

Peter J. Richardson ISB # 3195
Gregory M. Adams ISB # 7454
RICHARDSON ADAMS, PLLC
515 N. 27th Street
Boise, Idaho 83702
Telephone: (208) 938-2236
Fax: (208) 938-7904
peter@richardsonadams.com
greg@richardsonadams.com

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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for the J. R. Simplot Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF IDAHO POWER) **CASE NO. IPC-E-13-23**
COMPANY'S APPLICATION FOR)
APPROVAL OF SPECIAL CONTRACT) J. R. SIMPLOT COMPANY'S
BETWEEN IDAHO POWER COMPANY) PETITION FOR RECONSIDERATION
AND J. R. SIMPLOT COMPANY)
_____)

I. INTRODUCTION AND SUMMARY

Pursuant to Rule of Procedure ("RP") 331 of the Idaho Public Utilities Commission ("Commission" or "IPUC"), J.R. Simplot Company ("Simplot") hereby respectfully requests reconsideration of the Commission's Order No. 33038. In this case, Simplot asked for the same treatment as other existing customers on Idaho Power Company's ("Idaho Power" or the "Company") system – (1) a rate approximating what other special contract customers currently pay, and (2) liability and indemnification provisions identical to those applicable to other existing customers and consistent with the IPUC orders and extant Idaho law. Idaho Power's proposed special contract contained less favorable terms for Simplot on both scores. The Commission denied Idaho Power's Application and proposed special contract. Instead of setting a rate and terms for Simplot's special contract, however, the Commission ordered Simplot to

continue negotiating with Idaho Power. Through this Petition, Simplot seeks reconsideration of the Commission's determination that Idaho law allows Idaho Power to condition electric service on a limitation of liability for Idaho Power's breach of a legal duty and the Commission's direction that Simplot must negotiate a rate and a monetary cap on Idaho Power's liability.

II. PROCEDURAL AND FACTUAL BACKGROUND

This matter regards the appropriate terms for a special contract for electrical service at Simplot's new food processing facility in Caldwell, Idaho, referred to as the "Idaho Project." Because Simplot anticipated that the Idaho Project's electrical demand will exceed the Schedule 19 tariff's eligibility threshold of 20 megawatts ("MW"), Simplot requested that Idaho Power provide a special contract for service to the new facility. Despite engaging in extensive negotiations, Idaho Power and Simplot were unable to agree on limitation of liability language in a special contract.

Idaho Power therefore filed its proposed special contract which contained Idaho Power's proposed limitation of liability language. In addition to a standard mutual indemnification clause to which Simplot did not object in Section 11.1, Idaho Power's Application proposed the following broad waiver of its liability in Sections 11.2, 11.3 and 11.4 of the special contract:

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

11.3. EACH PARTY AGREES UNDER NO CIRCUMSTANCES SHALL THE TOTAL AGGREGATE CLAIMS AGAINST AND LIABILITY OF THE OTHER PARTY FOR DIRECT DAMAGES, UNDER ANY THEORY OF RECOVERY, WHETHER BASED IN CONTRACT, IN TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY), OR OTHERWISE, EXCEED ONE HUNDRED 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.

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

Idaho Power's Application at Attachment 1, p. 7. Idaho Power also included with its Application a rate for the special contract that was higher than the rates Idaho Power had previously proposed to Simplot during negotiations. See *Simplot's Comments* at 2 (March 28, 2014) (noting that the rate in the Company's December filing is 4.243 ¢/kWh, or 7.8% higher than the 3.937 ¢/kWh rate discussed in negotiations in the fall of 2013).

Through an Answer, Comments, and Reply Comments, Simplot requested that the Commission approve a special contract with rates similar to those provided to other special contract customers and without Idaho Power's proposed Sections 11.2, 11.3, and 11.4. *Simplot's Answer* at 1-2, 11 (Feb. 5, 2014); *Simplot Reply Comments* at 12-13 (April 11, 2014).

Commission Staff filed comments supporting a rate for Simplot similar to that currently provided to other special contract customers, but took no position on the limitation of liability clauses.

Idaho Power argued in support of its broad liability waiver and its higher rate than that provided to other special contract customers.

In Order No. 33038 (“Order”), the Commission first determined:

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.”

Order at 8 (quoting *Bunker Hill Co. v. Washington Water Power Co.*, 98 Idaho 249, 253, 561 P.2d 391, 395 (1977)).

The Order then rejected Idaho Power’s broad exculpatory clauses *exempting* Idaho Power’s liability, but instructed Simplot to negotiate an appropriate monetary level for Idaho Power’s liability for non-willful breaches of a legal duty. The Order concluded as follows:

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.

Order at 11 (underline in original). Thus, the Order concluded Idaho Power can require Simplot to agree to a predetermined monetary level of Idaho Power’s liability for non-willful conduct. However, while the Order appeared to conclude that Idaho Power cannot *exempt* its liability under any legal theory, the Order did not specifically address whether Idaho Power’s proposed Section 11.2 improperly sought to exempt Idaho Power from any liability for consequential or indirect damages that would otherwise be available under contract or tort law.

The Order also provided further guidance regarding the appropriate rate. Specifically, the Order determined that Simplot’s special contract rates should be based on Idaho Power’s most recent cost of service study. Order at 12.

Yet the Order did not set the terms for the disputed special contract. Instead, it stated: “we grant Idaho Power's request to reexamine and renegotiate the terms of its special contract with Simplot.” Order at 11. The Order therefore requires Simplot to reach agreement with Idaho Power on a limitation of liability prior to receiving a special contract rate for the new facility.

III. LEGAL STANDARD

IPUC RP 331.01 provides, “Petitions for reconsideration must set forth specifically the ground or grounds why the petitioner contends that the order or any issue decided in the order is unreasonable, unlawful, erroneous, or not in conformity with the law, and a statement of the nature and quantity of evidence or argument the petition will offer if reconsideration is granted.” *See also* I.C. § 61-626.

IV. GROUNDS FOR RECONSIDERATION

This Petition seeks reconsideration of the Order’s determination that Idaho Power may condition utility service on a customer’s agreement to a limitation on Idaho Power’s liability for breach of a legal duty. For the reasons set forth below, this aspect of the Order misconstrues Idaho law and lacks evidentiary support in the record before the Commission. Additionally, instead of requiring further negotiations, Simplot maintains the Commission should have approved the special contract with an appropriate rate based on the record before it and without Idaho Power’s liability limitations by requiring deletion of Sections 11.2, 11.3, and 11.4 of Idaho Power’s proposed special contract. At a minimum on reconsideration, the Commission should clarify the Order by expressly stating that Idaho Power may not require exemptions from liability for all consequential damages, indirect damages and lost profits, as it proposed in its Section 11.2. Simplot provides argument supporting reconsideration below, and if reconsideration is

granted, will provide any further evidence or argument that the Commission may request.

A. The Order Is Not in Conformity with Law Because it Misconstrued Idaho Law to Conclude that Idaho Power May Limit Its Liability.

As noted above, the Order was based on the conclusion that Idaho Power may condition electric service on a customer's agreement to limit Idaho Power's liability, and after the customer agrees to such a limitation, the limitation is enforceable. These conclusions are contrary to well-established Idaho law.

The Idaho Supreme Court has expressly ruled that a public servant, such as a utility, may not contractually limit its liability. *Strong v. Western Union Telegraph Co.*, 18 Idaho 389, 109 P. 910 (1910), *aff'd on reh'g* 18 Idaho 409, 109 P. 917 (1910); *McIntosh v. Oregon R. & Nav. Co.*, 17 Idaho 100, 109, 105 P. 66, 69 (1909). In *Strong*, just as in this case, the public servant, a telegraph company, sought to *limit* its liability for delay or mistakes in the transmission of messages to the sum paid for sending the message. 18 Idaho at 399, 109 P. at 913. The Idaho Supreme Court held this limitation on liability invalid. *Id.*, 18 Idaho at 404, 109 P. at 915. The same rule applies here. Idaho Power sought to limit its liability to the sum of 150% of the contract's annual revenue, but under *Strong* such a limitation would be invalid even if Simplot signed the contract.

Although the decision in *Strong* is dated, it remains good law. *Strong* was issued prior to the initial enactment of Idaho's utility code, I.C. §§ 61-101 *et seq.*, which created the IPUC in 1913. However, in Idaho, "changes in the common law by the adoption of a statute may not be presumed, nor may such changes be accomplished by legislation of doubtful implication." *Industrial Indem. Co. v. Columbia Basin Steel & Iron Inc.*, 93 Idaho 719, 723, 471 P.2d 574, 578 (1970). Unless the utility code expressly provided the IPUC with the authority to limit the

liability of utilities, the common law from *Strong* remains unchanged. And no Idaho statute is contrary to the holding in *Strong* that a public servant like Idaho Power cannot limit its liability.

In fact, since *Strong*, Idaho courts have consistently stated that express agreements exempting one party from liability for negligence are not valid in the case where a public duty is involved, such as the duty of a public utility company. See *Morrison v. Northwest Nazarene University*, 152 Idaho 660, 661, 273 P.3d 1253, 1254 (2012); *Jesse v. Lindsay*, 149 Idaho 70, 75, 233 P.3d 1, 6 (2008); *Lee v. Sun Valley Co.*, 107 Idaho 976, 978, 695 P.2d 361, 363 (1984); *Steiner Corp. v. Amer. Dist. Telegraph*, 106 Idaho 787, 791, 683 P.2d 435, 439 (1984); *Rawlings v. Layne & Bowler Pump Co.*, 93 Idaho 496, 500, 465 P.2d 107, 111 (1970). In *Lee*, the Court even named utilities and common carriers as “obvious examples of parties owing a public duty” and which are thus unable to be contractually exempted from liability for negligence. *Lee*, 107 Idaho at 978, 695 P.2d at 363.

In addition to a long line of Idaho Supreme Court decisions, the Idaho legislature has expressly imposed upon Idaho Power the duty to provide adequate service, and provided a private right of action against Idaho Power for harm caused by abdication of that duty.

Specifically, Idaho Code Section 61-302 states:

Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and as shall be in all respects adequate, efficient, just and reasonable.

Idaho Code Section 61-702 further provides:

In case any public utility shall do, cause to be done or permit to be done, any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by the constitution, any law of this state, or any order or decision of the commission, according to the terms of this act, such public utility shall be liable to the persons or corporations affected

thereby for all loss, damages or injury caused thereby or resulting therefrom. An action to recover such loss, damage or injury may be brought in any court of competent jurisdiction by any corporation or person.

(emphasis added).

The statutes require that the utility be liable for *all loss, damages or injury* caused by the utility's failure to provide adequate service. The Idaho Supreme Court has interpreted these two statutory provisions as imposing a duty similar to that imposed by common law negligence. See *C.C. Anderson Stores Co. v. Boise Water Corp.*, 84 Idaho 355, 361-62, 372 P.2d 752 (1962).

The statutes unambiguously state that if the utility fails to provide adequate and reliable service, the utility is liable for *all* damages to customers; the statutes do not provide that the utility's liability for damages may be contractually capped at a certain monetary level or that the utility may eliminate availability of indirect or consequential damages.

Instead of relying upon *Strong* and I.C. § 61-702, the Order relies on *Restatement of Contracts* § 575(2). According to the Order, "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 on liability will be deemed valid." Order at 9. From this, the Order relies on Section 575(2) of the *Restatement*, which provides: "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." *Id.* (emphasis added).

Reliance on the *Restatement* in this circumstance is erroneous. First, Section 575(2) of the *Restatement* is relevant only after the customer *agrees* to a predetermined valuation of a limitation of liability. Simplot has not *agreed* to limit liability for damages it might incur due to

a breach of a legal duty in negligence or contract law. Second, Section 575(2) of the *Restatement* is directly contrary to the holding in *Strong* and I.C. § 61-702. Additionally, no Idaho decisions have adopted Sections 574 or 575 regarding enforceability of exculpatory clauses. The Idaho Supreme Court cited those sections in *Rawlings*, 93 Idaho at 499-500, 465 P.2d at 110-111, but it did not adopt those sections of the *Restatement*. Instead, it relied on those sections and other authorities to hold that “express agreements exempting one of the parties for negligence are to be sustained except where: (1) one party is at an obvious disadvantage in bargaining power; (2) a public duty is involved (public utility companies, common carriers).” *Id.* The *Rawlings* case did not address the question of whether a party owing a public duty can require a *limit* to its liability as a condition of service.¹

The Order also relies on an intermediate appellate decision from Oregon, to conclude “[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.” Order at 10 (quoting *Garrison v. Pacific Northwest Bell*, 45 Or. App. 523, 531, 608 P.2d 1206, 1214 (1980)). However, the Order’s reliance on an intermediate appellate case from Oregon fails to grapple with the clear rule in *Strong* and I.C. § 61-702. Idaho law controls here. In any event, the courts are not “virtually unanimous” and, in fact, many states, like Idaho, have long held that a utility

¹ The only other time Sections 574 and 575 of the *Restatement* have been cited in an Idaho decision is *in the dissent* in the *Lee* case. See *Lee*, 107 Idaho at 982, 695 P.2d at 367 (Bistline, J., dissenting). Idaho appellate courts have expressly declined to follow certain other sections of the *Restatement of Contracts*. See *Fazzio v. Mason*, 150 Idaho 591, 596, 249 P.3d 390, 395 (2011) (declining to follow rule on impossibility of performance set forth in *Restatement (First) of Contracts* § 368 (1932)); *Lewis v. Fletcher*, 101 Idaho 530, 532, 617 P.2d 834, 836 (1980) (“The Restatement of Contracts takes the minority position that an option in writing and signed by the offeror which recites consideration is binding notwithstanding the fact that no such consideration was given or expected. . . . However, we choose to adhere to the majority position.”); *Dennett v. Kuenzli*, 130 Idaho 21, 28, 936 P.2d 219, 226 (Ct. App. 1997) (noting the divergence between Idaho common law and the *Restatement (Second) of Contracts* § 153(a) (1981) on the applicability of the unilateral mistake doctrine).

may not limit its liability. See *Indianapolis Water Co. v. Schoenemann*, 107 20 N.E.2d 671, 677 (Ind. App. 1939) (“Public Service Commission cannot relieve a utility from liability under the law of negligence as it exists in Indiana, by any rule it may adopt”); see also 27A Am. Jur. 2d *Energy* § 222 (2003); see also K.A. Drechsler, Annotation, *Validity of Contractual Provision by One Other Than Carrier or Employer for Exemption from Liability, or Indemnification, for Consequences of Own Negligence*, 175 A.L.R. 8, 39-40 (1948).

The Order is erroneous because it is contrary to *Strong* and I.C. § 61-702. In fact, the Order fails to even cite or discuss these controlling authorities.

B. The Order Is Not in Conformity with Law Because It Expands the Commission’s Authority.

The Order relies on the Commission’s “just and reasonable” standard of review and its authority to set service adequacy requirements, citing I.C. §§ 61-302, -507, -520, as a basis for requiring Simplot to agree to a limit on Idaho Power’s liability as a condition of service. Order at 8-9. According to the Order, the legislature created broad standards to allow the Commission to engage in “judicial interpretation on a case by case basis, considering the particular circumstances” of each situation. Order at 9 (quoting *Powers v. Canyon County*, 108 Idaho 967, 972, 703 P.2d 1342, 1347 (1985)). These aspects of the Order misconstrue Idaho law.

First, *Powers* was not an IPUC case. It was a constitutional challenge to a statute granting indigent benefits with an allegedly overbroad standard. See *Powers*, 108 Idaho at 972, 703 P.2d at 1347. The language quoted is mere dicta, which cited the IPUC statute to provide an example of a broadly written standard. *Powers* is inapplicable to this case.

The Idaho Supreme Court has held that the IPUC has no authority other than that granted to it by the legislature. *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 418,

690 P.2d 353 (1984). A public service commission has no inherent power; its powers and jurisdiction derive in entirety from enabling statutes creating it, and nothing is presumed in favor of its jurisdiction. *U.S. v. Utah Power & Light Co.*, 98 Idaho 665, 667, 570 P.2d 1353, 1355 (1977). Thus, the question is whether any provision in the utility code grants the IPUC authority to ignore *Strong*, and require a customer to agree to a contract with a utility that limits the utility's liability.

None of the provisions of the utility code cited by the Order state that the IPUC may limit a utility's liability under any theory of recovery. The Idaho legislature enacted the utility code in 1913 against the backdrop of the *Strong* decision that a utility may not contractually limit its liability. And the utility code unambiguously provides that utilities are liable for *all* damages associated with their failure to provide adequate and reliable service. *See* I.C. §§ 61-302, 61-702; *see also* IPUC Order No. 17499 at 51 (requiring removal of back-pay and liability limitations from Idaho Power's tariffs after finding that the Commission should not approve provisions differing from the general laws of contract and tort), *affirmed on reconsideration by* IPUC Order No. 17620 at 15-16. Idaho law therefore provides no authority for the Commission to impose a limitation on Idaho Power's liability to Simplot.

C. The Order Is Erroneous and Not in Conformity with Law Because It Reversed the Burden of Proof and Made Erroneous Factual Findings.

The Order states, "We do not find evidence that the terms were imposed on Simplot or that any obvious disadvantage in bargaining power existed." Order at 10. The Order later relies on this finding to conclude the parties should return to the bargaining table to determine for themselves the proper level at which to cap Idaho Power's potential damages.

The Order erroneously reverses the burden of proof. Idaho Power bears the burden of

proof in a rate proceeding where it proposes to impose a new exculpatory clause on Simplot. *See Boise Water Corp. v. Idaho Pub. Util. Comm.*, 97 Idaho 832, 835, 555 P.2d 163, 166 (1976); *Application of Pacific Telephone & Telegraph Co.*, 62 Idaho 568, 574, 113 P.2d 798, 800 (1940). Yet the Order reverses the burden and requires Simplot to prove it was disadvantaged. By the Order's own declaration of the new rule for exculpatory clauses, the default position is that a limitation of liability is *not* allowed. *See also In re Advice Letter No. 89-05 of Contel of the West, Inc.*, IPUC Case No. Con-T-89-2, Order No. 22812 (1989) (utility must prove it has a need to limit liability). Even if a limitation on liability could be lawfully imposed over the customer's objection, the utility has the evidentiary burden to demonstrate that a limitation of liability is necessary. It is not the customer's burden to prove it was in an unfair bargaining position.

Moreover, the Order reaches an erroneous factual finding that Simplot is not disadvantaged in negotiations with Idaho Power. The Order ignores the "obvious" disadvantage that Simplot explained in its comments. The customer (no matter how large or sophisticated) is in a disadvantaged bargaining position because if the customer wants to use electricity in Idaho Power's service territory, it must buy that electricity from Idaho Power. With no other potential sellers, the buyer has no leverage. Idaho Power's final offer is effectively a take-it-or-leave proposition.

In fact, Idaho law presumes the customer is at a disadvantage and requires no proof of such a disadvantage. The Idaho Supreme Court has held that an exculpatory clause is invalid if the party seeking exemption owes the other party a public duty, such as a duty to provide utility service, *or* (not "and") the other party is at an obvious disadvantage in bargaining power.

Morrison, 152 Idaho at 661, 273 P.3d at 1254. The customer must only prove the fact that it was

dealing with a party that has a public duty. The limitation on liability is invalid *by law* because Idaho Power owes a public duty to provide adequate and reliable utility service and to compensate customers for all damages that result from a failure to do so. See I.C. §§ 61-302, 61-702.

D. The Order Is Erroneous Because It Is Not Supported by Substantial Evidence.

The Order relies on *In re Advice Letter No. 89-05 of Contel of the West, Inc.*, IPUC Case No. Con-T-89-2, Order No. 22812 (1989), to conclude that the Commission can limit liability after reviewing “the factual underpinnings for the claim liability should be waived.” Order at 10. The Commission’s 1989 *Contel* decision cannot overrule *Strong* and I.C. § 61-702. However, even if the Commission’s 1989 *Contel* order could overrule Idaho law, Idaho Power failed to meet the test set forth in *Contel*. In other words, even if a limitation on liability could be lawfully imposed over the customer’s objection, the utility has the evidentiary burden to demonstrate that a limitation of liability is necessary. The Order and Idaho Power’s filings pointed to no instances where any Idaho utility had met the evidentiary burden set forth in *Contel*. And Idaho Power failed to meet that burden here.

Idaho Power cited no facts or evidence demonstrating that Idaho Power would be unable to provide utility service without limiting its liability, as required by *Contel*. Idaho Power provided no evidence that the cost of service to Simplot would increase without the limitation on Idaho Power’s liability. Idaho Power presented no evidence of a costly insurance policy it must obtain to continue providing utility service without a limitation on liability clause. Nor did Idaho Power present any evidence that its cost of capital will increase if it is forbidden from capping its potential damages for a breach of a legal duty. The Order cites a case where the Idaho Supreme

Court required the IPUC to allow a railroad to limit services in a rural location. *See In re Application of Union Pac. Railroad Co.*, 64 Idaho 529, 134 P.2d 599 (1943). That case presents the exception to the general rule that the utility must provide the public services as specified in the statutes. Unlike in that case, however, Idaho Power presented no evidence supporting its claim that it needs to lower the level of its service below that established by statute and limit its potential liability. The record lacks substantial evidence supporting the Order.

E. The Order Violates Idaho Law By Subjecting Simplot to Unjustified Discrimination.

The Order allows Idaho Power to impose differential treatment for Simplot with regard limitations on liability. Idaho law provides:

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.

I.C. § 61-315.

Aside from Simplot's Idaho Project, Simplot is aware of no other customers that have been *required* to agree to limitations of liability to obtain utility service. For the Commission's reference, Simplot has attached Idaho Power's Commission-approved Rules A and J as Exhibit 1 to this Petition. Rule J indicates that Idaho Power is not liable for occurrences beyond its control or necessary to maintain system integrity, which is consistent with general tort or contract law principles. It expressly states: "The provisions of this rule do not affect anyone's rights in tort." Rule A indicates that all Rules, including Rule J, apply to Idaho Power and every customer, unless the service schedule is to the contrary. Schedule 19 and the other standard service

schedules are not to the contrary.

Exhibit 2 to this Petition is the Micron special contract and the Commission Order approving the contract. That contract contains a standard indemnification provision in Section 12, but does not contain the monetary cap limiting liability as adopted by the Order in this case. This demonstrates that even without the right to a tariff rate, an Idaho Power special contract customer obtained special contract rates without a limitation on liability. While Idaho Power pointed to other special contracts containing broad limitations on liability, none of those customers objected. This is the first case where such a limitation is imposed over the customer's objection.

The record is devoid of any basis to conclude that Simplot – as opposed to other customers with no limitation of liability – will impose a higher cost of service without a liability limitation. Without any such record, the Order is discriminatory in violation of Idaho law.

F. The Order Is Unreasonable Because It Failed to Resolve the Case.

When the utility's proposed rate or condition is found unreasonable (as the Commission concluded here), "the commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices or contracts to be thereafter observed and in force and shall fix the same by order" I.C. § 61-502. But the Order here did not set the just rates and terms. Instead, it instructed the parties to resume negotiating.

The negotiations will be particularly hampered by an ambiguity in the Order. While the Order appeared to conclude that Idaho Power cannot *exempt* its liability for damages under any legal theory, the Order did not specifically state that Idaho Power's proposed Section 11.2 improperly sought to exempt Idaho Power from any liability for consequential and indirect

damages, including lost profits, arising under a contractual theory. Indirect and consequential damages, such as lost profits, would be the bulk of damages in an unexpected power outage, and if any customer were to agree to a monetary cap on damages these types of damages should reasonably be available subject to the cap. However, because the Order did not directly address the issue, Simplot fears that Idaho Power will construe the Order to permit it to impose complete exemptions from all contractual theories of recovery for consequential damages and lost profits, as it proposed in its Section 11.2. At a minimum, the Commission should clarify this issue on reconsideration.

However, without any evidence supplied by the party possessing the burden of proof, the Commission should have approved the contract without Idaho Power's proposed liability language (Sections 11.2, 11.3, and 11.4.), and determined an appropriate rate set by the Commission based on the evidence before it. The failure to do so places Simplot in the unfair position of needing to negotiate a limit to liability with incomplete guidance on the Commission's views.

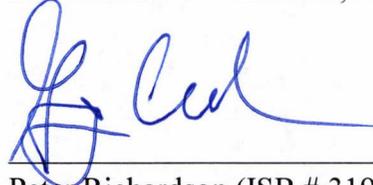
V. CONCLUSION

Simplot respectfully requests that the Commission grant this Petition for Reconsideration, and approve a special contract for the Idaho Project with base rates and liability limitation provisions that do not discriminate against Simplot. With regard to the base rates, Simplot maintains the Commission should set an appropriate rate based on the record before it and the guidance it provided in the Order. Additionally, Simplot respectfully requests that the Commission approve the special contract without Idaho Power's liability limitations by requiring deletion of Sections 11.2, 11.3, and 11.4 of Idaho Power's proposed special contract. At a

minimum on reconsideration, the Commission should clarify the Order by expressly stating that Idaho Power may not require exemptions from liability for all contractual theories of recovery for consequential damages and lost profits, as it proposed in its Section 11.2.

RESPECTFULLY SUBMITTED this 9th day of June 2014.

RICHARDSON ADAMS, PLLC

A handwritten signature in blue ink, appearing to read "Peter Richardson", is written over a horizontal line.

Peter Richardson (ISB # 3195)

Gregory M. Adams (ISB # 7454)

Of Attorneys for J. R. Simplot Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of June, 2014, a true and correct copy of the within and foregoing **PETITION FOR RECONSIDERATION BY THE J. R. SIMPLOT COMPANY** IN CASE NO. IPC-E-13-23 was served in the manner shown to:

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington
Boise, Idaho 83702
jean.jewell@puc.idaho.gov

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Lisa D Nordstrom
Jennifer M Reinhardt-Tessner
Idaho Power Company
PO Box 70
Boise, Idaho 83707-0070
lnordstrom@idahopower.com
jreinhardt@idahopower.com

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Signed 
Nina Curtis

Idaho Power Company

I.P.U.C. No. 29, Tariff No. 101

Original Sheet No. A-1

IDAHO PUBLIC UTILITIES COMMISSION

**Approved
Feb. 29, 2008**

**Effective
March 1, 2008**

Per O.N. 30508

Jean D. Jewell Secretary

**RULE A
INTRODUCTION**

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.

RULE J
CONTINUITY, CURTAILMENT AND
INTERRUPTION OF ELECTRIC
SERVICE

1. Electric Service is inherently subject to occasional interruption, suspension, curtailment, and fluctuation. The Company will have no liability to its Customers or any other persons for any interruption, suspension, curtailment, or fluctuation in service or for any loss or damage caused thereby if such interruption, suspension, curtailment, or fluctuation results from any of the following:

a. Causes beyond the Company's reasonable control including, but not limited to, fire, flood, drought, winds, acts of the elements, court orders, insurrections or riots, generation failures, lack of sufficient generating capacity, breakdowns of or damage to facilities of the Company or of third parties, acts of God or public enemy, strikes or other labor disputes, civil, military or governmental authority, electrical disturbances originating on or transmitted through electrical systems with which the Company's system is interconnected, and acts or omissions of third parties;

b. Repair, maintenance, improvement, renewal or replacement work on the Company's electrical system, which work in the sole judgment of the Company is necessary or prudent; to the extent practicable work shall be done at such time as will minimize inconvenience to the Customer and, whenever practicable, the Customer shall be given reasonable notice of such work;

c. Actions taken by the Company, which in its sole judgment are necessary or prudent to protect the performance, integrity, reliability or stability of the Company's electrical system or any electrical system with which it is inter-connected, which actions may occur automatically or manually.

2. Load curtailment and interruption carried out in compliance with an order by governmental authority shall follow the Company's plan entitled "Load Curtailment and Interruption Procedure", as filed with and approved by the Commission.

3. The provisions of this rule do not affect any persons rights in tort.

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF IDAHO POWER)
COMPANY'S APPLICATION FOR) **CASE NO. IPC-E-09-35**
APPROVAL OF A REPLACEMENT)
SPECIAL CONTRACT WITH MICRON) **ORDER NO. 31006**
TECHNOLOGY, INC.)

On December 31, 2009, Idaho Power Company (Idaho Power; Company) filed an Application with the Idaho Public Utilities Commission (Commission) requesting approval of a new special contract between Idaho Power and Micron Technology, Inc. (Micron) dated December 29, 2009 (Replacement Agreement). The Replacement Agreement is intended to replace the "current special contract" or Electric Service Agreement (ESA) between Idaho Power and Micron which has been in effect since August 31, 1995 (Current Agreement), as amended.

BACKGROUND

Idaho Power's current approved tariff Schedule 19 (Large Power Service) provides that electric service to customers with loads greater than 25 MW will be provided pursuant to a special contract. Idaho Power and Micron have operated under a special contract, the Current Agreement, since August 31, 1995. Since the Current Agreement between Micron and Idaho Power was initially approved by the Commission in 1995, there have been a number of amendments and extensions of the Current Agreement.

Beginning January 1, 2009, Idaho Power has been serving Micron under an Interim Bridge Agreement and under Schedule 26A, while Micron was undergoing significant restructuring of its operations. Order Nos. 30721, 30871. Both the Bridge Agreement and Schedule 26A expired on December 31, 2009. On January 1, 2010, service to Micron reverted back to the Current Agreement and Schedule 26, which has been updated throughout the year to reflect Commission-authorized rate changes.

The Current Agreement obligates Idaho Power to provide Micron up to 140,000 kW of contract demand. Micron's current contract demand is 85,000 kW. Micron has requested that its contract demand be reduced to 60,000 kW. Micron has also requested that it be given additional flexibility to increase or decrease its contract demand to respond more quickly to changes in market conditions. Idaho Power is willing to provide Micron with additional

operational flexibility and to reduce its contract demand but it needs reciprocal commitments from Micron to give it time to adjust its resource levels to respond to Micron's increasing or decreasing amounts of contract demand and reduction in the total contract demand that will be available to Micron.

In recognition of the fact that the Current Agreement has previously been amended several times and the fact that the parties have negotiated and agreed on several new items and conditions that they find to be mutually beneficial, Idaho Power and Micron have entered into the Replacement Agreement. Application, Atch. 1.

Schedule 26 is the tariff that contains the rates and charges to be paid by Micron. A new Schedule 26 reflecting the provisions of the Replacement Agreement is included with the Application as Attachment 2.

Summary of Revisions to Current Agreement

The principal differences between the Replacement Agreement and the Current Agreement are as follows:

- a. The 85,000 kW Contract Demand in the Current Agreement is reduced to 60,000 kW in the Replacement Agreement. This change is an operating benefit to Idaho Power and an economic benefit to Micron in that Micron will not be paying for capacity it does not need. Replacement Agreement ¶ 6.1.
- b. The total maximum 140,000 kW Contract Demand in the Current Agreement is reduced to 120,000 kW in the Replacement Agreement. This reduced maximum capacity obligation is a planning benefit to Idaho Power, yet provides Micron some headroom generally equivalent to the substation capacity at the current site. Replacement Agreement ¶ 6.2.a.
- c. In the Replacement Agreement, Micron is permitted to increase its Contract Demand in 1,000 kW increments on three months' notice rather than the one-year notice provided in the Current Agreement. In the Replacement Agreement, any new Contract Demand will be in effect for a minimum of six months rather than the one-year term in the Current Agreement. In the Replacement Agreement, Micron cannot increase its total Contract Demand more than 10,000 kW in any six-month period. Replacement Agreement ¶ 6.2.a.
- d. In the Replacement Agreement, decreases to Contract Demand require three months' prior written notice and the new decreased contract demand will be in effect for a minimum of six months. Replacement Agreement ¶ 6.2.b.

Changes to Schedule 26

The changes to rates incorporated in Schedule 26 are designed to recover the same average cents-per-kilowatt-hour as authorized by the Commission in Case No. IPC-E-09-08.

- The Contract Demand Charge has been lowered from the current \$1.94 per kW to \$1.30 per kW.
- The Scheduled Monthly Contract Demand provision and the initial implementation of the daily excess demand charge have been removed and covered in the Replacement Agreement.
- The Billing Demand Charge has been increased to \$8.48 per kW from \$7.48 per kW.
- The Energy Charge remains the same as under the current tariff.
- The Monthly O&M provision has been removed because it has not been applicable for a number of years. These costs have since been captured in other rate charges.

Idaho Power requests that the Commission issue an Order approving the Replacement Agreement and the rates and charges set out in its proposed amendment to tariff Schedule 26.

On January 22, 2010, the Commission issued a Notice of Application and Modified Procedure in Case No. IPC-E-09-35. The deadline for filing written comments was February 11, 2010. Commission Staff was the only party to file comments. Staff recommends that the Replacement Agreement and related changes to Schedule 26 rates and charges be approved for the effective date of the Commission's Order.

COMMISSION FINDINGS

The Commission has reviewed and considered the filings of record in Case No. IPC-E-09-35 including the new special contract between Idaho Power and Micron Technology, Inc. dated December 29, 2009 (Replacement Agreement) and the related amended Schedule 26 Electric Service Rate tariff. We have also reviewed the comments and recommendations of Commission Staff. Based on our review of the record in this case, we continue to find it reasonable to process the Company's Application under the Commission's Rules for Modified Procedure. IDAPA 31.01.01.204.

We find that the Replacement Agreement incorporates changes required by Micron's changed business and operating requirements. We find that the electric load requirements of

Micron continue to exceed 25 MW and trigger the necessity of a special contract. We find that the submitted Replacement Agreement is a negotiated special contract between Idaho Power and Micron that sets forth mutually beneficial and reciprocal commitments. We find the Replacement Agreement contract terms, conditions and related Schedule 26 rates and charges to be fair, just and reasonable. Pursuant to Replacement Agreement ¶ 15, the effective date of this contract (and rates and charges) is the date of Commission approval, i.e., the date of this Order.

CONCLUSIONS OF LAW

The Idaho Public Utilities Commission has jurisdiction over Idaho Power Company, an electric utility, and the Application filed in Case No. IPC-E-09-35 pursuant to Title 61 of the Idaho Code and the Commission's Rules of Procedure, IDAPA 31.01.01.000 *et seq.*

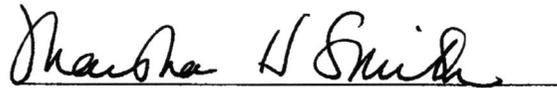
ORDER

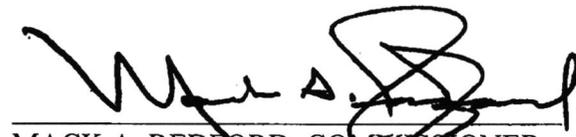
In consideration of the foregoing and as more particular described above, IT IS HEREBY ORDERED and the Commission does hereby approve the December 29, 2009, Replacement Agreement between Idaho Power Company and Micron Technology, Inc. and approves the related amended rates and charges set forth in Schedule 26 for an effective date of February 12, 2010.

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 12th
day of February 2010.


JIM D. KEMPTON, PRESIDENT


MARSHA H. SMITH, COMMISSIONER


MACK A. REDFORD, COMMISSIONER

ATTEST:


Jean D. Jewell
Commission Secretary

bis/O:IPC-E-09-35_sw2

BETWEEN
IDAHO POWER COMPANY
AND
MICRON TECHNOLOGY, INC.

THIS AGREEMENT FOR ELECTRIC SERVICE is executed on December 29th, 2009, by MICRON TECHNOLOGY, INC., a Delaware Corporation ("MICRON") and IDAHO POWER COMPANY, an Idaho Corporation ("IDAHO POWER"). In consideration of the mutual covenants hereinafter set forth, the parties hereby agree as follows:

SECTION 1 – PRIOR AGREEMENT

1.1. This Agreement replaces the August 31, 1995, Agreement for Electric Service between Micron and Idaho Power including any amendments and extensions of that agreement.

SECTION 2 – DEFINITIONS

2.1. "Commission" shall mean the Idaho Public Utilities Commission or its successor agency.

2.2. "Contract Demand" shall mean the monthly schedule of kilowatts Idaho Power has agreed to make available to the Micron Facility. (See Section 6.)

2.3. "Billing Demand" shall mean the kilowatts supplied to the Micron Facility during the coincident 15-consecutive-minute period of maximum use during the monthly billing period, adjusted for power factor, as measured by the metering equipment located at the Points of Delivery.

2.4. "Excess Demand" shall mean Billing Demand in excess of the Contract Demand.

2.5. "Interconnection Facilities" shall mean all facilities which are reasonably required by Prudent Electrical Practices and the National Electric Safety Code to interconnect and deliver electrical power and energy to the Micron Facility, including, but not limited to, transmission facilities, substation facilities and metering equipment.

2.6. "Micron Facility" shall mean the Micron manufacturing complex located at 8000 South Federal Way, Boise, Idaho.

2.7. "Points of Delivery" shall mean the locations specified in paragraph 6.2 where the electrical facilities owned by Micron are interconnected to the electrical facilities owned by Idaho Power and where power and energy are delivered by Idaho Power for the purpose of providing electrical service for the operations of the Micron Facility.

2.8. "Prudent Electrical Practices shall mean those practices, methods, and equipment that are commonly and ordinarily used in electrical engineering and utility operation to operate electrical equipment and deliver electric power and energy with safety, dependability, efficiency and economy.

2.9. "Schedule 26" shall mean the Micron tariff schedule of rates and charges or its successor schedules.

SECTION 3 – TERM OF AGREEMENT

3.1. This Agreement shall remain in effect until either Micron or Idaho Power terminates this Agreement as provided in paragraph 4.1.

SECTION 4 – TERMINATION

4.1. Notice of Termination. Either party to this Agreement shall have the right

to terminate this Agreement by delivering written notice of termination to the other party. The effective date of termination will be specified in the termination notice but such effective date cannot be earlier than 12 months after the date of the delivery of the notice of termination, if both parties give notice of termination, the earliest effective date will prevail.

4.2. Termination Charges. If this Agreement is terminated, Micron shall reimburse Idaho Power for Idaho Power's costs associated with the termination ("Termination Charges"). Termination Charges shall be limited to the net book value (original cost less depreciation) of the Interconnection Facilities (and as amended by mutual agreements of the parties, which Agreement will not be unreasonably withheld) paid for by Idaho Power plus the actual cost of the removal and transport to storage of surplus Interconnection Facilities, if any, less a credit, for any residual value of the surplus Interconnection Facilities. Termination Charges will not be assessed for unrecovered investment costs of Interconnection Facilities paid for by Micron. There shall also be deducted from the Termination Charges: (1) any valid claims hereunder which either Micron or Idaho Power may have against the other; and (2) any credits due under the terms of this Agreement and not otherwise recovered by or credited to Micron or Idaho Power. Subsequent to giving or receiving a termination notice as described in paragraph 4.1, Idaho Power will invoice Micron for any Termination Charges. Termination Charges shall be due and payable within fifteen (15) days of Micron's receipt of the invoice.

SECTION 5 – SERVICES TO BE PROVIDED

5.1. Supply Obligation. In accordance with Prudent Electrical Practices and the provisions of this Agreement, Idaho Power will furnish Micron's total requirements for

electric power and energy at the Micron Facility. Micron will not resell any portion of the power and energy furnished under this Agreement.

5.2. Points of Delivery. Electric power and energy shall be delivered by Idaho Power to the Micron Facility at the 12,500 volt transformer busses at Idaho Power's Micron and DRAM substations.

5.3. Description of Electric Service. Idaho Power shall supply three-phase, 60 HZ alternating current at nominal 12,500 volts, with a maximum steady state variation of plus or minus five percent (5 percent) under normal system conditions. Consistent with Prudent Electrical Practices, Idaho Power will operate within the capability of its existing system to minimize voltage level fluctuations, the normal frequency variation to be within plus or minus 0.05 HZ on a 60 HZ base.

SECTION 6 – CONTRACT DEMAND

6.1. Contract Demand. Micron agrees to contract for and Idaho Power agrees to provide power to the Micron Facility: 60,000 kilowatts of Contract Demand.

6.2. Changes to Contract Demand. Micron has the option to increase or decrease its Contract Demand level as follows:

a. Increases to Contract Demand. Under the terms of this Agreement, Micron may increase the Contract Demand above the 60,000 kilowatts of Contract Demand, in even increments of 1,000 kilowatts up to a total maximum Contract Demand of 120,000 kilowatts. Micron will notify Idaho Power in writing of its desire to increase its Contract Demand at least three months in advance of the first day of the month it desires the additional capacity to be made available. The new Contract Demand will be in effect

for a minimum of six months. Micron cannot increase its total Contract Demand more than 10,000 kilowatts in any six month period.

b. Decreases to Contract Demand. Micron may decrease the Contract Demand in even increments of 1,000 kilowatts up to the full amount of its then-current Contract Demand. Micron will notify Idaho Power in writing that it desires to decrease its Contract Demand at least three months in advance of the first day of the month in which it desires its decreased Contract Demand to be effective. The new Contract Demand will be in effect for a minimum of six months.

6.2.2. Minimum Monthly Billing Demand. The Minimum Monthly Billing Demand will be 25,000 kilowatts. If, in any two successive months, Billing Demand is less than 25,000 kilowatts, the parties agree to enter into good faith negotiations to revise paragraph 6.2 and its subparagraphs.

6.2.3. Excess Demand. The availability of power in excess of the Contract Demand is not guaranteed, and if Billing Demand at the Micron Facility exceeds the Contract Demand, Idaho Power may curtail service to the Micron Facility. Idaho Power reserves the right to install, at any time, at Micron's expense, any device necessary to protect Idaho Power's system from damage which may be caused by Billing Demand at the Micron Facility exceeding the Contract Demand. Micron will be responsible for any damages to Idaho Power's system or damages to third parties resulting from Billing Demand at the Micron Facility exceeding the Contract Demand. Micron agrees to use its best reasonable efforts to monitor its electric loads and to advise Idaho Power as soon as possible of the potential for Billing Demands at the Micron

Facility to exceed the Contract Demand. Billing Demands in excess of the Contract Demand will be subject to the Daily Excess Demand Charge specified in Schedule 26.

SECTION 7 – FACILITIES FOR DELIVERY TO MICRON FACILITY

7.1. Additional Facilities. To the extent that additional transmission and/or substation Interconnection Facilities are required to provide the requested service, special arrangements will be made in a separate Agreement between Micron and Idaho Power. If distribution facilities are required to supply the desired service, those facilities will be provided under the terms and conditions of Rule H of Idaho Power's General Rules and Regulations.

7.2. Operation and Maintenance. Idaho Power will operate and maintain Interconnection Facilities necessary to provide service to the Micron Facility. Such Interconnection Facilities include Interconnection Facilities paid for by Micron. Micron will pay Idaho Power a monthly operation and maintenance charge equal to a percentage of the total cost of the substation portion of the Interconnection Facilities including substation facilities paid for by Micron. The percentage amount is specified in Schedule 26.

SECTION 8 – CHARGES TO BE PAID BY MICRON TO IDAHO POWER

8.1. Rates and Charges. The rates and charges for electrical power, energy and other service provided by Idaho Power to the Micron Facility will be identified by component in Schedule 26. The total amount to be paid by Micron for electric service to the Micron Facility will be the sum of the components identified on Schedule 26.

8.2. Power Factor. When the Micron Facility's adjusted power factor is less than 95 percent during the 15-consecutive-minute period of maximum use for the monthly

billing period, Idaho Power will adjust the Billing Demand by multiplying the metered demand in kilowatts by 0.95 and dividing that product by the adjusted power factor. The reactive component of the adjusted power factor is comprised of the reactive load plus the 138/12.5 kV transformer reactive losses reduced by the amount of reactive correction paid for by Micron.

8.3. Billing and Metering Provisions. Billing Demand at the Micron Facility shall be determined on a 15 minute coincidental basis and shall be billed accordingly. Idaho Power will install and maintain suitable metering equipment for each Point of Delivery so that coincident Billing Demand and energy consumption can be determined for the billing period.

SECTION 9 – PAYMENT OF BILLS/SETTLEMENTS

9.1. Billing Data. Micron shall pay Idaho Power for all services provided under this Agreement. Invoices for payment for electric services shall be prepared and submitted to Micron monthly. All invoices or bills shall contain such data as may be reasonably required to substantiate the billing, including statements of the meter reading at the beginning and end of the billing period, meter constants, and consumption during the billing period.

9.2. Payment Procedure. All bills or accounts for electric service owned by Micron to Idaho Power hereunder shall be due and payable within fifteen (15) days following Micron's receipt of a bill. Payment will be made by electronic transfer of funds. Idaho Power will provide Micron with current ABA routing numbers and other necessary instructions to facilitate the electronic transfer of funds.

SECTION 10 – ACCESS TO PREMISES

10.1. During the term of this Agreement, and for a reasonable period following termination, Idaho Power shall have access to the Micron Facility premises at all reasonable times with proper notice to Micron for the purposes of reading meters, making installations, repairing and removing Interconnection Facilities and Idaho Power equipment and for other proper purposes hereunder.

SECTION 11 – ASSIGNMENT

11.1. This Agreement shall be binding upon the heirs, legal and personal representatives, successors and assigns of the parties hereto.

SECTION 12 – LIABILITY

12.1. 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.

SECTION 13 – MODIFICATIONS OF CONTRACT

13.1. This Agreement may not be modified except by writing, duly signed by both

parties hereto.

SECTION 14 – COMMISSION JURISDICTION

14.1. This Agreement and the respective rights and obligations of the parties hereunder, shall be subject to (1) Idaho Power's General Rules and Regulations as now or hereafter in effect and on file with the Commission and (2) to the jurisdiction and regulatory authority of the Commission and the laws of the State of Idaho.

14.2. The rates set forth in this Agreement and Schedule 26 are subject to the continuing jurisdiction of the Idaho Public Utilities Commission. The rates under this Agreement are subject to change and revision by order of the Commission upon a finding, supported by substantial competent evidence, that such rate change or revision is just, fair, reasonable, sufficient, non-preferential, and nondiscriminatory. It is the parties' intention by such provision that the rate making standards to be used in making any revisions or changes in rates, and the judicial review of any revisions or changes in rates, will be the same standards that are applicable to Idaho intrastate tariff rates.

SECTION 15 – COMMISSION APPROVAL

15.1. This Agreement shall become effective upon the approval by the Commission of all terms and provisions hereof without change or condition.

SECTION 16 – RIGHT OF FIRST REFUSAL

16.1. It is the parties' intent to provide Idaho Power with a Right of First Refusal applicable to Micron's purchase(s) of power and energy for the Micron Facility following the expiration or termination of the Electric Service Agreement. Accordingly, if Micron receives a legally enforceable proposal or proposals from a third party or parties offering to sell to Micron power and energy for the Micron Facility (the "Offer(s)"), which sale(s)

would commence after termination of the Electric Service Agreement, Micron will provide Idaho Power, to the extent permitted by law, with the following:

16.1.1. A copy of such third-party or parties Offer(s) including the rates and a description of the material terms and conditions upon which such sale(s) would be made; and

16.1.2. Documentation demonstrating to Idaho Power's reasonable satisfaction that the third-party seller or sellers making the Offer(s) are authorized under state and federal law to sell power and energy to the Micron Facility; and

16.1.3. Documentation demonstrating to Idaho Power's reasonable satisfaction that the potential third-party seller or sellers making the Offer(s) have the ability to deliver power either to the Micron Facility or to Idaho Power for delivery to the Micron Facility; and

16.1.4. Certification by Micron that it desires to purchase electric power and energy from such third-party seller or sellers in accordance with the rates, terms and conditions specified in the Offer(s).

16.2. Upon receipt of the above-described materials from Micron, Idaho Power will have sixty (60) days in which to notify Micron in writing whether or not it is willing to meet or better all of the material terms and conditions of the Offer(s) proposed by such third-party seller or sellers. If the Electric Service Agreement is still in effect and Idaho Power does not agree to meet or better such third-party's or parties' Offer(s), at Idaho Power's option, the Electric Service Agreement will be (1) amended to allow Idaho Power to serve the portion of Micron's load not served in accordance with the Offer(s) for the remaining term of the Electric Service Agreement, or (2) terminated in accordance with

paragraph 4.1 of the Electric Service Agreement.

16.3. The parties agree that the Right of First Refusal set forth hereinabove is not perpetual, but may be exercised by Idaho Power until Micron has received Offer(s), at one time or another, and whether or not such Offer(s) have been met or bettered by Idaho Power, for an aggregate total amount of power and energy equal to at least 18,000 kilowatts. The parties further agree that if Micron presents the third-party's or parties' Offer(s) to Idaho Power after termination of the Electric Service Agreement, the Right of First Refusal shall survive such termination.

IDAHO POWER COMPANY

By: JR Gale
Its: VP - Regulatory Affairs

MICRON TECHNOLOGY, INC.

By: Jose Eldredge
Its: Director of Facilities