

December 20, 2023

***VIA ELECTRONIC FILING***

Kathy Hunter  
Acting Executive Director and Secretary  
Washington Utilities and Transportation Commission  
621 Woodland Square Loop SE  
Lacey, WA 98503

**RE: Docket UE-230877—Rule 4—Application for Electric Service**

PacifiCorp d/b/a Pacific Power & Light Company (PacifiCorp or Company) respectfully requests the Washington Utilities and Transportation Commission (Commission) approve the Company's advice filing that amends PacifiCorp's Rule 4 Tariff (Tariff).

In the alternative, the Commission should suspend the Tariff and order a limited round of briefing or oral argument to address any unresolved questions of law or policy that the Commission has with the Tariff.

**I. The Commission should approve the Tariff.**

The Commission should approve PacifiCorp's proposed revisions to the Tariff, because they are consistent with Washington law and numerous Commission-approved limitations on utility liability. Importantly, approval would help the Company's ability to finance capital expenditures at reasonable rates, and would directly benefit customers given the need to finance construction of new renewable generation. PacifiCorp disagrees with Staff's summary conclusion that the revisions to the Tariff should be rejected because there is no agreement between the parties, even though the Commission has approved similar filings in the past.

**A. The Tariff is consistent with Washington law.**

When PacifiCorp became a Washington utility, it lost the right to freely contract (or not), with its Washington customers.<sup>1</sup> This includes the rights to negotiate specific terms and conditions to protect either party to the contract, either for PacifiCorp or its customers. Now, PacifiCorp operates as a public utility under Commission-approved rates and tariffs that establish the terms and conditions of PacifiCorp's services.<sup>2</sup> It is PacifiCorp's statutory duty to provide services that are "safe, adequate and efficient, and in all respects just and reasonable,"<sup>3</sup> at rates that are "just, fair, reasonable and sufficient."<sup>4</sup> These requirements cannot be waived by a written or oral

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<sup>1</sup> RCW 80.28.120.

<sup>2</sup> RCW 80.28.050 through .065 (requiring Commission approval of utility rates, service, terms, and conditions).

<sup>3</sup> RCW 80.28.010(2).

<sup>4</sup> RCW 80.28.010(1).

agreement between PacifiCorp and its customers.<sup>5</sup> And it is the Commission’s role to determine what constitutes just, reasonable, and compensatory rates and services.<sup>6</sup>

To implement these authorities, PacifiCorp is required to “file with the commission . . . all rates and charges made, established or enforced, or to be charged or enforced, all forms of contract or agreement, all rules and regulations related to rates, charges or service, used or to be used, and all general privileges and facilities granted or allowed.”<sup>7</sup> PacifiCorp cannot “charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges” in the Company’s published tariffs.<sup>8</sup>

This means that the Commission has plenary jurisdiction over utility tariff terms and conditions. And this necessarily includes limitations on utility liability for provision of utility services, and provides the Commission with the authority to approve the Company’s request.

Staff is correct that PacifiCorp is liable for damages if the Company violates Washington law or safety regulations.<sup>9</sup> However the plain language of this statute “does nothing more than preserve causes of action for private claims related to utility misconduct . . . .”<sup>10</sup> And the Commission is free to adopt utility limitations of liability that have the practical effect of preempting RCW 80.04.440 when damages arise from utility services under Commission-approved tariffs.<sup>11</sup> As *Puget Sound Energy* noted, “a party seeking the benefit of RCW 80.04.440 must demonstrate that the underlying claim is viable and not subject to an affirmative defense.”

Limitations of liability in utility tariffs are common affirmative defenses that preempt RCW 80.04.440.

For example, Washington courts have concluded that “Virtually all jurisdictions have enforced such limitations and disclaimers of liability, whether contained in a filed tariff or a private contract, unless the company’s negligence is willful or gross.”<sup>12</sup> “Limitation of liability provisions are an inherent part of the ratemaking process.”<sup>13</sup> And where Washington statutes vest this responsibility to approve liability limitations with the Commission, once a tariff becomes effective, limitations are “part of the law” and are “binding upon the customer whether he

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<sup>5</sup> RCW 80.28.010(12).

<sup>6</sup> RCW 80.28.020.

<sup>7</sup> RCW 80.28.050.

<sup>8</sup> RCW 80.28.080(1).

<sup>9</sup> Staff Memo at 1-2 (Dec. 21, 2023) (discussing RCW 80.04.440).

<sup>10</sup> *Markoff v. Puget Sound Energy, Inc.*, 447 P.3d 577, ¶ 34 (2019).

<sup>11</sup> *Id.* (citing *Citoli v. City of Seattle*, 61 P.3d 1165 (2002) (utility’s alleged violation of regulation requiring minimization of service interruptions did not support RCW 80.04.440 claim due to city ordinance limiting utility’s liability)).

<sup>12</sup> *Allen v. Gen. Tel. Co.*, 20 Wn. App. 144, 148 (1978).

<sup>13</sup> *National Union Ins. Co. of Pittsburgh, Pa. v. Puget Sound Power*, 972 P.2d 481 (1999) (citing *Lee v. Consolidated Edison Co.*, 98 Misc.2d 304, 413 N.Y.S.2d 826, 828 (N.Y.Sup.App.1978)).

actually knows of the limitation or not.”<sup>14</sup> This is because without the Commission exercising its authority to review and approve reasonable customer and utility protections, utilities “would have to raise its rates commensurate to its increased liability risk.”<sup>15</sup>

Consistent with these authorities, to PacifiCorp’s knowledge, the Commission has never concluded that it lacked jurisdiction or the authority to consider a utility’s application to limit liability. This is despite RCW 80.04.440 being the law of the land in Washington for over a hundred years.<sup>16</sup> PacifiCorp represents that these statutes and Washington court cases do not limit the Commission’s authority to approve the Company’s Tariff.

Indeed, California recently reached the similar conclusion, even where that decision preempted a customer’s ability to recover civil damages against utilities resulting from damage caused by wildfires. The California Supreme Court was asked whether a California Public Utility Commission (CPUC) statute that holds utilities liable for “all loss, damages, or injury” caused by utility acts or omissions would nonetheless be preempted by another CPUC statute that vests exclusive review of CPUC decisions with the California Supreme Court and court of appeal.<sup>17</sup> The Court concluded that yes—even though the plaintiffs were “seeking billions of dollars in alleged damages resulting directly from power shutoffs”—the suit should be preempted as a matter of law because it would “hinder or frustrate the PUC’s carefully designed implementation calculus” regarding utility wildfire mitigation plans and tariff provisions regarding public safety power shutoff events.<sup>18</sup> “To hold otherwise,” the Court noted, “would be to invite interference with a ‘broad and continuing supervisory or regulatory program’ of the PUC.”<sup>19</sup>

## **B. The Tariff is consistent with other Washington utility limitations on liability.**

The Commission routinely and uniformly approves limitations on liability for Washington utilities. Consider a single Puget Sound Energy (Puget) tariff that has dozens of liability limitations:

- Seven pages of Puget’s Electric Tariff G disclaim liability for any number of liabilities, losses, or damages that are caused by service disruptions.<sup>20</sup> This includes: causes beyond Puget’s control (including fire);<sup>21</sup> when Puget seeks to repair or improve or replace

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<sup>14</sup> *Allen*, 20 Wn. App. at 151 (string-citing *Cole v. Pacific Tel. & Tel. Co.*, 112 Cal.App.2d 416, 246 P.2d 686 (1952), *aff’d Hall v. Pacific Tel. & Tel.*, 20 Cal.App.3d 953, 98 Cal.Rptr. 128 (1971); *Wheeler Stuckey, Inc. v. Southwestern Bell Tel. Co.*, 279 F.Supp. 712 (W.D.Okl.1967); *Warner v. Southwestern Bell Tel. Co.*, 428 S.W.2d 596 (Mo.1968)).

<sup>15</sup> *Id.*

<sup>16</sup> 1911 Wa. Laws Ch. 117, § 102.

<sup>17</sup> *Gantner v. PG&E Corporation*, 538 P.3d 676 (Cal. 2023).

<sup>18</sup> *Id.* at 13 (cleaned up).

<sup>19</sup> *Id.* (citing *Hartwell Corp. v. Superior Court*, (2002) 27 Cal.4th 256, 266); see also, e.g., *Id.* at 10 (citing *San Diego Gas & Electric Co. v. Superior Court*, 13 Cal.4th 893, 918 (1996) (same)).

<sup>20</sup> PSE Electric Tariff G, Schedule 80, WN U-60, Or. Sheet No. 80-e.

<sup>21</sup> *Id.* at 80-f.

services;<sup>22</sup> when in Puget’s “sole judgment” actions are necessary to protect the Company’s system;<sup>23</sup> and when necessary to conserve energy.<sup>24</sup>

- Customers must properly care for Puget’s property on their premises, “and in the event of loss or damage to the Company’s property arising from neglect, carelessness, or misuse by the Customer, the cost of necessary repairs or replacement shall be paid by the Customer.”<sup>25</sup>
- When interconnecting with emergency service generators, Puget has four paragraphs that broadly limit its liability from risks of interconnection, including for circumstances arising out of a customer’s negligence or willful misconduct, even if the damages result in death or bodily injury.<sup>26</sup>
- When services are disconnected or interrupted to a customer-generator or other customer using Puget Interconnection Facilities, neither Puget “nor any other person or entity shall have any liability to any Interconnection Customer or any person or entity for any disruption in service or for any loss or damage caused thereby.”<sup>27</sup>
- Puget is not liable for any “damages to persons or property arising from the use of the service on the Premises of the Customer.”<sup>28</sup>
- Puget’s Customer Service and Restoration Service Guarantees (Schedules 130 and 131) do not apply to Interconnection Customers.<sup>29</sup>
- Puget is not responsible for damages beyond its reasonable control for delivery of primary voltage.<sup>30</sup>

Avista has similar protections,<sup>31</sup> and PacifiCorp mentioned several examples in our initial advice letter.<sup>32</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 80-h.

<sup>25</sup> *Id.* at 80-c.

<sup>26</sup> *Id.* at 80-kk.

<sup>27</sup> *Id.* at 80-B.2.

<sup>28</sup> *Id.*

<sup>29</sup> PSE Electric Tariff G, Schedule 80, Or. Sheet No. 80-e.

<sup>30</sup> *Id.* at 80-s.

<sup>31</sup> *See, e.g.,* Avista Electric Schedule 70, Rules and Regulations, 70-D, E, and T.

<sup>32</sup> *See, e.g.,* Washington Water Service Company, WN U-3, Original Sheet No. 15 (“The Utility’s liability, if any, for its gross negligence, willful misconduct or violation of RCW Chapter 19.122 is not limited by this tariff. With respect to any other claim or suit, by a customer or by any other party, for damages associated with the installation, provision, termination, maintenance, repair or restoration of service, the Utility’s liability, if any, shall not exceed an amount equal to the proportionate part of the monthly recurring charge for the service for the period during which the service was affected. THERE SHALL BE NO LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL

These examples are not limited to customer-caused harms, but also include utility-caused harms. For example, PacifiCorp's non-standard qualifying facility (QF) power purchase agreement specifically disclaims any consequential damages for either party.<sup>33</sup> The same prohibition is included for standard QF PPAs.<sup>34</sup> And these tariffs include multiple liquidated damages provisions.<sup>35</sup>

Puget's QF tariffs include the same or similar provisions. Relevant here, Puget's QF Interconnection Agreement disclaims Puget (or QF) liability for "indirect, incidental, or consequential or punitive damages of any nature or kind resulting from or arising in connection with" the disclosure of confidential information.<sup>36</sup> Puget's QF Interconnection Agreement has three paragraphs that limits Puget's liability to liquidated damages in the event Puget does not complete relevant interconnection facilities or network upgrades required by the QF.<sup>37</sup> And there is an entire Article that details the various circumstances where Puget (or QFs) are indemnified, and where consequential damages are severely limited.<sup>38</sup>

The Company represents that these examples, which similarly disclaim non-economic damages, provide adequate precedent to support the Company's Tariff.

**C. Approval is in the public interest because it would mitigate increasing costs to Washington customers.**

Electric utilities provide an essential service, requiring significant capital to continue operations, and emerging threats to capital financing will harm customers if not addressed. Utilities across the west are facing increased insurance costs and financing costs, the latter of which are further harmed with the threat of litigation. For example, this year both Moody's and S&P Global have

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DAMAGES.") (available here: <https://www.wawater.com/docs/rates/rates-2023-1006.pdf>); Puget Sound Energy, WN U-60, Second Revised Sheet Nos. 80-e, 80-f ("Neither the Company nor any other person or entity shall have any liability to any Customer or any other person or entity for any disruption in service or for any loss or damage caused thereby if such disruption is attributable to [listing various actions]") (available here: [https://www.pse.com/-/media/Project/PSE/Portal/Rate-documents/Electric/elec\\_sch\\_080.pdf?sc\\_lang=en](https://www.pse.com/-/media/Project/PSE/Portal/Rate-documents/Electric/elec_sch_080.pdf?sc_lang=en)); *Cioli v. City of Seattle*, 115 Wn. App. 459, 481 – 486 (2002) (upholding limitation of liability).

<sup>33</sup> PacifiCorp Schedule QF, Non-Binding Non-Standard QF PPA Term Sheet, Term 38 ("Indemnities to be provided for both Seller and PacifiCorp. *No Consequential Damages allowed for either party.*") (italics added).

<sup>34</sup> PacifiCorp Schedule QF, Form of Standard QF PPA, Attachment B, § 12.1.5 ("NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY FOR SPECIAL, PUNITIVE, INDIRECT, EXEMPLARY OR CONSEQUENTIAL DAMAGES, WHETHER SUCH DAMAGES ARE ALLOWED OR PROVIDED BY CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, STATUTE OR OTHERWISE.").

<sup>35</sup> See, e.g., Standard QF PPA, Attachment B, Exhibit F (liquidated damages for availability and output shortfalls).

<sup>36</sup> PSE Sch. 153, Attachment B, at 27; Attachment C, § 22.1.9.

<sup>37</sup> PSE Sch. 153, Attachment C, § 5.3 (if agreed to, liquidated damages "are the exclusive remedy for the Company's failure to meet its schedule," and are capped at 20 percent of the Company's actual costs.").

<sup>38</sup> See, e.g., § 18.2 (for example, "in no event shall either Party be liable . . . for any losses, damages, costs or expenses for any special, indirect, incidental, consequential, or punitive damages, including but not limited to loss of profit or revenue, loss of the use of equipment, cost of capital, cost of temporary equipment or services, whether based in whole or in part in contract, in tort, including negligence, strict liability, or any other theory of liability; provided, however, that damages for which a Party may be liable to the other Party under another agreement will not be considered to be special, indirect, incidental, or consequential damages hereunder.").

downgraded PacifiCorp's credit rating.<sup>39</sup> These costs will flow through to customers when utilities go to the market to secure funding to continue operation and invest in new infrastructure, including non-emitting generation. It is critical that the Commission, utilities, and intervenors work together to address the risks that threaten energy transition at the lowest possible cost.

Consistent with Washington's policy that the Commission "[p]reserve affordable energy services to the residents of the state,"<sup>40</sup> this Tariff is one strategy to manage these costs for our Washington customers, and will likely be considered credit positive for the Company.

## **II. Alternatively, the Commission should request legal briefing and oral argument to inform its decision.**

After Staff indicated they had concerns with the lawfulness of PacifiCorp's proposal, the Company offered to provide additional legal briefing to better inform the Commission's decision. Staff responded that while it is always open to receive additional legal briefing, it declined the Company's proposal for limited legal briefing, because Staff had additional policy concerns with the Tariff.<sup>41</sup> However, those important policy concerns have not been raised or discussed in Staff's memorandum.

Accordingly, if the Commission does not approve the Tariff, the Company continues to recommend the Commission provide an opportunity to address Staff's legal concerns and the important policy issues raised by these well-documented and increasing risks to utility operations.<sup>42</sup> This action would align with the processes for the Company's similar filing before the California and Oregon utility commissions, that have both suspended PacifiCorp's filings in order to investigate additional issues.

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<sup>39</sup> See, e.g., "PacifiCorp Downgraded To 'BBB+', Outlook Revised to Negative; Berkshire Hathaway Energy Co. Outlook Also Negative" (Jun. 20, 2023) (<https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/3009376>); "Moody's downgrades PacifiCorp to BAA1, outlook stable" (Nov. 1, 2023) (<https://www.moodys.com/credit-ratings/PacifiCorp-credit-rating-590000?cy=centraleur>).

<sup>40</sup> RCW 80.28.074(1).

<sup>41</sup> Commission Staff Response Email (Nov. 30, 2023) ("So far we've mostly been talking about whether the Commission can approve this, but beyond that there's of course also the question of whether it should. And I think that even if legal briefing convinced me it was permissible, Staff would still have some serious concerns with the filing.").

<sup>42</sup> RCW 80.28.060(1) (providing the Commission with the power to suspend tariff changes within thirty days of filing, or before the stated effective date, whichever is later).

### **III. Conclusion**

If the Commission does not approve the Company's Tariff, given the important policies at stake, the Company respectfully requests the Commission suspend the Tariff and order additional briefing or oral argument to inform its decision.

Dated this 20th day of December 2023,

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