

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,
Complainant,

v.

PacifiCorp d/b/a Pacific Power & Light
Company, Respondent

Docket UE-230877

PacifiCorp Initial Brief

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I. INTRODUCTION

1 PacifiCorp d/b/a Pacific Power & Light Company (PacifiCorp or the Company) respectfully requests the Washington Utilities and Transportation Commission (Commission) approve the Company's request to amend its Rule 4—General Rules and Regulations—Application for Electric Service, which would prospectively limit the Company's liability from injuries that result from providing electrical services to only economic damages.

II. ARGUMENT

2 The Commission has the authority to approve the Company's Petition. The request is permitted under Washington law, and while the Company requests a *broader* liability limitation than what this Commission has previously approved (because it would apply to the provision of all electric services), the Company's request is consistent with numerous Commission-approved tariffs that similarly limit liability to economic damages—and in some instances, *preclude any damages at all*—for various utility services. Strong policy reasons further support approving the Petition, including protecting the Company's ability to secure financing at reasonable rates and ensure low-cost electric services for its Washington customers.

3 The proposed tariff revision is similar to proactive measures approved in several states to mitigate the impact to utility rates from catastrophic environmental disasters. And because the proposed revisions can only be applied when consistent with Washington law, it does not conflict with any Washington authorities, including the state constitution, statutes, or Commission regulations or orders.

A. The Commission has the power to limit PacifiCorp’s liability to economic damages that result from the provision of electric services.

4 When PacifiCorp became a Washington utility, it lost the right to freely contract (or not), with its Washington customers.¹ This includes the rights to negotiate specific terms and conditions to protect either party to the contract, either for PacifiCorp or its customers. Now, PacifiCorp operates as a public utility under Commission-approved rates and tariffs that establish the terms and conditions of PacifiCorp’s services.² It is PacifiCorp’s statutory duty to provide services that are “safe, adequate and efficient, and in all respects just and reasonable,”³ at rates that are “just, fair, reasonable and sufficient.”⁴ These requirements cannot be waived by a written or oral agreement between PacifiCorp and its customers.⁵ And it is the Commission’s role to determine what constitutes just, reasonable, and compensatory rates and services.⁶

5 To implement these authorities, PacifiCorp is required to “file with the commission . . . all rates and charges made, established or enforced, or to be charged or enforced, all forms of contract or agreement, all rules and regulations related to rates, charges or service, used or to be used, and all general privileges and facilities granted or allowed.”⁷ PacifiCorp cannot “charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges” in the Company’s published tariffs.⁸

¹ RCW 80.28.120.

² RCW 80.28.050 through .065 (requiring Commission approval of utility rates, service, terms, and conditions).

³ RCW 80.28.010(2).

⁴ RCW 80.28.010(1).

⁵ RCW 80.28.010(12).

⁶ RCW 80.28.020.

⁷ RCW 80.28.050.

⁸ RCW 80.28.080(1).

6 This means that the Commission has plenary jurisdiction over utility tariff terms and conditions. This necessarily includes limitations on utility liability for providing utility services, and vests the Commission with the authority to approve the Company’s request.

7 This is true, even though Washington holds utilities liable “for all loss, damage or injury” caused by violations of Washington law or safety regulations.⁹ This statute, without further research, would appear to bar the Company’s application. However Washington courts have routinely and uniformly interpreted this statute to preserve the Commission’s power to limit utility liability in Commission-approved tariffs. This statute “does nothing more than preserve causes of action for private claims related to utility misconduct”¹⁰ And the Commission is free to adopt—and routinely does—utility limitations of liability that preempt RCW 80.04.440.¹¹ As *Puget Sound Energy* noted, “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.”¹²

8 Thus, limitations of liability in utility tariffs are affirmative defenses that preempt RCW 80.04.440.

9 For example, Washington courts have concluded 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.”¹³

⁹ RCW 80.04.440.

¹⁰ *Markoff v. Puget Sound Energy, Inc.*, 447 P.3d 577, ¶ 34 (2019).

¹¹ *Id.* (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)).

¹² 447 P.3d 577, ¶ 34.

¹³ *Allen v. Gen. Tel. Co.*, 20 Wn. App. 144, 148 (1978).

“Limitation of liability provisions are an inherent part of the ratemaking process.”¹⁴ And 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.”¹⁵ This is because without the Commission exercising its authority to review and approve reasonable customer and utility protections, utilities “would have to raise its rates commensurate to its increased liability risk.”¹⁶

10 And if there is any question whether PacifiCorp’s tariff conflicts with Washington law, Washington law controls. PacifiCorp’s proposal clarifies that the liability limitation can only be applied when consistent with Washington law. This is intentional and provides the Commission or Washington courts with flexibility to apply the provision as necessary based on the specific facts and circumstances in a given controversy.

11 Consistent with these authorities, to PacifiCorp’s knowledge, the Commission has never concluded that it lacked jurisdiction or the authority to consider a utility’s application to limit liability. This is despite RCW 80.04.440 being the law in Washington for over a hundred years.¹⁷ PacifiCorp represents that these statutes and Washington court cases do not limit the Commission’s authority to approve the Company’s Tariff.

¹⁴ *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)).

¹⁵ *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)).

¹⁶ *Id.*

¹⁷ 1911 Wa. Laws Ch. 117, § 102.

B. Approval would support PacifiCorp’s financial health and continued provision of low-cost electric services for its Washington customers.

12 Beyond the question of whether the Commission has the power to approve the Company’s application, there is the second question of whether the Commission should do so. PacifiCorp represents there are several policy arguments that support approval. Mainly, the proposal is one of several remedial measures that the Company has developed to reinforce PacifiCorp’s financial health, and support continued low-cost electric services for Washington customers.

i. PacifiCorp’s Financial Health

13 To appreciate PacifiCorp’s concern, consider the environment that utilities currently face regarding uncapped liability and the financial impact to customers. Western utilities like Pacific Gas and Electric (PG&E), Southern California Edison,¹⁸ Xcel Energy in both Colorado¹⁹ and Texas,²⁰ Hawaiian Electric Co.,²¹ and PacifiCorp have been subjected to significant financial pressures from catastrophic wildfire litigation. PG&E’s legal battles have been particularly acute, with litigation from the catastrophic 2018 Camp Fire resulting in a \$13.5 billion settlement and PG&E filing for Chapter 11 bankruptcy to manage its liabilities.²²

¹⁸ “Southern California Edison to pay \$80 mln to US over 2017 wildfire,” Reuters (Feb. 26, 2024) (available here: <https://www.reuters.com/world/us/southern-california-edison-pay-80-mln-us-over-2017-wildfire-2024-02-26/>).

¹⁹ “Xcel Energy faces legal firestorm: Understanding the Marshall Fire lawsuits,” Boulder Reporting Lab (Aug. 3, 2023) (available here: <https://boulderreportinglab.org/2023/08/03/xcel-energy-faces-legal-firestorm-understanding-the-marshall-fire-lawsuits/>).

²⁰ “Xcel Energy utility equipment started Texas wildfire, homeowner says in lawsuit,” Reuters (Mar. 1, 2024) (available here: <https://www.reuters.com/world/us/xcel-energy-utility-equipment-started-texas-wildfire-homeowner-says-lawsuit-2024-03-02/>).

²¹ “Maui County sues Hawaiian Electric Co. for damages from disastrous fires,” National Public radio (Aug. 24, 2023) (available here: <https://www.npr.org/2023/08/24/1195777967/maui-county-sues-hawaiian-electric-company-for-damages-from-disastrous-fires>).

²² See e.g., “PG&E Announces 13.5 Billion Settlement of Claims Linked to California Wildfires,” National Public Radio (Dec. 7, 2019) (available here: <https://www.npr.org/2019/12/07/785775074/pg-e-announces-13-5-billion-settlement-of-claims-linked-to-california-wildfires>).

14 PacifiCorp faces similar financial pressures from recent Oregon jury verdicts related to devastating wildfires in that state. Last year, a jury ruled that the Company must compensate 17 plaintiffs with damages exceeding \$90 million, including approximately \$4.5 million of economic damages and \$85.5 million of a-typical damages—nineteen times the amount of economic loss.²³ More recently, a jury ordered the Company to pay \$62 million to nine plaintiffs, with economic losses at approximately \$6.3 million, and a-typical damages of to \$56 million—nearly nine times the amount of economic loss.²⁴

15 These judgments include staggering a-typical damages. Yet they represent just two judgements. The Company has *several dozen additional lawsuits* in Oregon and California from wildfires that occurred in those states that similarly seek typical and a-typical damages.²⁵

16 These financial impacts have not gone unnoticed. Following the initial \$90 million judgment, and after specifically discussing the \$85.5 million in a-typical damages, S&P Global Ratings (S&P) lowered the Company’s credit rating from ‘A’ to ‘BBB+’ with a “negative outlook.”²⁶ In November 2023, Moody’s Investors Service (Moody’s) followed course, and downgraded PacifiCorp’s senior unsecured issuer rating

²³ “PacifiCorp Downgraded to BBB+, Outlook Revised to Negative; Berkshire Hathaway Energy Co. Outlook Also Negative,” S&P Global Ratings (June 20, 2023), available at:

<https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/3009376>.

²⁴ “Berkshire’s PacifiCorp Ordered to Pay At Least \$62 Million to Homeowners for 2020 Oregon Wildfire Damage,” Reuters (January 23, 2024), available at: <https://www.reuters.com/world/us/berkshires-pacificorp-ordered-pay-least-62-million-homeowners-2020-oregon-2024-01-23/>

²⁵ See, e.g., Berkshire Hathaway Energy Company, Form 10-K, at 91-99 (Dec. 31, 2023) (providing a general discussion of each of these wildfire-related lawsuits) (available here: <https://bit.ly/3wyWQw6>).

²⁶ “PacifiCorp Downgraded to BBB+, Outlook Revised to Negative; Berkshire Hathaway Energy Co. Outlook Also Negative,” S&P Global Ratings (June 20, 2023) (available here: <https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/3009376>).

to Baa1 from A3.²⁷ In December 2023, Moody’s noted that wildfire risk was a significant risk for the Company and has a substantial impact on its credit quality.²⁸

17 As noted in Berkshire Hathaway Energy’s (BHE) 2023 Annual Report, these credit downgrades “have and are expected to continue to have a material impact on PacifiCorp’s liquidity and may result in, among other things, PacifiCorp being unable to maintain sufficient levels of cash or to obtain necessary short- and long-term financing to fund its operations and financial obligations, capital investments and potential future settlements associated with the Wildfires.”²⁹

18 Beyond these liquidity concerns, there are similar impacts to the Company’s ability to procure insurance at reasonable costs. As the Public Utility Commission of Oregon recently noted in adopting a Staff Report recommending approval of a deferral application, when PacifiCorp renewed its commercial liability insurance policies in August 2023, the Company experienced an “increase from the \$29 million currently in rates to \$125 million (a \$96 million increase) for the policy period starting August 15, 2023.”³⁰ This finding is consistent with BHE’s Annual Report that similarly discusses these cost impacts:

PacifiCorp has experienced material increases in the cost of third-party liability insurance as a result of worsening damage claims in the utility industry associated with catastrophic wildfires in the geographic regions in which PacifiCorp operates. Such costs may continue to increase materially to the point of being prohibitively expensive, and it is possible

²⁷ “Moody’s Rating Action: Moody’s downgrades PacifiCorp to Baa1, outlook stable” (Nov. 21, 2023) (available here: https://www.moodys.com/research/Moodys-downgrades-PacifiCorp-to-Baa1-outlook-stable--PR_482643?cy=centraleur&lang=en).

²⁸ “Moody’s Investors Services, Credit Opinion, PacifiCorp, Update following a downgrade to Baa1” (Dec. 4, 2023) (available here: https://www.moodys.com/research/PacifiCorp-Update-following-a-downgrade-to-Baa1-Credit-Opinion--PBC_1389798?cy=centraleur&lang=en).

²⁹ Berkshire Hathaway Energy Company, Form 10-K, at 77 (Dec. 31, 2023) (available here: <https://bit.ly/3wyWQw6>).

³⁰ *In re PacifiCorp’s Wildfire Insurance Deferral*, Docket No. UM 2301, Order No. 24-021, Appendix A, at 4-5 (Jan. 24, 2024) (approving PacifiCorp’s request for deferral).

that PacifiCorp may be unable to obtain third-party liability insurance. Increases in the cost of insurance may be challenged when PacifiCorp seeks cost recovery and such amounts may not be recoverable in customer rates. To the extent third-party liability insurance costs continue to increase, becomes cost prohibitive or is unavailable and such increased costs are not recoverable in customer rates, PacifiCorp's financial condition and results of operations could be materially adversely affected and its liquidity position further negatively impacted.³¹

ii. Remedial Measures

19 PacifiCorp has not been a passive observer in response to these risks, and is aggressively hardening its system against wildfire risks, and taking steps to protect its financial health. This petition represents another mechanism.

20 Despite these measures, PacifiCorp is still vulnerable to financial pressures because of the lack of reasonable limits for a-typical damages in Washington. This is a concern, because the complexity of today's electrical grid can give rise to lawsuits that are not reasonably attributable to simple human error or negligence. This presents jurors with the unenviable task of navigating technical details to justly assign fault and evaluate damages. Even in the best of circumstances, jury verdicts are a risky proposition for both plaintiffs and defendants.

PacifiCorp's Application seeks to address one aspect of this concern. By limiting liability to economic damages from the provision of electric services, the Company is protected against the material threat from disproportionate a-typical damages. This ensures that while plaintiffs are entitled to fully recover their tangible, measurable losses, the Company is shielded from the uncertainty of speculative a-typical damage. And this

³¹ *Id.* at 78.

Tariff would only apply to future causes of action, and would have no impact on the Company's current litigation.

21 Reasonable limitations on liability are essential for all businesses, particularly for electric companies and their customers. As the Texas Supreme Court has cautioned: “Absent a limitation of liability, the risk of staggering loss could be borne by ordinary utility customers.”³² Liability limitations play a critical role in protecting customers from the potential for dramatic rate increases caused by uncapped damage awards, and supports approval of the Company's request.

iii. Customer Impacts

22 It will take time for the financial markets to respond to PacifiCorp's remedial actions, and whether they will positively impact the Company's risk profile. The Commission's decision on this Application will factor into that response.

23 Yet while the future is uncertain, the Company's current credit rating will continue to negatively impact customers. Begin with S&P's initial credit downgrade. Their “negative outlook” for PacifiCorp contemplates additional downgrades if the Company has more adverse legal judgments, and noted that limitations on liability could lead to a revision of its outlook to “stable.”³³ This outlook was issued prior to the Company's second jury verdict of \$62 million which included a nine-fold increase of atypical damages to economic damages.

³² *Houston Lighting & Power Co. v. Auchan United States*, 995 S.W.2d 668, at 674 (Tex. 1999).

³³ Sloan Millman & Gabe Grosberg, PacifiCorp Downgraded to BBB+, Outlook Revised to Negative; Berkshire Hathaway Energy Co. Outlook Also Negative, S&P Global Ratings (June 20, 2023), available at: <https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/3009376> (“We could affirm our ratings on PacifiCorp and revise the outlook to stable if its wildfire liabilities remain limited.”).

24 Yet even without further action, this initial downgrade has already impacted the Company's ability to raise capital. Many institutional investors are not permitted to purchase non-investment grade (i.e., rated below Baa3/BBB-) securities, or in some cases even securities rated below a single A rating. As a result, the Company will encounter increased borrowing costs which 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.

25 To highlight the issue, as noted above PacifiCorp plans to spend over [REDACTED] on capital projects. However, PacifiCorp reduced its planned expenditures [REDACTED] based on its credit downgrade and the resultant increasing borrowing costs. This capital spending will require PacifiCorp to raise funds by issuing new long-term debt in the capital markets. In PacifiCorp's recent January 2024 long-term debt offering, PacifiCorp spent a significant amount of time in discussions with investors to provide them a detailed update on its plans to mitigate further liability risks. Although PacifiCorp's 2024 offering was successful, several traditional investors declined to participate in the offering.

26 These increased borrowing costs will be passed on to customers in the appropriate rate proceeding. And S&P's warning demonstrates the impact that substantial, uncapped legal awards can have on the Company's financial health.

27 But these are not just PacifiCorp concerns. S&P has provided broader utility-sector analyses that underscore the critical importance of maintaining a robust credit

rating in the face of increased damages.³⁴ As S&P notes, it “has downgraded more IOUs due to physical events (e.g., hurricanes, storms, and wildfires) over the past six years by nearly 10 times compared with the previous 13 years.”³⁵ Yet utilities are not without remedies, and S&P notes that it expects utilities to “develop a three-pronged strategy toward reducing risk” that includes “reducing damages from physical events, minimizing litigation risk, and expanding capabilities for cost recovery.”³⁶ Regarding limiting damages specifically, S&P notes that caps on non-economic damages are credit positive: “The maximum amounts for non-economic, and punitive damages are sometimes capped by state statutes, and we view these caps as supportive of credit quality, limiting the total potential damages.”³⁷ And regarding expanding cost recovery capabilities:

After a utility experiences damages from a physical event or after being found liable for a wildfire, the utility must pay for these costs. We expect that IOUs and POUs will recover most of these costs from ratepayers, which has generally supported the industry’s credit quality. However, when the costs become unusually large, regulatory lag—the timing difference between when a utility incurs costs and when it’s recovered from ratepayers—increases, the balance sheet leverages, and utilities have even experienced significant disallowances that weaken credit quality. In these instances, we believe the industry hasn’t contained the credit risk and the industry is short of protective credit capabilities. As such we believe it’s important for the IOU industry to significantly increase and broaden recovery capabilities. This includes implementing storm reserves, increasing commercial insurance levels, incorporating self-insurance, participating in a special wildfire fund, and securitization. *While expanding cost recovery capabilities would support credit quality, we believe this alone without reducing damages from physical events or minimizing litigation risk, would likely not be sufficient to reduce credit risks.*³⁸

³⁴ “A Storm Is Brewing: Extreme Weather Events Pressure North American Utilities’ Credit Quality,” S&P Global Ratings (Nov. 9, 2023) (available at: [A Storm Is Brewing: Extreme Weather Events Pressure North American Utilities’ Credit Quality | S&P Global Ratings \(spglobal.com\)](https://www.spglobal.com/ratings/nadocs/press-releases/2023/11/09/a-storm-is-brewing-extreme-weather-events-pressure-north-american-utilities-credit-quality)).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* (emphasis added).

28 Thus, strong credit ratings are imperative for the financial viability of the utility industry generally, and for PacifiCorp’s specifically its ability to continue providing services at reasonable rates for its Washington customers.

29 PacifiCorp represents that these public and well-documented risks to PacifiCorp’s financial health support approval of the Company’s request, because a limitation of liability on a-typical damages would provide yet another mechanism to support the Company’s financial health.

C. The Petition is consistent with numerous Commission precedents that limit utility liability to actual economic damages—or no damages at all.

30 While the Company believes the Commission has the authority to approve this Petition, and that strong policy arguments support the Commission doing so, the Commission has numerous precedents that—while narrower in scope than PacifiCorp’s proposal—have limited damages for various utility services to actual economic damages, and in several circumstances, eliminated the recovery of any damages at all.

31 For example, beyond the eight PacifiCorp examples included in the Company’s initial petition and the various court decisions above, consider a single Puget Sound Energy tariff:

- Puget has no liability to Interconnection Customers, or any other person or entity, for “any disruption in service or for any loss or damage” caused by Puget’s disconnection or interruption of services.³⁹
- Puget has no liability for damages to persons or property arising from the use of customer equipment on the customer’s premise.⁴⁰

³⁹ Puget Schedule 80, Or. Sheet 80-B.2.

⁴⁰ Puget Schedule 80, Or. Sheet 80-e.

- Puget has broad indemnity for “any loss or damage,” including for “causes beyond its control or through ordinary negligence of employees, servants or agents,” that arise from various circumstances, including: causes beyond the Company’s reasonable control (including fires, winds, generation failures, or “electrical disturbances originating on or transmitted through electrical systems with which the Company’s system is interconnected.”); any Company performed “repair, maintenance, improvement, renewal or replacement work” that is necessary or prudent; and any action’s that Puget believes are “necessary or prudent to protect the performance, integrity, reliability or stability of the Company’s electrical system.”⁴¹
- Puget is not responsible for any damages caused by loss or reversal of one or more phases in three-phase service if beyond Puget’s reasonable control.⁴²
- Puget has broad indemnification for generators that interconnect for emergency service.⁴³ customers “assumes the risk of all damages losses, costs and agrees to indemnify the Company

32 Avista’s Washington tariffs include similar examples.⁴⁴ And there are additional examples for services provided by Qualifying Facilities (QFs) that specifically disclaim consequential damages for either party.⁴⁵

⁴¹ Puget Schedule 80, Or. Sheet 80-f.

⁴² Puget Schedule 80, Or. Sheet 80-s.

⁴³ *See, e.g.*, Puget Schedule 80, Or. Sheet 80-kk (“The Customer assumes the risk of all damages, losses, costs and agrees to indemnify the Company . . . from and against any and all claims, losses, costs, liabilities, damages and expenses including, but not limited to, . . . loss to the electrical system of the Customer caused by or arising out of any electrical disturbance.”)

⁴⁴ *See, e.g.*, Avista Schedule 70, Or. Sheet 70-T (“Electric service is inherently subject to interruption, suspension, curtailment, and fluctuation. The Company shall have no liability to its Customers or any other persons for any interruption, suspension, curtailment or fluctuation in service or for any loss or damage caused thereby if such interruption, suspension, curtailment or fluctuation results from [listing various examples, including fire, wind, generation failures, among others].”).

⁴⁵ PacifiCorp Standard On-System QF PPA (5MW Or Less, New), § 12.1.5 (“NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY FOR SPECIAL, PUNITIVE, INDIRECT, EXEMPLARY OR

33 These examples, which similarly disclaim non-economic damages (or any liability at all), provide adequate precedent to support the Company’s proposal.

D. The Petition is consistent with sister-state utility commission precedent.

34 Over a century of experience supports utility limitations on liability.⁴⁶ Courts have historically interpreted these limitations in accordance with the Filed Rate Doctrine, which provides that filed tariffs govern a utility’s relationship with its customers and have the full force and effect of law until suspended or set aside.⁴⁷ The public policy justifications supporting tariffed liability limitations are well summarized in a Texas Supreme Court decision:

[A] tariff’s limitations on liability for economic damages is reasonable because a utility: (1) must provide nondiscriminatory service to all customers within its area; (2) must maintain uniform rates and reduce costs; (3) cannot accurately estimate its exposure to damages or efficiently insure against risks; (4) cannot increase rates for all customers based on losses one specific class of customers incurs; and (5) must comply with PUC regulations.⁴⁸

35 Thus, liability limitations serve as a *quid quo pro* for economic regulation: “in return for serving the public interest through a fixed rate of return and reliability

CONSEQUENTIAL DAMAGES, WHETHER SUCH DAMAGES ARE ALLOWED OR PROVIDED BY CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, STATUTE OR OTHERWISE. THE PARTIES AGREE THAT ANY LIQUIDATED DAMAGES, DELAY DAMAGES, TERMINATION DAMAGES, PACIFICORP AND SELLER COST TO COVER DAMAGES, OR OTHER SPECIFIED MEASURE OF DAMAGES EXPRESSLY PROVIDED FOR IN THIS AGREEMENT DO NOT REPRESENT SPECIAL, PUNITIVE, INDIRECT, EXEMPLARY OR CONSEQUENTIAL DAMAGES AS CONTEMPLATED IN THIS PARAGRAPH.”); PacifiCorp Standard On-System QF PPA (5MW Or Less, Renewal), § 12.1.5 (same); PacifiCorp Non-Standard QF PPA, Term 38 (similar); Puget Schedule 91, 2nd Rev. Sheet 91-E, 6(G) (“The QF shall indemnify and hold harmless the Company from any and all liability arising from the operation and, if applicable, interconnection of the QF.”).

⁴⁶ See, e.g., *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571 (1921) (when included in a telegraph company’s tariff, “[t]he limitation of liability was an inherent part of the rate. The company could no more depart from it than it could depart from the amount charged for the service rendered.”).

⁴⁷ See, e.g., *Keogh v. Chicago & N.R. Co.*, 260 U.S. 156, 163 (1922) (“The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.”).

⁴⁸ *Southwestern Elec. Power Co. v. Grant*, 73 S.W.2d 211, 217 (2002).

standards,” courts and state commissions have found that tariffed liability limitations serve the public interest by keeping “the cost of service low.”⁴⁹

36 To that end, state courts have generally held that “rules promulgated by public utilities which absolve them from liability for simple negligence in the delivery of their services will be upheld.”⁵⁰ In decisions both issued in 1999, the Kansas and Texas Supreme Courts identified multiple state precedents consistent with this view of liability limitations, including Arizona, California, Delaware, the District of Columbia, Florida, Georgia, Illinois, Kansas, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nevada, New York, Oregon, Pennsylvania, South Carolina, Texas, and Washington.⁵¹

37 Due to the catastrophic damages caused by increasingly severe and more frequent natural disasters in recent years, these tariff provisions have taken on more importance and have faced more exacting scrutiny.

38 For instance, New York City was impacted by Superstorm Sandy and Tropical Storm Isaias in the past dozen years, resulting in billions of dollars in damages caused in part by utility outages. The primary utility impacted by the storm, Consolidated Edison Company (ConEd), had limitations of liability that excluded all damages arising from ConEd’s actions, even if based on utility negligence, which were consistently enforced

⁴⁹ John L. Rudy, *Limitation of Liability Clauses in Public Utility Tariffs: Is the Rationale for State-Sponsored Indemnity Still Valid?*, 52 Buff. L. Rev. 1379, 1394 (2004) (discussing the New York Public Service Commission decision *In Re Liab. Clauses in Rate Schedules of Gas and Elec. Corps.*, 26 P.U.R. (N.S.) 373 (1938)).

⁵⁰ *Danisco Ingredients v. Kansas City Power & Light Co.*, 267 Kan. 760, 769 (1999); *Id.* at 771 (“A public utility’s liability exposure has a direct effect on its rates, and this court, as well as the majority of jurisdictions addressing the question ... has concluded that it is reasonable to allow some limitation of liability such as that for ordinary negligence in connection with the delivery of the services.”).

⁵¹ *Id.* at 769-70; *Houston Lighting & Power Co. v. Auchan United States*, 995 S.W.2d 668, 672 (Tex. 1999). The Company’s Advice Letter in docket UE 428 cites additional consistent precedent from state courts in PacifiCorp service territory. See Pacific Power Advice No. 23-018 – Rule 4 – Application for Electrical Service, Docket UE 428, at 2 (Oct. 24, 2023).

for several decades.⁵² Only actions against utilities for gross negligence are recoverable in that state.⁵³

39 After a New York court dismissed several lawsuits for failure to prove ConEd was grossly negligent (and finding that simple negligence claims were barred by tariff),⁵⁴ the New York legislature and utility commission adopted additional caps on utility liability, and also established additional protections for customers. For example, ConEd liability is now limited to \$15 million for each instance where electricity supply is interrupted by the utility’s negligence or other events beyond the utility’s control (and individual customer recovery “will be adjusted downward on a pro rata basis to the extent required to hold payments to a total of \$15,000,000.”), while also requiring ConEd to specifically reimburse customers for certain damages (a credit for loss of electricity generally, and specific amounts for loss of foods, perishable medicine, etc.).⁵⁵ Additionally, the New York commission embarked on material grid hardening proceedings and addressed cost recovery for infrastructure storm damage in specific utility rate proceedings.⁵⁶

40 To the south, Florida has been impacted by frequent hurricanes over the past two decades that have resulted in billions of dollars in damage caused in part by utility

⁵² See, e.g., *Lee v. ConEd*, 413 N.Y.S.2d 826 (1978) (“Once accepted by the Commission, the tariff schedule (including the limitation of liability provision) takes on the force and effect of law and governs every aspect of the utility’s rates and practices; neither party can depart from the measure of compensation or standard of liability contained therein.”).

⁵³ *Food Pageant v. ConEd*, 54 N.Y.2d 167 (1981).

⁵⁴ *Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. v. Trumbull Ins. Co. & ConEd.*, 2016 N.Y.Misc. LEXIS 5093 (Sup Ct, NY County 2016).

⁵⁵ Con.Ed. PSC Electricity Tariff Rule 21.1 Continuity of Supply; “PSC Approves New Rules for Customer Credits and Reimbursements,” (Jul. 14, 2022) (available here: <https://dps.ny.gov/system/files/documents/2022/10/psc-approves-new-rules-for-customer-credits-and-reimbursements.pdf>).

⁵⁶ Lawrence Berkeley National Laboratory, “Case Studies of the Economic Impacts of Power Interruptions and Damage to Electricity System Infrastructure from Extreme Events,” at 35—39 (November 25, 2020) (available here: https://eta-publications.lbl.gov/sites/default/files/impacts_case_studies_final_30nov2020.pdf).

outages. These hurricanes “prompted a comprehensive re-evaluation of utility rules and practices in Florida, including both the engineering and economic aspects of hurricane preparation and response.”⁵⁷ These efforts included revising cost recovery standards (in both rate cases as well as through authorized surcharges), convening of multi-stakeholder workshops to revise storm-hardening rules and procedures, requiring Florida utilities to file forward-looking storm protection and system hardening plans, and authorizing the issuance of storm recovery bonds to finance the massive reconstruction costs caused by successive major storms.⁵⁸

41 Focusing on the West specifically, the California Supreme Court recently upheld state commission determinations on liability limitations that preempted a customer’s ability to recover civil damages against utilities resulting from power shutoff events. The Court was asked whether a statute that holds utilities liable for “all loss, damages, or injury” caused by utility acts or omissions would nonetheless be preempted by another statute that “bars actions that would interfere with the California Public Utilities Commission [CPUC] in the performance of its official duties.”⁵⁹ The Court concluded that yes—even though the plaintiffs were “seeking billions of dollars in alleged damages resulting directly from power shutoffs”—the suit should be preempted as a matter of law because it would “hinder or frustrate the PUC’s carefully designed implementation calculus” regarding utility wildfire mitigation plans and tariff provisions regarding public safety power shutoff events.⁶⁰ “To hold otherwise,” the Court noted, “would be to invite

⁵⁷ *Id.* at 19.

⁵⁸ *See, e.g., Id.* at 19-21 (discussing § 366.96 Fla. Statutes (2023) (utility storm protection plans and cost recovery), § 366.97 Florida Statutes (2023) (redundant poles and pole attachment rules), § 366.8260 Fla. Statutes (2023) (Storm recovery financing)).

⁵⁹ *Gantner v. PG&E Corporation*, 538 P.3d 676, 677 (Cal. 2023).

⁶⁰ *Id.* at 683 (cleaned up).

interference with a ‘broad and continuing supervisory or regulatory program’ of the PUC.’⁶¹

42 The Company represents that these examples, which similarly disclaim non-economic damages (or any liability at all), provide adequate persuasive authority to support the Company’s proposal.

III. CONCLUSION

43 PacifiCorp respectfully requests the Commission approve PacifiCorp’s Petition.

Respectfully submitted March 8, 2024,

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⁶¹ *Id.* (citing *Hartwell Corp. v. Superior Court*, 27 Cal.4th 256, 266 (2002)); *Id.* at 678 (citing *San Diego Gas & Electric Co. v. Superior Court*, 13 Cal.4th 893, 918 (1996) (same)).