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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 IDAHO POWER )  
COMPANY'S REQUEST FOR ) CASE NO. IPC-E-10-25  
ACCEPTANCE OF ITS 2011 RETIREMENT )  
BENEFITS PACKAGE ) SUR-REPLY COMMENTS OF THE  
) INDUSTRIAL CUSTOMERS OF  
) IDAHO POWER

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COMES NOW, the Industrial Customers of Idaho Power ("ICIP"), and pursuant to ICIP's Motion for Leave to File Sur-Reply Comments, hereby files these Sur-Reply Comments in the above-captioned matter, and respectfully requests that the Commission consider the same. For the reasons stated in ICIP's initial Comments and for the reasons set forth below, ICIP respectfully requests that the Commission reject Idaho Power Company's ("Idaho Power's" or the "Company's") request for acceptance of its 2011 Retirement Benefits Package. With these

Sur-Reply Comments, ICIP only addresses two new arguments and one new report included for the first time in Idaho Power's Reply Comments.<sup>1</sup>

**A. Idaho Power's speculation that a defined contribution plan designed to reward longevity may violate federal regulations is entirely unconvincing.**

The Commission Staff and ICIP both recommended that Idaho Power adopt a defined contribution plan that would reward longevity, and suggested that perhaps the Company could provide older employees and employees in critical operations roles with a larger employer-matching contribution than rank and file employees. *See Commission Staff Comments*, at p. 10; *ICIP Comments*, at p. 8. In response, Idaho Power did not dispute that such a plan would shift investment risk from ratepayers to employees, yet still reward longevity. Rather, the Company speculated that "the alternatives recommended by the Staff and ICIP *are likely* discriminatory and therefore unlawful." *Idaho Power Reply Comments*, p. 11 (emphasis added). Idaho Power weakly asserted, "A plan tilted in favor of employees based on criteria such as 'position classification' or 'critical operations' *would most certainly* violate the terms set forth in Title 26 C.F.R. 1.401(a)-4." *Id.* (emphasis added).

Idaho Power's speculative and inconclusive legal assertions demonstrate that it did not completely consider the viable defined contribution alternatives. Further, given that the vast majority of employers have moved to a defined contribution plan, including most public utility companies with similar motivations to promote longevity as Idaho Power's, it is hard to believe

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<sup>1</sup> ICIP's Sur-Reply Comments merely address the arguments and authorities raised by Idaho Power's Reply Comments that were not directly addressed in ICIP's initial Comments. ICIP stands by all comments made earlier, and in no way concedes any point previously made.

that other employers have not devised legal 401(k) plans that reward longevity. *See ICIP Comments*, at pp. 4-7. Without commenting on the highly complex regulatory scheme alluded to for the first time in Idaho Power's Reply Comments, ICIP submits that it is highly probable Idaho Power could engage an ERISA or tax attorney skilled enough to help it solve the hypothetical problem it appears to have not even yet fully considered.

**B. Idaho Power's new report by Towers Watson indicates that prospective employees do not consider the employer's retirement plan to be the major factor in choosing among employers, and the report therefore undermines Idaho Power's position that it must retain a traditional defined benefit plan for new employees to attract the best talent.**

Idaho Power expects that it will lose significant numbers of skilled workers over the next decade, and therefore believes it needs to "attract and retain skilled workers that will be able to fill these critical roles in the coming years." *Idaho Power Reply Comments*, at p. 17. Idaho Power relies on Towers Watson's "Retirement Attitudes: Attraction and Retention," which it did not provide in discovery but attached to its Reply Comments as Attachment No. 3.<sup>2</sup>

By selectively quoting from this report, Idaho Power failed to note that the report concluded that "younger employees' decisions to join an organization are more influenced by pay and vacation time." *Id.* at Attachment No. 3, p. 4. Indeed, for prospective employees aged 40-49 years old, the report listed six factors more important than retirement benefits, including in

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<sup>2</sup> ICIP Production Request No. 1 requested "all documents, studies, or other information provided by Towers Watson to Idaho Power," and ICIP requested that Idaho Power provide it with information that came available after filing of the request. That the Company withheld this study that appears as Attachment No. 3 of its Reply Comments, in violation of its obligation to provide full and ongoing responses to discovery, should cause the Commission to question what other relevant materials have been withheld.

order of importance: (1) base pay, (2) vacation/PTO, (3) flexible schedule, (4) health care benefits, (5) work location, and (6) career advancement. *Id.* at Attachment No. 3, p. 4, Figure 6. Even for prospective employees 50 or more years old, the report concluded that base pay, health care benefits, and vacation time, are more important factors than a retirement plan. *Id.* at Attachment No. 3, p. 5, Figure 7. Thus, Idaho Power's previously withheld report actually refutes its argument that it must retain a traditional defined benefit plan for new employees to attract skilled workers.

**C. The Commission can condition acceptance of Idaho Power's defined benefit pension plan for new employees on the Company's shareholder's agreement to assume the investment risk for the plan fund without violating the Fifth Amendment of the United States Constitution.**

The Commission stated, "Idaho Power must . . . consider changes to its retirement plan and address shareholder . . . liabilities in assignment of pension plan investment risk." Order No. 31091, at p. 3 (emphasis added). ICIP and Staff asserted that the Company's Application did not demonstrate it had done so. In response, Idaho Power has not described any alternatives it considered that would shift pension fund investment risk to shareholders. Instead, the Company posits for the first time in its Reply Comments that "an order requiring Company shareholders to become financially liable for benefit expenses without a corresponding return on investment may result in confiscatory rates that violate the U.S. Constitution's Fifth Amendment Takings Clause." *Idaho Power's Comments*, at p. 3. Idaho Power's speculation misses the point of the Commission's order and misconstrues the law.

The U.S. Constitution and the Idaho Constitution provide that private property shall not

be taken for public use without just compensation. *See* United States Constitution Amendment V; Idaho Constitution Article I, § 14. With regard to ratemaking, “[t]he Constitution protects utilities from being limited to a charge for their property serving the public which is so ‘unjust’ as to be confiscatory.” *Hayden Pines Water Co. v. Idaho Public Utilities Commission*, 122 Idaho 356, 358, 834 P.2d 873, 875 (1992) (internal quotation omitted).

Idaho Power is a regulated monopoly with the burden to prove the prudence of the expenses which it recovers from its ratepayers. In Order No. 31091, the Commission expressed concern that Idaho Power planned to charge its ratepayers to keep Idaho Power’s underfunded pension fund solvent at a time when the vast majority of employers have moved away from traditional defined benefit pension plans. If the Commission were to issue an order that (1) found continued use Idaho Power’s traditional defined benefit plan proposed in this case would be unreasonable, and (2) prospectively required that Idaho Power shareholders accept the liability for underfunded pension fund obligations Idaho Power may incur for new employees, no taking would occur. Idaho Power has the option today to cease offering a traditional defined benefit pension plan to new employees, and to adopt a defined contribution plan similar to those of most employers. Should the Company choose not to do so, it is entirely appropriate and legal for the Commission to require that Idaho Power shareholders accept the liability for future contributions to keep that pension fund solvent for new employees.

Nobody is “requiring” Idaho Power to continue to be one of the very few remaining companies offering new employees a traditional defined benefit pension plan. So requiring shareholders to accept the obvious liability involved with continuing to offer such a plan to new

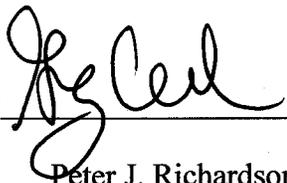
employees would not be “so unjust as to be confiscatory.” *See Hayden Pines Water Co.*, 122 Idaho at 358, 834 P.2d at 875.

### CONCLUSION

Because Idaho Power failed to adequately comply with Commission Order No. 31091, ICIP respectfully requests that the Commission reject Idaho Power’s 2011 Retirement Benefits Package, and require the Company to devise a plan that shifts responsibility and risk to its employees and/or shareholders.

DATED this 20<sup>th</sup> day of December, 2010.

RICHARDSON AND O’LEARY, PLLC

By:  \_\_\_\_\_

Peter J. Richardson  
Gregory M. Adams  
Attorneys for the Industrial  
Customers of Idaho Power

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 30<sup>th</sup> day of December, 2010, I caused a true and correct copy of the foregoing SUR-REPLY COMMENTS OF THE INDUSTRIAL CUSTOMERS OF IDAHO POWER to be served by the method indicated below, and addressed to the following:

Jean Jewell  
Idaho Public Utilities Commission  
472 West Washington Street (83702)  
Post Office Box 83720  
Boise, Idaho 83720-0074

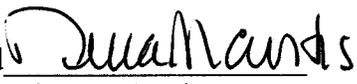
- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Electronic Mail

Lisa Nordstrom  
Donovan Walker  
Idaho Power Company  
PO Box 70  
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- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
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- Hand Delivered
- Overnight Mail
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Signed   
Nina M. Curtis