

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	DOCKET UE-230877
Complainant,	ORDER 04
v.	
PACIFICORP D/B/A PACIFIC POWER & LIGHT COMPANY,	FINAL ORDER
Respondent.	

SUMMARY

Synopsis: PacifiCorp seeks to receive Commission approval of proposed revisions to its WN U-76 tariff. Specifically, the Company proposes to modify Rule 4 of its General Rules and Regulations – Application for Electric Service, Section H – Limitation of Liability. PacifiCorp’s proposed modification presents serious questions regarding the Commission’s authority and the burden of liability, in the wake of the recent rash of wildfires in the Pacific Northwest. PacifiCorp’s filing presents two issues for consideration: 1) our legal authority to approve the proposed tariff; and 2) if the Commission has such authority, whether approving the proposed tariff would be in the public interest. On the first issue, we find that we do not have authority to approve the tariff revision, because doing so would violate RCW 80.04.440. Consequently, we do not address the second issue. Therefore, we reject PacifiCorp’s proposed tariff.

BACKGROUND

1 On October 24, 2023, PacifiCorp d/b/a Pacific Power & Light Company (PacifiCorp or Company) filed with the Washington Utilities and Transportation Commission (Commission) revised tariff sheets to its WN U-76 tariff. The Company proposes to modify Rule 4 of its General Rules and Regulations – Application for Electric Service, Section H – Limitation of Liability. The tariff sheets had an effective date of November

27, 2023.¹

- 2 In its revised tariff sheets, the Company proposes limiting its liability to actual economic damage. In short, PacifiCorp alleges that by taking service, a customer would agree to waive and release the Company from any and all claims for special, noneconomic, punitive, incidental, indirect, or consequential damages as part of any claim against the Company related to or arising from the Company's operations or electrical facilities.
- 3 Commission Staff (Staff) and the Assistant Attorney General (AAG) representing Staff met with the Company to discuss their concerns with and opposition to the proposed language. Staff and its counsel raised concern that the language proposed by the Company is counter to RCW 80.04.440, which states:

In case any public service company shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by any law of this state, by this title or by any order or rule of the commission, such public service company shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom, and in case of recovery if the court shall find that such act or omission was willful, it may, in its discretion, fix a reasonable counsel or attorney's fee, which shall be taxed and collected as part of the costs in the case. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any person or corporation.

- 4 The tariff revision contains this savings language: "[t]his provision shall not be binding where state law disallows limitations of liability," Staff argued that the tariff revision either has no impact in light of RCW 80.04.440, in which case the revision serves no purpose, or the revision does limit liability, in which case the revision should be rejected. Staff requested that the Company either withdraw the tariff filing or extend the effective date to continue discussions on the proposed language. On November 13, 2023, the Company filed revised tariff sheets extending the effective date to December 29, 2023.²
- 5 On December 20, 2023, the Company filed additional comments requesting that the Commission approve the tariff revisions. The Company argued that its proposed tariff revisions are consistent with Washington state law and that limitations of liability in

¹ *Wash. Utils & Transp. Comm'n v. Pac. Power & Light Co.*, Docket 230877, Tariff Filing, Tariff Sheets for WN U-76 (October 24, 2023).

² *Id.*, Amended Tariff Filing, Tariff Sheets for WN U-76 (November 13, 2023).

utility tariffs are common affirmative defenses. PacifiCorp further argued that its proposed tariff revisions are consistent with other limitations on liability approved by the Commission in the past.

6 Following the Company's additional filed comments, Staff modified its recommendation to request that the Commission suspend the matter and initiate an adjudication.

7 On December 21, 2023, Sierra Club filed comments on PacifiCorp's proposed revisions to Rule 4. In its comments, Sierra Club opposed the tariff revisions and argued that they are not in the public interest, requesting that the Commission reject the proposed revisions, or, in the alternative, hold proceedings to determine the legal and policy implications of the proposed revisions.

8 Following discussion at its December 21, 2023, open meeting, the Commission issued Order 01 on December 22, 2023, suspending the November 13, 2023, tariff filing and requiring briefing to determine the legal question of whether the Company's proposal is authorized by statute and, if so, whether the proposal is consistent with the public interest. Order 01 also authorized hearings in this matter, including public comment hearings.

9 On February 6, 2024, the Commission convened a virtual prehearing conference before Administrative Law Judge James E. Brown II.

10 During the prehearing conference, Staff requested a protective order. In response, the presiding administrative law judge granted that request and stated that a protective order setting forth protective provisions would be issued in Order 03 of this docket.

11 On February 15, 2024, the Commission entered Order 02, Prehearing Conference Order and Notice of Oral Argument (Order 02) in the above-referenced docket. Order 02 established a procedural schedule.

12 Order 02 also provided dates for the Company to submit an Initial Brief, for Public Counsel and Staff to submit Response Briefs, and for the Company to submit a Reply Brief, in preparation for the Oral Argument. The procedural schedule also established a date of June 27, 2024, for oral argument on the briefs, if deemed necessary.

13 On February 15, 2024, the Commission entered Order 03, Protective Order pursuant to RCW 34.05.446 and WAC 480-07-420 to govern the discovery and use of information designated as confidential in this proceeding.

14 On March 8, 2024, the Company submitted its Initial Brief. On May 3, 2024, Public

Counsel and Staff submitted their Response Briefs. On May 23, 2024, the Company submitted its Reply Brief.

- 15 On June 4, 2024, the Commission issued a Notice of Opportunity for Amicus Briefing and Notice of Revised Procedural Schedule, which allowed interested persons to provide additional input on the issues this case raises, in order to more fully develop the record in this proceeding. The Notice stated that interested parties were to file their amicus briefs by June 18, 2024, and that the date would be moved from June 27, 2024, to August 1, 2024.
- 16 The Commission conducted public comment hearings on June 20, 2024, and August 1, 2024, to allow the public an opportunity to comment on PacifiCorp's Customer Notice regarding its proposed Limitation of Liabilities.
- 17 On June 18, 2024, the Commission received an amicus brief from Puget Sound Energy and Avista Corporation d/b/a Avista Utilities, filing jointly, and from the NW Energy Coalition (NWEC), The Energy Project, and Sierra Club, also filing jointly.
- 18 On August 1, 2024, the Commission convened an oral argument hearing. Zachary Rogala represents PacifiCorp. Nash Callaghan, Assistant Attorney General, Olympia, Washington, represents Staff. Jessica Johanson-Kubin, Assistant Attorney General, Seattle, Washington, represents the Public Counsel Unit of the Attorney General's Office (Public Counsel).
- 19 At the conclusion of the oral argument, the Commission requested the parties submit supplemental briefs to address a number of issues that would aid in the deliberation over the legal questions presented in this matter.³ These issues are: 1) the Commission's authority in light of RCW 80.04.440 based on the ruling in *People's Org. For Washington Energy Res. (POWER) v. State of Wash. Utilities & Transp. Comm'n*, 101 Wash.2d 425, 679 P.2d 922 (1984); 2) whether PacifiCorp's proposed tariff provision triggered the privileges and immunities clause in the context of *Bennett v. United States*, 539 P.3d 361 (Wash. 2023); and 3) whether PacifiCorp's proposed tariff provision is unconscionable in the context of the Washington Consumer Protection Act (CPA), Chapter 19.86 RCW.
- 20 In order to aid in its review and consideration of the legal and policy effects of PacifiCorp's proposed tariff revisions, the Commission requested that the parties submit

³ Danner, TR 109:5-10.

supplemental briefs by August 8, 2024.⁴

21 On August 8, 2024, Public Counsel filed a Public Comment Exhibit. Public Counsel received a total of 20 comments regarding PacifiCorp's Customer Notice, regarding its proposed Limitation of Liabilities.

22 On August 8, 2024, Public Counsel and PacifiCorp each submitted supplemental briefs.

PUBLIC COMMENTS

23 The Commission appreciates the comments submitted by members of the public in this matter. Public comments are a vital part of our regulatory process, and we are always grateful for public participation in our proceedings. The majority of commenters were opposed to the proposed Limitation of Liabilities, with 13 of 20 comments against it. There was one comment in favor of the proposed Limitation of Liabilities, and five comments were marked as undecided. Many commenters expressed concerns about releasing the Company from liability for its own negligence. A common theme among the commenters was that releasing the Company from liability would allow it to cut corners and not operate the system diligently. The undecided commenters generally sought more information and clarification before taking a position.

AMICUS BRIEFS

24 The Commission appreciates the briefs submitted by interested persons addressing the legal question of whether the Company's proposed tariff is authorized by statute and, if so, whether such proposed tariff is consistent with the public interest.

PARTIES' BRIEFS

PacifiCorp

25 In its Brief, the Company argues that the Commission has the power to limit the Company's liability to economic damages that result from the provision of electric services.⁵ The Company asserts that the Commission has plenary jurisdiction over utility tariff terms and conditions.⁶ The Company relies on *Markoff v. Puget Sound Energy, Inc.*, 447 P.3d 577 (2019), and argues that Washington courts have interpreted RCW

⁴ Staff's Counsel indicated at the August 1, 2024, oral argument Staff would not submit a supplemental brief because they did not raise issues at the hearing that warrant them to file a supplemental brief. Callaghan, TR 112: 14-19.

⁵ PacificCorp Brief, ¶¶4-10.

⁶ PacificCorp Brief, ¶6.

80.04.440 to preserve the Commission’s power to limit utility liability in Commission-approved tariffs.⁷ The Company further maintains that limitations of liability in utility tariffs are affirmative defenses that preempt RCW 80.04.440.⁸

26 In addition, the Company argues that the approval of its tariff provision would support its financial health and continued provision of low-cost electric services for its Washington customers.⁹ The Company asserts that it faces financial pressures from recent Oregon jury verdicts related to devastating wildfires in that state.¹⁰ The Company argues that the financial judgment has lowered its credit rating from “A” to “BBB+” with a “negative outlook.”¹¹ The Company claims that the credit downgrades have a material impact on its liquidity and may result in its inability to maintain sufficient levels of cash or obtain necessary short and long term financing to fund its operations and financial obligations.¹² The Company argues that the verdicts also impact the Company’s ability to procure insurance at reasonable costs.¹³

27 The Company contends that despite aggressive remedial measures to protect itself against further injury to its financial health, it is still vulnerable to financial pressures because of the lack of reasonable limits for noneconomic damages in Washington. The Company reasons that the complexity of today’s electric grid presents jurors with having to navigate technical details to assign fault and evaluate damages. By limiting liability to economic damages from the provision of electric services, the Company is protected against the material threat from disproportionate noneconomic damages.¹⁴ The Company concludes reasonable limitations on liability are essential for all businesses, particularly for electric companies and their customers as liability limitations play a critical role in protecting customers from the potential for dramatic rate increases caused by uncapped damage awards.¹⁵

28 The Company argues that this initial downgrade has already impacted the Company’s ability to raise capital and that without a damage limit it will encounter increased

⁷ PacificCorp Brief, ¶9.

⁸ PacificCorp Brief, ¶8.

⁹ PacificCorp Brief, ¶¶12-29.

¹⁰ PacificCorp, Brief, ¶ 14.

¹¹ PacificCorp Brief, ¶¶16-17.

¹² PacificCorp Brief, ¶17.

¹³ PacificCorp Brief, ¶18.

¹⁴ PacificCorp Brief, ¶¶19-20.

¹⁵ PacificCorp Brief, ¶21.

borrowing costs that will constrain its financial flexibility and affect its capacity to economically invest in infrastructure, renewable energy projects, and other projects to fulfill its legal and regulatory commitments.¹⁶

- 29 The Company asserts the Commission has numerous precedents that have limited damages for various utility services to actual economic damages.¹⁷ It also claims that its petition is consistent with sister-state utility commission precedents.¹⁸

Commission Staff

- 30 Staff argues in its response brief that the proposed revision should be rejected both as a matter of public policy and as a matter of law.¹⁹
- 31 Staff contends that, as a matter of public policy, the Company's tariff revisions fail, as the Company has done little to demonstrate that the proposed revision is in the public interest, and it is doubtful that this proposed revision would in fact have the impact that the Company intends.²⁰
- 32 Staff argues that the Commission must consider its statutory duties when deciding whether the Company's proposal is in the public interest. As such, regardless of whether the Commission concludes it has the authority to grant the Company's proposed tariff revision, the question is whether doing so would be consistent with the Commission's responsibility of ensuring the public safe, adequate, and sufficient utility services at just, fair, reasonable, and sufficient rates.²¹ Staff further argues that current public policy appears to favor an incentive structure that encourages greater vigilance, not less.²²
- 33 Staff asserts that the Commission should recognize the sweeping nature of the Company's proposed limit on damages and the impact it would have on customers. Staff argues that the proposed tariff would limit a court's ability to make those plaintiffs whole and could dissuade plaintiffs from seeking complete recovery of their actual economic damages. Staff suggests the policy trade-off would be slightly lower rates for all customers in exchange for a potentially severe reduction in available recovery for

¹⁶ PacificCorp Brief, ¶24.

¹⁷ PacificCorp Brief, ¶30.

¹⁸ PacificCorp Brief, ¶34.

¹⁹ Commission Staff Response Brief, ¶22.

²⁰ Commission Staff Response Brief, ¶23.

²¹ Commission Staff Response Brief, ¶24.

²² Commission Staff Response Brief, ¶24.

customers impacted by a devastating event.²³

34 Staff argues that the proposed language is so broad that it will likely result in unintended consequences as the proposed limitation applies to any action arising out of the provision of electric service, not just wildfire-related litigation.²⁴

35 Staff asserts that the Company's current proposal is one-sided; it provides a benefit only to the Company by shifting potential losses onto ratepayers despite the Company claiming the revision will lower the cost of insurance and improve credit ratings, which would (eventually) be reflected in customer rates.²⁵

36 Staff maintains that the Company has provided no evidence to support a claim that Washington state courts have developed unreasonable standards for the claims from which the Company seeks to limit its liability, and that the Commission should not give credence to the Company's assertion that civil courts are prone to erroneously find utilities liable or grant excessive awards to plaintiffs in cases against utilities.²⁶

37 Staff asserts that, as a matter of law, the Company's proposed tariff revision would contradict the plain language of RCW 80.04.440, given that the proposed tariff limits damages to "actual economic damages," except "where state law disallows limitations on liability."²⁷ The statute states plainly that when a utility commits a violation of some kind "such public service company shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom."²⁸

38 Specifically, Staff asserts that the Commission does not have the authority to directly contradict the plain language of RCW 80.04.440 in an approved tariff and the Company confuses the ability to exempt the utility from liability under certain circumstances through an approved tariff with the authority to dictate the types of damages that are available once a court finds that the utility is liable.²⁹ Staff contends that the cases the Company cites do not support its preemption argument.³⁰

²³ Commission Staff Response Brief, ¶25.

²⁴ Commission Staff Response Brief, ¶26.

²⁵ Commission Staff Response Brief, ¶28.

²⁶ Commission Staff Response Brief, ¶27.

²⁷ Commission Staff Response Brief, ¶29.

²⁸ Commission Staff Response Brief, ¶29.

²⁹ Commission Staff Response Brief, ¶32.

³⁰ Commission Staff Response Brief, ¶33.

Public Counsel

- 39 Public Counsel argues that the Company’s proposal is not authorized under Washington law and is counter to RCW 80.04.440. Public Counsel argues that the statute does not create a private cause of action; rather, “it preserve[s] causes of action for private claims related to utility misconduct while adding the potential for recovery of attorney fees by successful claimants.”³¹
- 40 Public Counsel asserts that while tariffs properly filed and approved by the Commission have the authority of law, the Commission would exceed its authority if it approved a tariff that conflicts with existing statutory law. This, Public Counsel argues, is supported by the Washington Supreme Court and is consistent with the principle that the Commission, as an administrative agency, must act within the bounds of the authority expressly granted by statute.³²
- 41 Public Counsel contends that the Company’s proposed limitation of liability conflicts with the rights of utility customers under RCW 80.04.440, which makes utility companies liable ... for all loss, damage or injury caused” by their unlawful acts and the Washington authorities discussed by PacifiCorp do not compel a different conclusion.³³
- 42 Although the Company asserts the proposed tariff revision is consistent with Commission precedent approving limitations of liability in tariffs, Public Counsel argues that no precedent the Company cited conflicts with RCW 80.04.440, nor is as sweeping as the one it proposes.³⁴
- 43 Public Counsel maintains that the Company’s arguments that (1) Washington law controls if there is any question whether PacifiCorp’s proposed tariff conflicts with Washington law, and (2) that limitations of liability provisions in utility tariffs preempt RCW 80.04.440, cannot be squared.³⁵
- 44 Public Counsel argues that the Company’s proposed tariff revision fails to meet the Commission’s “just and reasonable” standard and is therefore not in the public interest. Namely, the proposed tariff would foreclose recovery of not only noneconomic damages (i.e., subjective, nonmonetary losses), but also indirect or consequential monetary losses

³¹ Public Counsel, Initial Brief, ¶7.

³² Public Counsel Initial Brief, ¶9, 10.

³³ Public Counsel Initial Brief, ¶11-20.

³⁴ Public Counsel Initial Brief, ¶21-24.

³⁵ Public Counsel Initial Brief, ¶25-27.

that would typically be considered economic damages, a result that would be substantively unconscionable.³⁶

45 Public Counsel contends that the scope of the Company’s proposed limited liability waiver far exceeds the liability waivers at issue in the Company’s cited authorities, as the proposed provision would apply to every potential cause of action, regardless of the Company’s degree of culpability.³⁷

46 Public Counsel further argues that the Company nowhere represents that it will not seek to raise its rates even if the proposed limitation of liability is approved, describing the tariff revision as merely another mechanism to support the Company’s financial health suggesting its customers will need to bear the loss either way.³⁸

47 Finally, Public Counsel argues that the proposed liability waiver is not limited to damages caused by wildfires and PacifiCorp’s proposed tariff revision would insulate it from damages negligently—or even willfully or intentionally—caused by its employees acting in the scope of their employment in any and all circumstances when the only risk the Company asserts to its financial health is wildfire litigation.³⁹

PacifiCorp Reply Brief

48 In its reply brief, PacifiCorp agrees with Public Counsel that Washington courts “have had few opportunities to consider the purpose and scope of RCW 80.04.440.”⁴⁰ But in the select instances where they have, courts have broadly supported and upheld the Commission’s power to approve utility limitations of liability. PacifiCorp contends that “[v]irtually all jurisdictions have enforced such limitations and disclaimers of liability, whether contained in a filed tariff or a private contract, unless the company’s negligence is willful or gross.”⁴¹

49 PacifiCorp suggests that “if the Commission has concerns with PacifiCorp’s proposal, it could narrow its scope with one of several reasonable options: by excluding willful or gross negligence; by amending the language to reflect the overlapping consensus of Staff and Public Counsel’s view of the Commission’s authority; or by rejecting the proposal

³⁶ Public Counsel Initial Brief, ¶28-31.

³⁷ Public Counsel Initial Brief, ¶32-34.

³⁸ Public Counsel Initial Brief, ¶35.

³⁹ Public Counsel Initial Brief, ¶36.

⁴⁰ PacifiCorp Reply Brief, ¶3 citing Public Counsel, Initial Brief, ¶8.

⁴¹ PacifiCorp Reply Brief, ¶3 citing *Allen v. General Telephone*, 578 P.2d 1333, 1336 (1978).

without prejudice, and open a rulemaking proceeding to consider the policy issues implicated by PacifiCorp’s proposal.”⁴²

50 PacifiCorp cites to Commission-approved tariffs of Avista and Puget Sound Energy that limit liability. By Staff’s and Public Counsel’s reasoning, the Company says, these tariffs would also be deemed unlawful.⁴³ PacifiCorp believes that Commission-approved tariff’s cannot be unconscionable, and that its proposed tariff is narrowly tailored, not overbroad.⁴⁴ Finally, PacifiCorp again argues that if the Commission has concerns with the Company’s proposed tariff, it can consider several alternatives, including narrowing the proposed tariff’s language, modifying the language so that limitations of liability apply to violations of Commission orders or rules, or addressing its concerns through rulemaking.⁴⁵

SUPPLEMENTAL BRIEFS

PacifiCorp

51 In its supplemental brief, the Company argues that its tariff is constitutional because it does not implicate a fundamental right of Washington citizenship.⁴⁶ The Company argues that under *Bennett v. United States*, 539 P.3d 361 (Wash. 2023), fundamental rights include the “right to the usual remedies to collect debts, and to enforce other personal rights,” and that non-economic damages are not a fundamental right.⁴⁷ With respect to the privileges and immunities argument, the Company maintains that its tariff would apply uniformly to all of its Washington customers, where it is not manifestly arbitrary or unreasonable.⁴⁸ In addition, the Company argues that the Commission’s decisions cannot be deemed unconscionable because the Washington’s Unfair Business Practices Act, commonly referred to as the Washington Consumer Protection Act, or CPA, Chapter 19.86 RCW, does not apply to utilities.⁴⁹

⁴² PacifiCorp Reply Brief, ¶5.

⁴³ PacifiCorp Reply Brief, ¶¶10-19.

⁴⁴ PacifiCorp Reply Brief, ¶¶20-25.

⁴⁵ PacifiCorp Reply Brief, ¶¶26-30.

⁴⁶ PacifiCorp Supplemental Brief, ¶¶4-6.

⁴⁷ PacifiCorp Supplemental Brief, ¶¶6-7 citing *Bennett v. United States*, 539 P.3d 361, 368-369 (Wash. 2023).

⁴⁸ PacifiCorp Supplemental Brief, ¶9.

⁴⁹ PacifiCorp Supplemental Brief, ¶12 citing PacifiCorp Repl. Br., at 9-10; RCW 19.86.170 (“Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws

Public Counsel

- 52 Public Counsel cites *People's Org. For Washington Energy Res. v. State of Wash. Utilities & Transp. Comm'n*, 101 Wash.2d 425, 679 P.2d 922 (1984), in which the Court held that by allowing a construction work in progress (CWIP) that was not used and useful to be recovered in rates, the Commission exceeded its authority under RCW 80.04.250.⁵⁰ Public Counsel argues that similarly here the Commission cannot exceed the plain and unambiguous language of RCW 80.04.440. Public Counsel also cites *Bennett* and argues that the right to pursue negligence causes of action in courts is a fundamental right of state citizenship.
- 53 Public Counsel notes that under the CPA, “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”⁵¹ However, it acknowledges that the CPA does not apply to actions regulated by the Commission.⁵²

DISCUSSION AND DECISION

- 54 The Legislature has entrusted the Commission with broad discretion to determine rates and services for regulated industries.⁵³ In addition, the Commission shall “[r]egulate in the public interest.”⁵⁴ Moreover, the burden of proving that a proposed increase is just and reasonable is upon the public service company.⁵⁵
- 55 As was stated previously in this order, PacifiCorp filed revised tariff sheets to its WN U-76 tariff. Specifically, the Company proposes to modify Rule 4 to read:

administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States . . .”); *Tanner Elec. Co-op v. Puget Sound Power & Light Co.*, 128 Wash.2d 656, 911 P.2d 1301 (1996).

⁵⁰ Public Counsel Supplemental Brief, ¶¶2-3.

⁵¹ Public Counsel Supplemental Brief, ¶15 citing RCW 19.86.020.

⁵² Public Counsel Supplemental Brief, ¶ 15 citing RCW 19.86.170.

⁵³ See RCW 80.28.020; *US West Commc’ns., Inc. v. Wash. Utils. & Transp. Comm’n*, 134 Wn.2d 48, 56, 949 P.2d 1321 (1997).

⁵⁴ RCW 80.01.040(3).

⁵⁵ RCW 80.04.130(1); see also RCW 80.04.010(23) which provides, among other things, “Public service company” includes every gas company, electrical company, telecommunications company, wastewater company, and water company.

H. LIMITATION OF LIABILITY

In any action between the parties arising out of the provision of electric service, the available damages shall be limited to actual economic damages. Neither party shall be liable to the other party for special, noneconomic, punitive, incidental, indirect, or consequential damages (including, without limitation, lost profits), regardless of whether such action is based in contract, tort (including, without limitation, negligence), strict liability, warranty or otherwise. By receiving electric service, Customer agrees to waive and release Company from any and all claims for special, noneconomic, punitive, incidental, indirect, or consequential damages (including, without limitation, lost profits) as part of any claim against Company related to or arising from Company's operations or electrical facilities. This provision shall not be binding where state law disallows limitations of liability.

56 The language in the proposed tariff raises a significant question regarding the legality of limiting PacifiCorp's liability. To that end, the Commission directed the parties to submit briefs based on the following questions: 1) whether the Company's proposal is authorized by statute and, if so, 2) whether the proposal is consistent with the public interest.⁵⁶

57 Additionally, PacifiCorp and Public Counsel have submitted briefs discussing the legal questions presented by the proposed language in Rule 4. The Commission requested that the parties submit supplemental briefs on the following issues: 1) the Commission's authority in light of RCW 80.04.440 based on the ruling in the *POWER* case; 2) whether PacifiCorp's proposed tariff provision triggered the privileges and immunities clause in the context of the *Bennett* case; and 3) whether PacifiCorp's proposed tariff provision is unconscionable in the context of the Washington CPA, Chapter 19.86 RCW.⁵⁷

Whether PacifiCorp's Tariff Proposal Is Authorized by Statute

58 We turn first to the question of whether the Company's proposed Rule 4 is authorized by RCW 80.04.440 or by Washington law, in a broader sense.

59 PacifiCorp argues that Washington case law has construed RCW 80.04.440 as granting the Commission the authority to limit utility liability in Commission-approved tariffs.⁵⁸

⁵⁶ Prehearing Conference Order, ¶ 10. This question turns on whether or not the Commission has the authority to approve a tariff provision that will limit liability for PacifiCorp customers if they have cause of action based on conduct or actions of the utility.

⁵⁷ See paragraph 19 of this order.

⁵⁸ PacificCorp Brief, ¶9.

In support of its position, the Company cites to *Markoff v. Puget Sound Energy, Inc.*, 447 P.3d 577 (2019),⁵⁹ as well as *Allen v. General Telephone Company of the Northwest*,⁶⁰ *National Union Insurance Company of Pittsburgh, Pa. v. Puget Sound Power & Light*,⁶¹ and *Citoli v. City of Seattle*.⁶² Public Counsel and Commission Staff also cite and analyze these cases in their construction of RCW 80.04.440.⁶³

60 Upon review of the arguments, we reject PacificCorp’s arguments, and find the analysis and arguments put forth by Public Counsel and Staff to be persuasive concerning the construction of RCW 80.04.440 and the application of the cases noted above.

61 In *Markoff*, the trial court granted Puget Sound Energy’s (PSE) motion to dismiss the plaintiff firefighter’s negligence claim, which was brought after a decommissioned pipeline owned by the company exploded, injuring the firefighter. On appeal, the Washington Court of Appeals upheld the trial court’s decision, and held that the statute does not create a private cause of action; rather, it “preserve[s] causes of action for private claims related to utility misconduct while adding the potential for recovery of attorney fees by successful claimants.”⁶⁴ The Court of Appeals went on to add that liability under the statute is “predicated upon a violation of law or safety regulation.”⁶⁵ This follows the holding in *National Union*, in which the Court of Appeals stated that predicate violations may include claims for negligence, gross negligence, and breach of contract.⁶⁶ With that baseline established in *Markoff* and *National Union*, we address whether RCW 80.04.440 allows the Commission to approve a tariff provision that will limit PacificCorp’s liability.

62 The Company argues that when it became a Washington utility it lost the right to negotiate specific terms and conditions to protect either the Company or its customers in contract. The Company claims its statutory duty is to provide services that are “safe, adequate and efficient, and in all respects just and reasonable,”⁶⁷ at rates that are “just,

⁵⁹ *Markoff v. Puget Sound Energy, Inc.*, 9 Wn. App. 2d 833, 848–49, 447 P.3d 577 (2019).

⁶⁰ *Allen v. Gen. Tel. Co.*, 20 Wn. App. 144, 149, 578 P.2d 1333 (1978).

⁶¹ *Nat’l Union Ins. Co. v. Puget Sound Power & Light*, 94 Wn. App. 163, 170, 972 P.2d 481 (1999).

⁶² *Citoli v. City of Seattle*, 115 Wn. App. 459, 465–66, 61 P.3d 1165 (2002).

⁶³ Commission Staff, Response Brief and Public Counsel, Initial Brief. [Need specific cites here]

⁶⁴ *Markoff v. Puget Sound Energy, Inc.*, 9 Wn. App. 2d 833, 848–49, 447 P.3d 577 (2019).

⁶⁵ *Id.* at 848 (citing *Zamora v. Mobil Corp.*, 104 Wn.2d 199, 209, 704 P.2d 584 (1985)).

⁶⁶ *Nat’l Union Ins. v. Puget Sound Power*, 94 Wn. App. 163, 174-75, 972 P.2d 481 (1999).

⁶⁷ PacificCorp Brief, ¶4 referencing RCW 80.28.010(2).

fair, reasonable and sufficient.”⁶⁸ PacifiCorp further states that “these requirements cannot be waived by a written or oral agreement between PacifiCorp and its customers.”⁶⁹

63 PacifiCorp asserts “it is the Commission’s role to determine what constitutes just, reasonable, and compensatory rates and services,”⁷⁰ and that “[I]mplementation of liability provisions are an inherent part of the ratemaking process.”⁷¹ The Company further asserts that where Washington statutes vest this responsibility to approve liability limitations with the Commission, once a tariff becomes effective, limitations are “part of the law” and are “binding upon the customer whether he actually knows of the limitation or not.”⁷² The Company posits that limitations of liability preempt RCW 80.04.440 and argues that a party seeking the benefit of RCW 80.04.440 must demonstrate that the underlying claim is viable and not subject to an affirmative defense.”⁷³ Thus, PacifiCorp concludes that limitations of liability in utility tariffs are affirmative defenses that preempt RCW 80.04.440.⁷⁴

64 We disagree with PacifiCorp’s conclusion. It is true that tariffs properly filed and approved by the Commission have the authority of law.⁷⁵ However, it is also true that the Commission would exceed its authority if it approved a tariff that conflicts with existing statutory law.⁷⁶ For instance, the Washington Supreme Court held in *POWER* that the Commission exceeded its authority by approving a rate increase that violated RCW

⁶⁸ PacificCorp Brief, ¶4 referencing RCW 80.28.010(1).

⁶⁹ PacificCorp Brief, ¶4 referencing RCW 80.28.010(12).

⁷⁰ PacificCorp Brief, ¶4 referencing RCW 80.28.020.

⁷¹ PacificCorp Brief, ¶9 referencing *National Union Ins. Co. of Pittsburgh, Pa. v. Puget Sound Power*, 972 P.2d 481 (1999) (citing *Lee v. Consolidated Edison Co.*, 98 Misc.2d 304, 413 N.Y.S.2d 826, 828 (N.Y.Sup.App.1978)).

⁷² PacificCorp Brief, ¶9 referencing *Allen*, 20 Wn. App. at 151 (string-citing *Cole v. Pacific Tel. & Tel. Co.*, 112 Cal.App.2d 416, 246 P.2d 686 (1952), *aff’d* *Hall v. Pacific Tel. & Tel.*, 20 Cal.App.3d 953, 98 Cal.Rptr. 128 (1971); *Wheeler Stuckey, Inc. v. Southwestern Bell Tel. Co.*, 279 F.Supp. 712 (W.D.Okl.1967); *Warner v. Southwestern Bell Tel. Co.*, 428 S.W.2d 596 (Mo.1968)).

⁷³ PacificCorp, Brief, ¶7 referencing *Markoff v. Puget Sound Energy, Inc.*, 447 P.3d 577, ¶ 34 (2019) (citing *Citoli v. City of Seattle*, 61 P.3d 1165 (2002) (utility’s alleged violation of regulation requiring minimization of service interruptions did not support RCW 80.04.440 claim due to city ordinance limiting utility’s liability)).

⁷⁴ PacificCorp Brief, ¶8.

⁷⁵ *Moore v. Pac. Nw. Bell*, 34 Wn. App. 448, 455, 662 P.2d 398 (1983).

⁷⁶ Public Counsel Brief, ¶9.

80.04.250.⁷⁷ The question in that case was whether the Commission properly granted a rate increase to a power company for its electrical operations. The Supreme Court held that including CWIP in the base rate violated RCW 80.04.250, which empowers the Commission to determine, for ratemaking purposes, the fair value of property “used and useful for service” in Washington.⁷⁸ The court determined that because CWIP was not “useful for service” the base rate violated the plain statutory language.

65 Similarly, in this case, the Commission must act within the bounds granted to it by statute. RCW 80.04.440 provides that utility companies “shall be liable ... for all loss, damage or injury caused” by their unlawful acts. PacifiCorp’s proposed tariff revision, however, would require utility customers to “waive and release ... any and all claims” for non-economic damages of any kind, as well as indirect economic damages. Approving the Company’s tariff revision would result in the direct contradiction of RCW 80.04.440 which allows recovery for all loss, damage or injury caused by unlawful acts of the utility.

66 We agree with the non-Company parties that we lack authority to approve the proposed language in Rule 4. This is a key fatal flaw in the Company’s argument.

67 In both its initial brief and reply brief,⁷⁹ the Company relied on the *Allen* case claiming that nearly all jurisdictions have enforced limitations of liability, unless the company’s conduct is willful or gross.⁸⁰ PacifiCorp’s proposed tariff revision, however, does not have an exception for willful conduct or gross negligence. Moreover, the discussion of limitation of liability in *Allen* does not even mention RCW 80.04.440, or whether a limitation of liability would violate that provision. Consequently, *Allen* is not helpful for the Company’s argument.

68 *National Union* does not help the Company either, as the facts in that case are distinguishable from this proceeding. In that case, the utility sought to rely on a tariff provision shielding it from liability for damages caused by service interruptions resulting from causes “beyond the Company’s reasonable control,” essentially a force majeure clause.⁸¹ The Court of Appeals read the force majeure provision to be consistent with

⁷⁷ *People’s Org. For Wash. Energy Res. v. Wash. Utils. & Transp. Comm’n*, 101 Wn. 2d 425, 430, 679 P.2d 922, 925 (1984) (hereinafter POWER); see also *Wash. Atty. Gen. Off., Pub. Couns. Unit v. Wash. Utils. & Transp. Comm’n*, 4 Wn. App. 2d 657, 680, 423 P.3d 861 (2018) (same).

⁷⁸ POWER, 101 Wn.2d at 429–30.

⁷⁹ PacifiCorp Brief, ¶9 and PacifiCorp Reply Brief, ¶ 3.

⁸⁰ *Allen v. General Telephone*, 578 P.2d 1333, 1336 (1978).

⁸¹ Nat’l Union Ins. Co., 94 Wn. App. at 168–69.

RCW 80.04.440. In short, the court held that the force majeure tariff provision did not relieve the utility from liability for its own negligence, despite there being a concurrent event beyond its control resulting in damages to its customers.⁸²

69 *Citoli* also concerned a force majeure clause. In that case, a municipal code provision limited Seattle City Light’s liability for interruption of electrical service due to circumstances beyond its control.⁸³ Law enforcement directed the utility to shut down services when protesters occupied a building. The affected business owner brought a cause of action for damages to his business. However, the court did not rely on the municipal code provision and held that because it was a situation beyond the utility’s control, the utility did not owe the plaintiff a duty. The court dismissed the plaintiff’s negligence claim as a matter of law.⁸⁴ Consequently, *Citoli*, like *National Union*, is factually distinguishable from this matter.

70 We turn now to PacifiCorp’s proposed “savings clause”, which states that “this provision shall not be binding where state law disallows limitations of liability.” PacifiCorp alleges that “if there is any question whether PacifiCorp’s tariff conflicts with Washington law, Washington law controls” and that its “proposal clarifies that the liability limitation can only be applied when consistent with Washington law.”⁸⁵ We reject PacifiCorp’s arguments on this issue. At best, the savings clause and PacifiCorp’s statement about Washington law controlling in the event of a conflict are circular or confusing, but PacifiCorp cannot have it both ways. Either the provision is consistent with Washington law, or it is not. If it is not consistent with the law, the Commission has no authority to approve it, and the savings clause is irrelevant and unenforceable. If the provision is consistent with Washington law, which it appears not to be, there is no need for the savings clause.

71 In light of the foregoing, we conclude that the tariff proposal, revised Rule 4, directly contradicts RCW 80.04.440. We also conclude that the statute is controlling. As such, we conclude that the tariff proposal is not authorized by law.

Whether PacifiCorp’s Tariff Proposal Is in the Public Interest

72 As we have determined RCW 80.04.440 is controlling, and that PacifiCorp’s tariff proposal is not authorized by law, there is no need for us to discuss and conclude whether

⁸² Nat’l Union Ins. Co., 94 Wn. App. at 169.

⁸³ *Citoli v. City of Seattle*, 115 Wn. App. 459, 465–66, 61 P.3d 1165 (2002).

⁸⁴ *Citoli v. City of Seattle*, 115 Wn. App. at 480.

⁸⁵ PacifiCorp Brief, ¶10.

the tariff proposal is in the public interest. We thank the parties, PacifiCorp, Public Counsel and Commission Staff for taking the time to brief this issue.

Commission Determination on Supplemental Briefs

73 For the reasons expressed above, we also decline to render a decision on the issues we requested the parties to analyze in their supplemental briefs. We recognize that these were difficult and challenging questions to address and thank the parties for taking the time to brief these issues for our consideration.

Conclusion

74 After reviewing the parties' briefs and oral argument, and for the reasons discussed above, PacifiCorp has not provided a clear legal basis that shows that the Commission is empowered to approve a proposed tariff provision that directly contradicts an existing statute. Therefore, we conclude that the Commission lacks the authority to approve PacifiCorp's proposed tariff.

75 The proposed tariff is outside the scope of statutory powers granted this Commission by the Washington Legislature. To be more specific, Washington courts have stated that administrative agencies, like this Commission, are creatures of the Legislature, without inherent or common law powers, and may exercise only those powers expressly granted to them and those necessarily implied from their statutory delegation of authority.⁸⁶ The Commission cannot approve a tariff that directly contradicts an existing statute. As such, we do not believe an administrative proceeding is the proper venue for an important public policy question involving public utilities and the limitation of damages.

76 However, the Commission acknowledges the challenges faced by electric utilities such as PacifiCorp. Climate change has made parts of their service territories more susceptible to wildfires, and it will take time and significant investment to harden their infrastructure sufficiently to address all wildfire risk. In the meantime, utilities continue to have an obligation to serve in wildfire-prone areas and face significant increases in insurance premiums and potentially higher borrowing costs as the result. Although we do not have authority to approve PacifiCorp's proposed tariff, we recognize the urgency, expense and size of the challenge facing PacifiCorp and other electric utility companies in the state and the region. Without some limitations on damages, utilities such as PacifiCorp may be subject to potentially crippling claims. An electric utility must be financially healthy in order to provide services to Washington customers, to meet the rising demand for

⁸⁶ See *Tri-City R.R. Co. v. Wash. Utils. & Transp. Comm'n*, 194 Wn. App. 642 (2016); *Davidson Serles & Assocs. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 159 Wn. App. 148 (2010).

electricity, and to meet the state’s requirements for non-emitting energy. While the Commission lacks statutory authority to accomplish what PacifiCorp requests, we believe that the Legislature is in the best position to consider this critically important issue.

FINDINGS OF FACT

77 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

- 78 (1) The Commission is an agency of the state of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including electrical companies.
- 79 (2) PacifiCorp is a “public service company” and an “electrical company” as those terms are defined in RCW 80.04.010 and used in Title 80 RCW. PacifiCorp is engaged in Washington state in the business of supplying utility services and commodities to the public for compensation.
- 80 (3) On October 24, 2023, PacifiCorp filed with the Commission revised tariff sheets to its WN U-76 tariff. The Company proposes to modify Rule 4 of its General Rules and Regulations – Application for Electric Service, Section H – Limitation of Liability. The tariff sheets had an effective date of November 27, 2023.
- 81 (4) On November 13, 2023, the Company filed revised tariff sheets extending the effective date to December 29, 2023.
- 82 (5) On December 22, 2023, the Commission issued Order 01 suspending the November 13, 2023, tariff filing and requiring briefing to determine the legal question of whether the Company’s proposal is consistent with the public interest.
- 83 (6) The tariff proposal for WN U-76 tariff, modifying Rule 4 of its General Rules and Regulations – Application for Electric Service, Section H – Limitation of Liability, is not authorized by statute.
- 84 (7) The tariff proposal for WN U-76 tariff, modifying Rule 4 of its General Rules and Regulations – Application for Electric Service, Section H – Limitation of Liability, should be rejected.

CONCLUSIONS OF LAW

85 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:

- 86 (1) The Commission has jurisdiction over the subject matter of, and parties to these proceedings.
- 87 (2) The tariff proposal for WN U-76 tariff, modifying Rule 4 of its General Rules and Regulations – Application for Electric Service, Section H – Limitation of Liability, is not authorized by any statute, law or regulation.
- 88 (3) The tariff proposal for WN U-76 tariff, modifying Rule 4 of its General Rules and Regulations – Application for Electric Service, Section H – Limitation of Liability, should not be approved.
- 89 (4) This Order fully and fairly resolves the issues in these dockets and is in the public interest.
- 90 (5) The Commission should retain jurisdiction to effectuate the terms of this Order.

ORDER

- 91 (1) The tariff proposal of PacifiCorp d/b/a Pacific Power and Light Company for WN U-76 tariff, modifying Rule 4 of its General Rules and Regulations – Application for Electric Service, Section H – Limitation of Liability, filed October 23, 2023 and revised November 13, 2023 and suspended by prior Commission order, is rejected.
- 92 (2) The Commission retains jurisdiction over the subject matters and parties to this proceeding to effectuate the terms of this Order.

DATED at Lacey, Washington, and effective October 29, 2024.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

/s/ David W. Danner
DAVID W. DANNER, Chair

/s/ Ann E. Rendahl
ANN E. RENDAHL, Commissioner

/s/ Milton H. Doumit
MILTON H. DOUMIT, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.