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 PacifiCorp Supplemental Brief

I. SUPPLEMENTAL BRIEF

1 As requested by the Washington Utilities and Transportation Commission (Commission), PacifiCorp submits this supplemental brief on three discrete issues of law. PacifiCorp's tariff is constitutional; Commission decisions can never be found unconscionable; and *People's Org. for Wash. Energy Res. v. WUTC* is not relevant, because it does not answer the question presented by PacifiCorp's tariff: What authority controls between a tariff proposed and adopted under two more specific Commission statutes on one hand, and a more general Commission statute on the other?

2 Because there are material reliance issues that would be implicated by a conclusion that tariff limitations on damages are unlawful, the Commission should avoid this question of law, and resolve this proceeding on policy grounds.

3 PacifiCorp's arguments follow.

A. PacifiCorp's proposal is constitutional.

4 Washington prohibits granting special favors, privileges, or immunities to its citizens.[1] If a law provides a privilege or immunity that impacts the "fundamental rights of state citizenship," it will only be upheld if there are "reasonable grounds" for the privilege or immunity.[2]

5 PacifiCorp's tariff is constitutional, because it does not implicate a fundamental right of Washington citizenship, and even if it did, reasonable grounds support that immunity.

6 First, PacifiCorp's tariff does not implicate a fundamental right of Washington citizenship. Relevant here, fundamental rights include the "right to the usual remedies to collect debts, and to enforce other personal rights," which includes the "right to pursue common law causes of action in court."[3] Washington has held that where statutes limit the actions that a party can bring (for example, where statutes of repose bar medical malpractice lawsuits entirely), a fundamental right is implicated.[4]

7 PacifiCorp's tariff does not present these concerns. If approved, the Company's Washington customers would still be able to sue PacifiCorp for a variety of causes of actions—the only prohibition is that customers could not recover noneconomic damages from those lawsuits. The Company is not aware of any case that holds that non-economic damages are a "fundamental right" for Washingtonians, and there are many Washington

[1] WA Const Art. 1, § 12 ("No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.").
[2] *Bennett v. United States,* 539 P.3d 361, 368 (2023).
[3] *Id.* at 369.
[4] *Id.*

statutes that exclude or limit noneconomic damages,[5] or define the category more narrowly than what would be allowed under the common law.[6]

8 If Washington's privilege and immunities clause prohibited damage caps or exclusions of noneconomic damages, it would follow that a Washington court could have addressed this issue before. While history alone cannot uphold the constitutionality of an unconstitutional statute, this lack of precedent is notable.

9 Second, even if PacifiCorp's tariff dealt with fundamental Washington rights, it would still be upheld because it is reasonable. When determining if government privileges or immunities were reasonable, where the action "uniformly applies to the members of the class, a reviewing court is limited to a determination of whether the classification was manifestly arbitrary or unreasonable."[7]

10 Here, PacifiCorp's tariff would apply uniformly to all of PacifiCorp's Washington customers.[8] For privileges and immunities purposes, this limits review of PacifiCorp's tariff to whether it is manifestly arbitrary or unreasonable. And as discussed in PacifiCorp's initial brief and during oral argument in this matter,[9] extraordinary circumstances support the reasonableness of PacifiCorp's filing. The Company does not belabor those points here, and only directs the Commission to PacifiCorp's second

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[5] *E.g.,* RCW 48.30.015(2) (capping damages to three times actual damages when insured unreasonably denies claim, coverage, or payment of benefits); RCW 7.70A.060(2) (limiting damages to $1 million for both economic and noneconomic damages in arbitrated health care actions).
[6] *Compare* RCW 48.140.010(10) (including broad definition of noneconomic damages) *with* RCW 4.20.046(2) (limiting noneconomic damages to "pain and suffering, anxiety, emotional distress, or humiliation" to certain parties), RCW 4.20.060(3) (same), *and* RCW 54.24.030(5) (excluding loss of consortium from recovery of damages).
[7] *Geneva Water Corp. v. City of Bellingham,* 532 P.2d 1156, 1160 (1975) (*citing Kasper v. Edmonds,* 420 P.2d 346 (1966); *Clark v. Dwyer,* 353 P.2d 941 (1960)).
[8] PacifiCorp Rule 4 General Rules and Regulations—Application for Electric Service, WN U-76.
[9] *E.g.,* PacifiCorp In. Br., at 6-12 (discussing PacifiCorp's financial health, remedial measures, and customer impacts).

quarter 10-Q that was recently filed with the U.S. Securities and Exchange Commission, where the Company recorded cumulative estimated probable losses associated with the wildfires of $2.658 billion through June 30, 2024.[10]

11 Because there is no fundamental right to noneconomic damages in Washington, PacifiCorp's tariff is constitutional. Even if there were, limiting noneconomic damages to support the financial health and continued provision of low-cost and reliable services for our Washington customers is reasonable, and surely not "manifestly arbitrary or unreasonable."[11]

B. Commission decisions can never be found unconscionable.

12 As discussed in PacifiCorp's reply brief, Commission decisions cannot be unconscionable, because Washington's Unfair Business Practices Act does not apply to utilities.[12] This means that unfair competition or practices, like unconscionable contract terms prohibited by RCW 19.86.020, cannot be used to challenge Commission-approved tariffs.[13]

13 Similar arguments hold for common law claims of unconscionability. The common law "shall be the rule of decision in all the courts" of Washington, where otherwise not preempted by federal or state law.[14] Yet here, the common law doctrine of unconscionability is preempted by Title 80 of the Revised Code of Washington.

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[10] Berkshire Hathway Energy, Form 10-Q, at 76 (Aug. 2, 2024).
[11] *Geneva Water,* 532 P.2d at 1160.
[12] PacifiCorp Repl. Br., at 9-10; RCW 19.86.170 ("Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States . . ."); *Tanner Elec. Co-op v. Puget Sound Power & Light Co*., 128 Wash.2d 656, 911 P.2d 1301 (1996).
[13] *E.g., Mellon v. Regional Trustee Services Corp.,* 334 P.3d 1120, ¶ 17 (2014) ("For example, advancing a substantively or procedurally unconscionable contract term is likely an "unfair" act or practice.").
[14] RCW 4.04.010

Washington utilities lost their right to freely contract with customers over a century ago.[15] After 1911, this Commission was given the power to terminate any existing public utility contract, and instead direct utilities to provide service subject to Commission approved tariffs. On its face, RCW 80.28.120, among other statutes within Title 80, reasonably preempt common law contractual claims of unconscionability for utility services, as this law requires utilities to provide service subject to Commission-approved tariffs, and not contracts.

14 To the point, Commission precedent is entirely silent on contractual disputes involving the doctrine of unconscionability. PacifiCorp can only identify two Commission proceedings where the doctrine has even been raised as a contested issue.[16] Yet the Commission ignored these collateral attacks, because unconscionability has no place in regulatory proceedings.[17]

15 This makes sense, because all utility tariffs resemble contracts of adhesion, or are otherwise unconscionable because a customer's only recourse is to intervene in a resource-intensive Commission proceeding to contest an objectionable rate or service, or otherwise decline service under the tariff. To address this reality, Washington vests the Commission with the power to determine what is the appropriate balance of terms and conditions when establishing just and reasonable utility rates and services.

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[15] RCW 80.28.120.

[16] *In re Verizon 2004 Amendment of Interconnection Agreements,* Docket No. UT-043013, CCG CLEC Response Brief, ¶¶ 27-29 (Oct. 1, 2004) (arguing Verizon's amendment is unconscionable because it violates Washington contract law); *In re Avista's 2015 GRC,* Docket No. UE-150204, ICNU Post-Hearing Brief, ¶ 52 (Nov. 4, 2015) (arguing, without citation to Washington law, that utility proposal was unconscionable).

[17] *In re Verizon 2004 Amendment of Interconnection Agreements,* Docket No. UT-043013, Order No. 12 (Nov. 19, 2004) (noting CCG CLEC's unconscionability argument, though declining to address it); *In re Avista's 2015 GRC,* Docket No(s). UE-150204 and UG-150205, Order 05 (Jan. 6, 2016) (noting ICNU's unconscionability argument, though declining to address it).

16 Just as the Commission does not resolve contract disputes, similarly here, the Commission does not investigate tariffs to determine if it could result in an unconscionable tariff.

C. *Power* is not relevant.

17 Public Counsel argues that a 1980's case prevents the Commission from approving PacifiCorp's request.[18] *Power* held that the Commission could not include construction work in progress (CWIP) in utility base rates, because under the then-current language of RCW 80.04.250, CWIP was neither "used" nor "useful."

18 This case is not relevant, because it answers the question of whether a specific utility expense (CWIP), was permitted by a specific statute (RCW 80.04.250).[19] Here, the Commission is asked to decide whether a tariff proposed and adopted by the Commission under two specific statutes (RCW 80.28.020 and 80.28.050), controls over the more general statute (RCW 80.04.440).

19 Because *Power* is a case that considered whether a statute permitted recovery of one cost category (CWIP), and not determining which authority would control between competing statutes (as is the case presented here), *Power* is not relevant.

[18] Public Counsel In. Br., ¶¶ 9-10 (discussing *People's Org. for Wash. Energy Res. v. WUTC,* 679 P.2d 922, 925 (1984) (*Power*).
[19] RCW 80.04.250 has since been amended to include CWIP as "used and useful" for utility services.

II. CONCLUSION

20 PacifiCorp respectfully requests the Commission approve PacifiCorp's advice filing that amends the Company's Rule 4 Tariff.

Respectfully submitted August 8, 2024,

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