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Attorney for the Commission Staff

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

**IN THE MATTER OF ROCKY MOUNTAIN )  
POWER'S APPLICATION TO REVISE ) CASE NO. PAC-E-23-22  
ELECTRIC SERVICE REGULATION NO. 3- )  
ELECTRIC SERVICE AGREEMENTS )  
 )  
 ) COMMENTS OF THE  
 ) COMMISSION STAFF  
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\_\_\_\_\_ )**

**COMMISSION STAFF ("STAFF")** OF the Idaho Public Utilities Commission, by and through its Attorney of record, Chris Burdin, Deputy Attorney General, submits the following comments.

**BACKGROUND**

On October 24, 2023, PacifiCorp dba Rocky Mountain Power ("Company") filed an application ("Application") with the Idaho Public Utilities Commission ("Commission") requesting authority to update Electric Service Regulation No. 3-Electric Service Agreements ("Rule 3").

The Company represents that Rule 3 defines the Company's general rules and regulations for electric service. Application at 1. The Company states that the proposed tariff amendment would update provisions regarding liability for non-economic damages. *Id.* Specifically, the proposed amendment would: (1) limit damages arising out of the Company's provision of electric

services to actual damages; (2) exclude a-typical 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. *Id.* at 1-2.

The Company represents that this provision strikes a reasonable balance between enabling actual damages when appropriate, and unreasonable treble damages. *Id.* at 2. The Company's proposed liability language provides:

**LIMITATION OF LIABILITY** 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.

*Id.* at 8.

## **STAFF ANALYSIS**

Staff reviewed the Application, and all submitted materials. Based on its review, Staff believes that the Company's proposed liability waiver: (1) is not in the public interest; (2) is not supported by other provisions of liability limitations; and (3) is not enforceable under Idaho law.

### **A. Company Financial Health and Public Interest**

The Company argues that the proposed modification to Rule 3 limiting liability enables the Company to finance expenditures at reasonable costs. Application at 4. The Company represents that the increased risk of wildfire has led to litigation and greater exposure to significant a-typical damages, including special, non-economic, punitive, incidental, indirect, or consequential. *Id.* Specifically, the Company represents that as a result of recent wildfire litigation in Oregon, the Company's credit rating was downgraded from A to BBB+. The Company contends that this downgrade directly impacts the Company's ability to access low-cost financing necessary for the Company's operations and investments to fulfill its service obligations to customers. *Id.* The Company concludes that the proposed language within Rule 3 to limit liability arising from a-typical damages would aid in both maintaining and potentially improving its current credit rating

for the benefit of customers, while retaining the ability for customers to be compensated for actual damages when appropriate. *Id.* at 5.

Based on its review of the Application, Staff believes that the Company has failed to present sufficient evidence to support a claim that it is in the public interest to limit the Company's liability as proposed in the Application. The Company does not claim that it is presently unable to access low-cost financing due to its credit rating downgrade. The Company does not present evidence to show any negative impact on customer rates due to the credit rating downgrade. Even if the Company had presented any such evidence, the Company does not claim that the proposed liability waiver would actually remedy any of those issues. Rather, the Company alleges that the proposed liability waiver "would aid in both maintaining and potentially improving its current credit rating." *Id.* The Company does not support this claim with any evidence.

Notably, the Company represents that the proposed waiver "strikes a reasonable balance between enabling actual damages when appropriate, and unreasonable treble damages." *Id.* at 2. While not directly specified, Staff believes that the Company is referring to punitive damages as the "unreasonable treble damages." However, Idaho law already contains safeguards against "unreasonable" punitive damages. Before a party is allowed to plead for punitive damages, the party must file a motion for a hearing with the court, and "the court [must] conclude[] that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." *Idaho Code* § 6-1604(2). Even if the court grants the motion to include punitive damages in the pleading, "the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted." *Idaho Code* § 6-1604(1).

Further, Idaho law also provides a limitation on noneconomic damages. "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)." *Idaho Code* § 6-1603(1). "The limitation of awards of noneconomic damages shall not apply to: (a) Causes of action arising out of willful or reckless misconduct. (b) Causes of action arising out of an act or acts which the trier of fact finds beyond a reasonable doubt would constitute a felony under state or federal law." *Idaho Code* § 6-1603(4).

The Company does not cite to any provisions of Idaho law in support of its argument, nor does the Company present any argument or authority to show that the current safeguards against

“unreasonable” damages are insufficient to protect the Company from any speculative future financial harm, or that the public interest requires an additional liability waiver at this time.

### **B. Other Limitations on Liability**

The Company argues that its proposal generally aligns with precedent from several western states where limitations on utility liability have been approved by various state courts and utility commissions. Application at 3, n.1-2. The Company contends that these examples highlight the general understanding that, to ensure reasonable rates, limitations of liability provisions are an inherent part of the ratemaking process. *Id.* at 3.

Based on its review of the Application, Staff believes that the Company’s proposal does not align with the examples of other limitations on liability relied on by the Company. Considering the examples provided, the tariff for Cheyenne Light, Fuel and Power Company in Wyoming provides:

#### **LIABILITY**

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The Company shall not be held liable for injury to persons or damage to property caused by its lines or equipment when contacted or interfered with by guy wires, ropes, antenna wires, attachments, trees, structures, or other objects not the property of the Company, which cross over, thru, or are in close proximity to the Company’s lines and equipment. The Company should be given adequate written notice before trees overhanging or in close proximity to the Company’s lines or equipment are trimmed or removed or when stacks, guys, radio or television antennas, wires, ropes, drainpipes, structures, or other objects are installed or removed near the Company’s lines or equipment, but the Company assumes no liability whatsoever because of such notice.

The 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.**

#### **INDEMNITY TO COMPANY**

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.**

*Cheyenne Light, Fuel and Power Company, Wyo. P.S.C. Tariff No. 14, Original Sheet No. R22* (bold emphasis added). A review of tariff language shows that it specifically does not limit liability

for the negligence or wrongful acts of the company. Similarly, the tariff for Montana-Dakota Utilities Co. in Wyoming provides:

**COMPANY EQUIPMENT AND USE OF SERVICE - 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.****

*Montana-Dakota Utilities Co., Wyo. P.S.C. Tariff No. 1, Rate Schedule 100 Conditions of Service, at 9 (bold emphasis added).* Again, the tariff language specifically does not limit liability for negligence or wrongful acts of the company.

Additionally, the tariff for Washington Water Service Company provides:

**Rule 25 – Limitations of Liability**

**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 LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES. THE UTILITY EXPRESSLY DISCLAIMS ALL WARRANTIES, STATED OR IMPLIED, EXCEPT THOSE SPECIFICALLY SET FORTH IN THIS TARIFF, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

The charge for services rendered under this tariff are expressly based on the limitations of damages and disclaimer of warranties set forth above.

*Washington Water Service Company, WN U-3, Original Sheet No. 15 (bold emphasis added).* As emphasized, the tariff language specifically does not limit liability for gross negligence or willful misconduct. Ironically, liability for violations of RCW Chapter 19.122, which is also not limited under the tariff language, includes provisions for treble damages. *See RCW 19.122.070 (Civil penalties-Treble damages-Existing remedies not affected).* Finally, that tariff language for Puget Sound Energy in Washington provides:

**CONTINUITY OF SERVICE – Electric service is inherently subject to disruption, including interruption, suspension, curtailment and fluctuation. 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 from any of the following: (a) Causes beyond the Company's reasonable control...

*Puget Sound Energy*, WN U-60, Second Revised Sheet Nos. 80-e, 80-f. A review of the tariff language shows that nothing in the cited tariff provides limitations on the Company's liability for negligence.

In its Application, the Company also argues that its own tariffs include several Commission-approved limitations of liability, and that the proposed tariff amendment would complement these existing limitations on liability. Application at 4. Staff disagrees. None of the Company's cited tariff language provides limitations on liability for the Company's negligence, or similar provisions. Based on the above analysis, Staff does not believe that the Company's proposed limitation on liability is supported by other provisions of liability limitations.

### **C. Enforceability and Idaho law**

In Idaho, "[f]reedom of contract is a fundamental concept underlying the law of contracts and is an essential element of the free enterprise system." *Rawlings v. Layne & Bowler Pump Co.*, 93 Idaho 496, 499, 465 P.2d 107, 110 (1970). However, when dealing with a public company acting as a public servant, the Court has historically found that "exempting it from liability for its own negligence would be contrary to public policy." *Strong v. W. Union Tel. Co.*, 18 Idaho 389, 109 P. 910, 915–16 (1910). Similarly, the Restatement (First) of Contracts § 574 provides:

A bargain for exemption from liability for the consequences of negligence not falling greatly below the standard established by law for the protection of others against unreasonable risk of harm, is legal except in the cases stated in § 575.

The Restatement (First) of Contracts § 575(1)(b) provides:

A bargain for exemption from liability for the consequences of a wilful breach of duty is illegal, and a bargain for exemption from liability for the consequences of negligence is illegal if . . . one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation.

As such, Idaho courts hold that "express agreements exempting one of the parties for negligence are to be sustained except where: (1) one party is at an obvious disadvantage in bargaining power; (2) a public duty is involved (public utility companies, common carriers)." *Steiner Corp. v. Am. Dist. Tel.*, 106 Idaho 787, 791, 683 P.2d 435, 439 (1984) (internal citations and quotations omitted); *Morrison v. Nw. Nazarene Univ.*, 152 Idaho 660, 661, 273 P.3d 1253, 1254 (2012).

In this case it is uncontested that the Company is a public utility that possesses a public duty to provide safe and reliable service:

Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and as shall be in all respects adequate, efficient, just and reasonable.

*Idaho Code* § 61-302. As part of that duty, the Company is subject to statutory liability for all loss, damages, or injury caused by the Company:

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.

*Idaho Code* § 61-702. As the Company is a public utility and is subject to a public duty that includes liability for damages caused by Company actions, Staff believes that any contractual provision limiting the Company's liability for negligence would not be sustained under Idaho law.

While the Commission is not tasked with determining the enforceability of the proposed liability language under Idaho law, Staff believes that the Commission may consider that same analysis in determining whether the proposed modification is fair, just, reasonable, or in the public interest. In fact, the Commission did just that in Case No. IPC-E-13-23, wherein the Commission found that:

[e]xempting a public utility from the consequences of negligent conduct when the utility is charged with a public duty is not reasonable. [A public utility] cannot abrogate its general duty to exercise reasonable care in operating its system to avoid unreasonable risks of harm to its customers. However, we find 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. We further find that any limitations of liability regarding intentional tortious conduct or gross negligence are contrary to the public interest and, as such, are unfair and unreasonable.

Order No. 33038 at 11. Based on the above analysis, Staff believes that the Company's proposed liability waiver is not enforceable under Idaho law; not fair, just, or reasonable; and not in the public interest.

#### **STAFF RECOMMENDATION**

Staff recommends that the Commission deny the Application.

Respectfully submitted this 23rd day of January 2024.



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Chris Burdin  
Deputy Attorney General

Technical Staff: Kimberly Loskot  
Kevin Keyt  
Jon Kruck

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 23<sup>rd</sup> DAY OF JANUARY 2024, SERVED THE FOREGOING **COMMENTS OF THE COMMISSION STAFF TO ROCKY MOUNTAIN POWER**, IN CASE NO. PAC-E-23-22, BY E-MAILING A COPY THEREOF, TO THE FOLLOWING:

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