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November 15, 2013

**VIA HAND DELIVERY**

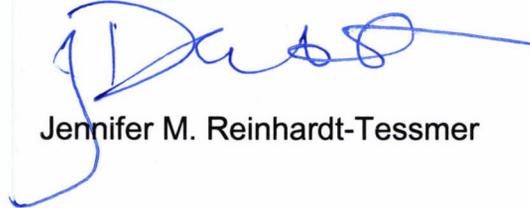
Jean D. Jewell, Secretary  
Idaho Public Utilities Commission  
472 West Washington Street  
Boise, Idaho 83702

Re: Case No. IPC-E-13-16  
Certificate for Public Convenience and Necessity for Jim Bridger Units 3 and  
4 – Idaho Power Company's Memorandum

Dear Ms. Jewell:

Enclosed for filing in the above matter are an original and seven (7) copies of Idaho Power Company's Memorandum Regarding *Idaho Code* §§ 61-526–61-528 and 61-541.

Sincerely,



Jennifer M. Reinhardt-Tessmer

JMR:csb  
Enclosures

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Attorneys for Idaho Power Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF IDAHO POWER	)	
COMPANY'S APPLICATION FOR A	)	CASE NO. IPC-E-13-16
CERTIFICATE OF PUBLIC CONVENIENCE	)	
AND NECESSITY FOR THE INVESTMENT	)	IDAHO POWER COMPANY'S
IN SELECTIVE CATALYTIC REDUCTION	)	MEMORANDUM REGARDING
CONTROLS ON JIM BRIDGER UNITS 3	)	<i>IDAHO CODE</i> §§ 61-526-61-528
AND 4.	)	AND 61-541
	)	

Pursuant to the schedule set forth in the Idaho Public Utilities Commission's ("Commission") Order No. 32884, Idaho Power Company ("Idaho Power" or "Company") hereby respectfully submits this Memorandum regarding *Idaho Code* §§ 61-526 through 61-528 and 61-541.

**I. PROCEDURAL BACKGROUND**

On June 28, 2013, Idaho Power filed an Application for a Certificate of Public Convenience and Necessity ("CPCN"), supported by concurrently filed direct testimony. Idaho Power's Application requested authorization of its investment in Selective Catalytic Reduction ("SCR") controls in Jim Bridger Units 3 and 4 pursuant to

I.C. §§ 61-526 through 61-528 and binding ratemaking treatment of its investment pursuant to I.C. § 61-541. In order to meet contractual deadlines, Idaho Power requested an order of approval from the Commission by November 29, 2013.

Following the Commission's Notice of Application on July 29, 2013, the Industrial Customers of Idaho Power, the Idaho Conservation League, and Snake River Alliance (collectively hereinafter referred to as the "Intervenors") petitioned for, and were granted, intervention pursuant to Order No. 32859. On August 30, 2013, the Commission issued a Notice of Scheduling, which provided deadlines for pre-filed direct testimony, rebuttal testimony, and legal briefs on the narrow issues related to the legal interpretation and application of I.C. §§ 61-526 through 61-528 and 61-541 (collectively referred to herein as "the Governing Statutes"). On October 24, 2013, the Commission issued a *Revised* Notice of Technical Hearing, which re-scheduled the technical hearing for November 7, 2013.

On October 11, 2013, Staff and the Intervenors filed direct testimony and, on October 29, 2013, Idaho Power filed its rebuttal testimony. The technical hearing was held on November 7, 2013. Pursuant to Order No. 32884, this brief addresses the legal interpretation and application of the Governing Statutes.

## **II. DISCUSSION**

### **A. Granting a CPCN and Binding Ratemaking Treatment for Investment into the SCR Controls Will Effectuate the Purpose of the Governing Statutes.**

Prior to constructing a generation plant, utilities must secure a certificate of convenience and necessity from the Commission. See I.C. §§ 59-526 through 59-528; *In re Garrett Transfer & Storage Co.*, 53 Idaho 200, 23 P.2d 739 (1933). The purpose of requiring such a certificate is to protect the public from speculation, duplication of

facilities, inadequate service, higher rates, and to protect utilities from competition. 73B C.J.S. Public Utilities § 182 (September 2013). When considering whether a CPCN should be granted, the primary consideration should be the rights and interests of the people of the State. See *Application of Kootenai Natural Gas Co.*, 78 Idaho 621, 308 P.2d 593 (1957) (public interest is the paramount consideration of public utilities commission in passing on application for certificate of convenience and necessity).

*Idaho Code* § 61-541 states that a public utility that proposes to construct, lease, purchase, or make a major addition to an electric generation or transmission facility, may request approval from the Commission in advance for ratemaking treatment that shall apply when the costs of the investment are included in the public utility's revenue requirements for ratemaking purposes. I.C. § 61-541. In essence, the statute provides a utility a vehicle for obtaining stakeholder participation in decision making prior to a significant investment into its generation while obtaining regulatory assurance that the investment will be recovered in rate base if the utility takes subsequent actions to appropriately manage the project.

When enacting I.C. § 61-541, the Legislature intended to provide the Commission with the "ability to shape the resources in a utility's portfolio prior to construction or commitment to such a resource." See I.C. § 61-541, RS18716 Statement of Purpose (2009). The statute was further intended to ensure utility expenditures are prudent and "pose less risk of financial loss," while benefitting customers through lower financing costs and a more transparent system of resource selection. *Id.* The Legislature recognized the magnitude of generation projects faced by many utilities and determined it was in the public interest to create a transparent process that permitted public input and an evaluation by the Commission in order to

procure binding ratemaking treatment, rather than shift the financial risk for such investments wholly onto utilities. New federal and state environmental rules and regulations and growing uncertainty about the future of traditional energy resources, like coal-fired generators, have resulted in pre-approval mechanisms like that provided in I.C. § 61-541, which enable utilities to obtain a prudence review prior to investing in new projects, rather than after the investment is made, with results binding on future commissions. See Burr, Michael T., *Game Changers - State Regulators Address Transformative Forces*, Fortnightly Magazine, p. 33, 35-36 (comments by Commissioner Kjellander), November 2013; see also McDermott, Dr. Karl, *Cost of Service Regulation in the Investor-Owned Electric Utility Industry*, pp. 37-38, June 2012 ([www.eei.org/issuesandpolicy/stateregulation](http://www.eei.org/issuesandpolicy/stateregulation)). “The twist on traditional regulation in this approach is moving the bulk of the prudence discussion to the front end (*ex ante*) of the regulatory process as opposed to the traditional (*ex post*) review upon completion of the plant.” McDermott, Dr. Karl, *Cost of Service Regulation in the Investor-Owned Electric Utility Industry*, June 2012. “[P]re-approval rearranges the order and effort expended in the regulatory process. It represents a change in kind, not quality. The same levels of effort and review are utilized but in a different order than under the traditional approach.” *Id.*

Here, Idaho Power is not constructing a new plant but installing pollution controls; therefore, the Governing Statutes do not explicitly mandate a certificate of convenience and necessity. However, as explained through the Company's testimony, the magnitude of this investment and the growing sensitivity and uncertainty surrounding coal-fired generation in today's political and social environment require assurance from the Commission that the Company will obtain rate base treatment for its investment

prior to proceeding with such large expenditures. See Technical Hearing Transcript, p. 15, ll. 13-25; p. 237, ll. 7-25; p. 238, ll. 1-7. Granting a CPCN and binding ratemaking treatment for installation of the SCR controls will effectuate the intent of the Governing Statutes and ensure future commissions are bound by this Commission's findings, permitting a level of certainty on prudence and ratemaking for a resource decision before significant investment by the utility occurs. Thus, although the Commission's pre-approval is discretionary, any suggestion that Idaho Power's considerable investment into SCR controls should only be evaluated for prudence *after* the utility obtains financing and expends significant amounts of capital is contrary to the legislative intent of the Governing Statutes.

Additionally, as intended by I.C. § 61-541, a Commission order providing a CPCN and assurance of binding ratemaking treatment reduces the Company's risk of higher financing costs,<sup>1</sup> not only for implementation of the SCRs but for the Company's entire construction program, which benefits both Idaho Power and its customers. See I.C. § 61-541, RS18716 Statement of Purpose (2009) (I.C. § 61-541 enacted in part to benefit customers with lower financing costs); Technical Hearing Transcript, p. 241, ll. 18-24.

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<sup>1</sup>Idaho Power plans to fund the SCR controls through a combination of internally generated funds and externally financed capital consistent with the financing of its total construction program. The terms that Idaho Power obtains for its externally financed capital (including cost thereof, desired maturity of issue, and financing terms) are dependent on the financial condition of Idaho Power and its parent company, IDACORP, Inc., and on the credit ratings, which are based in part on regulatory risk, which includes the extent to which regulatory agencies support the utility, the ability of the utility to recover its costs in a timely manner, and the ability of the utility to earn its regulated return. When the Commission issues an order, rating agencies assess the Commission's support of the utility and its impact on regulatory risk. See Technical Hearing Transcript, p. 241, ll. 18-24.

**B. The SCR Controls Ensure Reliable Service and Are the Least-Cost, Compliance Alternative.**

The Jim Bridger power plant is a critical component of Idaho Power's diverse generation portfolio; specifically, Units 3 and 4 constitute 10% of Idaho Power's total system generation capacity and 19% of the Company's baseload capacity. As aptly noted by Staff witness Mike Louis in his direct testimony, "halting operation of Bridger Units 3 and 4 without replacing this generation capacity is not an option." See Technical Hearing Transcript, p. 293, ll. 11-13.

The Company conducted an extensive analysis of its options for future generation in light of impending environmental regulations, including the BART Settlement Agreement (which requires that the Company's emissions at Jim Bridger Units 3 and 4 be reduced by 2015 and 2016, respectively), Wyoming law, the Wyoming Regional Haze Implementation Plan and anticipated U.S. Environmental Protection Agency ("EPA") requirements. The Company concluded implementation of the SCR controls in Units 3 and 4 is the least-cost, least-risk, compliance alternative; thus, the project is in the public interest. Idaho Power put significant effort into examining the economics of the SCR controls before concluding the controls were, by far, the least-cost alternative. See Technical Hearing Transcript, p. 136, ll. 17-25; pp. 137-142. As set forth in the testimony of Tom Harvey, the SCR controls are \$254 million less than the next least-cost, compliance alternative for Unit 3 and \$237 million less than the next least-cost, compliance alternative for Unit 4. *Id.* at p. 142, ll. 8-10.

Moreover, none of the Intervenors have demonstrated that a realistic lower-cost, reliable alternative exists that would allow the Company to comply with the BART Settlement Agreement or anticipated EPA regulations. Though parties can speculate as

to what legislation may come about in future decades that may impact plant operations and investments, such speculation is pure conjecture and does not provide the framework for the Commission's evaluation of a requested CPCN pursuant to the Governing Statutes. When acting on an application for a CPCN, the Commission must confine its determination to facts that can be demonstrated within reasonable limits. *See Applications of Intermountain Gas Co.*, 77 Idaho 188, 289 P.2d 933 (1955) certiorari dismissed 77 S.Ct. 20, 352 U.S. 801, 1 L.Ed.2d 37 (when considering natural gas company's application for a CPCN, the Commission could not speculate on future availability of gas, but was required to confine its determination to facts susceptible to reasonable demonstration). Based on the information reasonably demonstrable today, investment into the SCRs is in the best interest of the public as the lowest-cost, compliance alternative to ensure reliable service to Idaho Power's customers.

**C. The Company Requests Binding Ratemaking Treatment in the Full Amount of its Commitment Estimate.**

Idaho Power's Commitment Estimate is a reliable estimate of the total capital cost of the installation of the SCRs (including an Allowance for Funds Used During Construction or AFUDC) based on the Engineering and Procurement Contract, actual costs incurred in the development phase, and the forecast of future costs that the Company cannot quantify with 100% accuracy at this time ("estimated costs"). See Application, p. 7. As Tom Harvey stated in his rebuttal testimony, and as acknowledged by Staff witness Mike Louis at the technical hearing, the installation of the SCRs will necessarily require the Company to incur certain estimated costs. See Technical Hearing Transcript, p. 165, ll. 17-26; pp. 166-167; p. 322, ll. 21-25; p. 323, ll. 1-8. After a thorough analysis of Idaho Power's proposed investment, Mr. Louis concluded that

the investment is prudent and recommended binding ratemaking treatment of the investment pursuant to I.C. § 61-528, with the exception of the estimated costs. *Id.* at p. 290, ll. 1-8. In explanation, Mr. Louis articulated his concern that approving the estimated costs may serve to dis-incentivize the Company to implement the project in a cost-effective manner. *Id.* at p. 308, ll. 2-14. Mr. Louis's concerns appear to arise from a misunderstanding of I.C. § 61-541 and the impact of binding ratemaking treatment on a rate case, which the Commission appropriately ruled was a topic for legal briefing as opposed to witness testimony during the technical hearing.

*Idaho Code* § 61-541 is a relatively new statute, which has not received the benefit of lengthy interpretation by the Commission or the Idaho Supreme Court. Nevertheless, the plain language of the statute is clear as to the impact of binding ratemaking treatment on future rate case determinations. The statute provides in pertinent part that "A public utility that proposes to . . . make major additions to an electric generation or transmission facility, may file an application with the commission for an order specifying in advance the ratemaking treatments that shall apply . . . ." I.C. § 61-541. The statute goes on to provide that ratemaking treatment would include "[t]he maximum amount of costs that the commission will include in rates at the time determined by the commission without the public utility having the burden of moving forward with additional evidence of the prudence and reasonableness of such costs." *Id.*

According to the plain language, the Company would no longer carry the legal burden of demonstrating prudence and reasonableness when the Company seeks inclusion of the investment in its rate base; however, the statute does not prevent a prudence review by the Commission. In fact, it is presumed that when the Company

later seeks inclusion of this investment in its rate base, Staff would perform a comprehensive audit of the Company's expenditures and a detailed review of the Company's contracts and financial transactions to ensure reasonableness, accuracy, and prudence, which is exactly what it did in response to Idaho Power's application to increase its rate base and rates upon completion of the Langley Gulch power plant. See Order No. 32585 (Case No. IPC-E-12-14), pp. 6-7. As explained by Mr. Youngblood in his rebuttal testimony, just because an amount is pre-approved for binding ratemaking treatment, it does not mean that is the amount that will be included in rate base. See Technical Hearing Transcript, p. 236, ll. 14-25. If in prudently carrying out the project the Company's actual expenses are less than the pre-approved amount, the savings would be passed onto customers through a lower amount in rate base. *Id.* If the actual expenses exceed the pre-approved amount, the Company would have to establish the prudence of those excess expenses.

Therefore, in light of the prudence review that will occur when Idaho Power requests inclusion of this investment in its rate base, the Company has every motivation to implement the SCRs in a prudent and reasonable manner, even if the Company obtains binding ratemaking treatment of its full Commitment Estimate in this proceeding. As recognized by the Wyoming Public Service Commission in its memorandum opinion and order granting Rocky Mountain Power's application for a CPCN for the same SCR investments at issue in this case,<sup>2</sup> a prudence review by the Commission in a later rate case would act "as a check on any tendency the Company might have to inflate its cost

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<sup>2</sup> The Wyoming commission's ruling was subject to a stipulation that should the commission grant a CPCN, the utility would be entitled to a presumption of prudence in a future rate case, similar to the presumption provided through *Idaho Code* § 61-541.

estimates” in the CPCN proceeding. See Docket No. 2000-418-EA-12, Record No. 13314, Memorandum Opinion, Findings and Order, par. 67.

Depriving the Company of binding ratemaking treatment for those estimated costs that the Company is certain will be required for this investment and which can be fairly estimated based on similar projects, yet cannot be determined with 100% accuracy, means the Company would lose the security of binding ratemaking treatment on a significant portion of this socially and environmentally controversial investment. Limiting binding ratemaking treatment to only those future costs that can be measured with complete precision would frustrate the purpose of I.C. § 61-541, which envisions a utility seeking pre-approval for a large-scale, future investment. A utility cannot reasonably be expected to calculate future expenses associated with such large-scale projects with complete precision, and to interpret the statute as requiring such precision, would act to defeat the Legislature’s intent in implementing the section, as described in greater detail above. Therefore, Idaho Power seeks binding ratemaking treatment in the full amount of its Commitment Estimate, which is the most accurate gauge available of total expenses the Company anticipates it will be necessary to incur in order to complete installation of the SCRs.

### **III. CONCLUSION**

The Company has a statutory duty to provide electric service, and as the Company’s least-cost thermal generation resource, the Jim Bridger plant is a critical part of the Company’s ability to provide such service. In light of state and proposed federal legislation mandating reduction of nitrogen oxide emissions on Jim Bridger Units 3 and 4, the SCR controls are the lowest-cost, alternative that allows the Company to comply with the BART Settlement Agreement and its environmental obligations while

serving the energy needs of its customers. Therefore, investment in the SCR controls for Units 3 and 4 is in the public interest and, accordingly, Idaho Power respectfully requests that the Commission issue a CPCN and grant the Company binding ratemaking treatment in the full amount of its Commitment Estimate.

DATED at Boise, Idaho, this 15<sup>th</sup> day of November 2013.



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JENNIFER M. REINHARDT-TESSMER  
Attorney for Idaho Power Company

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15<sup>th</sup> day of November 2013 I served a true and correct copy of IDAHO POWER COMPANY'S MEMORANDUM REGARDING *IDAHO CODE* §§ 61-526-61-528 AND 61-541 upon the following named parties by the method indicated below, and addressed to the following:

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