BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PACIFICORP d/b/a PACIFIC POWER & LIGHT COMPANY, Respondent.	DOCKET UE-230877 Supplemental Brief of Public Counsel

I. SUPPLEMENTAL BRIEF

1. The Washington Utilities and Transportation Commission (Commission) requested additional briefing on the topics of *People's Org. for Wash. Energy Resources (Power) v. Wash. Utils. & Transp. Comm'n; Bennett v. United States;* Ch. 19.86 RCW; and unconscionability. The below briefing discusses these supplemental reasons for the Commission to reject Pacific Power & Light Company d/b/a PacifiCorp's filing (the Company). Public Counsel maintains that the Company's filing is nevertheless prohibited by the plain language of RCW 80.04.440 as a threshold matter.

A. People's Org. For Wash. Energy Resources (Power) v. Wash. Utils. & Transp. Comm'n (1984)

2. In *Power*[1] the Court held that the Commission was required to abide by RCW 80.04.250, which states that the Commission may ascertain and determine the fair value

[1] *People's Org. For Washington Energy Res. (Power) v. State of Wash. Utilities & Transp. Comm'n*, 101 Wash.2d 425, 679 P.2d 922 (1984).

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for rate making purposes of the property of any public service company used and useful for service in this state.[2] The court found that the Commission exceeded its authority when it allowed a construction work in progress, which was *not* used and useful for service, to be recovered in rates, as it violated the plain language of the statute.

3. The meaning of the statute must be determined primarily from the language of the statute itself.[3] "Where the language of a statute is plain, free from ambiguity, and devoid of uncertainty, there is no room for construction because the meaning will be discovered from the wording of the statute itself."[4] The Commission was then bound by the plain language of the statute.

4. Here, the language of RCW 80.04.440 is plain and unambiguous: a public services company "shall be liable…for all loss, damage or injury."[5] The Commission would exceed its authority, as circumscribed in Power, if it approved a provision which conflicts with the plain language of the statute.

B. Bennett v. United States (2023)

5. Any action by the Commission must comply with the state Constitution. In this case, the privileges and immunities clause is implicated as the Company seeks to abridge a fundamental right of certain Washingtonians without reasonable grounds. For guidance on this, one can look to *Bennet v. United States*.[6] In *Bennett*, the Washington State

[2] RCW 80.04.250.
[3] *Depart. of Transp. v. State Employees' Ins. Bd.,* 97 Wash.2d 454, 458, 645 P.2d 1076 (1982).
[4] *State v. Houck,* 32 Wash.2d 681, 684, 203 P.2d 693 (1949).
[5] RCW 80.04.440.
[6] *Bennett v. United States*, 539 P.3d 361 (Wash. 2023).

Supreme Court decided that a statute of repose, passed by the legislature to reduce the cost of medical malpractice insurance, did not pass the reasonable grounds test because it hypothesized facts not actually in evidence.

6. First, one must determine whether a statute or provision implicates a privilege or immunity. To do so, a court must decide whether the statute implicates any of "the fundamental rights of state citizenship."[7] These rights include "the rights to the usual remedies … to enforce other personal rights."[8]

7. The Washington State Supreme Court has held that, "'the rights to the usual remedies ... to enforce other personal rights'" include "the right to pursue common law causes of action in court."[9] Negligence has long existed in common law and is a foundational concept in tort law.[10] Therefore, the right to pursue negligence causes of action in court is a fundamental right of state citizenship.

8. Second, one must apply the reasonable grounds test. The *Bennett* court acknowledged that setting the outer time limit for commencement of a civil action, similar to setting limits of liability for utility companies, is "a difficult but necessary task in light of the important policy interests at stake."[10] In *Bennett*, the legislature reasoned that its provision would "tend to reduce rather than increase the cost of [medical] malpractice insurance."[11] This is analogous to the Company's reasoning in this case: that

[7] *Martinez-Cuevas v. DeRuyter Bros. Dairy*, 196 Wash.2d 506, 518-19, 475 P.3d 164 (2020).
[8] *Bennett*, at 368–69 (Wash. 2023).
[9] *Id*. at 369 (Wash. 2023). (quoting *Schroeder v. Weighall*, 179 Wash.2d 566, 571, 316 P.3d 482 (2014)).
[10] Donoghue v. Stevenson [1932] AC 562 (HL) (appeal taken from Scot.).
[11] *Bennett*, at 371 (Wash 2023)
[12] *Id*.

allowing the liability limitation provision would tend to reduce the cost of wildfire insurance, thus reducing costs to ratepayers.

9. The Court held that it must apply the privileges and immunities clause by scrutinizing the provision "to determine whether it *in fact* serves the legislature's stated goal."[12] Notably, the reasonable grounds test does not allow courts to "hypothesize facts."[13] In other words, "there must be a nexus between the legislature's stated purpose and the challenged statute, which cannot rest solely on hypothesized facts."[14]

10. The legislature's asserted rationale was that the statute would tend to decrease medical malpractice costs. Because the legislature did not show that the statute would actually reduce those costs, "precedent holds that we cannot "hypothesize facts" to conclude that the statute of repose would have such an effect."[15]

11. The same reasoning holds true here. The Company asserts that its liability limitation provision would reduce wildfire insurance costs but provides no evidence of this. In fact, there is evidence to the contrary. For example, Washington makes up only a small percent of the Company's service area. A rational insurance company is not likely to reduce overall wildfire insurance rates because of reduced liability in a tiny minority of the Company's holdings.

12. To pass the reasonable grounds test, the company would first need to show that approval of its provision *in Washington only* would actually reduce insurance costs. Next,

[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Bennett*, at 371. (quoting *Schroeder v. Weighall*, 179 Wash.2d 566, 571, 316 P.3d 482 (2014)).

the Company would need to demonstrate that the amount saved in insurance costs is significant enough to warrant approval of such a drastic and broad liability limitation. Here, however, the Company provides neither evidence that its provision will stop the increase in insurance costs nor any calculation of how much money it expects to save ratepayers. Without this information in hand, the Commission cannot abridge the rights of certain Washingtonians in violation of the state constitution.

13. Because the Company's proposed provision implicates a fundamental right, and because it fails the reasonable grounds test, the provision cannot be approved. The legislature itself does not have the authority to do so. Therefore, the Commission, which derives its power from the legislature, has no authority to approve the provision in violation of the state constitution.

C. Ch. 19.86 RCW and Unconscionability

14. PacifiCorp argues that the theory of unconscionability does not apply to utility companies because the Washington Consumer Protection Act (CPA) does not apply to those companies. Public Counsel acknowledges that the CPA does not apply here. Yet, unconscionability exists in Washington law outside the CPA as an essential and fundamental doctrine in contract law.[16] Unconscionability also exists separately as a theory of public policy.

[16] *See*, among others, *Pub. Emps. Mut. Ins. Co. v. Hertz Corp.*, 59 Wash. App. 641, 800 P.2d 831 (1990) (a liability limitation excluding intoxicated drivers was unconscionable and violated public policy); *Romney v. Franciscan Med. Grp.*, 186 Wash. App. 728, 349 P.3d 32 (2015) (an arbitration addendum was unconscionable); *Butcher v. Garrett-Enumclaw*, 20 Wash. App. 361, 581 P.2d 1352 (1978) (a disclaimer provision in the security agreement was unreasonable and unconscionable).

15. The CPA, Chapter 19.86 RCW, states that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."[17] It further states that the Act does not apply to actions regulated by the Commission.[18] Nowhere in the Act, or elsewhere, is it expressed or implied that actions regulated by the Commission are entirely exempt from principles of contract law or basic tenets of fairness.

16. A contract may be procedurally or substantively unconscionable. The Company's proposed provision is both. Procedurally, the customer has no meaningful choice and is unable to bargain with the Company. Substantively, the customer gives up potential damages in an as-yet-unknown amount for the unsubstantiated promise of lower rates. The Company receives all the benefit from the provision, reducing its liability by potentially hundreds of millions of dollars, while the customer receives only speculative benefit in an unknown amount. This is an illusory promise. Were the Company to prove that the customer would receive a benefit of reasonably equal value, the unconscionability analysis may reach a different result. As the record currently stands, the Company's proposed provision flies in the face of legal and public policy principles.

17. The Company's proposed provision is barred by RCW 80.04.440 as a threshold matter. The Power analysis shows that the Commission is indeed bound by the statute. There are additional legal and public policy reasons to reject the provision, including that it violates the Washington state constitution and principles of unconscionability as

[17] RCW 19.86.020.
[18] RCW 19.86.170.

described above. Public Counsel respectfully requests that the Commission reject the Company's filing.

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