Office of the Secretary
Service Date
May 19, 2014

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR APPROVAL OF A SPECIAL CONTRACT WITH J.R. SIMPLOT COMPANY.	)))))	**CASE NO. IPC-E-13-23** **ORDER NO. 33038**

Idaho Power filed an Application with the Commission on December 4, 2013, requesting that the Commission issue an Order approving special contract terms for electric service between Idaho Power and J.R. Simplot Company. Simplot filed an answer on February 5, 2014, disputing Idaho Power's contract language and requesting that the Commission include Simplot's suggested clauses in the contract. On February 25, 2014, the Commission issued a Notice of Application and Notice of Modified Procedure setting a comment deadline of March 28, 2014, and a reply deadline of April 4, 2014. Order No. 32984.

On March 28, 2014, Idaho Power, Commission Staff and Simplot each filed comments. A Simplot Motion to extend the reply deadline until April 11, 2014, was granted by the Commission on April 3, 2014. Order No. 33010. Each party filed reply comments.

By this Order, we clarify our position regarding the liability dispute between the parties and provide guidance as to the appropriate rate to be charged to Simplot.

THE APPLICATION

Idaho Power states, in spring 2013, a Simplot representative contacted Idaho Power requesting that the Company enter into negotiations for a special contract for Simplot's Caldwell plant. In response, Idaho Power drafted a special contract and the parties entered into negotiations regarding the specific terms.

Idaho Power maintains that the Company and Simplot have reached agreement "as to nearly all of the terms and conditions of the contract, but have reached an impasse on certain provisions regarding limitations on liability." Application at 1.

Idaho Power requests that the Commission approve terms regarding the bilateral waiver of indirect, special and consequential damages. Application, Attachment 1, Section 11.2. The Company also asks the Commission to approve its proffered terms regarding limitations on direct damages. *Id.*, Section 11.3.

Should the Commission determine that it is "prudent for the Company to assume the risk for unlimited direct damages and consequential damages associated with Simplot's business, Idaho Power requests an opportunity to re-examine the terms of the special contract, including, but not limited to, an appropriate cost-of-service, that appropriately reflect this assumption of risk." Application at 8.

SIMPLOT'S ANSWER

Simplot argues that Idaho Power's request for limited and waived liability is a violation of "the well-settled Idaho legal authority prohibiting the inclusion of such language in a utility's tariff." Answer at 2. Simplot maintains that Idaho Power's proffered clauses contradict the Idaho Supreme Court's rulings that exculpatory clauses used by a public utility are unenforceable.

Simplot also disputes Idaho Power's calculation of the rates included in the contract. Simplot states that "the cost of service study used to set Simplot's rate is vintage 2010 and is out dated [sic]."

COMMENTS

Idaho Power

Idaho Power maintains that its limitations on liability are narrowly tailored to protect customers. "Today, the electric grid faces a variety of challenges to maintaining its reliability, from integrating increasing amounts of intermittent generation to acts of sabotage. The grid's technological complexity results in potential service failures unrelated to human error. In light of this complexity, it is very difficult for a jury to distinguish between human error, negligence, and failures of technology beyond Idaho Power's control. Limitations on liability protect utilities and customers from 'liability for catastrophic loss and potential financial distress.'" IPC Comments at 3.

Idaho Power asserts that the Commission's last "official policy statement" regarding tort immunity limitations appeared in the *Contel* case. Case No. UPL-E-89-9. While the Commission found that limitations on a utility's liability are "seldom just and reasonable," the Commission did not conclude that it was legally prohibited from approving limitations on liability. Comments at 5. The Commission stated that limitations on liability should 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.

The Company insists that special contract customers are better positioned than a utility to protect their own interests because they can more accurately assess their exposure to losses. Idaho Power maintains that limitations of liability allow for fair and reasonable treatment of all customers because small customers are not required to potentially subsidize disproportionately large damage awards to large commercial and industrial customers. The Company argues that public policy supports the Company's proposed liability limitations "as necessary measures to protect customers, maintain just and reasonable rates, and allocate a portion of the risk to the special contract customer who is best able to assess and mitigate it." Comments at 6.

Finally, Idaho Power states that, pursuant to its regulatory compact, it is required to serve all customers in its service territory and cannot choose to limit its risk by refusing service to customers with exceptional potential damages. Therefore, "it would be unjust to hold Idaho Power liable for potentially large unlimited direct and consequential damages when its currently authorized rate of return on equity does not reflect the assumption of such risks." Comments at 9. Idaho Power reiterates that it is not seeking to be exempt from liability – it seeks to limit damages that are potentially significant and outside Idaho Power's ability to predict or control. Comments at 14.

Idaho Power professes that Simplot's special contract rates were calculated based on a cost-of-service study specific to the new Caldwell site. The result of the updated cost-of-service analysis was an annual revenue requirement for the new Caldwell facility of $8,302,325. However, since this study was completed, Idaho Power's "base rates for all of its customers have been adjusted to reflect Commission orders for the Open Access Transmission Tariff ("OATT") deferral adjustment, the depreciation study adjustment, the Boardman balancing account adjustment, and, most recently, the Langley Gulch power plant adjustment." Comments at 22. After considering these factors, the adjusted total revenue requirement for the Caldwell facility is $8,948,115. *Id.*

The Company argues that "Overall, the Company's approach is consistent with previous cost-of-service determinations used to establish rates for each of the Company's current special contracts. It is also consistent with the Company's overall objective of proposing a rate

design based on a defensible study that can demonstrate that the special contract is in the public interest and existing customers will not be unduly harmed." Comments at 25.

Staff

Staff maintains that the issue of limitation of liability has been adequately addressed by the parties to the contract. Staff clarified that, despite Simplot's argument to the contrary, special contract customers negotiate terms with Idaho Power for electric service which puts them in a different position than a customer receiving service under a tariff. Ultimately, Staff stated that a determination regarding limitations on liability is a policy decision best left to the Commission.

Staff more fully addressed the rate issue. Staff proposed that the average rate for the Simplot Caldwell special contract be established using the simple average of the three existing special contract rates, which is 3.795 ¢/kWh.[1] The associated annual revenue requirement is $8,003,281. Staff proposes its rate for two reasons. First, the three special contract rates are rates currently approved by the Commission for similarly situated customers, and second, the cost-of-service results presented in this case are not credible.

Staff asserts that, for several reasons, the Commission has not established special contract customer rates at a full cost-of-service level in recent cases. Likewise, for this case, Staff believes that a cost-of-service based rate is not appropriate. Staff maintains that the cost-of-service calculations presented in this case are outdated and inappropriate for establishing current class cost-of-service. In general, the accounting data is not current, the class usage characteristics used to develop demand and energy allocators has not been updated and the methodology has not been approved. Staff believes that Simplot's initial rates should not be based on Company proposed cost-of-service when the proposed cost-of-service methodology has not been fully vetted nor approved by the Commission. Therefore, Staff recommended that the average of the existing rates currently being paid by Idaho Power's three special contract customers be established as the initial average rate for the new Simplot Caldwell special contract.

[1]Assuming the level of sales used by Simplot and Idaho Power, this average rate would produce annual revenue of $8,003,281 (.03795 $/kWh x 210,890,146 kWh = $8,003,281).

Simplot

In its answer, Simplot proposed a "compromise rate" of 4.197 ¢/kWh which Simplot claims "more accurately reflects the fact that the Idaho Project will also be a special contract customer that takes power at the transmission, rather than the primary, voltage level." Comments at 3. In support of its compromise rate, Simplot points out that the Commission recently "declared that it is inappropriate to use the 2011 cost-of-service study to allocate rates." Comments at 6. Simplot asserts that its proposal would place Simplot "in a comparable position to the other special contract customers, and is therefore superior to Idaho Power's recommended rate, which has no basis in Commission precedent or rate-making principles." Comments at 7.

Although Simplot proposed a base rate of 4.197 ¢/kWh in its answer, based on newly available information, Simplot now proposes an alternative base rate of 3.699 ¢/kWh. Simplot asserts that this rate "would appropriately place Simplot's Idaho Project on the same footing as Idaho Power's other special contract customers and allow Simplot to receive the benefit of reduced electricity rates that should be associated with a switch from primary to transmission level delivery." Comments at 1.

Simplot maintains that, during negotiations, Idaho Power presented Simplot with a proposed rate design that would have resulted in an overall base rate of 3.937 ¢/kWh. However, in an attachment to its Application in this case, Idaho Power shows a base rate for Simplot of 4.243 ¢/kWh. Simplot asserts that the 4.243 ¢/kWh rate appeared for the first time in Idaho Power's Application to the Commission and that the Company included that rate without Simplot's prior knowledge. Comments at 3. Simplot states that "Idaho Power's offered rates are 15% higher than the average of the three current special contract customers' rates and 19% higher than the rates at Simplot's Don Plant, which has approximately the same level of power consumption and a similar load factor." Comments at 5.

REPLY COMMENTS

Idaho Power

In reply, Idaho Power re-affirms its position that the Company's proposed rates are "a reasonable reflection of the expected cost of providing service to the new Caldwell facility." Reply at 2. The Company states that Simplot's assertions regarding how Idaho Power arrived at its proposed rate have no basis in fact or analysis and do not accurately reflect the actual methodology utilized by the Company. Idaho Power also states that, contrary to Simplot's

assertions, "Simplot's new facility does not take service at transmission-level voltage of 44 kilovolts ('kV') or higher but, rather, at primary-level voltage of 12.5 kV through a distribution substation." Reply at 4.

Idaho Power admits that "the reason the proposed rates are higher than existing special contract rates is because the existing rates for the Company's three special contract customers are approximately 10 percent below cost-of-service, while the Company's proposed rates for the new Caldwell facility reflect full cost-of-service." Reply at 4. The Company asserts that its intent "was to calculate cost-based rates that reflect the new Simplot facility's allocable share of all currently approved costs." Reply at 7. Idaho Power explains that the difference between the rate that the Company provided in September 2013 and the rate provided in December 2013 (when this Application was filed with the Commission) is the adjustment made for costs that have been approved for recovery since the 2011 rate case. Reply at 8.

The Company discourages the Commission from utilizing Staff's and Simplot's approach of averaging the three existing special contract customers' rates. Idaho Power explains that special contract customers are not a combined class of similarly situated customers, "but rather three separate customer classes that are unique to the extent that they warrant individual consideration from a regulatory and ratemaking perspective." Reply at 12. Idaho Power further argues that Staff's and Simplot's proposed methodology is "an unreasonable departure from cost-based pricing." Comments at 13. The Company maintains that establishing rates for Simplot that are below cost-of-service will create the potential for rate instability and set an unworkable precedent for future new special contract customers. The Company states that, "if the Commission establishes averaging as the methodology to determine rates for new special contracts, the Company will be greatly limited in the level of reliable pricing information it can provide. Essentially, the Company would be limited to providing an average of existing special contract rates as a short term price estimation, with the significant caveat that the Company's next general rate case may result in a shift to cost-based rates that is completely unrelated to the initial average price. This unpredictable volatility will likely be viewed negatively by prospective special contract customers, thus hindering the State of Idaho's ability to attract new large businesses to Idaho Power's service area." Reply at 16.

Staff

In initial comments filed on March 28, 2014, the Staff and J.R. Simplot Company both proposed an average contract rate based on the rate average of the existing three special contracts. However, Staff and Simplot used different rates to calculate the average and therefore, calculated different averages. Staff's average was 3.795 ¢/kWh and Simplot's average was 3.699 ¢/kWh.

The rates are different because Staff based its calculations on base revenues and sales in the Langley Gulch case, Case No. IPC-E-12-14, and Simplot based its calculations on base revenues and sales in Idaho Power's 2013 PCA filing, Case No. IPC-E-13-10. The tariffed rates (demand, energy and customer charges) are the same in both cases but energy and possibly demand billing determinants are different. The Langley Gulch case used forecasted billing determinants for June 2012 through May 2013. The PCA case used forecasted billing determinants for June 2013 through May 2014. The different test years produced different revenues and different energy sales amounts for existing special contract customers even though the tariffed rates were the same in both years. Because special contract rates are different, the average of the special contract rates are different.

Staff agrees that the calculation should be based on the most recent base revenues and sales. In utilizing the rates from Idaho Power's 2013 PCA, Staff supports an initial annual revenue requirement of $7,800,827. The revenue requirement is the average rate times expected sales (.03699 $/kWh X 210,890,146 kWh = $7,800,827). This revenue requirement is $1,147,290 less than the $8,948,117 proposed by Idaho Power. It is Staff's proposal that the J.R. Simplot - Schedule 33 demand and energy rates be designed to produce $7,800,827 in annual revenue.

Staff also noted that two other filings will change all customers' rates on June 1, 2014. Base rates will change as the result of Commission Order No. 33000 issued in Case No. IPC-E-13-20, which requires Idaho Power to move some Net Power Supply Expense (NPSE) from the PCA into base rates. PCA rates are also expected to change on that same day as a result of Idaho Power's annual PCA filing which is scheduled for April 15. These two changes will impact rates for all customer classes including special contract customers and will change rates established in this case for the new Simplot special contract.

Simplot

Simplot urges the Commission to prevent Idaho Power from limiting its liability. Simplot explains that "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." Reply at 3. Simplot also maintains that Idaho Power incorrectly represents that the ratepayers would suffer if liability is not limited. Simplot explains that "a utility's legal wrongs are not ratepayer expenses in Idaho." Reply at 3.

Simplot states that Idaho Power's request for "a waiver for liability not only of its negligent conduct but also of its own intentionally wrongful conduct" is legally impermissible. Reply at 4. Alternatively, Simplot argues that, even if the Commission finds that it is not a violation of law to allow such limitations on liability, "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." Reply at 10.

FINDINGS AND CONCLUSIONS

The Idaho Public Utilities Commission has jurisdiction over Idaho Power Company, an electric utility, and the issues raised in this matter pursuant to the authority and power granted it 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 Commission has thoroughly reviewed the Application, Simplot's answer, and the comments and replies of all parties. Contrary to Simplot's assertions, limitations of liability are not, *per se*, illegal and unenforceable in utility contracts. By the same token, "no regulated monopoly can contract away its duty to serve the public interest or the state's right to enforce that obligation." *Bunker Hill Co. v. Washington Water Power Co.*, 98 Idaho 249, 253, 561 P.2d 391, 395 (1977).

Idaho Code § 61-302 mandates that "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." In furtherance of the utilities' duties, this

Commission is directed to "prescribe rules and regulations for the performance of any service or the furnishings of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules." *Idaho Code* § 61-507. The Commission is authorized 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. . . ." *Idaho Code* § 61-520.

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). Numerous state, circuit and federal courts, including Idaho, use the *Restatement of Contracts* as a starting point in an analysis of whether an exculpatory clause or limitation of liability will be deemed valid. The *Restatement of Contracts* § 574 states that

> 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 s 575.

Section 575 then states:

> (1) A bargain for exemption from liability for the consequences of a willful breach of duty is illegal, and a bargain for *exemption* from liability for the consequences of *negligence* is illegal if
>
> (a) the parties are employer and employee and the bargain relates to negligent injury of the employee in the course of the employment, or
>
> (b) 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.
>
> (2) *A bargain by a common carrier or other person charged with a duty of public service limiting to a reasonable agreed valuation the amount of damages recoverable for injury to property by a non-willful breach of duty is lawful.*

(Emphases added.)

In its discussion regarding permissible limitations of liability, the Idaho Supreme Court recently stated that "[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).'" *Jesse v. Lindsley*, 149 Idaho 70, 75, 233 P.3d 1, 6 (2008) (internal citations omitted). "The idea of a public duty is closely related to the idea of public policy. . . ." *Lee v. Sun Valley Company*, 107 Idaho 976, 978, 695 P.2d 361, 363 (1985). Whether a contract violates public policy is a question of law for the court to determine from all of the facts and circumstances of each case." *Jesse*, 233 P.3d at 6. However, courts "are usually reluctant to allow those charged with a public duty, which includes the obligation to use reasonable care, to rid themselves of that obligation by contract. . . . Implicit in such decisions is the notion that the service performed is one of importance to the public, and that a certain standard of performance is therefore required." *Wagenblast v. Odessa School Dist. No. 105-157-166J*, 110 Wash.2d 845, 849, 758 P.2d 968, 972 (1988). This Commission has stated that our authority to limit a public utility's liability in connection with the provision of utility services "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." *In the Matter of Advice Letter No. 89-05 of Contel of the West, Inc.*, Order No. 22812 at 3.

Exculpatory clauses, whether in contracts or tariffs, are often disfavored because these clauses "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; they benefit the typically economically stronger utility; and, as they are also drafted by the utility, it is fair to construe uncertain language against the utility . . . ." *Uncle Joe's Inc. v. L.M. Berry and Co.*, 156 P.3d 1113, 1119 (2007). However, "[c]ourts are virtually unanimous that provisions limiting a public utility's liability are valid so long as they do not purport to grant immunity or limit liability for gross negligence." *Garrison v. Pacific Northwest Bell*, 45 Or.App. 523, 531, 608 P.2d 1206, 1214 (1980).

In the present case, the proposed contract between Idaho Power and Simplot was arrived at through mutual negotiations. We do not find evidence that the terms were imposed on Simplot or that any obvious disadvantage in bargaining power existed. Indeed, the parties are

before the Commission on issues related to acceptable terms to be included in a fully negotiated contract. We continue to find the *Restatement of Contracts* instructive and persuasive. Exempting a public utility from the consequences of negligent conduct when the utility is charged with a public duty is not reasonable. Idaho Power 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.

Idaho Power requested that, if the Commission failed to adopt its proposals regarding limitations of liability, the Company be permitted to re-examine all terms of the special contract in light of the Commission's findings. Consequently, we grant Idaho Power's request to re-examine and renegotiate the terms of its special contract with Simplot. Based on evidence and arguments provided through the comments and replies of the parties, we offer guidance with respect to the appropriate rate to be charged by Idaho Power to Simplot.

The Commission has broad authority to regulate and fix the rates and charges assessed by Idaho Power. *Idaho Code* §§ 61-502, 61-503. "Not all differences in a utility's rates and charges as between different classes of customers constitute unlawful discrimination or preference. . . ." *Application of Boise Water Corp.*, 128 Idaho 534, 539, 916 P.2d 1259, 1264 (1996). The Commission "is not under a duty to set rates for different classes of customers which are either equal or uniform provided the rates set are just and reasonable." *FMC Corp. v. Idaho Public Utilities Com'n*, 104 Idaho 265, 275, 658 P.2d 936, 946 (1983). Each special contract customer exists as a separate class. "Differences in rates between classes of customers based on such criteria as the quantity of electricity used, nature of the use, the time of the use, the pattern of the use, or based on differences of conditions of service, or cost of service are not only permissible but often are desirable and even necessary to achieve reasonable efficiency and economy of operation." *Utah-Idaho Sugar Co. v. Intermountain Gas Co.,* 100 Idaho 368, 377, 597 P.2d 1058, 1067 (1979), *citing Pennsylvania Public Utility Comm'n v. Metropolitan Edison Co.,* 86 P.U.R.3d 163, 195–96 (Pa.Pub.Util.Comm.1970).

Because each special contract customer is considered a separate class with different conditions and contract terms affecting their rates, we find it unreasonable to determine a rate for

Simplot by simply averaging the rates of Idaho Power's other special contract customers. It is just and reasonable to utilize the Company's most recent cost-of-service study as a basis in determining the appropriate rate. Cost-of-service studies attempt to apportion to each customer class the various costs incurred by a utility in providing service to that class. Determining cost-of-service is more akin to an art than a mathematical science. Different variables can be used to arrive at different results. Moreover, "cost of service is but one criterion among many for consideration in forming a basis for rate differentiation between classes of service and between classifications of customers within a certain schedule." *Grindstone Butte Mut. Canal Co. v. Idaho Public Utilities Com'n*, 102 Idaho 175, 179, 627 P.2d 804, 808 (1981). However, we find that a rate utilizing cost-of-service as a starting point for negotiation is consistent with prior Commission Orders and is fair, just and reasonable.

ORDER

IT IS HEREBY ORDERED that the Application of Idaho Power for approval of special contract terms for electric service between Idaho Power and J.R. Simplot Company is denied, as more particularly described herein.

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

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 19th day of May 2014.

PAUL KJELLANDER, PRESIDENT

MACK A. REDFORD, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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