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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF ROCKY MOUNTAIN POWER'S APPLICCATION TO REVISE ELECTRIC SERVICE REGULATION NO. 3 – ELECTRIC SERVICE AGREEMENTS	**Case No. PAC-E-23-22** **BAYER'S COMMENTS**

P4 Production, L.L.C., an affiliate of Bayer Corporation (referred to herein as "Bayer"), submits the following comments pursuant to the Commission's *Notice of Modified Procedure* issued November 22, 2023.

COMMENTS

Rocky Mountain Power, a division of PacifiCorp (the "Company"), filed an application ("Application") requesting that the Idaho Public Utilities Commission ("Commission") approve a proposed amendment to Electric Service Regulation No. 3 – Electric Service Agreements to add a new section that would limit the Company's liability for its own negligence, as follows:

> In any action between the parties arising out of the provision of electric service, the available damages shall be limited to actual economic damages. Neither party shall be liable to the other party for special, noneconomic, punitive, incidental, indirect, or consequential damages (including, without limitation, lost profits), regardless of whether such action is based in contract, tort (including, without limitation, negligence), strict liability, warranty or otherwise. By receiving electric service, customer agrees to waive and release Company from any and all claims for special, noneconomic, punitive, incidental, indirect, or consequential damages (including, without limitation, lost profits) as part of any claim against Company related to or arising from Company's operations or electrical facilities. This provision shall not be binding where state law disallows limitations of liability.

For the reasons discussed below, Bayer opposes the proposed amendment to Electric Service Regulation No. 3, and respectfully requests that the Application be denied.

1. The proposed liability limitation violates Idaho law.

It has been the law of the State of Idaho for more than a century that a public utility is prohibited from limiting its liability for its own negligence by rule or regulation. This legal principle was first addressed in *Strong v. Western Union Telegraph Co.*, 18 Idaho 389 (1910). In that case, the plaintiff complained that a public telegraph company was liable for a mistake caused by its negligent conduct in the transmission of a telegram. The mistaken telegram caused significant economic harm to the plaintiff's business. In response, the telegraph company argued that its liability was limited by a disclaimer on the telegram form which stated: "said company shall not be liable for mistakes…in the transmission or delivery…beyond the amount received for sending the same." The Idaho Supreme Court rejected the telegraph company's argument, holding:

> Since a telegraph company is a public agent, exercising a quasi public employment, carefulness and fidelity are essentials to its character as a public servant, and public policy forbids that it should be released by its own rules or regulations from damages occasioned by its carelessness and negligence. It is chartered for public purposes; it has the power of eminent domain; the public are compelled to rely absolutely on the care and diligence of the company in the transmission of messages, and by reason of those powers and the relation it sustains to the public, it is obligated to perform the duties it is chartered to perform with the care, skill, and diligence that a prudent man would, under like circumstances, exercise in his own affairs, and if it fails to do so, it is liable in damages for such failure and cannot restrict its liability by rule or regulation which attempts to excuse it for its own negligence. It is a public servant and must serve the people impartially, carefully, and in good faith. We do not hold that the company is an insurer against mistakes or delays arising from causes beyond its own control, but it is liable for damages arising from the use of defective instruments or want of skill or care on the part of operators. A stipulation exempting it from liability for its own negligence would be contrary to public policy.

Id. at 915-16 (underline added). The Court declined to differentiate between ordinary negligence and gross negligence, holding instead that a public utility is prohibited from limiting its own liability by rule or regulation for any form of negligence, stating flatly that "if damages occur by reason of mistakes made because of defective instruments or incompetent operators, or through carelessness or negligence that with ordinary care might have been avoided, the company is liable." *Id*. at 916.

The *Strong* decision has stood for more than a century. It was not modified or abrogated by the subsequent enactment of the Public Utilities Act, Title 61, Idaho Code. Statutory enactments do not modify previously existing common law "unless the language of the statute clearly indicates the legislature's intent to do so." *Easterling v. HAL Pac. Properties, L.P.*, 171 Idaho 500 (2023). There is nothing in the Public Utilities Act that clearly indicates a modification or abrogation of the holding in *Strong.* Consequently, the *Strong* decision remains binding precedent in Idaho. The Idaho Supreme Court continues to cite the *Strong* case as authority for varying legal principles. *See, e.g., Washington Fed. v. Hulsey*, 162 Idaho 742, 752 (2017); *S. Griffin Const., Inc. v. City of Lewiston*, 135 Idaho 181, 189 (2000); *Stearns v. Williams*, 72 Idaho 276, 286 (1952).

Notably, sixty years after the *Strong* decision, the Idaho Supreme Court reiterated in *Rawlings v. Layne & Bowler Pump Co.*, 93 Idaho 496 (1970), that a public utility is prohibited from limiting its liability for its own negligent conduct. In that case, the Court held that contractual limitations of liability may be enforced "except where … a public utility is involved (public utility companies, common carriers.)" *Id*. at 500. This holding has been reaffirmed in *Lee v. Sun Valley Co.*, 107 Idaho 976, 978 (1984) and *Jesse v. Lindsley*, 149 Idaho 70, 75 (2008).[1]

There can be no question that the holding in *Strong* that a public utility cannot be shielded from liability for its own negligent conduct by rule or regulation remains the law in Idaho. The Application should be denied because the proposed amendment to Electric Service Regulation No. 3 would create a regulation that exempts the Company from liability for its own negligence in violation of the Idaho Supreme Court ruling in *Strong*.

2. The proposed liability limitation violates the Commission's Order No. 33038.

In 2014, the Commission allowed Idaho Power Company and J.R. Simplot Company to negotiate a bilateral liability restriction in Simplot's special contract *In the Matter of the Application of Idaho Power Company for Approval of a Special Contract with J.R. Simplot Company*, Case No. IPC-E-13-23 (July 7, 2014). In that case, Idaho Power and Simplot had negotiated all terms of the contract except for a proposed bilateral waiver of liability for indirect,

[1] The Commission cited this line of authority in support of its decision *In the Matter of the Application of Idaho Power Company for Approval of a Special Contract with J.R. Simplot Company*, Case No. IPC-E-13-23 (July 7, 2014).

special, and consequential damages. (Order No. 33038, p. 1.) The Commission ruled that "limitations of liability are not, *per se*, illegal and unenforceable in utility contracts," but that (a) "[e]xempting a public utility from the consequences of negligent conduct when the utility is charged with a public duty is not reasonable," (b) a public utility "cannot abrogate its general duty to exercise reasonable care in in operating its system to avoid unreasonable risks of harm to its customers," and (c) "any limitations of liability regarding intentional tortious conduct or gross negligence are contrary to the public interest and, as such, are unfair and unreasonable." *Id*. at 8, 11 (underlining in original omitted). Subject to the foregoing, the Commission ruled that "limiting the liability of a utility to a reasonable, **agreed-upon valuation** for damages recoverable by a non-willful breach of duty is fair, just and reasonable." *Id*. (emphasis added).

When read in concert with the holdings of the Idaho Supreme Court in *Strong* and *Rawlings*, Order No. 33038 is a recognition by the Commission that general limitations of liability for a public utility's own negligent conduct are not permitted, but contractually agreed-upon valuations for damages negotiated and agreed upon between a public utility and a single customer may be permissible in limited circumstances.

The Company's proposed amendment to Electric Service Regulation No. 3 should be denied because it is not a mutually negotiated and agreed-upon limitation of the value of damages, and because it would provide a general limitation of liability for the Company's own grossly negligent and intentional conduct.

3. The proposed liability limitation violates Idaho Code § 61-702.

The Idaho legislature has determined that under no circumstance may a public utility be exempted from liability arising from an unlawful act, as set forth in Idaho Code § 61-702, which reads:

> In case any public utility shall do, cause to be done or permit to be done, any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by the constitution, any law of this state, or any order or decision of the commission, according to the terms of this act, such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom. An action to recover such loss, damage or injury may be brought in any court of competent jurisdiction by any corporation or person.

(Underline added).

The Company's proposed amendment to Electric Service Regulation No. 3 violates Idaho Code § 61-702 because it would exempt the Company from liability for its own unlawful conduct. Therefore, the Application should be denied.

4. The proposed liability limitation does not "align" with regulations adopted in Wyoming, Washington, and New York.

Rather than focusing on Idaho's prohibition against the limitation of liability for a public utility's own negligence by rule or regulation, the Company argues that its proposed liability limitation should be approved because it "aligns" with tariffs limiting liability of public utilities approved in Wyoming, Washington, and New York. However, unlike the liability limitation proposed by the Company, the Wyoming and New York provisions do not exempt a public utility from liability for its own negligence, and the Washington provision is much narrower than the sweeping, blanket limitation proposed by the Company.

In Wyoming, the provisions limiting liability do not apply to a public utility's own negligence. The first Wyoming provision cited by the Company states: "Company shall not be liable for injury to persons, damage to property, monetary loss, or loss of business caused by accidents, acts of God, fires, floods, strikes, wars, authority or orders of government, or any other causes and contingencies beyond the Company's control." (Underline added). The second Wyoming provision states: "The customer shall hold the Company harmless and indemnify it against all claims and liability for injury to persons or damage to property when such damage or injury results from or is occasioned by the facilities located on the customer's side of the point of delivery unless caused by the negligence or wrongful acts of the Company's agents or employees." (Underline added). The third Wyoming provision states: "The Company will not be liable for any loss, injury, death or damage resulting in any way from the supply or use of electricity or from the presence or operation of the Company's structures, equipment, lines, appliances or devices on the customer's premises, except loss, injuries, death, or damages resulting from the negligence of the Company."[2] Unlike the Wyoming provision, the regulation proposed by the Company would limit its liability for its own negligence.

Likewise, the New York provision cited in footnote 5 of the Application does not limit a public utility's liability for its own negligence. It states: "Continuity of supply: The company

[2] Each of these Wyoming provisions are cited and quoted in footnote 1 of the Company's Application.

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 or through ordinary negligence of employees, servants, or agents the company will not be liable therefor." *Lee v. Consol. Edison Co. of New York*, 413 N.Y.S.2d 826, 827 (App. Term 1978) (underlining added). Unlike this New York provision, the regulation proposed by the Company would limit its liability for its own negligence.

In Washington, the first provision cited by the Company limits a public utility's liability for ordinary negligence only, stating: "The Utility's liability, if any, for its gross negligence, willful misconduct or violation of RCW Chapter 19.122 is not limited by this tariff. With respect to any other claim or suit, by a customer or by any other party, for damages associated with the installation, provision, termination, maintenance, repair or restoration of service, the Utility's liability, if any, shall not exceed an amount equal to the proportionate part of the monthly recurring charge for the service for the period during which the service was affected. THERE SHALL BE NO LIABILTY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES." (Underline added). The second Washington provision cited by the Company does not limit the public utility's liability for ordinary negligence. It states: "Neither the Company nor any other person or entity shall have any liability to any Customer or any other person or entity for any disruption in service or for any loss or damage caused thereby if such disruption is attributable to the causes, work or actions of the following…(a) Causes beyond the Company's reasonable control…" (Underline added).[3]

In footnotes 3 and 4 of the Application, the Company cites two California appellate decisions which purportedly held that the California Public Utility Commission has unfettered discretion to limit a public utility's liability to any degree. That might be the law in California, but it is not the law in Idaho, as explained above.

The regulation proposed by the Application does not align with the Wyoming and New York regulations because it limits the Company's liability for its own negligence, and it is much broader than the Washington regulations. Therefore, the Application should be denied.

[3] Each of these Washington tariffs are cited and quoted in footnote 2 of the Application. It should be noted that the Company failed to quote the "causes beyond the Company's control" language contained in the second quoted Washington tariff. The full language of that tariff can be found at the link provided in footnote 2 of the Application.

5. The Commission-approved provisions cited by the Company do not exempt a public utility from liability for its own negligence.

In Section 5 of the Application, the Company implies that its proposed liability limitation is no different in scope than certain provisions previously approved by the Commission. The Company's argument is without merit because such provisions do not limit a public utility's liability for its own negligence.

First, the Company references the force majeure provision in Electric Service Regulation No. 4R.3. (Application, p. 3.) However, this provision does not limit the Company's liability for damages caused by its own negligence, it simply limits liability for electric service interruptions under circumstances which may arise in the absence of negligence by the Company.

Second, the Company references Electric Service Regulation Nos. 5R.2(d), 5R.4, and 5R.5, each of which limits a public utility's liability for damage arising from a customer's conduct. (Application, p. 3-4.) These provisions do not limit a public utility's liability for its own negligence.

Third, the Company references Electric Service Regulation No. 7R.4(b) which limits the Company's liability for "any and all liabilities, actions or claims for injury, loss or damage to persons or property arising from the allocation of service by the Customer." (Application, p. 4; underline added.) This regulation addresses liability for actions by master-metered customers, it does not limit the public utility's liability for its own negligence.

Fourth, the Company references Electric Service Regulation No. 12R.5(a)(2) which requires customers to bear certain costs associated with customer-built extensions. (Application, p. 4.) This regulation does nothing to limit a public utility's liability for its own negligence.

Fifth, the Company references special conditions in Tariff 135 and Tariff 136 which limit a public utility's liability for "acts or omissions of the Customer that cause loss or injury, including death, to Customer or any third party." (Application, p. 4.) Again, this provision limits liability for actions of a customer, not the public utility's own negligence.

These previously approved provisions comply with the holding in *Strong* and Idaho Code § 61-702 because they do not limit a public utility's liability for its own negligence and unlawful conduct. Unlike these previously approved provisions, the Company's proposed amendment to Electric Service Regulation No. 3 would limit the Company's liability for its own negligence. Therefore, it must be rejected.

6. The proposed amendment to Electric Service Regulation No. 3 lacks clarity and conflates categories of damages available in civil lawsuits.

The Application should additionally be denied because the proposed regulation lacks clarity and conflates categories of damages available in civil lawsuits. The Application purports to create an exemption from liability for all non-economic damages, stating that allowable damages should be confined to "actual economic damages." Yet, the categories of damages the Company requests exemption from encompass actual economic damages.

The Application requests an exemption from "special, noneconomic, punitive, incidental, indirect, or consequential" damages. Of these, special, incidental, indirect, consequential all encompass actual economic damages. The term "actual damages" is synonymous with compensatory damages, which are "intended to compensate a plaintiff for its loss." 22 Am. Jur. 2d Damages § 25. Incidental, direct, and consequential damages are all forms of compensatory damages. 22 Am. Jur. 2d Damages § 24. Similarly, the term "special" damages refers to "actual economic harm or pecuniary loss." 22 Am. Jur. 2d Damages § 43.

The Application is contradictory because it purports to allow injured persons to recover "actual economic damages" while simultaneously prohibiting the recovery of various types of actual economic damages.

Because the Application lacks clarity and conflates categories compensatory damages, the Commission should deny the Application.

7. The Company has failed to demonstrate that it is in the best interest of the public to exempt public utilities from liability for their own negligence.

The Company argues that a sweeping exemption from liability for its own negligence is necessary to avoid "significant a-typical damages." However, Idaho has already capped non-economic damages in personal injury cases. Idaho Code § 6-1603 provides: "In no action seeking damages for personal injury, including death, shall a judgment for noneconomic damages be entered for a claimant exceeding the maximum amount of two hundred fifty thousand dollars ($250,000)."

In addition, punitive damages are restricted by Idaho Code § 6-1604 which requires a plaintiff proves "by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct" by the other party. *Id*. It is the existing policy of the Legislature to allow for

these categories of damages, subject to specific restrictions, to prevent juries from awarding astronomical and unrealistic amounts to harmed persons.

Still, these categories of damage exist for a reason. The purpose of punitive damages is deterrence, punishment, and prevention of intentionally harmful behavior by persons or entities who have the power to cause great harm. To illustrate, Idaho Jury Instruction 9.20 states:

> If you find that defendant's acts which proximately caused injury to the plaintiff were an extreme deviation from reasonable standards of conduct and that these acts were performed by the defendant with [malice] [fraud] [oppression] [wantonness] [gross negligence], you may, in addition to any compensatory damages to which you find the plaintiff entitled, award to plaintiff an amount which will punish the defendant and deter the defendant and others from engaging in similar conduct in the future.

Idaho Jury Instruction 9.20.

Exempting the Company from liability for its own negligence would incentivize the Company to take greater risks, and it would disincentivize the Company from upgrading antiquated and unsafe electrical transmission equipment and from investing in reasonable training and other proactive and preventative actions to protect the public from harm. It would shift onto the citizens of the State of Idaho the risk of the Company's own negligent conduct, instead of requiring that the Company bear the full responsibility for its own negligence. It would protect utility shareholders at the expense of public utility customers.

The Company argues that liability for its own negligence in Oregon caused its credit rating to be downgraded from A to BBB+ which, the Company asserts, impacts its access to low-cost financing. To be sure, any person or entity's negligence has consequences. The Company has not asserted that it is unable to secure adequate investment capital, nor has it demonstrated a justifiable basis for exempting it from liability arising from its own negligence. Rather, the Company simply asks that it be given liberty to act negligently and wrongfully and suffer little repercussion, thereby leaving the citizens of Idaho to bear the vast majority of damages arising from the Company's negligent conduct. Because this sweeping request that is in direct violation of the holding in *Strong* and Idaho Code § 61-602, the Company's proposed amendment to Electric Service Regulation No. 3 – Electric Service Agreements should be rejected.

CONCLUSION

For the foregoing reasons, including the clear rulings in that a utility cannot exempt itself from liability for negligence by rule or regulation, Bayer respectfully requests that the Commission deny the Application.

DATED this 22rd day of January, 2024.

RACINE OLSON, PLLP

By: _____
Thomas J. Budge
Legal counsel for P4 Production, L.L.C. (Bayer)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22rd day of January, 2024, I served a true, correct and complete copy of the foregoing document by email to each of the following:

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