DECISION MEMORANDUM

TO: COMMISSIONER KJELLANDER
COMMISSIONER SMITH
COMMISSIONER HANSEN
COMMISSION SECRETARY
COMMISSION STAFF

FROM: DON HOWELL

DATE: SEPTEMBER 19, 2003

RE: EIGHT APPLICATIONS FOR APPROVAL OF SERVICE TERRITORY AGREEMENTS BETWEEN UNITED ELECTRIC CO-OP AND THREE CITIES AND FIVE CO-OPS, CASE NO. GNR-E-03-4/5/6/7/8/9/10

On June 20, 2003, United Electric Co-op and eight other parties filed eight Applications seeking the Commission's approval of their respective Service Territory Agreements. These Agreements were entered into pursuant to the Electric Supplier Stabilization Act (ESSA) codified at *Idaho Code* §§ 61-332 *et seq*. The eight other parties include three cities (Rupert, Heyburn and Burley) and five electric cooperatives (East End Mutual Electric Company, Farmers' Electric Company, Raft River Rural Electric Cooperative, Riverside Electric Company, and Southside Electric). United is the successor Co-op entity following the consolidation of Rural Electric and Unity Light & Power.

On July 7-9, 2003, the Commission issued Notices of Applications and Notices of Modified Procedure requesting public comment on the Agreements. Order Nos. 29280, 29281, 29284, 29287, 29288, and 29289. The only party to file comments in these cases was the Commission Staff.

THE ESSA

The purpose of the ESSA is to promote harmony among and between electric suppliers furnishing electricity within Idaho. More specifically, the ESSA: (1) prohibits the "pirating" of consumers already served by another supplier; (2) discourages duplication of electric facilities; (3) actively supervises certain conduct of electric suppliers; and (4) stabilizes the territories and consumers served by such electric suppliers. *Idaho Code* § 61-332. Under the ESSA, an "electric supplier" is any public utility, cooperative, or municipality supplying or intending to supply electric service to a consumer. *Idaho Code* § 61-332A(5).

Idaho Code § 61-333(1) provides that any electric supplier may contract with any other electric supplier for the purpose of "allocating territories, consumers, and future consumers . . . and designating which territories and consumers are to be served by which contracting electric supplier." Under the ESSA, all agreements or contracts for the allocation of service territories or consumers shall be filed with the Commission. This section further provides that the Commission may, after notice and opportunity for hearing, "approve or reject contracts between cooperatives, . . . [and] between municipalities and cooperatives. The commission shall approve such contracts only upon finding that the allocation of territories or consumers is in conformance with the provisions and purposes of this act." *Id.; Idaho Code* § 61-334B(2).

Idaho Code § 61-334B(1) also allows the Commission to grant an exception to the anti-pirating provision of the ESSA. Before granting such an exception, the Commission must find "that granting a request is consistent with the purposes of" the ESSA.

THE CITY APPLICATIONS AND STAFF COMMENTS

The three Cities each had a written Service Territory Agreement with United that pre-dated the 2000 and 2001 amendments to the ESSA. The Parties request that the Commission approve these prior Agreements. The City Applications and Staff comments are set out below.

A. The United-Burley Application

1. <u>The Application</u>. United and Burley asked the Commission to approve their "Territory Service Agreement" dated May 21, 1985 and two subsequent "amendments" dated November 1, 1996[1] and May 6, 2003, respectively. The 1985 Agreement and its subsequent amendments establish service territories for each party. The Agreement and the amendments recognize that each party serves customers located in the other party's service area.

The 1996 amendment provides that the City shall have the right to install its own streetlights, pumps and other facilities for the delivery of city services located within United's service territory. Exh. 2, ¶ 8. Paragraph 7 of the 1996 amendment also provides for the parties to exchange United's customer NORCO with the City's customer Ag-West.

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[1] The first amendment (identified as Exhibit 2 to the Application) is actually a "Service Area Agreement" entered into between Rural Electric Company and the City of Burley. As previously mentioned, United is the successor to Rural Electric. This Agreement purportedly supersedes a Service Area Agreement between Burley and Rural Electric dated June 6, 1988.

The Application states that the initial Agreement and the two amendments were negotiated to settle and establish service territories between the parties, to provide stability and safety in service to customers, and to eliminate duplication of services. Appl. at ¶ 3.

2. Staff Comments. The Staff recommended approval of the 1985 Agreement and the subsequent amendments. Staff commented that the Agreement between the parties appear to provide the least cost service option for customers. In addition, the Agreement complies with the ESSA by drawing boundaries that partially identify each supplier's service territory. Staff believes that the Agreement complies with the purposes and provisions of the ESSA.

Staff also confirmed that the customer exchange involving NORCO and Ag-West was completed in the summer of 2002. Under these circumstances, Staff stated that granting an "exception" to the anti-pirating provision of the ESSA appears reasonable. *See Idaho Code* § 62-334B(1).

Commission Decision: Does the Commission find that the exchange of customers is consistent with the purposes of the ESSA as set forth in *Idaho Code* § 61-332? Does the Commission grant an "exception" to the anti-pirating provision contained in Section 61-332B? Does the Commission find that the allocation of territories and consumers is in conformance with the provisions and purposes of the ESSA?

B. The United-Heyburn Application

1. The Application. The parties ask that the Commission approve their "Service Area Stabilization and Wheeling Agreement" dated February 14, 1996. In the Agreement, United's predecessor Rural Electric and the City agreed to establish separate service territories for each party in Minidoka County. The Agreement also addresses the exchange of five customers and United agreed to transfer distribution facilities serving the affected customers. Exh. 1, ¶¶ 1-2, 4. One customer is transferred from United to the City's service, and four customers moved from United to the City's service, when the City annexes the underlying properties. *Id.* at ¶ 1(C) and (E). Another customer was to be temporarily transferred. The Agreement provides that the City shall have the right to install its own street lamps, pumps and other facilities for the delivery of city services located within United's service territory. *Id.* at ¶ 5. United also agrees to deliver electric service to the City's facilities within United's service area.

The Application states that the Agreement was negotiated to settle and establish service territories between the parties, to provide stability and safety to consumers, and to eliminate duplication of services. Appl. at ¶ 3. Because the Agreement predates the 2000 and 2001 amendments to the ESSA, the parties now request that the Commission approve the Agreement.

2. Staff Comments. The Staff recommended approval of the Agreement. The Staff noted that the Agreement appears to provide the least cost service option for customers and complies with the ESSA by drawing boundaries that identify each supplier's service territory. The Staff asserts that the Agreement fulfills the purposes and provisions of the ESSA.

With regard of the transfer or exchange of customers, the Staff made the following report. The single residential customer who was to be transferred from United to the City of Heyburn (¶ 1.C) was never transferred because the residence was removed. Another customer who was to be "temporarily" transferred from United to the City (¶ 1.D) was not transferred because the parties decided not to extend the "neutral" line to serve this customer. Extension of the facilities would have caused an unsafe clearance condition. Finally, the four customers in the City's service territory that were being served by United (¶ 1.E) are still being served by United because that area has not yet been annexed by the City. If the annexation does occur, Staff believes that it would be appropriate for the parties to obtain the consent of the customers. If the transfers of customers take place, the Staff believes that an exception to the anti-pirating provision of the ESSA appears reasonable.

Commission Decision: Does the Commission wish to pre-approve the transfer of customers? If not, should the parties seek an exception from the Commission when the transfer is to take place? Should customer consent be obtained before the transfer pursuant to *Idaho Code* § 61-334B(2)? Does the Commission find that the allocation of territories and consumers is in conformance with the provisions and purposes of the ESSA?

C. The United-Rupert Application

1. The Application. On April 2, 1985, the City of Rupert and United's predecessor entered into a "Service Area Agreement." On May 6, 2003, the parties amended their underlying Agreement to establish a boundary line for allocating territories, consumers and future consumers. The 1985 Agreement addresses the exchange of customers and facilities resulting from the realignment of the two service territories. Exh. 1 at ¶ 2. Paragraph 2 provides that following the alignment of service territories, a supplier assigned to a territory may ask the other party to disconnect service to a customer served by the non-assigned supplier. The parties agree to avoid

inconvenience to affected customers. *Id.* If either party fails to switch a customer, the refusing party shall pay the other $50.00 per day until the customer is exchanged.

The 1985 Agreement also provides that if the City annexes land that lies within United's service area, then United shall be allowed to continue to serve "existing future consumers in said service territory. [T]he City agrees that it will not exercise the power of condemnation . . . as to any of [United's] service area as established under this Agreement. . . ." *Id.* at ¶ 3. The Agreement also provides that United will deliver power to city facilities in any annexed area served by United.

In the 2003 amendment, the parties modified the initial Agreement by changing the boundary line dividing the parties' service territories. Exh. 2. The amendment also identified two customers "who are in close proximity to the service area of the City of Rupert and [they] may continue to be served by United, if in fact they are in the Rupert service area." Amendment at 2. All other terms and conditions of the initial Agreement remain in full force and effect.

The Application states that the Agreement and the amendment were negotiated to settle and establish service territories between the parties, to provide stability and safety in service to consumers, and to eliminate the duplication of services. Appl. at ¶ 3. Because the initial Agreement predated the 2000 and 2001 amendments to the ESSA, the parties now request the Commission approve the Service Area Agreement and its amendment.

2. Staff Comments. Staff recommended approval of the 1985 Agreement and its amendment. Staff noted that the Agreement appears to provide the least cost service option for customers and complies with the ESSA by drawing boundary lines that identifies each utility's service territory. Although the Agreement provides for the orderly exchange of customers who were initially in the other party's service area, Staff did not know whether the exchanges had been completed. Nevertheless, Staff believed that the Agreement contained in the Application would support the granting of an exception to the anti-pirating provision of the ESSA.

Commission Decision: Does the Commission wish to pre-approve the transfer of customers? If not, should the parties seek the Commission's permission when the transfer is to take place? Should customer consent for the transfer be obtained as a condition for the exchange pursuant to *Idaho Code* § 61-334B(2)? Does the Commission find that the allocation of territories and consumers is in conformance with the provisions and purposes of the ESSA?

THE CO-OP APPLICATIONS AND STAFF COMMENTS

In the five Co-op Applications, the parties state that they had pre-existing oral agreements regarding the allocation of territories and customers. The parties have now reduced their oral agreements to writing. The parties are electric non-profit corporations organized under the laws of Idaho. The Co-ops supply electric service to the respective consumers in adjacent and contiguous service territories.

A. United-East End Mutual Electric Application

1. The Application. On May 30, 2003, East End and United entered into their Stabilization Agreement. Each party is responsible for serving all new customers in their defined service areas. Exh. 1 at ¶ 2. To the extent that either party is currently providing service to consumers within the service area assigned to the other party, the existing supplier shall continue to serve these pre-existing customers. *Id.* at ¶ 3; Exh. 2.

The Agreement recognizes that United has a substation located in the East End service territory. The parties agree that United is entitled to leave "the substation in the East End territory without being in violation of the Agreement, provided however, United shall not expand its customer base in the East End territory." *Id.* at ¶ 11. The parties assert that their Agreement comports with the purposes of the ESSA and urge the Commission's approval.

2. Staff Comments. The Staff stated that the Agreement appears to provide the least cost service option for customers and complies with the ESSA by drawing boundaries that partially identify each supplier's service territory. The Staff also recognized that the Agreement provides that customers located in the other supplier's service territory may continue to be served by their existing supplier. ¶ 3; Exh. 2.

Commission Decision: Does the Commission find that the allocation of territories and consumers is in conformance with the provisions and purposes of the ESSA?

B. United-Farmers' Electric Application

1. The Application. On April 23, 2003, United and Farmers entered into their Stabilization Agreement. In the Agreement, the parties established separate territories for each party. Each party is responsible for serving all new customers in their defined service areas. Exh. 1 at ¶ 2. To the extent that either party is currently providing service to consumers within the service area assigned to the other party, the existing suppliers shall continue to serve their current customers. *Id.* at ¶ 3; Exh. 2. Exhibit 2 to the Agreement contain the names of Farmers and

United consumers that are located in the territory of the other party or who are in close proximity to the territory of the other party. As recited in paragraph 10, the parties will use good faith efforts to exchange the customers that are located in the defined territory of the other supplier. Absent an exchange, the parties agree that the customer may continue to be served until such time as events allow for the exchange of such customers. *Id.* at ¶ 10.

The parties also recognize there may be instances where it is more efficient for a new customer in one service territory to be served by the other supplier. In such cases, the parties may enter

> into a written agreement to permit the service of a new customer by [the] party whose distribution system is located in the service area of the other [supplier]. . . . Such agreement shall be in writing, authorized by the respective governing board of each party, and when executed shall be appended to this Agreement. The entering into such agreement is discretionary with either party and neither party shall party shall have the right of action against the other for the exercise of such discretion.

Id. at ¶ 6.

2. Staff Comments. The Staff recommended approval of the Agreement. The Staff stated that the Agreement appears to provide the least-cost service option for customers and complies with the ESSA by drawing boundaries that partially identify each service supplier's territory. Staff stated that the Agreement comports with the purposes and provisions of the ESSA. United indicated to Staff that it normally obtains the consent of the customer before switching suppliers.

Commission Decision: Does the Commission find that the Agreement is consistent with the purposes of the ESSA as set forth in *Idaho Code* § 61-332? Is the allocation of territories and consumers in conformance with the provisions and purposes of the ESSA? Does the Commission desire to make explicit that any future transfer of existing customers needs to be approved by the Commission? Should customer consent be obtained as a condition to the transfer pursuant to *Idaho Code* § 61-334B(2)?

C. United-Raft River Application

1. The Application. On May 28, 2003, United and Raft River entered into a "Service Area Stabilization Agreement." The Agreement established separate service territories for each party and each party is responsible for serving all new customers in their defined service areas.

Appl. at ¶ 2. To the extent that either party is currently providing service to consumers within the service area assigned to the other party, the existing supplier shall continue to serve these pre-existing customers. Exh. 1, ¶ 3.

The Agreement also states that there may be instances where it is more efficient for a new customer located in one service territory to be served by the other electric supplier. In such cases, the parties may execute a written agreement to permit the service of the new customer by the other supplier. If the parties enter into such an agreement, the agreement

> shall be in writing, authorized by the respective governing board of each party, and when executed shall be appended to this Agreement. The entering into such agreement is discretionary with either party and neither party shall have the right of action against the other for its exercise of such discretion.

Id. at ¶ 6.

2. Staff Comments. Staff recommended approval of the Agreement. Staff stated that it appears that the Agreement provides the least-cost service option for customers and complies with the ESSA by drawing boundaries that partially identify each supplier's service territory.

***Commission Decision*:** Does the Commission find that the allocation of territories and consumers is in conformance with the provisions and purposes of the ESSA? Does the Commission desire to make it explicit that any future transfer of existing customers needs to be approved by the Commission? Should customer consent for the transfer be obtained as a condition for the transfer per *Idaho Code* § 61-334B(2)?

D. United-Riverside Electric Application

1. The Application. On April 21, 2003, United and Riverside entered into their Stabilization Agreement. The Agreement establishes separate service territories for each party. Each party is responsible for serving all new customers in their defined service areas. Exh. 1 at ¶ 2. To the extent that either party is currently providing service to consumers within the service area assigned to the other party, the existing supplier shall continue to serve these pre-existing customers. *Id.* at ¶ 3.

The Agreement also states that there may be instances where it is more efficient for a new customer located in one of the established service territories to be served by the other electric supplier. In such cases, the parties may enter

> into a written agreement to permit the service of a new customer by [the] party whose distribution system is located in the service area of the other

> [supplier]. . . . Such agreement shall be in writing, authorized by the respective governing board of each party, and when executed shall be appended to this Agreement. The entering into such agreement is discretionary with either party and neither party shall have the right of action against the other for the exercise of such discretion.

Id. at ¶ 7.

The parties also agree that Riverside may construct and "express feeder" within United's territory. The parties agree that construction of the express feeder "shall not be construed as to allow Riverside to hook up new customers in that area, but is limited to the construction, operation and maintenance of an expressed feeder. . . . The construction, maintenance and operation of any express feeder shall be subject to United specifications for clearance and other construction." Exh. 1 at ¶ 4.

Exhibits 2 and 3 to the Agreement contains the names of Riverside and United customers that are located in the territory of the other party or who are in close proximity to the territory of the other party. As recited in paragraph 11, the parties will use good faith efforts to exchange the customers that are located in the defined territory of the other supplier. Absent an exchange, the parties agree that the customer may continue to be served by the existing supplier until such time as events allow for the trade of such customers. *Id.* at ¶ 11.

The Application states that the Agreement was established to settle and establish service territories between the parties, to provide stability and safety in service to consumers, and to eliminate the duplication of services. Appl. at ¶ 3.

2. <u>Staff Comments</u>. Staff recommended approval of the Agreement. Staff stated that it appears that the Agreement provides the least-cost service option for customers and complies with the ESSA by drawing boundaries that partially identify each supplier's service territory. The allocation of customers and territory comports with the purposes and provisions of the ESSA. Staff also noted that the Agreement provides that customers residing within the other supplier's service territory may continue to be served by their existing supplier. See Exhs. 2 and 3.

The Staff observed that paragraph 11 of the Agreement states that Exhibits 2 and 3 contains the name of customers which the two utilities agree to exchange. Staff reported that the exchange of the three customers identified in Exhibit 2 has not taken place. United told Staff that it normally obtains the consent of the customer before switching suppliers. Staff believes that customer consent should be obtained as a condition before authorizing a switch in suppliers.

"With this condition, granting an exception to the anti-pirating provision of the ESSA appears reasonable when considering the purposes of the ESSA." Staff Comments at 3.

***Commission Decision*:** Does the Commission desire to rule now on the exchange of customers? Does the Commission find that the allocation of territories and consumers is in conformance with the provisions and purposes of the ESSA? Does the Commission desire to make explicit that any future transfer of existing customers needs to be approved by the Commission? Should customer consent for the transfer be obtained as a condition to the transfer per *Idaho Code* § 61-334B(2)?

E. United-Southside Electric Application

1. The Application. On May 30, 2003, United and Southside entered into a "Service Area Stabilization Agreement." The Agreement establishes separate service territories for each party and each party is responsible for serving all new customers in their defined service areas. Appl. at ¶ 2. To the extent that either party is currently providing service to consumers within the service area assigned to the other party, the existing supplier shall continue to serve these pre-existing customers. Exh. 1, ¶ 3.

The Agreement also states that there may be instances where it is more efficient for a new customer located in one service territory to be served by the other electric supplier. In such cases, the parties may execute a written agreement permitting the exchange of customers between suppliers. If such an exchange takes place then the agreement shall be in writing, "authorized by the respective governing board of each party, and when executed shall be appended to this Agreement. The entering into such an agreement is discretionary with either party and neither party shall have the right of action against the other for its exercise of such discretion." *Id.* at 6.

The Application states that the Agreement was negotiated to settle and establish service territories between the parties, to provide stability and safety in service to consumers and to eliminate the duplication of services. Appl. at ¶ 3.

2. Staff Comments. The Staff recommended approval and noted that the Agreement appears to provide the least-cost service option for customers. The Staff also commented that the Agreement complies with the purposes of the ESSA by drawing boundaries that partially identify each supplier's service territory.

Staff noted that paragraph 3 recognizes that each supplier may continue to serve its existing customers. However, paragraph 6 also states there may be instances where it is efficient to allow a new customer to be served by the other supplier. United indicated to Staff that it normally obtains the consent of the customer before switching suppliers.

Commission Decision: Does the Commission find the Agreement is consistent with the purposes of the ESSA as set forth in *Idaho Code* § 61-332? Does the Commission desire to make explicit that any future transfers of existing customers need to be approved by the Commission? Should customer consent for any exchange be obtained as a condition of the transfer per *Idaho Code* § 61-334B(2)?

F. The Attorney Fees Issue

All eight Agreements contain language that provides that the prevailing party in any action arising under the parties' Agreements is entitled to recover attorney fees. In each of its comments, the Staff noted that prior to the amendments of the ESSA, *Idaho Code* § 61-334B provided that any suppler whose rights under the ESSA are in jeopardy, may bring suit in District Court. This section was repealed and amended in December 2000 and February 2001.

The Staff observed that *Idaho Code* § 61-334A now provides that an aggrieved customer or supplier "may file a complaint with the commission" and the Commission shall resolve the matter. *See Idaho Code* §§ 61-334A(2-3). In other words, the Legislature has removed resolution of disputes from the Court's jurisdiction and required that these matters be submitted to the Commission. Under the Public Utilities Law, the Commission does not have authority to award attorney fees other than intervenor funds pursuant to *Idaho Code* § 61-617A. *See Idaho Power Company v. Idaho PUC*, 102 Idaho 744, 639 P.2d 442 (1981). Consequently, an award of attorney fees for ESSA disputes may not be appropriate.

Commission Decision: If the Commission desires to approve the eight ESSA Agreements, does it wish to observe that parties may not be entitled to attorney fees for ESSA disputes submitted to the Commission for resolution?

Don

Don Howell

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