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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)
COMPANY'S APPLICATION FOR)
APPROVAL OF SPECIAL CONTRACT)
BETWEEN IDAHO POWER COMPANY)
AND J. R. SIMPLOT COMPANY)
_____)

CASE NO. IPC-E-13-23
J. R. SIMPLOT COMPANY'S REPLY
COMMENTS

I. INTRODUCTION

In this case, J.R. Simplot Company ("Simplot") asks for the same treatment as other existing customers on Idaho Power Company's ("Idaho Power" or the "Company") system – (1) a rate approximating what other special contract customers pay, and (2) liability and indemnification provisions identical to those applicable to other existing customers and consistent with the Idaho Public Utilities Commission ("Commission" or "IPUC") orders and extant Idaho law. Idaho Power asks for less favorable terms for Simplot on both scores. It requests Simplot pay a higher rate and have fewer liability protections than other ratepayers. The Commission should not allow for this discriminatory approach.

With regard to the base rates, Simplot maintains its position set forth in its Comments, and supported by Staff, that the appropriate base rate is the average rate currently available to the

other special contract customers on Idaho Power's system. These Reply Comments will respond solely to Idaho Power's lengthy argument that the Commission should abandon its long-standing policy against liability waivers in utility tariffs. For the reasons in Simplot's Answer and those further elaborated below, Simplot respectfully requests that the Commission approve the special contract without Idaho Power's liability limitations.

II. REPLY ARGUMENT

A. Idaho Power's Comments on Liability Waivers Incorrectly Framed the Issue.

In considering the appropriateness of limiting Idaho Power's liability, it is important to understand the circumstances under which Idaho Power would incur liability in the first instance. Generally speaking, Idaho Power would be liable in tort or contract if it breached a legal duty to provide adequate electrical service to Simplot, and Idaho Power's breach of that duty caused Simplot economic harm. "One cannot always look to others, however, to make compensation for injuries received; many accidents occur that do not give rise to a right to recover damages from another." 22 Am. Jur. 2d *Damages* § 4 (2003). Instead, "there must be both a right of action for a legal wrong inflicted by the defendant, and damages resulting to the plaintiff therefrom." *Id.* (footnotes omitted).

For example, Idaho courts will not hold a defendant liable for damages caused by a superseding cause – "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." *Mico v. Mobile Sales and Leasing, Inc. v. Skyline Corp.*, 97 Idaho 408, 411-12, 546 P.2d 54, 57-58 (1975) (internal quotation omitted). Likewise, in Idaho, a jury finding that 50% or more of the fault is attributable to the plaintiff would bar any recovery in

tort. *See Seppi v. Betty*, 99 Idaho 186, 195, 579 P.2d 683, 682 (1978). Although Idaho Power expresses concern over being held to the same implied warranties that apply to all sales of goods in Idaho, a breach of that warranty cannot be found where the buyer's misuse of the product causes it to malfunction or where the breach is not the proximate cause of the loss. *Chisholm v. J.R. Simplot Co.*, 94 Idaho 628, 631-32, 495 P.2d 1113, 1116-17 (1972); I.C. § 28-2-314, comment 13. The only circumstances at issue in this case are those in which Idaho Power has itself committed some legal wrong that causes damages to flow to Simplot. Thus, Idaho Power's concern with "forces beyond the utility's control" is irrelevant. *See Idaho Power's Comments* at 2.

Idaho Power's analysis also contains a critically incorrect assumption that any damages the Company would pay for its legal wrongs would be passed onto other ratepayers. From that assumption, Idaho Power concludes that a liability waiver is necessary to protect other ratepayers. However, the costs of a utility's legal wrongs are not ratepayer expenses in Idaho. For example, when an Idaho electric utility sought to include the costs of environmental clean-up on the asserted basis that the clean-up was a normal cost of utility business, the Commission rejected such rate recovery and stated, "For the Company to argue that toxic waste spills are a normal part of operations, chargeable to ratepayers, is simply unacceptable." *In Re Application of Utah Power and Light Co. for Approval of its Proposed Electric Rate Schedules and Electric Service Regulations*, Case No. U-1009-137, Order No. 19101 at 47 (1984). On the same topic, the Commission later stated, "It is our hope that the Company does not engage in toxic waste spills as an ordinary activity of doing business." *In Re Application of Utah Power and Light Co. for Approval of its Proposed Electric Rate Schedules and Electric Service Regulations*, Case No.

U-1009-157, Order No. 20372 at 15 (1986).¹

Furthermore, contrary to Idaho Power's apparent position that Idaho state courts are becoming notorious for large jury verdicts, there are already substantial caps on damages written into Idaho law even without a contractual liability waiver. For example, in the circumstance of a personal injury caused by unintentional negligence, Idaho law places a cap of \$250,000 (adjusted for inflation) for non-economic damages, such as pain and suffering. *See* I.C. § 6-1603; *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000). Idaho Power provides no support for the notion that jury verdicts have grown to the point that additional limitations on liability are necessary to continue providing utility services.

B. Idaho Power's Proposal Is Contrary to Idaho Law.

Idaho Power's proposed contract language is breathtaking in scope. Idaho Power seeks a waiver for liability not only of its negligent conduct but also of its own intentionally wrongful conduct. While Simplot acknowledges that some states (such as Texas) have allowed utilities to impose on their captive customers a waiver of liability for their negligent conduct, extant Idaho law is contrary to such a waiver of liability for Idaho Power's negligence. Furthermore, Idaho Power's proposal to waive liability for its own *intentional* wrongs is wholly unsupported by the law anywhere and is not a lawful policy for the Commission to adopt.

1. Idaho law prohibits Idaho Power from waiving liability for its own negligence.

The Idaho Supreme Court has long proclaimed that a utility or other public servant

¹ The Texas decision upon which Idaho Power relies so heavily also makes the critically incorrect assumption that, absent a liability waiver clause for commercial and industrial customers, "Losses paid to those commercial and industrial customers could be passed on to smaller customers . . ." *Houston Lighting & Power Co. v. Auchan*, 995 S.W.2d 668, 673 (Tex. 1999). For this and other reasons explained herein, the Texas decision has no applicability in Idaho.

cannot contract away its liability for its own negligence, yet Idaho Power fails to even mention this authority until page 11 of its Comments. As early as 1909, the Idaho Supreme Court held: “We think it may now be conceded to be the law, and that such is recognized by the overwhelming weight of authority, that a common carrier may limit its strict common-law liability as an insurer in such manner as the law can recognize as reasonable, and not inconsistent with sound public policy, but *cannot make a contract exempting the carrier from negligence.*” See *McIntosh v. Oregon R. & Nav. Co.*, 17 Idaho 100, 109, 105 P. 66, 69 (1909) (emphasis added).

Idaho Power makes the same argument that the Court rejected in *Strong v. Western Union Telegraph Co.*, 18 Idaho 389, 109 P. 910 (1910), *aff’d on reh’g* 18 Idaho 409, 109 P. 917 (1910). In *Strong*, the Court noted: “It is contended by counsel for respondent that the great weight of authority upholds the right of the telegraph company to adopt reasonable rules and regulations to govern the sending of messages, and to adopt rules and regulations such as the stipulation under consideration, fixing the liability of the company for delay or mistakes in the transmission or delivery of messages to the sum paid for sending the message, and that said stipulation is a reasonable one.” 18 Idaho at 399, 109 P. at 913. After considering a split in authority across the country on the point, the Court concluded that public policy in Idaho prohibits a public servant from limiting its liability for negligence by contract. *Id.*, 18 Idaho at 399-409, 109 P. at 913-17.

The *Strong* court reasoned that the customer “is but one of millions; his business will perhaps not admit of delay or contest in the courts and he is ex necessitate compelled to submit to any terms which the company might see fit to impose; but the law should not uphold a

contract under which a public agent seeks to shelter itself from the consequences of its own wrong and neglect.” *Id.*, 18 Idaho at 402, 109 P. at 914 (internal quotation omitted). The Court further rejected the notion that it would be sufficient to only hold the telegraph company to liability for gross negligence or intentional acts, instead holding, “Telegraph companies must therefore be held to a greater degree of care than is included in ‘willful negligence’ or ‘fraud.’” *Id.*, 18 Idaho at 406, 109 P. at 916.

Although the decisions in *McIntosh* and *Strong* are dated, they remain good law. These decisions were each issued prior to the initial enactment of Idaho’s utility code, I.C. §§ 61-101 *et seq.*, in 1913. However, in Idaho, “changes in the common law by the adoption of a statute may not be presumed, nor may such changes be accomplished by legislation of doubtful implication.” *Industrial Inem. Co. v. Columbia Basin Steel & Iron Inc.*, 93 Idaho 719, 723, 471 P.2d 574, 578 (1970) (holding that Workmen’s Compensation Law did not abolish common-law action for indemnification against negligent party). No Idaho statute is contrary to the holding in *McIntosh* and *Strong* that a public servant like Idaho Power cannot waive its own liability for negligence.

In fact, Idaho courts have consistently and quite recently stated that express agreements exempting one party from liability for negligence are not valid in the case where a public duty is involved, such as the duty of a public utility company. *See Morrison v. Northwest Nazarene University*, 152 Idaho 660, 661, 273 P.3d 1253, 1255 (2012); *Jesse v. Lindsay*, 149 Idaho 70, 75, 233 P.3d 1, 6 (2008); *Lee v. Sun Valley Co.*, 107 Idaho 976, 978, 695 P.2d 361, 363 (1984); *Steiner Corp. v. Amer. Dist. Telegraph*, 106 Idaho 787, 791, 683 P.2d 435, 440 (1984); *Rawlings v. Layne & Bowler Pump Co.*, 93 Idaho 496, 500, 465 P.2d 107, 111 (1970). In *Lee*, the Court even named utilities and common carriers as “obvious examples of parties owing a public duty”

and which are thus unable to be contractually exempted from liability for negligence. *Lee*, 107 Idaho at 978, 695 P.2d at 363.

Moreover, in addition to a long line of Idaho Supreme Court decisions, the Idaho legislature has expressly imposed upon Idaho Power the duty to provide adequate service, and provided a private right of action against Idaho Power for harm caused by abdication of that duty. *See* I.C. §§ 61-302, 61-702. These statutory provisions prohibit Idaho Power from exempting itself from liability.

Specifically, Idaho Code Section 61-302 states:

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 Section 61-702 further provides:

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.

(emphasis added).

The Idaho Supreme Court has interpreted these two statutory provisions as imposing a duty similar to that imposed by common law negligence. *See C.C. Anderson Stores Co. v. Boise Water Corp.*, 84 Idaho 355, 361-62, 372 P.2d 752 (1962). Nothing in Idaho's utility code states that the Commission may exempt Idaho Power from liability for a negligent failure to provide

adequate service. Nor should the Commission approve such efforts at Idaho Power's request.²

2. Idaho Power's proposed liability waivers unlawfully purport to waive liability for Idaho Power's *intentional* misconduct.

Aside from the unlawfulness of a liability waiver for negligence, Idaho Power further seeks to limit its potential liability for *intentional misconduct* or *gross negligence*. To establish gross negligence, "there must be evidence showing not only the breach of an obvious duty of care, but also showing deliberate indifference to the harmful consequences to others." *S. Griffin Const., Inc. v. City of Lewiston*, 135 Idaho 181, 189, 16 P.3d 278, 286 (2000) (internal quotations omitted). Generally speaking, "courts will not permit a party to excuse its liability through exculpatory clauses for intentional harms or for reckless, wanton, or gross negligence. Nor may contractual exculpatory clauses relieve one from liability for violation of the law, and liability for knowing or bad faith breaches of contract may never be limited." 17A Am. Jur. 2d *Contracts* § 286 (2003) (footnotes omitted); *see also Royal Ins. Co. of America v. Southwest Marine*, 194 F. 3d 1009, 1016 (9th Cir. 1999) (collecting treatises).

Idaho Power itself appears to acknowledge that, even in states that allow liability limitations in utility tariffs, such liability limitations can only be valid if "they do not purport to grant immunity or limit liability for gross negligence." *Idaho Power's Comments* at 10 (internal quotation omitted). Yet Idaho Power's proposed contract language nevertheless purports to limit liability for gross negligence. Specifically, Section 11.2 of Idaho Power's proposed contract

² Simplot acknowledges that the Commission determined in 1989 that it had authority to limit a utility's liability, albeit in very limited circumstances discussed *infra*. *In re Advice Letter No. 89-05 of Contel of the West, Inc.*, IPUC Case No. Con-T-89-2, Order No. 22812 (1989). However, that decision did not address the cases cited herein or the combined effect of I.C. §§ 61-302 and -702, which leave no room for Commission approval of Idaho Power's proposed liability waivers.

seeks to immunize Idaho Power from *any* indirect damages³ “under *any theory of recovery*, whether based in contract, in tort (including negligence and strict liability), under warranty or otherwise” *See Application* at Attachment 1, § 11.2 (emphasis added). Because there is no limit to this language’s waiver of liability for any theory of recovery, it seeks to immunize Idaho Power even if the Company commits gross negligence, intentional torts, knowing or bad faith breaches of contract, or even criminal fraud. Under this clause (if it were enforceable), Idaho Power could *intentionally* cut the power to the Idaho Project for nefarious purposes, but Simplot could not recover lost profits or any other indirect damages for the time it was unable to operate.

Likewise for direct damages,⁴ Section 11.3 of Idaho Power’s proposed contract uses the same overbroad waiver language to purport to limit Idaho Power’s damages to only 150% of the value of the annual revenue Simplot would pay under the contract. *See Application* at Attachment 1, § 11.3. Under this clause (if it were enforceable), Idaho Power could *intentionally* engage in conduct calculated to cause a fire that destroys the Idaho Project, but Simplot could not recover more than 150% of the annual value of payments under the special contract. The Commission should reject Idaho Power’s liability waiver clauses because insulating Idaho Power from intentional misconduct is contrary to the law and entirely inappropriate.

C. Idaho Power’s Reliance on the Law in Some Other States Is Unavailing.

Even though Idaho law prohibits Idaho Power’s proposed liability limitations, Idaho Power’s Comments ask the Commission to rely on out-of-state case law and a law review article. While these sources are academically interesting, they do not overcome the requirements and

³ Indirect damages are items such as lost profits that might occur due to an outage.

⁴ Direct damages are items such as harm to equipment at the Simplot facility caused by an unplanned outage.

controlling authorities of Idaho law.

Furthermore, in addition to Idaho, multiple out-of-state courts have refused to allow a utility to limit liability for its own negligence. *See Indianapolis Water Co. v. Schoenemann*, 107 20 N.E.2d 671, 677 (Ind. App. 1939) (“Public Service Commission cannot relieve a utility from liability under the law of negligence as it exists in Indiana, by any rule it may adopt”); *see also Collins v. Virginia Power & Electric Co.*, 168 S.E. 500, 504 (N.C. 1933); *Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n*, 67 N.M. 108, 353 P.2d 62, 68–71 (1960). “The view generally supported is that an electric utility company cannot validly contract against its liability for negligence, inasmuch as such a stipulation would be in contravention to public policy.” 27A Am. Jur. 2d *Energy* § 222 (2003) (footnotes omitted); *see also* K.A. Drechsler, Annotation, *Validity of Contractual Provision by One Other Than Carrier or Employer for Exemption from Liability, or Indemnification, for Consequences of Own Negligence*, 175 A.L.R. 8, 39-40 (1948) (stating same conclusion). The Commission should not rely on the out-of-state authorities that Idaho Power cites because they contravene binding Idaho precedent as well as multiple equivalent out-of-state authorities.

D. Idaho Power Has Presented No Evidence Supporting a Departure From Existing Commission Policy.

Simplot maintains that approval of Idaho Power’s proposed exculpatory clause would violate Idaho law. However, even if the Commission disagrees with Simplot’s legal conclusion, the Commission should still reject Idaho Power’s proposed contract language because it is entirely unsupported by *any evidence or facts* establishing the need for such broad waivers of liability. In *In re Advice Letter No. 89-05 of Contel of the West, Inc.*, the Commission concluded that exculpatory clauses “should be approved only following *our findings based upon a factual*

record 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.” IPUC Case No. Con-T-89-2, Order No. 22812 (1989) (emphasis added); *see also Bradley v. Utah Power and Light*, IPUC Case No. UPL-E-89-9, Order No. 23287 (1989). Idaho Power has provided no such factual record.

The Texas case upon which Idaho Power relies so heavily is distinguishable on this point. The law review article Idaho Power cites explained the reasoning behind the change in Texas policy:

In 1981, the PUCT conducted a proceeding to determine whether and to what extent to limit the liability of owners of transmission lines. *After hearing extensive testimony from a wide variety of parties*, Examiner Ricketts wrote a well-reasoned report on June 22, 1981, in which he concluded that the PUCT should approve liability limitations applicable to transmission lines and gave reasons in support of that conclusion. In 1999, a party challenged the validity of a liability limitation provision similar to the provision the PUCT approved in 1981. The Texas Supreme Court upheld that liability limitation provision as reasonable.

Richard J. Pierce, Jr., *Regional Transmission Organizations: Federal Limitations Needed for Tort Liability*, 23 Energy Law Journal 63, 66-67 (2002) (emphasis added) (discussing *Houston Lighting & Power Co. v. Auchan*, 995 S.W.2d 668 (Tex. 1999)).

In contrast, Idaho Power provides *no evidence* that maintaining the status quo with regard to its liability will increase rates. It offers no evidence that it has had to secure expensive insurance policies for other special contract or large power customers for which it has no liability waivers. There is no allegation or evidence that a failure to include overbroad liability clauses has somehow limited Idaho Power’s access to capital. Idaho Power makes no claim, and presumably can provide no evidence, that “there is a substantial likelihood that the service would not be provided in the absence of limitations of liability.” *See In re Advice Letter No. 89-05 of*

Contel of the West, Inc., Order No. 22812. Just as in the *Contel* case, the Commission has “not received such a showing in this proceeding.” *Id.* Instead, Idaho Power points to alleged industry trends by selectively quoting out-of-state case law and a law review article – none of which addresses Idaho Power’s factual situation.

Simplot asks for the same treatment as other existing customers. Simplot’s three closing facilities were Schedule 19-P customers that performed similar industrial functions to the single new facility. Idaho Power had no limitation on its liability for the three closing facilities. Nor does it have a limitation of liability for its existing special contract with Micron. There is no explanation why Simplot’s consolidation into a single facility has triggered the need for a special insurance policy when such was apparently not needed for the existing customers operating without liability waivers. There is no evidence supporting the need to impose a different condition for the provision of service to the new Simplot facility.

On the record before the Commission, Idaho Power’s proposal is fundamentally discriminatory. Idaho law expressly provides that Idaho Power may not “grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.” I.C. § 61-315. The record is devoid of any basis to conclude that Simplot – as opposed to other customers with no limitation of liability – will impose a higher cost of service without a liability waiver. Without any record, the Commission can reach no such finding and should therefore approve the special contract without Idaho Power’s proposed liability waiver clauses.

III. CONCLUSION

Simplot respectfully requests that the Commission approve a special contract for the

Idaho Project with base rates and liability limitation provisions that do not discriminate against Simplot. With regard to the base rates, Simplot maintains its position set forth in its Comments that the appropriate base rate is the average rate currently available to the other special contract customers on Idaho Power's system. Additionally, Simplot respectfully requests that the Commission approve the special contract without Idaho Power's liability limitations.

RESPECTFULLY SUBMITTED this 11th day of April 2014.

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