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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

| | | |
|---|---|---|
| IN THE MATTER OF | ) | Case No. GNR-E-01-02 |
| | ) | |
| CABLE ONE, INC., | ) | |
| | ) | OPENING BRIEF OF CABLE ONE |
| Petitioner, Complainant, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| IDAHO POWER COMPANY, INC. | ) | |
| | ) | |
| Respondent. | ) | |

## STATEMENT OF FACTS

By a written Stipulation filed with the Commission on December 19, 2001, the parties agreed that the following facts may be considered by the Commission as true for the purpose of this proceeding:

1. Cable One, Inc. is a Delaware Corporation authorized to do business in the State of Idaho.

2. Cable One provides cable television service to customers in Idaho communities which are within the electric service territory of Idaho Power.

3. Cable One offers high-speed Internet access to its customers.

4. Idaho Power Company is an Idaho Corporation and is an electrical corporation within the meaning of the Public Utilities Law and is a public utility within the meaning of Idaho Code § 61-538.

5. Idaho Power provides to Cable One pole attachment service in its electric service territory. Cable One has wires and auxiliary equipment attached to poles owned or controlled, in whole or in part, by Idaho Power.

6. Commencing in approximately December 2000 and continuing into October 2001, Cable One and Idaho Power negotiated for the purpose of agreeing on the rates for pole attachments as above described.

7. Idaho Power and Cable One are unable to agree on the rates for pole attachments and, accordingly, the Commission has jurisdiction to establish the rate Idaho Power may lawfully charge for the provision of pole attachment service.

The Petition filed by Cable One sets out certain other matters which are discussed in more detail below. Idaho Power's Answer does not deny these averments but says only, "…such allegations are contentions of law and speak for themselves." These matters are:

1. At the federal level, cable pole attachments are governed by Section 224 of the Communications Act of 1934, as amended. (47 U.S.C. 224.) Section 224 was adopted in the Communications Act Amendments of 1978, Public Law No. 95-234. Pursuant to Section 224 a State may certify to the Federal Communications Commission ("FCC") that it regulates rates for pole attachments in which event the FCC has no jurisdiction over pole attachment issues arising

in that State. The State of Idaho so certified to the FCC following enactment of Idaho Code 61-538 in 1983.

2. In 1984 the Commission decided its first pole attachment rate case, Case No. U-1008-206, *In the Matter of the Washington Water Power Company v. Benewah Cable Company et. al.*, Order No. 19229 ("*Benewah*"). In the course of resolving that dispute the Commission derived a methodology for calculating pole rates which was consistent with Idaho Code 61-538. The methodology adopted by the Commission in *Benewah* can generally be described as follows:

$$\text{"Net Cost of a Bare Pole} \times \text{Annual Carrying Charge} \times \frac{\text{Space Occupied}}{\text{Total Usable Space}} = \text{Rate"}$$

3. In a May 21, 1985, response to the FCC confirming its previous certification, the Commission represented that the methodology employed in the *Benewah* case constituted the "specific methodology" required by newly-adopted FCC regulations. (*See* Exhibit 4, page 8, Petition of Cable One.)

4. In its negotiations with Cable One, Idaho Power took the position that it was not bound by the *Benewah* methodology established by this Commission and that it intended to use a new and different rate methodology. (*See* Exhibit 1, page 17, Petition of Cable One.) The methodology advanced by Idaho Power is virtually identical to a formula adopted by the FCC to implement a 1996 amendment to Section 224. (See *Implementation of Section 703(c) of the Telecommunications Act of 1996,* CS Docket No. 97-151, 13 FCC Rcd 6777 (1998).) This new rate methodology did not supplant the FCC's original rate formula, which is very similar to the *Benewah* methodology and remains in full force and effect, but instead applies only to attachments made by telecommunications carriers and cable television systems which engage in the provision of telecommunication services. ("Telecommunications means the transmission, between or among points specified by the user, of information of the user's choosing, without

change in the form or content of the information as sent and received." 47 U.S.C. 153(43).) The so-called "telcom formula" can be expressed as follows:

$$\text{"Pole Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{Pole Height}} \times \frac{\text{Net Cost of Bare Pole}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate"}$$

$$\text{"Pole Usable Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \frac{\text{Total Usable Space}}{\text{Pole Height}} \times \text{Net Cost of Bare Pole} \times \text{Carrying Charge Rate"}$$

$$\text{"Pole Usable Space Factor} + \text{Pole Unusable Space Factor} = \text{Rate"}$$

This formula produces a much higher attachment rate than the *Benewah* methodology. In fact, this formula can result in rates which are at least twice and as much as three times as high as rates produced by the original formula.

5. Cable One pointed out to Idaho Power that, not only does their proffered methodology differ markedly from the Commission's methodology as set forth in *Benewah*, but also that Cable One offers no telecommunications services. (*See* Exhibit 1, pages 7-8, Petition of Cable One.) Idaho Power responded that it intended to use the new formula no matter what services Cable One was providing. (*See* Exhibit 1, page 17, Petition of Cable One.) Cable One thereupon filed its Petition.

## SUMMARY OF ARGUMENT

States are authorized to regulate the rates, terms and conditions of pole attachments if they certify to the FCC that they do, in fact, so regulate. The FCC's rules implementing Section 224 of the Communications Act of 1934, as amended, require that a state's certification must include, among other things, a representation that the state has adopted a "specific methodology" for the resolution of pole attachment disputes. In its 1985 certification to the FCC the

Commission cited the rate formula used in its 1984 decision in the *Benewah* case as the "specific methodology" in use in Idaho. This methodology has been used by cable operators and public utilities alike for the ensuing sixteen years to calculate pole attachment rates. By adoption and by use this methodology is a "rule" as that term is defined in the IDAPA. Idaho Power is now seeking to use a totally different methodology to calculate pole attachment rates. Since the instant proceeding is a two-party adjudication, and not an all-party rulemaking, Idaho Power must be ordered to calculate the rate it charges to Cable One using the Commission's established methodology.

## ARGUMENT

### The Public Utilities Commission Must Order Idaho Power To Use The Existing Rate Methodology

#### A. Idaho has a well-established specific rate-setting methodology in place.

##### 1. Idaho opted to regulate pole attachments in lieu of the FCC.

The present dual federal-state scheme for regulating the rates, terms and conditions of attachments to the poles owned by public utilities had its genesis in 1978. Faced with mounting evidence of anti-competitive conduct by telephone and electric utilities in their dealings with cable television operators with regard to pole attachments, Congress added a new Section 224 to the Communications Act of 1934 to address this issue. (*See* Pole Attachment Act of 1978, P. L. No. 95-234, 92 Stat. 33, §6; codified at 47 U.S.C. 224; *see* also H.Rep. No. 721, 95th Cong., 1st Sess. (1977).) Section 224 mandated a regulatory scheme for the FCC to follow in regulating the rates, terms and conditions of pole attachments. However, in a bow to federalism, Congress also provided that any State which regulated pole attachments could retain exclusive jurisdiction by certifying to the FCC that it did, in fact, regulate the rates, terms and conditions of pole attachments and that it considered the interests of the customers of both the attaching entity and the utility which owned the poles. (47 U.S.C. 224(c); s*ee* S. Rep. No. 95-580, 95th Cong., 1st

Sess. (1977), at 17; *see* also *First Report and Order* in CC Docket 78-144, 68 FCC2d 1585 (1978), at ¶ 50.)

In 1983, the Idaho legislature added Section 61-538 to the Idaho Code. That provision directs the Commission to resolve disputes between cable operators and public utilities over pole attachment rates, terms and conditions. The only guidance the Idaho statute gives to the Commission regarding rates is that the attachment rate should be no less than the utility's incremental cost of hosting the attachment and no more than an attributable share of the utility's capital costs and operating expenses. Based on this statute, the Commission was able to certify that it regulated the rates, terms and conditions of pole attachments. This bare-bones certification was sufficient to place Idaho on the FCC's list of states which had asserted jurisdiction over pole attachments.

**2. The Commission adopted a specific rate methodology.**

The first (and only) rate decision known to have been issued by the PUC pursuant to Section 61-538 was the *Benewah* case decided in 1984. The disputing parties in that case offered conflicting assumptions and inputs for a rate calculation under the general cost-sharing policy expressed in Section 61-538. The Commission had to choose between these competing assertions in order to arrive at a method of calculating the proper pole rate. In doing so the Commission made decisions on virtually every aspect of a rate formula, thus adding precision to the vague formulation contained in Section 61-538. Thus, for example, decisions were made as to which accounts should be used in calculating annual operating expenses, how much space should be assigned to the cable pole attachment, and how much of the so-called "neutral space" should be assigned to "usable space." This formulation tracked the FCC's original methodology quite closely. The specific decisions made in *Benewah* allowed utilities and cable operators to

thereafter calculate pole attachment rates by inputting the particular utility's numbers into the rate formula.

At about the same time, the cable industry was telling Congress that some state certifications under the lax standard contained in Section 224 masked non-functional regulatory schemes. In response to this argument, Congress amended Section 224 in 1984, adding a new paragraph (c)(3). (*See* Cable Communications Policy Act of 1984, P. L. No. 98-549, 98 Stat. 2779, §4.) This added paragraph provides that a State will not be considered to be regulating the rates, terms and conditions for pole attachments unless it has issued and made effective rules and regulations implementing the State's regulatory authority and has a process in place such that it can take final action on individual complaints within the time limits specified in the statute. In the rulemaking proceeding implementing this new provision, the FCC was asked to impose a uniform rate formula on the states. Although the FCC declined to take this action, it did state that "[w]hile we will not define the [rate-setting] methodology to be followed by the state, we believe that the rules and regulations should include a specific methodology which has been made publicly available in the state." (*Report and Order* in MM Docket No. 84-1296, 58 RR 2d 1 (1985), at ¶ 143.) The rule adopted by the FCC says that a State will be certified if, among other things, "[i]t has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state)...." (47 CFR 1.1414(a)(3).) Thus, for the first time, the FCC required a State to certify not only that it regulated the rates, terms and conditions of pole attachments, but also that it had adopted a "specific methodology" for calculating rates.

Subsequent to the adoption of 47 CFR 1.1414(a)(3), the FCC wrote to states which had previously certified that they had the authority to regulate pole attachments asking for the additional information which the new rule requires. In the case of Idaho, the FCC wrote a letter to the Commission on May 3, 1985, stating that "[w]ith the exception of a statement about methodology, your certification already includes all of the required information. Accordingly, if your state's rules and regulations include a specific methodology which has been made publicly available in the state, please so certify to the Commission by May 30, 1985." (*See* Attachment 1) In a responsive letter to the FCC dated May 21, 1985, the Commission cited the rate-setting formula adopted in *Benewah* as its "specific methodology." (*See* Exhibit 4, pages 8-9, Petition of Cable One.)

Although there apparently was some doubt in the Commission's mind whether a "specific methodology" was supposed to contain a substantive component in order to satisfy the FCC's requirements, there is no doubt that a substantive rate methodology was adopted in *Benewah* and that, of equal importance, the Commission represented it as such to the FCC as part of its certification. Moreover, ever since *Benewah* was decided 17 years ago, Idaho cable operators and public utilities alike have relied on that methodology to calculate and negotiate pole attachment rates. To the best of our knowledge, no utility has suggested using a different rate formula until the present dispute arose.

**B. The Benewah methodology cannot be changed in an adjudicatory proceeding.**

Idaho Code 61-538 confers jurisdiction upon the Commission to resolve disputes "[w]henever a public utility and a cable television company are unable to agree upon the rates, terms or conditions for pole attachments…" The section contemplates a two-party dispute resolution proceeding between a utility and a cable company who are unable to agree on rates.

Section 61-538, however, does not confer jurisdiction to abandon a certified methodology in favor of an entirely new methodology in the context of an adjudicatory proceeding. As is demonstrated below, the consideration, and potential adoption, of a new, prospective methodology must be undertaken in a proceeding that is properly noticed to the public and in which all interested parties have an opportunity to participate.

**1. The Benewah methodology is a "rule" under the Idaho Administrative Procedures Act.**

The *Benewah* methodology has been certified to the FCC as the methodology that meets the federal standard of a "specific methodology which has been made publicly available in the state." (47 C.F.R. 1.1414(a)(3).) Since its adoption in 1984 the *Benewah* methodology has been consistently employed by utilities and cable companies in Idaho. (*See* Response of the Idaho Cable Telecommunications Association to Idaho Power's Limited Objection to Petition to Intervene.) Thus, although not originally promulgated in accordance with Idaho Administrative Procedures Act ("IDAPA") requirements, the methodology has become, in effect, a "rule" within the meaning of the Act. There a "rule" is defined as, "…the whole or part of an agency statement of general applicability…that implements, interprets or prescribes: (a) law or policy; or (b) the procedure or practice requirements of an agency.…" (Idaho Code 67-5201(19).) The *Benewah* methodology has been certified to the FCC as being applicable to the setting of pole attachment rates, and it implements and interprets the law set forth in Idaho Code 61-538. Moreover, it has been accepted and applied as a governing precept. Thus, it is indisputably a "rule" for purposes of the IDAPA.

This conclusion is further bolstered by reference to judicial interpretations of the definition of "rule" under the federal Administrative Procedure Act, a definition which is virtually identical to that found in the IDAPA. (5 USC 551(4).) In distinguishing between a

"rule" and a "general statement of policy" the courts look to whether an agency statement has a "binding effect" on members of the public. Thus, even a general statement of policy which binds private parties will be considered a "rule". (See, *e.g., Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33 (D.C.Cir.1974).) The cases following this line of reasoning have emphasized the importance of the agency's own characterization of its action. (See, *e.g.*, *Patients for Customized Care v. Shalala*, 56 F.3d 592 (5th Cir.1995); *Amrep Corp. v. FTC*, 768 F.2d 1171 (10th Cir.1985), *cert. denied*, 475 U.S. 1034 (1986).) Thus, even if a binding policy is not adopted using the traditional rulemaking process, it can still be deemed a rule because the agency intended that it be so. That has been the case here since 1985. The policy of the *Benewah* case became a "rule" of general applicability and "binding effect" when the Commission certified to the FCC, pursuant to Section 224 (c)(3), that the methodology used in that case was the Commission's "specific methodology."

**2. A new rule, or a change to an old rule, must be adopted pursuant to IDAPA promulgation requirements.**

The IDAPA contains detailed and specific notice and process requirements, all aimed at insuring that interested parties receive notice of, and an opportunity to comment on, changes in agency policy. (*See* Idaho Code 67-5221, 67-5222). These procedures are to be followed "[p]rior to the adoption, amendment or repeal of a rule…" (Idaho Code 67-5222(1); *see* also Idaho Code 61-622 which specifically instructs the Commission to hold public proceedings for any changes in practices, rules and regulations.)

The Idaho Supreme Court has considered the question of under what circumstances an administrative agency may create or amend policy without being subject to the rulemaking procedures of the IDAPA. (*See Minidoka Memorial Hosp. v. Idaho Dep't of Health & Welfare*, 108 Idaho 344, 699 P.2d 1358 (1985); *Tomorrow's Hope v. Idaho Dep't of Health & Welfare*,

124 Idaho 843, 864 P.2d 1130 (1993).) In *Tomorrow's Hope*, the Court explained that an agency attempt to "redefine a legislative directive" would "in effect, create a new rule without having properly promulgated it." 124 Idaho at 845.

Abandoning the current *Benewah* methodology in favor of the "telcom formula", or some variant thereof, would constitute a significant redefinition of the general guidelines contained in Idaho Code 61-538 with respect to the setting of cable attachment rates. Not only is the "telcom formula" conceptually different from the methodology which has been in existence since 1984, it produces markedly different results in the form of rates that are nearly three times as high as the existing rates. It would, therefore, "effect a substantive change in direction from the agency's existing…policy." (*Tomorrow's Hope*, 124 Idaho at 846.) Accordingly, a proposed change to the existing methodology could only be undertaken in accordance with the promulgation requirements of the IDAPA, and not in the context of an individual rate case. (Idaho Code 67-5231(2) precludes an analogous challenge to the *Benewah* methodology.)

### C. Idaho Power Must Use The Methodology Previously Adopted by the Commission

In view of the fact that the Commission adopted a rate-setting methodology of general applicability in 1984 and confirmed it in 1985, and that this methodology is a "rule" under the IDAPA, Idaho Power must apply this methodology in arriving at a pole attachment rate for Cable One. If Idaho Power believes that a different methodology should be adopted, and that such a methodology would be in compliance with Idaho Code 61-538, the path it should take is to petition the Commission for the initiation of an appropriate proceeding, not to seek change in the methodology on an *ad hoc* basis in an adjudicatory proceeding. In the present dispute, however, Idaho Power has no choice but to use the methodology set forth in *Benewah*, which was

represented to the FCC as being the Commission's "specific methodology," and since 1984 has been consistently relied upon by all affected parties in Idaho.

Finally, it bears repeating that, even under the FCC's dual-formula scheme, a scheme which does not exist in Idaho, a *Benewah*-type formula would apply because Cable One does not offer any telecommunications services.

## CONCLUSION

Based on the reasons and authorities cited herein, the Commission should hold that Idaho Power is required to follow the *Benewah* methodology until such time as the methodology is changed or modified by the Commission in a proper proceeding.

Dated this ___ day of January, 2002.

MCDEVITT & MILLER LLP

_____
Dean J. Miller

FLEISCHMAN AND WALSH, L.L.P.

_____
Stuart F. Feldstein

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ___ day of January, 2002, true and correct copies of the foregoing OPENING BRIEF OF CABLE ONE were forwarded with all required charges prepaid, by the method(s) indicated below to the following:

| | | |
|---|---|---|
| Weldon Stutzman | Hand Delivered | □ |
| Idaho Public Utilities Commission | U.S. Mail | □ |
| 472 W. Washington | Fax | □ |
| Boise, Idaho 83702 | Fed. Express | □ |
| | | |
| Larry D. Ripley, Esq. | Hand Delivered | □ |
| IDAHO POWER CO. | U.S. Mail | □ |
| PO Box 70 | Fax | □ |
| Boise, Idaho 83707 | Fed. Express | □ |
| | | |
| Ronald Williams, Esq. | Hand Delivered | □ |
| 1015 West Hays | U.S. Mail | □ |
| Boise, Idaho 83702 | Fax | □ |
| | Fed. Express | □ |

DATED this _____ day of January, 2002.

_____
Stephanie Geraghty
Legal Assistant