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IDAHO PUBLIC UTILITIES COMMISSION

Attorneys for the J. R. Simplot Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF IDAHO POWER) **CASE NO. IPC-E-13-17**
COMPANY'S APPLICATION FOR)
APPROVAL OF SPECIAL CONTRACT) J. R. SIMPLOT COMPANY'S
BETWEEN IDAHO POWER COMPANY) ANSWER TO IDAHO POWER'S
AND J. R. SIMPLOT COMPANY) APPLICATION
_____)

**I.
INTRODUCTION AND SUMMARY
LIMITATION OF LIABILITY ISSUES**

COMES NOW the J. R. Simplot Company ("Simplot") pursuant to Rule 57(1) of the Rules of Procedure of the Idaho Public Utilities Commission ("Commission") and submits this Answer to Idaho Power Company's ("Idaho Power" or the "Company") Application for Approval of a Special Contract Between Idaho Power Company and J. R. Simplot Company ("Application"). Idaho Power proposes including the following language in the new special contract for electric service at Simplot's currently under construction state-of-the-art potato processing facility in Caldwell:

11.2. EACH PARTY EXPRESSLY AGREES THAT NEITHER PARTY NOR ITS AFFILIATES WILL UNDER ANY CIRCUMSTANCES BE LIABLE UNDER ANY THEORY OF RECOVERY, WHETHER BASED IN CONTRACT, IN TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY), UNDER WARRANTY, OR

OTHERWISE, FOR: ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL LOSS OR DAMAGE OR PUNITIVE DAMAGES WHATSOEVER; LOSS OF PROFITS OR REVENUE; LOSS OF USE OF MATERIAL OR EQUIPMENT; OR INCREASED COSTS OF CAPITAL AND FUEL COST; PROVIDED, HOWEVER, THAT NOTHING IN THIS PARAGRAPH 11.2 SHALL BE CONSTRUED TO LIMIT SIMPLOT'S PAYMENT OBLIGATIONS TO IDAHO POWER.

11.3. EACH PARTY AGREES UNDER NO CIRCUMSTANCES SHALL THE TOTAL AGGREGATE CLAIMS AGAINST AND LIABILITY OF THE OTHER PARTY FOR DIRECT DAMAGES, UNDER ANY THEORY OF RECOVERY, WHETHER BASED IN CONTRACT, IN TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY), OR OTHERWISE, EXCEED ONE HUNDRED PERCENT (100%) OF THE TOTAL CHARGES PAID BY SIMPLOT TO IDAHO POWER UNDER THIS CONTRACT UNDER ANY GIVEN CALENDAR YEAR; PROVIDED, HOWEVER, THAT THIS LIMITATION OF LIABILITY SHALL NOT LIMIT SIMPLOT'S PAYMENT OBLIGATIONS TO IDAHO POWER UNDER THIS AGREEMENT.

11.4. EXCEPT AS PROVIDED IN THIS AGREEMENT, IDAHO POWER MAKES NO WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING WITHOUT LIMITATION, THOSE OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO THE WORK AND SERVICES PROVIDED HEREUNDER.

Idaho Power's application fails to address the well-settled Idaho legal authority prohibiting the inclusion of such language in a utility's tariff. Because this proposed exculpatory language clearly violates Idaho law and this Commission's long standing policy prohibiting such clauses, Simplot respectfully requests the Commission order Idaho Power to offer Simplot a contract without such exculpatory language. In addition, such language is discriminatory as none of Idaho Power's regular tariff customers take service under a similar exculpatory clause in their tariffs. The proffered clauses also are in conflict with Idaho Power's approved General Rules and Regulations approved by this Commission. Finally, although some of Idaho Power's special contract customers do have similar clauses in their agreements, that fact does not provide justification for inclusion of such a clause in Simplot's contract over Simplot's objection. The

Commission should put a stop to such inconsistent and discriminatory treatment of Idaho Power's special contract customers and not and require it to adhere to this Commission's clearly articulated policy against such exculpatory clauses.

The rates and methodology for calculating the rates are discussed in Part Eight of Simplot's Answer.

II THE IDAHO SUPREME COURT HAS RULED THAT EXCULPATORY CLAUSES ARE UNENFORCEABLE IN THE PUBLIC UTILITY CONTEXT

The relevant Idaho case law precludes Idaho Power from insisting on exculpatory clauses in the Simplot contract. More specifically, the Idaho Supreme Court has ruled that a public utility may not shield itself from liability from negligence claims - *even from a customer who has agreed to such immunity in writing.*

The landmark decision on point in Idaho is *Strong v. Western Union Telegraph Co.*, 18 Idaho 389, 109 P. 910 (1910). In *Strong*, the plaintiff requested the defendant telegraph company to send a telegraph to a cattle buyer setting forth specific contract terms. The telegraph company negligently altered the terms as specified by the plaintiff resulting in monetary damages to the plaintiff. The back of the telegraph transmittal sheet contained a disclaimer of liability for any negligence on the part of the telegraph company in transmitting the telegraph. The company argued that this exculpatory clause was accepted by the plaintiff and served as a shield from liability for negligence.

The Idaho Supreme Court engaged in a long and detailed analysis of the related decisions from other states and concluded that Western Union was not entitled to immunity by virtue of the disclaimer. The Court stated:

Since telegraph companies are public agents, exercising a quasi-public employment, carefulness and fidelity are essentials to its character as a public servant, and public policy forbid 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 the 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

18 Idaho at 404.

The foregoing policy statement by the Supreme Court in *Strong* applies equally well to the relationship between Idaho Power and its customers, including Simplot. Idaho Power is a public utility that has been licensed to provide an essential service to the public. The citizens of Idaho who reside in Idaho Power's service territory do not have the benefit of a free marketplace where they can choose between competing suppliers of electric power. They are compelled to rely absolutely on the care and diligence of the Company in the transmission of power. Idaho Power's proposed exculpatory language shielding it from virtually all liability is a violation of the public trust under which it serves.

Subsequent to the *Strong* decision, the Idaho Supreme Court has reiterated its position on tort immunity for public utilities several times. In *Rawlings v. Layne & Bowler Pump Company* 93 Idaho 496, 465 P.2d 107 (1970), a buyer brought an action against a seller of a pump for crop damage allegedly caused by the negligent installation of the pump. The terms of the contract

that the buyer signed specifically stated that the buyer would not hold the seller liable for damages to crops arising from the negligent installation of the irrigation pump. Although the Supreme Court upheld summary judgment for the seller stating that generally contract provisions of this nature were enforceable, the Court noted several exceptions to this rule, including cases where a public duty is involved. The Court Stated:

On the basis of these authorities, we 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;

[2] A public duty is involved (public utility companies, common carriers)

‘Unless in circumstances affronting public policy, it is no part of the business of the courts to decline to give effect to contracts which the parties have freely and deliberately made.’ Since neither of these two factors essential to impair the validity of the provision are present in the case at bar, the provision must be given full force and effect.

93 Idaho at 499-500, citations omitted, emphasis provided. See also *Steiner Corp. v American Dist. Tele.*, 106 Idaho 787, 683 P.2d 435 (1984); *Lee v. Sun Valley Company* 107 Idaho 976, 695 P.2d 361 (1984). Idaho Power is therefore asking the Commission to approve an exculpatory clause that contravenes Idaho law.

III THIS COMMISSION HAS AN EXPLICITLY DECLARED POLICY PROHIBITING SUCH CLAUSES IN UTILITY TARIFFS

The issue at hand has also been previously ruled on by the Commission in *In the Matter of Advice Letter No. 89-05 of Contel of the West, Inc.*, Case No. CON-T-89-2. In that case, Contel sought to shield itself from tort liability for injuries resulting from negligence involved in the provision of 911 emergency reporting services. The Commission originally rejected Contel’s

proposed tariff in Order No. 22616 dated October 27, 1989. On Petition for Reconsideration, the Commission agreed with Contel that its previously filed and approved tariff protected it from contractual liability to third persons or entities but insisted that all of Contel's proposed exculpatory provisions be stricken from its proposed tariff. The Commission stated:

This order address provisions in the tariffs of regulated utilities limiting their liability to customers and others in the provision of utility service. We conclude as a matter of law that we have authority to approve such tariffs. But, we further determine as a matter of regulatory policy that such tariffs are seldom just and reasonable. They should be approved only following our findings based upon a factual record that (1) it is in the public interest based upon a factual record, and (2) there is a substantial likelihood that the service would not be provided in the absence of limitations of liability.

Order No. 22812 at p. 1.

Idaho Power has made no factual claim that it would not provide electric service to Simplot were it not for the inclusion of exculpatory language limiting is liability.

In *In the Matter of the Investigation Upon the Commission's own Motion of the Quality of Service of Utah Power and Light Company and upon the use of Exculpatory Provisions in its Tariffs in Civil Action*, Case No. UPL-E-89-9, the Commission again declared that exculpatory clauses have no place in a public utility's tariffs. In that case, it came to the Commission's attention that UP&L was using exculpatory language in its Electric Service Regulations as a defense to one of its customer's small claims court action against the utility. The Commission cited to the *Contel* docket, discussed above, noting:

The Commission Staff argues that the Company is not entitled to tort immunity, citing Idaho's Supreme Court decisions as well as In the Matter of Advice Letter No. 89-05 of Contel of the West, Inc., CON-T-89-02, where this Commission ruled, in Order No. 22813 that tariff provisions which provide tort immunity to a utility are 'seldom just and reasonable' and will be approved only where the record established that '[1] it is in the public interest to provide the particular utility service and to encourage the provision of the service, and [2] there is a substantial likelihood that the service would not be provided in the absence of limitations of liability. See Order No. 22812 at p. 1. In its reply

comments, UP&L conceded that it cannot satisfy the second criteria...

We consider the Contel Order to be the official policy statement of this Commission on the issue of tort immunity.¹

The Commission has never reversed that “official policy.”

**IV.
EXCULPATORY CLAUSES ARE ALREADY ADDRESSED, AND REJECTED, IN
IDAHO POWER’S GENERAL RULES, REGULATIONS AND RATES, TARIFF NO. 29.**

The issue of liability to customers for loss or damage associated with Idaho Power’s provision of electric service is already addressed in Idaho Power’s tariffs. Idaho Power’s proposed exculpatory clauses would be in violation of Rule J. That Rule entitled “Continuity, Curtailments and Interruption of Electric Service” provides:

1. Electric service is inherently subject to occasional interruption, suspension, curtailment and fluctuation. The Company [Idaho Power] will have no liability to its Customers or any other persons for any interruption, suspension, curtailment, or fluctuation in service or for any loss or damage caused thereby if such interruption, suspension, curtailment, or fluctuation results from any of the following:
 - a. Causes beyond the Company’s reasonable control...
 - b. Repair, maintenance, improvement, renewal or replacement work...
 - c. Actions taken by the Company . . . necessary or prudent to protect the performance, integrity or stability of the Company’s electrical system...
2. Load curtailment and interruption carried out in compliance with an order by governmental authority . . .
3. The provisions of this rule do not affect any persons rights in tort.

I.P.U.C. No. 29, Tariff No. 101, Original Sheet No. J-1. Emphasis provided.

¹ Order No. 23299 at p. 6. Emphasis provided. (Note pagination may differ from original as the download order from the Commission’s official web site was not paginated.)

The limitation of liability provisions in Rule J are limited in scope and explicitly exclude tort liability. Idaho Power's proposed exculpatory language impermissibly repeals its own Commission-approved tariff. Idaho Power should be required to follow its own rules in its own tariff and not be allowed to impose unreasonable limitation of liability clauses in its contract with Simplot.

Idaho Power addressed Rule J in its Application by stating:

Rule J limits the Company's liability for interruption of service caused by acts of God (commonly known as *force majeure* provisions) and the Company's "repair, maintenance, improvement, renewal or replacement work," it does not adequately limit contract and warranty claims, and explicitly states that "the provisions of this rule do not affect any person's right in tort."²

While correctly quoting provisions of its own tariff, Idaho Power rejects its applicability with the simple assertion that, "The current market standard is clear – utilities do not assume the risk for consequential damages and unlimited direct damages."³ Regardless of what the status of the "current market standard," the fact remains that Idaho Power's tariff does "not affect any person's right in tort." Rule J is a rule of general applicability to all of Idaho Power's tariffs, including Schedule 19. The proper place to explore whether the current market demands a limitation of liability clause would be in an evidentiary hearing before the Commission in which current market experts are called on to explain whether or not a utility must have immunity from liability in order to provide regulated, monopoly utility service. Although Idaho Power is unlikely to be successful in making such a showing, but Idaho Power must at least be put to the test before imposing such clauses on its captive ratepayers.

² Application at pp. 6 – 7.

³ *Id.* at 7.

V.
**IDAHO POWER'S FOOTNOTE REFERENCES TO OTHER
CONTRACTS ARE IRRELEVANT.**

Idaho Power, in a footnote, observes other special contracts that have similar exculpatory language. It cites to the Hoku contract which contains such exculpatory language.⁴ However, in the order approving that contract, Hoku did not file an objection and the Commission never addressed the question of limitation of liability. It was not an issue in the proceeding. Idaho Power, also observes (not in a footnote) that its contract with the contractor to build its most recent power plant had similar language. The Company did not provide a copy of that agreement with its Application so it is impossible to know exactly what is in it, and the Commission obviously cannot rely on it in resolving this dispute. However, assuming it does contain limitation of liability language, Idaho Power's contract with a construction company to build a power plant is an arms-length negotiated contract. It is simply inapplicable to this circumstance. Idaho Power also cites to the FMC special contract in which similar language appears, but the issue was not raised in the FMC docket either. Idaho Power also cites to a Potlatch special contract, but failed to reveal that Potlatch's special contract contains no limitation on liability for direct actual damages. Because the issue of limitation of liability was never raised in those cases and is not mentioned in the Commission's orders approving those agreements, the Commission did not have an opportunity to rule on the question. It is relevant, however, to the Commission's deliberations that the special contract between Idaho Power and INEL contains no limitation on direct damages⁵ and the special contract between Idaho Power and Micron has no limitation on

⁴ Incorrectly citing to Commission Order No. 30697 as the order approving that contract. The correct order is No. 30748.

⁵ *Application for Approval of Agreement for Electric Service Between Idaho Power and the U.S. Department of Energy* Case No. IPC-E-06-12, Order No. 30030 (May 8, 2006).

damages whatsoever.⁶ There is no basis on the record before this Commission to treat Simplot any differently from Micron, or at a minimum Potlatch and INEL.

Finally, Idaho Power observes that the J. R. Simplot Company has limitation of liability provisions in the terms governing its web site and governing the use of its product. However, unlike Idaho Power, the J. R. Simplot Company is not a state-sanctioned monopoly whose customers must, by law, only purchase product from it. Idaho Power's reference to private contracts between Simplot and its customers is irrelevant to the Commission's consideration in this case. If Simplot's customers are dissatisfied with Simplot's products, those customers can transact with another party. In contrast here, Simplot must buy its electricity from Idaho Power.

**VI.
IDAHO POWER'S INSISTENCE ON AN EXCULPATORY CLAUSE
IN THE SIMPLOT CONTRACT IS DISCRIMINATORY.**

None of the three Simplot potato processing plants in Idaho Power's service territory operate under a limitation of liability clause. Indeed, no Idaho Power customer taking service pursuant to Commission-approved tariffs have such clauses as a condition to taking service from the Company. It is facially discriminatory for the company to require exculpatory language in Simplot's special contract, when the Company has not done so in other special contracts. It is also facially discriminatory for the company to exclude such language from all of its tariffs for non-special contract customers while at the same time including such language for a subset of its special contract customers.

⁶ *In the Matter of Idaho Power Company's Application for Approval of a Replacement Special Contract with Micron Technology, Inc.* IPC-E-09-35 IPC-E-09-35 (February 12, 2010).

VII.
ALTERNATIVE LIMITATION OF LIABILITY LANGUAGE

The J. R. Simplot Company respectfully requests that the Commission issue its Order requiring Idaho Power to remove the exculpatory language from the draft special contract with Simplot. In place of the offending language Simplot respectfully suggests the Commission order Idaho Power to offer language that is used in the Micron special contract which reads:

Each party agrees to protect, defend, indemnify and hold harmless the other party, its officers, directors, and employees against and from any and all liability, suits, loss, damage, claims, actions, costs and expenses of any nature, including court costs and attorney's fees, even if such suits or claims are completely groundless, as a result of injury to or death of any person or destruction, loss or damage to property arising in any way in connection with, or related to, this Agreement, but only to the extent such injury to or death of any person or destruction, loss or damage to property is not due to the negligence or other breach of legal duty of such other party; provided, however, that each party shall be solely responsible for claims of and payment to its employees for injuries occurring in connection with their employment or arising out of any workman's compensation law.⁷

The Micron language is a standard mutual indemnification clause that is commercially reasonable and acceptable to the J. R. Simplot Company.

VIII.
**CALCULATION OF THE RATE FOR THE SIMPLOT
SPECIAL CONTRACT**

Dr. Reading has been working informally with representatives from Idaho Power to verify the accuracy of the rates contained in Idaho Power's proffered special contract. It is Simplot's understanding that Idaho Power has not conducted a cost of service study to support the rates in the contract. Simplot understands that Idaho Power simply updated inputs used to calculate the Schedule 19 rates to arrive at a rate for Simplot's new special contract. The cost of

⁷ *In the Matter of Idaho Power Company's Application for Approval of a Replacement Special Contract with Micron Technology, Inc.* Docket No. IPC-E-09-35, Order No. 31006 (February 12, 2010).;

service study used to set Simplot's rate is vintage 2010 and is out dated. Idaho Power used that study, for the Schedule 19 class and only updated it for the effects of adding Langely Gulch, OATT changes, depreciation changes and the update of the Boardman Balancing Account. This results in an overall rate for Simplot of 4.441 cents.

If no new cost of service study is conducted, Dr. Reading believes it would be more appropriate to start with the average of the current three special contract customers 2010 cost of service study and then make the same adjustments for Langley Gulch etc. Using the existing special contract customers' cost of service study as the starting point more accurately reflects the Simplot special contract rates because Simplot will be a special contract customer and not a Schedule 19 customer. Dr. Reading's substitute method results in an overall rate of 4.197 cents. Although the results of a new cost of service study are not known at this time, if the Commission chooses not to require a new cost of service study to be conducted, Simplot urges the Commission to use Dr. Reading's substitute method for estimating Simplot's rates.

RESPECTFULLY SUBMITTED this 5th day of February 2014

RICHARDSON ADAMS, PLLC

By 

Peter J. Richardson
Of Attorneys for J.R. Simplot Co.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September 2014, copies of the foregoing Answer of the J. R. Simplot Company to Idaho Power's Application were delivered to:

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