UE-230877

SIERRA CLUB

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RE: UE-230877; SIERRA CLUB COMMENTS ON PACIFICORP'S PROPOSED REVISION TO RULE 4

I. INTRODUCTION

Sierra Club thanks the Washington Utilities and Transportation Commission ("Commission") for the opportunity to provide comment on PacifiCorp's proposed revisions to Rule 4, wherein PacifiCorp requests broad liability protection "arising out of the provision of electric service." Sierra Club is a member-based organization without over 26,000 members in Washington, many of whom are PacifiCorp customers.

For the reasons set forth below, Sierra Club recommends that the Commission deny the Company's proposed tariff revision. In the alternative, if the Commission is inclined to consider the request, Sierra Club recommends a procedural schedule (discussed below) that will maximize administrative efficiency.

II. PACIFICORP'S PROPOSED TARIFF REVISION IS BOTH LEGALLY INVALID AND CONTRARY TO THE PUBLIC INTEREST.

The Commission can make quick work of PacifiCorp's proposed tariff revision because it is both legally invalid and its adoption would be contrary to the public interest. For ease of reference, PacifiCorp's proposed new tariff language is as follows:

> 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.

Summarized, PacifiCorp is asking this Commission to limit its liability, in any action arising out of its provision of electric service, to only actual damages, regardless of the utility's conduct. This incredibly broad waiver of liability is without precedent, and it is troubling that the Company would seek such a dramatic change in its relationship with the public through a tariff revision, originally requesting implementation within a mere 30 days.

A. Washington Law Does Not Support the Broad Waiver of Liability that PacifiCorp Seeks.

PacifiCorp falsely states that its proposal "generally aligns with precedent from several western states where limitations on utility liability have been approved . . ." including in Washington.[1] A review of Washington law, including the examples provided by PacifiCorp, shows that this is not the case.

As a preliminary matter, "it is a well-recognized rule that . . . those engaged in the operation of public utilities, cannot by contract relieve themselves of liability for negligence in the performance of their duty to the public or the measure of care they owe their patrons under the law."[2] Yet, PacifiCorp's proposal would do just that. Indeed, PacifiCorp's proposal would relieve itself of liability for not only its negligence but also its *gross* negligence as well as liability arising under contract, strict liability, warranty, or potentially any other claim.

[1] Advice 23-04 – Rule 4 – Appl. for Elec. Serv. at 1.
[2] *Broderson v. Rainier Nat. Park Co*., 187 Wash. 399, 404 (Wash. 1936), overruled on other grounds by Baker v. City of Seattle, 79 Wash. 2d 198 (Wash. 1971).

To be sure, public utility commissions, including this Commission, have, at times, limited a utility's exposure to liability. However, these liability waivers have been narrow and generally only apply to the utility's obligation to serve. In other words, utilities have been shielded from some liability stemming from a disruption in service, but not more broadly. For instance, WN U-60, Puget Sound Energy's ("PSE") Electric Tariff G shields PSE from liability for ordinary negligence, but only for damages associated with a disruption in service.[3] And notably, Electric Tariff G does not shield PSE from liability if its actions exceed ordinary negligence (such as gross negligence) or if its liability stems from some other source of law, such as contract or strict liability. Similarly, WN U-3, which contains rules and regulations governing service for the Washington Water Service Company, limits liability for the "installation, provision, termination, maintenance, repair or restoration of service" but *not* for the utility's "gross negligence, willful misconduct, or violation of RCW Chapter 19.122."[4] Moreover, the language of the liability limitation suggests that it is intended to address damages arising from a disruption in service, not necessarily every conceivable damage that could result from the water utility's provision of service.[5]

PacifiCorp's examples of where this Commission has approved limitations on liability for itself similarly are not comparable to what PacifiCorp seeks here. The majority of these examples point to the customer's acceptance of liability *after* PacifiCorp has provided service

[3] Puget Sound Energy, WN U-60, Second Revised Sheet Nos. 80-e, 80-f, *available at* https://www.pse.com/-/media/Project/PSE/Portal/Rate-documents/Electric/elec_sch_080.pdf?sc_lang=en.
[4] Wash. Water Serv. Co., WN U-3, Original Sheet No. 15, *available at* https://www.wawater.com/docs/rates/rates-2023-1006.pdf. It is also questionable whether the Commission should compare liability waivers for water utilities to electric utilities, as the risk profiles of these types of utilities are likely quite different.
[5] Damages in WN U-3 are limited to "an amount equal to the proportionate part of the monthly recurring charge for the service for the *period during which the service was affected*." This reference to "period during which the service was affected" suggests that the liability waiver is intended to address service disruptions.

and the customer takes some action outside of the Company's control.[6] Others point to liability shields for interrupted service, which, as noted above, is the extent to which liability waivers have been typically granted. And finally, PacifiCorp points to limited liability under force majeure provisions. However, force majeure indicates no fault on the part of the utility, and is analogous to the situation in *Citoli v. City of Seattle*, which the Company cites as an example of the courts upholding a limitation on liability.[7] In *Citoli*, utilities were held harmless for damages caused by disconnecting utility service to a building, after being ordered to do so by the local police.[8] Needless to say, this specific scenario is not similar to what PacifiCorp seeks here.

Finally, Washington statute has released utilities from liability when the utility is taking action to carry out orders issued by the governor or the Commission in the event of an energy supply emergency or required curtailment of energy.[9] These are limited scenarios in which a utility has been directed to disrupt electric service, and thus is not similar to the liability waiver that PacifiCorp seeks here.

In sum, PacifiCorp's liability waiver request is not legally sound, and Sierra Club urges the Commission to tread lightly prior to determining that it has the authority to grant such a broad waiver of liability.

B. PacifiCorp's Liability Waiver Request is Contrary to the Public Interest.

Even if liability *could* be waived for any damage (beyond actual damages) arising from a utility's provision of service, the Commission must address whether it *should* be waived.

[6] For instance, PacifiCorp points to limits on the Company's liability "arising from the resale of service by the Customer;" "regarding unauthorized reconnection/tampering" and "for applicant built extensions." Advice 23-04 – Rule 4 – Appl. for Elec. Serv. at 2-3.
[7] *Citoli v. City of Seattle*, 115 Wash. App. 459 (2002).
[8] *Id.* at 465-66.
[9] WAC 194-22-150; RCW 43.21G.050; RCW 43.21G.080.

Relieving a utility of its obligation to maintain a minimum standard of care is poor public policy, as it would encourage the utility to take riskier actions. For instance, if PacifiCorp knows that its liability for wildfire damage is severely limited, will the utility take necessary precautions to avoid allowing its equipment to spark wildfires in the first place? Given that the utility's equipment has and is likely to cause future wildfires, the Commission should consider how to strengthen incentives for good wildfire management, not lessen them.

Indeed, it is ironic that PacifiCorp seeks to shield itself from wildfire liability, when the severity of wildfires in the West has intensified due to climate change that is being driven by greenhouse gas emissions, including those from PacifiCorp's massive fossil fuel fleet. PacifiCorp is one of the dirtiest remaining electric utilities in the country and has no stated goal to reduce its carbon dioxide emissions. The fact that climate change-driven natural disasters are now threatening the Company's profitability is a direct result of the Company's refusal to account for the social and economic costs of its emissions, and shielding the Company from liability stemming from its own decision-making would further encourage PacifiCorp to ignore the real and significant social and economic impacts of its fossil fuel operations.

Moreover, requiring individuals to waive their legal rights as a condition of receiving electric service would likely be found unconscionable by a reviewing court. Electricity is a basic and essential part of modern life. Indeed, this is precisely why the expression "going off the grid" is often associated with living a more primitive life and/or disconnecting from society. Individuals cannot simply decline electric service if they disagree with a required liability waiver. This issue is magnified when the utility has been granted a monopoly, because customers cannot select a different provider, even if they wanted to.

Washington courts have also been reluctant to enforce liability waivers. Take for example, *Baker v. City of Seattle*, where the Washington Supreme Court considered a liability waiver written on a one-page golf cart rental agreement, which the plaintiff completed and signed prior to using the golf cart.[10] The entire rental agreement consisted of two sections: one for the renter to supply his personal information and a second, consisting of approximately 20 lines, outlining the legal agreement between the renter and the golf cart company. The Court found that "the [liability] disclaimer was contained in the middle of the agreement and was not conspicuous" and as a result, "[t]o allow the respondent to completely exclude himself from liability by such an inconspicuous disclaimer, would truly be unconscionable."[11] If the Washington Supreme Court would not enforce a liability waiver in this instance, it seems incredibly unlikely that the Court would enforce the board and unprecedented liability waiver requested here that would likely be buried in small print, amongst many contractual requirements of receiving electric service, or only available if the customer is knowledgeable enough to identify and seek out the applicable tariff.

PacifiCorp's argument in favor of the liability waiver is that it is needed to protect its credit rating. But this is a highly complex issue that cannot be decided based on PacifiCorp's sole piece of evidence that its credit was downgraded by A to BBB+. There is no evidence that ratepayers will be harmed by a BBB+ rating, that the Company will have any more difficulty accessing capital than it currently does, or that the Company's proposed tariff revision will result in the credit rating that it seeks. There are many aspects to this issue to evaluate prior to simply forcing customers to sign away significant legal rights.

[10] *Baker v. City of Seattle*, 79 Wash. 2d 198, 199-200 (1971)
[11] *Id.* at 202.

In sum, even if the Commission determines that it has the legal authority to grant PacifiCorp the liability waiver that it seeks, the decision to do so would likely be highly controversial and the Commission should carefully balance whether doing so would be good public policy.

III. IF THE COMMISSION WISHES TO FURTHER CONSIDER PACIFICORP'S REQUEST, THE COMMISSION SHOULD BIFURCATE THESE PROCEEDINGS INTO A LEGAL PHASE, FOLLOWED BY A POLICY PHASE.

For the reasons set forth above, PacifiCorp's tariff revision is legally infirm. Even if it were not, it raises significant and concerning policy issues that weigh against granting the proposal. The Commission should thus deny the application.

However, if the Commission is inclined to hold further proceedings, the Commission should bifurcate the proceedings into two parts.[12] The Commission should begin by accepting legal argument on whether the tariff revision is legally permissible under Washington law. While Sierra Club's comments here raise serious questions as to the legality of PacifiCorp's request, these comments are not, and were not intended to be, a comprehensive legal analysis. Additional time would be required for stakeholders to fully brief the Commission on the potential legal implications of PacifiCorp's request.

Following legal briefing from interested stakeholders, the Commission can issue an order answering whether PacifiCorp's tariff revision request is legally sound. If the answer to that question is "no," the Commission's inquiry can end. Only if the Commission finds that it has the legal authority to grant PacifiCorp's tariff revision request should the Commission then turn to a second part of this proceeding whether it can answer whether approval is in the public interest and sound public policy.

[12] PacifiCorp filed a similar tariff revision requisition before the Oregon Public Utility Commission. *See* Docket No. UE-428. Sierra Club's understanding is that the Oregon Commission intends to investigate this request in a bifurcated proceeding, as recommended here.

By bifurcating this proceeding into a legal track and a policy track, the Commission can consider these separate questions independently of each other. In the event that the Commission determines that it lacks legal authority to grant PacifiCorp's request, the Commission may also potentially avoid spending significant time on the highly complex and controversial public policy questions.

IV. CONCLUSION

Sierra Club recognizes the challenges that utilities, particularly in the West, will face as climate change-driven extreme weather events increase operational risk. Addressing these challenges will require a multitude of approaches: increasing resiliency through distributed resources, increasing wildfire management and equipment hardening, and rapidly transitioning away from fossil fueled resources that directly contribute to these weather events, among other approaches. Sierra Club disagrees, however, with shielding the utility from the majority of potential liability for its operational decisions, without regard to the utility's standard of care. The proposed tariff amendment is legally unsound and not in the public interest. The Commission should reject the proposal.

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Respectfully submitted,

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