

SUP-E-10-01

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IN THE MATTER OF THE APPLICATION OF)
IDAHO POWER COMPANY TO MODIFY ITS)
RULE H LINE EXTENSION TARIFF RELATED)
TO NEW SERVICE ATTACHMENTS AND)
DISTRIBUTION LINE INSTALLATIONS.)

IDAHO PUBLIC
UTILITIES COMMISSION

BUILDING CONTRACTORS)
ASSOCIATION OF SOUTHWESTERN)
IDAHO,)

Supreme Court Docket No. 37293-2010
(IPUC Case No. IPC-E-08-22)

Petitioner-Appellant,)

v.)

IDAHO PUBLIC UTILITIES COMMISSION and)
IDAHO POWER COMPANY,)

Respondents on Appeal.)

RESPONDENT IDAHO POWER COMPANY'S BRIEF

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

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I. STATEMENT OF CASE

A. Nature of the Case.

This appeal is about the Idaho Public Utilities Commission's ("Commission") authority under Title 61 of the Idaho Code to determine how Idaho Power Company ("Idaho Power" or "Company") may impose charges for line extensions. Commission Order Nos. 30853 and 30955 issued in Case No. IPC-E-08-22 modify Idaho Power's Rule H line extension tariff for new service attachments and distribution installations or alterations. In Order No. 30955, the Commission denied the Building Contractors Association of Southwestern Idaho ("BCA" or "Building Contractors") the relief they requested in their petition for reconsideration of Order No. 30853. R. Vol. IV, pp. 648-678. This appeal is directed to those portions of the aforementioned Commission Orders approving changes to the amount that customers and real estate developers pay to have equipment installed to connect to Idaho Power's distribution system, and denying the BCA's request for intervenor funding of its costs of participating in the case.

B. Course of Proceedings.

On October 30, 2008, Idaho Power filed an Application seeking authority to modify its line extension tariff. R. Vol. I, pp. 1-55. Specifically, the Company sought to update the charges that recover the costs it incurs for installing new service lines and relocating existing electric distribution facilities. On November 26, 2008, the Commission issued a Notice of Application and Intervention Deadline. Order No. 30687; R. Vol. I, pp. 94-97. Four parties petitioned to intervene and were granted intervention: the BCA, the City of Nampa, The Kroger Company,

and Association of Canyon County Highway Districts ("ACCHD"). The Commission issued its Notice of Parties on December 30, 2008. R. Vol. I, pp. 126-128.

Pursuant to Order No. 30687, the parties met on January 14, 2009, to discuss the processing of this case. The participating parties agreed that the case did not require a technical hearing or pre-filed testimony and therefore recommended that the case be processed under Modified Procedure¹ with comments due no later than March 20, 2009. Order No. 30719; R. Vol. 1, pp. 129-132. The comment deadline was subsequently extended to April 17, 2009, with response comments due by May 1, 2009. Order No. 30746; R. Vol. I, pp. 146-149.

On July 1, 2009, the Commission issued Order No. 30853 partially approving the Company's request to modify its line extension tariff. R. Vol. II, pp. 313-326. The Ada County Highway District ("ACHD"), City of Nampa, Association of Canyon County Highway Districts (collectively "the Districts"), and the BCA all filed timely Petitions for Reconsideration. The Districts argued that the Commission exceeded its statutory authority in approving the changes to Section 10 of the tariff ("Relocations in Public Road Rights-of-Way"). The BCA objected to changes to the line extension rate structure. On July 29, 2009, Idaho Power filed an Answer to the Petitions. R. Vol. II, pp. 383-404.

In Order No. 30883 issued August 19, 2009, the Commission granted in part and denied in part the Petitions for Reconsideration. R. Vol. III, pp. 405-410. The Commission granted reconsideration to the Districts to review the legal arguments, scheduling briefs and an oral

¹ "Modified Procedure" refers to development of the Commission's record by written submissions following a preliminary Commission finding that the public interest may not require a hearing to consider the issues presented in that proceeding. IDAPA 31.01.01.201.

argument on October 13, 2009. The Commission partially granted reconsideration to the BCA and scheduled an evidentiary hearing regarding the appropriate line extension allowances. The evidentiary hearing was held on October 20, 2009. Post-hearing reconsideration briefs were filed by BCA and Idaho Power on October 27, 2009. R. Vol. III, pp. 586-608. On November 9, 2009, the BCA filed a Petition for Intervenor Funding. R. Vol. IV, pp. 612-647.

After reviewing the initial record, the reconsideration testimony and briefs, and the intervenor funding petition, the Commission issued final Order No. 30955 on reconsideration affirming, rescinding, amending, and clarifying parts of its initial Order pursuant to Idaho Code § 61-624. R. Vol. IV, pp. 648-678. On January 10, 2010, the BCA filed an appeal to the Supreme Court from the Commission's final Order. R. Vol. IV, pp. 685-690.

C. Statement of the Facts.

1. The Cost-Causation Principle: Growth Should Pay Its Way.

Idaho Power's line extension tariff is the kind of non-recurring charge "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" described by the Court in *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 420, 690 P.2d 350 (1984).

The Rule H line extension tariff promotes one of the fundamental principles of utility regulation: that to the extent practicable, utility costs should be paid by those entities that cause the utility to incur the costs. Order No. 30955, p. 21; R. Vol. IV, p. 668. This principle is often referred to as "cost-causation" and is one of the bedrocks of utility regulation. "Simply put, it

has been traditionally required that all approved rates reflect to some degree the costs actually caused by the customer who must pay them.” *KN Energy, Inc., v. F.E.R.C.*, 133 P.U.R. 4th 607, 968 F.2d 1295, 1300 (C.A.D.C. 1992). Idaho Power’s line extension tariff is a good example of how the Commission exercises its jurisdiction to address “cost-causation” by requiring those entities that cause Idaho Power to incur additional costs to pay those additional costs.

Ideally, utility rates would always reflect the “cost of service” – that is, the cost involved in providing service to a particular customer. If the “cost-causers” do not pay, the electric rates for the utilities’ other customers will be higher than they would otherwise be. Order No. 30955, p. 21; R. Vol. IV, p. 668. If the Company does not recover costs of individual line extensions from the persons requesting them, Idaho Power’s rates are neither “just and reasonable” as required by Idaho Code § 61-503 nor non-discriminatory and non-preferential as required by Idaho Code § 61-315. Order No. 30955, p. 13; R. Vol. IV, p. 660.

2. Terminal Facilities and Line Installation Allowances.

Unlike generation or transmission plant costs, distribution plant costs can be associated with the specific customers that use them. Throughout most of Idaho Power’s history, the costs of new distribution plant have been recovered in two ways: (1) partially through up-front capital contributions from new customers and (2) partially through electric rates charged to all customers. Order No. 30853, p. 10; R. Vol. II, p. 322. The portion collected through electric rates represents the investment in new facilities made by Idaho Power and is often referred to as a construction or installation “allowance.” *Id.* To the extent customers pay up-front costs, facility investment does not occur and rates do not increase.

Prior to the last line extension cost recovery case filed in 1995, allowances for customer classes exceeded the Company's historical investments made on behalf of customers and were not derived based on embedded costs² at all. They were based upon revenue determinations that were anticipated to come from customers or in some instances based on the new customer's connected load. Tr. Vol. II, p. 285, L. 22 and p. 286, L. 2. Based on findings it made in Order No. 26780 in Case No. IPC-E-95-18 in February 1997, the Commission calculated allowances for new customers based on the total embedded cost of distribution facilities. R. Vol. IV, p. 639. Because total embedded cost is made up of two components, terminal facilities and line extensions, the Commission directed the utility to pay the cost of terminal facilities first with any remaining allowance applied to the line extension portion of the costs. *Id.*, pp. 639-640. Line installation allowances were administered in this fashion until December 1, 2009, when Order No. 30955 went into effect.

Under the line extension tariff approved in Order No. 30955, allowances equal to the installed costs of "standard" overhead³ terminal facilities provide a fixed credit toward the terminal facilities required for customers requesting service. Standard terminal facilities include transformer(s), service conductor, and meter(s). The fixed allowance of \$1,780 for single phase service or \$3,803 for three phase service is based on the cost of the most commonly installed overhead terminal facilities.

² "Embedded costs" are a snapshot of the cost of facilities recovered in rates at a given point in time. Future rate adjustments will reflect the change in current costs over time.

³ Overhead service has long been considered the Company's standard service. Underground service is provided at an additional cost to the party requesting it.

Line installation allowance amounts are firmly anchored in Idaho Power's actual costs of installing terminal facilities, as demonstrated in the Company's discovery responses and Company witness Scott Sparks' workpapers. R. Vol. II, pp. 294-299. This fixed allowance approach mitigates intra-class and cross-class subsidies by requiring customers with greater facilities requirements to pay a larger portion of the cost to serve them rather than socializing those additional costs to all ratepayers. This approach for determining line installation allowances also reduces upward pressure on rates by offsetting the cost of physically connecting new customers to Idaho Power's system.

3. The Commission's Initial Order No. 30853.

On July 1, 2009, the Commission issued final Order No. 30853 approving the Company's proposed allowances, miscellaneous costs, language regarding recovery of the costs of highway relocation expenses, and the requested changes to format and definitions. R. Vol. II, pp. 313-326. The Commission further approved a "cap" of 1.5 percent on general overhead costs, maintained the existing five-year period for Vested Interest Refunds, and eliminated lot refunds.

The Commission determined that Idaho Power's proposed fixed allowances of \$1,780 for single phase service and \$3,803 for three phase service represent a fair, just, and reasonable investment by the Company for the benefit of new customers when allocating line extension costs. *Id.*, p. 322. The Commission also found that the overall distribution allowance provided to developers, whether in the form of a subsequent refund or an upfront reduction in developer contribution (i.e., allowance), is properly based on the amount of distribution investment that can be supported by new customer rates. *Id.*, p. 324.

4. **BCA's Petition for Reconsideration.**

The BCA filed a Petition for Reconsideration on July 22, 2009, requesting reconsideration of Commission findings regarding terminal facilities allowances, per-lot refunds, and the time period in which vested interest refunds may be made. R. Vol. II, pp. 358-372. The BCA argued that Order No. 30853 approved an inherently discriminatory rate structure for line extensions by imposing unequal charges on customers receiving the same level and conditions of service. According to the BCA, this discrimination existed both as between existing customers and new customers and as among new customers, depending upon whether they receive service inside or outside of a subdivision and the number of new customers to be served by the requested facilities. Additionally, the Districts petitioned for reconsideration of unrelated portions of Rule H. *Id.*, pp. 341-357 and pp. 373-382. On July 29, 2009, Idaho Power filed an Answer to the Petitions. *Id.*, pp. 383-404.

On August 19, 2009, the Idaho Public Utilities Commission issued Order No. 30883 granting and denying reconsideration in part, and set forth a schedule for hearing and briefs. *Id.* at R. Vol. III, pp. 405-410. With regard to the BCA's Petition, the Commission found it appropriate to grant reconsideration on the limited issue of the amount of appropriate allowances. *Id.*, p. 408. The Commission denied reconsideration of the five-year vested-interest refund period and the per-lot refunds because the BCA's petition failed to specifically address why the five-year vested-interest refund period or the elimination of the per-lot refund is unreasonable or erroneous and did not provide sufficient or persuasive evidence to support its proposal to move to a ten-year lot refund policy. *Id.*

5. The BCA's First Petition for Intervenor Funding.

On July 13, 2009, BCA filed a request for \$28,386.35 of intervenor funding pursuant to Idaho Code § 61-617A to recover its legal fees, witness fees, and reproduction costs of participating in the proceeding. The BCA acknowledged that its Petition was untimely but submitted that it was an "inadvertent and unintentional oversight by its legal counsel with respect to the correct timing for submission of requests for intervenor funding." R. Vol. II, p. 328. In Order No. 30896 issued on September 3, 2009, the Commission denied the BCA's request for intervenor funding as untimely under the Commission Procedural Rule 164 because the fourteen-day deadline expired on May 15, 2009. IDAPA 31.01.01.164; R. Vol. III, pp. 428-430. The BCA did not file its request until July 13, 2009. R. Vol. II, pp. 327-340.

6. The Commission's Order on Reconsideration.

Order No. 30883 scheduled an evidentiary hearing regarding the appropriate line extension allowances contained in Rule H. R. Vol. III, pp. 405-410. The evidentiary hearing was held on October 20, 2009. Final reconsideration briefs were filed by the BCA and Idaho Power on October 27, 2009. *Id.*, pp. 586-608. On November 9, 2009, the Building Contractors filed a second Petition for Intervenor Funding. *Id.*, pp. 612-647.

The Idaho Public Utilities Commission issued Order No. 30955 on November 30, 2009. R. Vol. IV, pp. 648-678. In that Order, the Commission rejected the BCA's argument that the Commission cannot change its methodology from the 1995 case based on prior Idaho Supreme Court decisions indicating that it can alter its decisions "so long as [the] Commission enters sufficient findings to show that its action is not arbitrary and capricious." *Washington Water*

Power Co. v. Idaho Public Utilities Commission, 101 Idaho 567, 579, 617 P.2d 1242, 1254 (1980); *Rosebud Enterprises, Inc., v. Idaho Public Utilities Comm'n*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996) citing *Intermountain Gas Co. v. Idaho Public Util. Comm'n*, 97 Idaho 113, 119, 540 P.2d 775, 781 (1975).

The Commission reaffirmed its previous decision that allowances should be based upon the cost of standard terminal facilities and not on a per lot basis. R. Vol. IV, p. 668. Allowances of \$1,780 for single phase service and \$3,803 for three phase service ensure that customers are treated and charged equitably based on standard overhead service costs, thereby mitigating intra-class and cross-class subsidies. *Id.*, p. 669. The Commission noted that because the allowance is allocated on a per transformer basis and not a per customer basis, the allowance inside and outside subdivisions provides the same Company investment. *Id.*, p. 668.

Order No. 30955 explicitly noted that it was addressing distribution costs, not resource costs, and setting line extension charges based on the costs of standard terminal facilities that will be used to serve only the customer who is charged. *Id.*, p. 669. The Commission relied on the Supreme Court's observation in the *Homebuilders* case that there is no discrimination between "new" customers and "old" customers when the Commission sets new line extension charges to apply prospectively. *Id.*; *Homebuilders*, 107 Idaho at 421, 690 P.2d at 350. More specifically, the Court noted that no discrimination is present "when a non-recurring charge (e.g., a line extension charge) is imposed upon a new customer because the service they require demands an extension of existing distribution or communication lines and a charge is imposed to offset the utility's capital investment (in serving new customers)." *Id.*

The Commission summarized its position as follows:

Idaho Power's line extension charges are imposed only on those customers who will be served by the new facilities. The new facilities will provide service only to those customers who pay for them. The line extension allowances and charges are based upon the cost of terminal facilities. Once new customers pay the nonrecurring charge/line extension costs, they become existing customers and pay pursuant to the same rate schedule as all other existing customers in their class. As such, there is no distinction between new and existing customers in regard to nonrecurring rates and no rate discrimination. Idaho Code § 61-315.

R. Vol. IV, p. 670.

The Commission also denied the BCA's second request for intervenor funding filed on November 9, 2009, as failing to meet the requirements of Idaho Code § 61-617A and Commission Procedural Rule 165. *Id.*, p. 673; IDAPA 31.01.01.165. More specifically, the Commission found that the BCA's arguments did not materially contribute to its final decision in the case because it presented the same argument it did in the prior 1995 case and the BCA's advocacy did not address issues of concern to "the general body of users or consumers" as required by Idaho Code § 61-617A(2)(b) and (d). *Id.* On January 10, 2010, the BCA filed an appeal to the Supreme Court from the Commission's final Order. R. Vol. IV, pp. 685-690.

II. ISSUES PRESENTED ON APPEAL

- A. Whether the Commission's Determination to Base Line Extension Allowances on the Cost of Standard Equipment Necessary to Connect Service to New Customers Is Based Upon Substantial and Competent Evidence.**
- B. Whether the Commission Abused Its Discretion When It Denied the BCA Intervenor Funding.**
- C. Whether the BCA Is Entitled to an Award of Attorney Fees and Costs on Appeal.**

III. STANDARD OF REVIEW

The standard of review on appeal from an Order of the Commission has been clearly articulated in Idaho law. Article V, Section 9 of the Idaho Constitution provides that the Supreme Court shall have jurisdiction to review on appeal any Order of the Commission. An issue not presented to the Commission for rehearing will not be considered on appeal. Idaho Code §§ 61-626 and 61-629; *Industrial Customers of Idaho Power v. Idaho Public Utilities Comm'n*, 200 P.U.R. 4th 371, 134 Idaho 285, 288, 1 P.3d 786, 789 (2000); *Key Transp., Inc., v. Trans Magic Airlines Corp.*, 96 Idaho 110, 112-13, 524 P.2d 1338, 1340-41 (1974). 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.

See also Rosebud Enterprises, Inc., 128 Idaho at 618, 917 P.2d at 775; *A. W. Brown Co., Inc., v. Idaho Power Co.*, 121 Idaho 812, 815, 828 P.2d 841, 844 (1992).

In 2000, the Supreme Court recited the review standards and degree of deference that must be given to decisions of the Commission. In *Industrial Customers*, the Court stated that review of Commission determinations as to "questions of law" is limited to determining whether the Commission 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," the Court stated that 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.*; *Hulet v. Idaho Public Utilities Comm'n*, 138 Idaho 476, 65 P.3d 498 (2003); *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 624, 631, 917 P.2d 781, 788 (1996). See also *A. W. Brown*, 121 Idaho at 815-16, 828 P.2d at 844-45 and *Empire Lumber Co. v. Washington Water Power*, 114 Idaho 191, 193, 755 P.2d 1229, 1231 (1987), *cert. denied*, 488 U.S. 892, 109 S.Ct. 228, 102 L.Ed.2d 218 (1988).

In *Industrial Customers*, this Court described the appropriate test for substantial competent evidence as follows:

The "substantial evidence rule" is said to be a "middle position" which precludes a *de novo* hearing but nonetheless requires a serious review which 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 Ins. Fund v. Hunicutt*, 110 Idaho 257, 260, 715 P.2d 927, 930 (1985) (citations omitted).

It has been held by this Court that because Commission proceedings raise extremely complicated technical issues within the Commission's area of expertise, the Court shall apply the substantial evidence standard reflecting the policy that the Court's purpose on review is not to displace the Commission's choice with its own, even if the court justifiably could have made a different choice had the matter been before it *de novo*. *Rosebud Enterprises, Inc.*, 128 Idaho at 618, 917 P.2d at 785 *Hayden Pines Water Co. v. IPUC*, 111 Idaho 331, 336, 723 P.2d 875, 880 (1986).

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." *Hayden Pines*, 111 Idaho at 336, 723 P.2d at 880, quoting *Hunicutt*, 110 Idaho at 261, 715 P.2d at 931 (1985). The Commission's findings of fact are to be sustained 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. *Industrial Customers*, 134 Idaho at 288, 1 P.3d at 789; *Utah-Idaho Sugar Co. v. Intermountain Gas Co.*, 100 Idaho 368, 376, 597 P.2d 1058, 1066 (1979).

The Commission's findings need not take any particular form so long as they fairly disclose the basic facts upon which the Commission relies and support the ultimate conclusions. What is essential are sufficient findings to permit the reviewing Court to determine that the Commission has not acted arbitrarily. *Rosebud Enterprises, Inc.*, 128 Idaho at 624, 917 P.2d at 781 *Boise Water Corp. v. Idaho Public Util. Comm'n*, 97 Idaho 832, 840, 555 P.2d 163, 171 (1976); *Washington Water Power Company*, 101 Idaho at 575, 617 P.2d at 1250.

As demonstrated below, the Commission's determination in the present matter is amply supported by competent and substantial evidence, and the Commission clearly did not abuse its discretion in rendering its decision in this matter.

IV. ARGUMENT

A. **Growth-Related Line Extension Investments Increase Rates to Customers Not Served By the Line Extensions.**

The Company makes many investments for new customers for the numerous parts of its system that comprise its electric service, and the fact is that Idaho Power's investment per customer is increasing. There are two principal drivers that effect growth in rates over time: (1) inflation and (2) growth-related costs. At the time of the Application, Idaho Power's revenue requirement in base rates over the prior five years had increased by 21 percent and outpaced pure inflation largely due to customer growth, demonstrating that growth is not paying for itself. R. Vol. II, p. 391. Other than the Rule H line extension tariff, no means of assessing the distribution costs of serving new customers directly to those specific customers exists.

Since Idaho Power's line extension allowances were last updated in 1997, Idaho Power requested general rate increases in 2003, 2005, 2007, and 2008 to align the Company's revenues with its cost to provide electric service. Tr. Vol. II, p. 101, LL. 1-3. Idaho Power also sought rate increases in 2005 and 2008 to collect the cost of gas-fired generation plants built to meet customer energy demands. *Id.* at LL. 3-6. Company witness Greg Said concluded that these increases have been related to growth because "additional revenues generated from the addition of new customers and load growth in general is not keeping pace with the additional expenses created and required to provide ongoing safe and reliable service to new and existing customers." *Id.* at LL. 9-13. Growth in generation plant investment, transmission plant investment, and distribution plant investment were all impacting the growth in electric rates.

For many years of Idaho Power's existence, it was in a surplus generation and surplus transmission situation. R. Vol. II, p. 289. Under those conditions, the addition of new customer loads required no new generation costs and no new transmission costs, only new distribution costs. As a result, the Company and the Commission could be promotional (i.e., providing greater allowances) with regard to its line installation provisions. Costs per customer may actually have been declining at times even with generous allowances. *Id.*

Today's situation is not comparable to those times. Idaho Power is both generation and transmission constrained. Customers are experiencing the full incremental impact of adding new generation and transmission facilities to the Company's system. *Id.* As growth occurs, new plant costs in addition to normal replacement costs add to the impact of inflation experienced by customers. As a matter of good regulatory policy, now is not the time to continue promotional line installation activity to serve each individual applicant at the expense of existing customers. Charges for non-recurring costs of line extensions must recover all of the Company's investment related specifically to the customer class that causes the investment to be made.

B. The Commission Regularly Pursued Its Authority to Set Line Extension Allowances Based on the Cost of Standard Equipment to New Customers.

The statutory framework within which the Commission is authorized to set rates is found in Title 61, Chapters 3 and 5 of the Idaho Code. Idaho Code § 62-502 provides, in pertinent part:

DETERMINATION OF RATES. Whenever the commission, after a hearing . . . shall find that the rates . . . [or] charges or classifications . . . collected by any public utility for any service or product or commodity . . . are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provision of law, or that such rates . . . [or] charges or classifications are insufficient, the commission shall determine the just, reasonable or sufficient

rates . . . [or] charges, classifications, rules, regulations, practices or contracts to be thereafter observed and in force and shall fix the same by order as hereinafter provided, and shall, under such rules and regulations as the commission may prescribe, fix the reasonable maximum rates to be charged for water by any public utility coming within the provisions of this act relating to the sale of water.

Idaho Code § 61-503 provides:

POWER TO INVESTIGATE AND FIX RATES AND REGULATIONS. The commission shall have power, upon a hearing . . . to investigate a single rate . . . charge, [or] classification . . . of any public utility, and to establish new rates . . . charges, [or] classifications . . . in lieu thereof.

Finally, Idaho Code § 61-315 provides:

DISCRIMINATION AND PREFERENCE PROHIBITED. 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.

The *Homebuilders'* Court recognized that costs incurred to serve a specific customer or group of customers, such as line extension costs, may be recovered from those customers. The

Court held:

The instant case presents no factors such as when a nonrecurring 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 350 (emphasis added). Because the costs incurred by the Company are specific to the extension of distribution lines to the new customers directly benefiting from them, the Commission does not need to justify the difference in new customer Company investment based upon the factors enumerated in *Homebuilders* (e.g., cost of service, quantity of electricity used, differences in conditions of service or the time, nature or pattern of use) as suggested by the BCA. Utilities are permitted to recover line extension charges that will offset the actual per-customer cost of physically connecting to Idaho Power's distribution system. As the Commission made clear, it "is addressing distribution costs and not resource costs. We are setting line extension charges based on the costs of standard terminal facilities that will be used to serve only the customer who is charged." Order No. 30955, p. 22; R. Vol. IV, p. 669. As such, the instant case is distinguishable from hook-up fees designed to recover the costs of water supply resources at issue in the *Boise Water* case relied upon by the BCA. *Boise Water Corp. v. Public Utilities Comm'n*, 128 Idaho 534, 916 P.2d 1259 (1996).

1. **Allowances Reflecting the Cost of Line Extension Facilities Do Not Discriminate Against New Customers.**

The allowances approved by the Commission in Order No. 30955 reflect the actual cost of standard terminal facilities necessary to serve that customer. R. Vol. IV, pp. 668 and 670. To the extent that Order No. 30955 requires a new customer payment greater than that made to serve existing customers in 1997, it correctly reflects the increased payment in distribution facilities necessary in 2009 to serve new customers. Regulation does not exist in a vacuum. Commission policies can (and do) change as conditions change. This Court has recognized that "so long as the Commission enters sufficient findings to show that its action is not arbitrary and capricious,

the Commission can later alter its decisions.” *Washington Water Power Co.*, 101 Idaho at 579, 617 P.2d at 1254.

In light of the Company’s increased investments to serve new customers on its system as a whole that will be paid for by the entire rate paying public, it is reasonable and prudent for the Commission to require that specific line extension connection costs be substantially or fully funded by the individual customers causing them. “Not all differences in a utility’s rates and charges as between different classes of customers constitute unlawful discrimination or preference under the strictures of Idaho Code § 61-315.” *Homebuilders*, 107 Idaho at 420, 690 P.2d 350. So long as all potential new customers/applicants are treated in a like manner as a “customer class,” there is no unlawful discrimination. The BCA’s argument that the line installation allowances of new applicants must be compared to those of existing customers (who may or may not have been required to pay for new distribution facilities) does not make sense because these groups are not similarly situated. *Tr. Vol. II*, p. 294. In addition, having developers/applicants more fully fund line extensions also reduces ratepayer exposure to speculative development, at a time when the Company had installed primary (backbone) line and transformers to more than 20,000 lots without new customers taking service. *Id.*, p. 280.

2. **Allowances Set in Order No. 30955 Do Not Discriminate Between New Customers Located Inside and Outside Subdivisions.**

Regardless of whether construction is inside or outside of a subdivided development, the line extension tariff approved in Order No. 30995 requires the Company to provide customers and developers a fixed allowance equal to the Company’s investment toward their required terminal facilities. *R. Vol. IV*, p. 668. Customers are eligible to receive maximum allowances

up to \$1,780 for single phase services and \$3,803 for three phase services per service attachment; whereas developers of subdivisions (with no connected load) are eligible to receive the same amounts for each transformer installed within a development. These allowances are based on the cost of standard equipment – not the number of customers or lots served, which would cause a windfall to developers. *Id.* In no instance will allowances exceed the cost of the facilities provided. R. Vol. III, p. 599.

For residential customers connecting load, the allowance generally covers the full cost of the service connection resulting in no cost to the customer. Tr. Vol. II, p. 267. The \$1,780 allowance approved by Order No. 30955 was based upon the current installation cost of Standard Terminal Facilities for single phase service. *Id.*, p. 266. Standard Terminal Facilities costs include the costs associated with providing and installing one overhead service conductor and one 25 kVa transformer to serve a 200 amperage meter base. *Id.*, p. 267. The only cost difference between customers is that those inside residential subdivisions pay an underground wire installation charge equal to the differential between overhead service and underground service. *Id.*, p. 268. However, if customers request underground service attachments outside of subdivisions, they are also required to pay the same underground wire installation charge. In both cases, most customers receive the equivalent of overhead service attachments without any personal investment because the allowance (credit) provided by the Company (investment) covers the entire cost of the required service.

Customers requesting services beyond the “standard” or most commonly installed facilities are required to pay all costs above the provided allowance as a contribution in aid of

construction. R. Vol. III, p. 600. If the customer wants underground service, or if the customer is building a large home that requires larger than standard transformation, or if the customer is some distance from existing facilities, that customer is responsible for the additional costs of providing service. As a result, customers are treated and charged equitably based on a standard overhead service, thereby mitigating intra-class and cross-class subsidies. *Id.*

a. **All Customers and Developers Receive the Same Standard Terminal Facilities Allowance.**

Contrary to the Building Contractors' claims, customers outside of subdivisions are not eligible to receive a greater allowance than those inside subdivisions. Instead, *all* customers receive allowances for line installations and service connections requiring terminal facilities up to the equivalent of the cost of standard overhead terminal facilities only – regardless of whether the connection is inside or outside a subdivision. Order No. 30955, p. 21; R. Vol. IV, p. 668. Consequently, subdivision developers with lots that share a transformer will receive a pro rata share of the transformer allowance. If Idaho Power paid allowances based on lots rather than transformers as the BCA suggests, the Company and its rate paying customers would be forced to give developers a standard terminal facilities allowance greater than Idaho Power's actual costs to provide the facilities. *Id.* These excess payments would then have to be funded by increasing rates to all other customers.

Developers of subdivisions (businesses that do not take electric service) receive Company-funded allowances of \$1,780 for each single phase transformer installed within a development and \$3,803 for each three phase transformer installed within a development to help

offset their development costs. Here, developers are paying for and installing a portion⁴ of potential future customers' terminal facilities above the Company's investment as part of a business venture; they are not the ultimate customers of Idaho Power. Allowances (Company investment) are credited directly to developers' work orders as a reduced cost of electric facilities. Developers may or may not reduce home prices to pass these cost savings on to home buyers (future rate paying customers).

The Company's required investment in terminal facilities has, and always will, vary between service connections within the same customer class. R. Vol. II, p. 388. Recognition of this is demonstrated in the level of allowances provided under the line extension tariff prior to December 1, 2009. For some customer classes, the Company was required to pay an "open-ended" level of allowance equal to overhead terminal facilities requirements without regard to the size and type of terminal facilities required. *Id.* This resulted in customers (within the same customer class) receiving varying levels of Company investment. Some allowances were based on a fixed or flat amount and some were based on an "open-ended" amount equaling the total cost or a percentage of the total cost of overhead terminal facilities. *Id.* The allowances approved in Order No. 30955 do not depart from existing policy nor do they have a discriminatory effect on customers because similarly situated customers are treated the same under the tariff.

⁴ Service conductor and meters are not installed within subdivisions until later when homes are actually constructed and customer load occurs. Tr. Vol. II, p. 276.

b. **Line Extension Cost Recovery Does Not Create "Excess Revenue."**

On page 12 of its Appellant's Brief, the BCA asks what becomes of "excess revenue" when the terminal facilities allowance credited to new customers falls below its embedded cost. This question implies that when developers receive allowances in an amount equal to the Company's actual cost to provide those terminal facilities, a negative investment and financial windfall for the Company are somehow created at the expense of developers. This is simply not true. The Company either makes an investment on behalf of customers or it does not; if made, the Company is only allowed to earn a return on the investment it makes and does not receive "excess revenues." R. Vol. II, p. 389. At no time would the Company "recover through rates more than it invested in the distribution facilities serving the new customer." Appellant's Brief, p. 12.

However, recovery of investment-related expenses should not be confused with Contributions In Aid of Construction ("CIAC") (e.g., work order expenses paid by customers in excess of allowances) which offset rate base. Tr. Vol. II, p. 283. Idaho Power does not earn a return on any payments in excess of the allowances because customer CIACs directly offset Idaho Power's distribution investment (i.e., cost of service) and thus reduce rate base growth. CIACs also reduce the responsibility of existing customers to pay for distribution facilities that do not serve them. This relieves upward rate pressure for the distribution component of rate base, even if other cost components continue to increase beyond cost amounts currently embedded in rates. See Appellant's Brief, p. 33; Tr. Vol. II, p. 121, LL. 1-8; p. 123, LL. 17-23.

c. **Building Contractors' Proposed Alternative to Order No. 30853 Is Flawed.**

The Building Contractors' proposal as described by Dr. Slaughter's testimony would provide an upfront allowance to developers (not customers) of residential subdivisions equal to \$1,232 *per lot/customer* within the subdivision. *Id.*, p. 234. Dr. Slaughter compares this embedded cost number to the Commission-ordered allowance within residential subdivisions of \$1,780 *per installed transformer*.⁵ This is not a valid comparison for several reasons.

First, the Building Contractors' \$1,232 per lot allowance within a residential subdivision is based upon historical investments that the Company has made on behalf of customers ("embedded costs"). Those computations include embedded costs related to investments the Company has made in substations, primary lines, secondary lines, transformers, services, and meters that have been allocated to the residential class in rate proceedings. *Id.*, p. 274.

The Building Contractors' proposed \$1,232 per lot allowance greatly exceeds the costs found in most residential subdivision work orders, which typically include only a primary line (or backbone), a number of transformers, and secondary line to individual lots. There are no costs associated with substations, services, or meters in residential subdivision work orders, yet these costs are included in the \$1,232 amount. *Id.*, p. 276. Service conductor and meters are not installed within subdivisions until later when homes are actually constructed and customer load occurs. Thus, the Building Contractors' proposal would provide allowances to a developer for costs that are not incurred or included in the developer's work order to construct facilities

⁵ Even on a per transformer basis, the Commission-approved allowance of \$1,780 is more generous than Idaho Power's embedded net plant investment in transformers, which is \$1,533 per residential *transformer*. Tr. Vol. II, p. 279.

necessary for the residential subdivision. The Building Contractors' embedded cost allowance proposal is also inconsistent with the Company's treatment of other customer classes, where only transformers, service conductor, and meters (not primary or secondary lines) are considered for allowances. *Id.*, p. 277.

It should also be noted that the Building Contractors' proposed per lot allowance of \$1,232 included the costs of both primary and secondary transformers that receive allocation to residential class in general rate case proceedings. New residential requests under the line extension tariff provisions rarely, if ever, include primary transformers. *Id.*, pp. 277-78.

Second, per Order No. 30955, residential customers outside of subdivisions receive allowances based solely on standard terminal facilities. They receive no allowances for the costs of substations, primary lines, or secondary lines. The Building Contractors' proposal would offer an unlawful preference to developers by offering a more generous allowance for speculative lots inside a residential subdivision based on facilities that are not considered for allowances to actual new residential customers outside of subdivisions. *Id.*, p. 276.

Third, because transformers often serve more than one ultimate customer, offering developers an allowance on a per lot basis rather than on a per transformer basis can also lead to the unreasonable result that the allowance is greater than the cost of terminal facilities (in this case transformers) required to provide service. Tr. Vol. II, pp. 276-77; R. Vol. IV, p. 668. If greater allowances are given to developers, all other customers will pay higher rates to fund those allowances. By contrast, if additional residential customers request service that can be met by an existing transformer, under Order No. 30955, those customers only receive a terminal

facilities allowance reflective of service conductor and metering because the transformer is already there. Tr. Vol. II, pp. 281-282.; R. Vol. IV, p. 668.

C. The Commission Did Not Abuse Its Discretion When It Denied the BCA Intervenor Funding.

The Commission is authorized to award intervenor funding pursuant to Idaho Code § 61-617A, and the Supreme Court reviews such awards using 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.

Generally speaking, Idaho Power does not take a position on intervenor funding requests. The Commission is the appropriate party to determine whether "the participation of the intervenor has materially contributed to the decision rendered by the commission" as required by Idaho Code § 61-617A(2)(a). Once an intervenor funding award is made, Idaho Code § 61-617A(3) directs that "expenses awarded to qualifying intervenors shall be an allowable business expense" in the utility's pending or next rate case.

If intervenor funding were to be awarded to the BCA in this instance, it is unclear which ratepayers would pay the intervention expenses. Idaho Code § 61-617A(3) requires that "expenses awarded shall be chargeable to the class of customers represented by the qualifying intervenors." It is not readily apparent which class the BCA represented, or which class

benefitted from their participation. Developers do not take power service and do not belong to a customer class. If the BCA is successful and larger allowances are instituted at the BCA's urging, customers will arguably not benefit by paying the higher rates necessary to fund them. Although the costs could theoretically be assigned generally to all customer classes, it would be inappropriate for customers to pay these expenses if they do not take service at the distribution level as required under Rule H (e.g., primary or transmission level customers, such as large commercial or industrial customers).

D. The BCA Is Not Entitled to Attorney Fees and Costs on Appeal.

1. Idaho Code § 12-117 Is Preempted By Another Statute.

By its own terms, Idaho Code § 12-117 as amended effective May 31, 2009, does not apply to this case because another statute controls. Idaho Code § 12-117(1) reads:

(1) Unless otherwise provided by statute, in any administrative proceeding or civil judicial proceeding involving as adverse parties a state agency or political subdivision and a person, the state agency or political subdivision or the court, as the case may be, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law. (Emphasis added.)

The wording of Idaho Code § 61-617A(2) evidences the Idaho Legislature's intent⁶ to make the standard set forth in Idaho Code § 61-617A the basis for an attorney fee award in matters before

⁶ This Court determined that the award of attorney fees in Idaho is dependent upon a statute or rule of the Court permitting the awarding of such fees and that the Commission did not have authority to award them in the absence of that authority. *Idaho Power Co. v. Idaho Public Utilities Comm'n*, 102 Idaho 744, 639 P.2d 442 (1981). In response to the Court's decision, the Idaho Legislature enacted Idaho Code § 61-617A authorizing the Commission to award intervenor funding to customers materially contributing to the Commission's decision. S.L. 1985, ch. 126, § 1.

the Commission. The Commission is vested with the discretion to award attorney's fees and costs under very specific circumstances:

(2) The commission may order any regulated electric, gas, water or telephone utility with gross Idaho intrastate annual revenues exceeding three million five hundred thousand dollars (\$3,500,000) to pay all or a portion of the costs of one (1) or more parties for legal fees, witness fees, and reproduction costs, not to exceed a total for all intervening parties combined of forty thousand dollars (\$40,000) in any proceeding before the commission. The determination of the commission with regard to the payment of these expenses shall be based on the following considerations:

(a) A finding that the participation of the intervenor has materially contributed to the decision rendered by the commission; and

(b) A finding that the costs of intervention are reasonable in amount and would be a significant financial hardship for the intervenor; and

(c) The recommendation made by the intervenor differed materially from the testimony and exhibits of the commission staff; and

(d) The testimony and participation of the intervenor addressed issues of concern to the general body of users or consumers.

This Court has previously found that the decision of the adjudicating body awarding fees will not be overturned absent an abuse of discretion. *Hellar v. Cenarrusa*, 106 Idaho 571, 682 P.2d 524 (1984) (reviewing an award of fees under Idaho Code § 12-121). In this case, the Commission explained its rationale; the BCA's arguments did not materially contribute to its final decision in the case because it presented the same argument it did in the prior 1995 case and the BCA's advocacy did not address issues of concern to "the general body of users or

consumers” as required by Idaho Code § 61-617A(2)(b) and (d). R. Vol. IV, p. 673. Consequently, the Commission cannot be said to have acted unreasonably or without foundation with regard to its review of attorney fees and costs under Idaho Code § 61-617A (or Idaho Code § 12-117, assuming the latter statute applied).

2. **Even if Idaho Code § 12-117 is Not Preempted, It Does Not Apply to Legislative Agencies like the Commission.**

As noted by ACHD, Idaho Code § 12-117 does not form a basis for an award of attorney fees in this instance. Idaho Code § 12-117 allows for an award of attorney fees to persons who prevail against a “state agency.” Idaho Code § 12-117(4)(c) makes reference to Idaho Code § 67-5201 for definition of a “state agency” which is subject to the attorney fee provision. Idaho Code § 67-5201 specifically excludes from the definition of “state agency” agencies of the legislative branch. The Court has previously found that the Idaho Public Utilities Commission is a legislative agency not falling within the definition of a “state agency” as defined by Idaho Code § 67-5201. *Owner-Operator Independent Drivers Ass’n, Inc., v. Idaho Public Utilities Comm’n*, 125 Idaho 401, 871 P.2d 818 (1994) citing *A. W. Brown Co., Inc., v. Idaho Power Co.*, 121 Idaho 812, 819, 828 P.2d 841, 848 (1992).

3. **The Instant Case Does Not Satisfy the Requirements of the Private Attorney General Exception to the American Rule on Attorney Fees.**

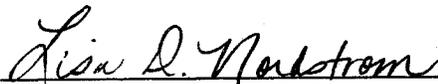
The private attorney general doctrine does not form a basis for an award of attorney fees in this case. The private attorney general doctrine was developed to allow for an award of attorney fees when an action meets three specific requirements: (1) great strength or societal importance of the public 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. *Hellar*, 106 Idaho at 578, 682 P.2d at 531 (1984). Much like the Court found in the *Owner-Operator Independent Drivers Ass'n* case regarding interstate motor carrier registration renewal fees, the BCA's action alleging the Commission authorized insufficient standard terminal facilities allowances lacks sufficient societal importance or number of people standing to benefit to justify an award of attorney fees under this theory. If the BCA were to succeed on appeal, rates for electric service would increase – not decrease – for main body of the Company's customers.

V. CONCLUSION

The Commission regularly pursued its regulatory authority under Title 61 of the Idaho Code to determine how Idaho Power may charge for costs it incurs for distribution line extensions to new customers. The Commission's Orders authorizing line installation allowances are based on substantial and competent evidence – the actual cost to the utility of providing standard equipment to connect new customers to its distribution system. The Commission set allowances consistent with the legal parameters set forth in the *Homebuilders* case by offering the same allowance amount for the same standard equipment necessary to connect that specific customer to Idaho Power's system. Therefore, Idaho Power respectfully requests that Order No. 30955 in Case No. IPC-E-08-22 be affirmed. Idaho Code § 61-629.

Respectfully submitted this 16th day of July 2010.



LISA D. NORDSTROM
Attorney for Respondent Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of July 2010 I served a true and correct copy of RESPONDENT IDAHO POWER COMPANY'S BRIEF upon the following named parties by the method indicated below, and addressed to the following:

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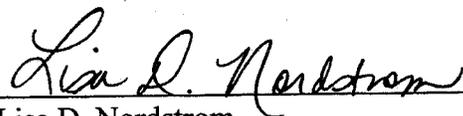
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