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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

JEANYNE JAMES, ROBIN COLBERT,  
JANE DREVO, SAM DREVO, BROOKE  
EDGE AND BILL EDGE, SR., LORI  
FOWLER, IRIS HAMPTON, JAMES  
HOLLAND, RACHELLE MCMASTER,  
KRISTINA MONTOYA, NORTHWEST  
RIVER GUIDES, LLC, SHARIENE  
STOCKTON AND KEVIN STOCKTON,  
VICTOR PALFREYMAN, PALFREYMAN  
FAMILY TRUST, and DUANE BRUNN,  
individually and on behalf of all others  
similarly situated,

Plaintiffs,

v.

PACIFICORP, an Oregon corporation; and  
PACIFIC POWER, an Oregon registered  
electric utility and assumed business name of  
PACIFICORP,

Defendants.

Nos. **20CV33885** (Lead)  
21CV33595, 20CV37430,  
22CV26326, 22CV29976,  
22CV30450, 22CV29694,  
22CV29187, 22CV13946,  
22CV29859, 22CV41640

**PACIFIC POWER’S MOTION TO  
STAY ANY PHASE II TRIALS**

Assigned to: Hon. Steffan Alexander

Trial Date: April 24, 2023

Verdicts: June 12 and 14, 2023

**UTCRC 5.050 STATEMENT**

Defendants PacifiCorp and Pacific Power (collectively, “PacifiCorp”) requests oral argument on this motion and estimates that 30 minutes will be required. Official court reporting services are requested.

**MOTION**

PacifiCorp respectfully requests that the Court stay any Phase II trials pending resolution of PacifiCorp’s post-trial motions filed on August 11, 2023, and any subsequent

1 appeals. This Motion to Stay is supported by the following Memorandum of Law, the  
2 pleadings and papers on file, and the record in this action.

3 **MEMORANDUM OF LAW**

4 **I. INTRODUCTION**

5 On August 11, 2023, and concurrently with this Motion, PacifiCorp filed post-trial  
6 motions (“Post-Trial Motions”) that challenge nearly every part of the foundation for the  
7 “Phase II Damages Proceedings” envisioned in Plaintiffs’ July 21, 2023, Motion for Entry of  
8 Case Management Order No. 8 (“Plaintiffs’ CMO Motion”)—including the sufficiency and  
9 basis for findings of class-wide causation and injury; the availability of noneconomic  
10 damages; the sufficiency of evidence of gross negligence and recklessness; the legal basis for  
11 several of Plaintiffs’ remaining claims; and class certification. It is undisputed that resolution  
12 of those disputes will significantly impact almost every aspect of any Phase II trial: the  
13 necessary fact and expert testimony, the documentary evidence, resolution of trial motions,  
14 the trial plan, the jury instructions, and the verdict form. Nonetheless, Plaintiffs urge this  
15 Court to proceed immediately with conducting Phase II jury trials to resolve the claims of an  
16 undefined group of thousands of absent class members.

17 Class counsel’s proposed process would require the Court to begin scheduling up to  
18 five concurrent trials every 60 days, each resolving the claims of approximately 15 class  
19 members selected by Plaintiffs, starting as early as October 2023. (Plaintiffs’ CMO Motion  
20 at 11.) Class counsel’s proposal at most would resolve 450 class members’ claims per year,  
21 meaning that the Phase II trials would take place over a *ten-year period*. A process requiring  
22 years of individualized trials would impose an immeasurable burden and strain on the Court  
23 and its docket, PacifiCorp, and even class counsel and the absent class members. And that  
24 burden would be imposed notwithstanding the risk that the Phase II trials could be rendered  
25 unnecessary or that their scope could be significantly altered depending on the outcome of  
26 the Post-Trial Motions and any subsequent appeals.

1 For that reason, PacifiCorp proposed to class counsel that the parties agree to stay any  
2 Phase II trials pending resolution of the issues on appeal. Plaintiffs’ counsel expressed  
3 opposition to “any stay of Phase II pending Pacific Power’s post-trial motions and any  
4 attempted appeal.” (Declaration of Matthew Preusch in Support of CMO Motion (“Preusch  
5 Decl.”), Ex. 2 at 4.)

6 To be clear, PacifiCorp is not proposing a complete stay of all *litigation* pending the  
7 outcome of any appeal. As detailed in Pacific Power’s Opposition to Plaintiffs’ Motion for  
8 Entry of Case Management Order No. 8 (“Defendant’s Opposition to Plaintiffs’ CMO  
9 Motion”), PacifiCorp has proposed an alternative Phase II process and schedule that allows  
10 the parties to make substantial progress on a realistic timeline through at least mid-2024. But  
11 proceeding with Phase II *trials* immediately—when the Post-Trial Motions have not been  
12 decided and those motions raise such fundamental issues regarding which claims and  
13 questions Phase II will decide, much less whether Phase II should proceed at all—is  
14 inefficient and would waste the Court’s valuable resources, and would result in undue  
15 prejudice and a violation of due process. On the other hand, granting a stay serves the  
16 interests of judicial economy and efficiency and would not cause any undue delay or  
17 prejudice to the named plaintiffs or absent class members. This Motion should be granted.

## 18 II. BACKGROUND

19 Filed in September 2020, this consolidated action raises important and complex  
20 questions concerning the liability of a public utility for damages caused by wildfire. Among  
21 other things, it presents unique issues regarding the evidence required to prove causation for  
22 wildfire, the interpretation and application of Oregon’s wildfire statute (ORS 477.089) and  
23 recoverable damages in a wildfire, the scope of the Oregon Public Utility Commission’s  
24 jurisdiction, and class certification in wildfire cases. The procedural posture of the case also  
25 is complex, as the operative pleadings have been amended numerous times, the parties have  
26 engaged in extensive motion practice and discovery, and issues concerning class certification

1 have been the subject of extensive briefing and argument. *See James v. PacifiCorp*, 323 Or  
2 App 764, 524 P3d 506 (2023).

3 Following the Phase I jury trial, PacifiCorp has now filed the Post-Trial Motions: a  
4 motion for judgment notwithstanding the verdict (“JNOV Motion”), a motion for new trial  
5 (“Motion for New Trial”), and a renewed motion to decertify (“Motion to Decertify”).

6 The JNOV Motion argues, among other things, that Plaintiffs failed to establish class-  
7 wide causation or class-wide injury. PacifiCorp also argues that the jury awarded  
8 noneconomic damages in violation of Oregon law, and that the Court lacked jurisdiction over  
9 specific portions of the case. The JNOV motion further argues that the evidence of gross  
10 negligence or recklessness by PacifiCorp was insufficient, the evidence required for punitive  
11 damages was insufficient, the elements necessary for trespass or nuisance were not proven,  
12 and personal property damages were not adequately proven.

13 In addition to the above matters, the alternative Motion for New Trial also challenges  
14 class-wide liability based on instructions that improperly relieved Plaintiffs of their burden to  
15 prove the claims of every absent class member and directed the jury to “assume that the  
16 evidence at the trial applies to all class members.” PacifiCorp challenges several other  
17 instructions and evidentiary rulings, including the adverse inference instruction related to  
18 pre-litigation spoliation, which effectively relieved Plaintiffs of their burden of proof.

19 Finally, the Motion to Decertify renews PacifiCorp’s argument that certification of  
20 the very class of plaintiffs that will be litigating “Phase II” was improper, citing evidence  
21 from the trial demonstrating that the class does not satisfy ORCP 32 criteria.

22 A decision in PacifiCorp’s favor on any of these critical issues—whether by this  
23 Court or an appellate court—will profoundly impact Phase II. In spite of that reality, class  
24 counsel urge this Court to press forward with a series of jury trials to resolve the claims and  
25 damages sought by the owners of 2,437 private properties allegedly impacted by the Labor  
26 Day fires, or approximately 4,500 individual class members. (*See Class Certification Order*

1 at 2, 6, 23.) Specifically, class counsel proposes that, starting as early as October 2023, the  
2 Court begin conducting mini-trials every 60 days, with each trial resolving the claims of  
3 approximately 15 absent class members selected by Plaintiffs and lasting five days until all of  
4 the absent class members’ claims are resolved. (Plaintiffs’ CMO Motion at 5.) Under that  
5 approach, the Court might resolve (at most) 450 class members’ claims per year, which  
6 would result in the Court holding *James* trials for *ten years*—all or many of which will have  
7 been either unnecessary or fundamentally different in scope depending on the outcome of the  
8 Post-Trial Motions and subsequent appeals.

9 PacifiCorp has opposed the CMO Motion and filed its own Motion for Entry of Case  
10 Management Order No. 8 (“Defendant’s CMO Motion”). This Motion and Defendant’s  
11 CMO Motion dovetail. In addition to explaining the myriad problems with Plaintiffs’  
12 proposed process and detailing why a stay of full-scale trials in any form is necessary,  
13 Defendant’s CMO Motion also proposes a schedule with defined deadlines for pretrial  
14 events. That schedule allows the parties to make substantial progress toward identifying  
15 class members, categorizing class claimants, filing pleadings, and engaging in pretrial claim  
16 identification and some discovery, but it would avoid embarking on a wasteful, years-long  
17 trial process that may ultimately prove unnecessary and irrelevant to reaching an ultimate  
18 conclusion.

### 19 III. ARGUMENT

#### 20 A. The Court Should Exercise Its Inherent Authority to Stay the Phase II Trials.

21 The Oregon Rules of Civil Procedure are to be construed to ensure “the just, speedy,  
22 and inexpensive determination” of claims. ORCP 1 B. To accomplish this directive, trial  
23 courts have “inherent discretion to manage the docket and pursue judicial efficiency.” *State*  
24 *v. Pyle*, 321 Or App 149, 154 n 4, 516 P3d 273 (2022). A decision to stay a civil trial falls  
25 squarely within the trial court’s authority to manage its docket. *See, e.g.*, UTCR 7.020(5)  
26 (trial court may elect to delay trial date upon good cause shown); SLR 7.015 (trial court has

1 authority over scheduling); SLR 7.025 (judges in cases designated complex may postpone  
2 trial). Indeed, “the power to stay proceedings is incidental to the power inherent in every  
3 court to control the disposition of the causes on its docket with economy of time and effort  
4 for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 US 248, 254, 57 S Ct 163  
5 (1936). In the context of class actions, courts are expressly authorized to “make appropriate  
6 orders \* \* \* dealing with \* \* \* procedural matters.” ORCP 32 E(5). A stay is a “procedural”  
7 order authorized under ORCP 32 E(5).

8 The Court should exercise its inherent authority to control its docket and stay any  
9 Phase II trials pending resolution of the Post-Trial Motions and the outcome of any appeal.  
10 The granting of such a stay is appropriate because (1) the issues raised in the Post-Trial  
11 Motions are fundamental to whether and/or with respect to what issues Phase II will proceed;  
12 (2) neither the named plaintiffs nor absent class members will be unduly prejudiced by a  
13 stay; (3) PacifiCorp will be prejudiced if it is forced to participate in Phase II trials prior to  
14 resolution of the issues it is challenging post-trial and on appeal; and (4) conducting Phase II  
15 trials now, before resolution of the issues on appeal, will waste judicial resources and is  
16 impractical.

17 **1. Resolution of the Post-Trial Motions and Related Issues Will**  
18 **Fundamentally Alter the Scope of Phase II**

19 The outcome of the Post-Trial Motions and any subsequent appeal of Phase I issues  
20 would profoundly affect the Phase II trials. First, and critically, PacifiCorp argues that  
21 Plaintiffs did not establish class-wide and individual causation, particularly in the Santiam  
22 Canyon. PacifiCorp also contends that the issues certified by the Court and tried in Phase I  
23 did not include specific questions of individual causation, which were reserved for Phase II.  
24 If PacifiCorp is correct with respect to those arguments, even in part, then the Phase II trial  
25 process is profoundly different in several obvious ways (if it proceeds at all)—including  
26

1 which absent class members will be selected, what issues will be tried, what evidence will be  
2 considered, and what questions the jury will be required to answer.

3 Further, PacifiCorp contends that non-economic damages are not recoverable in this  
4 action. If PacifiCorp prevails on that issue, the nature and scope of trials involving absent  
5 class members would be significantly different than if those individualized trials were  
6 conducted prior to such a ruling. Rather than extensive testimony of personal experiences,  
7 mental health history and background, and other matters that are relevant to only  
8 noneconomic damages, the damages portion of the Phase II trials will focus only on  
9 economic damages and evidence relevant to calculation of those damages.

10 PacifiCorp also is challenging the nature and manner in which personal property  
11 damages were proved by the named plaintiffs—and as they likely would be attempted to be  
12 proven by the absent class members in any Phase II trials. Again, a resolution of that issue in  
13 PacifiCorp’s favor would substantially alter the manner in which any Phase II trials would be  
14 conducted.

15 And PacifiCorp is challenging whether a class should have been certified at all. If  
16 this Court or an appellate court determines that decertification is appropriate, trials of absent  
17 class members in this proceeding would not occur as such. A delay of any Phase II trials  
18 until these fundamental issues are resolved is the most practical, efficient, and fair way to  
19 proceed.

20 Plaintiffs’ anticipated counterarguments are not persuasive. Plaintiffs will discount  
21 entirely the possibility that the Post-Trial Motions or appeals will change anything.  
22 Unquestionably, however, this complex and novel case involved many legal issues that have  
23 never been addressed by Oregon courts. Blindly rolling the dice on a massive trial effort that  
24 may not yield defensible or lawful results is not an appropriate way to analyze the risks and  
25 burdens that the Court faces.

26

1 Plaintiffs will also argue that trials should begin anyway, and any issues affected by  
2 post-trial or appellate decisions can simply be fixed later. But practical reality is to the  
3 contrary. Focusing on damages only, Phase I underscored that the majority of the parties’  
4 time and resources will be spent addressing matters that are the subject of arguments post-  
5 trial and on appeal. Of the three major subjects of damages (real property, personal property,  
6 and noneconomic damages), real property was the least disputed and took up relatively less  
7 trial time. The bulk of discovery and trial time will be spent on personal property and  
8 noneconomic damages, the latter of which requires extensive (and intrusive) discovery and  
9 personal testimony that lengthens and complicates the proceedings significantly.

10 Thus, even if one only looks at the damages-related issues, Phase II trials will be very  
11 different if the scope of recoverable damages is narrowed and clarified. A reversal on  
12 noneconomic damages, for example, would mean that most of the discovery and trial time  
13 was spent on issues that ultimately were not recoverable. And the remaining triable issues—  
14 principally, valuation of real property—may have been eliminated in many cases where  
15 appraisers largely agree on values. The benefit of a stay in potentially saving substantial time  
16 and effort is manifest.

17 The disputed issues with respect to the scope of Phase II amplify those points. As  
18 outlined in Defendant’s Opposition to Plaintiffs’ CMO Motion, it would be inconsistent with  
19 the Court’s prior orders (and a violation of due process and other fundamental legal  
20 principles) to apply the Phase I verdict of general, non-specific causation to every absent  
21 class member without giving PacifiCorp an opportunity to contest individual causation.  
22 Establishing a Phase II process without guidance on that issue (among many) is simply  
23 stumbling along a path in the dark.

24 **2. A Stay of Phase II Trials Will Not Prejudice Absent Class Members**

25 Plaintiffs will not be unduly prejudiced by a stay of Phase II trials. As an initial  
26 matter, for the reasons stated in Defendant’s Opposition to Plaintiffs’ CMO Motion,



1 substantial work needs to occur before Phase II trials can go forward—plaintiff  
2 identification, filing of complaints, answers, and discovery to name just some of the tasks.  
3 Continuing with that work—which can occur concurrently with the post-trial and appeal  
4 period—limits, as a practical matter, the impact of any stay to the period after all those issues  
5 are resolved.

6 In addition, resolving absent class members’ damages through consecutive jury trials  
7 will have little practical impact given the certainty of appeals from those verdicts on the same  
8 grounds as any earlier appeal. If the Phase II trials proceed without the fundamental issues  
9 first being resolved, PacifiCorp will appeal from each of these trials. Thus, the denial of a  
10 stay prior to resolution of the Post-Trial Motions and subsequent appeals of the same will  
11 not, in fact, speed class members’ recovery of damages. Moreover, that a stay might delay  
12 recovery of relief for *past* harms, as opposed to preventing future harms, rarely supports  
13 denial. *See, e.g., CMAX, Inc. v. Hall*, 300 F2d 265, 268–69 (9th Cir 1962) (affirming order  
14 postponing trial until conclusion of related proceeding that “might result in an order which  
15 would affect” the action, and holding that potential delay in recovery of money damages  
16 caused did not demonstrate irreparable damage); *Earl v. Boeing Co.*, 21 F4th 895, 900 (5th  
17 Cir 2021) (where “plaintiffs only seek money damages, it is not apparent why plaintiffs  
18 would be prejudiced by waiting on merits discovery until the end of the Rule 23(f)”; *Pena v.*  
19 *Taylor Farms P., Inc.*, 2015 WL 5103157, at \*6 (ED Cal Aug. 31, 2015) (because plaintiffs  
20 sought “only damages, not an injunction,” delay occasioned by stay pending appeal of class  
21 certification order did “not prevent the balance of hardships from tipping sharply in the  
22 defendants’ favor”).

23 Nor will proceeding with Plaintiffs’ proposed process speed or encourage resolution.  
24 As explained in Defendants’ Opposition to Plaintiffs’ CMO Motion, and contrary to the well-  
25 established bellwether process, Plaintiffs’ approach—an open-ended process with cases  
26 selected by Plaintiffs’ counsel over the course of years—does nothing to advance

1 meaningfully the parties’ assessment of their respective positions or the possibility of  
2 resolution. The point of Plaintiffs’ proposal appears to be to threaten a process so onerous  
3 and burdensome on the parties and the Court that Defendant must be forced to submit. But  
4 that approach will be neither effective nor helpful.

5 Class counsel has provided no specific reason for expediting Phase II trials other than  
6 making vague statements that determining “individual damages without delay is crucial.”  
7 (*See* CMO Motion at 2.) Class counsel also asserts in the CMO Motion that absent class  
8 members are “living in trailers or temporary house, or have been displaced to other  
9 communities.” (*Id.*) Of course, the impact of the Labor Day fires is undisputed. As  
10 established at trial, however, many of the named plaintiffs have rebuilt homes on their  
11 properties or have decided not to return. Many also have received insurance payments and  
12 emergency relief funds. Absent class members are in the same position. Indeed, Plaintiffs  
13 acknowledge the fact of class members’ insurance payments in their CMO Motion. (*Id.* at 4  
14 (noting that PacifiCorp “has paid to settle the claims of the Class Members’ subrogating  
15 insurers.”).) Even under Plaintiffs’ approach, Phase II trials will only result in judgments  
16 that will be appealed and will delay—not advance—any ultimate recovery.

17 PacifiCorp has set forth a proposed process that would allow the parties to make  
18 substantial progress towards an ultimate resolution. That mitigates any harm or prejudice to  
19 Plaintiffs or the absent class members with the grant of a limited stay of Phase II trials.

20 **3. Proceeding with Phase II Trials Prejudices Defendant**

21 PacifiCorp would be unduly prejudiced if it were required to engage in trials of 450  
22 class members’ claims while at the same time seeking a resolution of the fundamental issues  
23 on appeal. Class counsel’s proposed process would require not only trials, but discovery and  
24 other matters, for 4,500 absent class members every week for years. Not only would it  
25 impose a massive burden on PacifiCorp, that burden would have no justification if one or  
26 more key issues is ultimately resolved in PacifiCorp’s favor.

1           **4. A Stay Promotes Judicial Efficiency and Economy**

2           Finally, and perhaps most critically, engaging in Plaintiffs’ proposed expensive and  
3 resource-intensive Phase II trial process violates basic considerations of promoting judicial  
4 efficiency and controlling costs. ORCP 1 B. Interests of judicial economy strongly favor  
5 staying Phase II trials until the Court considers and resolves the Post-Trial Motions and the  
6 parties’ receive guidance from the appellate courts. Without a stay, this Court risks  
7 burdening its docket (and the Multnomah County Circuit Court docket more generally) with  
8 hundreds of trials over many years, all of which could be unnecessary, more limited, or  
9 resolved depending on the outcome of PacifiCorp’s challenges.

10           **B. ORS 19.225 Further Supports Entry of a Stay of Any Phase II Trials**

11           ORS 19.225 provides, in part, that an application for interlocutory appeal from an  
12 order in a class action “shall not stay proceedings in the circuit court unless the circuit court  
13 judge or the Court of Appeals or a judge thereof shall so order.” A stay is not automatic, but  
14 it is clearly authorized when an appeal is sought from critical, otherwise non-appealable  
15 orders—including, but not limited to, class certification orders—entered in a class action.

16           Here, although no application is yet pending, the propriety of a stay pursuant to  
17 ORS 19.225 may become ripe depending on the resolution of the Post-Trial Motions. And,  
18 at this juncture, the considerations for entering stays in class actions pursuant to ORS 19.225  
19 may inform the Court’s exercise of its inherent authority.

20           A party seeking to stay proceedings pending appeal of a class certification order must  
21 show: “(1) it is likely to succeed on the merits of the appeal; (2) it will be irreparably injured  
22 in the absence of a stay; (3) issuance of a stay will not substantially injure the non-movant;

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1 and (4) the stay is in the public interest.”<sup>1</sup> *Gray v. Golden Gate Nat'l Recreational Area*,  
2 2011 WL 6934433 at \*2 (ND Cal Dec. 29, 2011) (citing *Leiva–Perez v. Holder*, 640 F3d  
3 962, 964-70 (9th Cir 2011)); *Flo Eddie, Inc. v. Sirius XM Radio, Inc.*, 2015 WL 4397175, at  
4 \*1 (CD Cal June 8, 2015) (same); *CGC Holding Co., LLC v. Hutchens*, 965 F Supp 2d 1277,  
5 1278 (D Colo 2013) (same). The factors should be examined on a flexible “continuum,”  
6 which is “essentially the same as the ‘sliding scale’ approach” applied to requests for  
7 preliminary injunctions.” *Leiva–Perez*, 640 F3d at 964-66. The federal standard is similar to  
8 the test that Oregon courts apply when determining whether to grant a stay pending judicial  
9 review of administrative agency orders. *See Von Weidlein Intern., Inc. v. Young*, 16 Or App  
10 81, 515 P2d 936 (1973) (when determining whether to grant the stay the court should balance  
11 the interests, including the irreparable harm to petitioners and public interest).

12 Each one of those factors supports issuing a stay now. To satisfy the first factor,  
13 PacifiCorp must only show that it has a “substantial case for relief on the merits,” not that it  
14 is more likely than not to succeed. *Gray*, 2011 WL 6934433, at \*1 (citing *Leiva–Perez*, 640  
15 F3d at 966–67). This showing may be satisfied by a showing of “reasonable probability,”  
16 “fair prospect;” or “serious legal questions[.]” *Id.* at 967-68. A petition that presents an  
17 unsettled question of law constitutes a “serious legal question.” When showing a “serious  
18 legal question” the movant must show that a legal question exists, and that the hardship  
19 balance tips sharply towards the movant. *Brown v. Wal-Mart Stores, Inc.*, 2012 WL  
20 5818300, at \*2 (ND Cal Nov. 15, 2012). For the reasons outlined in its Post-Trial Motions,  
21 PacifiCorp has a substantial case for relief on the merits pursuant to that standard.

22 \_\_\_\_\_  
23 <sup>1</sup> Although no Oregon case analyzes the standard for evaluating a motion to stay pursuant to  
24 ORS 19.225, authority interpreting its federal corollary, FRCP 23(f), is persuasive. *James*,  
25 323 Or App at 773 (drafters of ORS 19.225 “intended that interlocutory appeals of class  
26 action orders in the state be handled similarly to those in the federal system,” and it is  
“appropriate to look to federal cases that address the exercise of discretion under FRCP  
23(f)” which “was intended to align with the discretionary portion of section 1292(b)”; *see*  
*also Froeber v. Liberty Mut. Ins. Co.*, 222 Or App 266, 276 fn. 6 (2008) (“Oregon statutes  
governing class actions are modeled after the federal rules”).

1 A party moving for a stay pursuant to FRCP 23(f) also must show that irreparable  
2 harm is likely or probable. *Romero v. Securus Techs., Inc.*, 383 F Supp 3d 1069, 1075 (SD  
3 Cal 2019) (citing *Leiva-Perez*, 640 F3d at 968.) “[T]he prospect of substantial,  
4 unrecoverable time and resources” can constitute irreparable harm, as can the possibility of  
5 an appeal that “result[s] in decertification of the class, thereby resulting in a substantial waste  
6 of time and resources.” *Id.*; see also *Pena*, 2015 WL 5103157, at \*4 (costs may be  
7 irreparable harm “when granting a motion to stay would avoid substantial, unrecoverable,  
8 and wasteful discovery costs,” or “when the costs would impose ‘serious burdens’ that an  
9 appeal would avoid”). This factor weighs significantly in favor a stay. The costs of  
10 preparing for and engaging in hundreds of jury trials will be huge and unrecoverable—and  
11 unnecessary if PacifiCorp prevails on appeal.

12 As explained above, neither the named plaintiffs nor the absent Class Members would  
13 be substantially injured by a stay. A stay would merely maintain the status quo while the  
14 parties await a decision from the appellate court that could possibly reshape the case. Any  
15 harm from such a stay is minimal when juxtaposed with the potential magnitude of a decision  
16 by the appellate court. *Ewing Industries Corp. v. Bob Wines Nursery, Inc.*, 2015 WL  
17 12979096, at \*1 (MD Fl Feb. 2 , 2015) (internal citations omitted).

18 Lastly, the public has an interest in the efficient use of judicial resources. *Brown*,  
19 2012 WL 5818399, at \*5. A stay that ensures the proper resolution of important issues while  
20 preventing potentially wasteful work on the party of the court and the parties is in the public  
21 interest. *Gray*, 2011 WL 69334433, at \*3. Consistent with that view, the District of Oregon  
22 recently stayed a trial on damages in an individual action while the defendant pursued an  
23 interlocutory appeal of the jury’s verdict on liability. *ICTSI Oregon, Inc. v. Int’l Longshore*  
24 *& Warehouse Union*, No. 3:12-CV-1058-SI, 2020 WL 2768683, at \*10 (D. Or. May 28,  
25 2020). Although Judge Simon concluded that success on the appeal was unlikely, he stayed  
26 commencement of the damages trial to, among other things, “serve[] the public interest by

1 avoiding potentially wasteful use of the parties’ and the district court’s resources.” *Id.* The  
2 public interest is similarly served by a stay of Phase II trials in this case.

3 **C. Proceeding with Plaintiffs’ Proposal for Phase II Trials Would Violate Due**  
4 **Process.**

5 Plaintiffs’ proposed Phase II process is inconsistent with due process in at least two  
6 ways. First, proceeding with Phase II before resolution of liability in Phase I forces  
7 PacifiCorp to litigate as though uncertain, highly contested, and potentially non-preclusive  
8 findings have been established. *See Bates v. United Parcel Serv., Inc.*, 511 F3d 974, 983-84  
9 (9th Cir 2007) (discussing district court’s stay of all proceedings following phase one of trial  
10 in ADA class action, pending defendants’ interlocutory appeal). Of course, the fact of an  
11 appeal may not prevent proceeding with the second phase of a bifurcated proceeding in some  
12 cases. In the unique circumstances of this case, however, it would be a due process violation  
13 to allow trials to proceed when the question of liability has not been established in Phase I,  
14 and when PacifiCorp has been deprived of its opportunity to be heard and present defenses.

15 Second, by proposing a process so manifestly burdensome and unrealistic—  
16 potentially 30 trials a year on an essentially full-time basis for ten years—Plaintiffs are  
17 attempting to use a procedural structure and decision to exert undue hydraulic pressure to  
18 resolve the dispute (or, at a minimum, agree to some alternative process), which would  
19 prevent Defendant from presenting its full case and defenses to a jury. But the law does not  
20 sanction “settlements through coercion” or the use of procedural rules “as a means for  
21 clubbing the parties—or one of them—into an involuntary compromise.” *Kothe v. Smith*,  
22 771 F2d 667, 669 (2d Cir 1985); *see also In re LaMarre*, 494 F2d 753, 756 (6th Cir 1974)  
23 (“It is, of course, clear that on due process grounds, no judge can compel a settlement prior to  
24 trial on terms which one or both parties find completely unacceptable.”).

25 ///

26 ///

1 IV. CONCLUSION

2 For the reasons discussed above, this Court should enter an order staying any Phase II  
3 trials pending resolution of the Post-Trial Motions and any appeals that may follow.

4  
5 DATED: August 11, 2023

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**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the foregoing documents titled **PACIFIC POWER’S MOTION TO STAY ANY PHASE II TRIALS** on the following named person(s) on the date indicated below by

- mailing with postage prepaid.       email. (courtesy copy only)
- hand delivery.       email pursuant to agreement among parties/counsel dated October 29, 2020, consenting to service via email. (Plaintiffs James, et al. only)
- overnight delivery.       eService via OJD eFile. (if registered)

If by mail or overnight delivery, a true copy of the above referenced document was served upon said persons, contained in a sealed envelope or package, addressed to said persons or at their last-known addresses indicated below.

**Service List Attached**

DATED: August 11, 2023

s/ Brad S. Daniels  
BRAD S. DANIELS, OSB No. 025178  
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