



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

April 20, 2004

**HAND DELIVERED**

Frederick C. Lyon  
Clerk of the Courts  
Idaho Supreme Court  
451 West State Street  
Boise, ID 83720-0101

**Re: Docket No. 29016, *Idaho Power Company v. Idaho Public Utilities Commission***

Dear Mr. Lyon:

Enclosed with this correspondence are:

1. A check for \$71 for the Commission's Petition for Rehearing. I.A.R. 23(a)(7).
2. The Commission's Petition for Rehearing filed pursuant to I.A.R. 42.
3. The Commission's Memorandum in Support of Its Petition for Rehearing.

The Commission has enclosed an original and nine copies of the Petition for Rehearing and the Memorandum in Support of the Commission's Petition. Please date stamp one copy of this document.

If you have any questions, please contact me at 334-0357. Thank you for your assistance.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "John R. Hammond".

John R. Hammond  
Deputy Attorney General

Enclosures

cc: Parties of Record

O:IPCE0134\_Correspondence\_Lyon\_jh6

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 Idaho Public Utilities Commission

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

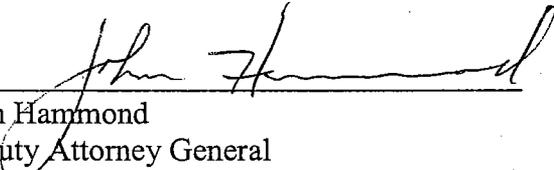
|   |   |                               |
|---|---|-------------------------------|
| <b>IDAHO POWER COMPANY,</b>               | ) |                               |
|   | ) | <b>SUPREME COURT</b>          |
|   | ) | <b>DOCKET NO. 29016</b>       |
| <b>Applicant/Appellant,</b>               | ) |                               |
|   | ) |                               |
| <b>v.</b>                                 | ) |                               |
|   | ) |                               |
| <b>IDAHO PUBLIC UTILITIES COMMISSION,</b> | ) | <b>IDAHO PUBLIC UTILITIES</b> |
|   | ) | <b>COMMISSION'S PETITION</b>  |
| <b>Respondent on Appeal.</b>              | ) | <b>FOR REHEARING</b>          |
|   | ) |                               |
|   | ) |                               |
|   | ) |                               |

COMES NOW the Respondent on Appeal, Idaho Public Utilities Commission ("Commission"), pursuant to Idaho Appellate Rule 42, and files this timely Petition for Rehearing of the Court's Opinion No. 32 issued in this proceeding on March 30, 2004. The Commission respectfully asserts that the Court erred in holding that the Commission's use of the word "may" was intended to mean "shall" or "must." Even if the Commission was imprecise in its use of the word "may," the denial of lost revenue recovery was neither confiscatory nor a violation of any constitutional right. The Court should have employed the ratemaking standard

of review when considering the Commission's decision to deny recovery of lost revenue in Order Nos. 28992 and 29103 that were part of the annual Power Cost Adjustment rate setting process. *See Industrial Customers v. Idaho PUC*, 134 Idaho 285, 289, 1 P.3d 786, 790 (2000). *See also Hayden Pines Water Company v. Idaho PUC*, 122 Idaho 356, 358, 834 P.2d 873, 875 (1992) quoting *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989). In addition, there is substantial and competent evidence in the record supporting the Commission's ratemaking decision to deny the recovery of lost revenue in Order Nos. 28992 and 29103.

To expedite the Court's review of this matter, the Commission also submits its Memorandum in Support of the Petition for Rehearing. The Commission respectfully requests that the Court grant a rehearing of this appeal.

DATED this 20th day of April 2004.

  
\_\_\_\_\_  
John Hammond  
Deputy Attorney General

Attorney for the Respondent on Appeal  
Idaho Public Utilities Commission

bls/O:IPCE0134\_Appeal Filings\_Petition for Rehearing

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| <b>Applicant/Appellant,</b>               | ) |                              |
|   | ) |                              |
| v.  | ) |                              |
|   | ) |                              |
| <b>IDAHO PUBLIC UTILITIES COMMISSION,</b> | ) | <b>MEMORANDUM IN</b>         |
|   | ) | <b>SUPPORT OF THE IDAHO</b>  |
| <b>Respondent on Appeal.</b>              | ) | <b>PUBLIC UTILITIES</b>      |
|   | ) | <b>COMMISSION'S PETITION</b> |
|   | ) | <b>FOR REHEARING</b>         |
|   | ) |                              |

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COMES NOW the Respondent on Appeal, Idaho Public Utilities Commission ("Commission"), pursuant to Idaho Appellate Rule 42, and files this timely Memorandum in Support of its Petition for Rehearing of the Court's Opinion No. 32 issued on March 30, 2004.

**STATEMENT OF THE CASE**

This appeal arose from the latter of a two-case proceeding before the Commission. In the first case (No. IPC-E-01-3), the Commission approved the implementation of an Idaho

Power energy conservation program called the Irrigation Buy-Back Program (“Program”). In the second case (No. IPC-E-01-34), the Commission allowed Idaho Power to recover nearly \$74 million in “direct costs” the Company had paid to irrigators to reduce their power consumption, but denied the recovery of approximately \$12 million of alleged “lost revenue.” Order Nos. 28992 and 29103; R. at 190, 224.

The central issue on appeal concerned the Commission’s decision to deny the recovery of lost revenue in the annual Power Cost Adjustment (PCA) case that adjusts customer rates. On March 30, 2004, the Court issued its Opinion vacating the Commission’s decision to deny the Company the recovery of lost revenue. In response, the Commission has filed its Petition for Rehearing and this supporting Memorandum. For purposes of this Memorandum the Commission relies on the Statement of Facts contained in its Brief from pages 4 through 15.

#### **ARGUMENTS IN SUPPORT OF THE PETITION FOR REHEARING**

- A. There is substantial and competent evidence that the Commission’s use of the word “may” in Order No. 28699 was not intended to be mandatory or to mean “shall” or “must.”**
- B. Idaho Power provided no evidence that the Commission’s denial of lost revenue recovery resulted in PCA rates that were confiscatory or that the denial violated any constitutional right.**
- C. There is substantial and competent evidence in the record to support the Commission’s decision in Order Nos. 28992 and 29103 to deny Idaho Power recovery of lost revenues.**

#### **ARGUMENT**

##### **Standards of Review**

Article V, Section 9 of the Idaho Constitution provides the Supreme Court shall have jurisdiction to review on appeal any Order of the Commission. *Industrial Customers of*

*Idaho Power v. Idaho PUC*, 134 Idaho 284, 288, 1 P.3d 786, 789 (2000). *Idaho Code* § 61-629 defines the scope of the Supreme Court's limited review and states in relevant part:

The review on appeal shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order appealed from violates any right of the appellant under the constitution of the United States or of the state of Idaho.

*Idaho Code* § 61-629; *Hulet v. Idaho PUC*, 138 Idaho 476, 478, 65 P.3d 498, 500 (2003).

The Court's review of Commission determinations as to "questions of law" is limited to determining whether it has regularly pursued its authority and whether the constitutional rights of the appellant have been violated. *Industrial Customers*, 134 Idaho at 288, 1 P.3d at 789. Regarding "questions of fact," where the Commission's findings are supported by substantial, competent evidence in the record, the Court must affirm those findings and the Commission's decision. *Id.* The Court has delineated the test for substantial competent evidence as:

The "substantial evidence rule" is said to be a "middle position" which precludes a *de novo* hearing but nonetheless requires a serious review that goes beyond the mere ascertainment of procedural regularity. Such a review requires more than a mere "scintilla" of evidence in support of the agency's determination, though "something less than the weight of the evidence." "Put simply", we wrote, "the substantial evidence rule requires a court to determine 'whether [the commission's] findings of fact are reasonable.'"

*Industrial Customers*, 134 Idaho at 293, 1 P.3d at 794 quoting *Idaho State Insurance Fund v. Hunnicutt*, 110 Idaho 257, 260, 715 P.2d 927, 930 (1985) (citations omitted).

The "Commission as the finder of fact, need not weigh and balance the evidence presented to it but is free to accept certain evidence and disregard other evidence." *Industrial Customers*, 134 Idaho at 293, 1 P.3d at 794. "The commission is free to rely on its own expertise as justification for its decision." *Id.* Simply put, findings of the Commission must be reasonable "when viewed in the light that the record in its entirety furnishes, including the body of evidence

opposed to the [Commission's] view." *Application of Hayden Pines*, 111 Idaho 331, 336, 723 P.2d 875, 880 (1986) quoting *Hunnicut*, 110 Idaho at 261, 715 P.2d at 931. The Commission's findings of fact are entitled to a presumption of correctness and should be sustained unless the clear weight of the evidence is against its conclusions or is strong and persuasive that the Commission abused its discretion. *Industrial Customers*, 134 Idaho at 288, 1 P.3d at 789. The Court will not displace the Commission's findings of fact when faced with conflicting evidence, "even though the Court would have made a different choice had the matter been before it *de novo*." *Rosebud Enterprises, v. Idaho PUC*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996).

**A. There is substantial and competent evidence that the Commission's use of the word "may" in Order No. 28699 was not intended to be mandatory or to mean "shall" or "must."**

In Order No. 28699 the Commission used the word "may" with the phrase "be treated as a purchased power expense in the Company's power cost adjustment mechanism," only to direct the Company to book or record the "direct costs and lost revenue impacts" so that the accounts could be reviewed later to determine if recovery was proper. R. at 402. In addition, it would be inconsistent with the Commission's duties if it were to issue a blank check to the Company prior to knowing whether any cost was actually incurred by the Company. *See Idaho Code* §§ 61-301, 61-302. Furthermore, it is necessary and standard practice to order a public utility to first record expenses or costs so that they can be verified and reviewed when recovery is sought in the future (i.e., the second proceeding). *Industrial Customers*, 134 Idaho at 287, 1 P.3d at 788. *See also In re Idaho Power*, 161 PUR 4<sup>th</sup> 18 (IPUC 1995) (amounts spent by Company in the past are not eligible for recovery through future rates because of the retroactive ratemaking proscription unless they were preserved for that purpose by deferral or other regulatory action). Accordingly, it was not the intent of the Commission when using this

language to guarantee Idaho Power the recovery of lost revenues. Its only intent was to reserve the issue of cost recovery of direct costs and lost revenues for later review.

The Commission clearly understood the distinction between the words “may” and “shall.” Both words appear in that portion of Order No. 28699 that was quoted in the Court’s Opinion:

The Commission further finds that the direct costs and lost revenue impacts of this Program may be treated as a purchased power expense in the Company’s Power Cost Adjustment (“PCA”) mechanism. Idaho Power and the parties shall develop and present a proposal to the Commission recommending a procedure to calculate the amount of revenue impact that should be passed through the Company’s PCA mechanism.

Slip Op. at 5 (emphasis added). In this context the Commission used “may” in a discretionary sense and “shall” in a mandatory sense. The proper interpretation of the meaning of the word “may” here is indicative that the Commission will exercise discretion in deciding whether the Company might recover lost revenues in the future. As the Commission noted in its Brief, “may” means the right to exercise discretion, while “shall” means must or is mandatory (without discretion). *Commission Brief* at 31, citing *Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995). By using this language the Commission clearly intended for the “may” to be permissive and the “shall” to be mandatory. In other words, if the Commission had intended in Order No. 28699 to guarantee lost revenue recovery for Idaho Power it would have stated so clearly by using the word “shall” or other mandatory language.<sup>1</sup> As the author of these Orders the Commission is in the best position to know what it intended.

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<sup>1</sup> For example, in the Order concerning the Company’s 2001 PCA filing the Commission found explicitly it was “authorizing Idaho Power to recover approximately \$168.3 million[.]” through an increase in retail rates. Order No. 28722 at R. 580. No such explicit language appears in Order No. 28699.

The Court's reliance on Idaho Power's statements that it would not go forward with the Program without recovery of lost revenues is misplaced.<sup>2</sup> As the Order accurately depicts, the state was facing an energy crisis at the time Idaho Power submitted its Application. R. at 310. Without this Program Idaho Power would have had to purchase a larger quantity of power from the wholesale market to serve its customers at prices that were projected to be double that of purchasing load reductions from irrigators.<sup>3</sup> This is the reason the Commission said it would have been imprudent and unreasonable for the Company to not implement this Program with or without lost revenue recovery. R. at 197, 233. By using the "may treat" language, the Commission guaranteed that Idaho Power would have the opportunity in the cost recovery proceeding to demonstrate it should recover lost revenues. This reservation of cost recovery authorization is consistent with the Court's recognition of this practice in *Industrial Customers*, 134 Idaho at 287, 1 P.3d at 788.

**B. Idaho Power provided no evidence that the Commission's denial of lost revenue recovery resulted in PCA rates that were confiscatory or that the denial violated any constitutional right.**

Even if the Commission was imprecise in its use of the word "may", its denial of lost revenue recovery was neither confiscatory nor a violation of any constitutional right. The Court should have employed the ratemaking standard of review when considering the Commission's decision to deny recovery of lost revenue in Order Nos. 28992 and 29103 that were part of the

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<sup>2</sup> The Court in the Opinion, at p. 2, stated that the Commission's "findings" in Order No. 28647, R. at 308, noted the Company's willingness to proceed with the Program was dependent upon assurances it would recover lost revenues. This "finding" comes from the "Background" section of the Commission Order which merely describes Idaho Power's Application. R. at 308. The Commission's "findings" in this Order are contained in the record at pages 310-12, and do not discuss or explicitly guarantee Idaho Power recovery of lost revenues.

<sup>3</sup> Prior to approval of the implementation of the Program Idaho Power represented that the average Flat Mid-Columbia Forward Market Price of power was \$305 per MW as of March 2, 2001. R. at 394. This compared to the \$150 per MW the Company paid irrigators for their load reductions.

annual Power Cost Adjustment rate-setting process. The function of ratemaking is legislative and not judicial. *Industrial Customers*, 134 Idaho at 289, 1 P.3d at 790. The Commission, as an agency of the legislative department of government, exercises delegated legislative power to make rates. *Id.* So long as it regularly pursues its authority and remains within constitutional limitations, the courts have no jurisdiction to interfere with its determinations. *Id.* Thus, the Commission's rate setting Order Nos. 28992 and 29103 carry with them a presumption of validity. *See Application of Utah of Power & Light Co.*, 107 Idaho 446, 448-49, 690 P.2d 901, 903-04 (1984). In other words, the judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases where the invalidity is manifest. *Petition of the Mountain States Tel. & Tel. Co.*, 76 Idaho 474, 480, 284 P.2d 681, 683 (1955) *citing Los Angeles Gas & Electric Corp.*, 289 U.S. 287, 304-05, 53 S.Ct. 637, 643-44, 77 L.Ed. 1180 (1933).

The only constitutional issue raised by Idaho Power is that the denial of lost revenue recovery was confiscatory. Idaho Power has the burden of proof to demonstrate that rates are confiscatory. *Id.* However, as the Commission pointed out in its Brief on Appeal, Idaho Power offered no evidence that the denial resulted in a PCA rate order that was confiscatory under either the Idaho or United States Constitutions. *Commission Brief* at 38-39. Indeed, the Company presented no authority or evidence in the proceeding before the Commission or on appeal regarding confiscation. *Id.*; R at 234.

In *Hayden Pines Water Company v. Idaho PUC*, 122 Idaho 356, 834 P.2d 873 (1992) this Court adopted the United States Supreme Court's test regarding confiscation set out in *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989), stating:

The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public, which is so “unjust” as to be confiscatory. If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments. . . . It is not the theory but the impact of the rate order that counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry. . . is at an end.

122 Idaho at 358, 386 P.2d at 875 (emphasis added) quoting *Duquesne*, 488 U.S. at 307-08, 310, 1089 S.Ct. at 615-17.

Idaho Power failed to meet its burden of providing any evidence clearly establishing that the Commission’s rate order was confiscatory. Rather, the record demonstrates that unlike the direct costs (i.e., payments to irrigators) of this Program, lost revenues were just an estimate of revenue the Company might have received from the sale of power to irrigators had the Program not operated. R. at 224. The Commission found rates should accurately reflect the actual costs to provide service and given the unique context that caused this Program to be implemented, lost revenues were not an actual cost of service that should be borne by ratepayers. *Id.* Thus, the Commission determined it would be unreasonable to force Idaho Power’s customers to pay for power they did not purchase, consume or benefit from. *Id.*

As this Court has noted and as the Chief Justice observed in her dissent, “the concern of this Court is not in the details of the PUC’s decision, but in the overall effect the ratemaking order will have on ratepayers, and in ensuring that the effect of the order will not be unreasonable or unjust to the utility.” Slip Op. at 7. See also *Intermountain Gas Co. v. Idaho PUC*, 97 Idaho 113, 120, 540 P.2d 775, 782 (1975) citing *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944). Here the Company offered no evidence and the record is devoid of any evidence that the “total effect of the rate order” is

unjust and unreasonable. Furthermore, the Commission's findings in Order Nos. 28992 and 29103 explain the explicit reasons why recovery of lost revenues was denied and provide the substantial and competent evidence needed for the Court to affirm the Commission's decision.

**C. There is substantial and competent evidence in the record to support the Commission's decision in Order Nos. 28992 and 29103 to deny Idaho Power recovery of lost revenues.**

Even if the Commission was inartful in the use of the word "may" there is no legally compelling reason to require ratepayers to pay for the Company's lost revenue.<sup>4</sup> However, there is substantial and competent evidence to support the Commission's decision to deny recovery of lost revenue. In Order No. 29103 the Commission listed four findings why it was not reasonable to charge ratepayers for lost revenues. First and foremost, the Commission found that "lost revenue is not a recoverable 'expense' to be recovered from ratepayers." R. at 232. The Commission found "that lost revenue does not constitute an actual cost of providing service that should be borne by ratepayers." *Id.* (emphasis added). Unlike the direct costs (i.e., payments to irrigators), lost revenue is an estimate of revenue that Idaho Power might have received from the sale of power to irrigation customers if the Program had not operated. R. at 224. The Commission found that allowing the recovery of lost revenue would force the Company's customers to pay for power they did not purchase, consume or benefit from. R. at 232.

Second, the Commission found that customer rates should not be raised to compensate the Company for lost revenues because "rates should accurately reflect the actual cost incurred to provide service." R. at 232. The Commission rejected the recommendations of

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<sup>4</sup> The Company has stated and the Court cites Idaho Power's reliance on what it thought Order No. 28699 meant. Despite this reliance the Company did not suffer any harm as it was given the opportunity to demonstrate that it was entitled to recover lost revenues in the cost recovery proceeding (the second case).

the Company and its Staff and relied upon its own expertise. *Industrial Customers*, 134 Idaho at 293, 1 P.3d at 794. The Commission declared that requiring “ratepayers to pay for energy they did not consume, but avoided due to this program, is . . . unreasonable.” R. at 232. The issue of recovering lost revenues through the PCA rate mechanism clearly implicated the Commission’s ratemaking functions as delegated by the Idaho Legislature. *Industrial Customers*, 134 Idaho at 289, 1 P.3d at 790. The Commission’s rate setting decision carries with it the presumption of validity. *See Application of Utah of Power & Light Co.*, 107 Idaho 446, 448-49, 690 P.2d 901, 903-04 (1984).

Third, the Commission found given the unique context that caused this Program to be implemented, allowing lost revenue recovery would “partially destroy the goal of reducing overall energy costs to all ratepayers at a time when energy costs were at all time highs.” R. at 232. The purpose of this Program was to conserve power and mitigate rate impacts on consumers not to generate revenue for the Company. Thus, the Commission found the recovery of lost revenue would be inappropriate and unreasonable. R. at 232.

Fourth, the Commission further found that denying the recovery of lost revenue is “consistent with our prior conservation and DSM Orders. . . . *See* Order Nos. 25062, 25122 and 25640.” R. at 233; *see also* R. at 598; *supra* at n. 11.

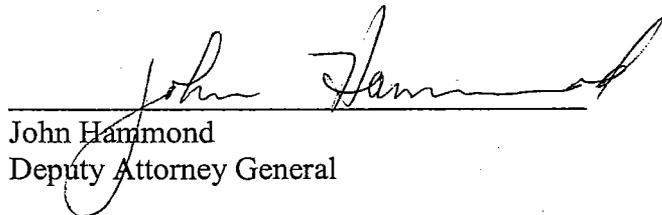
The Commission contends these findings explain the reasons and disclose the facts that it relied upon to deny the Company the recovery of lost revenue. While acknowledging that there is contrary evidence in the record and that the language of Order No. 28699 was inartful, the Commission’s findings to deny the Company the recovery of lost revenue in Order Nos. 28992 and 29103 are still supported by substantial, competent evidence and should be affirmed

by the Court on rehearing. *Industrial Customers*, 134 Idaho at 288, 1 P.3d at 789; *Hulet*, 138 Idaho at 478, 65 P.3d at 500.

### CONCLUSION AND REQUEST FOR RELIEF

Based on the foregoing, the Commission requests rehearing on the Court's Opinion. The Commission requests that the Court grant and schedule the rehearing at its earliest convenience. The record demonstrates that denial of lost revenue did not violate any constitutional right of the Company. Furthermore, the record contains substantial and competent evidence to support the Commission's decision in Order Nos. 28992 and 29103 to deny the Company recovery of lost revenues through the annual Power Cost Adjustment case.

RESPECTFULLY SUBMITTED this 20th day of April 2004.



John Hammond  
Deputy Attorney General

Attorney for the Respondent on Appeal  
Idaho Public Utilities Commission

bls/O:IPCE0134\_Appeal Filings\_Memorandum in Support

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 20th DAY OF APRIL 2004, SERVED THE FOREGOING **PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING**, IN SUPREME COURT DOCKET NO. 29016, IPUC CASE NO. IPC-E-01-34, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

LARRY D RIPLEY  
BARTON L KLINE  
IDAHO POWER COMPANY  
PO BOX 70  
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SECRETARY