

SUP-E-10-01

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IDAHO PUBLIC
UTILITIES COMMISSION

THE BUILDING CONTRACTORS
ASSOCIATION OF SOUTHWESTERN IDAHO,
Appellant,

v.

IDAHO PUBLIC UTILITIES COMMISSION, and
IDAHO POWER COMPANY,
Respondents.

Docket No. 37293-2010

APPELLANT'S BRIEF

**Appeal from the Idaho Public Utilities Commission
Commissioner Marsha H. Smith, Presiding**

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I. STATEMENT OF THE CASE

A. Nature of the case

Appellant Building Contractors Association of Southwestern Idaho ("BCA") seeks review of the Idaho Public Utilities Commission ("Commission") Order No. 30955 ("Order 30955") approving certain unlawfully discriminatory revisions to Idaho Power Company's ("Idaho Power" or "Company") Rule H line extension tariff ("2009 Rule H Tariff") in case number IPC-E-08-22. Order 30955 approved revisions to the Rule H tariff that unlawfully discriminate in two ways. First, it authorizes Idaho Power to provide new customers a lesser level of investment than it provided existing customers, thereby causing new customers to subsidize other customers' rates. Second, it authorizes Idaho Power to invest less to extend service to new customers residing inside subdivisions than it invests in new customers outside of subdivisions by forcing inside-subdivision customers to share the benefit of a \$1,780 Company investment in facilities that each outside-subdivision customer gets the full benefit of. The reduced Company investment results in additional costs imposed on all new customers that are not attributable to them and that existing customers were not and are not subject to. These additional costs are not reasonable or justified on this record.

In this regard, the 2009 Rule H Tariff is inconsistent with the principles concerning rate discrimination in Idaho Code § 61-315 and set out by the Idaho Supreme Court in *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 690 P.2d 350 (1984) ("*Homebuilders*"), and *Boise Water Corp. v. Public Utilities Comm'n*, 128 Idaho 534, 916 P.2d 1259 (1996) ("*Boise Water*"). In these cases, the Idaho Supreme Court found unlawful

discrimination between customers of the same class under I.C. § 61-315 where they were charged different rates without justification.

Order 30955 also is inconsistent with the Commission's previous determination in a case involving the Rule H tariff (the "1995 Case").¹ In that case, the Commission determined that "new customers are entitled to have the Company provide a level of investment equal to that made to serve existing customers in the same class." R. Vol. IV, p. 639 (emphasis added). Here, however, without any supporting reasoning or justification, the Commission has altered the tariff's methodology, which previously was structured specifically to ensure that "new customers are treated the same as existing customers in terms of the rates they pay." Tr. p. 292, LL. 8-16; Ex. 206. The 2009 Rule H Tariff now requires new customers to pay a greater portion of costs to connect to Idaho Power's system than existing customers paid, and requires new customers within residential subdivisions to pay an even greater portion.

The basic premise for Idaho Power's 2009 Rule H tariff amendments was to make "growth pay for itself" and to reduce an alleged source of "upward pressure on rates." The record, however, lacks any evidence or findings by the Commission to support the assertion that growth is not paying for itself, that new customers (rather than inflation and the cost of new generation and transmission needed to serve all customers) are creating upward pressure on rates, or that the 2009 changes to Rule H appropriately remedy these alleged evils if they do exist. Likewise, Order 30955 lacks findings or conclusions regarding the extent to which the approved

¹ The 1995 Case was Commission case no. IPC-E-95-18, which concluded with the Commission's 1997 Order No. 26780 ("1995 Case Order"), a copy of which is included in the record on appeal at R. Vol. IV, pp. 626-45.

changes affect overall Company rates or whether the changes actually accomplish the asserted goal of making growth cover its costs.

BCA raised these points in the proceedings below, and provided substantial evidence and argument showing the true source of increasing costs is inflation, generation, and transmission and that the Rule H changes would result in unlawful discrimination. But Order 30955 gives barely a nod to BCA's arguments and evidence. Instead, asserting only that conditions are different today and that the standards of *Homebuilders* do not apply to non-recurring costs for line extensions to serve new customers, Order 30955 dismisses its own and this Court's relevant precedent. Order 30955 fails to even mention this Court's *Boise Water* decision. In short, Order 30955 utterly fails to grapple with the applicable factors and standards relevant to its decision.

This appeal also challenges the Commission's decision to deny BCA intervenor funding pursuant to Idaho Code § 61-617A and the Commission's Rules of Procedure, IDAPA 31.01.01.161-165, on the Commission's asserted grounds that BCA did not materially contribute to the Commission's decision, did not address issues of concern to the general body of users or consumers, and did not timely file its intervenor funding request.

B. Course of proceedings below

On October 30, 2008, Idaho Power applied to modify its Rule H tariff. R. Vol. I, pp. 1-55 ("Application"). On January 21, 2009, the Commission issued notice that the Application would be processed under Modified Procedure and established a schedule for parties to file comments concerning the Application with the Commission. R. Vol. I, pp. 129-132. The

Commission deferred deciding whether a hearing was necessary until it reviewed the parties' comments. *Id.*

On April 17, 2009, BCA filed its comments, together with the pre-filed Direct Testimony of Dr. Richard Slaughter. R. Vol. II, pp 204-209; 210-251. Dr. Slaughter, an expert economist, testified about the divergence of the Company's proposal from the standard established in the 1995 Case, included evidence in rebuttal of the Company's assertion that growth was the cause of increased distribution costs, described the adverse economic effects of the tariff revisions, and offered an updated method for computing appropriate allowances and administering vested interest refunds. *Id.*²

On May 1, 2009, BCA also filed its response to the comments submitted by the Commission Staff. R. Vol. II, pp. 253-261.

On July 1, 2009, based on the parties' comments and without holding a hearing, the Commission issued Order No. 30853 partially approving the Application. R. Vol. II, pp. 313-26 ("Original Order"). Among other things, the Original Order significantly altered Rule H's structure by eliminating the previous \$800 per developed lot/new customer refund and providing for a flat \$1,780 allowance for each transformer installed inside a subdivision, and a \$1,780 allowance for each customer located outside a subdivision. *Id.* at 10-12.

On July 13, 2009, BCA filed its *Request for Consideration and Granting of Late-Filed Request for Intervenor Funding* pursuant to Idaho Code § 61-617A and the Commission's Rules

² The meanings of the terms "allowances" and "vested interest refunds" are discussed below. *See infra* n.6 and discussion in accompanying text.

of Procedure, IDAPA 31.01.01.161-165. R. Vol. II, pp. 327-40 (“First Intervenor Funding Request”). The Commission denied BCA’s Intervenor Funding Request as untimely. R. Vol. III, pp. 428-30 (“First Intervenor Funding Order”).

On July 22, 2009, BCA timely filed its *Petition for Reconsideration and/or in the Alternative for Clarification and Petition for Stay* of the Original Order, R. Vol. II, pp. 358-72 (“Petition for Reconsideration”), as did the Ada County Highway District (“ACHD”), the City of Nampa, and the Association of Canyon County Highway Districts. R. Vol. II, pp. 341-57, 373-82.

On August 19, 2009, the Commission granted in part BCA’s Petition for Reconsideration, ordered that a technical hearing be held on the issue of the amount of appropriate allowances, and established a September 11, 2009 deadline for BCA to file direct testimony with the Commission. R. Vol. III, pp. 405-10,

The technical hearing was held on October 20, 2009. At the hearing’s conclusion, the Commission asked for post-hearing briefs. Tr. Vol. II, pp. 299-300. BCA and the Company filed briefs on October 27, 2009. R. Vol. III, pp. 586-96 (BCA) and 597-608 (Idaho Power).

On November 9, 2009, BCA timely filed its *Request for Intervenor Funding* in which it sought intervenor funding for its efforts during the entire proceeding (i.e. pre- and post-Original Order). R. Vol. IV, pp. 612-47 (“Second Intervenor Funding Request”).

On November 30, 2009, the Commission issued Order 30955 affirming, rescinding, amending, and clarifying parts of its Original Order, and denying BCA’s Second Intervenor Funding Request on grounds that BCA had not materially contributed to the proceedings, did not

raise issues of concern to the general body of rate payers, and did not timely request intervenor funding for the pre-Original Order portion of the proceeding. R. Vol. IV, pp. 648-78.

On January 8, 2010, BCA and ACHD timely appealed to this Court challenging the Commission's decisions. R. Vol. IV, pp. 679-83 (ACHD); 684-90 (BCA). The appeals were consolidated by this Court for purposes of the Agency's Record only. R. Vol. IV, pp. 699-700.

C. Statement of facts

This statement of facts is organized in two main subsections: BCA first summarizes the facts regarding the Commission's approved changes to the Rule H Tariff; and, second, BCA summarizes the facts regarding the Commission's denial of BCA's intervenor funding request.

1. The Commission's changes to the Rule H Tariff

a. The Company's Application

Idaho Power applied for approval of certain amendments to its Rule H tariff (sometimes referred to as a "Line Extension" tariff). R. Vol. I, pp. 1-55. This tariff governs Idaho Power's charges for "requests for electric service . . . that require the installation, alteration, relocation, removal, or attachment of Company-owned distribution facilities."³ R. Vol. I, p. 11.

Specifically, Idaho Power sought to "reorganize the tariff sections, add or revise definitions, update charges and allowances, modify refund provisions, and delete the Line Installation Agreements section." R. Vol. I, p. 4. BCA's primary concerns in the proceedings below and on appeal are the changes to line extension charges, allowances, and refund provisions ultimately approved by Order 30955.

³ "Distribution" facilities include the power lines serving local areas and the individual customer premises. They are distinguished from "generation" or "transmission" facilities, as discussed further below.

Idaho Power's premise for the tariff revisions was that "reducing allowances and refunds will relieve one area of upward pressure on rates and will take a step toward growth paying for itself." Tr. Vol. I, p. 61. The Application explained its intent to "defer rate increases by proposing Rule H revisions to update line extension charges and allowances, thereby shifting more of the cost burden for new service attachments and distribution line installations or alterations from general ratepayers to new customers requesting construction for these services." R. Vol. I, p. 3, ¶ 3. Idaho Power's main witness, Gregory Said, testified that "the only thing that's being addressed here is the level of investment that the Company should be making on behalf of not current customers but future customers to connect them and allow them to receive the same residential service rates that all other residential customers receive." TR. Vol. II, pp. 125-26.

b. Line Installation Charges

Ostensibly, "[l]ine installation charges offset the actual per-customer cost of physically connecting to Idaho Power's distribution system" R. Vol. III, p. 599 (Idaho Power's Post-Hearing Brief). It is well-settled, and BCA does not contest, that Idaho Power can charge new customers for the new service attachments and distribution line installations attributable to them.⁴ In the 1995 Case, the Commission found that such charges to new customers were permissible because, "[i]n the case of distribution plant, it is easy to identify the purpose for its construction," R. Vol. IV, p. 639; that is, "line extension charges are imposed only on those

⁴ As explained below, BCA takes issue with the level of investment that Order 30955 now allows Idaho Power to make in new customers, not necessarily the cost above an appropriate Company investment imposed on new customers to connect to the system. These are related, but different, concepts.

customers who will be served by the related facilities” and “[t]hose facilities will provide service only to those customers who paid for them.” R. Vol. IV, pp. 635-36. Thus, distribution plant costs can be contrasted with “transmission, substation and generation costs [which] are viewed as system-related rather than customer-specific,” and for which Idaho Power recoups all its costs through its power rates paid by all customers. *Id.*

c. The Pre-2009 Rule H Tariff Treatment of Line Extension Costs, Allowances, and Refunds

Prior to Order 30955, the Rule H tariff required Idaho Power to invest in new customer distribution facilities at a level “equal to that made to serve existing customers in the same class,” R. Vol. IV, p. 639 (1995 Case Order), and required new customers to pay those line extension costs in excess of the portion that Idaho Power was required to invest. Idaho Power’s level of investment in new customer distribution approximated its “embedded cost” (also sometimes referred to as “embedded investment”).⁵ *Id.*

The Rule H tariff approved in the 1995 Case authorized Idaho Power to invest in new customer distribution facilities through a system of “allowances” and “refunds.” An “allowance”—sometimes called a “Company-funded allowance”—represents Idaho Power’s investment, rather than the new customer’s investment, in new customer distribution facilities that the Company is authorized to recoup through electric rates paid by all customers. R. Vol. I, p. 168 (IPUC Staff Comments); *see also* R. Vol. I, p. 26 (definition of “Line Installation

⁵ “Embedded cost represents the Company’s current ‘level of investment made to serve existing customers,’ and . . . approximates the Company’s per customer level of investment in distribution plant that it can recover through existing rates.” R. Vol. III, pp. 442 LL. 18-23 (Slaughter testimony); Tr. Vol. II, p. 232, L. 21 – p. 233, L. 6. *See also* R. Vol. I, pp. 169-70 (Commission Staff’s discussion of embedded investment).

Allowance” in proposed version of 2009 Rule H Tariff included with Application). The “refund” component of the Rule H tariff came into play when a subdivision developer (who, rather than receiving an up-front Company-funded allowance, was required to pay the costs of new distribution facilities needed for a subdivision) requested a refund from Idaho Power for each subdivision customer that connected within five years of the new distribution facilities’ completion.⁶ R. Vol. IV, p. 641 (1995 Case Order). This structure of up-front allowances and refunds was intended to ensure that Idaho Power provided new customers “a level of investment equal to that made to serve existing customers in the same class,” R. Vol. IV, p. 639 (1995 Case Order). And, as Commission Staff observed in the instant case, the refund component of the structure “puts the risk of development on the subdivision developer rather than on Idaho Power’s ratepayers.” R. Vol. I, p. 172 (IPUC Staff Comments).

The 1995 Case, in which the Commission approved this system of allowances and refunds, saw Idaho Power seeking to eliminate allowances and refunds and require a new customer to pay the entire cost of line extensions. At that time, line extensions were paid by the new residential customer or developer, and the Company later refunded up to \$1,200 per customer when he or she connected to the system. R. Vol. IV, pp. 628-629. Similar to this case, BCA then opposed the elimination of the refunds because, among other things, it would require new customers to pay the entire cost of the new line extension *plus* pay in their general rates an

⁶ The Rule H Tariff also provides for a “vested interest refund” to be paid to an applicant for new service who has paid to the Company line installation charges for extension of distribution facilities where additional applicants later attach to that section of distribution facilities. R. Vol. I, p. 21. The vested interest refund provisions of the tariff are not at issue in this appeal.

increment to cover the Company's investment in line extensions serving its existing customers and would have negative impacts on developers. *Id.*, at p. 631. Ultimately, The Company modified its proposal and urged the Commission to approve an overall allowance based on the cost of terminal facilities and up to a \$1,300 per new customer refund. *Id.*, pp. 628-629. The Company advocated that this proposed allowance was justified because, "if an allowance or Company investment is established equal to the embedded cost of facilities already included in rates, new customers are treated the same as existing customers in terms of the rates they pay." Tr., p. 292, LL. 12-16. As the Company then urged in support of its modified allowance structure, ensuring that everyone (i.e. existing and new customers) pays the average rate base embedded in rates would "keep all customers on a level playing field." R. Vol. IV, p. 630 (Commission summary of Company's argument).⁷ The Commission agreed, stating:

We find that new customers are entitled to have the Company provide a level of investment equal to that made to serve existing customers in the same class. Recovery of those costs in excess of embedded costs must also be provided for and the impact on the rates of existing customers is an important part of our consideration. We also recognize that requiring the payment of all costs above embedded investment from new customers could have severe economic effects.

R. Vol. IV, p 639. The Commission thus confirmed the new customer's entitlement to a minimum Company investment equal to the Company's investment in its existing customers, i.e. its "embedded cost" in distribution. At the same time, the Commission apparently recognized that requiring a Company investment greater than embedded cost could produce impacts (i.e.

⁷ Other jurisdictions have described this as putting new and existing customers on "equal footing." See, e.g., *Meglino v. Eagleswood*, 103 N.J. 144, 145, 510 A.2d 1134, 1145 (N.J. 1986) (also stating that "equality of treatment is obviously the polestar," 510 A.2d at 1140).

cause upward pressure) on the rates of existing customers because the Company would have to recover its above-embedded cost investment through rates. The Commission also apparently believed it was appropriate to balance the risk of upward pressure on rates against the risk of severe economic impacts to new customers if they paid too great a portion of the new facilities costs.

The reason a Company investment in distribution facilities to serve new customers based on its embedded distribution investment does not create upward pressure on rates is that the Company already is authorized to recover that level of investments over time through rates charged to its customers. As in the 1995 Case, the Commission Staff recognized in the instant proceeding the importance of analyzing allowances in light of embedded costs:

. . . the line extension rules should provide a new customer allowance (Company investment) that can be supported by electric rates paid by that customer over time. . . . In order to properly establish an allowance, a refund and the potential for additional customer contribution, a detailed analysis of distribution investment embedded in existing electrical rates must be conducted.

R. Vol. I, pp. 168-169 (emphasis added). Staff then undertook that detailed analysis and calculated the Company's *per customer* embedded distribution investment to be \$1,232.44. R. Vol. I, pp. 169-170.

Also in the instant proceeding, BCA's witness, Dr. Slaughter, explained why embedded costs were an appropriate basis for analyzing the allowances for distribution facilities serving new customers:

[E]mbedded cost approximates the Company's per customer level of investment in distribution plant that it can recover through existing rates. To the extent that the Commission wants to relieve upward pressure on rates, then limiting the Company's

investment in distribution to serve new customers to its current per customer embedded costs for distribution facilities providing the same service to existing customers accomplishes this.

R. Vol. III, pp. 442-43; Tr., Vol. II, pp. 233-234. Using data provided by Idaho Power in response to discovery, Dr. Slaughter calculated the Company's average embedded investment in distribution for residential customers to be \$1,102.00, Ex. 204, which BCA concedes is reasonably close to Commission Staff's \$1,232.44 figure. R. Vol. III, p. 443 LL.7-12 (Slaughter).

When the Company's investment in distribution facilities for new customers falls below its embedded cost, then it recovers through rates more than it invested in the distribution facilities serving the new customer. Tr. Vol. II, p. 237, L. 15 – p. 239, L. 3. For example, in a sixty lot residential subdivision under Commission Staff's \$1,232.44 embedded cost calculation and the \$1,780 allowance approved in the 2009 Rule H Tariff Case, the Company could net \$1,084.00 more than its per customer investment. Tr. Vol. II, p. 240. In this situation, the Company realizes a profit on each new customer installation supplemental to the Company's authorized rate of return. Tr. Vol. II, p. 243, LL. 6-18. Absent a true-up or accounting for this (i.e. some method of refunds to new customers who have overpaid to connect to the Company's system), the obvious question is: what becomes of this additional income or excess revenue provided by the new customer? Dr. Slaughter testified that, absent a timely true-up that attributes the excess revenues back to the new customers who paid them,

. . . the practical effect quite likely will be that the amount earned on new distribution plant in excess of embedded costs, will be applied to help pay the Company's other costs, including non-recoverable costs, generation and/or

transmission costs—new customers will be paying an unequal proportion of these costs when compared with existing customers.

Tr. Vol. II, p. 247, LL. 1-9. In effect then, through the increased customer contribution necessitated by a below-embedded cost investment by the Company, the new customer winds up subsidizing the rates of existing customers. The opposite result occurs when a company invests more than its embedded cost.⁸

d. The 2009 Rule H Tariff Treatment of Line Extension Costs, Allowances, and Refunds.

The Commission altered Rule H's structure of allowances and refunds by eliminating the existing \$800 per developed lot/new customer refund (see R. Vol. I, pp. 42-43 highlighting changes to refunds rules) and providing for a flat \$1,780 allowance for each transformer installed inside a subdivision, and a \$1,780 allowance for each customer located outside a subdivision. R. Vol. II, p. 322 (Original Order).⁹ Because up to ten new customers may connect to a transformer within a subdivision, new customers inside of subdivisions share the allowance. Tr. p. 237, LL. 3-5 (Slaughter). "The \$1,780 allowance is based upon the installed cost of that transformer (\$915) along with service conductor and metering (\$865)." Tr. p. 281, LL. 1-4. The

⁸ See e.g., Order 26780, R. Vol. IV, p. 639-40 ("Recovery of those costs in excess of embedded costs must also be provided for and the impact on the rates of existing customers is an important part of our consideration," and whether the allowance is applied through a terminal facilities component or a line extension component is not critical, but "[t]he amount of the allowance is critical, however."); *City of Aurora v. Public Utilities Comm'n of State of Colorado*, 785 P.2d 1280 (1990); *Home Builders Association of Metropolitan Denver v. Public Utilities Comm'n of State of Colorado*, 720 P.2d 552 (1986) (recognizing relationship between line extension allowances, company embedded investment and subsidization of rates).

⁹ In Order 30955, the Commission found that this \$1,780 figure is "based on the average cost of distribution facilities (the Standard Terminal Facilities) for a new customer." R. Vol. IV, p. 651. "Standard Terminal Facilities" are defined in the 2009 Rule H Tariff as "the overhead Terminal Facilities the Company considers to be most commonly installed for overhead single phase and three phase services," and "Terminal Facilities include transformer, meter, overhead service conductor, or underground service cable and conduit (where applicable)." R. Vol. I, pp. 12-13.

Commission found that “[b]ecause the allowance is calculated on a per transformer basis and not a per customer basis, the allowance inside and outside subdivisions provides the same Company investment.” R. Vol. IV, p. 668 (Order 30955).

The 2009 Rule H Tariff authorizes a smaller allowance (i.e. lesser level of Company investment) than previously authorized. R. Vol. II, p. 390; R. Vol. III, p. 598; Tr. p. 273, LL. 3-7; Tr. p. 118, LL. 5-7. Said another way, under the 2009 Rule H Tariff, Idaho Power provides a lesser level of investment to new customers than it provided existing customers and a lesser level of investment among new customers who share transformers because they live inside subdivisions.

BCA’s witness Dr. Richard Slaughter calculated that the range of the Company’s per customer investment under the 2009 Rule H Tariff can vary from a high of \$1,780 to as low as \$149 depending on whether the customer is located inside or outside a subdivision and the size of the subdivision. R. Vol. III, p. 445; Tr. Vol. II, p. 237, LL. 1-14.

2. *The Commission’s denial of BCA’s request for intervenor funding*

As authorized by the Commission’s Rule of Procedure 71, IDAPA 31.01.01.071, BCA as an intervenor actively participated throughout the proceedings below.

Prior to the Commission’s Original Order, BCA filed comments and direct expert testimony describing the infirmities of Idaho Power’s proposed changes to the Rule H tariff. R. Vol. II, pp. 233-34. BCA also responded to the Commission Staff’s comments, pointing out what BCA believed to be Staff’s “inadvertent” assumption that a per transformer allowance

would provide a per customer Company investment approximating its embedded distribution costs. R. Vol. II, p. 255.

BCA petitioned for reconsideration of the Commission's Original Order, R. Vol. II, pp. 358-72, and, pursuant to the Commission's Order granting reconsideration, R. Vol. III, p. 408, filed additional direct expert testimony, R. Vol. III, pp. 440-458, participated in a technical hearing, R. Vol. III, pp. 502-04, and submitted a post-hearing brief, R. Vol. III, pp. 586-96. These efforts all focused on the basic arguments made here—that the Rule H tariff modifications result in unlawful discrimination under *Boise Water, Homebuilders*, and the Commission's prior decision in the 1995 Case. In its request for reconsideration, BCA identified the lack of findings or conclusions supporting the Commission's decision in the Original Order and, in the alternative to reconsideration, requested the Commission clarify for the record that it was rejecting its previous standard set in the 1995 Case, as well as the basis for and scope of the new standard, and enumerate its justification for this change and for the resulting discriminatory charges. R. Vol. II, p. 268.

BCA twice requested intervenor funding pursuant to Idaho Code § 61-617A and IDAPA 31.01.01.161-165—once following the proceedings leading up to the Original Order (the First Intervenor Funding Request), and again following the reconsideration proceedings (the Second Intervenor Funding Request). No party opposed either request. Nevertheless, the Commission denied both, but for different reasons.

The Commission denied BCA's First Intervenor Funding Request on grounds that it was untimely under the Commission's Rule of Procedure 164, IDAPA 31.01.01.164. Rule 164

requires that intervenor funding requests must be made “no later than fourteen (14) days after the last evidentiary hearing in a proceeding or the deadline for submitting briefs, proposed orders, or statements of position, whichever is last.” Under its Modified Procedure, the Commission did not originally schedule an evidentiary hearing or deadlines for submitting briefs, proposed orders, or statements of position prior to the Original Order. Rather, it received comments from the parties with the possibility of scheduling a hearing after considering the comments. R. Vol. I, p. 131. The Commission did not order a hearing, and determined that the May 1, 2009 deadline for filing reply comments triggered a May 15, 2009 deadline for filing requests for intervenor funding. Consequently, BCA’s First Intervenor Funding Request, filed on July 13, 2009, was deemed untimely and denied. R. Vol. III, p. 429.

The Commission denied BCA’s Second Intervenor Funding Request on grounds that BCA did not “materially contribute” to the Commission’s decision and its advocacy did not address issues of concern to ‘the general body of users or consumers.’” R. Vol. IV, p. 673. The Commission also determined that BCA was not entitled to intervenor funding for its efforts prior to the Original Order on the ground that BCA’s First Intervenor Funding Request was not timely filed.

II. ISSUES PRESENTED ON APPEAL

1. Whether the Commission’s 2009 Rule H Tariff imposes unlawfully disparate and discriminatory rates as among new customers living inside and outside of subdivisions and as between new customers and existing customers.

2. Whether the Commission regularly pursued its authority to set nondiscriminatory rates, where its decision is not supported by substantial evidence, findings or conclusions to support the disparate and discriminatory rates authorized by Order 30955.
3. Whether the Commission abused its discretion in failing to award BCA intervenor funding.
4. Whether BCA is entitled to an award of attorney fees and costs on appeal.

III. STANDARDS OF REVIEW

Two standards of review apply in this appeal. The first applies to this Court's review of the substantive issues concerning the 2009 Rule H Tariff and the second applies to the question of whether BCA should have been awarded intervenor funding for its participation in the proceedings below.

The standard of review on the substantive issues concerning the 2009 Rule H Tariff is, itself, bifurcated. "[W]ith regard to questions of law[,] review of Commission orders is limited to a determination of whether the Commission has regularly pursued its authority and whether the constitutional rights of the appellant have been violated. With regard to questions of fact[,] this Court will sustain the Commission's determinations unless it appears that the clear weight of the evidence is against its conclusions or that the evidence is strong and persuasive that the Commission abused its discretion." *McNeal v. Idaho PUC*, 142 Idaho 685, 132 P.3d 442 (2006) (citation omitted). This Court also needs to determine whether in allocating costs to new

customers, the Commission regularly pursued its authority to set nondiscriminatory rates. *Boise Water*, 916 P.2d at 1262-63.

On the issue of intervenor funding, which the Commission is authorized to award pursuant to statute, the Supreme Court employs an abuse of discretion standard. *Idaho Fair Share v. Idaho Public Utilities Comm'n*, 113 Idaho 959, 751 P.2d 107 (Idaho), *rev'd on other grounds*. *J.R. Simplot Co., Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991). "The wording of I.C. § 61-617A makes it evident that the Commission is vested with the discretion to award attorney's fees and costs The decision of the adjudicating body awarding fees will not be overturned absent an abuse of discretion." *Id.* at 963, 751 P.2d at 111.

IV. ARGUMENT

The Commission's Order 30955 authorizes Idaho Power to charge new customers discriminatory rates and charges in violation of the anti-discrimination provisions of Idaho Code § 61-315 and the Idaho Supreme Court's decisions in *Homebuilders* and *Boise Water*. Without any apparent rationale or justification, it also is contrary to the Commission's own decision in the 1995 Case, where it recognized that "new customers are entitled to have the Company provide a level of investment equal to that made to serve existing customers in the same class." R. Vol. IV, p. 639. Order 30955 fails to satisfy the legal standards established in *Homebuilders* and *Boise Water*, and does not provide the necessary level of rationale for its substantial divergence from a prior, longstanding Commission ruling on the same tariff involved in this case. *See Washington Water Power v. IPUC*, 101 Idaho 567, 617 P.2d 1242 (1980) ("So long as the

Commission enters sufficient findings to show that its action is not arbitrary and capricious, the Commission can alter its decisions.”)

A. *Homebuilders* and *Boise Water* provide the applicable standards to implement Idaho’s anti-rate discrimination statute.

The starting point in reviewing Order 30955 with respect to its treatment of charges Idaho Power may impose on new customers to obtain service, is with the standards established by Idaho Code § 61-315 and by the *Homebuilders* and *Boise Water* Courts.

Idaho Code § 61-315 prohibits rate discrimination by a public utility. It states:

No public utility shall, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. The commission shall have the power to determine any question of fact arising under this section.

I.C. § 61-315 (emphases added). This prohibition of preferential or discriminatory rates formed the basis for the Idaho Supreme Court’s decisions in *Boise Water* and *Homebuilders*.

In *Homebuilders*, this Court reviewed the Commission’s decision to impose a non-recurring charge on the installation or conversion to electric heating after May 1, 1980. *Homebuilders*, 107 Idaho at 417, 690 P.2d at 352. The charge was imposed only on customers who had the option of choosing natural gas for heating, *Id.*, and the Commission ordered the money collected through those charges be used specifically to offset the cost for new generating facilities. *Id.* at 418, 690 P.2d at 353. The *Homebuilders* Court held that the charge “unlawfully discriminate[d] between ‘new’ and ‘old’ customers,” and that the Commission incorrectly

assumed “that only ‘new’ customers were responsible for the [increased] level of demand [on new generating facilities].” *Id.* at 421, 690 P.2d at 356. In reality, the Court held, all customers—old and new—are equally responsible for the level of demand on generating facilities and, therefore, there was no difference in the cost of service between old and new customers that would justify a difference in rates. *Id.*

The *Homebuilders* Court identified factors that could justify a difference in rates, including “cost of service, quantity of electricity used, differences in conditions of service, or the time, nature and pattern of the use,” *Homebuilders*, 107 Idaho at 420, 690 P.2d at 355, but found that there was no justification for the Commission-approved rate disparity in that case. Accordingly, the Court held that the charge “violate[d] the legislative prohibition against discriminatory or preferential rates.” *Id.*

In *Boise Water*, the Court reviewed the Commission’s decision to increase Boise Water Corporation’s non-recurring charges for new connections to its system (i.e. “hook-up fees”) after July 25, 1994. *Boise Water*, 128 Idaho at 535, 916 P.2d at 1260. Boise Water recently had constructed a water treatment plant and the Commission found that “the cost of supply for a new service connection varied greatly depending on whether the water supply came from a well or [the] water treatment plant.” *Id.* at 536, 916 P.2d at 1261. For that reason, the Commission increased the hook-up fees to “help protect existing rate-payers from the costs associated with growth and ‘ensure that growth pays for itself.’” *Id.* at 536, 916 P.2d at 1261. The *Boise Water* Court, however, found that the question presented was whether the Commission properly allocated “the entire increased cost of resource supply [i.e. the new water treatment plant] to new

customers via hook-up fees.” *Id.* at 538, 916 P.2d at 1263. More specifically, the Court stated that, “as in *Homebuilders*, the focus . . . is whether the cost of service differs between the two classes [of customers—those added to the system before the water treatment plant came online, and those added after].” *Id.* at 539, 916 P.2d at 1264. The Court reiterated the *Homebuilders* holding that a “difference in rates and charges must be justified by a corresponding classification of customers that is based on such factors as cost of service, quantity of resource use, differences in the condition of service or in the time, nature or pattern of the customers’ use,” *Boise Water*, 128 at 539, 916 P.2d at 1264 (citing *Homebuilders*). The Court concluded that “the cost has increased proportionately for each Boise Water customer,” that “[t]here is no difference in the cost of service between [old and new customers],” that “[e]ach new customer that has come into the system at any time has contributed to the need for new facilities,” and that “[t]o the extent that the new hook-up fees are based on an allocation of the incremental cost of new plant construction required by growth . . . solely to new customers, the fees unlawfully discriminate between old and new customers” *Id.*

The *Homebuilders* and *Boise Water* decisions then do not stand for a blanket rule, as suggested by the Commission, that “no discrimination is present ‘when a non-recurring charge [e.g., a line extension charge] is imposed upon a new customer’” R. Vol. IV, pp. 669-70 (Order 30955). First, the Court held in both cases that the non-recurring charges at issue were discriminatory. *Homebuilders*, 107 Idaho at 416, 690 P.2d at 351 (stating the case involved a “non-recurring charge”); *Boise Water*, 128 Idaho at 535, 916 P.2d at 1260 (stating the case involved one-time “hook-up fees”). Second, these cases require the Commission to justify a

difference in rates and charges based on the *Boise Water/Homebuilders* factors regardless of whether the charge is "non-recurring." True, there arguably could be lawful differences in non-recurring charges between customers, but they must be justified based upon an application of the *Boise Water/Homebuilders* factors to actual facts in the record. No justification exists in the instant case, nor are there facts or analysis in the record that would provide such justification.

B. Order 30955 imposes unlawfully discriminatory charges as between customers inside and outside of subdivisions.

Order 30955 authorizes a \$1,780 allowance per transformer installed within a residential subdivision and a \$1,780 allowance per customer outside of residential subdivisions. R. Vol. IV, p. 674 (Order 30955 denying BCA's petition to amend Original Order); R. Vol. II, p. 332 (Original Order at 10). This arrangement patently treats customers inside and outside subdivisions disparately because in a subdivision a single transformer may serve multiple (up to ten) customers if those customers are located in sufficient proximity to each other, Tr. p. 237, LL. 3-5 (Slaughter), whereas, in the case of a single customer requesting service outside a subdivision, a transformer will only serve that one customer. Thus, customers within a residential subdivision will share a transformer and the \$1,780 per transformer allowance pro rata. On the other hand, the single new customer outside a residential subdivision shares a transformer with no one and receives the full benefit of the \$1,780 allowance.

Order 30955 also eliminates the previously required \$800 per subdivision lot refund that accounted for (i.e. made up for) what previously was deemed an insufficient level of investment that would occur if the Company provided only an allowance for Terminal Facilities (i.e.

transformers) and the subdivision developers paid the upfront cost of new distribution facilities needed to serve a subdivision. Subdivision developers now will receive only a per transformer allowance and no per lot refund. Because the developer's costs are passed through to each lot purchaser (i.e. Idaho Power's new customers), the elimination of per lot refunds results in a lesser Company investment in each new customer within a subdivision, and a higher cost to the developer that is passed on to the new home purchaser, some of whom are priced out of the market. Tr. Vol. II, pp. 209-10, LL. 1-24, L. 1; R. Vol. II, pp. 246-247; Exh. 203.

BCA presented un rebutted evidence that, except in the case of a new customer requesting service to a single lot who will not have to share a transformer, no other customers (i.e., those within subdivisions) will receive the full benefit of the Company's \$1,780 per transformer investment. Tr. Vol. II, p. 237, L. 1 – p. 245, L. 25. In its Response to Staff Comments, and its Petition for Reconsideration, BCA illustrated this clearly in a table summarizing data already in evidence. R. Vol. II, p. 256; R. Vol. II, pp. 362-63. This table illustrates that, because of the elimination of any per-lot refund, the new customers inside a subdivision must share the approved \$1,780 allowance. This reduces the Company's per customer investment to as low as \$149 in a sixty-lot subdivision. R. Vol. II, p. 362. Each of the new customers inside a sixty-lot subdivision is, therefore, required to pay through rates \$1,631 ($\$1,780 - \149) more than the single new customer outside a subdivision pays for the same service. To rub salt in the wound, this per transformer allowance results in the new subdivision customer then paying-through rates as an "existing customer"—up to \$1,084 more than the Company invested in the facilities constructed to serve that new customer. R. Vol. III, pp. 445, 447 (Table 1).

Idaho Code Section 61-301 requires all rates and charges to be just and reasonable, and Idaho Code Section 61-315 prohibits either preferential or discriminatory treatment of ratepayers by public utilities. The 2009 Rule H Tariff satisfies neither of these statutes.

The previous Rule H system of allowances and refunds was structured to ensure that Idaho Power provided new customers “a level of investment equal to that made to serve existing customers in the same class.” R. Vol. IV, p. 639 (1995 Case Order). It also tied the Company’s level of investment in new customer distribution facilities to average embedded costs in order to “keep all customers on a level playing field.” R. Vol. IV, p. 630 (Commission summary of Company’s argument). The Commission has abandoned this methodology and reasoning without acknowledging it or providing a reasoned explanation. *See Boise Water*, 128 Idaho at 537, 916 P.2d at 1262 (“In addition to making findings of fact based on substantial, competent evidence, the IPUC must explain the reasoning employed to reach its conclusions in order to ensure that the IPUC has applied relevant criteria prescribed by statute or its own regulations and has not acted arbitrarily or capriciously.”)

Order 30955 avoids this question by urging that the approved tariff provides for an equal “per transformer” investment regardless of where the customer is located. R. Vol. IV, p. 668. In its testimony Idaho Power does the same by creating an “applicant” class of customers and arguing that the 2009 Rule H Tariff treats “applicants” for new service equally (presumably by giving them access to a Company funded transformer) and that once they have paid the increased cost to receive service they become “existing customers” paying existing customer rates, who all then pay the same general rates. Tr. p 288, L. 9 – p 289, L. 2. *See also* R. Vol. III, p. 599 (“So

long as all potential new customers/applicants are treated in a like manner, there is no unlawful discrimination.” (emphasis added)). This addresses neither the disparity in overall costs paid by new customers inside and outside subdivisions to receive the same level of service, nor between “new” and “existing” customers (as further explained in the next section).

Indeed, the same argument could have been made in the *Boise Water* case—once the applicants for new service paid the increased hook-up charge, they too became “existing customers” subject to the same rates as existing customers. But that did not change the fact that Boise Water’s proposed increased contribution to become a customer bore no real relationship to the cost to interconnect, but rather was calculated to help offset other costs attributable to all customers, i.e., water treatment.

C. Order 30955 authorizes unlawfully discriminatory charges as between new customers and existing customers.

The 2009 Rule H Tariff’s \$1,780 transformer/terminal facilities allowance also results in new customers receiving a lesser level of investment than existing customers received. This is unlawfully discriminatory.

The 2009 Rule H Tariff’s \$1,780 allowances fall far short of the previously authorized allowances. The \$1,780 figure is “based on the average cost of distribution facilities (the Standard Terminal Facilities) for a new customer.” R. Vol. IV, p. 651. “Standard Terminal Facilities” are defined in the 2009 Rule H Tariff as “the overhead Terminal Facilities the Company considers to be most commonly installed for overhead single phase and three phase services.” R. Vol. I, p. 12. The version of the Rule H tariff in effect immediately prior to

approval of the 2009 Rule H Tariff authorized allowances for new customers of "Overhead Terminal Facilities" plus a refund of \$800 per subdivision lot¹⁰ or "Overhead Terminal Facilities" plus \$1,000 to \$1,300 depending on whether the new non-subdivision customer utilized electricity for heating. There were differences in the allowances/refunds as among new customers, but those differences bore a relationship to the Company's ability to recover them through the authorized rates it would charge that customer once connected to service.¹¹ No such nexus exists under Order 30955. The 2009 Rule H Tariff's allowance of "overhead Terminal Facilities" plus nothing, is a much smaller allowance than the previous tariff's "Overhead Terminal Facilities" plus \$800 or \$1,000 or \$1,300. This produces a corresponding cost to the new customer that previous new customers (now existing customers) did not incur because that cost was incurred by the Company and it is recovering it through its existing rates.

To be clear, BCA's case is not premised simply on the fact that the 2009 Rule H Tariff allowance is smaller than previously required, or that new customers may pay more to extend service than existing customers who accessed service when facilities costs were lower. BCA has consistently acknowledged that the Rule H tariff must be adjusted incrementally from time to

¹⁰ Inside of subdivisions, the previous version of the Rule H tariff authorized an allowance equal to the cost of Overhead Terminal Facilities plus \$800 per lot. R. Vol. I. p. 43; R. Vol. I, p. 198 (IPUC Staff Comments Att. 8). The developer would pay all of the costs in excess of terminal facilities up-front, but would receive the \$800 as a *per lot refund* for each new customer connected to electric service within five years.

¹¹ See Tr. Vol. II, pp. 243-45:

[I]t is clear that under [Rule H approved by the 1995 Case Order], the developer's "Net Cost" plus the \$800 per lot refund almost exactly equal the "Work Order Cost per lot," which in turn are almost exactly equal to the average embedded cost of \$1,232 computed by Staff. Whether as a result of simple coincidence or of thoughtful consideration, under the existing Rule H tariff approved in [the 1995 Case Order], current Company per customer investment in new distribution closely approximates its current embedded cost.

time to reflect factors such as inflation. BCA understands that there will be a cost difference between what new customers pay for line extensions as compared to old customers. *See Boise Water*, 128 Idaho at 538, 916 P.2d at 1264 (“The BCA concedes that hook-up fees may be charged and need to be increased incrementally from time to time to reflect such factors such as inflation”); *see also* R. Vol. III, p. 452 LL. 10-19 (Testimony of R. Slaughter).

The 2009 Rule H Tariff allowance, however, results in new customers overpaying for distribution facilities, in Idaho Power over-earning on its investment to serve those new customers, and in existing customers necessarily being subsidized in the rates they pay. The 2009 Rule H Tariff must be rejected for this reason. Also, allowance now bears no apparent relationship to the actual cost to extend service to new customers, or the Company’s ability to recover those costs through its existing rates.

At least under the previous Rule H tariff, the allowances for residential line extensions (in the form of an up-front terminal facilities allowance plus \$1000-\$1,300 or terminal facilities plus an \$800 per-lot refund) were “quite close to the approximate \$1,000 to \$1,200 [current Company] per customer embedded cost of distribution.” Tr. Vol. II, p. 239, LL. 13-18 and Exhibit 205. Under Order 30955, line extension allowances no longer swing around *any* objective anchor that future customers, Commissions, or this Court can hold to.

D. Order 30955 violates the standards established in *Homebuilders* and *Boise Water*.

As discussed above, the *Homebuilders* and *Boise Water* Courts held that a regulated public utility may not unlawfully discriminate between customers. Those Courts also held that,

while not all rate differences are unlawfully discriminatory, a “difference in rates and charges must be justified by a corresponding classification of customers that is based on such factors as cost of service, quantity of resource use, differences in the condition of service or in the time, nature or pattern of the customers’ use.” *Boise Water*, 128 at 539, 916 P.2d at 1264; *Homebuilders*, 107 Idaho at 420, 690 P.2d at 355 (substantively same language as quoted). This list of factors does not appear to be exclusive. Presumably it makes room for Commission consideration of potential impacts of a given charge or rate on new customers/homeowners, real estate development, and the State’s economy, as well as the potential subsidization of new customers by existing customers and vice-versa.

But Order 30955 does not explain why the new 2009 Rule H Tariff structure should not be viewed as unlawfully preferential or discriminatory under any factors. Indeed, there is no evidence in the record to support a finding under any of the *Boise Water/Homebuilders* factors that justifies the disparate line extension charges authorized under the 2009 Rule H Tariff.

1. *There are not substantial evidence in the record or sufficient findings to justify a difference in rates as between customers inside and outside subdivisions.*

The Commission’s decision here effectively classifies new customers into “subdivision” and “non-subdivision” classes and a large, but theoretically finite, number of small to large subdivision classes, although the Commission never recognizes it. These implicit classifications are not based on these *Boise Water/Homebuilders* factors; indeed, the Commission did not even mention these factors in its Orders.

Instead the Commission stated: “[b]ecause the allowance is calculated on a per transformer basis and not a per customer basis, the allowance inside and outside subdivisions provides the same Company investment.” R. Vol. IV, p. 668 (emphasis added). The Commission misses the mark. BCA does not dispute that under the approved new tariff the Company will invest the same amount in each transformer outside a subdivision that it does in each transformer inside a subdivision. But the anti-discrimination statute, I.C. 61-315, this Court’s *Boise Water* and *Homebuilders* decisions, and the Commission’s 1995 Case Order correctly focus on equal treatment as among customers, not transformers. Unless justified under the *Boise Water/Homebuilders* factors, new customers are entitled to have Idaho Power provide the same level of investment regardless of whether they live inside or outside of subdivisions. The Commission wrongly reasons that it is sufficient for Idaho Power to provide the same investment per transformer.

2. *There are not substantial evidence in the record or sufficient findings to justify a difference in rates as between new and existing customers.*

The Commission also does not justify the disparate treatment of new customer as compared to existing customers using any of the *Boise Water/Homebuilders* factors. Neither of the Commission’s Orders in this case acknowledges that a difference in rates or charges exists as between new and existing customers, let alone mentions the *Boise Water/Homebuilders* factors.

Apparently, the Commission did not address the *Boise Water/Homebuilders* factors because it interprets *Homebuilders* to mean that *as a matter of law* “there is no discrimination between ‘new’ and ‘old’ customers when the Commission sets new line extension charges,” R.

Vol. IV, p. 669 (citing *Homebuilders*), thus avoiding the need to analyze the issue in any meaningful way in light of facts in the record. Order 30955 specifically asserts that the *Homebuilders* Court created an exception to analyzing rate discrimination under the *Boise Water/Homebuilders* factors where “a non-recurring charge is imposed upon new customers because the service they require demands an extension of existing distribution or communication lines and a charge is imposed to offset the cost of the utility’s capital investment.” *Homebuilders*, 107 Idaho at 421, 690 P.2d at 356. R. Vol. IV, pp. 669-70. But this reading does not accurately or completely portray the *Homebuilders* holding.

Boise Water and *Homebuilders* both involved non-recurring charges that the Court found to be unlawfully discriminatory against new customers vis-à-vis existing customers. In both cases, the Idaho Supreme Court held that differences in such charges “must be justified by a corresponding classification of customers that is based on such factors as cost of service, quantity of resource use, differences in the condition of service or in the time, nature or pattern of the customers’ use.” *Boise Water*, 128 at 539, 916 P.2d at 1264; *Homebuilders*, 107 Idaho at 420, 690 P.2d at 355 (substantively same language as quoted). The Commission has not undertaken any such analysis or justification in the instant Case.

The Commission interprets BCA’s argument below at least implicitly, to be that the Commission cannot change its policy from the 1995 Case. R. Vol. IV, p. 668. The Commission then cited this Court for the proposition that “[s]o long as the Commission enters sufficient findings to show that its action is not arbitrary and capricious, the Commission can alter its decisions.” R. Vol. IV, p. 668 (citing *Washington Water Power v. IPUC*, 101 Idaho 567, 617

P.2d 1242 (1980)). BCA agrees that this is the standard, but disagrees that the Commission has come close to satisfying it. In any case, had the Commission attempted to satisfy *Washington Water Power* or justify the 2009 Rule H Tariff's disparate rate structure under the *Boise Water/Homebuilders* factors, which it has not, the evidence in the record does not support the different treatment of new customers and existing customers discussed above. See e.g., Tr. Vol. II, pp. 123, L. 24 – p. 125, L., 10 (Said cross-exam).

3. *There are not substantial evidence in the record or sufficient findings to support the conclusion that the Rule H amendments somehow address alleged "upward pressure on rates" or make "growth pay for itself."*

The record simply does not support the unequal treatment of new customers approved by the Commission in this case. The Company ostensibly desires to "relieve one area of upward pressure" and believes its requested changes in allowances, particularly the elimination of per-lot refunds in subdivisions, "will take a step toward growth paying for itself," R. Vol. I, p. 61, by shifting more of the cost burden for new service attachments and distribution line installations from general ratepayers to new customers. R. Vol. I, p. 3. But this allegation is the sum extent of the Company's case and evidence to support its requested changes.

Idaho Power made no attempt to rebut the extensive BCA testimony and Staff Comments demonstrating that inflation, not growth, was the driving factor of increased distribution facilities costs, and that rapid growth only causes the effects of inflation to be felt sooner. Tr. Vol. II, p. 188, L. 11 – p. 191, L. 7 (R. Vol. II, p. 219, L. 9 – p. 220, L. 20) and Exhibit 203 (Slaughter); R. Vol. I, pp. 183-189 (Staff). Idaho Power did not attempt to rebut this evidence concerning the source of increased costs, perhaps because it acknowledges that the changes authorized by the

2009 Rule H Tariff were not proposed by the Company to keep pace with inflation, but rather to shift more of the cost of new distribution facilities to new customers to free up capital so it can fund new system-wide, generation and transmission facilities. R. Vol. I, p. 61 LL. 9-22 (Said).¹² See also R. Vol. I, p. 3 (purpose of Application was to “shift[] more of the cost burden . . . to new customers”); Tr. Vol. II, p. 247 LL. 1-9 (Slaughter testifying “the practical effect quite likely will be that the amount earned on new distribution plant in excess of embedded costs will be applied to help pay the Company’s other costs, including non-recoverable costs, generation and/or transmission costs . . .”).

Idaho Power also offered no evidence to indicate what reduction in allowances actually would be necessary to prevent the alleged upward pressure on rates owing to new customer line extensions. Even the Commission Staff recognized the Company’s omission in its filed

Comments

. . . Idaho Power has done no analysis to prove that growth is not paying for itself, nor has the Company done any analysis to determine specifically what amounts of allowances can relieve upward pressure on rates. . . . The Company concludes that a reduction in Company investment in new distribution plant is necessary and proposes a reduction in allowances based strictly on policy without supporting analysis.

¹² Mr. Said testified:

While the provisions of Rule H have required some contributions in aid of construction for new distribution facilities, there are no requirements for contributions in aid of construction for new transmission or generation facilities which are also typically required to serve customer growth. Reducing the Company’s new customer-related distribution rate base by reducing allowances and refunds will relieve one area of upward pressure on rates and will take a step toward growth paying for itself.

R. Vol. I, p. 61.

R. Vol. I, p. 168.

Idaho Power does not dispute if its investment in distribution facilities to serve new customers does not exceed its embedded cost, there will be no upward pressure on rates attributable to that component of its costs:

Q. [by Mr. Creamer] To the extent that the Company's investment in distribution facilities to serve new customers does not exceed its current embedded costs for distribution facilities, then the Company's current rates are sufficient to recover the costs of the new facilities; would you agree with that?

A. [by Mr. Said] For that particular element of rates, yes. . . .

Q. Mr. Said, if the revenues that the Company receives for – from its new customers are sufficient to recover the embedded costs that the Company has for line extensions and distribution facilities, then there is no upward pressure on rates, is there?

A. Again, for that component.

Tr., Vol. II, p. 121, LL. 1-8; p. 123, LL. 17-23 (Said Cross).

The Commission's Orders make no note of these facts or deficiencies in Idaho Power's record. And, despite the Commission's prior holding in the 1995 Case that "the amount of the allowance is critical," R. Vol. IV, p. 640, neither the Commission's Original Order nor Order 30955 in this case undertake any critique or analysis of the only facts going to this "critical" issue—the analysis of the relationship between embedded costs and appropriate allowances presented by BCA's pre-filed testimony and in Staff's Comments. R. Vol. III, pp. 442-43 (Slaughter); R. Vol. I, pp. 168-70 (Staff). These Orders do not in any way aid an understanding of why the Commission would conclude that the disparate treatment it has authorized is reasonable or justified.

The Commission's Orders do not analyze the extent to which this disparate treatment will affect pressure (upward or downward) on rates, let alone the extent to which Company investment in distribution facilities to serve new customers is creating upward pressure on rates. The Commission merely recites Idaho Power's bare assertion that growth was not paying for itself and concluded that "[d]ifferent circumstances exist now than did in 1995." R. Vol. IV, p. 668. *See also* R. Vol. II, p. 323 (Original Order) ("By updating line installation charges and increasing the allowances, the appropriate amount of contribution will be provided by new customers requesting these services. These changes relieve one area of upward pressure on rates." (emphases added)).

One simply cannot determine from the record that the \$1,780 per transformer allowance addresses the "fundamental principle of utility regulation" the Commission claims it addresses—that is, "[t]o the extent practicable, utility costs should be paid by those that cause the utility to incur the costs." R. Vol. IV, p. 650. Nor is there any apparent link between a flat \$1,780 per transformer allowance and the extent to which this investment might actually achieve a goal of making growth pay for itself.

Absent evidence or findings on these issues, the Commission simply justifies the approved changes based on a summary conclusion that "[d]ifferent circumstances exist now than did in 1995." R. Vol. IV, p. 668. But the Commission does not describe what those differences might be or how they might have affected the Commission's analysis and decision.

4. *The Rule H amendments inappropriately shift system-related generation and transmission costs to new customers.*

The Commission cloaks its decision on the 2009 Rule H Tariff as involving only “distribution costs not resource [i.e. generation and transmission] costs.” R. Vol. IV, p. 669. However, the record shows that Idaho Power sought to change the Rule H tariff so it could put less money toward new customers’ distribution infrastructure and more money toward system-wide facilities that benefit all customers. This matters because the Idaho Supreme Court has held that “[t]o the extent that the new hook-up fees are based on an allocation of the incremental cost of new [generation and transmission] plant construction required by growth . . . solely to new customers, the fees unlawfully discriminate between old and new customers . . .” *Boise Water*, 128 Idaho at 539, 916 P.2d at 1264.

As BCA’s expert, Dr. Slaughter, testified:

. . . the practical effect quite likely will be that the amount earned on new distribution plant in excess of embedded costs, will be applied to help pay the Company’s other costs, including non-recoverable costs, generation and/or transmission costs—new customers will be paying an unequal proportion of these costs when compared with existing customers.

Tr., Vol. II, p. 247, LL. 1-9. This was not contradicted by Idaho Power, which conceded that if the new customer could be required to pay more of the distribution costs, it would help reduce upward pressure on rates attributable to the Company’s growing requirements for generation and transmission assets:

Q. [By Mr. Creamer] In your response on reconsideration, you stated that the Company’s position that because of the substantial investments that are to be made in generation and transmission assets, the Company thinks it’s reasonable

for the Commission now to adjust its policy concerning the level of Company investment in line extensions; correct?

A. [by Mr. Said] Correct.

Q. And to require more investment from the new customer for those line extension facilities than in the past?

A. That's correct.

Q. As a result, then, the new customers as they pay these costs for the line extension for the distribution facilities, that helps offset pressure on existing customers' rates from generation and transmission and other sources; isn't that correct?

A. Well, it's all customers from that point forward in time, yes.

Tr. Vol. II, p. 288, L. 9 – p. 289, L. 2.

In effect then, the Company's below-embedded cost investment results in new customers subsidizing the rates of existing customers, keeping them lower than they otherwise would be because of the Company's growing system-wide generation and transmission costs. *See City of Aurora v. Public Utilities Comm'n of State of Colorado*, 785 P.2d 1280 (1990); *Home Builders Association of Metropolitan Denver v. Public Utilities Comm'n of State of Colorado*, 720 P.2d 552 (1986) (recognizing relationship between line extension allowances, company embedded investment, and subsidization of rates).

E. The Commission improperly denied BCA's intervenor funding requests.

BCA made essentially the same arguments to the Commission as made here to the Court, but the Commission rejected them and, for that reason, denied BCA's unopposed Second Intervenor Funding Request. However, as demonstrated in this brief, BCA's arguments have merit and, as a result, the Commission should not have denied BCA's Second Intervenor

Funding Request on grounds that BCA did not materially contribute to the case. R. Vol. IV, p. 673. Nor should the Commission have denied the Second Intervenor Funding Request on grounds that BCA's advocacy did not address "issues of concern to 'the general body of users or consumers.'" *Id.* (quoting I.C. § 61-617A). Finally, the Commission abused its discretion in denying BCA's requests for intervenor funding for efforts made prior to the Original Order.

1. *The Commission abused its discretion in finding that BCA did not materially contribute to the proceedings below.*

BCA contributed material and relevant facts and arguments to this matter. The Commission's disregard for those facts and arguments in reaching its decision should not be grounds for concluding that BCA did not materially contribute to the case.

Even though the BCA did not prevail below, and even if it does not succeed on appeal, it still has materially contributed in all phases of the case. BCA provided the Commission with comments and direct testimony concerning Idaho Power's Application. Pursuant to the Commission's direction during the reconsideration phase, BCA also developed and presented at a technical hearing additional direct testimony, specifically aimed at describing what an appropriate allowance should be—i.e., one based on embedded costs that could be recognized through a refund to appropriately allocate risk between the Company and developers and with new customers bearing the costs above the embedded cost (including additional cost attributable to inflation) of new distribution facilities. BCA fully participated in the examination of witnesses at a technical hearing and submitted a post-hearing brief at the Commission's request.

All of BCA's efforts materially contributed to the case, particularly those efforts done at the direction of the Commission. Where a party participates in ways specifically requested by the Commission, the Idaho Supreme Court has held that the Commission should consider that participation as materially contributing to the case. *See Idaho Fair Share*, 113 Idaho at 963-64, 751 P.2d at 111-12 (remanding with instructions to the Commission to consider for intervenor funding the intervenor's time spent responding to the Commission's request for information).

The Commission faults BCA for "recycling" arguments and reasoning from the 1995 Case. R. Vol. IV, p. 673. This, however, misrepresents BCA's arguments from then and now. The Commission is mistaken in its observation that it had not been persuaded by BCA's arguments in the 1995 Case. There, BCA was successful in preventing the complete elimination of Company allowances for line extensions, in obtaining recognition of the need for the Company to make a minimum level of Company investment (equal to embedded cost) so as to provide equal treatment of new and existing customers, and in obtaining the Commission's recognition of the potential economic impact on new customers if they are required to pay too great a portion of line extension costs. *See generally* R. Vol. IV, pp. 626-45. It may be true that much of BCA's case today resembles the 1995 Case, but BCA cannot be faulted for using arguments and facts from the prior proceeding when Idaho Power makes another run at eliminating its investment in facilities to serve new customers. In fact, BCA's arguments are even more relevant in the current proceeding because here they were presented in support of maintaining the precedent obtained in the 1995 Case.

Arguably, the Commission's interpretation of the intervenor funding statute, I.C. § 61-617A, creates a higher standard for awarding intervenor funding than contemplated by the statute. Under the Commission's interpretation, a party only is entitled to intervenor funding if they prevail on an issue. This goes too far; one need not prevail to materially contribute. The Commission's heightened standard does not promote the policy of the intervenor funding statute, which is "to encourage participation by intervenors by awarding all or a portion of the costs of intervention." *Idaho Fair Share*, 113 Idaho at 962, 751 P.2d at 110.

The Commission's finding that BCA did not materially contribute is not supported by the record or prior Commission decisions and is an abuse of discretion.

2. *The Commission abused its discretion in finding that BCA failed to raise "issues of concern to 'the general body of users or consumers.'"*

BCA's arguments that the 2009 Rule H Tariff is unlawfully discriminatory concerns all new and existing residential users and consumers. As the Commission observed in the 1995 Case, in establishing the proper Company investment in new distribution facilities "the amount of the allowance is critical." R. Vol. IV, p. 640. This is because, depending on how the allowance relates to the Company's embedded investment recoverable through rates, new or existing customers may be affected in the overall rates and costs they pay for the same service.

In addition, the Commission in the 1995 Case had no trouble finding that BCA raised issues of concern to the general body of users or consumers, where BCA opposed the elimination of allowances/refunds the Company had sought then and seeks today. R. Vol. IV, p. 644. The Commission's finding that BCA did not advocate issues of concern to the general body of users

and consumers is not supported by the record or prior Commission decisions and is an abuse of its discretion.

3. *The Commission abused its discretion in denying BCA's requests for intervenor funding for BCA's efforts made prior to the Original Order*

The Commission abused its discretion in denying the pre-Original Order portion of the Second Intervenor Funding Request. The Commission did not recognize the issue—whether BCA was entitled to intervenor funding for the entire proceeding even though its First Intervenor Funding Request was denied—as one of discretion, it did not act within the boundaries of its discretion or apply the applicable legal standards, and it did not reach its decision through an exercise of reason. *See Johanssen v. Utterbeck*, 146 Idaho 423, 429, 196 P.3d 341, 347 (2008) (describing the abuse of discretion standard).

In denying the Second Intervenor Funding Request, the Commission did not recognize that it had any discretion to consider BCA's pre-Original Order efforts. Rather, without explanation, the Commission concluded that the pre- and post-Original Order proceedings were separate proceedings. Nothing in the Commission's Rules of Procedure or governing statutes suggests that a petition for reconsideration institutes a separate proceeding from the original. Tellingly, the reconsideration portion of a proceeding even shares the same caption as the original. It thus makes more sense to treat the reconsideration portion of a proceeding as an extension of the original proceeding rather than an entirely new proceeding. Viewed in this way, Rule 164's requirement that requests for intervenor funding be filed within fourteen days after the last action in a "proceeding" means that an intervenor could permissibly request intervenor

funding for an entire proceeding by filing its request within fourteen days after the last action on reconsideration. In this case, BCA timely filed its Second Intervenor Funding Request within this timeframe.

The Commission, however, did not entertain this thought and, instead, summarily concluded that it could not grant BCA's request for pre-Original Order intervenor funding made in its Second Intervenor Funding Request. The Commission did not recognize its discretion in making this determination and, therefore, did not act within the boundaries of its discretion or reach its decision through an exercise of reason. Accordingly, the Commission abused its discretion in summarily denying the pre-Original Order portion of BCA's Second Intervenor Funding Request.

F. BCA is entitled to an award of attorney fees and costs on appeal.

BCA has been required to retain the services of counsel to bring this appeal and is entitled to recover its attorney fees and costs on appeal as private attorney general and/or pursuant to Idaho Code Section 12-117 and Idaho Appellate Rules 40 and 41.

The private attorney general doctrine was developed to allow for an award of attorney fees when an action meets three specific requirements: 1) great strength or societal importance of the public policy indicated by the litigation; 2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff; and 3) the number of people standing to benefit from the decision. *Heller v. Cenarrusa*, 106 Idaho 571, 578, 682 P.2d 524, 531 (1984). This appeal has great strength and societal importance in that it seeks to have our government officials (i.e. the Commission) perform their duties so as to protect the public from

discriminatory practices by the state's largest public utility and, perhaps equally as important, to provide a reasoned analysis and explanation for its decisions so that the public understands the basis for decisions that have significant impacts on their lives and livelihood. Private enforcement by BCA was necessary because no other person or entity took up this fight against Idaho Power's and the Commission's discriminatory rates. If BCA had not engaged in this lengthy and financially burdensome effort in the interest of not just its developer members but all new Idaho Power customers, no one else would have. And many people—indeed, all new Idaho Power customers—stand to benefit from BCA's efforts to have Idaho Power continue to provide them the same level of investment it provides existing customers. BCA, thus, is entitled to its attorney fees on appeal under the private attorney general doctrine.

BCA also is entitled to an award of attorney fees under Idaho Code § 12-117 which, in a proceeding involving a state agency such as the Commission, requires the Court to “award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.” The purpose of I.C. § 12-117 is “to serve as a deterrent to groundless or arbitrary action and to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never have made.” *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 138, 176 P.3d 126, 143 (2007).

BCA is entitled to an award of its reasonable attorney fees because the Commission did not act with a reasonable basis in fact or law in approving the discriminatory charges imposed on

new customers in Order 30955. Despite BCA's efforts, the Commission did not address relevant Idaho Supreme Court precedent or make findings sufficient to justify its approval of Idaho Power's Rule H tariff amendments. BCA incurred substantial expense and hardship in an attempt to correct the Commission's mistakes below, and believes it is appropriate for this Court to deter the Commission from acting arbitrarily in the future.

BCA recognizes that the Idaho Supreme Court in *Owner-Operator Independent Drivers Ass'n, Inc. v. Idaho Public Utilities Comm'n*, 125 Idaho 401, 871 P.2d 818 (1994), declined to award attorney fees against the Commission on the ground that the Commission is a "legislative agency" and therefore not a "state agency" subject to Section 12-117. BCA nevertheless requests its attorney fees under Section 12-117 in case the Court wishes to revisit that decision. BCA believes the Commission is an "agency" empowered by state law to undertake, and does undertake, quasi-judicial and quasi-legislative functions in the same manner as other agencies enacting rules and deciding contested cases as against itself and between parties, and therefore, it should not be immune from attorney fees where its actions are improper. BCA notes that, unless the Court provides an avenue to recover attorney fees against the Commission under this statute or the private attorney general doctrine (as discussed above), it would appear that no avenue exists to obtain such an award against the Commission.

Finally, BCA seeks an award of costs under I.A.R. 40, which authorizes the Court to award costs to the prevailing party.

Accordingly, on the grounds set forth above, BCA respectfully requests an award of attorney fees and costs.

V. CONCLUSION

For the foregoing reasons, Order 30955 should be set aside and the Company's Application denied with respect to the amended line extension charges, allowances, and refunds. In addition, BCA is entitled to intervenor funding to the full extent allowed by statute. BCA respectfully requests its attorney fees and costs on appeal.

DATED this 24th day of May, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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