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March 28, 2014

VIA HAND DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho 83702

Re: Case No. IPC-E-13-23
Approval of Special Contract with J. R. Simplot Company – Idaho Power
Company's Comments

Dear Ms. Jewell:

Enclosed for filing in the above matter are an original and seven (7) copies of Idaho Power Company's Comments.

Sincerely,



Lisa D. Nordstrom

LDN:csb
Enclosures

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IDAHO PUBLIC UTILITIES COMMISSION

Attorney for Idaho Power Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION)
OF IDAHO POWER COMPANY FOR) CASE NO. IPC-E-13-23
APPROVAL OF A SPECIAL CONTRACT)
WITH J.R. SIMPLOT COMPANY.) IDAHO POWER COMPANY'S
) COMMENTS
)
_____)

COMES NOW, Idaho Power Company ("Idaho Power" or "Company"), and in accordance with Idaho Public Utilities Commission ("Commission") Order No. 32984, hereby submits its Comments regarding the above matter.

Following considerable negotiation, J. R. Simplot Company ("Simplot") advised Idaho Power on November 27, 2013, that it would sign the Electric Service Agreement (also referred to herein as a "special contract") for Simplot's Caldwell facility but only if Sections 11.2-11.4 regarding limitations on liability were substantially revised. Idaho Power believed (and still believes) that Sections 11.2-11.4 were (and are) drafted appropriately. Having reached an impasse, on December 4, 2013, Idaho Power filed an Application for Approval of Special Contract Terms between Idaho Power and Simplot

containing the liability limitation provisions at issue. Simplot responded with an Answer to Idaho Power's Application on February 5, 2014, in which it opposed the Company's proposed limitations on liability and urged the Commission to adopt a substitute method for calculating Simplot's Caldwell special contract rate. On February 25, 2014, the Commission issued its Notice of Application and Modified Procedure in Order No. 32984. For the reasons set forth below, Idaho Power urges the Commission to approve the terms of the special contract with the limitation of liability provisions and rate as proposed by Idaho Power in its Application.

I. LIMITATION OF LIABILITY

A. Idaho Power's Proposed Limitations Are Narrowly Tailored to Protect Customers.

Electric service is inherently subject to occasional interruption and fluctuation, often due to forces beyond the utility's control. Prolonged outages have the potential to cause damages in the billions of dollars. For example, the August 14, 2003, blackout that occurred throughout the Midwestern and the Northeastern United States caused an estimated \$5 billion in damage.¹ Power outages and disturbances across the country have been estimated to cause \$119 billion to \$188 billion in damages per year.² Idaho Power is not immune to such outages—a short circuit on a Wyoming transmission line serving the Jim Bridger power plant in 1996 resulted in a power failure affecting eight western states.

¹ Thomas Eisenmann & R. Matthew Willis, *Blackout: August 14, 2003* (Harvard Bus. Sch. June 28, 2004).

² Primen, *The Cost of Power Disturbances to Industrial and Digital Economy Companies* (June 29, 2001).

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.³ 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."⁴ The proposed special contract between Idaho Power and Simplot includes three "limitations of liability" provisions, which are also known as exculpatory clauses.

The provisions generally protect Idaho Power and its customers in two ways. First, Section 11.2 limits the types of damages for which Idaho Power may be liable. Specifically, Idaho Power would be protected from liability for "consequential" or "special" damages, which do not flow directly and immediately from the action but instead from some of the consequences or results of the action.⁵ Consequential damages arising from the intervention of special circumstances are not ordinarily predictable and would not necessarily be incurred by every injured party.

³ *Transmission Access Policy Study Group v. F.E.R.C.*, 225 F.3d 667, at 727 (D.C. Cir. 2000) (" . . . technological complexity of modern utility systems and resulting potential for service failures unrelated to human errors justified liability limitations.").

⁴ *Houston Lighting & Power Co v. Auchan*, 995 S.W.2d 668, 673 (Tex. 1999)(hereinafter "*HL & P*"); *Id.* at 675 ("The public interest in protecting the financial integrity of public utilities is another basis for concluding that tariff provisions such as the one at issue in this case are not unreasonable when applied to claims for ordinary negligence."); *see also* Prosser & Keeton, *The Law of Torts* 663 (5th Ed. 1984) ("The consequential damages from a blackout . . . can be enormous and most regulatory agencies take this into account when establishing limitation on liability.").

⁵ Section 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."). (Emphasis added).

Consequential damages can be substantial and can include lost profits from business operation, lost use, lost sales contracts, and reduced value because of defective quality. These are the types of risks known only by Simplot that Idaho Power could not anticipate and factor into its cost-of-service calculations.

Second, Section 11.3 limits total aggregate damages, whether direct⁶ or indirect, to 150 percent of the total charges paid by Simplot in a calendar year.⁷ Importantly, both these protections are entirely reciprocal and provide the same protections for Simplot. These provisions are narrowly focused and, contrary to Simplot's characterizations, do not shield Idaho Power from "virtually all liability."⁸ These types of damages are covered by the Company's liability insurance and self-insured retention and are factored into the cost-of-service calculation for all customers.

Finally, Section 11.4 disclaims any expressed or implied warranties, including those of merchantability and fitness for a particular purpose, with respect to the services provided in the special contract.⁹ If electricity is found to be a "good"¹⁰ rather than a

⁶ "Direct damages" arise naturally or ordinarily from a breach of contract; they are damages which, in the ordinary course of human experience, can be expected to result from breach.

⁷ Section 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 fifty percent (150%) 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.").

⁸ J. R. Simplot Company Answer to Idaho Power's Application at 4 ("Simplot Answer"). See *contra*, In the Matter of Advice Letter No. 89-05 of Contel of the West, Inc., Case No. CON-T-89-2, Order No. 22812 (Oct. 30, 1989) (rejecting request for full tort immunity).

⁹ Section 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.").

¹⁰ *Idaho Code* § 28-2-105 defines "goods" as "all things . . . which are movable at the time of identification to the contract for sale"

service, and thus falls under the Uniform Commercial Code, *Idaho Code* § 28-2-316¹¹ allows contracting parties to disclaim or limit warranties in writing.

B. The Commission Should Revise Its Policy and Allow Limitations on Liability for Special Contracts.

The Commission issued its last “official policy statement”¹² on the issue of tort immunity limitations in its 1989 *Contel*¹³ Order. In that case, the Commission concluded that tariff provisions limiting a utility’s liability in the provision of service are “seldom just and reasonable.” Importantly, the Commission did not conclude that it was legally prohibited from approving limitations of liability. On the contrary, the Commission specifically found that it was legally authorized to allow utilities to limit their liability. However, based on regulatory policy, the Commission concluded such provisions 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.”¹⁴ In *Contel*, the Commission found that the utility had failed to make this showing and so rejected the tariff language limiting the utility’s liability.

¹¹ *Idaho Code* § 28-2-316 states, “. . . to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.” Moreover, “unless the circumstances indicate otherwise, all implied warranties are excluded by . . . language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty.”

¹² *Carson Bradley v. Utah Power and Light Company*, Case No. UPL-E-89-9, Order No. 23287 (Sept. 10, 1990). 116 P.U.R.4th 133, 136.

¹³ In the Matter of Advice Letter No. 89-05 of Contel of the West, Inc., Case No. CON-T-89-2.

¹⁴ Case No. CON-T-89-2, Order No. 22812 at 1 (Oct 30, 1989).

The Commission should narrowly revisit liability limitations specific to special contract customers and approve Idaho Power's proposed liability limits in this case. 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.

1. Liability Limitations Protect Residential Customers.

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. Large, special contract customers are by definition "special"—uniquely situated industrial operations that are large enough to justify being considered a cost-of-service class of one. If these large customers fail to take steps to protect themselves from a potential outage, they would be exposed to potential losses disproportionate to the potential losses suffered by residential customers.¹⁵ Resulting losses would vary greatly depending upon factors like the customer's use of electricity, the activities each was engaged in at the time of the outage, the ability to defer these activities, the cost of such deferral, and the nature and efficacy of the self-protection measures taken by each customer. While the cost of providing service without liability limitation provisions would vary greatly both among and within customer classes, it would be extremely difficult to establish a rate structure that reflected accurately (or even approximately) the resulting wide variation in cost-of-service. Many small customers would be required to pay rates significantly higher than

¹⁵ *HL & P*, 995 S.W.2d at 673 (liability limitations resulted in lower utility rates by protecting the majority of customers from substantial losses incurred by limited commercial and industrial customers).

their cost-of-service in order to provide revenues sufficient to recover the disproportionately high liability component of the cost-of-service for relatively few large customers.

In 1999, the Texas Supreme Court upheld a limitation of liability provision similar to the one at issue here.¹⁶ The Court found that limitations of liability resulted in lower rates for customers because the only customers “who would suffer substantial economic damages would be commercial or industrial users [and] [l]osses paid to those commercial or industrial customers could be passed on to smaller customers, including residential users, in the form of higher rates.”¹⁷ Thus, the Court reasoned that “tariffs that limit economic damages are not unreasonable, even when the damages suffered are substantial.”¹⁸ Here, in an effort to keep rates lower for all customer classes, the

¹⁶ *HL & P*, 995 S.W.2d at 669-670 (upholding the following tariff language: “Company [*HL & P*] will make reasonable provisions to supply steady and continuous electric service, but does not guarantee the electric service against fluctuations or interruptions. Company will not be liable for any damages, whether direct or consequential, including, without limitation, loss of profits, loss of revenue, or loss of production capacity, occasioned by fluctuations or interruptions unless it be shown that Company has not made reasonable provisions to supply steady and continuous electric service, consistent with the Customer’s class of service, and in the event of a failure to make such reasonable provisions (whether as a result of negligence or otherwise), Company’s liability shall be limited to the cost of necessary repairs of physical damage proximately caused by the service failure to those electrical facilities of Customer which were then equipped with the protective safeguards recommended or required by the then current edition of the National Electrical Code.”).

¹⁷ *Id.* at 673.

¹⁸ *Id.* at 673. The Texas court also observed that many other state courts concluded that absent liability limitations a utility would be forced to raise rates. See *Cole v. Pacific Tel. & Tel. Co.*, 112 Cal.App.2d 416, 246 P.2d 686, 688 (1952); *Landrum v. Florida Power & Light Co.*, 505 So.2d 552, 554 (Fla.Dist.Ct.App.1987); *Southern Bell Tel. & Tel. Co. v. Invenchek, Inc.*, 130 Ga.App. 798, 204 S.E.2d 457, 460 (1974); *In re Illinois Bell Switching Station Litig.*, 161 Ill.2d 233, 204 Ill.Dec. 216, 641 N.E.2d 440, 446 (1994); *Singer Co. v. Baltimore Gas & Elec. Co.*, 79 Md.App. 461, 558 A.2d 419, 427 (1989); *Wilkinson v. New England Tel. & Tel. Co.*, 327 Mass. 132, 97 N.E.2d 413, 416 (1951); *Computer Tool & Eng’g, Inc. v. Northern States Power Co.*, 453 N.W.2d 569, 573 (Minn.Ct.App.1990); *Montana ex rel. Mountain States Tel. & Tel. Co. v. District Court*, 160 Mont. 443, 503 P.2d 526, 528-29 (1972); *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 825 P.2d 588, 590-91 (1992); *Coachlight Las Cruces, Ltd. v. Mountain Bell Tel. Co.*, 99 N.M. 796, 664 P.2d 994, 998-99 (App.1983); *Lee v. Consolidated Edison Co.*, 98 Misc.2d 304, 413 N.Y.S.2d 826, 828 (1978); *Behrend v. Bell Tel. Co.*, 242 Pa.Super. 47, 363 A.2d 1152, 1165 (1976), *vacated and remanded*, 473 Pa. 320, 374 A.2d 536 (1977), *aff’d on remand*, 257 Pa.Super. 35, 390 A.2d 233 (1978); *Allen v. General Tel. Co.*, 20 Wash.App. 144, 578 P.2d 1333, 1337 (1978).

Commission should permit limited liability in certain categories of contract damages in recognition of the fact that special contract customers can protect and/or insure themselves against consequential damages without socializing those costs to other customers.¹⁹

2. Liability Limitations Properly Allocate Risk.

Utilities are exposed to significant litigation risk associated with blackouts and are unable to reasonably ascertain and protect themselves against that type of risk.²⁰ It would be extremely difficult to make a reasonably accurate estimate of any utility's actual level of exposure in the event of an outage in the absence of a liability limitation provision. The process of making such an estimate would be complicated and would require access to a great deal of information that is available only to the utility's individual customers. However, it is apparent that a prolonged system-wide outage would expose a utility to potentially catastrophic damages and would require it to expend substantial sums on legal services even if it was successful in contesting its liability for damages.²¹

Special contract customers, on the other hand, are better positioned than a utility or smaller customer to protect their own interests by estimating their exposure to losses attributable to a potential power outage and protecting themselves from those potential

¹⁹ See *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 418 (1959) (customers better able to insure themselves against risk).

²⁰ *HL & P*, 995 S.W.2d at 674 ("The PUC reasoned that an electric utility is unable to anticipate the 'nature and size of the claims that can be incurred because of service interruptions' and that it is not feasible to require a utility 'to protect itself against these potential losses which simply cannot be accurately ascertained.'").

²¹ See Richard J. Pierce, Jr., *Regional Transmission Organizations: Federal Limitations Needed for Tort Liability*, 23 Energy Law Journal 63, 68 (2002) (noting extensive litigation related to blackouts in the Midwest in 1998, the northeast in 1999, and in California in 2000 and 2001).

losses.²² Large customers have access to the data about the nature of their electric uses and the likely consequences of outages. Based on this information, large customers can take preventative measures, such as installing backup generating equipment or obtaining business interruption insurance.²³ It is reasonable to expect large customers to mitigate their risks to avoid requiring smaller customers to pay the higher rates that would be attributable to large customers' disproportionately larger damage awards in the event of a system outage.

Further, under the regulatory compact, Idaho Power is required to serve all customers in its service territory and cannot choose to limit its risk exposure by refusing service to customers with exceptional potential damages. In the words of the Commission, "Idaho Power has the responsibility to serve all of its customers at all times."²⁴ Thus, this relationship lacks proportionality—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.²⁵

²² *HL & P*, 995 S.W.2d at 674 (" . . . the burden of estimating potential damages and of obtaining protection against losses caused by electrical outages should fall on the customer, not the utility.").

²³ See *Southwestern Sugar*, 360 U.S. at 418.

²⁴ *Meridian Gold Company v. Idaho Power Company*, Case No. IPC-E-90-14, Order No. 23657 at 3 (April 26, 1991).

²⁵ *HL & P at 674* ("An unregulated business can set its prices based on what the market will bear and can factor in potential or actual liability. When an electric utility's rate is set by the PUC, it cannot vary from that rate. And an electrical utility cannot pick and choose its customers on the basis of the potential liability that would be associated with a loss of power to a particular customer's business It must provide service to all regardless of the potential liability that would be associated with a loss of power to a particular customer's business.").

3. Utility Tariffs Commonly Include Liability Limitations.

Many utility tariffs contain provisions addressing specific instances when a utility cannot be held liable for negligent conduct or omission.²⁶ State regulatory commissions and the courts have generally upheld limitations of liability because they “balance[] lower rates for all customers against the burden of limited recovery for some.”²⁷ As summarized by the Oregon Court of Appeals, “Courts are virtually unanimous [in holding] 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.”²⁸ The U.S. Supreme Court has also upheld limitation of liability provisions when the claim for economic damages is based on alleged negligence as opposed to damages for physical injury.²⁹ Based on its finding that many courts have approved liability limitations, in 1999 the Texas Supreme Court concluded that limitations of liability are not unreasonable when

²⁶ See e.g., *Transmission Access Policy Study Group*, 225 F.3d at 727 (“Prior to unbundling, retail tariffs were primarily a matter for state regulation, and most states had approved tariff provisions permitting utilities to limit their liability for service interruptions to instances of gross negligence or willful misconduct.”); see also Pierce, 23 Energy Law Journal, n. 12 (the following courts have approved some form of liability limitation: *Los Angeles Cellular Tel. Co. v. Superior Ct.*, 65 Cal. App. 4th 1013 (1998); *Woloshin v. Diamond State Tel. Co.*, 380 A.2d 982, 984-85 (Del. Ch. 1977); *Ill. Bell Switching Station Litig.*, 641 N.E.2d 440, 441-45 (1994); *Angelo Pavone Enters. v. South Cent. Bell Tel. Co.*, 459 So. 2d 1223, 1226 (La. Ct. App. 1984); *Wilkinson v. New England Tel. & Tel. Co.*, 97 N.E.2d 413, 416 (Mass. 1951); *Montana ex rel. Mountain States Tel. & Tel. Co. v. Dist. Ct.*, 503 P.2d 526, 529 (Mont. 1972); *Allen v. General Tel. Co.*, 578 P.2d 1333, 1336-37 (Wash. Ct. App. 1978); *Olson v. Mountain States Tel. & Tel. Co.*, 580 P.2d 782, 784 (Ariz. Ct. App. 1978); *Shoemaker v. Mountain States Tel. & Tel. Co.*, 559 P.2d 721, 724 (Colo. Ct. App. 1976); *Southern Bell Tel. & Tel. Co. v. Invenchek, Inc.*, 204 S.E.2d 457, 460 (Ga. Ct. App. 1974); *Burdick v. Southwestern Bell Tel. Co.*, 675 P.2d 922, 925 (Kan. Ct. App. 1984); *Computer Tool and Eng’g. Inc. v. Northern States Power Co.*, 453 N.W.2d 569, 573 (Minn. Ct. App. 1990); *Bulbman, Inc. v. Nev. Bell*, 825 P.2d 588, 590 (Nev. 1992); *Coachlight las Cruces, Ltd. v. Mountain Bell Tel. Co.*, 664 P.2d 994, 1000 (N.M. Ct. App. 1983); *Lee v. Consolidated Edison Co.*, 413 N.Y.S.2d 826, 823 (1978); *Garrison v. Pacific Northwest Bell*, 608 P.2d 1206, 1211 (Or. Ct. App. 1980); *Behrend v. Bell Tel. Co.*, 363 A.2d 1152, 1166 (Pa. Super. Ct. 1976), vacated, 374 A.2d 536 (Pa. 1977), aff’d, 390 A.2d 233 (Pa. Super. Ct. 1978).

²⁷ *Transmission Access Policy Study Group*, 225 F.3d at 727.

²⁸ *Garrison v. Pacific Northwest Bell*, 608 P.2d 1206, 1211 (Or. Ct. App. 1980).

²⁹ *Southwestern Sugar*, 360 U.S. 411; *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566 (1921); *Hart v. Pennsylvania R.R. Co.*, 112 U.S. 331 (1884).

they limit economic damages resulting from the utility's negligence.³⁰ Here, the Commission should likewise conclude that the limitation on liability at issue here is reasonable and should be approved.

C. Limitation of Liability Is Legally Enforceable.

The Idaho Legislature has granted the Commission authority to balance the needs of the public versus the needs of the individual in connection with the provision of public utility service.³¹ The Commission has previously construed the *Idaho Code's* explicit grants of statutory authority together with *Idaho Code* § 61-501's grant "to do all things necessary to carry out the spirit and intent of the provisions of this act" to give it the authority, in proper circumstances, to limit a public utility's liability in connection with provision of utility services.³² As noted above, the Commission's conclusion is consistent with the majority of other jurisdictions, where state regulators and the courts have not only concluded that liability limitations are legal, but have also approved their use to protect utilities and their customers.

Simplot cites *Strong v. Western Union Telegraph*³³ and *Rawlings v. Layne & Bowler Pump Company*³⁴ for the proposition 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

³⁰ *HL & P*, 995 S.W.2d at 675.

³¹ Case No. CON-T-89-2, Order No. 22812 at p. 3 (Oct 30, 1989). See I.C. § 61-502 (Commission given authority over rules, regulations, practices and contracts of utilities affecting rates); § 61-503 (Commission given authority to fix appropriate rules, regulations, contracts or practices for public utilities); § 61-507 (Commission given authority to prescribe rules and regulations for performance of any service or the furnishing of any commodity); § 61-515 (Commission given safety authority).

³² Case No. CON-T-89-2, Order No. 22812 at p. 3 (Oct 30, 1989).

³³ *Strong v. Western Union Telegraph Co.*, 18 Idaho 389, 109 P. 910 (1910).

³⁴ *Rawlings v. Layne & Bowler Pump Company*, 93 Idaho 496, 465 P.2d 107 (1970).

companies, common carriers).”³⁵ While Idaho Power is indeed a public utility,³⁶ Simplot does not have an obvious disadvantage in bargaining power. Simplot is a multinational company with approximately six times³⁷ the annual revenues and five times the employees of Idaho Power. Moreover, Idaho Power does not seek to be “exempted” from damages caused by its negligence. In fact, Simplot has negotiated with Idaho Power in Section 11.3 of the special contract such that Idaho Power would pay direct damages up to 150 percent of Simplot’s total annual contract charges in the event they are incurred due to Idaho Power’s negligence. Therefore, the special contract in this case does not run afoul of *Strong* and *Rawlings*.

D. Limitations of Liability Are Common in Commercial Contracts.

Limitations on liability are not only commonplace in utility tariffs, they often appear in general commercial and construction contracts as well. Generally, both parties desire limitations on liability. For instance, if Simplot were to negligently cause damage to Idaho Power’s facilities that resulted in an outage, Simplot’s liability would be limited to 150 percent of the annual charges under the contract; Simplot would not be liable for consequential damages associated with Idaho Power’s inability to serve other customers or lost profits. Based on a review of just those documents that are publicly available, Simplot’s own contracts provide for a waiver of consequential damages and

³⁵ *Id.* at 499–500, 465 P.2d 107.

³⁶ *Idaho Code* § 61-219 defines a “public utility” as including “electrical corporations.” According to *Idaho Code* § 61-119, an “electrical corporation” refers to every corporation that owns, controls, operates, or manages any electric plant for compensation within the state of Idaho.

³⁷ Forbes.com currently ranks Simplot as America’s 61st largest private company with approximately \$6 billion in revenues and 10,000 employees during the fiscal year ending August 30, 2013.

limitation on direct damages from the terms of use governing its website³⁸ to the terms that govern the use of its products.³⁹

Idaho Power's contracts often contain these provisions as well; the contract for construction of its Langley Gulch power plant limited direct damages to 25 percent of the contract price (Section 26.1(a)) and included a complete waiver of incidental, punitive, and consequential damages (Section 26.2).⁴⁰ The Commission has reviewed and approved power purchase agreements that limit the parties' liability such as those for the Potlatch Corporation⁴¹ and U.S. Geothermal.⁴² Other special contracts approved by this Commission have had provisions limiting liability, including those for Hoku Materials, Inc.,⁴³ FMC Corporation,⁴⁴ and the Monsanto Company.⁴⁵

³⁸ *J.R. Simplot Terms and Conditions*, simplot.com, http://www.simplot.com/terms_conditions (last updated August 6, 2013).

³⁹ *Simplot ColorPack, Six Iron 12-0-0*, simplot.com, http://techsheets.simplot.com/Partners/Six_Iron.pdf (last visited March 27, 2014).

⁴⁰ *Contract for Engineering, Procurement and Construction Services between Idaho Power Company and Boise Power Partners Joint Venture Consisting of Kiewit Power Engineers Co. and TIC - The Industrial Company and Idaho Power Company for Langley Gulch Power Plant*, March 7, 2009, sec.gov, http://www.sec.gov/Archives/edgar/data/49648/000105787710000150/a10-22214_1ex10d44.htm (last visited March 27, 2014).

⁴¹ *In the Matter of the Joint Petition of Avista Corporation and Potlatch Corporation for Approval of Power Purchase and Sale Agreement*, Case No. AVU-E-02-08, Order No. 29418 (Section 13 provided for waiver of "any special, incidental, punitive, exemplary or consequential loss or damage whatsoever").

⁴² *In the Matter of the Application of Idaho Power Company for Approval of an Agreement to Purchase Capacity and Energy from USG Oregon, LLC and Authorize Recovery in the Company's Power Cost Adjustment*, Case No. IPC-E-09-34, Order No. 31087 (Section 23.3 limiting liability to direct actual damages and holding neither party liable "for consequential, incidental, punitive, exemplary or indirect damages, lost profits or other business interruption damages . . .").

⁴³ *In the Matter of the Application of Idaho Power Co. for Approval of a Special Contract to Supply Electrical Power to Hoku Materials, Inc.*, Case No. IPC-E-08-21, Order No. 30697 (Section 12 provided that "Neither party shall, in any event, be liable to the other for any special, incidental, exemplary, punitive, or consequential damages").

⁴⁴ *In the Matter of the Application of Idaho Power Co. and FMC Corporation for Approval of a Special Contract for Service*, Case No. IPC-E-97-13, Order No. 27463 (Section 14.2 provided that damages are limited to actual damages caused by the Company and do not include consequential or indirect damages).

Idaho Power does not seek to exclude liability from all damages; rather, it seeks to limit those categories of damages that are potentially significant and outside Idaho Power's ability to predict or control. Because of the difficulty inherent in forecasting potential damages at the time of contracting and increasingly large damages awarded by juries, provisions that limit liability now regularly appear in business contracts.

E. Limitations of Liability Provisions in the Simplot Special Contract Are Not Discriminatory.

Idaho Power updated its special contract template to reflect current commercial practices; it did not single out the Simplot Caldwell facility for different treatment. Although Simplot argues that the proposed limitation of liability provisions would be discriminatory as to other special contracts, this is not correct because each special contract is treated as a distinct rate class of one customer. The Idaho Supreme Court interpreted Idaho's utility anti-discrimination statute, *Idaho Code* § 61-315,⁴⁶ in the *Idaho State Homebuilders v. Washington Water Power* decision⁴⁷ and identified cost-of-service, quantity of electricity used, differences in conditions of service, or the time, nature, and pattern of use as appropriate justifications for setting different rates and charges to different customers. The Commission has subsequently adhered to those

⁴⁵ *In the Matter of the Application of PacifiCorp, dba Rocky Mountain Power for Approval of an Electric Service Agreement with Monsanto Company*, Case No. PAC-E-06-09, Order No. 30197 (Section 10.2 provided that "PacifiCorp shall not be liable for any physical damages, economic losses, costs, or damages resulting therefrom, including but not limited to special, indirect, incidental, consequential, punitive or exemplary damages.").

⁴⁶ *Idaho Code* § 61-315 states, "**Discrimination and preference prohibited.** No public utility shall, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. The commission shall have the power to determine any question of fact arising under this section."

⁴⁷ *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 690 P.2d 350 (1984).

enumerated factors “as guidelines for the Commission to use to evaluate whether there is a reasonable justification for setting different rates and charges for different classes of customers.”⁴⁸

The Commission has generally affirmed⁴⁹ the use of special contracts for larger customers, indicating that it was “supportive of any type of pricing that is responsive to customer needs so long as the net revenues collected from those customers are fair and do not place an undue burden on other customers.”⁵⁰ Specific to Idaho Power, the Commission has found “a large customer whose aggregate electric load exceeds 20,000 kW can have a significant impact on the Company’s ability to manage or serve that load.”⁵¹ Thus, the Commission approved Idaho Power’s Schedule 19, Large Power Service, requiring customers with an aggregate power requirement receiving service at one or more points of delivery on the same premises that exceeds 20,000 kilowatts “to make special contract arrangements with the Company.”⁵²

Even Simplot admits that “some of Idaho Power’s special contract customers do have similar clauses in their agreements”⁵³ In fact, Simplot itself agreed to a

⁴⁸ Case No. IPC-E-95-18, Order No. 26780 at 7 (Feb 6, 1997).

⁴⁹ Under *Idaho Code* §§ 61-502 and -503, the Commission has jurisdiction to fix new contract rates and review existing contracts; on its own motion, the Commission can investigate rates or practices and order them changed.

⁵⁰ Case No. GNR-E-96-1, Order No. 26555 at 8 (Aug 16, 1996).

⁵¹ Case No. IPC-E-10-23, Order No. 32132 at 5 (Dec 10, 2010).

⁵² *Id.*, I.P.U.C. No. 29, Tariff No. 101, Original Sheet No. 19-1.

⁵³ Simplot Answer at 2; *see also* footnotes 43-45.

waiver of consequential damages in its Pocatello special contract.⁵⁴ While staggered contract terms prevent simultaneous renegotiation to modernize liability terms, Idaho Power anticipates additional special contracts will be negotiated in the near term such that resolution of this issue can be incorporated into those new special contracts.

F. Idaho Power's Rule J Does Not Obviate the Need for Additional Protections.

Simplot argues that Idaho Power's Rule J, Continuity, Curtailment and Interruption of Electric Service,⁵⁵ can adequately address Idaho Power's concerns. While Rule J is appropriate for the typical consumer whose potential damages pose a more modest risk to the Company, Rule J is simply insufficient to adequately reduce the risk for the Company and its customers of potential liability under a special contract. 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 rights in tort."⁵⁶

Simplot also argues that the proposed special contract provisions are in conflict with Rule J.⁵⁷ This argument is inapposite because Simplot is not seeking service under Idaho Power's tariffs. Rather, Simplot has requested a special contract, the

⁵⁴ *In the Matter of the Application of Idaho Power Co. for Approval of an Agreement for Electric Service Between Idaho Power Co. and the J.R. Simplot Co.*, Case No. IPC-E-04-17, Order No. 29576 (Section 12.1 provided, "In no event shall either Party be liable to the other for any indirect, incidental, special, or consequential damages of any character including, without limitation, damages for lost profits or work stoppages.").

⁵⁵ I.P.U.C. No. 29, Tariff No. 101, Original Sheet No. J-1.

⁵⁶ *Id.*

⁵⁷ Simplot Answer at 8.

terms of which will, by design, differ from the terms of Idaho Power's tariffs. Indeed, if Simplot wanted to avail itself of the protections afforded by Rule J, then it could accept service under Idaho Power's Schedule 19 to the extent that its load does not exceed 20 megawatts ("MW").⁵⁸

If Simplot's Caldwell facility exceeds 20 MW, two options exist: (1) include the Company-requested limitation of liability provisions in the special contract such that it and the associated Schedule 33 tariff would govern⁵⁹ in place of Rule J, subsection 3⁶⁰ or (2) address the liability risk through Simplot's Caldwell cost-of-service rate schedule. However, to the extent Idaho Power must secure additional liability insurance to serve Simplot in the event the Commission denies Idaho Power's request, the Commission should direct Simplot to provide Idaho Power with location-specific detail⁶¹ related to potential loss so that the Company may procure a Simplot-specific insurance policy and include the associated expense in the special contract's cost-of-service analysis and ultimate revenue requirement determination.

⁵⁸ Idaho Power does not know if or when Simplot's total electric load for its Caldwell facility might exceed 20 MW. However, based upon Simplot's request for additional capacity to be available by January 31, 2014, Idaho Power completed the facilities needed to provide the requested capacity on January 8, 2014.

⁵⁹ See I.P.U.C. No. 29, Tariff No. 101, Original Sheet No. A-1 ("These Rules and Regulations are a part of the Tariff of Idaho Power Company and apply to the Company and every Customer to whom service is supplied; provided, **that in case of conflict between these Rules and Regulations and the provisions of any schedule of this Tariff, the provisions of such schedule will govern as to service supplied thereunder.**") (Emphasis added).

⁶⁰ I.P.U.C. No. 29, Tariff No. 101, Original Sheet No. J-1. Subsection 3 of Rule J states, "The provisions of this rule do not affect any person's rights in tort."

⁶¹ For Idaho Power to estimate the amount of insurance necessary at the Caldwell facility in the absence of limited liability, Simplot would need to provide Idaho Power with information regarding its operations, property value, business income, etc.

G. Simplot's Alternative Limitation of Liability Language Is Insufficient.

Simplot also suggests the Commission order Idaho Power to offer language that is used in the Micron Technology, Inc., special contract, to wit:

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.⁶²

This indemnity provision is substantially similar to Section 11.1 of the proposed special contract, which Simplot and Idaho Power already agreed to. While Idaho Power agrees that this language is a reasonable mutual indemnification clause, it does not address the magnitude of each party's liability with regard to consequential damages or a limitation of direct damages.

II. CALCULATION OF SIMPLOT'S SPECIAL CONTRACT RATES

A. Simplot's Special Contract Rates Were Calculated through a Cost-of-Service Study Specific to the New Caldwell Site.

On page 11 of its Answer, Simplot stated its belief that Idaho Power did not conduct a cost-of-service study to support the rates in the special contract. Rather than conducting a full cost-of-service study, Simplot mistakenly believed that the Company

⁶² Simplot Answer at 11.

updated the inputs used to calculate Schedule 19 rates in its last general rate case, Case No. IPC-E-11-08 (“2011 Rate Case”), to arrive at a rate for Simplot’s new special contract.⁶³ Contrary to this belief, Idaho Power did indeed perform a cost-of-service study specific to Simplot’s new special contract based on the expected cost to serve the new Caldwell plant. Due to this apparent misunderstanding, Idaho Power met with representatives from Simplot and the Commission Staff on March 10, 2014, to clarify the cost-of-service methodology actually used to calculate the rates in the proposed Agreement. While Idaho Power believes this meeting was informative to all parties, the Company feels it is appropriate to reiterate its cost-of-service methodology in these Comments.

Before describing the specific steps in the cost-of-service process, however, it is important to first note the overall objective in developing a special contract rate. According to Idaho Power’s Rule C, Service and Limitations,⁶⁴ and Schedule 19, Large Power Service,⁶⁵ special contract arrangements are required for customers whose aggregate load is greater than 20 MW. The magnitude of these customers’ size and shape of their load may have significant impacts on the Company’s hourly operations and the performance of Idaho Power’s overall electrical system. Due to the potential system impact of a new large load, and because the cost-of-service study is used to set rates for all customers, all rate classes are potentially impacted when the Company

⁶³ *Id.*

⁶⁴ I.P.U.C. No. 29, Tariff No. 101, Original Sheet No. C-2 (“Special contract arrangement will be required when a Customer’s aggregate power requirement exceeds 20,000 kW.”).

⁶⁵ I.P.U.C. No. 29, Tariff No. 101, Original Sheet No. 19-1 (“If the aggregate power requirement of a Customer who receives service at one or more Points of Delivery on the same Premises exceeds 20,000 kW, the Customer is ineligible for service under this schedule and is required to make special contract arrangements with the Company.”)

acquires a new large load. If a contract is not designed properly, the addition of a new large load can unduly impact rates for all customers. Consequently, two primary goals when determining rates for a new large load are to charge rates that are reflective of cost and to ensure that other customer classes are not unduly harmed.

The cost-of-service study for a new large load utilizes the same methodology as the cost-of-service study filed in a general rate case. A stand-alone single customer study is not performed; rather, the existing study is customized to incorporate a new large load into the Company's system. In this case, the process for determining the proposed Simplot special contract rates was no exception. The starting point for this calculation was the cost-of-service study reflecting the final stipulated results of the 2011 Rate Case. At a high level, this study was modified to reflect the removal of the three existing Simplot Schedule 19P locations (Aberdeen, Nampa, and Caldwell), which will close when the production at the new Caldwell facility is fully operational, and the addition of the new Simplot special contract as an individual rate class. This modified study resulted in contract rates specific to the new Simplot special contract reflecting the final approved revenue requirement and cost-of-service methodology from the Company's most recent general rate case.

To execute the modifications summarized above, the 2011 Rate Case study was first adjusted to remove the demand and energy values for the three existing Simplot locations from the Schedule 19P allocation factors in both the jurisdictional separation study ("JSS") and the class cost-of-service study. Demand and energy values provided by Simplot for the new Caldwell facility were then utilized to determine the appropriate demand and energy allocation factors for the new Simplot special contract, which were then used to update the JSS and class cost-of-service study. Customer-related

allocation factors were also recalculated to reflect the removal of the three existing Simplot sites from Schedule 19P and the addition of the new Simplot special contract. Once these factors were updated, all energy-related, demand-related, and customer-related components of the Company's revenue requirement approved in the 2011 Rate Case were allocated to the new Simplot special contract customer in Caldwell according to the Company's 2011 Rate Case methodology.

For the assignment of distribution substation plant, Simplot's Caldwell facility required a transformer upgrade to accommodate the new load at a cost of \$2.4 million. Because Simplot was required to fund the substation upgrade up-front through a contribution-in-aid-of-construction ("CIAC"), the Company added the substation investment of \$2.4 million to Account 362 as well as a fully offsetting CIAC amount. Both the investment and the offsetting CIAC were directly assigned to the new Simplot special contract in accordance with the cost-of-service methodology utilized in the 2011 Rate Case. Due to the eventual closure of the Nampa, Aberdeen, and Caldwell sites, and given Simplot's desire to obtain full ownership of facilities currently subject to facilities charges, the Company also removed all direct assignment of facilities charge-related distribution plant to Schedule 19P for the three existing Simplot locations. By removing this direct assignment, existing plant from these three locations became "system" plant subject to allocation to all rate classes. Facility charge revenue associated with this plant was removed as well. In addition to the transformer upgrade, a metering package estimate of \$24,000 was added to Account 370 and directly assigned to the new Simplot special contract in the same manner as meter investment for all of the Company's special contract customers.

Again, the Company's approach to calculating rates for the Simplot special contract was to modify the class cost-of-service study from the 2011 Rate Case to reflect the removal of the three existing Simplot customers and the addition of the new Simplot special contract. The result of this updated cost-of-service analysis was the determination of an annual revenue requirement for the new Simplot Caldwell facility of \$8,302,325. This, however, represented a revenue requirement based upon the updated cost-of-service study from the 2011 Rate Case and, since that time, the Company has had a number of single-issue rate cases where base rates were adjusted. Specifically, the Company's base rates for all of its customers have been adjusted to reflect Commission orders for the Open Access Transmission Tariff ("OATT") deferral adjustment,⁶⁶ the depreciation study adjustment,⁶⁷ the Boardman balancing account adjustment,⁶⁸ and, most recently, the Langley Gulch power plant adjustment.⁶⁹

In order to determine a revenue requirement for the new Simplot facility that is equivalent to the costs currently being recovered from all of the Company's other rate classes, Idaho Power made an adjustment to the revenue requirement determined from the cost-of-service analysis. The Company determined that an additional \$645,790 of revenue requirement was needed, resulting in a total revenue requirement for the new Caldwell facility of \$8,948,115. The \$645,790 adjustment was derived in two steps. First, the Company determined the per unit level of incremental cost recovery approved by the Commission for Simplot's existing three facilities since the 2011 Rate Case.

⁶⁶ Case No. IPC-E-12-06, Order No. 32540 (Apr 27, 2012).

⁶⁷ Case No. IPC-E-12-08, Order No. 32559 (May 31, 2012).

⁶⁸ Case No. IPC-E-12-09, Order No. 32549 (May 17, 2012).

⁶⁹ Case No. IPC-E-12-14, Order No. 32585 (Jun 29, 2012).

Second, that per unit level of approved recovery was applied to Simplot's projected energy sales for the new Caldwell facility to determine the required adjustment. The Company then spread the additional revenue requirement to the functionalized generation, demand, energy, and customer billing determinants of Simplot's revenue requirement results from the class cost-of-service study described above.

The rate design proposed by the Company to recover the required revenue of \$8,948,115 is a seasonal rate design, based upon the demand and energy unit costs for a summer and non-summer season, similar to the seasonal rate designs for the Company's other retail classes. While a special contract typically does not have a service charge billing component, two of the Company's three current special contracts include a Contract Demand billing component intended to recover a portion of the demand-related costs associated with providing the facilities and capacity requested by the customer. For Simplot's special contract for the Caldwell facility, a Contract Demand Charge based upon the requested 30 MW of capacity was determined. The Company's methodology for determining the Contract Demand Charge was based upon the same methodology used to derive standby reservation charges for Schedule 45, Standby Service.⁷⁰ The remaining demand-related costs are reflected in the seasonal monthly billing demand charge.

B. The Proposed Special Contract Rates Are Consistent with Previous Cost-of-Service Determinations and Are in the Public Interest.

The cost-of-service analysis is used to determine rates for all of the Company's customer classes. Within the Company's class cost-of-service methodology, each special contract customer is considered an individual rate class so that the costs

⁷⁰ I.P.U.C. No. 29, Tariff No. 101, Original Sheet No. 45-1.

incurred to serve that customer are assigned to that customer alone and not spread to other customers. The Company currently has three special contract customers: Micron Technology, Inc.; the United States Department of Energy Idaho Operations Office; and the J. R. Simplot Company plant in Pocatello, Idaho. For each of these special contracts, a similar cost-of-service study was initially performed to establish the rates for the contract term; it is also performed each time the Company files a general rate case. Over time, as revenue requirements are ultimately determined and rate allocation is ultimately ordered by the Commission, each of the customer classes may move closer to or farther from its cost-of-service. Currently, the Company's three special contract customers' rates are below the level required to recover their full cost-of-service. It is not reasonable for Simplot to expect to receive rates below cost-of-service just because other customers are paying less than their current cost-of-service.

In addition, the cost to serve each special contract customer is unique to that customer, reflective of the costs incurred to serve each customer's specific load requirements. Simplot's assertion that a special contract for its new Caldwell facility should start with "the average of the current three special contract customers cost of service study and then make the same adjustments for Langley Gulch etc."⁷¹ is not based upon the anticipated costs to be incurred by the Company to serve Simplot's Caldwell load. Moreover, it would likely result in rates below the cost-of-service determination in the Company's next general rate case. As stated above, because the Company's cost-of-service study is used to determine rates for all customer classes, establishing rates in this case that are below cost-of-service would unduly shift revenue

⁷¹ Simplot Answer at 12.

requirement responsibility to other rate classes if the new Simplot special contract is not moved to full cost-of-service in the Company's next general rate case.

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.

III. CONCLUSION

Given the rise in extremely large jury verdicts and the potential magnitude of damages that could be sought by a special contract customer, Idaho Power believes the Commission should determine whether it continues to be appropriate for Idaho Power and its customers to act as an indemnity for sophisticated industrial customers with access to business interruption insurance. The Company has set forth reasonable limitation of liability language in the proposed special contract that is consistent with prudent energy contract procedures and market standards. Idaho Power respectfully requests the Commission approve the terms of the special contract as proposed by Idaho Power in Attachment 1 to its Application without change or condition.

In the alternative, if the Commission determines that it is reasonable for the Company to continue assuming 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, a cost-of-service that appropriately reflects this assumption of risk. The Commission should also direct Simplot to provide Idaho Power with location-specific detail related to potential

loss so that the Company may procure a Simplot-specific insurance policy and include the associated expense in the special contract's cost-of-service analysis and ultimate revenue requirement determination.

If the Commission limits liability for special contract customers as proposed by Idaho Power, the Company also requests the Commission approve the seasonal rates shown in Schedule 33, Attachment 2 to its Application. These rates are reflective of the detailed cost-of-service analysis performed by the Company based on the expected cost to serve the specific load requirement at Simplot's new Caldwell plant. The Company's approach is consistent with previous cost-of-service determinations used to determine the rates for each of the Company's other special contract customers. The costs to serve each of these customers are unique to each customer and reflective of the costs incurred to serve each customer's specific capacity requirements. This same methodology, used to determine the rates to serve the specific load requirements at Simplot's new Caldwell facility, is consistent with the Company's overall objective of proposing a rate design based on a defensible study that is reflective of the costs to serve the specific customer's load and ensures that existing customers will not be unduly harmed.

Respectfully submitted this 28th day of March 2014.



LISA D. NORDSTROM
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of March 2014 I served a true and correct copy of IDAHO POWER COMPANY'S COMMENTS upon the following named parties by the method indicated below, and addressed to the following:

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