

# **ATTACHMENT B**

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

**IN THE MATTER OF ROCKY MOUNTAIN ) CASE NO. PAC-E-23-22**  
**POWER’S APPLICATION TO REVISE )**  
**ELECTRIC SERVICE REGULATION NO. 3- ) ORDER NO. 36175**  
**ELECTRIC SERVICE AGREEMENTS )**  
**)**

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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 represented that Rule 3 defined the Company’s general rules and regulations for electric service. Application at 1. The Company stated 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 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. *Id.* at 1-2. The Company represented 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.

Attachment 1 to the Application.

## STAFF COMMENTS

Staff reviewed the Application, and all submitted materials. Staff believed that the Company's proposed liability waiver: (1) was not in the public interest; (2) was not supported by other provisions of liability limitations; and (3) was not enforceable under Idaho law. Staff Comments at 2.

Based on its review of the Application, Staff believed that the Company failed to present sufficient evidence to support a claim that it was in the public interest to limit the Company's liability as proposed in the Application. *Id.* Staff noted that the Company did not cite to any provisions of Idaho law in support of its argument, nor did the Company present any argument or authority to show that the current safeguards against "unreasonable" damages were insufficient to protect the Company from any speculative future financial harm, or that the public interest required an additional liability waiver at this time. *Id.* at 2-4.

Staff noted that the Company did not claim that it was presently unable to access low-cost financing due to its credit rating downgrade, and the Company did not present evidence to show any negative impact on customer rates due to the credit rating downgrade. *Id.* at 3. Staff also noted that the Company did not claim that the proposed liability waiver would actually remedy any of those issues, only that the proposed liability waiver "would aid in both maintaining and potentially improving its current credit rating." *Id.*

Additionally, Staff believed that the Company's proposal did not align with the examples of other limitations on liability relied on by the Company. *Id.* at 4. Staff reasoned that none of the examples the Company provided exempted liability for negligent, gross negligent, or willful conduct. *Id.* at 4-6.

Finally, Staff believed that the proposed liability limitation was not enforceable under Idaho law. *Id.* at 6-7. Staff noted that while the Commission was not tasked with determining the enforceability of the proposed liability language under Idaho law, Staff believed that the Commission may consider that same analysis in determining whether the proposed modification is fair, just, reasonable, or in the public interest. *Id.*

Based on its analysis, Staff believed that the Company's proposed liability waiver was not enforceable under Idaho law; not fair, just, or reasonable; and not in the public interest. *Id.* at 7.

## PUBLIC COMMENTS

### 1. P4 Production, L.L.C., an affiliate of Bayer Corporation (“Bayer”)

Bayer believed that the proposed liability limitation violates Idaho law. Bayer Comments at 2. Bayer explained that a public utility is prohibited from limiting its liability for its own negligence by rule or regulation, and Bayer cited to *Strong v. Western Union Telegraph Co.*, 18 Idaho 389 (1910) and subsequent Idaho Supreme Court cases. *Id.* Bayer concluded that 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 rulings. *Id.* at 3.

Additionally, Bayer argued that the proposed liability limitation violates the Commission’s Order No. 33038. *Id.* at 3. Bayer reasoned that 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 Case No. IPC-E-13-23. *Id.* Bayer contended that when read in concert with the holdings of the Idaho Supreme Court, 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. *Id.* at 4. Bayer concluded that the Company’s proposed amendment to Electric Service Regulation No. 3 should be denied because it would provide a general limitation of liability for the Company’s own grossly negligent and intentional conduct. *Id.*

Bayer also believed that the proposed liability limitation violates *Idaho Code* § 61-702. *Id.* at 4. Specifically, that the proposed amendment violated *Idaho Code* § 61-702 because it would exempt the Company from liability for its own unlawful conduct. *Id.* at 5.

Bayer argued that the proposed liability limitation did not “align” with regulations adopted in Wyoming, Washington, and New York, as the Wyoming and New York provisions did not exempt a public utility from liability for its own negligence, and the Washington provision was much narrower than the sweeping, blanket limitation proposed by the Company. *Id.*

Finally, Bayer argued that the proposed amendment to Electric Service Regulation No. 3 lacked clarity and conflated categories of damages available in civil lawsuits, and that the Company failed to demonstrate that it was in the best interest of the public to exempt public utilities from liability for their own negligence. *Id.* at 8-9.

## **2. Sierra Club (“Sierra”)**

Sierra believed that the Company’s tariff revision request was both legally invalid and contrary to the public interest. Sierra Comments at 1. Sierra presented similar arguments to both Staff and Bayer, arguing that Idaho law did not support the broad liability limitation the Company sought, and that the Company’s request was not in the public interest. *Id.* at 1-7. Sierra concluded that the Commission should consider that authorizing liability limitations of this kind may lead to other utilities seeking the same protection, and that the Commission should instead consider how the Commission can provide incentives for the Company to more effectively manage risk, particularly from wildfires. *Id.* at 7.

## **3. Other Comments**

The Commission also received four (4) individual public comments voicing opposition to the Company’s requested limitation on liability.

### **COMPANY REPLY COMMENTS**

The Company argued that the Commission possessed the discretion to approve proposed tariffs that include limitations on liability, provided that such limitations did not: (1) entirely exempt the utility from negligent conduct; (2) limit liability for intentional or gross negligence; and (3) were in the public interest and necessary for continued service. Company Reply Comments at 4. As such, the Company contended that the Commission has the authority to limit utility liability to economic damages arising from the provision of electric service. *Id.* at 6.

The Company argued that the Application is consistent with other state utility commission precedent. *Id.* at 7. The Company presented examples from other states and jurisdictions that the Company contended aligned with its proposed liability limitations. *Id.* at 7-13. The Company represented that these examples, which disclaim a-typical damages or any liability at all, provided adequate persuasive authority from other jurisdictions to support the Company’s proposal. *Id.* at 13.

The Company represented that the Commission should approve the proposed tariff language as necessary for continued low-cost electric service in Idaho and in the public interest. *Id.* at 13-19. The Company reasoned that by limiting a-typical damages arising from the provision of electric service, that the Company was protected from future disproportionate legal awards that could lead to insolvency and the necessity to raise customer rates to cover associated costs, that approval of the proposed tariff language was 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. *Id.* at 19.

### COMMISSION FINDINGS AND DECISION

The Commission has jurisdiction over the Company and the issues raised in this matter pursuant to the authority and power granted under Title 61 of the Idaho Code. Specifically, the Commission has jurisdiction pursuant to *Idaho Code* § 61-520 regarding the Commission's authority to "fix just and reasonable standards, classifications, regulations, practices, measurements or service to be furnished, imposed, observed and followed by all electrical, gas and water corporations. . . ."

The Legislature enacted a "just and reasonable" standard in order to allow the Commission "judicial interpretation on a case by case basis, considering the particular circumstances" of each situation. *Powers v. Canyon County*, 108 Idaho 967, 972, 703 P.2d 1342, 1347 (1985). "In arriving at a conclusion as to what constitutes 'adequate, efficient, just and reasonable' service in any particular case, the relative rights of the utility and the public must be taken into consideration, for, under some circumstances, each may have to suffer some inconvenience or loss." *In re Application of Union Pac. R. Co., for Leave to Discontinue Agency at Montour, Idaho*, 64 Idaho 529, 532, 134 P.2d 599, 602 (1943).

Having reviewed the Application, the record, and all submitted comments, the Commission finds that it is not fair, just, nor reasonable to approve the Company's request to update Electric Service Regulation No. 3-Electric Service Agreements to include a section limiting the Company's liability for damages to actual economic damages, regardless of whether the Company's own actions contributed to those damages.

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, in the absence of any Commission authorized exception, 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.

This is not the first time the Commission has considered a company’s request to include limitations on liability. In Case No. IPC-E-13-23, the Commission considered the issue of a special contract between Idaho Power Company and the J.R. Simplot Company. In that case, the parties requested that the Commission approve terms regarding the bilateral waiver of indirect, special, and consequential damages, as well as terms regarding limitations on direct damages. *In the Matter of the Application of Idaho Power Company for Approval of a Special Contract with J.R. Simplot Company*, Order No. 33071 at 2-3. In reaching its decision, 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. The Commission believes that the same analysis, reasoning, and conclusions found in Case No. IPC-E-13-23 remain applicable today.

Notably, the Company's proposed language expressly includes language limiting liability for negligent conduct and does not exclude willful conduct, or gross negligence in its limitation. The Commission continues to find limitations of liability regarding willful conduct or gross negligence contrary to the public interest, unfair, and unreasonable. However, even if those exclusions were present, in this case the Commission also finds that allowing the Company, operating as a regulated monopoly pursuant to a Commission granted Certificate of Public Convenience and Necessity, to include in its Electronic Service Regulations a limitation on liability for ordinary negligence is also against the public interest, unfair, and unreasonable.

Unlike the special contract at issue in Case No. IPC-E-13-23, a limitation on liability for ordinary negligence in this case would not be agreed to through mutual negotiations between the Company and its customers. The Commission finds that any such terms of limitation of liability for negligent conduct would be imposed through an obvious disadvantage in bargaining power and, thus, against the public interest.

While the Company presents case citations and examples from other jurisdictions in support of its argument, the Commission finds them unpersuasive. The Company heavily relies on examples of limitations on liability for conduct outside of a company's control, or instances in which a state legislature has enacted statutory limitations on liability for natural disasters or other emergencies; situations that are not present here.

Similarly, the Company's arguments concerning the potential for financial harm due to unlimited liability are not supported by the Company's own provided sources. Taking the Company at its word that it does not seek to limit its own liability for gross negligence and willful conduct, regardless of what the proposed language provides, the proposed limitation on liability will not alleviate any of the Company's, or investors' concerns. The Company would still be subject to the very same danger or liability that caused the present financial concerns, yet the



Company’s customers, faced with the choice between receiving power or making do without, would be denied access to potential damages and the ability to make themselves whole in matters of ordinary negligence.

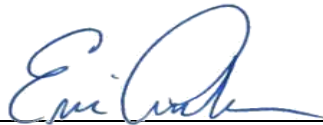
The Commission “must follow our conscious exercise of discretion in a formal case proceeding or rulemaking in which we have had an opportunity to review the factual underpinnings for the claim that liability should be limited.” Order No. 33071 at 4. The Commission does so here and finds that the Company’s Application is against the public interest, unfair, unreasonable, and must be denied.

**ORDER**

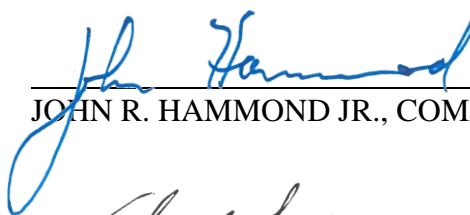
IT IS HEREBY ORDERED that the Company’s Application is denied.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date upon this Order regarding any matter decided in this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. *Idaho Code* §§ 61-626.

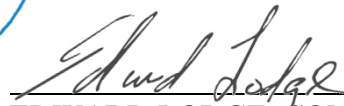
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho, this 14<sup>th</sup> day of May 2024.



ERIC ANDERSON, PRESIDENT



JOHN R. HAMMOND JR., COMMISSIONER



EDWARD LODGE, COMMISSIONER

ATTEST:



Monica Barrios-Sanchez  
Commission Secretary

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