

Docket No. UE-230877 - Vol. III

WUTC v. PacifiCorp dba Pacific Power & Light Company

August 1, 2024



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BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant, DOCKET NO. UE-230877

v.

PacifiCorp dba Pacific Power &
Light Company,
Respondent.

ORAL ARGUMENT - VOLUME III
BEFORE ADMINISTRATIVE LAW JUDGES
JAMES E. BROWN II AND HAILEY CALLAHAN
August 1, 2024
9:03 AM

Washington Utilities and Transportation Commission
621 Woodland Square Loop SE
Lacey, Washington 98504

(Some participants appeared via videoconference)

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REPORTED BY: CRYSTAL R. McAULIFFE, RPR, CCR, #2121

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1 LACEY, WASHINGTON; AUGUST 1, 2024
2 9:03 a.m.
3 -o0o-
4 JUDGE BROWN: So let's be on the record at
5 this point. Today is Thursday, August 1, 2024. And the
6 time is 9:03. My name is James E. Brown II. I'm an
7 Administrative Law Judge with the Washington Utilities
8 and Transportation Commission and I'm presiding in this
9 matter along with the Commissioners and Administrative
10 Law Judge Hailey Callahan.
11 We're here today for an oral argument filed
12 by the parties in Docket UE-230877, which is captioned
13 WUTC versus PacifiCorp d/b/a PacifiCorp -- I'm sorry,
14 Pacific Power & Light Company.
15 To recount briefly, on October 24, 2023,
16 PacifiCorp filed with the Washington Utilities and
17 Transportation Commission the revised tariff sheets to
18 its tariff -- I'm sorry, to WN U-76 tariff. The Company
19 proposes to modify Rule 4 of its General Rules and
20 Regulations - Application for Electric Service,
21 Section H - Limitation of Liability.
22 The Company proposes to limit its liability
23 to actual economic damage. By taking service, a
24 customer would agree to waive and release the Company
25 from any and all claims for special noneconomic,

1 punitive, incidental, indirect, or consequential damages
 2 as part of being a claim against the company related to
 3 or arising from companies -- the company's operations or
 4 electrical facilities.

5 The oral argument addresses the question
 6 that arises from PacifiCorp's filing; that is, whether
 7 the Company's proposal is authorized by statute and, if
 8 so, whether the proposal is consistent with the public
 9 interest.

10 So let's -- while we're on the record, let's
 11 take appearances with regard to the Company and then
 12 Staff and then Public Counsel.

13 MR. ROGALA: Good morning, Your Honor.
 14 Zachary Rogala, attorney for PacifiCorp.

15 MR. CALLAGHAN: Good morning, Your Honor.
 16 Nash Callaghan, AAG for Commission Staff.

17 MS. JOHANSON-KUBIN: Good morning. This is
 18 Jessica Johanson-Kubin, AAG for Public Counsel.

19 JUDGE BROWN: Okay. Let's move forward and
 20 talk about our plans for this oral argument. My
 21 understanding from my discussion with the parties is
 22 that oral argument will take approximately two and a
 23 half hours overall.

24 And so what we will do is allow for each
 25 party to present their argument, giving a time frame of

1 a half hour each. Thirty minutes each. And then with
 2 regard to rebuttal, we ask that the parties stay within
 3 the 15-minute time limit for their rebuttal.

4 And we will proceed with PacifiCorp putting
 5 forth its oral argument first, followed by staff --
 6 followed by staff and then public counsel, unless there
 7 are any objections.

8 Hearing none -- if we actually do get to the
 9 point of where the oral argument is still proceeding at
 10 10:30, we'll take a short ten-minute break. Or if we
 11 can upon agreement by the parties, we will push through
 12 to completion.

13 I just also want to remind the parties,
 14 again, to keep their microphones muted unless they are
 15 speaking and also to only use video for those portions
 16 of the oral argument when they have a speaking role.

17 If -- if you are having any technical issues
 18 or you observe -- observed that a party or
 19 representative has dropped off the online meeting,
 20 please mention it in the chat. And the chat should be
 21 reserved for technical issues and requests for breaks
 22 only.

23 Also, I want to advise the parties, the
 24 Commissioners or I may have questions from the bench
 25 during the presentation of oral arguments.

1 Are there any questions?

2 All right. Hearing none. Let's proceed
 3 with oral -- the oral arguments at this time.

4 MR. ROGALA: Thank you. Thank you, Your
 5 Honor.

6 Good morning, Chair Danner, Commissioner
 7 Rendahl, Commissioner Doumit, Your Honors Brown and
 8 Callahan. And like I mentioned earlier, it's nice to be
 9 here in person. First visit to the Washington
 10 Commission. Pleasure to be here.

11 With me today, we have our consummate
 12 professional, Ariel Son behind me. I also note we've
 13 got quite a few PacifiCorp executives, attorneys, and
 14 subject matter experts on the phone with us as well.

15 So we're here today to discuss PacifiCorp's
 16 request to amend Rule 4; that would apply to any
 17 Washington customer seeking to interconnect and receive
 18 services from us in the state.

19 But before we get to the merits --

20 COMMISSIONER DOUMIT: Counsel -- I'm sorry,
 21 Your Honor. I just -- for us on the phone -- or maybe
 22 it's just me -- if you could speak a little -- a little
 23 closer to the mic, that would be helpful for us here.

24 Pardon me for interrupting you from the
 25 get-go.

1 MR. ROGALA: Yeah, keep. Yeah, always
 2 interrupt if you can't hear.

3 Is this better?

4 All right. So, you know, before we get to
 5 the merits, I'd -- I'd like to, you know, provide a few
 6 quick points for what this case is not about.

7 First, this case -- it's not about
 8 PacifiCorp trying to dodge responsibilities. We will
 9 settle all reasonable claims. And to date, I think
 10 we've settled close to \$1 billion -- and that's with a
 11 "B" -- of wildfire-related litigation in the past two
 12 years.

13 But if approved, we will be responsible for
 14 all economic damages under Rule 4. We're only asking
 15 that we create a reasonable limit on what damages we
 16 would be responsible for.

17 Because as we've experienced in jury
 18 verdicts in Oregon, noneconomic damages can amount to 19
 19 times the economic damages in a given class-action
 20 litigation. So that's the issue we're trying to address
 21 here today.

22 This case is also not about allowing us to
 23 commit gross negligence or willful torts or intentional
 24 torts. Our tariff aligns with Washington precedent that
 25 disfavors utility limitations of liability that would

1 shield utilities from these causes of action, because
2 our tariff would not operate if it conflicts with
3 Washington law.

4 And if the Commission wants any additional
5 assurances on this point, it can adopt one of the
6 alternative tariff proposals that we included in our
7 reply brief; that would specifically call out these
8 causes of action.

9 This case also isn't an end-run of the
10 legislative process. We brought this docket to you
11 first because the legislature gave you the power to
12 decide these -- these technocratic issues.

13 And this case is also not a novel request.
14 While we acknowledge our proposal is broader in the
15 scope of services it would apply to -- and, here, the
16 provision of "all" utility services. It's
17 unquestionably narrower than the liability limitations
18 that you've approved for other utilities, because we're
19 only asking for a limitation of noneconomic damages.

20 And there's several examples cited in our
21 brief where the Commission has excluded "all" liability
22 and "all" damages.

23 And two additional points. You know, this
24 case is not unique to PacifiCorp. As Puget and Avista
25 note in their amicus brief, this is an issue that every

1 verdicts in a case where you continue to strongly
2 contest your liability because you think your employees
3 in that moment exceeded the relevant standard of care
4 for a utility in those circumstances and you continue to
5 contest that verdict and you're taking that case on
6 appeal. But, nonetheless, those cases resulted in two
7 material downgrades to your credit. In these
8 circumstances, you know, how couldn't you consider all
9 options, including what we're discussing here today.

10 And to just put, you know, some numbers to
11 what we're discussing here. You know, the James cases
12 resulted in material financial harm to PacifiCorp. In
13 2023 we recorded a \$1.67 billion contingent wildfire
14 liability loss. So this is a loss that, you know, based
15 on GAAP accounting principles, we believe, is reasonably
16 expected to be incurred unless we have a favorable
17 decision before the Oregon Supreme Court.

18 For perspective, we have about 5 to 6
19 billion in gross revenue each year; so this is about
20 20 percent of our annual gross revenue. Normally, we
21 have, you know, 800 to 1.2 billion in operating revenue
22 after paying our expenses each year. This contingent
23 liability expense wiped that out. So for 2023, we had
24 an \$800 million loss for the year.

25 For perspective, that's five times greater

1 utility is going to face in an ever-warming climate
2 where the pool of reasonably priced insurance is
3 shrinking and we have growing capital constraints to
4 meet Washington's clean energy transition requirements.

5 And, finally, you know, more modestly, this
6 case isn't a silver bullet for us. I'm not here to
7 oversell anything. If approved, this petition will not
8 solve our financial position, but it will help.

9 And I want to state, we are taking an
10 all-of-the-above strategy to mitigate our financial
11 harms. This includes suspending our annual upstream
12 dividends to Berkshire Hathaway Energy. That's the tune
13 of about \$4- to \$600 million in upstream dividends each
14 year. We've suspended that dividend for the foreseeable
15 future to help support our liquidity position.

16 And we're collaboratively developing
17 catastrophic wildfire funds and self-insurance funds for
18 stakeholders across our six states and we're pursuing
19 legislative solutions where appropriate.

20 So what this case is about and why we filed
21 is because we need to take proactive steps to mitigate
22 uncapped jury awards. We did this because we think it's
23 what you would expect from a prudently managed utility.

24 Said another way. If you were managing
25 PacifiCorp and you were subject to the James jury

1 than Puget's operating income for 2023. So these are
2 material harms. But we understand this is a contentious
3 filing. We're not here to oversell that. But we need
4 to take action to fix our problem and that's why we're
5 here. So let's get to the merits.

6 First, on the question of law.

7 I think there's three statutes at play here
8 that give the Commission the authority to approve our
9 petition. The first is RCW 80.04.440. And this is what
10 I like to think of as the baseline consumer protection.
11 This statute holds PacifiCorp liable for all violations
12 of Washington law and for all damages that arise from
13 those violations. We think this creates a general
14 prohibition against all liability caps or waiver of
15 damages.

16 Standing alone, I think it's fair to say
17 this statute would prohibit our tariff. But there's two
18 more at play here. And these more specific statutes
19 control over the general language in 440.

20 The first is 80.28.050. And this is just
21 the typical utility statute that requires us to file all
22 tariff provisions with this Commission for approval.
23 And then RCW 80.28.020, this let's the Commission
24 approve these, quote, "rules, regulations, practices, or
25 contracts" if they're just and reasonable.

1 So applied here, you know, we are
2 responsible for all liability and damages if we violate
3 Washington law. Yet, we can propose -- and the
4 Commission can adopt any, quote, "contract, agreement,
5 rules, or regulations related to rates, charges, or
6 service," unquote. And if approved by the Commission,
7 they become the law of the land.

8 So this is the effective preemption argument
9 that we discussed in our briefs. And it's supported by
10 the plain language of Washington statutes. We propose a
11 contract, if approved by the Commission, that has the
12 binding affect of law.

13 And I think this was not eloquently said in
14 our initial reply briefs. But now that I've had some
15 distance from the argument, I think this is the
16 appropriate question to be answered. It's not "does a
17 Commission-approved tariff conflict with a Washington
18 statute?"

19 Because the answer to that question is easy.
20 No, a statute will always trump a tariff.

21 That's not the question we're here to answer
22 today. The question we're here to answer is "Does a
23 tariff that's been adopted subject to two Washington
24 statutes that are more specific than 80.04.440 allow the
25 Commission to do what we're proposing?"

1 relevant here, quote, ordinary negligence of Puget's
2 employees, servants, or agents to address performance,
3 integrity, reliability, and stability of the company's
4 electrical system.

5 The next example, Puget requires all
6 interconnection customers to waive, quote, "Any immunity
7 defense or other protection afforded by workers'
8 compensation, industrial insurance, or similar laws,
9 including the Washington Industrial Insurance Act,
10 Title 51 of the Revised Code of Washington," end quote.

11 And, finally, Washington Water Service
12 Company has a cap on noneconomic damages -- sorry, a cap
13 on economic damages that's equal to a monthly service
14 charge in their tariff and this applies to damages
15 caused by, quote -- sorry, damages that arise from,
16 quote, "the provision of water services and there shall
17 be no liability for consequential or incidental
18 damages," unquote.

19 So the Puget examples above absolve that
20 utility of all liability and all damages for various
21 Puget-caused actions, including excusing Puget from its
22 common law negligence duties, as well as waiving dozens
23 of additional Washington statutes and calling them out
24 specifically. And the Washington water example creates
25 an explicit cap on economic damages and excludes

1 We think the answer to that is "Yes." The
2 more specific language controls over 80.04.440 and that
3 provides the Commission the power to do what we're
4 asking for today.

5 Staff, Public Counsel, and the joint amicus
6 brief of NWEAC, Sierra Club, and TEP, they disagree.
7 Each parses the baseline statute to reach a separate
8 conclusion.

9 First, either the Commission can only limit
10 liability -- and I take that to be Staff's argument --
11 or the Commission can limit liability or damages, but
12 only those that arise from violation of the Commission's
13 statutes, regulations, and orders. And I take that to
14 be Public Counsel's argument. Or that the Commission
15 has never approved tariff provisions that limit
16 liability for utility cost actions. I take that to be
17 NWEAC, TEP, and Sierra Club's arguments.

18 But that can't be right, because the
19 Commission routinely does all of these things. And of
20 the dozens of examples in our brief, I'd like to
21 highlight three.

22 So the first is the Commission allows Puget
23 to disclaim any liability, unquote, for, quote, any loss
24 or damage. This is from disruptions in electrical
25 service caused by a variety of circumstances but

1 consequential or liability damages for -- similar to our
2 petition -- the provision of services. So if
3 PacifiCorp's request is unlawful, then so are these, as
4 well as the dozens discussed in our briefing and what we
5 relied upon when we determined whether the Commission
6 had the power to file this in the first place.

7 COMMISSIONER RANDAHL: Mr. Rogala, can
8 you -- for the first example for PSE is that in its
9 general rule applicable to all customers similar to what
10 Pac has proposed -- or PacifiCorp has proposed here?

11 MR. ROGALA: Commissioner Randahl, it's in
12 Puget Schedule 80, original sheet 80F. This is under
13 their continuity of service tariff. So it is narrower
14 in the scope of services that ours would apply to
15 because it only discusses actions that Puget has taken
16 to address, quote, "performance, integrity, reliability,
17 or stability of the company's electrical system."

18 I'd argue that phrase is similarly broad
19 compared to what we're proposing here. But it is
20 narrower in scope. Ours would be broader. But it does
21 apply to all customers. All Puget customers.

22 COMMISSIONER RANDAHL: Thank you.
23 MR. ROGALA: So that's our legal argument.
24 But, importantly, I don't think the
25 Commission needs to answer this question. I don't think

1 you have to engage in these kind of line-drawing
 2 exercises. I think you can practice some intentional
 3 avoidance here and make a decision just on the policy
 4 questions. I think this would be a reasonable decision,
 5 because it would avoid, you know, any sort of unintended
 6 consequences of a Commission conclusion of law that
 7 could call into question some of the other utility
 8 tariffs that are currently on the books and,
 9 importantly, who aren't here to defend their, you know,
 10 specific tariffs.

11 Similar to the PGE -- PG&E case cited from
 12 California, you know, this type of conscious avoidance
 13 would avoid, quote, "inviting interference with your
 14 broad and continuing supervisory and regulatory program
 15 of the Commission." And to that end, the Commission can
 16 just avoid a decision on the conclusion of law.

17 So let's move, I think, to the more
 18 important question, which is the policy question.

19 Should the Commission approve PacificCorp's
 20 request?

21 I don't want to belabor the policy
 22 arguments. I think our briefing raises those issues
 23 well and we don't need to take up the Commission's time
 24 with additional discussion. But I would like to instead
 25 focus on the alternatives that we provided in our reply

1 listing out all the different conflicts that could occur
 2 in future cases.

3 Second, the Commission could amend our
 4 filing to tailor generally to Staff and Public Counsel's
 5 arguments. If you wanted to reach this question of law,
 6 I think you could amend our filing to say "in any action
 7 between the parties arising out of the provision of
 8 electric service" -- here would be the new amended
 9 language -- quote, "for violation of Commission order or
 10 rule, the company's liability and" -- and that's the end
 11 of the new language -- "the available damages should be
 12 limited to actual economic damages."

13 So this would be -- this would do two
 14 things.

15 First, it would narrow the explicit causes
 16 of action that we believe we are liable for and the
 17 damages that arise from the liability to violations of
 18 Commission authorities. That's Public Counsel's
 19 argument.

20 And then to Staff's argument, it would only
 21 discuss our liability that could result from the
 22 provision of electric services and not focus on damages.

23 So this would create the kind of subject
 24 object that Staff was asking for and that Public Counsel
 25 had requested regarding the Washington authorities.

1 brief. These provide the Commission with options if
 2 it's uncomfortable with our current proposal.

3 And so the first is, you know, what do we do
 4 with the Washington case law that disfavors prohibitions
 5 against gross negligence, you know, willful and
 6 intentional torts?

7 Well, we were aware of these cases when we
 8 filed. But instead of building this kind of Rube
 9 Goldberg type tariff liability provision where this
 10 liability provision would be triggered under these
 11 circumstances; this provision would be triggered under
 12 these circumstances. We decided it was more efficient
 13 and, I think, effective to just include the last
 14 sentence that says "this tariff does not operate if it
 15 conflicts with Washington law." That provides this
 16 Commission and reviewing courts the opportunity to apply
 17 the condition, you know, based on the facts and
 18 circumstances. And I think it's easier for customers to
 19 understand. It's easier to implement at an initial face
 20 value.

21 But we can easily amend this proposal to
 22 include "gross negligence, willful misconduct, and
 23 violations of law."

24 We're not trying to hide the ball here. We
 25 just thought this was a more eloquent solution than

1 In the alternative, you could consider a cap
 2 on noneconomic damages. For example, a 3X cap on
 3 noneconomic damages compared to economic damages or
 4 whatever figure or multiplier the Commission felt was
 5 reasonable. Hopefully, it wouldn't be 19 times, you
 6 know, what we experienced in Oregon, but, you know, we
 7 believe that's another opportunity to create some sort
 8 of financial protection.

9 Third -- and -- and I want to be clear, we
 10 are -- we support our initial petition, but we also
 11 support this alternative relief.

12 If the Commission is not -- is not
 13 comfortable with our current petition, just dismiss it
 14 without prejudice and consider opening up an
 15 investigation or a rulemaking to address this issue on a
 16 statewide basis.

17 As Puget and Avista noted in their amicus,
 18 this issue won't be going away, how to develop
 19 protections that effectively balance the needs of our
 20 customers and the financial integrity of utilities. And
 21 this could be the opportunity for the Commission to have
 22 a statewide discussion on that subject. And if so, just
 23 dismiss our petition and we can move to the next venue.

24 So that's our argument. You have the power
 25 to approve our request and it should do so -- and the

1 Commission should do so to help our financial position.
 2 And regardless which approach the Commission
 3 takes, you should preserve your power and discretion to
 4 consider these types of issues, both now and in the
 5 future.
 6 So I would just like to close with two
 7 general remarks.
 8 First, like we noted above, this filing is
 9 not a silver bullet; it won't fix all of our concerns.
 10 Without some movement, these harms will increase
 11 customer rates and will limit the capital we can spend
 12 on various projects; whether wildfire mitigation efforts
 13 or new renewable assets.
 14 So we urge the Commission to be clear-eyed
 15 when it approaches this issue and give it the
 16 consideration it deserves.
 17 And, finally, I would just like to close
 18 with words from the Oregon Commission. That Commission
 19 denied our request. But I think their order is
 20 instructive because it did so, I think, in a very
 21 even-handed approach. It is instructive for these
 22 issues going forward.
 23 So I'm quoting the Commission's order here.
 24 "In closing, while we reject PacifiCorp's
 25 tariff as filed, we emphasize that Oregon needs to find

1 approve or you do a contested filing route.
 2 We chose the advise filing, similar to
 3 Washington. They rejected it without prejudice saying,
 4 you know, there's an open question of law. The company
 5 is -- excuse me, has the ability to refile. We have not
 6 done so, because we're waiting to see where all these
 7 cases come out.
 8 The filings have been rejected in Wyoming;
 9 in Idaho. And those are with prejudice.
 10 And in Utah, we sought legislative change
 11 and we have legislative --
 12 CHAIR DANNER: You did not go before the
 13 Commission there; you just went straight --
 14 MR. ROGALA: We did not. We just went
 15 straight to legislature.
 16 CHAIR DANNER: And the decisions in Wyoming
 17 and Idaho you said were with prejudice.
 18 Are their statutes similar to ours or are
 19 there notable differences?
 20 MR. ROGALA: There's no similar prohibition
 21 like RCW 440. Those two petitions were dismissed on
 22 both public policy grounds as well as some core
 23 precedent that disfavors, I think -- some core precedent
 24 that is adjacent to the question presented, but that was
 25 used to dismiss those cases.

1 appropriate policy and regulatory solutions to the
 2 serious problems wildfire liability creates for
 3 PacifiCorp and, indeed, all utilities and their
 4 customers. The James verdicts are an example of the
 5 risk utilities may face in adjudication of wildfire
 6 actions in civil courts where juries evaluate whether
 7 the company met an unclear and rapidly changing duty of
 8 care engaging in willful misconduct. It may be
 9 impossible for a utility to avoid a civil court finding
 10 of gross negligence regardless of actions the utility
 11 took," unquote.
 12 Thank you. And I want to be helpful today,
 13 so happy to answer any questions you have.
 14 JUDGE BROWN: I have none at this time.
 15 CHAIR DANNER: So thank you very much,
 16 Mr. Rogala. The -- Oregon was just one state to address
 17 this. I know that Idaho did. Utah did. I don't know
 18 if others did.
 19 Can you tell me about -- first, the
 20 regulatory decisions in -- in other states?
 21 MR. ROGALA: In California, the filing was
 22 dismissed without prejudice.
 23 They have kind of a two-track process. You
 24 can file an uncontested tariff filing if the California
 25 Staff believe that the Commission has the power to

1 I think the most relevant example to bring
 2 up is the Oregon case. So in Oregon, Oregon has a
 3 constitutional right to access to courts and access to
 4 adequate remedies.
 5 So, effectively, what this right means is
 6 that all Oregonians have access to civil courts and
 7 appropriate damages based on whatever cause of action
 8 that they bring before that Court. That right can be
 9 curtailed if there's a compelling state interest.
 10 In Oregon we argued that the regulatory
 11 compact is a compelling state interest. There's case
 12 law in Oregon that the workers -- the Oregon workers'
 13 compensation scheme; the waiver of sovereign liability.
 14 Those two cases present a compelling state interest. So
 15 we kind of piggybacked off that argument to say, well,
 16 if workers' compensation and sovereign immunity present
 17 compelling state interests, so does the regulatory
 18 compact which has, you know, a century long history in
 19 the state of Oregon.
 20 The -- it was a novel argument. You know,
 21 it's like -- like the issue presented here, it's the
 22 issue of first impression.
 23 The Oregon Commission dismissed our filing.
 24 They said they were skeptical about the regulatory
 25 compact creating a compelling state interest, but based

1 on the factual record because we -- similar to here,
2 it's just a paper filing, we didn't have an evidentiary
3 record. So they allowed us to refile and pursue kind of
4 a contested case option with a full evidentiary record
5 if we wanted to go that route. That decision was
6 62 days ago. So we're still re-evaluating strategies.

7 But I think the takeaway is there's no other
8 state that has the statutory scheme similar to
9 Washington's, but I think it would be a good analogy.
10 But for -- for what it's worth.

11 CHAIR DANNER: And so climate change is, of
12 course, imposing risks -- not just wildfire risks, but
13 flooding and hurricane risks for other utilities around
14 the nation.

15 So if you go beyond your service territory,
16 are you aware of other states that are being asked to --
17 to look at this kind of a proposal for other kinds of
18 risks?

19 I mean, I know that -- that Hawaii was
20 facing some -- Hawaii Electric, of course, faced a lot
21 of litigation around the fires in -- in Maui. There
22 have been floods and rainstorms and hurricanes. They
23 are increasing. There's -- there's other risks.

24 Are you aware of this kind of a proposal in
25 other parts of the country?

1 it Hurricane Uri four, five years ago.

2 COMMISSIONER RANDAHL: Sandy.

3 MR. ROGALA: Sandy. Hurricane Sandy. And
4 then was Texas Hurricane Uri. I can't remember. Either
5 way, you had -- you had some of the nations largest
6 weather-caused disasters in known memory knock out power
7 to customers, you know, for weeks on end and caused
8 billions in damages.

9 In Florida, hurricanes are a more common
10 concern. So in that state, the Commission was kind of
11 the first to the table to create regulatory mechanisms
12 that allowed for grid hardening and recovery on those
13 investments, as well as caps on damages, but not -- not
14 a full waiver of noneconomic damages like we've proposed
15 but instead a multiplier approach.

16 But after 20 years of hurricanes in Florida,
17 there was more legislative solutions that were needed,
18 and so now there's statutes in effect in Florida that
19 are both providing for these kind of capital recovery
20 mechanisms, as well as limitations of liability subject
21 to whatever test the legislature determines is
22 reasonable at that time.

23 And I heard the alarm, so I don't want to
24 eat up other folks' time, but the similar story exists
25 in New York and in Texas. The solution can either be

1 MR. ROGALA: I'll give kind of a general
2 discussion on four states.

3 First, the one that I don't think is -- is
4 as helpful. In Hawaii, because of the devastating
5 wildfires there, I understand that the utility has
6 entered into significant settlement agreements with
7 affected customers. And, you know, depending on the
8 terms of the settlement agreements, that could resolve
9 the -- the Hawaii concern.

10 I was -- I don't have the figures in mind,
11 but I remember when I read the S&P article and it came
12 out, I think, two days ago, the figures were pretty
13 astonishing that are at issue. So it remains to be seen
14 whether there'd have to be any regulatory or legislative
15 solutions to implement this, I think, first-of-its-kind
16 settlement agreement.

17 But I -- I don't think that's helpful here,
18 because we already have a jury verdict and it -- it is
19 in a case that we contest liability on. So I think it's
20 different from our circumstances.

21 But the other three states, you know, want
22 to talk about are New York, Texas, and Florida. And I
23 don't think there's any good narrative that provides
24 kind of a decision tree on issues like this.

25 So in New York, they were subject to -- was

1 raised at the Commission or at the legislature. And,
2 you know, I -- I tend to think the Commission is in a
3 better place to resolve these issues as opposed to the
4 legislature because it's what you do every day. But
5 there are, you know, examples in all states of both
6 legislative and regulatory fixes and it really comes
7 down to which approach the State would like to choose,
8 so.

9 CHAIR DANNER: And I'm not sure how to ask
10 this question.

11 It's -- the steps that must be taken,
12 basically, to protect your utility from these kinds of
13 jury verdicts requires, I assume, changes in operation,
14 grid maint -- grid hardening, those kinds of
15 investments. And the infrastructure you have was
16 constructed at a time when this was -- your
17 infrastructure was built through rainforests and now
18 those rainforests are drying and there are other weather
19 patterns.

20 How much lead time would be necessary to
21 make those kinds of investments that will make your
22 infrastructure less susceptible to these kinds of
23 wildfires?

24 I mean, the -- the jury verdict was
25 negligence/gross negligence. And I'm not familiar. I

1 have not read them. You know, how much of this is a
 2 matter of simply grid hardening and adapting wildfire
 3 plans as opposed to -- I mean, the particulars of the --
 4 of the -- of the awards.

5 MR. ROGALA: Chair Danner, great -- great
 6 question. I am not our wildfire mitigation plan
 7 attorney, so take my response with a grain of salt.

8 Every quarter we have an all-hands-on call.
 9 The first part of all of those calls in recent memory
 10 has been our efforts at wildfire mitigation and
 11 prevention.

12 We have not sat on our laurels after the
 13 fires from 2020. And I know we're investing hundreds of
 14 millions of dollars in wildfire prevention and grid
 15 hardening investments now and for the foreseeable
 16 future, because that's the first -- that's -- that's the
 17 way to solve these issues. Don't put us in a position
 18 where our resources have caused harm to customers where
 19 we have to deal with liability and noneconomic damages
 20 on the tail-end.

21 The proactive way to do this is to create
 22 effective mechanisms that allow for appropriate
 23 incentives to harden our infrastructure.

24 Our wildfire mitigation plans filed in each
 25 state have these details. But from my layman's

1 and liability for damages?

2 MR. ROGALA: Absolutely, Chair Danner. I
 3 think you see that in headlines already in newspapers
 4 across our service territory where we've had PSPS events
 5 and folks are rightfully concerned when their power gets
 6 shut off.

7 But in light of the blockbuster liabilities
 8 that we're experiencing, it's hard for utilities not to
 9 take that approach whenever there's risk of, you know, a
 10 catastrophic wildfire.

11 So I -- it is -- it is a difficult position
 12 to be in, but I think the conservative approach is PSPS
 13 events.

14 CHAIR DANNER: Mm-hmm. My final question --
 15 we are -- we are seeing the affects of climate change.
 16 A lot of that climate change is due to the burning of
 17 fossil fuels and PacifiCorp has a role in that.

18 Does PacifiCorp see in your six-state
 19 territory that there is a link between what is happening
 20 in states like Washington and Oregon and the activities
 21 of the company with regard to its coal plants.

22 MR. ROGALA: Chair Danner, I don't pretend
 23 to have a, you know, good six state 30,000 foot view of
 24 the balance of equities between our -- the emissions
 25 from coal fleet and the damages that we're experiencing

1 perspective, this is a decadal problem. It's not
 2 something that -- you know, we don't get to harden our
 3 grid in the next year, in five years. It is a -- it is
 4 a ten-year-plus problem. Because we have 17, almost
 5 18,000 miles of transmission lines, similar amount of
 6 distribution assets and the largest, you know, wind and
 7 solar fleet in the west. So there's a lot that we have
 8 to do to adapt to a warming climate.

9 This liability provision, this is at the
 10 tail-end of those investments. So I think in every
 11 state we have to take a, you know, multi-tiered approach
 12 to address these concerns.

13 But, to our knowledge, this is the first
 14 time we've -- that utilities have raised the damages
 15 question in util- -- before utility Commissions in the
 16 west. So it's kind of broadening that policy discussion
 17 on what the full suite of options should be, you know,
 18 moving forward.

19 CHAIR DANNER: One of those options might be
 20 public safety power shutoffs. And I assume that those
 21 would become more frequent if you're concerned about
 22 liability for negligence or no gross negligence.

23 MR. ROGALA: I agree.

24 CHAIR DANNER: Do -- do those -- do PSPS
 25 events trigger their own risk of -- of litigation and --

1 from an ever-growing climate.

2 I do know these issues are the subtext of
 3 many of our discussions in all of our states, most
 4 recently in the multi-state protocol negotiations.

5 How much of an extent those issues should
 6 guide the Commission in policy decisions like this, I --
 7 I leave to the Commission's judgment, because I don't
 8 feel I have a -- a good additional context to provide
 9 there.

10 CHAIR DANNER: All right. Well, thank you
 11 very much. I appreciate it. Those are all my
 12 questions.

13 COMMISSIONER DOUMIT: So if I could, Your
 14 Honor, a couple questions. Thanks.

15 Are you able to hear me okay?

16 MR. ROGALA: Yes.

17 COMMISSIONER DOUMIT: Okay. Chair Danner
 18 sort of went in to some of the other jurisdictions.

19 In Utah, Counsel, is the limitation -- or
 20 the cap on damages legislation relate solely to damages
 21 related to wildfires?

22 MR. ROGALA: Oh, that's a great question.

23 So the -- the language of the statute allows
 24 for -- it caps noneconomic damages at a hundred thousand
 25 where there's no physical injuries. And when physical

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1 injuries are present, that's a \$450,000 cap.
 2 And, again, this is noneconomic damages.
 3 COMMISSIONER DOUMIT: Right.
 4 MR. ROGALA: So we would still be
 5 responsible for all medical costs, expenses, recovery,
 6 lost wages, et cetera. We're talking about noneconomic.
 7 Go ahead.

8 COMMISSIONER DOUMIT: Is it as sweeping as
 9 this currently -- and I know you said you, you know, can
 10 change it -- the current draft of your tariff revision,
 11 is the Utah legislation is sweeping, is that including
 12 all -- essentially all -- all acts of the company? Or
 13 is it just related to wildfires?

14 If you don't know, we can -- that's all
 15 right. We can find out later. No worries.

16 MR. ROGALA: Yeah, Commissioner Doumit, I'll
 17 pull it up. And for rebuttal, I can just give you the
 18 cite.

19 COMMISSIONER DOUMIT: And, secondly, that --
 20 that is not just confined, I would think, to the
 21 company's customers in Utah, that's -- that pertains to
 22 anybody with potential damages from the action of the
 23 company; is that correct?

24 MR. ROGALA: I think it might be -- I think
 25 there are single issue prohibitions in Utah where you

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1 hypothetically.

2 Well, they also don't have access to some of
 3 the cheapest power in the west and some of the lowest
 4 rates in the west. They don't have access to the
 5 reliability and diversity of our transmission fleet and
 6 our generation resources. And that -- that
 7 discrimination or diversity of options, that's just
 8 inherent in utility ratemaking in Washington.

9 But it does, I think, raise -- and I think
 10 that's lawful. I don't see any question of law that
 11 would prevent that type of decision-making to occur.
 12 But it is a really important policy question.

13 And, you know, while you can think of
 14 utilities as little, you know, experiments, little --
 15 little laboratories of democracy to use, you know, some
 16 language from Supreme Court cases, you know, each
 17 utility can -- the Commission can tinker with tariff
 18 provisions and rates to effectively balance the public
 19 interest for each specific utility. But at a certain
 20 point, issues become statewide enough. They become
 21 important enough that you should elevate them from
 22 utility specific to a statewide approach.

23 We provide that as an opportunity for the
 24 Commission to pursue and -- and we -- again, we are open
 25 to dismissal without prejudice and moving to the next

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1 can't enact legislation that just benefits one entity.

2 COMMISSIONER DOUMIT: Right. I'm
 3 sure that's -- they are probably equal protection
 4 rational basis and that's what I'm sort of getting to
 5 here as well. And Idaho sort of pointed this out in its
 6 order as well.

7 You have a customer who under this tariff
 8 would be such a cap on damage -- but I think joint
 9 advocates in their brief said what about, you know, a
 10 customer in -- in a car and a noncustomer in a car and
 11 collision with a company agent who is at fault. You
 12 would have a distinct -- distinction between the -- the
 13 ability of the noncustomer to sue for noneconomic
 14 damages. I mean, you -- you would concur with that --
 15 that -- as it stands, the way this is written, that's a
 16 correct statement; right?

17 MR. ROGALA: I -- I do agree that there
 18 would be discrimination between nonPacifiCorp customers
 19 and PacifiCorp customers.

20 But I do want to provide some context to
 21 that, because we have discrimination already between all
 22 of the utilities. Right?

23 So the example I was thinking about, you
 24 know, consider any of the municipal utility districts
 25 that would not have a tariff limitation like ours. Just

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1 venue if the Commission likes.

2 COMMISSIONER DOUMIT: And just one more.
 3 You mentioned the PSE tariff. That -- that was damages
 4 related to continuity of service. Was that correct?

5 It wasn't for any act -- any act of -- of
 6 the company. Damages related to anything the company
 7 does including negligence; is that right?

8 MR. ROGALA: Correct. I do think it's
 9 squishy language that can be very broad. So it's,
 10 quote, "disclaim any liability, any loss of damage,"
 11 unquote. And then it's from disruptions in electrical
 12 service caused by, among others -- and here's the
 13 squishy language -- quote, "ordinary negligence of
 14 Puget's employees, servants, or agents to address
 15 performance, integrity, reliability, or stability of the
 16 company's electrical system."

17 COMMISSIONER DOUMIT: You know, I -- not
 18 that you would have -- and I can ask our staff this, if
 19 they know when they come up.

20 You don't know the date of that -- that
 21 tariff, I'll bet?

22 MR. ROGALA: I know it was approved or
 23 reapproved in Puget's last rate case. It's been on the
 24 books for, I think, 10, 20 years.

25 But, you know, like many things, there's a

9 (Pages 55 to 58)

1 lot of issues in tariffs that can lay dormant until, you
 2 know, they become important, so.
 3 COMMISSIONER DOUMIT: So the National Union
 4 case, which you cited and I think everybody cited in
 5 their briefs which related to Court of Appeals claiming
 6 of finding of fact for the trial court to remand it to
 7 deal with whether Puget's negligence, independent of the
 8 tariff at that point could be -- could be used -- you
 9 know, held against Puget, you know, in terms of -- it
 10 didn't turn on some plants. It was a force majeure, you
 11 know, continuity discontinuance issue, not liable for
 12 that when Puget allegedly, you know, didn't turn on
 13 its -- fire up its -- its plants and, therefore, that --
 14 and the Court said, hey, that's independent of the --
 15 you know, of the tariff. And I -- I presume that
 16 this -- that tariff language was added after that case.
 17 It's just my -- that's just my speculation.
 18 But anyway, we're establish -- it -- it is
 19 narrow just to that continuity of the service. It's not
 20 a broad thing. Okay.
 21 MR. ROGALA: I -- I'd agree, Your Honor.
 22 COMMISSIONER DOUMIT: All right. Thanks.
 23 Yep.
 24 Nothing further from me. Thank you.
 25 MR. ROGALA: Can I -- I'll just save my

1 And now I believe we'll -- we will move to
 2 staff at this point. You may proceed.
 3 MR. CALLAGHAN: Thank you, Your Honor.
 4 Good morning, Your Honors. Good morning,
 5 Commissioners.
 6 The arguments against this tariff revision
 7 have been thoroughly outlined in Staff's brief and the
 8 briefs of Public Counsel and the amicus brief of the
 9 joint environmental advocates. I'm not going to
 10 reiterate those arguments here, but I do want to respond
 11 to a few points raised in the Company's reply brief and
 12 any amicus brief of PSE and Avista.
 13 First, I want to address the alternative
 14 suggestions to approving the proposed tariff revision
 15 that was made by PacifiCorp. In the Company's reply
 16 brief, it suggests that if the Commission does not
 17 approve the Company's proposal, it could narrow the
 18 scope of the requested limitation or initiate a
 19 rulemaking on the topic. And the amicus brief makes the
 20 same suggestion.
 21 Staff does not recommend either of these
 22 courses of action.
 23 First, let me address the amended language.
 24 The amended language that's provided in the
 25 Company's reply brief would need to be assessed and

1 thing for rebuttal.
 2 COMMISSIONER DOUMIT: Yeah, please.
 3 Go ahead.
 4 MR. ROGALA: Oh, thank you, Commissioner
 5 Doumit.
 6 We haven't talked about precedent and I
 7 think that's great and let me say why. I'm not trying
 8 to dodge discussions of precedent. I just don't think
 9 it's very instructive. The case law is very thin. If
 10 we're being honest, I think we can grab -- cherry-pick
 11 statements from all of these case to support PacifiCorp,
 12 Staff, and Public Counsel's arguments.
 13 I think the real takeaway here is I don't
 14 know of a case in Washington that has addressed the
 15 question that I think we're trying to answer here, which
 16 is which statute controls? 440 or the other two that I
 17 discussed earlier.
 18 So to the extent the Commission has
 19 questions about precedent, I'm happy to answer those.
 20 But again, I think the -- the real issue,
 21 the Commission's decision should rest on the policy
 22 concerns, not on the questions of law. Thank you.
 23 COMMISSIONER DOUMIT: Great.
 24 Nothing further, Your Honor. Thank you.
 25 JUDGE BROWN: Thank you.

1 given the same careful legal and policy considerations
 2 as the originally proposed tariff language. Coming up
 3 with new language at the end of this proceeding doesn't
 4 afford the Commission the benefit of a full record and
 5 does not allow the other parties the ability to evaluate
 6 and consider the new proposal.
 7 The proper way to propose new language is to
 8 withdraw the petition and file another one, not to
 9 suggest new tariff language at the end of a proceeding.
 10 But, regardless, Staff does not agree that
 11 these revisions would be appropriate to approve.
 12 Primarily for policy reasons, these are still very
 13 broad.
 14 For example, one of the proposed amendments
 15 is this provision shall be binding in cases involving
 16 gross negligence -- shall not be binding in cases
 17 involving gross negligence, willful misconduct,
 18 violation of law or where state law disallows
 19 limitations on liability. That's still a very broad
 20 coverage.
 21 Typically, what you'd see in tariffs is that
 22 the limitation applies only to a specific instance. So,
 23 for example, force majeure, this is -- it applies to
 24 everything except these certain instances.
 25 So the same policy arguments apply here that

1 Staff included in its brief and Public Counsel and the
 2 joint environmental advocates.
 3 So there's also some issues that I won't get
 4 into about these are a little bit vague, it's unclear
 5 what they apply to and, um, these are -- you know, these
 6 are all reasons why the -- the appropriate method of
 7 coming up with a revision is to refile so that we know
 8 exactly what we are considering when -- when we're
 9 approving.
 10 The -- so moving on to the proposed proposal
 11 to initiate a rulemaking in the alternative. So first,
 12 any interested party can petition the Commission to
 13 initiate a rulemaking.
 14 Obviously, the Commission, if it wants to,
 15 can initiate a rulemaking on its own. But if
 16 PacifiCorp/PSE/Avista are interested in initiating a
 17 rulemaking, they can petition and describe what they are
 18 looking for and the Commission can consider that.
 19 But I don't see what a rulemaking on this
 20 topic would accomplish. As a general matter, commission
 21 rules are requirements that the public service company
 22 is required to follow. There are some commission rules
 23 that dictate a process for customers to follow in their
 24 interactions with a regulated company but, in general,
 25 commission rules are enforceable against the regulated

1 judgments in civil cases. Because, otherwise, none of
 2 this makes sense. Why would the Commission need to
 3 approve a tariff limiting damages?
 4 The assumption has to be either that
 5 Washington common law has some sort of high error rate
 6 or that judgments in Washington civil cases are out of
 7 control. But we don't have any evidence substantiating
 8 that in this record.
 9 The Company makes that assertion in their
 10 initial brief, but there's very little to back that up.
 11 And that's the entire foundation of this request,
 12 because it's so broad.
 13 So, again, I just want to point out that
 14 that's the entire foundation of the Company's case and
 15 there really is nothing in the record that substantiates
 16 that assumption. Thank you.
 17 JUDGE BROWN: Are there any questions?
 18 CHAIR DANNER: Yeah. So thank you for that.
 19 So how do you -- if you put yourself in our
 20 shoes and we have a duty to ensure that utilities
 21 provide service that is safe, reliable, and affordable
 22 and clean and we have seen devastating wildfires in
 23 California and Oregon and Hawaii and elsewhere and as a
 24 result of that, we have seen insurance costs
 25 skyrocketing -- this -- in Washington, even though those

1 entity and their agents, not anyone else. So a
 2 commissioned rule wouldn't really directly bestow an
 3 effective limitation on liability, only an approved
 4 tariff can do that.
 5 Okay. So let's say the Commission is open
 6 to some revised version of what the company wants but
 7 just not the language in the current tariff. Well, if
 8 that's the case, then the Commission should just give
 9 that guidance in the order denying this petition and
 10 wait for the company to file a new petition consistent
 11 with that guidance.
 12 So a rulemaking or a policy statement isn't
 13 needed here and would put an unnecessary strain on
 14 commission resources.
 15 Now, again, I don't know exactly what the
 16 IOUs are envisioning with this rulemaking. But again,
 17 that's why they should petition the Commission to
 18 initiate the rulemaking so that they can explain what
 19 they are looking for.
 20 Finally, Your Honor, I do want to highlight
 21 a point that was brought up in Staff's brief, but does
 22 deserve repeating.
 23 So the Company's entire argument here is
 24 built on an assumption. The assumption is that there is
 25 something wrong with Washington state law related to

1 wildfires did not happen here -- and we are seeing the
 2 credit ratings change and the cost of money becoming
 3 more expensive.
 4 What kind of record would we need to develop
 5 to use that as a basis for a policy change?
 6 And are you -- are you saying that we -- we
 7 would -- basically, we would have to get the experts to
 8 come in here and quantify what that is before we could
 9 take any kind of action?
 10 MR. CALLAGHAN: Thank you, Your Honor.
 11 So in Staff's brief, I outlined that really
 12 this -- this problem -- which, again, in Staff's brief
 13 we acknowledge it's a serious problem. It's something
 14 the entire state takes seriously; the Commission takes
 15 seriously.
 16 We're not suggesting that this is not an
 17 important issue that we need to address. The -- the
 18 point that we are making here is that this needs to be
 19 addressed in a holistic way. The Company's concerns
 20 about their finances, et cetera, we need to find what
 21 the most efficient way of avoiding these kinds of civil
 22 judgments is. And Staff's position is that, first and
 23 foremost, it's to avoid negligence that causes
 24 wildfires.
 25 So, again, this is something that should be

1 considered in a general rate case, because the Company's
2 filing their wildfire mitigation plans in November. We
3 hope that they have, you know, some bold actions that
4 they are proposing and, really, we need to determine
5 what the most cost-effective way of preventing these
6 kinds of wildfires or preventing utility responsibility
7 for these kinds of wildfires is.

8 This proceeding is a yes/no on one proposal.
9 What the Commission should do is look at
10 this holistically in a proceeding like a GRC.

11 CHAIR DANNER: So there are multiple
12 wildfires burning across Oregon and Washington as we
13 speak. There are -- general rate cases, as you know,
14 take 11 months and this company does not have one in
15 front of us right now.

16 I am -- I am concerned about -- and this is
17 a perception and I'm trying to figure out what kind of
18 record I need to make that, but when we get before a
19 jury of our peers who are not living in the utility
20 world and they see a deep-pocketed company that is owned
21 by some very rich people, they may be inclined to say,
22 well, they can afford it and not realize that they are
23 passing these costs on to -- indirectly to other utility
24 customers that I have a duty under law to protect as
25 regard to the reliability and safety and cost of their

1 what incentives does that provide the company?
2 Does it incent the company to be more
3 cautious when it comes to the operation of their
4 electric system or less cautious?

5 I mean, if -- if they are getting a
6 limitation on damages, that provides less of an
7 incentive. And Staff doesn't believe that that's the
8 right direction.

9 COMMISSIONER RANDAHL: All right. So,
10 similarly, I guess I'm concerned about -- obviously, we
11 have one company before us. This is one company's
12 actions. This is not a general, you know, action that
13 is posed in a rulemaking or some effort that's broadly
14 affecting all the utilities.

15 But, as you say, we can take this up in a
16 rate case, but the utility wildfire mitigation actions
17 are one way to reduce risk. But that -- the other risks
18 that are broadly resented and impacting insurance rates
19 for all the utilities and impacting access to capital
20 for all utilities, not just in the West.

21 And this is just on the policy side, but
22 wouldn't limitations on liability and damages provide
23 credit agencies and the insurance companies some sense
24 of risk reduction for companies that can reduce some of
25 those costs that can also benefit customers.

1 service.
2 I'm trying to figure out how, as a
3 regulatory matter, I can address what I see is a very
4 serious risk. And, basically, what I'm hearing from you
5 is, sorry, there's no way you can do it except for a
6 two-year process.

7 Is that -- is that what I'm saying -- is
8 that what I'm hearing you say?

9 MR. CALLAGHAN: No.

10 So, Your Honor, the company could bring a
11 different tariff provision that -- I mean, this is
12 narrow in scope. This is just a proposed limitation on
13 damages. But they could bring a proposal that, you
14 know, lays out the -- the different possible ways of
15 addressing this issue. For example, you know, increased
16 spending on wildfire mitigation projects, initiatives,
17 et cetera.

18 And the other issue here is -- you know,
19 think about this in terms of performance-based
20 ratemaking.

21 If the Commission -- let's say the -- the
22 proposed tariff revision were legally enforceable.
23 Staff doesn't believe that it is, but let's say that it
24 was.

25 If that were the case and this were granted,

1 MR. CALLAGHAN: Thank you, Your Honor.
2 It -- it would, but as with all arguments
3 related to credit ratings, it's never clear that this
4 specific action would cause an upgrade in credit
5 ratings. Right?

6 This is one of the problems that we always
7 have with arguments that utilities make about the impact
8 on their credit ratings.

9 So I -- I will note again that -- as others
10 have pointed out, that this petition has been denied in
11 most of the Company's other jurisdictions. And so I --
12 I only point that out to -- to note that the potential
13 impact on, you know, Washington approving this is much
14 less -- right? -- because we're a small part of the
15 company's overall service territory.

16 So I don't know that the shifting of risk
17 from the company to Washington ratepayers and only
18 Washington ratepayers and customers is a trade for, you
19 know, the -- the prospect of slightly lower rates
20 because of a credit rating upgrade.

21 I -- I think that that's -- we just don't
22 have enough evidence in the record to be sure that that
23 positive outcome is actually going to happen.

24 CHAIR DANNER: Well, how -- how would we
25 possibly get that kind of evidence?

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1 I mean, it's -- you know, we can -- we can
2 see what the trends are. We know what was going on with
3 the Hawaii Electric and the impacts it had on that
4 company and its stock prices/insurance costs, and other
5 utilities as well.

6 But what -- what you're proposing, I'm --
7 I'm -- unless we, you know, somehow model this or live
8 through it, how do we know what the impacts are going to
9 be to the dollar?

10 MR. CALLAGHAN: Yeah. I agree with that,
11 Your Honor. I mean, I don't think that that's
12 incorrect. You -- you can make a persuasive argument
13 about the direction a certain Commission decision is
14 going to make, but you don't know if it will result in
15 an upgrade or, you know, preferable terms or anything
16 like that. I agree with that. I don't dispute that.

17 CHAIR DANNER: And also the -- the question
18 if the company wants to make the kind of grid
19 enhancements that would be necessary to protect it from
20 the kinds of actions that led to the lawsuits, it has to
21 basically get that capital either from the shareholders
22 or from the ratepayers and there's going to be a limit
23 of which investors are gonna say, sure, I'll go into
24 that environment. So that means it's mostly gonna fall
25 on the ratepayers who are also under other pressures.

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1 And if this Commission is then asked to approve those in
2 a lengthy GRC; of course, that's gonna have some rate
3 shock issues. And if we don't approve it, then we are
4 going to see -- in my estimation, we're gonna see a
5 whole lot more public safety power shutoffs, which is
6 going to lead to disruption of the economy and to
7 people's lives which are also gonna be very difficult to
8 quantify.

9 So I'm just trying to get an idea of what
10 kind of record I need to have before I can consider
11 actions that would reduce the risk of these kinds of
12 jury awards that I believe will have an impact.

13 So, thanks.

14 MR. CALLAGHAN: Thank you, Your Honor.

15 So, again, Staff's position here is -- if
16 the issue is the availability of funds to invest in
17 wildfire mitigation projects; that is classically the
18 realm of the general rate case. I know that those are
19 long proceedings.

20 But the reason for that is the Commission in
21 that instance -- if the company brought this proposal in
22 a general rate case, the Commission could decide
23 between, well, do we want to approve this, you know,
24 limitation on liability or could we, you know, increase
25 the company's ROE or approve a hypothetical capital

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1 structure or approve other kinds of adjustments?

2 And in that proceeding, the Commission could
3 weigh its options. But this is just one option; yes or
4 no.

5 And, again, I think that holistic view --
6 maybe not a GRC, maybe just a holistic view of what we
7 do with wildfire-related costs for this company; that
8 would be the appropriate venue to consider this kind of
9 proposal. So you could weigh different options and see
10 what's the -- the best option for customers.

11 COMMISSIONER DOUMIT: Your Honor, I have a
12 question, if I could, please.

13 Counsel, a hypothetical for you. You
14 suggested one pathway as to sort of invite the company
15 to come back in -- withdraw this petition, come back in
16 with maybe narrowly -- more narrowly tailored tariff
17 provision.

18 Based on your legal analysis of this filing,
19 however, I'm wondering, if the company came back with a
20 revision that kept noneconomic damages for
21 wildfire-related matters in which the company was
22 neither grossly negligent or willfully -- or committed
23 willful misconduct, would that be something that
24 would -- that in your determination we would have the
25 legal authority to approve.

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1 MR. CALLAGHAN: So in terms of the -- the
2 Staff's interpretation, yes. Because that is a
3 limitation on liability. It's a specific limitation.
4 Um, but again, it's -- it's a -- I can't speak to the
5 policy or -- well, so, if we're talking about the public
6 interest standard. I don't have my client here to be
7 able to discuss that hypothetical, and so -- but in
8 terms of --

9 COMMISSIONER DOUMIT: I was just asking,
10 legal -- legal authority to do that. I'm sorry. Sorry
11 to interrupt. Go ahead.

12 MR. CALLAGHAN: No. No. That's perfectly
13 fine.

14 So the limitation -- I think it would have
15 to be specifically described in terms of "in this
16 instance the company is not held liable," rather than
17 "in this instance," you know, the -- "the types of
18 damages are limited" because of 440.

19 But if it was crafted in terms of "in these
20 specific instances in which the plaintiffs are claiming
21 that the utility is at fault for a wildfire, the company
22 is not liable."

23 So something like that would meet Staff's
24 interpretation of what's required by 440.

25 COMMISSIONER DOUMIT: Thank you.

13 (Pages 71 to 74)

1 MR. CALLAGHAN: Thank you.
 2 JUDGE BROWN: Are there any further
 3 questions?
 4 All right. Hearing none. We will proceed
 5 to Public Counsel and their oral argument.
 6 MS. JOHANSON-KUBIN: Hello, Commissioners
 7 and Your Honors. My name is Jessica Johanson. I'm an
 8 attorney for Public Counsel within the Attorney
 9 General's Office.
 10 I'm here today to request that the
 11 Commission reject PacifiCorp's filing that seeks to
 12 eliminate its liability for even grossly negligent or
 13 reckless conduct.
 14 Here, the Commission must apply
 15 RCW 80.04.440. This is a threshold matter and if the
 16 Commission finds that the provision runs afoul of the
 17 plain language of the statute, then the Commission must
 18 reject the filing.
 19 If the Commission desires further reasons to
 20 reject this filing, there are several legal and policy
 21 reasons to do so.
 22 First, the Commission-approved liability
 23 limitation provisions relied upon by PacifiCorp are
 24 readily distinguishable from this current overbroad
 25 filing and those liability limitation provisions may

1 violated RCW 80.04.250 which empowered the Commission to
 2 determine for ratemaking purposes the fair value of
 3 property used and useful for service in Washington.
 4 In other words, the Court found that the
 5 Commission is bound by the statute and was not able to
 6 approve a tariff that violates the statute.
 7 Secondly, the Commission is a
 8 quasi-legislative body in that the legislature delegated
 9 some of its duties to the Commission. There's
 10 serious constitutional concerns raised with a
 11 quasi-legislative body limiting or extinguishing causes
 12 of action. Even the legislature, itself, isn't
 13 empowered to do that.
 14 In 2023, the Supreme Court of Washington in
 15 Bennett v. United States, the Court held that an
 16 eight-year statute of repose for medical malpractice
 17 actions violated the State constitution's privileges and
 18 immunities clause as a matter of law and that the
 19 statute of repose implicated fundamental -- a person's
 20 fundamental right to pursue common law causes of action.
 21 Specifically, the Court noted that the
 22 legislatures interest in reducing medical malpractice
 23 insurance premiums did not provide reasonable grounds
 24 for privileges and immunities purposes. The legislature
 25 can't delegate power it doesn't have.

1 themselves be against state law.
 2 Second, the financial impact asserted by
 3 PacifiCorp is speculative and better addressed in a
 4 general rate case.
 5 Third, this provision, if approved, would be
 6 unfair to victims and would cause a disparate impact
 7 based on where a person lives.
 8 So I'll begin with RCW 80.04.440, which I
 9 will call "the statute," which states, paraphrased, that
 10 any public services company which does an impermissible
 11 act shall be liable to those affected for all loss,
 12 damage, or injury.
 13 PacifiCorp doesn't argue that its provision
 14 comports with the statute; instead, it asserts that
 15 utility tariffs can preempt the statute.
 16 And while the Commission has broad authority
 17 to regulate utilities in the public interest, it is
 18 still constrained by applicable laws and by the power
 19 delegated to it by the legislature.
 20 The precedent is well-established that the
 21 Commission is constrained by existing statutory law.
 22 This is demonstrated in the Supreme Court of
 23 Washington's 1984 case, Power v. WUTC.
 24 In that case, the Supreme Court held that
 25 including construction work in progress in the base rate

1 In Bennett, the Court held that the
 2 legislature did not have the power to extinguish or
 3 limit causes of action that a person has a fundamental
 4 right to. Since it doesn't have that power, it can't
 5 delegate it to the Commission.
 6 The dispute here is only whether the statute
 7 preserves customers' rights to recover damages. A plain
 8 reading of the statute says yes. A company shall be
 9 liable for all loss, damage, or injury.
 10 By contrast, this filing proposes that
 11 customers must waive and release any and all claims
 12 including, without limitation, negligence.
 13 Commission is clearly bound by statutory law
 14 and the company's filing conflicts with the plain
 15 language of the statute.
 16 PacifiCorp claims that the Commission has
 17 previously allowed liability limitations that run
 18 counter to this statute. Upon further review, this
 19 didn't prove to be true. All of them were
 20 distinguishable, either based on how narrow they were
 21 written or because they were limiting liability for
 22 actions outside of the company's control; whereas,
 23 PacifiCorp seeks to limit liability for its own actions
 24 in all circumstances.
 25 Also, these provisions haven't been tested

1 in Court. Public Counsel believes that they are likely
 2 unenforceable as they are against state law.
 3 PacifiCorp tries to circumvent this by
 4 stating that the provision won't be binding where state
 5 law disallows limitations liability, but this is not
 6 sufficient.
 7 It's not in the public interest to approve
 8 an unlawful provision because it has a chilling effect
 9 on victims who would take the disclaimer at face value
 10 and not know that their specific circumstances indicated
 11 that the provision was in violation of state law.
 12 Each potential victim would also
 13 individually bear the burden of litigating that issue.
 14 Instead, it should be decided here in this venue before
 15 it gets to the potential individual victims.
 16 Next, the financial impact that PacifiCorp
 17 asserts is speculative and better addressed in a general
 18 rate case. PacifiCorp doesn't provide any concrete
 19 evidence of the financial impact. And although it
 20 argues it may be able to obtain financing, it does fail
 21 to note that even after the massive James verdict in
 22 Oregon and associated credit downgrade, it reported to
 23 the Wyoming Commission that it was still able to raise
 24 \$3.8 billion, double its revenue requirement.
 25 PacifiCorp also doesn't show that approval

1 injuries.
 2 Let's next imagine that PacifiCorp burns
 3 down a person's house and seriously injures some people
 4 at a party. Only -- again, only noncustomers could
 5 recover. This also raises issues, such as: Are
 6 children parties to the contract? Grandparents who live
 7 in the same house. Roommates?
 8 What happens if a landlord includes
 9 utilities as part of a rental agreement? Are the
 10 tenants bound by this liability limitation?
 11 There are just too many questions raised
 12 that aren't answered here.
 13 Where a person lives would end up
 14 determining where they have -- whether they have the
 15 same rights as other Washingtonians.
 16 So, in conclusion, this proposed provision
 17 says that customers must waive and release any and all
 18 claims; including, without limitation, negligence.
 19 By contrast, RCW 80.04.440 says that
 20 companies like PacifiCorp shall be liable for all loss,
 21 damage, or injury.
 22 PacifiCorp fails to present any comparable
 23 cases that support its position. And we, therefore,
 24 urge the Commission to reject this filing.
 25 And I'm happy to answer any questions at

1 of this filing would actually impact its overall
 2 wildfire insurance costs. Washington is only 8 percent
 3 of its service territory. And Oregon, Idaho, and
 4 Wyoming have already denied similar provisions.
 5 Finally, because PacifiCorp is a monopoly,
 6 customers have no other choice for utility services.
 7 Because utility service provided are based on geographic
 8 location, this filing creates a disparate impact on
 9 Washingtonians based on where they live.
 10 As discussed in Bennett, concern over rising
 11 insurance premiums is not reasonable grounds to violate
 12 the privileges and immunities clause of the State
 13 Constitution.
 14 I'll run through just a few hypotheticals
 15 that demonstrate the substantive unconscionability of
 16 this filing.
 17 Let's imagine that a PacifiCorp employee
 18 runs over a small child on their way to repair a power
 19 line in Yakima. In that case, the family of the child
 20 can only recovery for their damages if they don't live
 21 in Yakima and they don't receive services from
 22 PacifiCorp.
 23 If the child does live in Yakima and,
 24 therefore, receives those services, then they can't
 25 recover, even though they would have received the same

1 this point.
 2 CHAIR DANNER: Thank you very much. And I
 3 appreciate your comments.
 4 There -- do you see there is any way to
 5 narrowly -- narrowly tailor a tariff provision so that
 6 some of those examples that you gave would be excluded
 7 when some of the examples that we have been talking
 8 about, which was really -- you know, we're talking about
 9 wildfire-related damages would be included?
 10 MS. JOHANSON-KUBIN: So it could be tailored
 11 to only include actions that are outside of the
 12 company's control; such as, if they had taken all
 13 reasonable care of their power lines and yet wind
 14 knocked it over and caused a wildfire.
 15 But, no, public counsel does not think that
 16 it could be narrowly tailored the way that -- that the
 17 company proposed in limiting it to only ordinary
 18 negligence, because that does still appear to violate
 19 the plain language of the statute.
 20 CHAIR DANNER: So I'm trying to figure out
 21 if there's a reasonable standard that would apply here.
 22 You know, if it's negligent for the company
 23 to have poles that are not fire resistant because that
 24 was a reasonable standard of care ten years ago, but is
 25 not today, is it negligent if it doesn't fix those

1 tomorrow, even though doing so would be very expensive
2 and there would be no guarantee of recovery in a rate
3 case.

4 How do you deal with a situation like that?

5 MS. JOHANSON-KUBIN: I think that the
6 specific facts would have to be handled on a
7 case-by-case basis.

8 And if the company was engaging in this --
9 the appropriate standard of care, then they wouldn't be
10 liable. But if the standard of care has changed and
11 they haven't updated their practices to deal with that,
12 then -- then I believe that they would be liable under
13 the statute.

14 CHAIR DANNER: So is that standard of
15 care -- so you are -- you are just trusting that a jury
16 would understand that; that a jury would determine that
17 the company really wouldn't have had time or the means
18 to make the changes and that, therefore, the -- the
19 damages would be assessed appropriately? Is that -- is
20 that your assumption?

21 MS. JOHANSON-KUBIN: Yes. I mean, the
22 company is a sophisticated party and they have the means
23 to present a robust defense in court to the jury, and so
24 I don't think that that is a reason for limiting an
25 individual's access to justice.

1 should be on the shareholders instead.

2 And it's possible that the company could
3 decide that it was no longer profitable enough to
4 function in Washington.

5 But in that case, there is always someone
6 willing to come in and buy up the physical
7 infrastructure and continue providing power and utility
8 services at the slightly lower profit margin.

9 CHAIR DANNER: What -- what's the basis for
10 that statement?

11 MS. JOHANSON-KUBIN: Just based on municipal
12 utilities having purchased up prior infrastructure in
13 other cases.

14 CHAIR DANNER: Okay. All right. Thank you.
15 I have no further questions.

16 COMMISSIONER DOUMIT: So I have a question,
17 if I could. So in response --

18 JUDGE BROWN: Proceed, please.

19 COMMISSIONER DOUMIT: Thank you.

20 In response to Chair Danner's question about
21 whether we could narrowly tailor something, you said --
22 it sounded like, I'm paraphrasing -- yeah, if it was
23 a -- something un- -- not caused by the company, okay,
24 that would -- you could cap economic damages sort of, in
25 that instance.

1 CHAIR DANNER: All right. And one of the
2 concerns that I've had that I expressed earlier is that
3 even though the company -- the company shareholders
4 would be liable for that kind of negligence, there are
5 secondary effects that reach to all ratepayers because
6 of rising insurance costs because of changes in the cost
7 of debt because of credit rating impacts because of the
8 willingness of investors to get into the utility sector.

9 Those are the kinds of secondary impacts
10 that are significant. And I'm just trying to figure
11 out, again, my duty of ensuring that our utilities
12 provide safe, reliable, and affordable service.

13 How do I -- how do I meet that? How do I
14 thread that needle?

15 MS. JOHANSON-KUBIN: Well, I think one part
16 of providing safe service is making sure that the
17 company is able to compensate victims of -- of any
18 potential negligence that may occur. And also Public
19 Counsel --

20 CHAIR DANNER: But that would be on the
21 shareholders; that would not be on ratepayers, so that
22 would be --

23 MS. JOHANSON-KUBIN: Yes. So Public
24 Counsel's position would probably be that we would argue
25 against inclusion of damages in rates and that that

1 Wouldn't -- under your argument, though,
2 would you still not have a disparate treatment if you
3 are saying to customers, yeah, you know -- customers
4 only, right, who are subject to tariff. You know, you
5 don't have this opportunity to petition for -- sue for
6 noneconomic damages, but somebody else, in the example
7 you gave, you know, from the next jurisdiction would
8 have.

9 Isn't that still -- wouldn't that still sort
10 of fail under your disparate treatment test? Even that
11 sort of narrowly tailored --

12 MS. JOHANSON-KUBIN: I don't think so
13 because if it's not the company's fault then regardless
14 of where they were located and which person was
15 impacted, then the company is not liable if it's not
16 their fault.

17 COMMISSIONER DOUMIT: But that's the status
18 quo; right? That's the status quo?

19 MS. JOHANSON-KUBIN: Yes.

20 COMMISSIONER DOUMIT: In an ideal world, if
21 all the proofs were perfect, you know, and they're not
22 at fault, then their not at fault. So that's not --
23 that's really not a narrowly tailored tariff. That's
24 just -- that's just the way the world is right now;
25 right?

1 MS. JOHANSON-KUBIN: Yes.
 2 COMMISSIONER DOUMIT: Okay. So there really
 3 isn't, I guess, a narrowly -- something you would
 4 describe as being narrowly tailored.
 5 But just -- just say -- say we did have the
 6 authority to narrowly tailor, I'm still -- I mean,
 7 you're raising the point. It's a good one, I think, on
 8 this disparate treatment.
 9 We can only apply this tariff to the
 10 company's customers. I mean, that's the -- that's the
 11 bound of our authority.
 12 Do you would concur with that?
 13 MS. JOHANSON-KUBIN: Yes.
 14 COMMISSIONER DOUMIT: So we can't, in other
 15 words, make (audio disruption) that says the company is
 16 not liable for noneconomic damages for anybody in the
 17 state of Washington; right?
 18 MS. JOHANSON-KUBIN: Correct.
 19 COMMISSIONER DOUMIT: No way around it.
 20 So then you've got a whole other set of
 21 calculations that counsel for the company raised. You
 22 have what are these customers for the company, they've
 23 had the benefit of having, you know, economies of scale,
 24 they have cheaper power through the years, so this is
 25 a -- you know, it's not -- again, that's not -- that's

1 that.
 2 JUDGE BROWN: Are there any further
 3 questions at this point?
 4 Okay. At this point, we will -- we will
 5 move to the round of rebuttal and we'll start with the
 6 company.
 7 Also, as a reminder, please keep your -- I'm
 8 sorry, your rebuttal to 15 minutes.
 9 MR. ROGALA: Thank you, Your Honor,
 10 Commissioners, I'll be brief. I think it's been a good
 11 discussion.
 12 Four quick points and then I'll conclude.
 13 First, Public Counsel raises an interesting
 14 privileges in the immunities case, a recent Washington
 15 Supreme Court case.
 16 COMMISSIONER DOUMIT: Counsel, I'm just --
 17 can I ask you to get closer to the mic again. Sorry for
 18 those it would stop. And then interliance. Thank you.
 19 MR. ROGALA: I'd just like to respond to
 20 Public Counsel's recent privileges and immunities
 21 Washington Supreme Court case. I wasn't aware of that
 22 case. It wasn't in their response brief.
 23 But in my general understanding there's
 24 typically two constitutional fights that happen on
 25 privilege and immunities constitutional arguments and

1 not a pure sort of argument to say company customer and
 2 noncompany customer should be treated equally because
 3 really -- they are -- they're not, essentially; right?
 4 MR. ROGALA: Mm-hmm.
 5 COMMISSIONER DOUMIT: There are other --
 6 other factors that have to be taken into account.
 7 Do you agree with that?
 8 MS. JOHANSON-KUBIN: Yes. And I think that
 9 if -- so there are reasonable grounds to violate the
 10 privileges and immunities clause. And so I think the
 11 provision of basic utilities services is one of those
 12 reasonable grounds, which is why you can include
 13 anything in a tariff that is just specific to the
 14 company's customers.
 15 But the question that raises is: Is this
 16 wildfire cost mechanism, is that necessary for the basic
 17 provision of services?
 18 And my answer to that is, no. They can
 19 still provide services at a relatively affordable rate
 20 if you deny this provision, which means that it -- it
 21 isn't reasonable grounds.
 22 COMMISSIONER DOUMIT: All right. Great.
 23 Thank you for going -- going further that --
 24 that line with me. I appreciate that. Thank you.
 25 MS. JOHANSON-KUBIN: Yeah. Happy to do

1 remedy clause arguments. And I'm drawing from my Oregon
 2 experience.
 3 The privileges and immunities arguments are
 4 typically delegated to the legislature to resolve and
 5 those are narrowly tailored in the sense of what
 6 legislative actions are prohibited by that
 7 constitutional provision. And the remedies clause is
 8 broader and can strike down more legislative actions.
 9 But regardless how either of these
 10 provisions work, it's really important, I think, to not
 11 lose sight of what this litigation really involves.
 12 These are the most high-profile, well-lawyered
 13 litigation causes of action in the civil court system in
 14 any state, because it's essentially tort reform through
 15 the courts; either for limitations -- sorry, for
 16 limitations on tort liability or damages or against.
 17 So I'm skeptical that the Bennett case is on
 18 point or should be applied here broadly. And I would be
 19 cautious in drawing conclusions from that recent Supreme
 20 Court case without additional briefing from counsel.
 21 Second, Public Counsel noted that our tariff
 22 is substantively unconscionable. I would direct Public
 23 Counsel to our reply brief which cites RCW 19.86.170,
 24 which holds that no utility actions can be
 25 unconscionable because they are approved by this

1 commission and exempted from Washington's Consumer
 2 Protection Act, so there is no argument for
 3 substantive --

4 CHAIR DANNER: I'm sorry. Could you give me
 5 that cite again?

6 MR. ROGALA: 19.86.170. That specifically
 7 exempts all decisions from this Commission from
 8 Washington's Consumer Protection Act.

9 But I don't really want this to turn into a
 10 back and forth on the legality. I want to draw this
 11 back to the important policy questions.

12 Public Counsel's examples are sobering.
 13 We're not -- we don't deny that. But we don't want to
 14 lose sight of what our provision would do. All of the
 15 examples that Public Counsel highlight would be able to
 16 recover economic damages. We're just talking about
 17 noneconomic damages. So all lost wages, all actual
 18 damages, all hospital bills, those are recoverable.

19 And to the extent the Commission has
 20 concerns with an outright ban on noneconomic damages, it
 21 can take the multiplier cap, like we proposed in earlier
 22 arguments, you know, a 3X or 5X of economic damages.

23 And if the Commission is looking to narrowly
 24 tailor our tariff, you know, SB244 from Utah that
 25 Commission Doumit had asked about I think provides a

1 demonstrated credit downgrades. We also cited in our
 2 reply brief an SMP report that talks about how without
 3 significant legislative and regulatory fixes at
 4 commissions across the west, they will downgrade more
 5 utilities because of the lack of reasonably priced
 6 insurance, the shrinking pool of providers who would
 7 even provide insurance, and dramatic capital constraints
 8 and low growth that we'll see across the West.

9 You also have -- you know, which I think we
 10 tried to downplay in our reply brief, but is a dramatic
 11 example where the CEO of our company, Warren Buffett, in
 12 his annual letter to shareholders called out explicitly
 13 the concerns it has with PacifiCorp's financial health.
 14 And I don't think you can imagine a more robust record
 15 to support a policy decision on this issue. And I think
 16 that's supported by the standard of decision. The
 17 standard of decision here is RCW 80.28.020. It's your
 18 just and reasonable statute.

19 And in my mind, you know, it's the broadest
 20 standard of decision that I'm aware of, of state
 21 regulatory agencies.

22 Scott Hempling says it better than, I think,
 23 anyone. He looks at the just and reasonable standard
 24 as, you know, hey, Commission, figure it out. Right?

25 This is the legislature's attempt to

1 reasonable example. This is limited to wildfire
 2 liability. It does allow for recovery from intentional
 3 torts or gross negligence. It creates a, you know,
 4 hundred-thousand-dollar cap on noneconomic damages when
 5 there's no physical injury and then a 450 cap if there
 6 are injuries.

7 There's also a statutory -- or sorry,
 8 statute of limitations, so all claims have to be brought
 9 within two years of ignition of the fire. There's other
 10 concerns that the Commission could draw from if it wants
 11 to circumscribe our tariff. And I believe all of these
 12 examples staff believed would be supported under their
 13 view of the Commission's interpretation -- or their view
 14 of the Commission's statutory powers, but we did not
 15 discuss the statute -- statute of limitations issue;
 16 that is new.

17 So that's how the tariff could be tailored.
 18 But I want to conclude on what record would support even
 19 approving a decision in the first place. And this gets
 20 to Chair Danner's, I think, the main policy question
 21 here.

22 You know, at least from my perspective,
 23 PacifiCorp is in an extraordinary circumstance. A
 24 \$1.67 billion contingent loss. You know, five times the
 25 size of Puget's operating income. Two already

1 delegate some of the most technical and technocratic
 2 issues to an agency staffed by experts to reach a
 3 decision that fits for each utility.

4 So I think under that broad standard
 5 decision and the factors, you know, that we've discussed
 6 here, I think, you have more than adequate enough record
 7 to do something here.

8 And we understand that our proposal has
 9 significant policy concerns. So if you're not
 10 comfortable with our approach, we recommend any of the
 11 solutions we've discussed earlier and we believe this is
 12 just a start of the conversation and we'll continue for
 13 several years as we try and, yeah, steer our utility
 14 back towards a stronger financial health and a more
 15 robust and hardened grid.

16 So thank you.

17 JUDGE BROWN: Are there any questions?

18 CHAIR DANNER: I don't have any -- I guess
 19 one question I had is you heard Public Counsel say,
 20 that of course, you could simply sell your Washington
 21 territory and walk away.

22 Is that -- is that a reasonable option as
 23 far as you're concerned?

24 MR. ROGALA: Chair Danner, I was hoping you
 25 wouldn't ask.

1 In Warren Buffett's letter to shareholders
 2 in 2023, he did signal that municipalization is an
 3 option. Public power is an option if state legislatures
 4 and regulatory Commissions do not find some way to
 5 balance the risk proposed -- the risk raised by
 6 blockbuster wildfire litigation.

7 We are not considering any efforts to sell
 8 or engage in municipalization or public power in
 9 Washington, but we -- we can't predict the future. And
 10 so, um, yeah.

11 CHAIR DANNER: And in municipalization, of
 12 course, it's the company would exit and receive through
 13 an eminent domain evaluation.

14 But the existence of the risks that we've
 15 been talking about would affect the value of the company
 16 and the ability of the company to take its investment
 17 back; is that correct?

18 MR. ROGALA: Absolutely.

19 Prior to my practice with utility
 20 commissions, I worked for a private firm in Missoula and
 21 was involved with a condemnation of the Missoula Water
 22 Company, which is the largest condemnation proceeding in
 23 U.S. history in the last two decades. And that water
 24 utility was subject to a variety of the liabilities.
 25 And one of the sticking points in the judge's

1 not have sovereign immunity to have ownership over these
 2 issues because that allows for recovery with customers.

3 The second piece is who pays for these
 4 damages?

5 Say you have a wildfire that destroys a
 6 municipality's distribution infrastructure. They can
 7 always socialize that cost across the tax base and they
 8 do not need to earn a rate of return on their
 9 investments.

10 So they can effectively broaden the pool of
 11 who pays for these resources and lower the cost to
 12 harden or replace this infrastructure.

13 But in a -- an environment of dramatically
 14 increased capital costs, increased load, you know, those
 15 social -- those socialization questions, those tax
 16 questions, those become more burdensome and we see that
 17 with the repeal of the CCA initiative that's currently
 18 in Washington and these are real concerns.

19 So I -- I don't want to suggest that we are
 20 considering municipalization whatsoever. Let's make
 21 that clear.

22 But in responding to Public Counsel's
 23 hypothetical, it is not a rosy gilded path down that --
 24 that option and it would not effectively resolve the
 25 issues that, yeah, Commission Randahl raises, so.

1 determination of the valuation of the property is that
 2 really difficult sniff test.

3 How do you value the -- the rate base such
 4 that the, you know, taxpayers of that district here, you
 5 know, the municipali- -- municipality or the state,
 6 that's a -- you know, constitutionally supported by the
 7 Fifth Amendment. And that's a really difficult
 8 question, but it is impacted by existing liabilities.

9 CHAIR DANNER: All right. Thank you.

10 COMMISSIONER RANDAHL: But that suggestion
 11 to municipalize, that doesn't reduce the risk. It might
 12 reduce the risk to shareholders of the existing company,
 13 but it doesn't reduce the risk of liability for a
 14 municipal entity, which is subject to the same insurance
 15 issues and ability to raise credit but in a different
 16 way.

17 MR. ROGALA: Commissioner Rendahl, you --
 18 you raise a very good point. And I think there's two
 19 pieces here.

20 One, I think it's worse off for customers in
 21 terms of recovery. Because a municipality or a
 22 state-run utility has sovereign immunity and customers
 23 cannot sue for recovery of economic or noneconomic
 24 damages.

25 So I think you want private entities who do

1 CHAIR DANNER: The other question I want to
 2 ask you is you heard from Nash Callaghan that -- that
 3 having the ability to sue for negligence acts as a
 4 deterrent to the company from engaging in negligence.

5 And if we were to reduce the opportunities
 6 for damages, for noneconomic damages, what -- what is
 7 gonna keep -- I was gonna say "your feet to the fire,"
 8 but that's probably not the analogy I want. But you
 9 know what I mean.

10 What -- what are you going to do to ensure
 11 that you are going to operate the utility in a safe as
 12 manner as possible?

13 MR. ROGALA: Yeah. Great question,
 14 Chair Danner.

15 And I agree with Nash here. I mean,
 16 that's -- that's an easy economic incentive that could
 17 result from approval of our tariff.

18 But I think we have to look at this as the
 19 all-of-the-above strategy that we're considering. This
 20 is one piece of a regulatory and legislative strategy to
 21 improve our financial condition. This tariff proposal
 22 is at the far end of that strategy.

23 What happens if we get everything wrong?
 24 Right?

25 There's a lot of ways that we can never have

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1 to use this tariff. And that's the goal. We never have
2 to use this tariff. Right?

3 So what do we do before we get down here?

4 Well, the first approach is we work on our
5 wildfire mitigation plans. Where we actually spend the
6 money to prevent circumstances like this from happening
7 in the first place. We'll have plans that we file with
8 the Commission. Commission can approve. And subject to
9 additional investigation and engagement from
10 stakeholders, that's the checks and balances on whether
11 we're doing it right.

12 The next layer of protection is ensuring
13 that the premiums we pay for insurance are reasonable.
14 And that's the insurance -- the multi-state insurance
15 pool that we are currently working with stakeholders on
16 in all of our states that would create a type of
17 umbrella insurance policy, a self-insurance fund, that
18 would prevent us from having to be, you know -- to use
19 your words, Chair Danner -- our feet held to the fire by
20 insurance companies, because we're captive to the
21 policies that we have access to.

22 After the insurance pool, we also have the
23 wildfire fund and this would offset -- you know, all of
24 these details are currently being discussed in
25 confidential multi-stakeholder proceedings. But this

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1 fund would offset the expenses and damage awards from
2 specific wildfires subject to, you know, shareholder and
3 customer contributions that will be negotiated in each
4 state.

5 So you kind of have this really, you know,
6 multi-tiered process where the Commission can evaluate
7 the utility's actions to make sure that this free
8 ridership economic incentive problem that staff raises
9 doesn't get out of hand.

10 And -- and to be clear, we come before this
11 Commission every year. And so if in five years we have
12 upgraded credit, we're in a better financial position,
13 we're actually building assets instead of just signing
14 PPAs, then we can strip this back, you know, create a
15 cap on noneconomic damages or a more narrowed-in-scope
16 provision. Because we do not pretend to have an answer
17 and we're trying to -- we're doing what we can to
18 address this problem and the solution will change as we
19 move forward.

20 CHAIR DANNER: Thank you.

21 And I alluded to this earlier or maybe I
22 spoke on it directly.

23 Are you seeing the fear of liability would
24 affect the operations in -- in such that we would see an
25 uptick in public safety power shutoffs and the

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1 disruptions that those would cause as a way of avoiding
2 the potential for liability risks from operations during
3 conditions where you have to make a judgment call?

4 MR. ROGALA: Absolutely. And I'd point you
5 to recent articles in Oregon and Washington papers where
6 we've had PSPS events and that's the conservative
7 approach to minimize wildfire litigation. It's not
8 preferred, because of the obvious reasons, but it's...

9 COMMISSIONER DOUMIT: I -- just for the
10 record, I think I'm correct in this, but counsel for
11 Staff can correct me if I'm wrong.

12 Washington abolished sovereign immunity for
13 tort claims back in -- I think, in the '60s, Counsel. So
14 we may stand in a different place than some other
15 states.

16 MR. ROGALA: Commissioner Doumit, I would
17 love to be corrected. I was speaking off-the-cuff,
18 because that issue was not briefed in Public
19 Counsel's -- yeah. Thank you.

20 COMMISSIONER DOUMIT: No worries. Thank
21 you.

22 JUDGE BROWN: Are there are any further
23 questions?

24 All right. We'll now move to Staff's
25 rebuttal.

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1 MR. CALLAGHAN: Thank you, Your Honor.
2 I -- I'll be brief here.

3 Let's step back and take a look at the big
4 picture. The company's main argument here is that they
5 are suffering a bad financial situation primarily
6 because of the judgments in Oregon and California and,
7 specifically, because those judgments include a large
8 amount of noneconomic damages.

9 And let's just assume that the final numbers
10 that we have here that the appeals don't work, so let's
11 assume that those are the final numbers.

12 What they're asking the Commission to do
13 here is because of the company's financial situation due
14 to Oregon and California customers receiving noneconomic
15 damages, they're asking the Commission to prevent
16 Washington customers from potentially recovering those
17 same kinds of damages if a future wildfire event happens
18 in Washington.

19 In Staff's view, that is fundamentally
20 unfair and not in the public interest.

21 Thank you.

22 CHAIR DANNER: Thank you.

23 And, of course, the policy question here is:
24 Can the utility continue to provide safe/affordable/
25 reliable service without that reduction of risk?

20 (Pages 99 to 102)

1 We're having to -- it would be a trade-off.
 2 It would be a policy call. And I think we all
 3 acknowledge that it would be significant and
 4 unprecedented.
 5 But the question that I have is if you have
 6 a revenue requirement that is going through the roof to
 7 deal with these kinds of costs and then you have this --
 8 this is for the ratepayers' side but then you've got the
 9 shareholders' side to and it affects the ability to
 10 track investment.
 11 How do you address the policy issues with
 12 the conditions that you are advocating be maintained?
 13 MR. CALLAGHAN: Thank you, Your Honor.
 14 So, again, the -- the real question here is,
 15 okay, given that these judgments exist -- because I
 16 agree, we need to decide what to do. Right? Whether or
 17 not it's fair or unfair.
 18 The question here, though, is, is this the
 19 only avenue or is this the best avenue to address these
 20 financial concerns?
 21 And there are multiple ways that this could
 22 be addressed. You know, specifically, um, if you think
 23 about the wildfire insurance costs going through the
 24 roof, there may need to be a legislative solution to
 25 that. Right? Because it may be the case that no matter

1 way you slice this. We're already seeing this with what
 2 Utah has done and that's different than what Oregon has
 3 done. But, you know, states have to make their own
 4 decisions there.
 5 So no question, although you're welcome to
 6 respond.
 7 MR. CALLAGHAN: No. Thank you, Your Honor.
 8 COMMISSIONER DOUMIT: And just to follow-up
 9 on that, Counsel.
 10 You say a legislative fix is the way to go.
 11 Perhaps that's true. But I mean, it's still -- there's
 12 still the same unfairness in the disparate treatment
 13 between Washington residents and Oregon or California
 14 residents in that case if the legislature cut off
 15 economic damage. Isn't that case?
 16 MR. CALLAGHAN: So I was -- I was
 17 specifically talking about the -- the issue of
 18 ever-increasing wildfire insurance costs.
 19 So it may be the case that that issue
 20 would -- would need to be addressed from -- in some
 21 legislative --
 22 COMMISSIONER DOUMIT: Okay. So going back
 23 to just liability, then, you would say under your
 24 argument that what Utah did is, essentially, unfair to
 25 its residents because none of the other states in the

1 what the utilities do, the wildfire insurance companies
 2 are primarily worried with the fact that climate change
 3 is happening. And so it may be the case that no matter
 4 what the utility or the Commission does, those costs are
 5 going to increase and increase going on into the future.
 6 So that might require some kind of legislative solution.
 7 But for the Commission and the decision that
 8 we have today, really, the question is if we are going
 9 to address the company's financial situation, is the
 10 best vehicle to do that taking away the customers'
 11 ability to fully recover in the event of -- of a
 12 devastating wildfire when other states' customers have
 13 recovered those amounts or is it addressing their
 14 financial situation in some other way?
 15 CHAIR DANNER: Well, and I -- I would
 16 respond that, again, we're making policy calls and the
 17 policy calls require us to balance. And the other
 18 states may have made a decision that they're willing to
 19 have public service -- public safety power shutoffs more
 20 frequently, that they're willing to suffer from higher
 21 insurance rates and not fear the kind of blow back that
 22 that would entail because of the significant increase in
 23 rates that we've been seeing in recent years.
 24 So, you know, I'm not -- I think that
 25 there's going to be some differences amongst states any

1 footprint have done that yet; is that right?
 2 MR. CALLAGHAN: I think that the -- I would
 3 say that I think that's a fair argument to make.
 4 But I would say that I think that the direct
 5 comparison and the -- the argument that Washington
 6 residents now need to forgo the possibility of fully
 7 recovering -- specifically because California and Oregon
 8 customers have already gotten that kind of recovery in
 9 past cases, I think that that is -- again, fundamentally
 10 unfair.
 11 I do acknowledge that there -- regardless of
 12 how it happened, the company has a financial situation
 13 that the Commission may want to address in certain ways.
 14 Staff's position is this is -- it's either
 15 not the way to address it or this should at least be
 16 considered in a holistic manner. Not just approve this
 17 revision or not, but is this revision appropriate or
 18 should other, you know, ratemaking adjustments happen in
 19 order to alleviate this concern, if the Commission does
 20 find that it is a concern.
 21 COMMISSIONER DOUMIT: One last question.
 22 What about -- okay. In the number of
 23 possible sort of solutions -- and the company pointed
 24 out sort of three general -- I mean, you would just say,
 25 look, everything else but liability are damages capped;

1 is that right?
 2 MR. CALLAGHAN: Well, not necessarily. I
 3 think it just should be something that is considered
 4 among other possible proposals. And what we have here
 5 is just a -- essentially, a yes/no on one single
 6 proposal.
 7 COMMISSIONER DOUMIT: Thank you.
 8 MR. CALLAGHAN: Thank you.
 9 JUDGE BROWN: Are there any further
 10 questions at this point?
 11 All right. We will now move to Public
 12 Counsel's rebuttal.
 13 MS. JOHANSON-KUBIN: Thank you.
 14 I will just briefly note that RCW 19.86.170
 15 that was brought up by the company's counsel -- while it
 16 does provide that the company is not subject to certain
 17 unfair practices, it does not specifically exempt them
 18 from general doctrines of contract law such as
 19 unconscionability.
 20 And that is the extent of my rebuttal, but
 21 I'm happy to answer any questions.
 22 CHAIR DANNER: So can you define for me
 23 "unconscionability"?
 24 MS. JOHANSON-KUBIN: Yes. When a contract
 25 is so one-sided that a reasonable or informed person

1 to this proceeding?
 2 All right. So I --
 3 CHAIR DANNER: I do.
 4 JUDGE BROWN: Please.
 5 CHAIR DANNER: So we have -- we -- we've had
 6 some discussion today about -- there were a number of
 7 items that were not briefed. The power versus UTC case,
 8 the Bennett versus U.S. case, privileges and immunities,
 9 unconscionability, and, of course, the consumer
 10 protection statute 19.86.170.
 11 I was wondering, Judge, if you would
 12 entertain another round of briefs. Maybe limit it to
 13 five pages or maybe our counsel can -- the counsel that
 14 are present could -- could recommend something else.
 15 But I -- I would like to have a little
 16 additional briefing on those issues. Because, I think,
 17 especially the privileges and immunity issues are -- are
 18 important to us making a determination about what our
 19 legal authority is.
 20 MR. CALLAGHAN: Chair Danner, may I -- I
 21 offer a suggestion?
 22 CHAIR DANNER: Sure.
 23 MR. CALLAGHAN: So given that those
 24 arguments were made by specific parties, maybe instead
 25 of briefing, a bench request issued to those parties

1 would not ever agree to it but they do not have the
 2 choice.
 3 And I don't think that a reasonably informed
 4 person, given this circumstance, would agree to sign
 5 away their ability to recover for potentially massive
 6 damages that they incur.
 7 CHAIR DANNER: Even -- even if it meant that
 8 they might not receive electric service 24 hours a day
 9 or that their rates are going to double or triple?
 10 MS. JOHANSON-KUBIN: I don't know that I
 11 could speak to those specific facts. But I think that a
 12 reasonable person who was -- was really weighing, you
 13 know, could they afford a slightly higher monthly
 14 payment versus catastrophic damages, they could fall on
 15 that side.
 16 CHAIR DANNER: Okay. I mean, it's the kind
 17 of decisions we all make when we determine how much
 18 health insurance or auto insurance we get or life
 19 insurance for that matter.
 20 But yeah. So thank -- thank you for that.
 21 I have no further questions.
 22 JUDGE BROWN: Are there any further
 23 questions at this point?
 24 All right. Hearing none, are there any
 25 questions among the parties about next steps with regard

1 regarding their specific arguments today would be just
 2 more -- a more targeted way of addressing it.
 3 CHAIR DANNER: Well, that would be fine.
 4 Except that I would probably like to hear more than one
 5 perspective on it.
 6 So if Public Counsel raised the arguments, I
 7 would still like to have the company being able to
 8 respond. So I -- I don't think that we would require
 9 briefs if -- if you don't find that they would be of
 10 value to you or us to.
 11 But I wanted to make that opportunity
 12 available. And I don't think they have to be long
 13 briefs, but I would like them to be focused on those
 14 issues.
 15 MR. CALLAGHAN: Thank you, Your Honor.
 16 JUDGE BROWN: Would that be one round of
 17 briefs?
 18 CHAIR DANNER: Absolutely, just one.
 19 JUDGE BROWN: All right.
 20 CHAIR DANNER: And again, I -- I don't think
 21 we need a long leeway here. I think we could, you know,
 22 do this in -- in a week or a little bit more than that.
 23 But I think that can be discussed by counsel.
 24 JUDGE BROWN: I'm sorry. Was there
 25 something you wanted to add?

1 Okay. At this point -- at this point would
2 the parties brief the issues raised by Chair Danner in a
3 brief five pages or less to be due, I would say, one
4 week from today.

5 CHAIR DANNER: And, again, this is an
6 opportunity to submit briefs, not a requirement to
7 submit briefs.

8 MR. ROGALA: Your Honor, I -- I have no
9 concerns with that. Happy to send a short brief.

10 Just for expectation setting, the issues
11 would be Washington's right to privileges and immunities
12 and how that constitutional right could be relevant, if
13 at all, to this case through the Bennett case.

14 Second, addressing how unconscionability is
15 relevant to Commission decisions; specifically that
16 statute -- or unconscionability under the common law as
17 well. Because I understand Public Counsel had that
18 rebuttal.

19 But was there a third issue?

20 CHAIR DANNER: No. There was the power
21 versus UTC case with -- which dealt with whether --
22 whether 440 was supreme and controlling.

23 MR. ROGALA: I believe that was Public
24 Counsel's 1980-case, but.

25 CHAIR DANNER: Yeah. It's not in their

1 MS. JOHANSON-KUBIN: Your Honor, may we have
2 up to 7 pages just in case, since we have so many issues
3 here?

4 JUDGE BROWN: Seven pages is acceptable.

5 MS. JOHANSON-KUBIN: Thank you.

6 JUDGE BROWN: Are there any further
7 questions at this point?

8 All right. I would like to thank all of the
9 parties and their representatives. And we are adjourned
10 and we are off the record. Thank you.

11
12 (Hearing adjourned at 11:08 a.m.)
13
14

1 table of authorities, so they didn't cite it in the
2 brief.

3 MR. ROGALA: Okay. Understood. No concerns
4 from PacifiCorp.

5 JUDGE BROWN: All right.

6 COMMISSIONER RANDAHL: And did I also
7 understand you wanted perspective on the RCW 19.86.170,
8 the Consumer Protection Act argument?

9 CHAIR DANNER: Yeah. And I think that --
10 that fit in with the unconscionability argument as well.

11 I suppose I should ask counsel whether
12 they -- do you believe five pages is enough to cover
13 those four or five issues?

14 MR. CALLAGHAN: So, Your Honor, after
15 tomorrow, I'm going back on paternity leave for a month.

16 But given that this -- these issues were not
17 raised by Staff, I would just expect Staff to file a
18 note saying that we are not filing a brief because these
19 issues were not raised by us.

20 CHAIR DANNER: And I -- I -- honestly, I
21 don't even think such a notice is required. I think
22 this is a -- I'm -- I want to provide parties the
23 opportunity and they're not required to take this
24 opportunity.

25 MR. CALLAGHAN: Thank you, Your Honor.

1
2 C E R T I F I C A T E

3
4
5 STATE OF WASHINGTON)

) ss.

6 COUNTY OF KITSAP)

7
8 I, CRYSTAL R. McAULIFFE, a Certified Court
9 Reporter in and for the State of Washington, do hereby
10 certify that the foregoing transcript of the hybrid oral
11 argument on AUGUST 1, 2024, is true and accurate to the
12 best of my knowledge, skill and ability.

13 IN WITNESS WHEREOF, I have hereunto set my hand
14 and seal this 15th day of August, 2024.

15
16
17 *Crystal McAuliffe*



18 CRYSTAL R. McAULIFFE, RPR, CCR #2121
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