the pertinent remedies available. However, if a PacifiCorp employee crashed into a PacifiCorp customer's house, the Petition would limit the customer's damages

⁴¹ The Joint Advocates also note that the Company's filings fail to demonstrate that PacifiCorp maintains a commitment to meeting Washington's interim clean energy targets, which in the long term will lessen the severity of climate change.

⁴² See, e.g. *Guedon v. Rooney et al.*, 160 Or. 621 (Feb. 15, 1939).

to only actual damages. Whether or not a customer's home is hit is unrelated to whether the owner of the property in question takes service from PacifiCorp or not. Similarly, if a PacifiCorp employee crashed into a car carrying a PacifiCorp customer and a non-PacifiCorp customers, the damages available to each would be different.

27. These outcomes would result in severe inequities between customers in terms of the scope of remedies available. While the Filing is brought in the wake of several wildfire-related claims, it is important to consider the sweeping impact approving the Filing would have on any number of claims arising from any number of incidents whose facts are not yet known. Due in part to the inequitable treatment of varying customers under the Commission's protective regulatory umbrella, the Filing should be denied.
28. Should the Filing be approved, it is highly likely that a court would find the Commission's relevant decision to be in contravention of applicable law. However, until that time, the Company would be able to leverage the Filing as a tactic to decrease the settlement awards negotiated with plaintiffs bringing suit for a wide range of issues. This would significantly increase the burden on these plaintiffs and give PacifiCorp unfair bargaining power in these negotiations. Considering these practical impacts of approving this Filing, the Commission should rely on its broad authority to uphold the public interest and reject the Filing.⁴³
29. Approving the Filing would severely limit Washington customers' rights, without any discernible benefit to either PacifiCorp or its customers. PacifiCorp seeks broad liability protections against potential, future wildfire verdicts, asserting that this protection would

⁴³ RCW 80.01.040.

support the Company's financial health and ability to provide reliable and low-cost service. Yet, the Company provides no concrete evidence that this would be the case. The record is insufficient in this proceeding to render a decision on the current impact of utility liability on the Company's financial position.

30. PacifiCorp argues that without the liability protections that it seeks here, the Company *may* be unable to obtain short- and long-term financing.⁴⁴ What PacifiCorp fails to mention is that in early 2024, PacifiCorp announced to the Wyoming Public Service Commission that it had secured over \$3.8 billion in debt financing, over double its total revenue requirement.⁴⁵ Notably, this financing was secured after the *James* verdict and PacifiCorp's credit downgrading.

31. PacifiCorp also notes that its wildfire insurance costs have significantly increased.⁴⁶ While this may be true, PacifiCorp has failed to provide any evidence that approving its Filing would have any discernible impact on wildfire insurance costs, particularly given that its service territory in Washington is relatively small and its regulators in Oregon, Idaho, and Wyoming have all denied similar liability protection requests.

32. As noted above, wildfire liability exposure for Western utilities is complex, likely requiring a statewide, or even regionwide, response. The liability protection that PacifiCorp seeks here is unlikely to have any impact on its overall financial health, yet significantly and unfairly infringes upon the rights of Washington customers.

⁴⁴ PacifiCorp Initial Brief at 8, ¶ 17.

⁴⁵ WY Pub. Service Comm., April 4, 2024 Open Meeting, Statement of PacifiCorp Chief Executive Officer Cindy Crane, at 16 minutes, 30 seconds, https://drive.google.com/file/d/1hT38ADbi2oFLJ4_WPmi53Xt0yYoSo31P/.

⁴⁶ PacifiCorp Initial Brief at 8-9, ¶ 18.

III. CONCLUSION

33. As articulated herein, the Commission should deny the Filing.

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Respectfully submitted,

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