BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PACIFICORP d/b/a PACIFIC POWER AND LIGHT COMPANY, Respondent.	DOCKET UE-230877

RESPONSE BRIEF OF COMMISSION STAFF

May 3, 2024

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

I. INTRODUCTION

1 As discussed at the prehearing conference in this docket, this brief addresses both the legal and policy questions raised by PacifiCorp's (PacifiCorp or Company) proposed tariff revision. The policy question posed by PacifiCorp's tariff revision is: Should the Commission decide *ex ante* what types of damages are appropriate in civil cases against PacifiCorp, or should that decision be left to the court hearing each specific case? When the question is phrased this way, the answer is obvious. Punitive, special, noneconomic, and other types of damages are available in civil cases for good reason. There are reasonable standards that govern when courts are able to grant these types of damages and the court hearing each individual civil case should be the body that decides whether these types of damages are appropriate under the circumstances. Further, even if the Commission is interested in considering PacifiCorp's proposal, it should decline to do so outside of a rate setting case. Limitations on liability are acceptable as part of a utility's tariff because limiting liability reduces risk, which can be accounted for by setting lower rates. PacifiCorp has proposed no reduction in rates to account for the large risk reduction it requests here and therefore the proposal should be denied, at least until the Commission can also consider how the reduced risk should be accounted for in rates.

2 The legal question posed by this tariff revision is: Does the Commission have the authority to approve such a broadly worded rule? The answer to this question is no. In general, the Commission does have the authority to limit liability in the sense of limiting the circumstances under which a utility is found legally responsible in civil court. But it does not have the authority to limit the kinds of damages that are available in civil court once PacifiCorp is found liable. That type of limitation directly contradicts RCW 80.04.440. While the legal issues raised by this petition are interesting, the Commission need not reach

them in order to decide this case. The tariff revision is simply bad public policy and can be denied on the basis that it is not in the public interest. The increased risk of utility-caused wildfires is a serious issue that the Commission has made a top priority for at least the past several years. But addressing this problem requires a comprehensive review of all available options and the current filing allows the Commission to consider only whether or not to approve one option. Denying this filing would not be a dismissal of the concerns PacifiCorp raises in this filing, but an acknowledgement that the Commission should consider the issue of wildfire safety carefully and in a proceeding that allows the Commission to weigh all options and the associated costs and risks of each option systematically.

II. BACKGROUND

3 The Company proposes the following addition to Rule 4 of its tariff:

> 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.[1]

4 The Company made arguments in favor of granting this proposed revision in the October 24, 2023 cover letter. PacifiCorp summarizes what it believes the revision will do in the cover letter:

> The proposed tariff amendment would: (1) limit damages arising out of the Company's provision of electric services to actual damages; (2) exclude a-typical damages (including special, non-economic, punitive, incidental,

[1] Revised tariff sheets filed Oct 24, 2023. "Parties" is not defined in Rule 4 or in the definitions section of Rule 1, but presumably this refers to the customer and PacifiCorp.

> indirect, or consequential); (3) only apply prospectively, and for actions arising out of the provision of electric service; and (4) would not apply where state law otherwise disallows the limitation. This provision strikes a reasonable balance between enabling actual damages when appropriate, and unreasonable treble damages.[2]

5 The Company further argued in favor of the tariff revision in a response filed on December 20, 2023.[3] In the response, PacifiCorp argued that the Commission does have the authority to grant the requested revision despite RCW 80.04.440 and that doing so would improve the Company's financial health and help keep customer rates low.[4]

6 In the Company's initial brief, it states that the revision "would prospectively limit the Company's liability from injuries that result from providing electrical services to only economic damages."[5] PacifiCorp argues that the revision is within the Commission's authority to adopt because approved tariffs limiting liability effectively preempts RCW 80.04.440.[6] The Company also argues, however, that the rule does not conflict with statue because of the rule's last sentence:

> 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.[7]

7 In terms of why this proposed change is good public policy, PacifiCorp argues that Washington state law currently allows unreasonable amounts of atypical damages,[8] and that jury verdicts are "a risky proposition" for both plaintiffs and defendants.[9] It makes various

[2] October 24, 2023 cover letter, p. 1.
[3] PacifiCorp Response filed December 20, 2023.
[4] *Id.*
[5] Initial Brief at 2, ¶ 1.
[6] *Id.* at 3, ¶ 4–5, ¶ 9.
[7] *Id.* at 5, ¶ 10.
[8] *Id.* at 9, ¶ 20.
[9] *Id*.

arguments about why this revision would benefit the Company and ratepayers, noting that the revision might help improve the Company's financial health and that improved credit ratings would ultimately lead to lower customer rates.[10]

8 In the Staff memo submitted prior to the open meeting, Staff raised concerns that the proposed rule conflicts with state law. RCW 80.04.440 states in full:

> 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 wilful, 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.[11]

9 The statute can be paraphrased and broken into an if-then statement:

> <u>If:</u>
>
> The Company does any act, matter or thing prohibited, forbidden, or declared to be unlawful, or omit to do anything required by any law of the state, by this title or by any order or rule of the commission,
>
> <u>Then:</u>
>
> The Company shall be liable to the persons or corporations affected thereby for all loss, damage, or injury caused thereby or resulting therefrom… if the court shall find that such act or omission was wilful, 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.

10 As a shorthand, throughout this brief Staff will refer to the "if" portion of RCW 80.04.440 as Part 1 and the "then" portion of the statute as Part 2.

[10] *Id*. at 5-12.
[11] Emphasis added.

III. LEGAL STANDARD

A. The Standard for Approving Tariff Revisions

11 Under RCW 80.28.010(3), all rules and regulations issued by any electric company "affecting or pertaining to the sale or distribution of its product or service, must be just and reasonable." Under RCW 80.28.020, if the Commission finds the rules within a company's tariffs to be "unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of the law," then the Commission "shall determine the just, reasonable, or sufficient rates, charges, regulations, practices or contracts to be thereafter observed and in force, and shall fix the same by order." The question at issue in this case is therefore whether the Company's current rules are unjust or unreasonable in light of the absence of PacifiCorp's proposed tariff revision. As always, the Commission is tasked with regulating in the public interest.[12]

B. The Effect of Approved Tariff Revisions

12 A Commission-approved tariff generally has the force and effect of law.[13] However, tariffs do not repeal or supersede a statute.[14] The Commission may approve a tariff that limits liability under certain circumstances.[15] But where a statute sets forth that which is required, an agency does not have discretion to act in variance to its terms.[16] The Commission may not approve a tariff that is inconsistent with statutory requirements.[17]

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[12] RCW 80.01.040(3); RCW 80.28.020.
[13] *See e.g., General Tel. Co. of N.W., Inc. v. City of Bothell*, 105 Wn.2d 579, 585, 716 P.2d 879 (1986).
[14] *See Public Utility Dist. No. 2 of Pacific County v. Comcast of Washington IV, Inc.*, 184 Wn. App. 24, 54, 336 P.3d 65 (2014) (citing *People's Org. for Wash. Energy Res. v. Utils. & Transp. Comm'n*, 101 Wn.2d 425, 427–34, 679 P.2d 922 (1984)).
[15] *Allen v. General Telephone Co. of Northwest*, Inc., 20 Wn. App. 144, 151, 578 P.2d 1333 (1978) ("When so filed and approved by the Commission and when proper notice is given that the tariff is available for public inspection, the rule becomes a part of the law of this State. Since Mr. Allen did not challenge the rule in an administrative review, it is conclusive on the question of liability in this action between him and the defendant. RCW 80.04.410.")
[16] *See Public Utility Dist. No. 2 of Pacific County*, 184 Wn. App. at 54.
[17] *See Waste Mgmt. of Seattle, Inc. v. Utils, and Transp. Comm'n*, 123 Wn.2d 621, 627-28, 869 P.2d 1034 (1994*); see also* RCW 34.05.570(3)(b).

C. The Case Law of RCW 80.04.440

1. *Markoff v. Puget Sound Energy, Inc.*

13 *Markoff* is a 2019 decision from Division One of the Washington Court of Appeals. The trial court in *Markoff* granted Puget Sound Energy's (PSE) motion to dismiss the plaintiff firefighter's negligence claim, brought after the company's decommissioning of a leaking pipeline that exploded, injuring the firefighter. On appeal, Division One upheld the trial court's decision, reasoning that the professional rescuer doctrine applied to the incident, barring the plaintiff's negligence claim. The court interpreted RCW 80.04.440 as "preserv[ing] causes of action for private claims related to utility misconduct while adding the potential for recovery of attorney fees by successful claimants."[18] The court in *Markoff* rejected the notion that RCW 80.04.440 created a "private cause of action separate and independent of their common law claims."[19] Put simply, the holding in *Markoff* is that RCW 80.04.440 does not change any defenses a utility would normally have against civil claims against it.

2. *Citoli v. City of Seattle*

14 *Citoli* is a 2002 decision from Division One of the Court of Appeals. In *Citoli v. City of Seattle*, the plaintiff sued both Seattle City Light and PSE for shutting off electric and gas service respectively in response to an order from law enforcement.[20] The court concluded that the breach of contract claim the plaintiff brought against Seattle City Light failed as a matter of law because a section of the municipal code limited liability in the event of "the interruption . . . of electric service from any cause beyond the control of the Department,

[18] *Markoff v. Puget Sound Energy, Inc.*, 9 Wn. App. 2d 833, 848-49, 447 P.3d 577 (2019).
[19] *Id.*
[20] *Citoli v. City of Seattle*, 115 Wn. App. 459, 466-80, 61 P.3d 1165 (2002).

including, but not limited to . . . riots, . . . civil, military or governmental authority . . . and acts or omissions of third parties."[21] The appeals court concluded the following:

> This provision applies regardless of whether there was an "emergency declared by appropriate authority." Seattle City Light received a police order transmitted through EOC to shut off electricity to the building. This was a circumstance beyond its control. Seattle City Light's contractual duty to provide electrical service does not impose upon it a duty to second-guess police orders based on the absence of a formal declaration of emergency from the Mayor.[22]

The plaintiff also made a negligence claim, arguing that "Seattle City Light breached its duty to avoid interruptions of service and to minimize inconvenience because it disconnected electricity to the entire building when it could have disconnected service only to the second and third floors."[23] The Court of Appeals also dismissed this claim as a matter of law because the Seattle Municipal Code limited liability, with the court concluding that "[t]he general duty imposed by former WAC 480–100–076 to minimize delay must be viewed together with liability limitations embodied in SMC 21.49.110(U) and SMC 21.29.110(V). '[M]unicipal ordinances and statutes are to be harmonized if possible.' "[24]

15 The plaintiff claimed that PSE, the customer's natural gas provider, had breached its tariff and that the company had wrongfully interfered with the plaintiff's business relationships.[25] On the breach of tariff claim, the Court concluded that while the rule in tariff had technically been violated by PSE, the company was still not liable for damages under a portion of the approved tariff that included a force majeure clause and the plaintiff was therefore not entitled to damages.[26]

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[21] *Id. at* 477.
[22] *Id*.
[23] *Id*. at 479.
[24] *Id*. at 480 citing *Heinsma v. City of Vancouver,* 144 Wn.2d 556, 566, 29 P.3d 709 (2001).
[25] *Id.* at 481-87.
[26] *Id.* at 481-82 ("The company, its employees and authorized representatives, or the customer will not be liable for losses or damages when such losses or damages result from any act, omission, or circumstances occasioned by or in consequence of any acts of God, strikes, lockouts, acts of the public enemy, . . . and any

3. *Lane v. City of Seattle*

16 In the 2008 case, *Lane v. City of Seattle*, the Supreme Court of Washington affirmed that the phrase "all loss, damage or injury" in RCW 80.04.440 means what it says:

> RCW 80.04.440 allows people to sue water companies for "all loss, damage or injury" resulting from an illegal act. On its face, "all loss" includes interest. Depriving a party of money for a time deprives him of its productive use during that time. "Justice delayed is justice denied" is literally true for money. If a losing party has wrongfully kept another's money at 12 percent interest for six years before giving it back, it is the same as taking the lost value. "All loss, damage or injury" includes interest on money improperly taken or withheld.
>
> Seattle argues that the statute does not include the word "interest." Neither does it expressly include "medical bills" or "lost work time" or "profits," but the phrase "all loss, damage or injury" has been held to include those. Seattle says we would have to infer state consent to interest payments from the statute. However, "all loss, damage or injury" is clear, broad, and inclusive. We have no authority to judicially amend the broad statute to read "all loss (except interest)."[27]

Lane confirms that Part 2 of RCW 80.04.440 requires the availability of all damages that would fit under the umbrella of "all loss, damage or injury;"[28] in other words, damages that would normally be available to a plaintiff when the utility is found liable in a civil case.

4. *National Union Ins. Co. of Pittsburgh, Pa. v. Puget Sound Power & Light*

17 In *Lane*, the Washington Supreme Court cited the 1999 *National Union* case to support the assertion that the "all loss" language in RCW 80.04.440 is broad and inclusive.[29] In *National Union*, Division One of the Court of Appeals reversed and remanded the trial court's decision to grant Puget Sound Power & Light's motion to dismiss, which was based

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other cause, whether of the kind herein enumerated or otherwise, and whether caused or occasioned by or happening on account of the act or omission of the company or any other party, if the cause is not reasonably within the control of the party asserting force majeure and which by the exercise of due diligence such party is unable to prevent or overcome.")

[27] *Lane v. City of Seattle*, 164 Wn.2d 875, 888, 194 P.3d 977 (2008)(citations omitted).

[28] *See Id.* at 889 ("First, RCW 80.04.440 says nothing about a reasonably prudent investor. It consents to suit for all 'loss, damage or injury' and does not exempt from those losses the usual judgment interest.")

[29] *Id.* at 888.

on language in the company's tariff that limited liability in the event that an interruption in service was beyond the company's control.[30] The Court of Appeals concluded that the tariff approved by the Commission was ambiguous and must be interpreted in light of the statutory and regulatory scheme as a whole. The Court concluded that the continuity-of-service tariff did not, as a matter of law, absolve the utility of a negligent failure to utilize backup equipment to restore power.[31] The Court believed that a tariff limiting the utility's liability for negligence in this manner would be at odds with the utility's statutory duty if interpreted in a manner that completely absolved the utility for any negligence:

> First, absolving Puget Power of liability for its negligent failure to utilize available backup equipment would be at odds with its statutory duty to provide "adequate and efficient" electric service, RCW 80.28.010, and regulatory duty "to avoid interruptions of service, and, when such interruptions occur, to reestablish service with a minimum of delay." WAC 480–100–076. Second, holding Puget Power liable for its negligent failure to utilize available backup equipment would permit its customers to exercise their right to recover damages under RCW 80.04.440.[32]

This case demonstrates that ambiguous tariff language will be interpreted by Washington courts in light of the statutory scheme as a whole.

5. *Employco v. City of Seattle*

18 In the 1991 *Employco* case, the Supreme Court of Washington held that, despite the city passing an ordinance that limited liability for "any loss…from any cause,"[33] the court found that the ordinance did not preempt RCW 80.04.440:

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[30] *National Union Ins. Co. of Pittsburgh, Pa. v. Puget Sound Power & Light*, 94 Wn. App. 163, 168-69, 972 P.2d 481 (1999) ("CONTINUITY OF SERVICE—Electric service is inherently subject to interruption, suspension, curtailment and fluctuation. Neither the Company nor any other person or entity shall have any liability to any Customer or any other person or entity 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 any of the following: a. Causes beyond the Company's reasonable control including, but not limited to, fire, flood, drought, winds, acts of the elements[.]").

[31] *Id*. at 174-75.

[32] *Id.*

[33] *Employco Personnel Servs., Inc. v. City of Seattle*, 117 Wn.2d 606, 610-11, 817 P.2d 1373 (1991)("[t]he [City Light] Department shall not be liable for any loss, injury, or damage resulting from the interruption, restoration, or reduction of electric service from any cause.")

> Applying this test, the ordinance in this case is in conflict with state statutes. The City argues that the ordinance forbids suits for damages for loss of electrical service occasioned by acts of negligence. State statutes, to the contrary, authorize such suits and permit recovery of damages for negligently caused losses.[34]

19 Much like PacifiCorp in its Initial Brief,[35] the city in *Employco* argued that the ordinances preempted state statute and that these ordinances are necessary to keep rates low,[36] but the Washington Supreme Court rejected both arguments:[37]

> In viewing the statutory scheme as a whole, the conclusion is reached that the legislature clearly did not intend that the City of Seattle have immunity from "any loss, injury, or damage resulting from the interruption ... of electric service from any cause", as stated in the Seattle ordinance.[38]

This is another example of an attempt to limit liability that has been overturned based on inconsistency with the plain language of RCW 80.04.440.

6. *Gantner v. PG&E*

20 In its December 20, 2023 response, PacifiCorp cites the recent California Supreme Court decision, *Gantner v. PG&E Co.*[39] for support. But the Company's response is also forthright about the fact that in *Gantner*, the conflict at issue was between one statute that provided a right of action against a utility and another statute that limited a court's ability to review CPUC decisions.[40] For that reason, the *Gantner* decision is not a persuasive comparison.

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[34] *Id. at* 614-15.
[35] Initial Brief at 3, ¶ 4 – 5, ¶ 9.
[36] *Employco*, 117 Wn.2d at 616-18.
[37] *Id.* at 618 ("The City argues that the purpose of the ordinance is to provide for setting of reasonable rates, and that the City's ability to do that is affected by the ruling of the Superior Court. The City further argues that if it has to defend itself in lawsuits like this, it raises the specter of higher rates for the average citizen. This is a specious argument which is manifestly without merit").
[38] *See Id. at* 615.
[39] *Gantner v. PG&E Corporation*, 538 P.3d 676 (Cal. 2023).
[40] PacifiCorp Response at 3; *Gantner*, 538 P.3d at 677-78.

D. Case Law Summary

21 The case law of RCW 80.04.440 establishes a few important points. First, there are instances in which limitations on liability within an approved tariff are valid and enforceable. Second, a tariff or city ordinance can and has been found void or unenforceable due to conflicts with RCW 80.04.440, which guarantees that a public service company will be responsible for "all loss, damage or injury caused thereby or resulting therefrom" if it is found liable. Third, the Commission should carefully consider whether approving a proposed limitation on liability or damages would be consistent with the Commission's statutory duties, as courts will interpret the tariff in a way that ensures consistency with those duties if the tariff is ambiguous. Finally, the Commission should note that the cases in which tariffs or ordinances limiting liability were enforceable were actual limitations on liability, not limitations on damages.

IV. DISCUSSION

22 The proposed revision should be rejected both as a matter of public policy and as a matter of law. Section A discusses why, even if the tariff revisions had the impact the Company assumes that they would, the proposal should be rejected as a matter of policy. Section B discusses why the Commission should reject the proposal as a matter of law.

A. The Commission Should Reject the Proposed Revision as a Matter of Policy

23 The Company's proposed tariff revision is not in the public interest. The Company seeks a sweeping limitation on damages without thorough consideration of the potential impact on customers. As discussed in section IV.B. below, it is doubtful that this proposed revision would in fact have the impact that the Company intends. But even assuming that the proposed revision would have the intended effect, the Company has done little to demonstrate that the proposed revision is in the public interest. While the Company

discusses the perceived benefits of its proposal in the abstract, it has not provided any evidence that those benefits are the likely outcome of the tariff revision, or that they outweigh the costs of approving this request. This leaves the Commission with no basis to conclude that the revision is in the public interest, or that the current tariff is unjust or unreasonable.

24 First, the Commission should consider its statutory duties when deciding whether the Company's proposal is in the public interest. Even if the Commission concludes that it has the authority to grant this tariff revision, would doing so be consistent with the agency's "charge of ensuring the public safe, adequate, and sufficient utility services at just, fair, reasonable, and sufficient rates?"[41] The Commission should consider this question in the context of the transition from traditional cost of service ratemaking into performance-based ratemaking. Under performance-based ratemaking, the Commission will track metrics and incent utilities through penalties and rewards for defined achievements and behaviors.[42] Would limiting damages that are currently available in a civil case against PacifiCorp incent the Company to be more or less vigilant when it comes to public safety? If anything, current public policy appears to favor an incentive structure that encourages greater vigilance, not less. Both the Commission and Washington State as a whole have made wildfire mitigation efforts a priority in recent years. If recent legislation is any indication, the Washington State Legislature believes that wildfire mitigation efforts are an aspect of utility operations that deserves even greater attention in the future.[43]

25 Second, the Commission should recognize the sweeping nature of this proposed limit on damages and the impact it would have on customers. Staff agrees with the comments

[41] *National Union*, 94 Wn. App. at 172.
[42] RCW 80.28.425.
[43] *See* RCW 80.28.440.

filed by Sierra Club in this docket that PacifiCorp's proposed tariff revision is an **"**incredibly broad waiver of liability [] without precedent."[44] Limiting the types of damages that customers can recover from PacifiCorp would limit a court's ability to make those plaintiffs whole and could dissuade plaintiffs from even seeking complete recovery on their actual economic damages.[45] If, for example, this revision does not allow a successful plaintiff to recover attorney fees for a willful act or omission, then that party would have to pay all litigation expenses out of whatever the court granted them from actual economic damages. This would leave them only partially compensated for the actual economic damages they suffered. Further, limiting recovery to only actual economic damages ignores the well-established policy reasons that noneconomic damages are available for certain civil claims.[46] The Commission should also consider that (even assuming that this limitation on liability does result in lower rates for customers later on) the revision essentially trades slightly lower rates for all customers in exchange for a potentially severe reduction in available recovery for customers impacted by a devastating event. In Staff's view, it is far from clear that slightly reduced rates for all customers is the just and reasonable option.

26 This proposed language is also so broad that it will likely result in unintended consequences. While both this brief and PacifiCorp's Initial Brief focus on wildfire-related litigation, the limitation applies to "any action" arising out of the provision of electric service. And while this may not be the Company's intention, this rule's language is not one-sided. For example, it appears that (under the Company's preemption theory at least) this language prohibits PacifiCorp from exercising its right under RCW 80.28.240(2) to pursue

[44] Sierra Club comments at 2 (filed Dec. 21, 2023).
[45] Note that the proposed revision does not actually define what "actual economic damages" means, a concerning vagueness given that this is a key term.
[46] *See e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L. Ed. 2d 585 (2003). ("Compensatory damages are intended to redress a loss or injury, while punitive damages serve a deterrent function").

treble damages against a person who has tampered with utility property and/or diverted power.[47]

27 Further, the Company's policy argument is premised on the belief that civil courts are prone to erroneously finding utilities liable and/or granting excessive awards to plaintiffs in cases against utilities.[48] While Staff is not inclined to delve into this topic extensively, Staff does not think the Commission should give this assumption credence. The Company has not provided any evidence to support a claim that Washington state courts have developed unreasonable standards for the claims the Company seeks protection from and a cursory review of recent tort cases involving utilities in the state of Washington suggests otherwise.[49]

28 Third, even if the Commission is generally open to considering the Company's proposal, it should deny the proposal in this proceeding. The Company has alleged that this revision will lower the cost of insurance and improve credit ratings, which would (eventually) be reflected in customer rates. If the Commission is open to approving new limitations on civil recovery, it should do so in a proceeding where the Commission can consider the impact that lowering of PacifiCorp's risk should have on customer rates.[50] As PacifiCorp notes in its initial brief, the logic behind allowing limitations on liability through

[47] While treble damages are not explicitly listed in the proposed tariff language, they are a form of punitive damages. Further, the October 24, 2023 letter states on page 1 that "[t]his provision strikes a reasonable balance between enabling actual damages when appropriate, and unreasonable treble damages," indicating that the Company believes that the rule would prohibit treble damages.
[48] *See* Initial Brief at 9, ¶ 20.
[49] *See Walter Family Grain Growers, Inc. v. Foremost Pump & Well Servs., LLC.,* 21 Wn. App. 2d 451, 461-64, 506 P.3d 705 (2022) (Discussing standards of care applicable to electric utilities, which varies "depending on the foreseeable danger presented by the utility's activity"); *see also Wells v. Nespelem Valley Elec. Coop., Inc.,* 13 Wn. App. 2d 148, 156, 462 P.3d 855 (2020) (A utility is held to the highest degree of care, but only when the "utility's operation exposes the public to serious accidents or death.")
[50] *See Allen v. General Tel. Co. of Nw., Inc.,* 20 Wn. App. 144, 151, 578 P.2d 1333 (1978) ("The rule which disclaims or limits the telephone company's liability for damages resulting from a failure to print this initial listing is one which affects the charges for basic services rendered. Without such a rule, the company would have to raise its rates commensurate to its increased liability risk.")

tariff is that these limits reduce risk, allowing for services to be provided at lower cost to ratepayers.[51] But the Company's current proposal is one-sided; it provides only a benefit to the Company by shifting potential losses onto to ratepayers. New limits that would substantially reduce the Company's risk should always be accounted for in rates. But as noted above, even if they were accounted for in rates, the question of whether these changes were in the public interest would remain.

B. The Commission Should Reject the Proposed Revision as a Matter of Law

1. The proposed rule directly contradicts RCW 80.04.440

29 Even prior to a review of the relevant case law, the Commission has sufficient reason to reject the proposed revision. This rule would contradict the plain language of RCW 80.04.440. The proposed rule and the full text of RCW 80.04.440 are provided above in the background section of this brief. Reviewing these side-by-side reveals a clear tension. The proposed rule limits damages to "actual economic damages," except "where state law disallows limitations on liability." The statute on the other hand 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.*"[52] In sum, the proposed tariff disallows certain types of damages unless state law disallows such a limitation and RCW 80.04.440 *does* disallow this kind of limitation, making the proposed tariff completely ineffective.

30 PacifiCorp argues both that the Commission has the authority to effectively preempt RCW 80.04.440 through an approved tariff,[53] and that the tariff's last sentence means state

[51] *See* Initial Brief at 15-16, ¶ 35.
[52] RCW 80.04.440. Emphasis added.
[53] Initial Brief at 3 ¶ 4 – 5 ¶ 9 ("Thus, limitations of liability in utility tariffs are affirmative defenses that preempt RCW 80.04.440"); PacifiCorp Response at 2 ("And the Commission is free to adopt utility limitations of liability that have the practical effect of preempting RCW 80.04.440 when damages arise from utility services under Commission-approved tariffs.")

law controls when the tariff would be inconsistent with statute.[54] These two assertions are contradictory. Either the proposed limitation preempts RCW 80.04.440, or the tariff is only effective to the extent that it is consistent with Washington statute, both cannot be true. The effect that the proposed tariff revision would have is very different depending on the theory to which one subscribes. Instead of addressing this contradiction, PacifiCorp essentially invites the Commission to approve the tariff and let a future court decide how to resolve the issue.[55] As noted in the legal section above, tariffs cannot supersede a statute and the use of the word "shall" imposes a mandatory duty.[56] The Commission should reject the proposed tariff revision for that reason.

2. The Commission has the authority to approve limitations on liability in tariff, but the proposed rule is not actually a limitation on liability and would be void due to RCW 80.04.440

31 The Commission should question whether the proposed rule is truly a limitation on liability at all. Liability is when a party is held legally responsible for something.[57] An actual limitation on liability would circumscribe the circumstances under which an entity may be found legally liable.[58] Proposed Rule 4 limits damages; it does not to alter the circumstances under which the Company can or cannot be found liable. Much of PacifiCorp's arguments in this proceeding focus on establishing that the Commission has

[54] Initial Brief at 5, ¶ 10.
[55] *See* Initial Brief at 5, ¶ 10 ("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.")
[56] *See e.g., Waste Management of Seattle, Inc.*, 123 Wn.2d at 629.
[57] Liability defined as "The quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment." Black's Law Dictionary, page 997 (9th ed, 2009); *see also*, Legal Information Institute: Liability: "A party is liable when they are held legally responsible for something." *Available at*: liability | Wex | US Law | LII / Legal Information Institute (cornell.edu).
[58] Staff is cognizant of the fact that in certain legal practices, a clause limiting the types of damages a party can recover in future litigation is sometimes referred to informally as a limitation on liability because it reduces the potential amount for which the other party could be found liable. However, the point here is that limitations on liability such as a force majeure clause do not contradict RCW 80.04.440, while a limitation on damage types do.

the authority to limit liability through an approved tariff. While the Commission does indeed have that authority, it does not follow that it has the authority to approve the Company's current request to limit damages.

32 The Company mistakes 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 *has* committed a "prohibited, forbidden, or unlawful" act or omission and is therefore liable. It is clear that the Commission has the authority to order the first limitation if the Commission finds it in the public interest and if that limitation does not conflict with statute. Because Commission-approved tariffs have the effect of law,[59] a tariff exempting a utility from liability in specified circumstances does not conflict with Part 1 of RCW 80.04.440. But the Commission does not have the authority to directly contradict the plain language of Part 2 of RCW 80.04.440 in an approved tariff, which expressly states that the utility "*shall be liable* to the persons or corporations affected thereby *for all loss, damage, or injury caused thereby or resulting therefrom*"[60] if it commits a violation. Rather than a rule in which PacifiCorp is shielded from liability in specific instances against specific types of claims, the Company's proposed tariff revision broadly states that, if the Company *is* found liable, the damages a court can grant are limited to actual economic damages.

[59] *General Tel. Co. of N.W., Inc.,* 105 Wn.2d at 585.
[60] Emphasis added.

33 The Company argues in its December 20, 2023 response that "the Commission is free to adopt utility limitations of liability that have the practical effect of preempting RCW 80.04.440 when damages arise from utility services under Commission-approved tariffs."[61] In support of this assertion, it cites *Markoff v. Puget Sound Energy* and *Citoli v. City of Seattle*. But these cases do not support PacifiCorp's preemption argument.

34 *Citoli* supports the notion that the Commission has the authority to approve a tariff that includes an actual limitation on liability, i.e., limiting the circumstances under which the utility could be found to have committed a violation. In *Citoli*, the tariff included a force majeure clause, not a limit on the kinds of damages available in the event the utility was found liable. As for *Markoff*, the central holding in that case is that those preserved causes of action are not altered by RCW 80.04.440, specifically that the preserved causes of action cannot be asserted free of the limitations, defenses, or exceptions that those causes of action are normally subject to.[62] This holding is simply not relevant to the question of the Commission's authority to limit recovery of specific types of damages through a tariff. While PacifiCorp characterizes a limitation on liability in tariff as an affirmative defense,[63] this characterization is only plausible for actual limitations on liability, not limitations on damages.

35 The tariffs that PacifiCorp cites in its' December response and the Initial Brief do not contradict the conclusion that a limitation on types of damages is prohibited under RCW 80.04.440. In the Initial Brief, the cited tariffs are all actual limitations on liability, not damages.[64] The only exception is the reference to PacifiCorp's Qualifying Facility (QF)

[61] PacifiCorp Response at 2.
[62] *Markoff*, 9 Wn. App. 2d at 848-49.
[63] Initial Brief at 4, ¶ 8.
[64] *Id.* at 13, ¶ 30-14, ¶ 32.

PPA, which has language that does appear to limit different kinds of damages.[65] However, upon closer inspection, the relevant language is in an attachment to Schedule QF, and both the attachment itself and Schedule QF describe these as "working draft[s]"[66] and "template[s]."[67] The language in these attachments is thus not an enforceable part of the tariff; the attachments essentially act as examples for the actual contracts signed between Qualifying Facilities and PacifiCorp, which are not part of the Commission-approved tariff. It should also be noted that offering these contracts between QFs and utilities are required by the Public Utility Regulatory Policies Act (PURPA), a 1978 federal law. As PacifiCorp noted, RCW 80.04.440 has been effective for substantially longer and one could make many arguments as to why the protections in RCW 80.04.440 were not intended to cover a QF's contract with an IOU.[68] In the alternative, it is also possible that this language was simply approved in error and is unenforceable for the same reasons outlined above.[69]

V. CONCLUSION

36 If the Commission were to approve this tariff revision, it would be void due to its direct conflict with Part 2 of RCW 80.04.440. Although the Commission has the authority to approve limitations on liability, that authority is constrained by statute and the proposed rule language conflicts with existing law. Even if the Commission concludes that the tariff

[65] *Id*. at 14, n.45. A similar reference is made to PSE's QF PPA tariff in the Company's December 20, 2023 response.
[66] Schedule QF Attachment A, at 1. *Available at*: QFa - Attachment A to Schedule QF - _Standard_PPA_(NEW).pdf (pacificpower.net)
[67] Schedule QF, Original Sheet No. QF.2. *Available at*: QF_Avoided_Cost_Purchases_and_Procedures_for_Qualifying_Facilities.pdf (pacificpower.net)
[68] For example, at the time RCW 80.04.440 was passed it was clearly a statute meant to clarify that the Commission's regulation of utilities does not prevent customers or members of the public from bringing a civil case against them, but that protection was not meant to extend to an arm's length contract between a QF as a seller and a regulated utility. Title 80 as a whole regulates the services provided by public service companies to retail customers.
[69] *See* WAC 480-80-010: "The tariffs and contracts filed by public service companies must conform with these rules. If the commission accepts a tariff or contract that conflicts with these rules, the acceptance does not constitute a waiver of these rules unless the commission specifically approves the variation consistent with WAC 480-80-015 (Exemptions from rules in chapter 480-80 WAC). Tariffs or contracts that conflict with these rules without approval are superseded by these rules."

revision would be enforceable, the Commission should reject the proposal because the Company has not demonstrated that it is in the public interest. If the Commission is open to considering limitations on PacifiCorp's future liability (especially of the magnitude implicated in this proposal), the Commission should consider this kind of proposal in a proceeding in which the Company's reduction in risk can be balanced through lowering customer rates accordingly.

37 The question of how to address the risks of devastating future wildfires is one that Staff, the Commission, and Washington State as a whole take very seriously. This topic has been one of the Commission's top concerns in recent years, and no doubt it will continue to be a priority in the future. Staff's position in this case is *not* that the concerns raised by the Company through this proposal are meritless. The risks posed by wildfires are increasing and will continue to do so in the future. Staff's primary issue with this proposal, aside from the legal issues, is that there are many options to cost-effectively reduce the risk of wildfires, and it is far from clear that this proposal is the best option. First and foremost, the Company should be focused on taking prudent steps to minimize the possibility that its system is the cause of wildfires. To that end, Staff looks forward to seeing the Company submit a thorough and bold wildfire mitigation plan required later this year under RCW 80.28.440. The ideal method of reducing the Company's potential liability is taking the appropriate steps to ensure that the Company's operations are not the cause of future wildfires. If, after the Company takes those direct measures, PacifiCorp still believes the concerns raised in this docket persist, then it can return to the Commission with a new proposal.

Respectfully submitted this 3rd day of May, 2024.

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