

## BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

<b>IN THE MATTER OF THE APPLICATION</b>	)	
<b>OF IDAHO POWER COMPANY FOR</b>	)	<b>CASE NO. IPC-E-13-23</b>
<b>APPROVAL OF A SPECIAL CONTRACT</b>	)	
<b>WITH J.R. SIMPLOT COMPANY.</b>	)	<b>ORDER NO. 33071</b>
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Idaho Power filed an Application with the Commission on December 4, 2013, requesting that the Commission issue an Order approving special contract terms for electric service between Idaho Power and J.R. Simplot Company. Simplot filed an answer on February 5, 2014, disputing Idaho Power's contract language and requesting that the Commission include Simplot's suggested clauses in the contract. The Application was processed by Modified Procedure and comments were filed by all parties. On May 19, 2014, the Commission issued a final Order clarifying its position regarding the liability dispute between the parties and providing guidance as to the appropriate rate to be charged to Simplot under the contract. Order No. 33038. The parties were directed to re-examine and re-negotiate contract terms based on the Commission's findings.

On June 9, 2014, Simplot filed a Petition for Reconsideration. Simplot argues that the Commission's determinations regarding limitations of liability misconstrue Idaho law and lack evidentiary support in the record. Simplot takes exception to the Commission's directive for the parties to continue negotiations based on its findings. Simplot maintains that the Commission should have approved the special contract with an appropriate rate and without limitations of liability. Simplot further asserts that, at a minimum, "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. . . ." Petition at 5. On June 16, 2014, Idaho Power filed an answer to Simplot's Petition. Idaho Power states that Simplot has failed to demonstrate that the Commission's Order is unreasonable, unlawful, erroneous, or not in conformity with the law. Answer at 1.

By this Order, we deny reconsideration for the reasons set out below.

## BACKGROUND

### *Idaho Power's Application*

Idaho Power stated that, in spring 2013, a Simplot representative contacted Idaho Power requesting that the Company enter into negotiations for a special contract for Simplot's Caldwell plant. In response, Idaho Power drafted a special contract and the parties entered into negotiations regarding the specific terms. Idaho Power maintained that the Company and Simplot had reached agreement "as to nearly all of the terms and conditions of the contract, but have reached an impasse on certain provisions regarding limitations on liability." Application at 1.

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

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

### *Simplot's Answer*

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

Simplot also disputed Idaho Power's calculation of the rates included in the contract. Simplot maintained that, during negotiations, Idaho Power presented Simplot with a proposed rate design that would have resulted in an overall base rate of 3.937¢/kWh. However, in an attachment to its Application in this case, Idaho Power shows a base rate for Simplot of 4.243¢/kWh. Simplot asserts that the 4.243¢/kWh rate appeared for the first time in Idaho Power's Application to the Commission and that the Company included that rate without Simplot's prior knowledge. Comments at 3. Simplot states that "Idaho Power's offered rates are

15% higher than the average of the three current special contract customers' rates and 19% higher than the rates at Simplot's Don Plant, which has approximately the same level of power consumption and a similar load factor." Comments at 5.

Simplot further argued that "the cost of service study used to set Simplot's rate is vintage 2010 and is out dated [sic]." Simplot proposed a "compromise rate" of 4.197¢/kWh which Simplot claimed "more accurately reflects the fact that the Idaho Project will also be a special contract customer that takes power at the transmission, rather than the primary, voltage level." Comments at 3. In support of its compromise rate, Simplot pointed out that the Commission recently "declared that it is inappropriate to use the 2011 cost-of-service study to allocate rates." Comments at 6. Simplot asserted that its proposal would place Simplot "in a comparable position to the other special contract customers, and is therefore superior to Idaho Power's recommended rate, which has no basis in Commission precedent or rate-making principles." Comments at 7.

Although Simplot proposed a base rate of 4.197¢/kWh in its answer, Simplot modified its original position during the pendency of this proceeding and ultimately proposed a base rate of 3.699¢/kWh. Simplot asserted that its modified rate "would appropriately place Simplot's Idaho Project on the same footing as Idaho Power's other special contract customers and allow Simplot to receive the benefit of reduced electricity rates that should be associated with a switch from primary to transmission level delivery." Comments at 1.

#### ***Final Order No. 33038***

After a thorough review of the evidence and arguments of the parties, the Commission determined that, "contrary to Simplot's assertions, limitations of liability are not, *per se*, illegal and unenforceable in utility contracts." Order No. 33038 at 8. The Commission explained that *Idaho Code* § 61-302 mandates "every public utility [to] 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." The Idaho Supreme Court has stated that, "[i]n arriving at a conclusion as to what constitutes 'adequate, efficient, just and reasonable' service in any particular case, the relative rights of the utility and the public must be taken into consideration, for, under some circumstances, each may have to suffer some inconvenience or

loss.” *In re Application of Union Pac. R. Co., for Leave to Discontinue Agency at Montour, Idaho*, 64 Idaho 529, 532, 134 P.2d 599, 602 (1943).

With regard to permissible limitations of liability, the Commission noted that the Idaho Supreme Court recently stated “[t]he general rule sustaining agreements exempting a party from liability for negligence is subject to two exceptions: ‘(1) one party is at an obvious disadvantage in bargaining power; or (2) a public duty is involved (public utility companies, common carriers).’” *Jesse v. Lindsley*, 149 Idaho 70, 75, 233 P.3d 1, 6 (2008) (internal citations omitted). The Commission reasoned that, although courts are reluctant to allow those charged with a public duty to rid themselves of that obligation by contract, “[c]ourts are virtually unanimous that provisions limiting a public utility’s liability are valid so long as they do not purport to grant immunity or limit liability for gross negligence.” *Garrison v. Pacific Northwest Bell*, 45 Or.App. 523, 531, 608 P.2d 1206, 1214 (1980).

We reiterated Commission precedent which states that our authority to limit a public utility’s liability in connection with the provision of utility services “must follow our conscious exercise of discretion in a formal case proceeding or rulemaking in which we have had an opportunity to review the factual underpinnings for the claim that liability should be limited.” *In the Matter of Advice Letter No. 89-05 of Contel of the West, Inc.*, Order No. 22812 at 3. Ultimately, we found that exempting a public utility from the consequences of negligent conduct is not reasonable because the utility is charged with a public duty. Order No. 33038 at 11. “Idaho Power cannot abrogate its general duty to exercise reasonable care in operating its system to avoid unreasonable risks of harm to its customers.” *Id.* However, we found 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.” *Id.* We further found that limitations of liability regarding intentional tortious conduct or gross negligence are contrary to the public interest and, therefore, impermissible.

The Commission also offered guidance on the appropriate rate to be charged to Simplot by Idaho Power. We explained that the Commission has broad authority to regulate and fix the rates and charges assessed by Idaho Power. *Idaho Code* §§ 61-502, 61-503. “Not all differences in a utility’s rates and charges as between different classes of customers constitute unlawful discrimination or preference. . . .” *Application of Boise Water Corp.*, 128 Idaho 534, 539, 916 P.2d 1259, 1264 (1996). We stated that, “because each special contract customer is

considered a separate class with different conditions and contract terms affecting their rates, we find it unreasonable to determine a rate for Simplot by simply averaging the rates of Idaho Power's other special contract customers" as was recommended by Commission Staff and Simplot. Order No. 33038 11-12. We found it just and reasonable to direct the parties to utilize the Company's most recent cost-of-service study as the starting point in determining an appropriate rate because cost-of-service studies attempt to apportion to each customer class the various costs incurred by a utility in providing service to that class.

Idaho Power's Application requested that, if the Commission failed to adopt its proposals regarding limitations of liability, the Company be permitted to re-examine all terms of the special contract in light of the Commission's findings. Based on the findings in our Order, we granted Idaho Power's request.

## **ISSUES ON RECONSIDERATION**

### ***Legal Standards***

Reconsideration provides an opportunity for a party to bring to the Commission's attention any question previously determined and thereby affords the Commission with an opportunity to rectify any mistake or omission. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). Consistent with the purpose of reconsideration, the Commission's Procedural Rules require that petitions for reconsideration "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." Rule 331.01, IDAPA 31.01.01.331.01. Rule 331 further requires that the petitioner provide a "statement of the nature and quantity of evidence or argument the petitioner will offer if reconsideration is granted." *Id.*

The Commission may grant reconsideration by reviewing the existing record, by written briefs, or by evidentiary hearing. IDAPA 31.01.01.332. If reconsideration is granted, the record must be finally submitted within 13 weeks after the deadline for filing petitions for reconsideration. *Idaho Code* § 61-626(2). The Commission must issue its order upon reconsideration within twenty-eight (28) days after the matter is finally submitted for reconsideration. *Id.*

### ***Simplot's Petition***

On June 9, 2014, Simplot filed a Petition for Reconsideration. Simplot's Petition "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." Petition at 2.

Simplot maintains that the Commission's Order misconstrues Idaho law regarding limitations of liability and unlawfully expands the Commission's authority. Although Simplot acknowledges that the case it relies on was issued prior to the enactment of Title 61, Simplot argues that neither the enactment of the Public Utilities Law nor subsequent cases have changed the Idaho Supreme Court's position that limitations of liability are invalid. *See Strong v. Western Union Telegraph Co.*, 18 Idaho 389, 109 P. 910 (1910). Simplot further states that the Commission's findings are not supported by substantial evidence.

Simplot also argues that the Commission's findings subject Simplot to unjustified discrimination. "Simplot is aware of no other customers that have been *required* to agree to limitations of liability to obtain utility service." Petition at 14. In support of its proposition, Simplot cites Idaho Power's Commission-approved Rules A and J. Simplot notes that Idaho Power has other special contract customers with "broad limitations of liability," but distinguishes itself from those special contract customers because "none of those customers objected" to inclusion of such language in their contracts. Petition at 15.

Finally, Simplot asserts that the Commission's Order is unreasonable because it fails to resolve the case. Simplot maintains that the Commission should have approved the special contract with an appropriate rate and without limitations of liability.

### ***Idaho Power's Answer***

Idaho Power argues that Simplot has failed to demonstrate that the Commission's final Order is unreasonable, unlawful, erroneous or not in conformity with the law. The Company states that the Commission regularly pursued its authority and acted within its discretion. Idaho Power maintains that *Idaho Code* §§ 61-305, -507 and -520 grant the Commission authority to set rates, prescribe rules and create just and reasonable standards for Idaho's public utilities. Answer at 2.

Idaho Power asserts that Simplot misconstrues Idaho law and fails to recognize that Idaho Power seeks to limit its liability – not create an exemption from liability. The Company argues that, “[a]bsent 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.” Answer at 4. Idaho Power proposed new limitation of liability language which it believes is responsive to the Commission’s direction provided in Order No. 33038.

Idaho Power further argues that a difference in contract terms between special contract customers does not amount to discrimination. The Company states that, even within the cost-of-service study, each special contract customer is an individual and distinct rate class. Answer at 8. “Special contract customers are uniquely situated and warrant individual consideration from both regulatory and ratemaking perspectives.” *Id.*

### **FINDINGS AND CONCLUSIONS**

The Idaho Public Utilities Commission has jurisdiction over Idaho Power Company, an electric utility, and the issues raised in this matter pursuant to the authority and power granted it under Title 61 of the Idaho Code and the Public Utility Regulatory Policies Act of 1978 (PURPA). Specifically, the Commission has authority pursuant to *Idaho Code* § 61-520 to “fix just and reasonable standards, classifications, regulations, practices, measurements or service to be furnished, imposed, observed and followed by all electrical, gas and water corporations. . . .”

After a thorough review of the underlying record, Simplot’s Petition for Reconsideration and Idaho Power’s answer, we find that Simplot has failed to establish that Order No. 33038 is unreasonable, unlawful, erroneous or not in conformity with the law. Simplot bases its entire Petition on a case that was decided prior to the adoption and implementation of the Public Utilities Law. Idaho Code amply provides authority for the Commission to establish rates, regulations, contracts and practices; prescribe rules and regulations for the performance of any services provided by a public utility; and fix just and reasonable standards, classifications, regulations and practices to be followed by a public utility. *See Idaho Code* §§ 61-305, -507 and -520.

Simplot’s argument that *Idaho Code* § 61-702 applies to limitations of liability and imposes a requirement that the utility be liable for all loss, damages or injury is misplaced. Section 61-702 provides for a cause of action against any act by the utility that is prohibited or has been declared to be unlawful. The statute does not expressly or impliedly prohibit the use of



limitations of liability nor does it override the authority granted to the Commission to prescribe rules and regulations and fix just and reasonable standards.

Moreover, the Commission's findings in Order No. 33038 are supported by thorough analysis and substantial evidence. Contrary to Simplot's assertions, the Idaho and regional case law is clear that exemptions from liability are disfavored but limitations of liability should be considered with regard to the facts and circumstances of each case. We find that Idaho Power's revised proposal for Section 11 of its contract with Simplot (as provided in its Answer) is responsive to the parameters set in Order No. 33038. We find the language regarding limitations of liability just and reasonable.

Finally, Simplot's argument that anything other than rates similar to other special contract customers amounts to discrimination is entirely without merit. As we previously stated, "each special contract customer is considered a separate class with different conditions and contract terms affecting their rates." Order No. 33038 at 11. Differentiation between classes of customers does not constitute unlawful discrimination when it is based on conditions of service, cost of service, or differing terms required to serve each class of customer. *See Application of Boise Water Corp.*, 128 Idaho 534, 916 P.2d 1259 (1996); *Agricultural Products Corp. v. Utah Power & Light Co.*, 98 Idaho 23, 557 P.2d 617 (1976).

Simplot does little more on reconsideration than rehash the arguments provided in the underlying proceeding and complain that the Commission failed to rewrite the contract between Idaho Power and Simplot. Special contracts between Idaho Power and its large customers are individually negotiated between the parties to the contract. Because special contracts have many moving parts and pieces based on the needs of the customer and abilities of the utility, we decline to rewrite the contract before giving the parties to the contract an opportunity to work out their differences in light of Commission direction. We continue to find that this is the most reasonable approach. However, we approve the proposed Section 11 language included in Idaho Power's answer and direct the parties to implement these terms and consider the impact on the remaining disputed contract terms.

We find that Simplot has failed to establish that Order No. 33038 is unreasonable, unlawful, erroneous or not in conformity with the law. We further find that the conclusions of Order No. 33038 are supported by substantial and competent evidence. Therefore, we deny Simplot's Petition for Reconsideration.



## ORDER

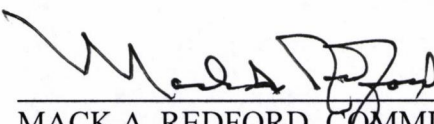
IT IS HEREBY ORDERED that the Petition of J.R. Simplot Company for Reconsideration of Order No. 33038 is denied, as more particularly described herein.

IT IS FURTHER ORDERED that Idaho Power's revised proposal for Section 11 of its contract with Simplot (as provided in its answer) is approved.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this Case No. IPC-E-13-23 may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

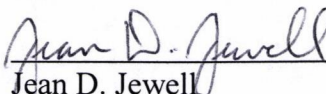
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 7<sup>th</sup> day of July 2014.

  
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PAUL KJELLANDER, PRESIDENT

  
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MACK A. REDFORD, COMMISSIONER

  
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MARSHA H. SMITH, COMMISSIONER

ATTEST:

  
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Jean D. Jewell  
Commission Secretary

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