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*On Behalf of Sierra Club*

**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 ) COMMENTS OF SIERRA CLUB  
SERVICE REGULATION NO. 3 - )  
ELECTRIC SERVICE AGREEMENTS )

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**I. INTRODUCTION**

Sierra Club thanks the Idaho Public Utilities Commission (“Commission”) for the opportunity to provide comment on Rocky Mountain Power’s (“RMP” or “Company”) proposed revisions to Electric Service Regulation No. 3, wherein RMP requests broad liability protection “arising out of the provision of electric service.”<sup>1</sup> Sierra Club is a member-based organization with over 3,000 members in Idaho, many of whom are RMP customers. For the reasons set forth below, Sierra Club recommends that the Commission deny the Company’s proposed tariff revision.

**II. RMP’S TARIFF REVISION REQUEST IS BOTH LEGALLY INVALID AND CONTRARY TO THE PUBLIC INTEREST.**

The Commission can make quick work of RMP’s proposed tariff revision because it is both legally invalid and its adoption would be contrary to the public interest. For ease of reference, RMP’s proposed new tariff language is 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

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<sup>1</sup> Appl. at Attach. 1, para. 9.

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.

Summarized, RMP is asking this Commission to limit its liability, in any action arising out of its provision of electric service, to only actual damages, regardless of the utility's conduct. This incredibly broad waiver of liability is without precedent.

**A. Idaho Law Does Not Support the Broad Liability Limitation that RMP Seeks.**

RMP falsely asserts that its proposal “generally aligns with precedent from several western states where limitations on utility liability have been approved . . .”.<sup>2</sup> While it is true that public utilities have been granted liability limitations in some, narrow circumstances, the liability limitation requested here would so greatly expand the scope of any liability limitations previously granted that it is inherently different in kind from previous approvals.

To begin, it is notable that RMP does not cite any Idaho precedent to support the liability limitation that it seeks because to do so would acknowledge that Idaho courts and this Commission have historically disfavored limitations on liability for public utilities. As the Idaho Supreme Court stated in *Jesse v. Lindsley*, “[t]he 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).”<sup>3</sup> Public utility liability waivers and limitations are disfavored because they

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<sup>2</sup> Appl. at 2, para. 4.

<sup>3</sup> *Jesse v. Lindsley*, 149 Idaho 70, 75 (2008) (internal quotations omitted) (citing with approval *Lee v. Sun Valley Co.*, 107 Idaho 976, 978 (1984) and *Rawlings v. Layne & Bowler Pump Co.*, 93 Idaho 496, 499-500 (1970).

“alter the normal rule that an entity is responsible for the consequences of its negligent conduct; they are imposed on a take-it-or-leave-it-basis, without the possibility of negotiation; [and] they benefit the typically economically stronger utility. . .”<sup>4</sup> Indeed, utility tariffs govern the relationship between the utility and its customers but are drafted unilaterally by the utility, for its own benefit. Rightfully then, this Commission has held that tariff provisions that provide tort immunity for a utility are “seldom just and reasonable and will be approved only where the record establish[es] that it is in the public interest to provide the particular utility service and to encourage the provision of the service, and there is a substantial likelihood that the service would not be provided in the absence of limitations of liability.”<sup>5</sup> Even when this Commission has authorized some liability limitations, for instance in the context of an individual contract between an electric utility and a large energy customer,<sup>6</sup> the Commission has taken the opportunity to make clear that an *exemption* of liability is never reasonable but that a *limitation* on liability could be fair, just, and reasonable, depending on the circumstances and if the liability limitation does not extend to intentional tortious conduct or gross negligence.<sup>7</sup>

To be sure, public utility commissions, including this Commission, have, at times, limited a utility’s exposure to liability. However, these liability waivers have been narrow and generally only apply to the utility’s obligation to serve and/or to situations outside of the utility’s control. In other words, utilities have been shielded from some liability stemming from a disruption in service or where damages occur through no fault of their own, but not more broadly. Indeed, all

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<sup>4</sup> *Uncle Joe’s, Inc. v. L.M. Berry and Co.*, 156 P.3d 1113, 1119 (Alaska 2007) (cited with approval in *In re the Appl. of Idaho Power Co. for Approval of A Special Cont. with J.R. Simplot Co.*, No. 33038, 2014 WL 2112866, at \*9 (Idaho Pub. Utils. Comm’n May 19, 2014).

<sup>5</sup> *Bradley v. Utah Power and Light Co.*, No. 23287, 116 P.U.R.4th 133 (Idaho Pub. Utils. Comm’n Sept. 10, 1990) (internal quotation marks omitted) (citing with approval *In re of Advice Letter No. 89-05 of Contel of the West, Inc.*, Case No. CONT-T-89-2, Order No. 22812 at 1).

<sup>6</sup> *In re the Appl. of Idaho Power Co. for Approval of A Special Cont. with J.R. Simplot Co.*, No. 33038, 2014 WL 2112866, at \*9 (Idaho Pub. Utils. Comm’n May 19, 2014)

<sup>7</sup> *Id.*

of the examples RMP provided of liability limitations in Idaho are limited to these situations: an interruption in service or actions beyond the Company's control, largely customer use of electricity after delivery.<sup>8</sup>

When considered in light of the relevant legal precedent and previously approved liability limitations, it is clear that the Commission should deny RMP's current request. Not only is RMP engaged in a public duty but its customers are also at an obvious disadvantage, as they are unable to individually negotiate RMP's terms of service nor select a different utility provider if they disagree with the terms in the Company's tariffs. While a limited number of large energy consumers may be in a position to individually contract with RMP (and in such instances a liability limitation may be acceptable), the vast majority of RMP's customers have no leverage to negotiate individual terms.

Moreover, RMP's request is neither narrowly construed nor contingent upon the Company's standard of care. Instead, the proposed tariff revision is extremely broad, applying to "any action between the parties arising out of the provision of electric service . . ." without any exemption for when the utility is found to have acted grossly negligent or worse. This Commission has already found that provisions that purport to limit liability for gross negligence or intentional tortious conduct are "contrary to the public interest and, as such, are unfair and unreasonable."<sup>9</sup> Yet, avoiding liability for its gross negligence appears to be precisely RMP's intention, considering that the Company's gross negligence verdict for wildfires started in

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<sup>8</sup> Appl. at 2-4. As just one example, RMP cites to Rule 5 that limits the Company's liability "*at the Point of Delivery*" (Rule 5(4)) and for "defects of *Customer's installation* of equipment[.]" (Rule 5(5)) (emphasis added). These are situations in which the Company has been shielded from liability for damages arising of the customer's use of electricity, over which the Company has no control.

<sup>9</sup> *In re the Appl. of Idaho Power Co. for Approval of A Special Cont. with J.R. Simplot Co.*, No. 33038, 2014 WL 2112866, at \*9 (Idaho Pub. Utils. Comm'n May 19, 2014).

Oregon<sup>10</sup> is presumably what prompted the current tariff revision proposal.<sup>11</sup> Strikingly, RMP seeks to avoid paying out rightful damages should it again be found grossly negligent, without the burden of committing to any additional actions that would reduce the risk of wildfire in the first place.

Finally, RMP cannot establish that there is a “substantial likelihood” that electric service will not be provided without a liability limitation because it is already providing service. The issue here does not pertain to extending service to a new customer, but continuing to provide service to existing customers, which the Company has an obligation to do.

**B. RMP’s Requested Liability Limitation is Contrary to the Public Interest.**

Even if prior Idaho Supreme Court and Commission precedent did not counsel against granting RMP’s requested liability limitation, the Commission should do so because the tariff revision does not promote the public interest.

Relieving a utility of its obligation to maintain a minimum standard of care is poor public policy, as it would encourage the utility to take riskier actions. For instance, if RMP knows that its potential liability for wildfire damage is severely limited, will the utility maintain or increase its vigilance in monitoring wildfire conditions and altering operations as necessary? Given that the utility’s equipment has caused wildfires and a court has concluded that RMP could have avoided the extensive damages caused, the Commission should consider how to strengthen incentives for good wildfire management, not lessen them. For instance, rather than debating whether to strip the public of their legal rights to protect RMP’s financial standing, the

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<sup>10</sup> Ted Sickinger, *PacifiCorp Found Negligent in Four Or. Wildfires; Jury Awards Victims \$72 Million*, Seattle Times (June 12, 2023), available at <https://www.seattletimes.com/nation-world/pacificorp-found-negligent-in-four-oregon-wildfires-jury-awards-victims-72-million/>.

<sup>11</sup> Appl. at 4, para. 6 (explaining that the proposed tariff amendment is needed to better enable the Company to “finance expenditures at reasonable costs, as the increased risk of wildfire has led to litigation and greater exposure to significant atypical damages, including special, non-economic, punitive, incidental, indirect, or consequential...”).

Commission could consider whether to tie RMP's rate of return to demonstrations that the Company is aggressively completing its wildfire mitigation plans and rapidly transitioning away from fossil fuels, the emissions of which contribute to more extreme wildfires in the West.

Indeed, it is ironic that RMP seeks to shield itself from wildfire liability, when wildfire severity has intensified due to climate change that is being driven by greenhouse gas emissions,<sup>12</sup> including those from RMP's massive fossil fuel fleet. RMP is one of the dirtiest remaining electric utilities in the country and has no stated goal to reduce its carbon dioxide emissions. The fact that climate change-driven natural disasters are now threatening the Company's profitability is a direct result of the Company's refusal to account for the social and economic costs of its emissions, and shielding the Company from liability stemming from its own decision-making would further encourage RMP to ignore the real and significant social and economic impacts of its fossil fuel operations.

In addition, requiring individuals to waive their legal rights as a condition of receiving electric service would likely be found unconscionable by a reviewing court. Electricity is a basic and essential part of modern life. This is precisely why the expression "going off the grid" is often associated with disconnecting from society. Individuals cannot simply decline electric service if they disagree with a required liability waiver, particularly when the utility operates within a regulated monopoly and customers do not have any other service provider options. These realities are coupled with the fact that RMP's proposed tariff revision provides the utility with extensive benefits without providing any corresponding benefit to the public, such as a

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<sup>12</sup> While it is not currently possible to determine that any individual wildfire occurred (or would not have occurred) but for climate change, conclusive evidence demonstrates that wildfires are increasing due to the changing climate, which is driven by carbon emissions. *See, e.g.,* Nat'l Oceanic & Atmospheric Admin., *Wildfire Climate Connection* (July 23, 2024), available at <https://www.noaa.gov/noaa-wildfire/wildfire-climate-connection> ("Climate change, including increased heat, extended drought, and a thirsty atmosphere, has been a key driver in increasing the risk and extent of wildfires in the western United States during the last two decades...All these factors have strong direct or indirect ties to climate variability and climate change.").

commitment to reduce its greenhouse gas emissions, increase its wildfire management practices, or some other commitment to improving its service and reducing risk. This highlights the power imbalance between utilities and their customers and the critical role played by the Public Utilities Commission in protecting the public from corporate overreach.

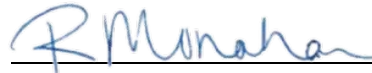
RMP's sole argument in favor of the liability limitation is that it is needed to protect its credit rating. But this is a highly complex issue that cannot be decided based on RMP's one piece of evidence that its credit was downgraded by A to BBB+. There is no evidence that ratepayers will be harmed by a BBB+ rating, that the Company will have any more difficulty accessing capital than it currently does, or that the Company's proposed tariff revision will result in the credit rating that it seeks. There are many aspects to this issue to evaluate prior to simply forcing customers to sign away significant legal rights. For instance, could RMP's credit rating be improved by increasing and expanding the Company's wildfire risk management? RMP's request for broad liability protection does not include any mention of or promise to more effectively reduce risks to the public stemming from "the provision of electric service," even as it seeks to limit its liability exposure.

### **III. CONCLUSION**

In conclusion, both law and policy caution against granting RMP broad liability protection that would cover all aspects of the Company's business and operations, regardless of the Company's standard of care or efforts to reduce risks to the public. While RMP's footprint in Idaho is relatively small, the Commission should consider that authorizing liability limitations of this kind for RMP will likely lead to other utilities seeking the same protection. The Commission should deny RMP's request and instead consider how the Commission can provide incentives to RMP to more effectively manage risk, particularly from wildfires.

Dated this 23<sup>rd</sup> day of January, 2024.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this 23<sup>rd</sup> day of January 2024, served a true and correct copy of the foregoing **Comments of Sierra Club**, in case number PAC-E-23-22, by e-mailing a copy thereof to the following:

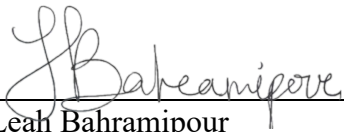
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