



February 6, 2024

***VIA ELECTRONIC DELIVERY***

Commission Secretary  
Idaho Public Utilities Commission  
11331 W. Chinden Blvd  
Building 8 Suite 201A  
Boise, ID 83714

**RE: CASE NO. PAC-E-23-22  
IN THE MATTER OF THE APPLICATION OF ROCKY MOUNTAIN POWER FOR  
AUTHORITY TO REVISE ELECTRIC SERVICE REGULATION NO. 3 – ELECTRIC  
SERVICE AGREEMENTS**

Attention: Commission Secretary

Pursuant to Commission Order No. 36003 providing Notice of Modified Procedure and establishing the procedural schedule please find Rocky Mountain Power's Reply Comments in the above referenced matter.

Informal inquiries may be directed to Mark Alder, Idaho Regulatory Manager at (801) 220-2313.

Very truly yours,

A handwritten signature in blue ink that reads "Joelle Steward". The signature is fluid and cursive.

Joelle Steward  
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*Attorney for Rocky Mountain Power*

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

**IN THE MATTER OF THE APPLICATION ) CASE NO. PAC-E-23-22  
OF ROCKY MOUNTAIN POWER FOR )  
AUTHORITY TO REVISE ELECTRIC ) REPLY COMMENTS OF  
SERVICE REGULATION NO. 3 – ) ROCKY MOUNTAIN POWER  
ELECTRIC SERVICE AGREEMENTS**

Pursuant to Rule 202.01(d) of the Rules of Procedure of the Idaho Public Utilities Commission (“Commission”) and the Commission’s November 22, 2023, Notice of Application and of Modified Procedure, Rocky Mountain Power a division of PacifiCorp (“Rocky Mountain Power” or the “Company”) hereby submits reply comments in the above-referenced case.

**I. BACKGROUND**

1. On October 24, 2023, the Company filed an application (“Application”) requesting authority to update Rocky Mountain Power Electric Service Regulation No. 3—Electric Service Agreements (“Rule 3”). The proposed amendment would: (1) limit damages arising out of the Company’s provision of electric services to actual damages; (2) exclude atypical damages (including special, noneconomic, punitive, incidental, 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.

2. On November 22, 2023, the Commission issued Order No. 36003 establishing a modified procedure with written comments due January 23, 2024, and Company reply comments due February 6, 2024.

3. On January 22, 2024 and January 23, 2024 Commission Staff (“Staff”), P4 Production, L.L.C, an affiliate of Bayer Corporation (“Bayer”), and Sierra Club (collectively “Intervenors”) filed comments in response to the Company’s Tariff Advice filing recommending the Commission deny the Company’s proposed changes to Rule 3. The comments submitted largely contend that the Commission does not possess the legal authority to approve the proposed tariff that seeks to impose a cap on liability and argue PacifiCorp’s proposal is not aligned with the public interest. The sections below respond to the comments submitted by the Intervenors:

## II. REPLY COMMENTS

### A. **The Commission has the authority to limit utility liability to economic damages arising from the provisions of electric service.**

4. Contrary to the legal representation made by some of the Intervenors, the Commission possesses the authority to approve limitations of liability arising out of provisions of electric service.<sup>1</sup> In fact, the Commission has regularly exercised that authority to approve electric utility tariffs that include liability limitations. These liability limitations apply to general electric service and to various specialized retail customer offerings from Idaho utilities. For example:

- Rocky Mountain Power: “Company does not guarantee constant or uninterrupted delivery of Electric Service and shall have no liability to its Customers or any other persons for any interruption ... in Electric Service or for any loss or damage caused

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<sup>1</sup> The comments submitted by both Staff and Bayer take the general position that limitations of liability for an electric utility is inconsistent with Idaho law. Staff Comments at 6-7 (January 23, 2023); Bayer Comments at 2-5 (January 22, 2023). On the other hand, Sierra Club acknowledges that public service commissions have historically imposed limitations on utility liability but provides other arguments against the Company’s proposal. Sierra Club Comments at 3 (“To be sure, public utility commissions, including this Commission, have, at times, limited a utility’s exposure to liability.”).

thereby if such interruption ... results from the following [lists various circumstances in which no liability attaches]”.<sup>2</sup>

- Idaho Power Company: “Customer voluntarily agrees to release the Company ... from all liability, loss, claims or actions for injury, death, expenses (including, but not limited to, reasonable attorney’s fees and court costs) or damage to person or property resulting from the Company’s installation, maintenance and removing of the lighting fixture located on a Customer-owned support.”<sup>3</sup>
- Avista: “Electric service is inherently subject to interruption, suspension, curtailment, and fluctuation. The Company will endeavor at all times to provide a regular and uninterrupted supply of service, but in case the supply of service shall be interrupted or irregular or defective or fail from causes beyond its control, the Company will not be liable therefor.”<sup>4</sup>

5. The Commission’s tariff approvals are consistent with its rulings on liability limitations. Contrary to the claim of Bayer,<sup>5</sup> the Commission held that Idaho Code § 61-702 “does not expressly or impliedly prohibit the use of limitations of liability,”<sup>6</sup> and that “Idaho and regional case law is clear that exemptions from liability are disfavored but limitations of liability should be considered with regard to the facts and circumstances of each case.”<sup>7</sup> The Commission went on to conclude that Idaho Power’s “language regarding limitations of liability just and reasonable.”<sup>8</sup> The Commission also noted that “[c]ourts are virtually unanimous that provisions limiting a public utility’s liability are valid so long as they do not purport to grant immunity for gross negligence.”<sup>9</sup>

6. The Commission’s rulings and tariff approvals are consistent with the treatment of utility liability limitations by the Idaho courts. Idaho courts have adopted a “general rule” that

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<sup>2</sup> Rocky Mountain Power, Electric Service Regulation No. 4, I.P.U.C. No. 1, Sheet No. 4R.3 (effective Dec. 13, 2019). Idaho Power Company includes a similar liability limitation for service interruption at. *See*, Idaho Power Company, I.P.U.C. No. 30, Tariff No. 101, Sheet No. J-1 (effective Jan. 1, 2024).

<sup>3</sup> Idaho Power Company, I.P.U.C. No. 30, Tariff No. 101, Sheet 15-1 (effective Jan. 1, 2024) (Tariff for dawn to dusk customer lighting).

<sup>4</sup> Avista Corporation, I.P.U.C. No. 28, Sheet No. 70-I (effective June 15, 2025).

<sup>5</sup> Bayer Comments at 4 (January 22, 2023) (“The proposed liability limitation violates Idaho Code § 61-702.”).

<sup>6</sup> *See In the Matter of Application of Idaho Power Co. for Approval of a Special Contract with J.R. Simplot Co.*, Case No. IPC-E-13-23; Order No. 33071 at 7-8 (July 7, 2014).

<sup>7</sup> *Id.*, at 8.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, at 4, quoting, *Garrison v. Pacific Northwest Bell*, 45 Or. App. 523, 531, 608 P.2d 1206, 1214 (1980).

agreements exempting a party from liability for negligence are enforceable.<sup>10</sup> However, an exception to this rule arises when a “public duty is involved.”<sup>11</sup> The courts further recognize that utilities are “obvious examples of parties owing a public duty.”<sup>12</sup> The Commission has interpreted this “general rule” to conclude that completely *exempting* a public utility from liability for negligent conduct is contrary to public policy.<sup>13</sup> Nevertheless, the Commission may approve “provisions in the tariffs of regulated utilities *limiting* their liability.”<sup>14</sup> The Commission has determined “that this authority should be exercised in a limited manner,” consistent with a review of each proposed tariff.<sup>15 16</sup>

7. It is clear that the Commission possesses the discretion to approve proposed tariffs that include limitations on liability, provided that such limitations do not: (1) entirely exempt the utility from negligent conduct; (2) limit liability for intentional or gross negligence; and (3) that the proposed tariff is in the public interest and necessary for continued service.<sup>17</sup>

8. In line with these parameters, the Commission has considered proposed tariff language from a telecommunications utility aimed at limiting the utility’s liability for

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<sup>10</sup> *Jesse v. Lindsley*, 149 Idaho 70, 75 (2008) (“The general rule sustaining agreements exempting a party from liability for negligence is subject to two exceptions: (1) one party is at an obvious disadvantage in bargaining power; or (2) a public duty is involved (public utility companies, common carriers).”) (internal quotations omitted).

<sup>11</sup> *Lee v. Sun Valley Co.*, 107 Idaho 976, 978 (1984).

<sup>12</sup> *Id.*

<sup>13</sup> *See In the Matter of Application of Idaho Power Co. for Approval of a Special Contract with J.R. Simplot Co.*, Case No. IPC-E-13-23; Order No. 33038 at 11 (May 19, 2014) (“Idaho Power cannot abrogate its general duty to exercise reasonable care in operating its system to avoid unreasonable risks of harm to its customers.”).

<sup>14</sup> *In the Matter of Advice Letter No. 89-05 of Contel of the W. Inc.*, Case No. CON-T-89-2, Order No. 22812, (1989) at 1 (Oct. 1, 1989) (emphasis added).

<sup>15</sup> *Id.* at 5–6 (“This limitation of authority, however, must follow our conscious exercise of discretion in a formal case proceeding or rulemaking in which we have had an opportunity to review the factual underpinnings for the claim that liability should be limited.”)

<sup>16</sup> *Id.* (“First, the primary incentive that public utilities receive for the provision of utility service is their return on invested capital. Ordinarily, no further special incentives in the way of limitations of liability are appropriate. Second, however, there may be unusual factual circumstances that would justify this Commission exercising its authority to limit a utility's liability for the provision of a given service in order to encourage a service that we find to be in the public interest and that may not be otherwise provided”); see also *id.* at 1 (stating that liability limitations should be approved only when “there is a substantial likelihood that the service would not be provided in the absence of limitations of liability”).

<sup>17</sup> *See Supra* footnotes 16 & **Error! Bookmark not defined.**

“consequential, incidental, or indirect damages for any cause of action, whether in contract or tort.”<sup>18</sup> However, the utility failed to provide justification that the proposed limitation was in the public interest and necessary for service.<sup>19</sup> As a result, the Commission rejected the proposed tariff language on this evidentiary basis without examining its substantive merits. Significantly, the Commission’s dismissal of the tariff language was without prejudice, indicating that utilities could request approval for such limitations in their tariffs if they can demonstrate that the liability limitation is both in the public interest and necessary.<sup>20</sup>

9. Staff and Bayer’s comments reveal an overly narrow interpretation of past precedents, which if endorsed by the Commission, would inappropriately limit its authority, cast doubt on the currently approved tariffs of regulated utilities that limit liability, and stand in direct opposition to several preceding decisions by the Commission. Generally speaking, these comments confuse the courts’ prohibition on completely exempting a utility from negligence, with the Commission’s discretionary authority to approve reasonable limitations on liability that are necessary to continued electric service operation and serve the public interest. For example, Bayer asserts that the Idaho Supreme Court in *Rawlings v. Layne & Bowler Pump Co.* established that “a public utility is prohibited from *limiting* its liability . . . .”<sup>21</sup> However, a closer examination of the

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<sup>18</sup> *In the Matter of Tariff Advice Amendments Submitted by Idaho Rural Exchange Carriers, Albion Tel. and Rural Tel. Co. Regarding the Carriers’ Y2K Liability and Gen. Liability Limitations*, Case No. GNR-T99-23, Order No. 28247 at 3 (Dec. 30, 1999).

<sup>19</sup> *Id.* at \*6 (“Without addressing the merits of the proposed tariff provisions to limit liability, we find that the tariff advices do not address” the standard adopted in Order No. 28247.).

<sup>20</sup> *Id.* at 7 (“Although the Commission has declined to approve the three tariff advices, we do so without prejudice. If the Companies believe that such liability limitations are necessary, reasonable and satisfy the conditions mentioned above, the parties may submit appropriate Applications to the Commission.”); see also *In re Investigation upon the Comm’n’s Own Motion of the Qual. of Serv. of Utah Power & Light Co. and Upon the Use of Exculpatory Provisions in its Tariffs in Civil Action*, Case No. UPL-E-89-9, Order No. 23287 (Sept. 1, 1990) (ordering an electric utility to revise its tariffs to remove liability limitations after the utility conceded that it could not satisfy the standard identified in Order No. 28247).

<sup>21</sup> Bayer Comments at 3 (January 22, 2024) (emphasis added).

case reveals that the Court actually stated: “we hold that express agreements *exempting* one of the parties from negligence are to be sustained except where . . . a public duty is involved . . . .”<sup>22</sup>

10. The Company broadly concurs with the Intervenors that it cannot absolve itself from liability for any conduct that may be deemed negligent by a jury, nor can it impose limitations on liability for intentional or grossly negligent conduct—and the Company is not attempting to do so in this proceeding.<sup>23</sup> Under the Company’s proposal, Rocky Mountain Power would remain accountable for actual economic damages stemming from actions arising out of provisions of electric services, while proposing a reasonable limitation on additional a-typical damages, that is necessary for continued low-cost and dependable service in Idaho.<sup>24</sup> Indeed, this proposed limitation is much narrower than similar provisions approved by the Commission, including Idaho Power’s Rule J(1) that provides the circumstances where that utility would have “*no liability* to its Customers or any other persons for interruption, suspensions, curtailments, or fluctuation in service.”<sup>25</sup>

11. Based on the foregoing, the Company submits that the Commission has the authority to limit utility liability to economic damages arising from the provision of electric service. Section B of these comments will discuss how such limitation is consistent with tariffs approved by other jurisdictions. Thereafter, Section C of these comments will address why the

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<sup>22</sup> *Rawlings v. Layne & Bowler Pump Co.*, 93 Idaho 496, 500, 465 P.2d 107, 111 (1970) (emphasis added).

<sup>23</sup> While the proposed tariff language does not expressly exclude instances of willful or grossly negligent conduct, it does contain a clause that states, “This provision shall not be binding where state law disallows limitations of liability.” Hence, the proposed language inherently excludes application to situations where state law prohibits limiting liability, which includes cases of willful or gross negligence.

<sup>24</sup> Bayer submitted comments that the Company’s proposed tariff language lacks clarity around the term “actual economic damages.” Bayer Comments at 8 (January 22, 2024). The Company disagrees and reiterates that actual economic damages exclude special, noneconomic, punitive, incidental, indirect, or consequential damages. Furthermore for the purposes of the comments, the term “a-typical” damages is a reference to special, noneconomic, punitive, incidental, indirect, or consequential damages.

<sup>25</sup> See <https://docs.idahopower.com/pdfs/aboutus/ratesregulatory/tariffs/34.pdf>

proposed tariff language in the Application is necessary for continued low-cost service in Idaho, in the public interest, and should be approved by the Commission.

**B. The Application is consistent with other state utility commission precedent.**

12. Contrary to the comments submitted by Staff and Bayer, limitation on liabilities for electric utilities are prevalent in other jurisdictions. As Sierra Club accurately put it in its comments, “[t]o be sure, public utility commissions, including this Commission, have, at times, limited a utility’s exposure to liability.”<sup>26</sup> In fact, over a century of experience supports utility limitations on liability.<sup>27</sup> Courts have historically interpreted these limitations in accordance with the Filed Rate Doctrine, which provides that filed tariffs govern a utility’s relationship with its customers and have the full force and effect of law until suspended or set aside.<sup>28</sup> The public policy justifications supporting tariffed liability limitations are well summarized in a Texas Supreme Court decision:

[A] tariff’s limitations on liability for economic damages is reasonable because a utility: (1) must provide nondiscriminatory service to all customers within its area; (2) must maintain uniform rates and reduce costs; (3) cannot accurately estimate its exposure to damages or efficiently insure against risks; (4) cannot increase rates for all customers based on losses one specific class of customers incurs; and (5) must comply with PUC regulations.<sup>29</sup>

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

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<sup>26</sup> Sierra Club Comments, at 3.

<sup>27</sup> See, e.g., *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571 (1921) (when included in a telegraph company’s tariff, “[t]he limitation of liability was an inherent part of the rate. The company could no more depart from it than it could depart from the amount charged for the service rendered.”).

<sup>28</sup> See, e.g., *Keogh v. Chicago & N.R. Co.*, 260 U.S. 156, 163 (1922) (“The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.”).

<sup>29</sup> *Southwestern Elec. Power Co. v. Grant*, 73 S.W.2d 211, 217 (2002).



and state commissions have found that tariffed liability limitations serve the public interest by keeping “the cost of service low.”<sup>30</sup>

14. To that end, state courts have generally held that “rules promulgated by public utilities which absolve them from liability for simple negligence in the delivery of their services will be upheld.”<sup>31</sup> In decisions both issued in 1999, the Kansas and Texas Supreme Courts identified multiple state precedents consistent with this view of liability limitations, including Arizona, California, Delaware, the District of Columbia, Florida, Georgia, Illinois, Kansas, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nevada, New York, Oregon, Pennsylvania, South Carolina, Texas, and Washington.<sup>32</sup>

15. Due to the catastrophic damages caused by increasingly severe and more frequent natural disasters in recent years, these tariff provisions have taken on more importance. As wildfires in the West and hurricanes in the Gulf and East Coast regions have increased in number and severity, states have found liability limitations a key tool in preserving utility financial stability. Like the development of utility wildfire mitigation plans, and approval of securitization financing of infrastructure hardening for utilities at high risk of natural disasters, use of liability limitations have been upheld by courts and expanded by some legislatures.

16. For example, Florida has been impacted by frequent hurricanes over the past two decades that have resulted in billions of dollars in damage caused in part by utility outages. These

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<sup>30</sup> John L. Rudy, *Limitation of Liability Clauses in Public Utility Tariffs: Is the Rationale for State-Sponsored Indemnity Still Valid?*, 52 Buff. L. Rev. 1379, 1394 (2004) (discussing the New York Public Service Commission decision *In Re Liab. Clauses in Rate Schedules of Gas and Elec. Corps.*, 26 P.U.R. (N.S.) 373 (1938)).

<sup>31</sup> *Danisco Ingredients v. Kansas City Power & Light Co.*, 267 Kan. 760, 769 (1999); *Id.* at 771 (“A public utility’s liability exposure has a direct effect on its rates, and this court, as well as the majority of jurisdictions addressing the question ... has concluded that it is reasonable to allow some limitation of liability such as that for ordinary negligence in connection with the delivery of the services.”).

<sup>32</sup> *Id.* at 769-70; *Houston Lighting & Power Co. v. Auchan United States*, 995 S.W.2d 668, 672 (Tex. 1999). The Company’s Advice Letter in Docket No. UE 428 cites additional consistent precedent from state courts in PacifiCorp service territory. See Pacific Power Advice No. 23-018 – Rule 4 – Application for Electrical Service, Docket No. UE 428, at 2 (Oct. 24, 2023).

hurricanes “prompted a comprehensive re-evaluation of utility rules and practices in Florida, including both the engineering and economic aspects of hurricane preparation and response.”<sup>33</sup> These efforts included revising cost recovery standards (in both rate cases as well as through authorized surcharges), convening of multi-stakeholder workshops to revise storm-hardening rules and procedures, requiring Florida utilities to file forward-looking storm protection and system hardening plans, and authorizing the issuance of storm recovery bonds to finance the massive reconstruction costs caused by successive major storms.<sup>34</sup>

17. In addition to these efforts, in 2023, the Florida Legislature passed a new statutory cap on utility liability, which provides that utilities are “not liable for damages based in whole or in part on changes in the reliability, continuity, or quality of utility services which arise in any way out of an emergency or disaster, including, but not limited to, a state of emergency . . .”<sup>35</sup> This statute also vests the Florida Public Service Commission, rather than the state courts, with exclusive jurisdiction over resolving damages issues going forward, which allows the agency to rely on its expertise and discretion to strike a reasonable balance on appropriate tariff conditions.<sup>36</sup> Similarly, New York City was impacted by Superstorm Sandy and Tropical Storm Isaias in the past dozen years, resulting in billions of dollars in damages caused in part by utility outages. The primary utility impacted by the storm, Consolidated Edison Company (“ConEd”), had limitations of liability that excluded all damages arising from ConEd’s actions, even if based on utility

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<sup>33</sup> *Id.* at 19.

<sup>34</sup> *See, e.g., Id.* at 19-21 (discussing § 366.96 Fla. Statutes (2023) (utility storm protection plans and cost recovery), § 366.97 Florida Statutes (2023) (redundant poles and pole attachment rules), § 366.8260 Fla. Statutes (2023) (Storm recovery financing)).

<sup>35</sup> 2023 Fla. Laws Ch. 304 § 10(1) (codified at Fl. Code Ann. § 366.98(1)).

<sup>36</sup> *Id.* (“Consistent with the commission’s jurisdiction over public utility rates and service, issues relating to the sufficiency of a public utility’s disaster preparedness and response shall be resolved by the commission.”).

negligence, which were consistently enforced for several decades.<sup>37</sup> Only actions against utilities for gross negligence are recoverable in that state.<sup>38</sup>

18. After a New York court dismissed several lawsuits for failure to prove ConEd was grossly negligent (and finding that simple negligence claims were barred by tariff),<sup>39</sup> the New York legislature and utility commission adopted additional caps on utility liability, and also established additional protections for customers. For example, ConEd liability is now limited to \$15 million for each instance where electricity supply is interrupted by the utility's negligence or other events beyond the utility's control (and individual customer recovery "will be adjusted downward on a pro rata basis to the extent required to hold payments to a total of \$15,000,000."), while also requiring ConEd to specifically reimburse customers for certain damages (a credit for loss of electricity generally, and specific amounts for loss of foods, perishable medicine, etc.).<sup>40</sup> Additionally, the New York commission embarked on material grid hardening proceedings and addressed cost recovery for infrastructure storm damage in specific utility rate proceedings.<sup>41</sup>

19. Texas has also experienced winter storms causing tremendous electric outages and economic impacts in the last decade. In 2021, Winter Storm Uri caused millions of outages, several hundred deaths, and direct and indirect losses to the Texas economy of \$80 to \$130 billion.<sup>42</sup> After

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<sup>37</sup> See, e.g., *Lee v. ConEd*, 413 N.Y.S.2d 826 (1978) ("Once accepted by the Commission, the tariff schedule (including the limitation of liability provision) takes on the force and effect of law and governs every aspect of the utility's rates and practices; neither party can depart from the measure of compensation or standard of liability contained therein.").

<sup>38</sup> *Food Pageant v. ConEd*, 54 N.Y.2d 167 (1981).

<sup>39</sup> *Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. v. Trumbull Ins. Co. & ConEd.*, 2016 N.Y.Misc. LEXIS 5093 (Sup Ct, NY County 2016).

<sup>40</sup> Con.Ed. PSC Electricity Tariff Rule 21.1 Continuity of Supply; "PSC Approves New Rules for Customer Credits and Reimbursements," (Jul. 14, 2022) (available here: <https://dps.ny.gov/system/files/documents/2022/10/psc-approves-new-rules-for-customer-credits-and-reimbursements.pdf>).

<sup>41</sup> Lawrence Berkeley National Laboratory, "Case Studies of the Economic Impacts of Power Interruptions and Damage to Electricity System Infrastructure from Extreme Events," at 35—39 (November 25, 2020) (available here: [https://eta-publications.lbl.gov/sites/default/files/impacts\\_case\\_studies\\_final\\_30nov2020.pdf](https://eta-publications.lbl.gov/sites/default/files/impacts_case_studies_final_30nov2020.pdf)).

<sup>42</sup> See, e.g., FERC-NERC-Regional Entity Staff Report, *The February 2021 Cold Weather Outages in Texas and the South Central United States*, at 11-12 (Nov. 2023) (available here: <https://www.ferc.gov/media/february-2021-cold-weather-outages-texas-and-south-central-united-states-ferc-nerc-and>).

Uri, the Texas Legislature passed laws and the Texas utility commission implemented regulations aimed at preventing a recurrence of the winter storm outages.<sup>43</sup> The new laws addressed issues such as generator winterization requirements, changes in market design, and securitization to finance payment of energy costs incurred during Uri. These authorities complement the state’s judicial opinions that uphold utility limitations of liability in a variety of circumstances,<sup>44</sup> and reflect the Texas Supreme Court’s decision that “one need only consider a power outage in the commercial district of a major Texas city to realize the potential liability of an electric utility. . . . Absent a limitation of liability, the risk of staggering loss could be borne by ordinary utility customers.”<sup>45</sup>

20. Focusing on the West specifically, two sister-state utility commissions have upheld similar tariff provisions that limit damages to economic damages (or no liability whatsoever). For example, Washington courts have concluded that “Virtually 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.”<sup>46</sup> “Limitation of liability provisions are an inherent part of the ratemaking process.”<sup>47</sup> And where Washington statutes vest the responsibility to approve liability limitations with that state commission, once a tariff becomes effective, limitations are “part of the law” and are “binding upon the customer whether he actually knows of

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<sup>43</sup> For a high-level description of the 2021 legislative and PUC actions, see Texas Comptroller of Public Accounts, *Fiscal Notes: Winter Storm Uri 2021*, at 11-13 (Oct. 2021), available at: <https://comptroller.texas.gov/economy/fiscal-notes/2021/oct/winter-storm-impact.php>.

<sup>44</sup> See, e.g., *CenterPoint Energy Res. Corp. v. Ramirez*, 640 S.W.3d 205 (Tex. 2022); *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 217 (Tex. 2002).

<sup>45</sup> *Houston Lighting & Power Co. v. Auchan United States*, 995 S.W.2d 668, at 674 (Tex. 1999).

<sup>46</sup> *Allen v. Gen. Tel. Co.*, 20 Wn. App. 144, 148 (1978) (applying a telephone utility tariff where the company “shall not be liable to the Advertiser for damages resulting from failure to include any time of advertising specified in [the agreement] . . .”).

<sup>47</sup> *National Union Ins. Co. of Pittsburgh, Pa. v. Puget Sound Power*, 972 P.2d 481 (1999) (citing *Lee v. Consolidated Edison Co.*, 98 Misc.2d 304, 413 N.Y.S.2d 826, 828 (N.Y.Sup.App.1978)).

the limitation or not.”<sup>48</sup> This is because without the commission exercising its authority to review and approve reasonable customer and utility protections, a utility “would have to raise its rates commensurate to its increased liability risk.”<sup>49</sup> Washington has applied limitations of liability to limit damages to economic damages, or no damages at all,<sup>50</sup> and Oregon Courts have adopted this same reasoning.<sup>51</sup>

21. Similarly, the California Supreme Court recently upheld state commission determinations on liability limitations in a decision that preempted a customer’s ability to recover civil damages against utilities resulting from public safety power shutoff events. The Court was asked whether a statute that holds utilities liable for “all loss, damages, or injury” caused by utility acts or omissions would nonetheless be preempted by another statute that “bars actions that would interfere with the California Public Utilities Commission [CPUC] in the performance of its official duties.”<sup>52</sup> The Court concluded that yes—even though the plaintiffs were “seeking billions of dollars in alleged damages resulting directly from power shutoffs”—the suit should be preempted as a matter of law because it would “hinder or frustrate the PUC’s carefully designed implementation calculus” regarding utility wildfire mitigation plans and tariff provisions regarding

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<sup>48</sup> *Allen*, 20 Wn. App. at 151 (string-citing *Cole v. Pacific Tel. & Tel. Co.*, 112 Cal.App.2d 416, 246 P.2d 686 (1952), *aff’d Hall v. Pacific Tel. & Tel.*, 20 Cal.App.3d 953, 98 Cal.Rptr. 128 (1971); *Wheeler Stuckey, Inc. v. Southwestern Bell Tel. Co.*, 279 F.Supp. 712 (W.D.Okl.1967); *Warner v. Southwestern Bell Tel. Co.*, 428 S.W.2d 596 (Mo.1968)).

<sup>49</sup> *Id.*

<sup>50</sup> *Citoli v. City of Seattle*, 61 P.3d 1165 (2002).

<sup>51</sup> *Boardmaster Corp.*, 198 P.3d at 461 (“The Washington Court of Appeals’ reasoning in *Citoli* is compelling, and we adopt it here. As in *Citoli*, the applicable tariff in this case, Rule 14, limits Pacific Power’s liability for suspending electrical service if such suspension is solely attributed to causes beyond Pacific Power’s reasonable control, including ‘governmental authority.’ In discontinuing service to BoardMaster’s property, Pacific Power acted—as plaintiffs’ complaint alleges—pursuant to Jackson County’s June 13, 2003, directive. That order from Jackson County constituted ‘governmental authority’ and, as such, was beyond Pacific Power’s ‘reasonable control.’”).

<sup>52</sup> *Gantner v. PG&E Corporation*, 538 P.3d 676, 677 (Cal. 2023).

public safety power shutoff events.<sup>53</sup> “To hold otherwise,” the Court noted, “would be to invite interference with a ‘broad and continuing supervisory or regulatory program’ of the PUC.”<sup>54</sup>

22. The Company represents that these examples, which similarly disclaim atypical damages (or any liability at all), provide adequate persuasive authority from other jurisdictions to support the Company’s proposal.

**C. The Commission should approve the proposed tariff language as necessary for continued low-cost electric service in Idaho and in the public interest.**

23. Contrary to the comments presented in opposition, the proposed tariff is crafted with the intent to reasonably reinforce the financial stability of the Company, thereby ensuring continued low-cost electric service in Idaho. To appreciate the necessity of the proposed language, the Commission must consider the challenging environment that electric utilities currently face regarding uncapped liability and the consequential financial impact on their customers. For instance, utilities in the Western U.S., such as Pacific Gas and Electric (“PG&E”), Xcel Energy, and PacifiCorp, have been subjected to significant financial pressures stemming from lawsuits that associated with catastrophic wildfires.

24. PG&E’s legal battles have been particularly acute, with the 2018 Camp Fire serving as a stark example. The fire, one of the deadliest and most destructive in California’s history, was found to be caused by PG&E’s electrical transmission lines. The aftermath saw the utility engulfed in a myriad of lawsuits culminating in a settlement of approximately \$13.5 billion and a Chapter 11 bankruptcy declaration to manage the liabilities and facilitate the compensation to the

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<sup>53</sup> *Id.* at 683 (cleaned up).

<sup>54</sup> *Id.* (citing *Hartwell Corp. v. Superior Court*, 27 Cal.4th 256, 266 (2002)); *Id.* at 678 (citing *San Diego Gas & Electric Co. v. Superior Court*, 13 Cal.4th 893, 918 (1996) (same)).

plaintiffs.<sup>55</sup> Xcel Energy, while seemingly having a lesser degree of potential liability compared to PG&E, has also faced lawsuits related to wildfires.<sup>56</sup>

25. PacifiCorp has also been subject to significant financial pressures due to recent jury verdicts related to devastating wildfires in Oregon. For example, an Oregon jury ruled that the Company must compensate 17 plaintiffs with a payment exceeding \$90 million. Of this amount, the actual economic losses were approximately \$4.5 million, contrasted by a staggering \$85.5 million assigned to a-typical damages.<sup>57</sup> This means that the a-typical damages were almost nineteen times the economic losses. In a separate case, a different Oregon state jury recently ordered the Company to pay \$62 million to nine plaintiffs, with economic losses at approximately \$6.3 million, and a-typical damages surging to \$56 million—nearly nine times the economic losses.<sup>58</sup>

26. Following the initial \$90 million judgment, S&P Global Ratings (“S&P”) responded by lowering the Company's credit rating from ‘A’ to ‘BBB+’ with a “negative outlook.”<sup>59</sup> This downgrade was influenced, in part, by the substantial \$85.5 million awarded in a-typical damages. S&P Global explicitly cited these damages as a factor in their decision to downgrade the Company’s creditworthiness. Additionally, in November 2023, Moody’s Investors

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<sup>55</sup>See e.g., Richard Gonzales, *PG&E Announces 13.5 Billion Settlement of Claims Linked to California Wildfires*, *National Public Radio*, (December 7, 2019), available at: <https://www.npr.org/2019/12/07/785775074/pg-e-announces-13-5-billion-settlement-of-claims-linked-to-california-wildfires>

<sup>56</sup> See e.g., Judith Kohler, *No Criminal Charges for Xcel Energy in Marshall Fire, But Civil Liability Another Matter*, *Denver Post* (June 8, 2023), available at: <https://www.denverpost.com/2023/06/08/xcel-energy-marshall-fire-investigation>

<sup>57</sup> Sloan Millman & Gabe Grosberg, *PacifiCorp Downgraded to BBB+, Outlook Revised to Negative; Berkshire Hathaway Energy Co. Outlook Also Negative, S&P Global Ratings* (June 20, 2023), available at: <https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/3009376>

<sup>58</sup> Clark Mindock, *Berkshire’s PacifiCorp Ordered to Pay At Least \$62 Million to Homeowners for 2020 Oregon Wildfire Damage*, *Reuters* (January 23, 2024), available at: <https://www.reuters.com/world/us/berkshires-pacificorp-ordered-pay-least-62-million-homeowners-2020-oregon-2024-01-23/>

<sup>59</sup> Supra footnote 57 The recent \$62 million lawsuit also further underscore the ongoing credit risks that the Company faces in the future.

Service (“Moody’s”) downgraded PacifiCorp’s senior unsecured issuer rating to Baa1 from A3.<sup>60</sup> In December 2023, Moody’s noted that wildfire risk was a significant risk for the Company and has a substantial impact on its credit quality.<sup>61</sup> These downgrades have real world impacts on the Company’s ability to raise capital for investment: many institutional investors have are not permitted to purchase non-investment grade (i.e., rated below Baa3/BBB-) securities, or in some cases even securities rated below a single A rating. As detailed in the Application, the Company will encounter increased borrowing costs due to this credit rating downgrade, which will constrain its financial flexibility and affect its capacity to invest economically in crucial infrastructure enhancements, renewable energy projects, and other endeavors necessary to fulfill its legal and regulatory commitments.<sup>62</sup>

27. In the context of this proceeding, the reservations expressed by S&P demand close attention. Their issuance of a “negative outlook” is based on the potential for further credit rating downgrades if the Company is subjected to more adverse legal judgments in the future. S&P’s warning clearly demonstrates the significant impact that substantial, uncapped legal awards can have on the Company’s fiscal stability. Notably, as explained above, PacifiCorp has recently been subject to another multi-million jury verdict, an event that could further affect its creditworthiness. Both S&P Global’s assessment of PacifiCorp as a company and their broad sector analysis<sup>63</sup>, underscore the critical importance of maintaining a robust credit rating. A strong credit rating is imperative for the Company’s ongoing financial viability and is integral to its ability to continue providing services at reasonable rates for its customers in Idaho.

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<sup>60</sup> Moody’s Rating Action: Moody’s downgrades PacifiCorp to Baa1, outlook stable, p. 1.

<sup>61</sup> Moody’s Investors Services, Credit Opinion, PacifiCorp, Update following a downgrade to Baa1, December 4, 2023, p.1.

<sup>62</sup> Application at 5 (October 24, 2023).

<sup>63</sup> A Storm Is Brewing: Extreme Weather Events Pressure North American Utilities' Credit Quality, S&P Global Ratings (November 9, 2023), available at: [A Storm Is Brewing: Extreme Weather Events Pressure North American Utilities' Credit Quality | S&P Global Ratings \(spglobal.com\)](https://www.spglobal.com/ratings/en/press-releases/2023/11/09/a-storm-is-brewing-extreme-weather-events-pressure-north-american-utilities-credit-quality).



28. In the face of these considerable financial and operational challenges, the Company has embarked on a detailed response designed to bolster its infrastructure and heighten the safety measures it already had in place. These actions are critically important for reducing the risk of wildfires. Contrary to the claims made by the Sierra Club and Bayer, PacifiCorp has been proactive, carrying out in-depth assessments and enhancements of its wildfire prevention tactics, with special attention to vegetation management and the modernization of infrastructure.<sup>64</sup> The Company has refocused its capital plan in the next three years on wildfire mitigation expenses to reduce the risk of wildfire events, and on investment in the ongoing safety and reliability of the service. Furthermore, while historically PacifiCorp has paid dividends to its parent company, Berkshire Hathaway Energy (“BHE”), to manage the common equity component of the capital structure, in sustained periods of capital investment, PacifiCorp is able to retain earnings to help finance investments and forego dividend payments to BHE. BHE has pledged that it will not require a dividend from PacifiCorp over the next five years, which will allow PacifiCorp to retain earnings to help finance wildfire settlements and capital investments.

29. Despite these strategic and preventive initiatives, PacifiCorp is still vulnerable to financial strains linked to the provision of affordable electricity in Idaho. This vulnerability is due, in large part, to the lack of limitations on liability for atypical damages. While Staff and Bayer argue that there is no need for such limitations, citing that Idaho law caps noneconomic damage awards at \$250,000,<sup>65</sup> it is important to clarify that this cap is solely applicable to personal injury claims and does not apply to other types of legal actions that could be filed against the Company.

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<sup>64</sup> Sierra Club Comments at 5 (“For instance, if RMP knows that its potential liability for wildfire is severely limited, will the utility maintain or increase its vigilance in monitoring wildfire conditions and altering operations as necessary?”); Bayer Comments at 9 (“Exempting the Company from liability for its own negligence would incentivize the Company to take great risks . . .”).

<sup>65</sup> Staff’s Comments at 3 (January 23, 2023); Bayer Comments at 8.

The complexity of today's electrical grid can result in disruptions that could give rise to various causes of action not attributable to simple human error or negligence. This complexity presents jurors with the challenging task of navigating intricate technical details and specialized knowledge in order to justly assign fault and evaluate damages.

30. By establishing a limitation on liability to strictly economic damages, in the context of the Company's provision of electric services, the Company is protected against a material threat to its financial stability that may arise from disproportionate legal awards for atypical damages.<sup>66</sup> This safeguard ensures that while plaintiffs are entitled to recover their tangible, measurable losses as determined by a jury, the Company is concurrently shielded from the uncertainty of speculative damages. This reasonable limitation is likely to favorably influence the Company's credit rating by making it more attractive to lenders and investors. It is important to note that S&P's "negative outlook" was attributed almost exclusively to the ongoing risk posed by future unlimited liabilities, and that S&P indicated that a limitation on liability could lead to a revision of its outlook to "stable."<sup>67</sup>

31. Commission approval of the proposed tariff language can potentially stabilize or even enhance the Company's credit outlook, which is critical for maintaining investor confidence and securing the capital necessary for ongoing operations and future developments in Idaho. It would result in more favorable interest rates for borrowed capital, empowering the Company to more economically invest in essential infrastructure upgrades and safety enhancements without

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<sup>66</sup> Staff provides comments that Idaho law caps noneconomic damage awards at \$250,000. However, it is crucial to recognize that this limitation is applicable exclusively to personal injury claims and does not extend to other types of claims that may be brought against the Company. Staff's Comments at 3 (January 23, 2023).

<sup>67</sup> Sloan Millman & Gabe Grosberg, PacifiCorp Downgraded to BBB+, Outlook Revised to Negative; Berkshire Hathaway Energy Co. Outlook Also Negative, S&P Global Ratings (June 20, 2023), available at: <https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/3009376> ("We could affirm our ratings on PacifiCorp and revise the outlook to stable if its wildfire liabilities remain limited...").

having to significantly raise customer rates to offset higher borrowing expenses. Indeed, this approach would allow the Company to redirect additional funds towards sustained wildfire mitigation efforts—funds that might otherwise be required to cover substantial atypical damage judgments. Customers ultimately reap the rewards of these investments through better safety measures and the assurances of stable rates, which are at risk of being compromised if the Company remains exposed to unbounded liability. This approach not only secures the Company's financial integrity but also protects consumers from unforeseen rate fluctuations, thus supporting the ongoing delivery of affordable and reliable utility services in Idaho well into the future.

32. PacifiCorp expects to spend approximately \$ [REDACTED] in capital expenditures from [REDACTED] through [REDACTED] with significant investments in wildfire mitigation efforts as well as new energy projects, related transmission, increased reliability, improved power delivery, and safe operations. These investments are needed to meet customer needs for cost-effective and reliable service. However, PacifiCorp has adjusted its capital investment plan reducing the planned expenditures in [REDACTED] through [REDACTED] by nearly \$ [REDACTED] when compared to [REDACTED]. This capital spending will require PacifiCorp to raise funds by issuing new long-term debt in the debt capital markets. In the interim, the Company has maintained access to capital, however the costs of that capital have increased, reflecting the risk associated with the ongoing liability and operational risk. PacifiCorp spent a significant amount of time talking with its investors in the December 2023 and early January 2024 timeframe leading up to its January 2024 long-term debt offering to provide them a detailed update on our plans to mitigate any further liability risk. Although PacifiCorp was able to access the debt capital markets, some traditional investors in PacifiCorp debt decided not to participate.

33. Implementing reasonable limitations on liability is essential for all businesses, particularly for electric companies and their customers, who depend on this indispensable and affordable service in their everyday life. The Texas Supreme Court has provided a perspective that aligns with this view, emphasizing the importance of such limitations for the ongoing financial viability of utilities and for keeping electricity rates affordable for consumers. The Court has cautioned: “Absent a limitation of liability, the risk of staggering loss could be borne by ordinary utility customers.”<sup>68</sup> This statement highlights the critical role that liability caps play in protecting customers from the potential for dramatic increases in electricity rates due to the financial impact of large, uncapped liabilities on utility companies.

34. Accordingly, the Commission should approve the proposed tariff language as necessary and in the public interest because it provides a necessary safeguard for the financial stability of the Company and ensures the continued provision of affordable and reliable electricity to consumers in Idaho. By limiting atypical damages arising from the provision of electric service, the Company is protected from future disproportionate legal awards that can lead to insolvency and the necessity to raise customer rates to cover associated costs. A more predictable liability landscape not only would improve the Company’s credit rating, leading to lower borrowing costs and enabling continued investment in infrastructure and reliability measures, but also attracts investment for the future electric service in Idaho. This, in turn, fosters a more robust and reliable grid for consumers. Approval of the proposed tariff language is a reasonable step towards balancing the interests of individual plaintiffs seeking reasonable compensation and the broader public’s interest in secure, reasonably priced and reliable utility services.

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<sup>68</sup> *Houston Lighting & Power Co. v. Auchan United States*, 995 S.W.2d 668, at 674 (Tex. 1999).

### **III. CONFIDENTIAL INFORMATION**

35. This filing, specifically the capital investment details, contains confidential information including trade secret and other Company confidential information exempt from public review under Idaho Code §§ 74-104–109 and Idaho Public Utilities Commission’s Rule of Procedure 67.


### **IV. REQUEST FOR RELIEF**

36. The Company respectfully requests the Commission approve the Company’s proposed Rule 3 changes.

DATED this 6<sup>th</sup> day of February 2024.

Respectfully submitted,

ROCKY MOUNTAIN POWER

A handwritten signature in blue ink, appearing to read "Joe Dallas", is written over a horizontal line.

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