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IDAHO PUBLIC
UTILITIES COMMISSION

March 1, 2010

Ms. Jean Jewell
Commission Secretary
Idaho Public Utilities Commission
472 W. Washington
Boise, ID 83702

RE: **IPC-E-09-09**

Dear Ms. Jewell:

We are enclosing an original and seven (7) copies of the **COMMENTS AND PROTEST OF THE INDUSTRIAL CUSTOMERS OF IDAHO POWER** in the above case.

An additional copy is enclosed for you to stamp for our records.

Sincerely,



Nina Curtis

Richardson & O'Leary PLLC

encl.

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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for the Industrial Customers of Idaho Power

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE) **CASE NO. IPC-E-09-09**
APPLICATION OF IDAHO POWER)
COMPANY OF A PRUDENCY) COMMENTS AND PROTEST OF
DETERMINATION FOR ENERGY) THE INDUSTRIAL CUSTOMERS OF
EFFICIENCY RIDER FUNDS SPENT IN) IDAHO POWER
2002-2007)

Pursuant to Rule 203 of the Rules of Procedure of the Idaho Public Utilities Commission (the "Commission") and the Commission's Notice of Modified Procedure served February 8, 2010, the Industrial Customers of Idaho Power ("ICIP") hereby file these comments and protest. As discussed below, ICIP opposes the Commission's approval of the stipulation submitted by Idaho Power Company ("Idaho Power" or the "Company") and Commission Staff ("Staff") in this case, and respectfully urges the Commission not to unconditionally approve the Memorandum of Understanding for Prudency Determination of DSM Expenses ("Memorandum of Understanding") attached to that stipulation.

BACKGROUND

This case began in Idaho Power's 2008 general rate case (Case No. IPC-E-08-10). There, the Company sought a Commission order finding that from 2002 through 2007 it had prudently

spent the entirety of approximately \$29 million in demand side management (“DSM”) funds collected from ratepayers on the energy efficiency rider. *See Application of Idaho Power Company for a Prudency Determination of Energy Efficiency Rider Funds Spent in 2002-2007* (hereinafter “*Application*”), Case No. IPC-E-09-09, ¶ 2 (April 1, 2009). In Idaho Power’s 2008 general rate case, Staff initially filed testimony recommending that the Commission defer a ruling on the prudency determination until after Idaho Power provided documentation of how it spent the energy efficiency rider funds. *See id.* at ¶ 1. Subsequently, Staff and the Company filed, and the Commission approved, a stipulation that the Company’s expenditure of approximately \$14.3 million of these rider funds was just, reasonable and in the public interest, but the Commission required the Company to file a pleading regarding the remaining \$14,657,971 by April 1, 2009. *Id.* at ¶¶ 2-3 (quoting Commission Order No. 30740). Now, the Company has filed its application for approval of that remaining amount, and Staff has signed a stipulation stating that it agrees the Company prudently spent those ratepayer dollars on programs designed to reduce demand. *See Stipulation, In the Matter of Application of Idaho Power Company for a Prudency Determination of Energy Efficiency Rider Funds Spent in 2002-2007* (hereinafter “*Stipulation*”) Case No. IPC-E-09-09, ¶ 5 (January 25, 2010).

But the stipulation does not only address those remaining \$14.6 million spent from 2002 to 2007. It also shoehorns in a request for the Commission’s approval of a new Memorandum of Understanding between Staff and the three investor-owned-utilities in Idaho regarding future prudency reviews. *See id.* at ¶¶ 3-4 and Attachment 1. This Memorandum of Understanding is the product of negotiations between Staff and the three investor-owned-utilities -- Idaho Power, Avista Utilities, and Rocky Mountain Power. ICIP and other stakeholders received no notice of, or prior invitation to attend, these negotiations and had inadequate opportunity to shape the

substantive and procedural requirements for future DSM prudency reviews contained in the resulting Memorandum of Understanding.

Apparently, the Memorandum of Understanding arose out of Staff's conclusion that Idaho Power had provided insufficient evidence that it had prudently spent the remaining \$14.6 million of ratepayer funds at issue in this case. With regard to whether the Company "provided sufficient evidence of evaluations of its programs for 2002 through 2007," Staff concluded "[n]ot entirely." Direct Testimony of Lynn Anderson, Idaho Public Utilities Commission Staff, Case No. IPC-E-09-09, p. 4 (February 19, 2010). In response, "Staff convened a workshop," and the "[t]he end result was an agreement by each of the utilities to formally evaluate all of their programs on regular, multi-year cycles and to report the results. . . ." *Id.* at pp. 4-5. "In exchange for the utility commitments, Staff agreed that if the evaluation and reporting commitments are fulfilled and if there is no evidence of DSM imprudence, then, when requested by the utilities, Staff would recommend that DSM expenditures be found prudent by the Commission." *Id.* at p. 5. And Staff also "agreed that it would recommend that Idaho Power's remaining \$14,657,971 or Rider-funded expenses from 2002 through 2007 be found prudent in the present case before the Commission." *Id.* Staff therefore believes the utility commitments contained in the Memorandum of Understanding warrant ignoring the insufficiency of Idaho Power's documentation of its DSM expenditures of rider funds from 2002 through 2007. *See id.* (stating that "Staff's major concerns in the past should be resolved as evidenced by future evaluations).

However, the Memorandum of Understanding only contains weak requirements for the analysis of the prudency of utility expenditures of ratepayer-funded DSM dollars. It includes as an attachment Staff's "expectations" for such reviews. *See Stipulation* at Attachment 1, p. 9. Although Staff's expectations include a requirement for cost-effectiveness evaluations from

different perspectives, this evaluation process does not include a requirement that DSM programs prove cost-effective to receive Staff's support in a prudency review. Further, Staff's expectations do not require a third party to evaluate the effectiveness and prudency of the utilities' DSM expenditures. *See id.* at Attachment 1, p. 9. Most troubling, the Memorandum of Understanding only requires the utilities to make a "good faith effort to address Staff's expectations." *See id.* at Attachment 1, p. 1.

The utilities and Staff agree that "implementation of the DSM prudency guidelines and evaluation framework . . . will not automatically result in DSM prudency findings" and that "future prudency findings will require preparation of a formal filing with the Commission." *Id.* at Attachment 1, pp. 2-3. But they go on to assert that a "showing by the utility that it made a good faith effort to reasonably perform within these guidelines will constitute *prima facie* evidence that the utility's DSM expenses were prudently incurred for cost recovery purposes." *Id.* at Attachment 1, p. 6. As such, "the utility can reasonably expect that in the ordinary course of business Staff will support the full cost recovery of its DSM program expenses." *Id.* To obtain Staff's support, the Memorandum of Understanding contains only requirements to comply with guidelines for reporting and analysis of cost-effectiveness -- not substantive requirements that the utilities prudently achieve demand reductions with Commission-approved DSM programs. *See, e.g., id.* at Appendix 1, p. 2 (stating that Idaho Power's 2009 *Demand Side Management Annual Report* is the template).

As discussed below, ICIP supports requiring transparency going forward with regard to how utilities are spending ratepayer-funded DSM dollars, and will not challenge Staff's finding of prudency as to Idaho Power's expenditure of the remaining \$14.6 million spent from 2002 to

2007. But ICIP opposes unconditioned Commission endorsement of the Memorandum of Understanding between Staff and the three investor-owned-utilities.

DISCUSSION

To start, ICIP urges the Commission to recognize that this case involves large sums of money paid by ratepayers on their power bills to be used for conservation and electricity demand reductions by investor-owned, electric utilities in the business of profiting off of electricity sales. Although Idaho Power's initial filing only addressed the remaining \$14.6 million of energy efficiency rider funds from 2002 to 2007, this case now includes a request for Commission approval of the Memorandum of Understanding that will address future prudency reviews. And those future reviews will involve far larger sums of money. Idaho Power currently collects an energy efficiency rider of 4.75% of base rates, from which Idaho Power projected it would collect \$29.7 million in 2009, *see Application* at ¶ 4, and over \$33 million in 2010. *See Direct Testimony of Tim Tatum, Exhibit No. 3, Case No. IPC-E-09-05 (March 16, 2009)*. Any procedure that provides for anything less than a completely transparent, open, and *independent* review of how an investor-owned, electric utility spends that amount of ratepayer money to "unsell" electricity would not adequately protect ratepayers.

ICIP supports efforts by Staff and the utilities to avoid a situation where a utility seeks a rubber stamp on its several-year-old DSM expenditures such as in this case where Idaho Power seeks approval of \$14.6 million of rider funds long after they were spent. However, ICIP respectfully urges the Commission to require a more thorough and independent review of DSM expenditures than called for in the Memorandum of Understanding. Commission Staff and the utilities provided no public notice of the DSM Evaluation Workshop held on October 5, 2009. Ratepayers and other stakeholders were not invited to, and have not participated in, the process

that resulted in the Memorandum of Understanding. The guidelines contained therein were obviously designed to shape the utilities' future prudency reviews. Unfortunately, the ratepayers and the other stakeholders did not have any opportunity to participate in and help shape that process.

To the extent the opportunity to provide these comments allows for such after-the-fact participation, ICIP respectfully submits that an investor-owned-utility ought not be allowed to run its own demand-side reduction programs. The overarching utility-incentive structure accepted by most utility economists is the Averch-Johnson effect. *See* Harvey Averch and Leland Johnson, "Behavior of the Firm Under Regulatory Constraint," *American Economic Review*, Vol. LII (December 1962). That well-accepted principle holds that utilities will seek to fulfill their fiduciary duty to their shareholders to maximize returns by pursuing capital investments, so long as the authorized rate of return on those investments exceeds the cost of capital. Some economists have applied the Averch-Johnson effect to decoupling mechanisms and concluded that even revenue decoupling mechanisms cannot overcome the overarching incentive for capital investments resulting in ineffective utility promotion of DSM programs. *See* Steve Kihm, "When Revenue Decoupling will Work ... and When It Won't," *The Electricity Journal*, Volume 22, Issue 8 (October 2009). Utilities profit from selling electricity and from building capital resources to sell electricity. They have significant economic incentive – and even a fiduciary duty – to pursue capital investments supported by higher electricity use.

Given that economic reality and the substantial sums of money now involved, ICIP continues to assert that Idaho Power's DSM programs should be operated by a third party without an incentive for the DSM programs to be unsuccessful in reducing electricity sales. *See In the Matter of the Application of Idaho Power Company to Implement a Demand Side*

Management Incentive Pilot Program, Case No. IPC-E-06-32, Order No. 30268, p. 4 (March 12, 2007) (stating ICIP's suggestion that the Commission should assign the task of DSM implementation to a third-party provider of conservation). Staff too has expressed interest in further exploring the option of having a third party run the DSM programs. *See Comments of the Commission Staff, In the Matter of the Application of Idaho Power Company for Authority to Implement Modifications to the Performance-Based Demand-Side Management Incentive Pilot Program*, Case No. IPC-E-09-4, p. 4 (May 1, 2009).

At a minimum, ICIP respectfully requests that the Commission impose additional conditions on its approval of the Memorandum of Understanding. ICIP recognizes that even if a utility implements Staff's DSM prudence guidelines and evaluation framework in the Memorandum of Understanding, the utility will still need Commission approval of the expenditures in a formal filing, such as a general rate case. *See Stipulation* at Attachment 1, pp. 2-3. Nevertheless, Staff's support or opposition of the utility's expenditure of DSM funds is important. Thus, ICIP would support Commission approval of the Memorandum of Understanding only with the addition of the following conditions, which would limit the Company's inherent motivation to inadequately operate its DSM programs and provide for a more adequate prudence review.

1. The Memorandum of Understanding should *require* an independent, third-party evaluation of DSM expenditures to receive Staff's support.

Staff recognizes the importance of evaluating DSM programs. DSM program results "can only be estimated through a combination of engineering measurements, verification of installations and assumptions, and overall program evaluation." Direct Testimony of Lynn Anderson, Idaho Public Utilities Commission Staff, Case No. IPC-E-09-09, p. 4 (February 19,

2010). Staff concludes that “[p]rograms that are not properly evaluated will suffer from unreliable cost-effectiveness estimates and will not likely be improved to their optimum performance levels.”

ICIP submits that the only way to obtain an unbiased and accurate evaluation of an investor-owned utility’s DSM programs is through the use of an independent, third party evaluator. Staff recognizes that third party evaluations “tend to be perceived as being more objective and transparent, and thus more credible, than evaluations performed by utility staff.” *See Stipulation* at Attachment 1, p. 9. But Staff’s expectations in the Memorandum of Understanding do not require a third party to evaluate the effectiveness and prudence of the utilities’ DSM expenditures, *see id.*, and even if they did, the Memorandum of Understanding only requires the utilities to make a “good faith effort to address Staff’s expectations.” *See id.* at Attachment 1, p. 1. Without requiring investigation by a third-party evaluator with specialized knowledge of DSM programs, Staff and ratepayers will have difficulty determining if Idaho Power is prudently spending the approximately \$30 million per year it will collect from rate payers for its DSM programs. The Company should not be allowed to conduct its own evaluation of the prudence of its own DSM expenses.

2. The Memorandum of Understanding should expressly provide that Staff will only support a prudence finding if the utility demonstrates that it actually prudently incurred the DSM expenses at issue.

As discussed above, the Memorandum of Understanding requires Staff to support all utility DSM expenditures if the utilities merely comply with the reporting requirements of the Memorandum of Understanding. It states “[b]y performing within these guidelines, assuming there is no evidence of imprudent actions or expenses, the utility can reasonably expect that in the ordinary course of business Staff will support full cost recovery of its DSM program

expense.” *Id.* at Attachment 1, pp. 2-3, 6. This language improperly shifts the burden of proof to Staff. This means that Staff will have the burden of demonstrating that the utilities incurred DSM expenses imprudently, not that the utilities must demonstrate prudent expenditures. The Commission authorizes individual DSM programs. But without an auditing backstop to ensure the utilities actually implement the programs adequately, ratepayer funds are at risk. The Memorandum of Understanding should expressly provide that the utilities have the full burden of proof that their DSM expenditures are prudent. In addition, Staff and any interveners reserve the right to challenge the prudence of DSM expenditures.

For example, the Memorandum of Understanding requires utility analysis of the cost-effectiveness of their programs, and requires that evaluation include “changes in the program due to evaluation results.” *Stipulation* at Attachment 1, p. 5. But it does not state that Staff will oppose a prudence finding for programs the utility has pursued despite their lack of cost-effectiveness. Further, the Memorandum of Understanding does not state that Staff will not support the continued operation of programs that prove to lack cost-effectiveness. Cost-effectiveness needs to be the governing factor of the DSM programs to ensure that ratepayer funds achieve the greatest demand-side reductions for ratepayer benefit. The Memorandum of Understanding should expressly state that Staff and interveners reserve the right to oppose a prudence finding for non-cost-effective DSM programs.

3. The Memorandum of Understanding should make explicit that the utilities will be subject to a ratepayer refund of energy efficiency rider funds that the Commission finds to be spent imprudently.

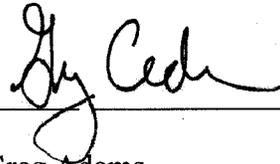
Finally, there needs to be a serious deterrent to Idaho Power imprudently spending \$30 million per year of ratepayer dollars because the utility uses that money to implement DSM programs that, if successful, will lower its profits. ICIP proposes that the Commission make

explicit in any order approving the Memorandum of Understanding that the utility risks paying a ratepayer refund and corresponding revenue requirement reduction for amounts of ratepayer-supplied DSM funds found to be imprudently spent. Without such a deterrent, the utility has little incentive to adequately run the Commission-authorized programs.

CONCLUSION

In sum, ICIP submits that if Idaho Power is allowed to continue running its own \$30-million-dollar-per-year program to decrease future electricity sales, the Commission should at least require a third-party evaluation of the prudence of the utility's DSM expenditures and expressly state conditions deterring the utility from inadequately running the DSM programs.

Respectfully submitted this 1st day of March 2010,

A handwritten signature in black ink, appearing to read "Greg Adams", written over a horizontal line.

Greg Adams
RICHARDSON & O'LEARY, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of March, 2010, a true and correct copy of the within and foregoing COMMETNS AND PROTEST OF THE INDUSTRIAL CUSTOMERS OF IDAHO POWER was served in the manner shown to:

Ms. Jean Jewell
Commission Secretary
Idaho Public Utilities Commission
P O Box 83720
Boise, ID 83720-0074

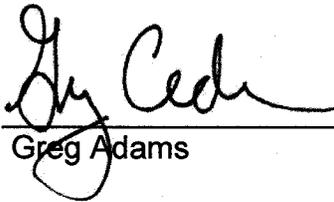
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