

**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 Reply Brief

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I. REPLY

1 Both the Washington Utilities and Transportation Commission (Commission) Staff and the Public Counsel Unit of the Attorney General’s Office (Public Counsel) argue that the Commission lacks the power to approve PacifiCorp’s proposed limitation of liability.

2 Yet they use different vehicles to get there. Staff argues the Commission can limit utility liability, but not damages. Public Counsel points the other direction: the Commission can limit liability and damages, but only for violations of Commission orders or rules, as opposed to Washington law.¹ Together, either the Commission can limit liability but not damages (Staff); or the Commission can limit liability and damages, but only for violations of Commission orders or rules (Public Counsel).

3 The Commission should decline to engage in these line-drawing exercises. PacifiCorp agrees with Public Counsel that Washington courts “have had few opportunities to consider the purpose and scope of RCW 80.04.440.”² But in the select instances where it has, the courts have broadly supported and upheld the Commission’s power to approve utility limitations of liability. In Washington, a “filed tariff has the force and effect of law.”³ When approved by the Commission, a utility tariff becomes

¹ Staff Resp. Br., at 1 (“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.”); PC Resp. Br., at 10 (“Public Counsel respectfully submits that the Commission exceeds its authority by approving a limitation of liability in a tariff that reduces the rights of customers to bring an action predicated upon a violation of Washington law—because RCW 80.04.440 “preserves” such causes of actions. However, it appears that the Commission would be well within its authority to approve a tariff revision that impacted the rights of customers to bring an action predicated upon violation of the Commission’s own orders and rules. Limitations on liability for interruption of service, for example, would appear to fall into this category.”).

² PC Resp. Br., at 3.

³ *Citoli v. City of Seattle*, 61 P.3d 1165, 1178 (2002) (citing *General Tel. Co. of N.W., Inc. v. City of Bothell*, 105 Wash.2d 579, 585, 716 P.2d 879 (1986)).

“part of the law and is binding upon the customer whether he actually knows of limitation or not . . .”⁴ This is because “[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.”⁵

4 Consistent with these Washington authorities, and the dozens of utility tariffs discussed in PacifiCorp’s briefing, the Commission routinely approves limitations of liability (or damages) for violations of not only Commission orders and rules, but also Washington law. These include examples where the Commission has shielded utilities from liability for non-economic damages—or any liability whatsoever. Staff and Public Counsel’s view of the scope of the Commission’s authority calls into question these Commission-approved utility tariffs, and the Commission should decline to cede its long-held powers in response to these arguments.

5 That said, the Company is sensitive to the policy implications of its request. Although PacifiCorp’s proposal is *narrower* in the scope of damages it seeks to exclude compared to previously approved Commission tariffs (only noneconomic damages are limited), it is nonetheless *broader* in the scope of utility services that the waiver would apply to (the provision of all electric services). If the Commission has concerns with PacifiCorp’s proposal, it could narrow its scope with one of several reasonable options: by excluding willful or gross negligence; by amending the language to reflect the overlapping consensus of Staff and Public Counsel’s view of the Commission’s authority; or by rejecting the proposal without prejudice, and open a rulemaking proceeding to consider the policy issues implicated by PacifiCorp’s proposal.

⁴ *Allen v. General Telephone*, 578 P.2d 1333, 1336 (1978).

⁵ *Id.*

6 Regardless which approach the Commission takes, the issues raised in this Application merit close Commission consideration. Utility commissions need to earnestly consider how to best manage increasing wildfire risks from a changing climate, where the pool of reasonably priced insurance coverage has dramatically dried up, and when utilities will continue to face blockbuster liabilities that impact their financial health and ability to provide reliable and affordable utility services. The Company’s waiver presents one constructive solution to these questions; PacifiCorp looks forward to discussing this and other solutions in the future.

7 The Company’s arguments follow.

A. Neither Staff nor Public Counsel disagree that approval would support PacifiCorp’s financial health, and ability to provide reliable and low-cost services for Washington customers.

8 Neither Public Counsel nor Staff disagree that approval would support PacifiCorp’s financial health and continued reliable and low-cost services for our Washington customers. Instead, both advance alternative policy arguments to discredit PacifiCorp’s proposal.⁶ While the Company responds to each of these alternative policy arguments below, it is important to highlight this apparent agreement, because it narrows the scope of contested issues that the Commission is asked to resolve in this proceeding.

B. If Staff is correct, multiple Commission-approved tariffs are unlawful.

9 Staff argues that the Commission has the power to limit utility liability, but this power does not extend to tariffs that only limit damages.⁷ And because PacifiCorp’s

⁶ See, e.g., Staff Resp. Br., at 11-15; PC Resp. Br., at 12-16.

⁷ Staff Resp. Br., at 1 (“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

waiver should be construed as only limiting damages, the Commission lacks the power to approve PacifiCorp's request.

10 Putting aside the fact that Staff agrees that PacifiCorp's request is a "waiver of liability" that is not limited to damages,⁸ Staff's argument would render multiple Commission-approved tariffs unlawful.

11 For example, Avista is not "liable for any loss or damage resulting from defects" in Customer-installed equipment;⁹ Avista "shall not be held liable for damage to persons or property arising from the use of the service on the premise of the Customer;"¹⁰ and Avita is not liable "for any loss or damage" caused by various service interruptions.

12 Similarly, Puget Sound Energy (Puget) requires all interconnection customers to assume "the risk of all damages, losses, costs and expenses resulting from or in connection with performance of" its Interconnection Agreement.¹¹ Puget's Interconnection Agreement specifically limits damages to direct damages, and in "no event shall either Party be liable to the other Party for any indirect, special, consequential, or punitive damages,"¹² and it restates this limitation with a separate prohibition against consequential damages.¹³ Puget also disclaims liability for various damages arising from QF tariffs, including a liquidated damages clause (which, by definition is limited to

liable."); *Id.* at 17 ("PacifiCorp's arguments in this proceeding focus on establishing that the Commission has 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 request to limit damages.").

⁸ Staff Resp. Br. at 12 ("Staff agrees with the comments filed by Sierra Club in this docket that PacifiCorp's proposed tariff revision is an "incredibly broad *waiver of liability* . . .") (emphasis added).

⁹ Avista Sch. 70, Sec. Rev. Sheet 70-E.

¹⁰ *Id.*

¹¹ Puget Schedule 152, Attach. I, § 7.1.

¹² *Id.* § 7.2.

¹³ *Id.* § 7.4 ("Other than as expressly provided for in this Agreement, neither Party shall be liable under any provision of this Agreement for any losses, damages, costs, or expenses for any special, indirect, incidental, consequential, or punitive damages . . .").

damages and not liability);¹⁴ has multiple disclaimers against “indirect, incidental, or consequential or punitive damages of any nature or kind” for disclosure of confidential QF information;¹⁵ and includes requirements for equitable relief in lieu of damages.¹⁶

13 Each of these examples discuss limitations on damages, not liability. If the Commission agrees with Staff that it lacks the power to approve utility limitations on damages (as opposed to liability), it would call into question each of these tariffs.

C. If Public Counsel is correct, multiple Commission-approved tariffs are unlawful.

14 Public Counsel argues that the Commission has the power to limit utility liability or damages, but only for violations of Commission orders or rules.¹⁷

If Public Counsel is correct, multiple Commission-approved tariffs are unlawful. For example, Puget has a broad limitation of liability that limits “any liability to any Interconnection Customer or any other person or entity for any disruption in service or for any loss or damage caused thereby.”¹⁸ Puget has the same limitation for damages caused by specific circumstances, including:¹⁹ “fire, flood, drought, winds, acts of the elements, court orders, insurrections or riots” to name a few.²⁰ “In no event,” shall Puget

¹⁴ Puget Sch. 153 Attach. C, § 5.3 (approved by Commission Advice No. 2021-39).

¹⁵ Puget Sch. 153 Attach. B, § 13.1.7 (approved by Commission Advice No. 2021-39).

¹⁶ Puget Sch. 153 Attach. C, § 22.1.9 (approved by Commission Advice No. 2021-39).

¹⁷ PC Resp. Br., at 10 (“Public Counsel respectfully submits that the Commission exceeds its authority by approving a limitation of liability in a tariff that reduces the rights of customers to bring an action predicated upon a violation of Washington law—because RCW 80.04.440 “preserves” such causes of actions. However, it appears that the Commission would be well within its authority to approve a tariff revision that impacted the rights of customers to bring an action predicated upon violation of the Commission’s own orders and rules. Limitations on liability for interruption of service, for example, would appear to fall into this category.”); *Id.* at 10-11 (“In other words, this is not an either-or situation. Public Counsel does not argue that RCW 80.04.440 precludes all limitations of liability for claims against public utilities—full stop. Rather, the statute, properly construed, precludes only those limitation of liability provisions that conflict with its plain terms.”).

¹⁸ Puget Schedule 80, Or. Sheet 80-B.2.

¹⁹ *Id.* Or. Sheet 80-e.

²⁰ *Id.* Or. Sheet 80-f.

“be liable for the actions of inactions of the Interconnection Customer or its subcontractors . . .” under various interconnection agreements.²¹

15 The Commission also allows Puget to disclaim “any liability” for “any loss or damage” caused by disruptions in service due to the negligence of Puget’s employees, servants, or agents.²² Puget also broadly disclaims damages for “any losses, damages, costs or expenses for any special, indirect, incidental, consequential, or punitive damages,” arising from a variety of circumstances, including “contract, in tort, including negligence, strict liability, or any other theory of liability” for various QF disputes.²³

16 Most stark, Puget requires Interconnection Customers to waive “any immunity defense, or other protection that may be afforded by any workers’ compensation, industrial insurance, or similar laws (including the Washington Industrial Insurance Act, Title 51 RCW).”²⁴

17 These examples extend well beyond Public Counsel’s view that the Commission only has the power to disclaim liability for violations of Commission orders or regulations; they hold that Puget is not liable for “any liability” or “any loss or damage,” including from breach of contract or the negligence of its own employees, servants, or agents—and specifically requires customers to disclaim any protections provided by various workers compensation and similar insurance statutory provisions.

Public Counsel attempts to distinguish these examples, by arguing that each has an adequate nexus to Commission orders or rules and would be permitted by

²¹ Puget Schedule 152, Attach. D, § 20.1; Puget Schedule 152, Attach. E, § 19.1; Puget Schedule 152, Attach. F, § 17.1; Puget Schedule 152, Attach. G, § 18.1; Puget Schedule 152, Attach. J, § 12.11.1.

²² Puget Schedule 80, Or. Sheet 80-f.

²³ Puget Schedule 153 Attach. C, § 18.2 (approved by Commission Advice No. 2021-39).

²⁴ Puget Schedule 152, Attach. I, § 7.2.

RCW 80.04.440. For example, because some deal with limiting damages beyond a utility's control, others with damages from use of customer equipment, and others from interruption of services, they are close enough to the nexus of a Commission "order or rule" to be permitted by RCW 80.04.440.²⁵

18 This is not persuasive. It is unclear how RCW 80.04.440 would allow Puget to disclaim *all* damages caused by its negligence because it arises from "interruptions of service," but PacifiCorp would not be permitted to disclaim a more limited set of damages (only non-economic) for actions "arising out of the provision of electric service"?²⁶ It is also unclear how Puget would be permitted to disclaim specific provisions of Washington's Revised Code (including the entirety of RCW Title 51),²⁷ but similar treatment would not extend to PacifiCorp's proposal? It would seem that PacifiCorp's tariff satisfies Public Counsel's test: If Puget's "interruptions of service" provides an adequate link to a Commission "order or rule," surely PacifiCorp's "arising out of the provision of electric service" does as well?

19 Perhaps Public Counsel's argument can be parsed to conclude that Puget's tariffs are lawful, while PacifiCorp's is not. But the Company recommends the Commission exercise its discretion and decline to do so. Instead, consistent with the dozens of utility limitations of liability found in Avista, Puget, and PacifiCorp's electric utility tariffs, the Commission should conclude it has the power to approve PacifiCorp's proposal. A conclusion otherwise calls into question these multiple examples.

²⁵ PC Resp. Br., ¶¶ 22-23.

²⁶ PacifiCorp Attach. B Proposed Tariff Sheets, Or. Sheet No. R4.4.

²⁷ Puget Schedule 152, Attach. I, § 7.2.

D. Commission-approved tariffs cannot be unconscionable, and PacifiCorp’s proposal is narrower than other utility tariffs regarding what types of damages are limited.

20 As noted above, neither Public Counsel nor Staff disagree that approval would support PacifiCorp’s financial health. Instead, both argue that PacifiCorp’s proposal is overbroad in terms of the damages or claims that it would exclude.

21 This argument is not persuasive.

22 As an initial matter, the Company’s proposal is narrower than prior Commission-approved tariffs in terms of damages. The Commission has approved many limitations of liability that exclude all damages—economic and noneconomic, or any liability whatsoever.²⁸ These precedents demonstrate that PacifiCorp’s tariff, at least in terms of damages, is not per se unreasonable.

23 Further, contrary to Public Counsel’s claim, Commission-approved tariffs can never be found unconscionable.²⁹ Washington’s Unfair Business Practices Act does not apply to utilities.³⁰ This means that unfair competition or practices, like unconscionable contract terms prohibited by RCW 19.86.020, are not causes of action to challenge Commission-approved tariffs. This makes sense, because most utility tariffs resemble contracts of adhesion or are substantively unconscionable because a customer’s only recourse for objecting to a utility rate or service is to intervene in a resource-intensive Commission proceeding, or otherwise decline service under the Commission-approved

²⁸ See, e.g., PacifiCorp In. Br., at 13-15.

²⁹ PC Resp. Br., at 13.

³⁰ RCW § 19.86.170 (“Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States . . .”); *Tanner Elec. Co-op v. Puget Sound Power & Light Co.*, 128 Wash.2d 656, 911 P.2d 1301 (1996).

tariff. Instead, Washington vests the Commission with the power to determine what is the appropriate balance of terms and conditions when establishing just and reasonable utility rates and services.

24 To the point, Commission precedent is entirely silent on contractual disputes involving the doctrine of unconscionability. PacifiCorp can only identify two Commission proceedings where the doctrine has been raised as a contested issue.³¹ The Commission ignored these collateral attacks, because the doctrine of unconscionability has no place in regulatory proceedings.³²

25 Similarly here, the Commission should disregard Public Counsel’s argument that PacifiCorp’s tariff is substantively unconscionable.

E. If the Commission has concerns with PacifiCorp’s request, it could consider several reasonable alternatives to narrow its scope.

26 While PacifiCorp’s proposal is narrower in the scope of damages that are excluded compared to previous Commission decisions, PacifiCorp readily acknowledges that its proposal is nonetheless broader in the range of utility services that would be covered by its request (extending to all actions in the provisions of electrical services). Yet PacifiCorp represents that its financial health, future threats from wildfire risks caused by global climate change, and shrinking pool of reasonably priced insurance supports the Commission taking decisive action on this issue now.

³¹ *In re Verizon 2004 Amendment of Interconnection Agreements*, Docket No. UT-043013, CCG CLEC Response Brief, ¶¶ 27-29 (Oct. 1, 2004) (arguing Verizon’s amendment is unconscionable because it violates Washington contract law); *In re Avista’s 2015 GRC*, Docket No. UE-150204, ICNU Post-Hearing Brief, ¶ 52 (Nov. 4, 2015) (arguing, without citation to Washington law, that utility proposal was unconscionable).

³² *In re Verizon 2004 Amendment of Interconnection Agreements*, Docket No. UT-043013, Order No. 12 (Nov. 19, 2004) (noting CCG CLEC’s unconscionability argument, though declining to address it); *In re Avista’s 2015 GRC*, Docket No(s). UE-150204 and UG-150205, Order 05 (Jan. 6, 2016) (noting ICNU’s unconscionability argument, though declining to address it).

27 However, if the Commission is concerned with PacifiCorp’s proposal, it could consider several reasonable alternatives to narrow the Company’s request.

28 First, the Company agrees with Public Counsel that Washington courts have declined to uphold limitations of liability for gross negligence or willful actions.³³ The Company was aware of this case law when it drafted its request, as well as the various Commission and Washington statutes that establish diverging requirements on what liability or damages are permitted in various circumstances. Yet the Company does not believe it would be possible to draft a comprehensive waiver that incorporated all of these authorities, and instead provided a work-around where the waiver would not be operative if it conflicted with Washington law. This avoided the need for a convoluted Rube Goldberg-styled liability of limitation that could be triggered in a variety of facts of circumstances. Yet if the Commission wanted to address Public Counsel’s concern, it could simply narrow the Company’s proposed tariff language. For example, the Petition could be amended with the following underlined language: “This provision shall not be binding in cases involving gross negligence, willful misconduct, violation of law, or where state law disallows limitations of liability.”

29 Second, Staff agrees that the Commission has the power to limit utility liability, but this power does not extend to tariffs that only limit utility damages.³⁴ Public Counsel agrees that the Commission has the power to limit utility liability or damages, but only

³³ PC Resp. Br., at 14.

³⁴ Staff Resp. Br., at 1 (“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.”); *Id.* at 17 (“PacifiCorp’s arguments in this proceeding focus on establishing that the Commission has 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 request to limit damages.”).

for violations of Commission orders or rules.³⁵ Staff and Public Counsel’s argument would appear to support utility imitations of liability, but only for violations of Commission orders or rules, and only if liability was limited. If the Commission agreed with Staff or Public Counsel regarding the scope of its powers, it could amend PacifiCorp’s requested tariff to reflect that scope. For example, the Commission could amend PacifiCorp’s Petition with the following language: “In any action between the parties arising out of the provision of electric service for violation of Commission order or rule, the Company’s liability and the available damages shall be limited to actual economic damages.” This solution would seem to fit within Staff and Public Counsel’s view of the law.

30 Third, the Company is sensitive to the policy issues presented by its proposal, and notes that instead of reaching a decision in this proceeding, the Commission could also address these concerns in a rulemaking proceeding. This would allow the Commission to consider input from the broader regulated community and determine how the policies in PacifiCorp’s Petition could also be addressed on a state-wide basis, as opposed to a utility-specific proceeding. If the Commission has concerns with PacifiCorp’s Petition, it could deny the Petition without prejudice, and initiate a rulemaking to continue discussions of these issues.

³⁵ PC Resp. Br., at 10 (“Public Counsel respectfully submits that the Commission exceeds its authority by approving a limitation of liability in a tariff that reduces the rights of customers to bring an action predicated upon a violation of Washington law—because RCW 80.04.440 “preserves” such causes of actions. However, it appears that the Commission would be well within its authority to approve a tariff revision that impacted the rights of customers to bring an action predicated upon violation of the Commission’s own orders and rules. Limitations on liability for interruption of service, for example, would appear to fall into this category.”); *Id.* at 10-11 (“In other words, this is not an either-or situation. Public Counsel does not argue that RCW 80.04.440 precludes all limitations of liability for claims against public utilities—full stop. Rather, the statute, properly construed, precludes only those limitation of liability provisions that conflict with its plain terms.”).

31 The Company stands by its initial Petition, yet given the importance of the issues,
offers these suggestions to inform the Commission’s deliberations.

II. CONCLUSION

32 PacifiCorp respectfully requests the Commission approve PacifiCorp’s request,
and if helpful, schedule oral argument to inform the Commission’s deliberations.

Respectfully submitted May 23, 2024,

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