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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys 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
) ANSWER TO PETITION FOR
) RECONSIDERATION
)

Idaho Power Company ("Idaho Power" or "Company"), in accordance with *Idaho Code* § 61-626 and RP 331.05, hereby responds to the Petition for Reconsideration of final Order No. 33038 issued May 19, 2014, filed by J.R. Simplot Company ("Simplot").

I. INTRODUCTION

Simplot has failed to demonstrate that the Idaho Public Utilities Commission's ("Commission") Order No. 33038 (the "Order") is unreasonable, unlawful, erroneous, or not in conformity with the law. RP 331.01. The Commission pursued its authority and was acting within its discretion. The Commission properly applied Idaho law, and its

Order is based upon substantial and competent evidence in the record. Consequently, reconsideration should be denied.

II. THE COMMISSION HAS AUTHORITY TO SET CONTRACTUAL TERMS AND CONDITIONS OF ELECTRIC SERVICE

Simplot claims that the Commission lacks the authority to set terms and conditions of utility service regarding limitation of liability in a special contract. *Idaho Code* § 61-305 states that the Commission has the power to:

investigate a single rate, fare, toll, rental, charge classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, *contracts or practices, or any thereof, of any public utility*, and to establish new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices or schedule or schedules in lieu thereof.

Emphasis added. The Commission's authority to set rates for utilities encompasses the ability to establish contracts or practices related to such rates. Additionally, I.C. § 61-507 allows the Commission to "prescribe rules and regulations for the performance of any service...supplied by any public utility." Further, I.C. § 61-520 states that the Commission has the ability to "ascertain and 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 Idaho Supreme Court noted the Commission's authority to "deal broadly with existing and future rates, rates schedules and *contracts affecting rates*" in *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 880, 591 P.2d 122, 127 (1979) (emphasis added). Simplot is correct in its assertion that the Commission has the authority granted to it by the legislature. Simplot failed to acknowledge that the

legislature granted the Commission the authority to set the contracts or practices of any public utility, including contract clauses that impact rates, such as a limitation of liability clause in this case.

**III. THE COMMISSION PROPERLY APPLIED THE LAW TO FIND THAT
A UTILITY MAY LIMIT ITS LIABILITY**

Simplot incorrectly argues that the Commission's Order misconstrues Idaho law, primarily relying upon *Strong v. Western Union Telegraph Co.*, 18 Idaho 389, 109 p. 910 (1910) and I.C. § 61-702 as controlling law. Simplot's reliance on *Strong* and I.C. § 61-702 is misplaced because neither directly applies to the facts of this case.

Strong is not controlling under these facts. The question in *Strong* dealt with the validity of an adhesion contract, printed upon the back of a telegram. *Strong* at 912 ("There appears to be considerable conflict in the various decisions upon the question of validity of the printed stipulation upon a telegraph blank limiting the liability of the company for mistakes and delays in transmission of messages."). The telegraph company did not deny a mistake in the telegram, which set the price for an offer to buy steers at a price \$.70 higher than intended by the sender of the message, and instead relied upon the limitation of liability printed on the reverse of its telegram to prevent damages from attaching after such losses had already been incurred. *Id.* However, in this case, Idaho Power seeks to limit liability in a negotiated contract between two large companies prior to an event that may lead to damages. The facts are distinguishable because in this case, Idaho Power seeks to institute limitation of liability terms in a negotiated contract with a customer six times its size. Negotiated contracts are very different than contracts of adhesion in that the terms in negotiated contracts are

reached through a process of collective bargaining, such as the negotiations that have occurred between Simplot and Idaho Power.

Further, if the Commission determines that *Strong* is controlling law, nothing in the Commission's Order is inconsistent with its holding. The Court in *Strong* concluded that if the telegraph company failed to perform its duties, it could not exempt itself from liability for its own negligence. *Id.* at 915-16 ("A stipulation exempting it from liability for its own negligence would be contrary to public policy."). Simplot fails to understand that a limitation of liability is not an exemption of liability. Idaho Power does not seek to *exempt* itself from liability in an adhesion contract. Idaho Power seeks to negotiate commercially reasonable terms which *limit* liability of either party to certain types of damages, except in the case of gross negligence or willful misconduct. These limitation of liability terms protect Simplot as well in the event Simplot's facilities cause damage to Idaho Power's system or to its other customers through simple negligence (e.g., Simplot-owned or operated equipment creates harmonics or low voltage impacting electric service to others, or causes damage to Idaho Power equipment due to sustained overload). Such terms are entirely consistent with Idaho law and the Commission's Order. Absent such liability limitations, the contract price should be adjusted upward to reflect the unlimited risk of damages beyond Idaho Power's ability to reasonably ascertain.

Simplot also asserts that I.C. § 61-702 requires that a utility be liable for all damages it may cause. This section of the code is contained within a chapter that provides for penalties and enforcement due to prohibited action by a utility. I.C. § 61-701 et seq. It does not prevent or prohibit a utility from contracting to different terms

regarding damages. It provides for a cause of action in instances that are not governed by contract. See *Mayfield Springs Water Co.*, Case No. MSW-W-08-01 at 10 (2008) (citing I.C. § 61-702, the Commission stated, “In comparison, the Public Utilities Law allows any person injured or damaged by a utility to file suit in a court of competent jurisdiction.”). It is important to note that the provision of adequate service under I.C. § 61-302 does not mean a utility must provide perfect service. “Electric service is inherently subject to occasional interruption, suspension, curtailment, and fluctuation.” Idaho Power Company Tariff, Rule J. Such expected interruptions do not rise to the level of acts prohibited under I.C. § 61-702 as noncompliance under the law.

Further, Simplot alleges that I.C. §§ 61-302, 61-702 impose a duty similar to common law negligence citing *C.C. Anderson Stores Co. v. Boise Water Corp.*, 84 Idaho 355, 361-62, 372 P.2d 752, 756 (1962). Petition for Reconsideration at 8. This misstates the holding in the case. The *C.C. Anderson* Court held that the conclusion in the case was “also in harmony with the duty imposed by statute upon a public utility.” *Id.* at 362. In *C.C. Anderson*, Anderson sued the water company for negligence under a theory of *res ipsa loquitur*, alleging that a water rupture was an inference of negligence. *Id.* at 361. The Court held that the inference of negligence was reasonable and justified under those facts. *Id.* Nothing regarding the holding in *C.C. Anderson* infers that I.C. §§ 61-302, 61-702 impose a duty similar to negligence. The Court simply stated that the holding of negligence under the facts of that case is “in harmony with” the duties of a public utility, which duties are imposed by statute. *Id.* at 362. Simplot’s assertion that Idaho Code imposes a duty similar to negligence upon a public utility is inaccurate.

In order to resolve the issue and due to guidance in the Commission’s Order,

Idaho Power proposes the limitation of liability clause to read:

SECTION 11 — INDEMNIFICATION, LIMITATION OF LIABILITY, AND EXCLUSIVITY OF WARRANTIES

11.1. If one of the Parties is negligent related to this Agreement (“Negligent Party”) and that negligence causes liability, liens, suits, loss, damage, claims, actions, costs, and expenses of any nature (collectively “Damages”), the Negligent Party agrees to protect, defend, indemnify and hold harmless the other party and its successors and their officers, directors, employees, affiliates, and agents, from, for, and against any and all Damages resulting from the negligence, whether actual or merely alleged, including court costs and attorney's fees. If both parties are negligent, they shall be responsible for resulting Damages in proportion to their negligence.

11.2. NEITHER PARTY NOR ITS AFFILIATES WILL BE LIABLE UNDER ANY THEORY OF RECOVERY, WHETHER BASED IN CONTRACT, TORT, WARRANTY, OR OTHERWISE, FOR: ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL LOSS OR DAMAGE; PUNITIVE DAMAGES; LOSS OF PROFITS OR REVENUE; LOSS OF USE OF MATERIAL OR EQUIPMENT; OR INCREASED COSTS OF CAPITAL OR FUEL COSTS; *PROVIDED, HOWEVER*, THAT NOTHING IN THIS PARAGRAPH 11.2 SHALL BE CONSTRUED TO LIMIT (A) SIMPLOT'S PAYMENT OBLIGATIONS TO IDAHO POWER OR (B) EITHER PARTY'S LIABILITY FOR GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.

11.3. EACH PARTY AGREES UNDER NO CIRCUMSTANCES SHALL THE TOTAL AGGREGATE LIABILITY OF THE OTHER PARTY UNDER THIS AGREEMENT EXCEED ONE HUNDRED FIFTY PERCENT (150%) OF THE TOTAL AMOUNT PAID BY SIMPLOT TO IDAHO POWER UNDER THIS AGREEMENT DURING THE TWELVE MONTHS IMMEDIATELY PRECEDING THE DATE OF BREACH. IF TWELVE MONTHS HAVE NOT PASSED SINCE THE DATE OF COMMISSION APPROVAL OF THIS AGREEMENT AT THE TIME OF THE BREACH, THE SUM OF (A) THE ACTUAL AMOUNTS PAID BY

SIMPLOT TO IDAHO POWER UNDER THIS AGREEMENT FOR THE MONTHS THAT HAVE PASSED SINCE THE DATE OF COMMISSION APPROVAL AND (B) THE PROJECTED AMOUNTS TO BE PAID BY SIMPLOT TO IDAHO POWER UNDER THIS AGREEMENT (CALCULATED BASED ON THE AVERAGE AMOUNT PAID BY SIMPLOT UNDER THIS AGREEMENT DURING THE MONTHS THAT HAVE PASSED) FOR THE REMAINING NUMBER OF MONTHS NECESSARY TO REACH AN AGGREGATE OF TWELVE MONTHS, WILL BE USED IN THE CALCULATION IN THE PRECEDING SENTENCE. THE LIMITATION OF LIABILITY SET FORTH IN THIS PARAGRAPH 11.3 SHALL NOT LIMIT (A) SIMPLOT'S PAYMENT OBLIGATIONS TO IDAHO POWER UNDER THIS AGREEMENT, OR (B) EITHER PARTY'S LIABILITY FOR GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.

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.

This new version of the limitation of liability clause is responsive to the Commission's Order. It prohibits limitation of liability for willful misconduct or gross negligence on the part of either party, and otherwise reflects standard commercial terms in other Idaho Power contracts, other Simplot contracts, and the industry in general. This proposed language does not exempt Idaho Power from liability. It would function to limit both parties' liability to certain types of damages in the event of ordinary negligence.

IV. DIFFERENCES IN TERMS ARE NOT UNJUSTIFIED DISCRIMINATION

Simplot focuses much of its argument on provisions in special contracts with other large load customers, alleging that terms should be mirrored and rates averaged from other special contracts, going so far as to assert that the Commission's Order

constitutes unjustified discrimination under I.C. § 61-315. As stated in Idaho Power's Reply Comments in this case, each special contract customer is an individual and distinct rate class within the cost-of-service study. Direct Testimony of Matthew Larkin, Case No. IPC-E-11-08. Idaho Power and the Commission have always considered its special contract customers to be individual rate classes within the Company's service framework. Special contract customers are uniquely situated and warrant individual consideration from both regulatory and ratemaking perspectives. Reliance upon earlier special contracts is not determinative because staggered terms for special contract customers prevents simultaneous renegotiation to modernize contract terms.

"Not all differences in a utility's rates and charges as between different classes of customers constitute unlawful discrimination or preference under the strictures of section 61-315." *Application of Boise Water Corp.*, 128 Idaho 534, 539, 916 P.2d 1259, 1264 (1996) (citing *Idaho State Homebuilders v. Washington Water Power Co.*, 107 Idaho 415, 420, 690 P.2d 350, 355 (1984)). While the court in *Boise Water* was opining on differences in rates, differences in other terms of service can be analogized. Lack of uniformity, whether in rates or other provisions, does not constitute discrimination. Differences "in the conditions under which rates were put in force" as well as provisions of a contract, cost of service, and "effect of contract rates on other customers" are evaluated. *Agricultural Products Corporation v. Utah Power & Light Co.*, 98 Idaho 23, 30-31, 557 P.2d 617, 624-25 (1976).

Extending such reasoning to terms of a contract leads to the conclusion that differences can be, and in this case were, justified. If Idaho Power were to agree to accept liability at the terms Simplot desires, the increased risk and increased costs

associated with such risk would be huge. In the words of Simplot, the “true costs of this...would be hundreds of millions of dollars.” Idaho Power Application at 4. The effect of placing such risks and the costs associated with those risks on other customers justifies a difference in treatment for this customer class of one.

V. THE COMMISSION PROPERLY APPLIED THE BURDEN OF PROOF, MADE FACTUAL FINDINGS BASED UPON SUBSTANTIAL, AND COMPETENT EVIDENCE

Simplot alleges that the Order improperly applied the burden of proof in its statement that “[w]e do not find evidence that terms were imposed on Simplot or that any obvious disadvantage in bargaining power existed.” Petition for Reconsideration at 11 (citing Order at 10). This statement does not reverse the burden of proof; it states the Commission’s finding of fact.

Simplot alleges that the Commission’s Order was not based upon substantial evidence. Idaho Power informed the Commission that Simplot’s proposed terms would create increased risk, and such risk carries with it increased costs. Idaho Power Comments at 2-4. Idaho Power submitted to the Commission Simplot’s own assertion that such costs would be “hundreds of millions of dollars.” Idaho Power Application at 4. The language proposed above by Idaho Power in response to the Order attempts to balance the risks and costs associated with providing electric service to Simplot.

VI. CONCLUSION

Idaho Power has proposed limitation of liability language that conforms with the Commission’s Order. However, prior to entering into a special contract, Simplot must provide Idaho Power with a revised load profile to calculate the revenue requirement to serve the new facility.

Simplot has failed to demonstrate that the Commission's Order No. 33038 is unreasonable, unlawful, erroneous, or not in conformity with the law. RP 331.01. The Commission's Order No. 33038 is based upon substantial and competent evidence in the record. The Commission regularly pursued its authority and was acting within its discretion. Consequently, Idaho Power respectfully requests that the Commission deny Simplot's Petition for Reconsideration.

DATED at Boise, Idaho, this 16th day of June 2014.



JULIA A. HILTON
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of June 2014 I served a true and correct copy of IDAHO POWER COMPANY'S ANSWER TO PETITION FOR RECONSIDERATION upon the following named parties by the method indicated below, and addressed to the following:

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