

Sup-E-10-01

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BUILDING CONTRACTORS ASSOCIATION)
OF SOUTHWESTERN IDAHO,)

Petitioner/Appellant,)

v.)

IDAHO PUBLIC UTILITIES COMMISSION,)

Respondent on Appeal,)

and)

IDAHO POWER COMPANY,)

Respondent/Respondent on Appeal.)

SUPREME COURT
DOCKET NO. 37293-2010

IDAHO PUBLIC UTILITIES COMMISSION

BRIEF OF RESPONDENT
IDAHO PUBLIC UTILITIES
COMMISSION

APPEAL FROM THE IDAHO PUBLIC UTILITIES COMMISSION

Commissioner Marsha H. Smith, Presiding

MICHAEL C. CREAMER (ISB #4030)
MICHAEL P. LAWRENCE (ISB #7288)
GIVENS PURSLEY LLP
601 W. Bannock Street
PO Box 2720
Boise, ID 83701-2720

Attorneys for Appellant
Building Contractors Association Southwest of Idaho

LAWRENCE G. WASDEN
Attorney General

KRISTINE A. SASSER (ISB #6618)
DONALD L. HOWELL, II (ISB #3366)
Deputy Attorneys General
472 W. Washington Street
PO Box 83720
Boise, ID 83720-0074

Attorneys for Respondent
Idaho Public Utilities Commission

LISA D. NORDSTROM (ISB #5733)
DONOVAN E. WALKER (ISB #5921)
Idaho Power Company
PO Box 70
Boise, ID 83707-0070

Attorneys for Respondent/Respondent on Appeal
Idaho Power Company

TABLE OF CONTENTS

STATEMENT OF THE CASE..... 1

- A. Nature of the Case 1
- B. The Course of Proceedings..... 2
- C. Concise Statement of the Facts..... 4
 - 1. The Initial Line Extension Tariff Proceeding..... 4
 - 2. The Commission’s Initial Decision (Order No. 30853) 7
 - 3. BCA’s Initial Intervenor Funding Request..... 8
 - 4. Reconsideration and the IPUC Hearing..... 9
 - 5. BCA’s Second Request for Intervenor Funding..... 11
 - 6. IPUC Reconsideration Order No. 30955 11

ISSUES PRESENTED ON APPEAL..... 14

ARGUMENT..... 15

- A. Standard of Review 15
- B. The Commission Adequately Explained Its Authority and Reasoning for Changing its Methodology from “Embedded Costs” to “Actual Facilities Costs” 17
- C. There is Sufficient Evidence to Support the Commission’s Decision to Approve the Line Extension Allowances Based Upon Idaho Power’s Actual Cost of Standard Terminal Facilities 19
- D. The Holdings of *Homebuilders* and *Boise Water* do not Apply to this Case 21
- E. The Denial of BCA’s Intervenor Funding Requests was Based upon Sufficient Evidence and was within the Commission’s Discretion 26
 - 1. Denial of BCA’s Initial Funding Request was Appropriate 29
 - 2. BCA Failed to Materially Contribute to the IPUC’s Decision 31
 - 3. BCA’s Positions did not Address Issues of Concern to the General Body of Ratepayers 33
 - 4. BCA’s Costs were Unreasonable 34
- F. BCA is not Entitled to an Award of Attorney Fees on Appeal 34
 - 1. BCA is not Entitled to Attorney Fees on Appeal under the Private Attorney General Doctrine..... 35
 - 2. BCA is not Entitled to Attorney Fees on Appeal under *Idaho Code* § 12-117 36

CONCLUSION..... 39

APPENDIX A – ORDER NO. 30955

TABLE OF AUTHORITIES

Cases

<i>A.W. Brown v. Idaho Power Co.</i> , 121 Idaho at 815, 828 P.2d 841.....	16, 37
<i>Duncan v. State Bd. of Accountancy</i> , ___ Idaho ___, ___ P.3d ___ slip op. at 6, 2010 WL 1632647 (April 23, 2010).....	35
<i>FMC Corp. v. Idaho PUC</i> , 104 Idaho 265, 277, 658 P.2d 936 (1983).....	23
<i>Grindstone Butte Mutual Canal Co. v. Idaho Public Utilities Comm'n</i> , 102 Idaho 175, 627 P.2d 804 (1981).....	24, 26
<i>Hayden Pines Water Co. v. Idaho PUC</i> , 111 Idaho 331, 723 P.2d 875 (1986).....	16
<i>Heller v. Cenarrusa</i> , 106 Idaho 571, 682 P.2d 524 (1984).....	35
<i>Hulet v. Idaho PUC</i> , 138 Idaho 476, 65 P.3d 498 (2003).....	16, 17, 19
<i>Idaho Fair Share v. Idaho PUC</i> , 113 Idaho 959, 751 P.2d 107 (1988).....	27
<i>Idaho State Homebuilders v. Washington Water Power</i> , 107 Idaho 415, 690 P.2d 350 (1984).....	passim
<i>In re Avista</i> , 2008 WL 857075 (Idaho PUC).....	33
<i>In re Idaho Power</i> , 2009 WL 2578516 (Idaho PUC).....	3, 10
<i>In re Idaho Power</i> , 2009 WL 2844075 (Idaho PUC).....	32
<i>In re Rocky Mountain Power</i> , 2009 WL 3159489 (Idaho PUC).....	33
<i>Industrial Customers of Idaho Power v. Idaho PUC</i> , 134 Idaho 285, 1 P.3d 786 (2000).....	passim
<i>Intermountain Gas Co. v. Idaho PUC</i> , 97 Idaho 113, 540 P.2d 775 (1975).....	12, 18
<i>Kootenai Medical Center v. Bonner County Com'rs</i> , 141 Idaho 7, 105 P.3d 667 (2004).....	35
<i>Owner-Operator Independent Drivers Ass'n v. Idaho PUC</i> , 125 Idaho 401, 871 P.2d 818 (1994).....	35, 36, 37
<i>Roe v. Harris</i> , 128 Idaho 569, 917 P.2d 403 (1996).....	35
<i>Rosebud Enterprises v. Idaho PUC</i> , 128 Idaho 609, 917 P.2d 766 (1996).....	12, 16, 18, 38
<i>State v. Hagerman Water Right Owners ("HWRO")</i> , 130 Idaho 718, 947 P.2d 391 (1997).....	35, 36
<i>State v. Pina</i> , ___ Idaho ___, ___ P.3d ___, 2010 WL 963485 (March 18, 2010).....	37
<i>Ultrawall v. Washington Mut. Bank</i> , 135 Idaho 832, 25 P.3d 855 (2010).....	37
<i>Utah Power & Light Co. v. Idaho PUC</i> , 105 Idaho 822, 673 P.2d 422 (1983).....	1
<i>Utah-Idaho Sugar Co. v. Intermountain Gas Co.</i> , 100 Idaho 368, 597 P.2d 1058 (1979).....	30
<i>Washington Water Power v. Idaho PUC</i> , 101 Idaho 567, 617 P.2d 1242 (1980).....	18, 19

Statutes

<i>Idaho Code</i> § 67-5201(1).....	37
<i>Idaho Code</i> § 12-117.....	passim
<i>Idaho Code</i> § 12-121.....	35
<i>Idaho Code</i> § 61-305.....	1
<i>Idaho Code</i> § 61-315.....	13, 17, 21, 25

<i>Idaho Code</i> § 61-501	18
<i>Idaho Code</i> § 61-617A.....	passim
<i>Idaho Code</i> § 61-625	30
<i>Idaho Code</i> § 61-626	passim
<i>Idaho Code</i> § 61-629	15
<i>Idaho Code</i> §§ 61-502 and 61-503	17
<i>Idaho Code</i> §§ 61-626 and 61-627	30

Other Authorities

Order No. 30687	2
Order No. 30853	passim
Order No. 30883	3, 10
Order No. 30896	passim
Order No. 30900	10
Order No. 30955	passim

Rules

I.A.R. 35.....	14
IDAPA 31.01.01.161-.165	3, 34
IDAPA 31.01.01.164	9, 14, 27, 29
IDAPA 31.01.01.165	27
IDAPA 31.01.01.201	2
IDAPA 31.01.01.331.01	29

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a final Order on reconsideration issued by the Idaho Public Utilities Commission ("Commission" or "IPUC"). The underlying administrative proceeding was initiated when Idaho Power Company filed an application with the Commission requesting approval of changes to the Company's line extension tariff. This appeal involves the IPUC's approval of Idaho Power's line extension tariff. A "tariff" sets out the terms, conditions and rates for utility services provided to customers. *Idaho Code* § 61-305.

Line extension costs are incurred by Idaho Power when the Company "extends" electric service to a previously unserved location. Some of the new line extension facilities (and their costs) can be attributed directly to and recovered from the customer who requests new service; while some facilities will be used by more than a single customer. The line extension tariff provides the customer with an installation "allowance" that is a credit against the costs the customer must pay to obtain service. An "allowance" is "a Commission determination of . . . a reasonable amount of investment that the Company should make on behalf of new customers in distribution facilities. . . ." Tr. Vol. II at p. 55, ll. 1-4. When the costs of extending service exceed the allowance, the requesting customer pays the balance. The allowance or credit amount becomes part of Idaho Power's rate base,¹ that is, it is recovered through rates paid by all customers.

¹ Generally, a utility's "rate base represents the original cost minus depreciation of all property justifiably used by the utility in providing service to its customers." *Utah Power & Light Co. v. Idaho PUC*, 105 Idaho 822, 824, 673 P.2d 422, 424 (1983).

In its application and proposed tariff, Idaho Power sought to update its line extension allowances to better reflect the current costs of new distribution facilities necessary to serve new customers. The tariff also addresses the charges for relocating existing electric facilities. When a customer pays the appropriate costs of installing new facilities necessary to obtain service, then a smaller amount of line extension costs will have to be recovered in the rates paid by all customers. In this case, the Commission authorized Idaho Power to update its line extension tariff rates and charges paid by a new customer to more accurately reflect the current costs the Company incurs to serve that new customer.

B. The Course of Proceedings

Idaho Power filed its application and proposed tariff with the IPUC on October 20, 2008. On November 26, 2008, the Commission issued a Notice of Application and set a deadline for interested persons to intervene. Order No. 30687, R. Vol. I at 94. Four parties, including the Building Contractors Association of Southwestern Idaho (“BCA” or “Contractors”), subsequently requested and were granted intervention.² Pursuant to the Commission’s notice, the parties met on January 14, 2009, to discuss how the case should be processed at the IPUC. The parties agreed that “Modified Procedure” was the appropriate way to process this case. Under Modified Procedure, the Commission reviews applications based on written comments submitted by parties and interested persons after it preliminarily finds that the public interest may not require a formal hearing. IDAPA 31.01.01.201.

² The other parties granted intervention were Kroger, the City of Nampa, and the Association of Canyon County Highway Districts. These other intervenors are not parties to this appeal.

Following the submission of written comments, the Commission on July 1, 2009, issued final Order No. 30853 amending and approving changes to Idaho Power's line extension tariff.

On July 13, 2009, BCA filed its first request for intervenor funding pursuant to *Idaho Code* § 61-617A and IPUC Rules, IDAPA 31.01.01.161 through .165. In another final Order No. 30896 issued September 3, 2009, the Commission denied BCA's intervenor funding request because the request was nearly two months past the deadline for filing such requests. R. Vol. III at 428. BCA did not seek reconsideration of the decision denying intervenor funding.

Four petitions for reconsideration of the IPUC's Order No. 30853 approving the new line extension tariff were timely filed pursuant to *Idaho Code* § 61-626. On August 19, 2009, the IPUC issued Order No. 30883 granting in part and denying in part the petitions for reconsideration. The IPUC convened a hearing on October 13, 2009, for the parties to present witnesses and oral argument regarding the issues to be addressed on reconsideration. In particular, the Commission sought further evidence whether the amounts of the approved line extension allowances were appropriate. *In re Idaho Power*, 2009 WL 2578516 (Idaho PUC).

After reconsideration, BCA again petitioned for intervenor funding on November 9, 2009. In this second request, BCA sought to recover the initial funding denied by the Commission in September 2009 in final Order No. 30896, and its attorney and witness fees on reconsideration. R. Vol. IV at 612.

On November 30, 2009, the IPUC issued its final order on reconsideration, Order No. 30955. This Order further clarified, amended, affirmed and rescinded provisions of Idaho Power's line extension tariff based upon the reconsideration record. The Order also denied

BCA's second intervenor funding request based upon the standards of *Idaho Code* § 61-617A and IDAPA 31.01.01.165. Order No. 30955, Appendix A at 26, R. Vol. IV at 648.³ On January 8, 2010, BCA filed its Notice of Appeal from the Commission's final Order on reconsideration.

C. Concise Statement of the Facts

Idaho Power has had a line extension tariff in place for decades. The line extension tariff applies to requests for electric service "that require the installation, alteration, relocation, removal or attachment of Company-owned distribution facilities." R. Vol. I at 11. Prior to the present 2008 application to update the line extension tariff, Idaho Power last made modifications to the tariff in 1995. In the present case, Idaho Power proposed to update its line extension charges "to reflect current costs associated with providing and installing 'standard terminal facilities' for single-phase and three-phase service and line installations." R. Vol. I at 5. "Standard terminal facilities"⁴ are the most commonly installed facilities required to bring service to an individual customer in an unserved location. Standard terminal facilities are part of the distribution facilities constructed by the Company.

1. The Initial Line Extension Tariff Proceeding

For customers or developers seeking new line extensions, Idaho Power proposed to provide an allowance equal to the installed costs of these standard facilities. *Id.* The allowance provides a fixed credit toward the cost of constructing terminal facilities and/or line installations

³ For the convenience of the Court, the IPUC's final order on reconsideration, Order No. 30955, is reproduced in the Appendix A to this brief. Brief citations to this Order will be made to Appendix A.

⁴ Standard terminal facilities include a transformer, meter, and wiring/service conductor. Order No. 30955, Appendix A at 2.

for customers requesting service under the line extension tariff. *Id.*; Tr. Vol. II at 55. Customers requiring facilities that exceed the cost of the most commonly installed “standard terminal facilities” would pay the line extension costs that exceed the amount of the allowance. Thus, Idaho Power’s proposed tariff changes were intended to mitigate intra-class and cross-class subsidies by requiring customers with greater facilities requirements to pay a larger portion of the cost to serve them. Order No. 30955, Appendix A at 22. The allowances credited to new customers are funded by Idaho Power, included in the Company’s rate base and are eventually recovered in the rates for all customers.

As part of its application, Idaho Power also proposed to eliminate “per lot refunds” in subdivisions in an effort to reduce the growth of rate base that results from issuing refunds. Idaho Power Reply at 5, R. Vol. II at 267. Since 1995, Idaho Power has given per lot refunds to developers that paid line extension costs to Idaho Power prior to construction.⁵ The lot refunds provided to developers were issued when the homes on the developers’ lots were eventually sold, and new individual customers began taking service.

In response to the Commission’s Notice, written comments were filed by Commission Staff, the intervenors, and more than 40 members of the public. The Staff agreed in principle with Idaho Power’s rationale that growth should pay for itself and that new customer growth, combined with the effects of inflation, does indeed cause upward pressure on rates. Staff Comments at 3, R. Vol. I at 168.

⁵ These developer costs did not include the costs of distribution substations, drop wires, or meters – the components of the standard facilities provided to individual customers. Order No. 30853 at 12, R. Vol. II at 324.

BCA and many of the public comments submitted by contractors argued that Idaho Power's new tariff would create an undue hardship on the construction industry and negatively impact the housing market. BCA objected to Idaho Power's proposed changes to the line extension charges and allowances, and opposed elimination of the per lot refunds to developers. BCA asserted the proposed changes were inconsistent with the methodology taken by the IPUC when the line extension tariff was last revised in 1995. BCA Comments at 2, R. Vol. II at 205. BCA maintained the focus of the 1995 tariff was on the level of investment for distribution facilities embedded in existing customer rates, and that "new customers were entitled to have the Company provide a level of investment equal to that made to serve existing customers in the same class." *Id.*

Idaho Power filed reply comments. Idaho Power maintained that, by providing allowances equal to the cost of the "standard" and most commonly installed facilities, the Company can help ensure that the additional costs associated with larger "non-standard" facilities are recovered from those customers requesting new service rather than spreading those non-standard costs to all ratepayers. Idaho Power Reply at 2, R. Vol. II at 264. Idaho Power also disputed BCA's assertion that updated line extension charges and credits will have a direct impact on housing prices. The Company argued that the market sets housing prices – not home builders, suppliers, utilities or developers – and that builders and developers have the opportunity to adjust their construction practices to meet current economic conditions. *Id.* at 6, R. Vol II at 268.

BCA also filed reply comments disputing Staff's analysis and recommendations regarding the appropriate level of investment in distribution facilities. BCA maintained Staff's analysis essentially concurs with BCA's position (that the increased costs of distribution facilities are attributable to inflation), yet Staff supported a line extension tariff that disproportionately allocates the additional cost of facilities to new customers simply because they are new customers. BCA Reply at 2, R. Vol. II at 254.

2. The Commission's Initial Decision (Order No. 30853)

After reviewing Idaho Power's application and the written comments, the Commission issued final Order No. 30853 amending and approving Idaho Power's proposed customer allowances. The Commission noted that the capital costs of installing new generation and transmission facilities has always been recovered through the rates paid by all customers. Order No. 30853 at 9; R. Vol. II at 321. Distribution facilities are different, however, because "it is possible to associate specific facilities with specific customers who use them." *Id.* at 10, R. Vol. II at 322. Accordingly, "the costs of new distribution plant have, throughout most of Idaho Power's history, been recovered in two ways – partially through upfront capital contributions from new customers, and partially through electric rates charged to all customers." *Id.*

Based upon the comments the IPUC found "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 allocation of line extension costs." *Id.* Although the allowance amounts were increased, the per lot refund for subdivisions was eliminated. The Commission rejected BCA's argument to increase the per lot refunds. The IPUC found that BCA included

inappropriate costs in its calculations and the costs were miscalculated. *Id.* If per lot refunds were continued or the refund amount increased, then the combination of allowance and lot refund to the developer would exceed the total distribution cost to provide service to the new subdivision customers. The Commission determined that basing the developer's allowance on the cost of transformers was appropriate because transformers may serve more than just a single customer. Such costs are more reflective of actual costs and how distribution facilities are actually deployed. *Id.* at 12, R. Vol. II at 324.

The Commission concluded that the overall changes in the tariff would result in the appropriate costs being collected from new customers when they request service. This change would relieve one factor causing upward pressure on all customer rates. *Id.* at 11; R. Vol. II at 323. The Commission further found "the Company's proposal is impartial to customer class, minimizes subsidization of terminal facilities costs, and carries the added benefit of administrative simplicity." *Id.*

3. BCA's Initial Intervenor Funding Request

Nearly two months after the deadline for submitting intervenor funding requests and almost two weeks after the Commission's final Order approving Idaho Power's line extension tariff, BCA filed its initial request for intervenor funding. BCA conceded that its request was untimely but stated it was an "inadvertent and unintentional oversight by its legal counsel with respect to the correct timing of submission of requests for intervenor funding." Order No. 30896 at 1, *quoting* BCA Request at 2, R. Vol. II at 328. BCA sought to recover its attorney fees, witness fees, and reproduction costs totaling \$28,386.35. *Id.* at 5, R. Vol. II at 331.

The IPUC denied BCA's request for intervenor funding. The Commission found its Rule 164 requires a funding request to be filed "no later than fourteen (14) days after the last evidentiary hearing . . . or the deadline for submitting briefs," whichever is last. IDAPA 31.01.01.164. The Commission found that "the 14-day deadline expired on May 15, 2009. BCA did not file its request until July 13, 2009. BCA's request for intervenor funding is untimely and is, therefore, denied." Order No. 30896 at 2, R. Vol. III at 429.

Order No. 30896 was denoted as "A FINAL ORDER" and stated that any person seeking reconsideration of the Order may file a petition for reconsideration within 21 days in compliance with *Idaho Code* § 61-626. *Id.* BCA did not file a petition seeking reconsideration of the Commission's decision to deny BCA's intervenor funding request.

4. Reconsideration and the IPUC Hearing

BCA sought reconsideration and clarification of final Order No. 30853. R. Vol. II at 358. BCA argued that the Commission's decision to base allowances on actual standard facilities costs was a "momentous change in policy." BCA Petition for Reconsideration at 2, R. Vol II at 359. BCA insisted that the Commission should retain the allowance and per lot refund methodology from the 1995 case. *Id.* at 4, R. Vol. II at 361. Idaho Power's "investment in facilities for each new customer should be equal to the embedded costs of the same facilities used to calculate rates, and those costs in excess of embedded costs should be borne by the customers requesting service." *Id.* at 3; R. Vol II at 360. BCA argued that the per customer estimates of embedded cost for distribution facilities ranged between \$1,002 and \$1,232. *Id.* at 4, R. Vol II at 361.

BCA stated that the new allowances approved by the Commission will mean “the Company investment in distribution for new customers will vary from \$1,780 for a customer requesting service to a single location outside a subdivision to as low as \$149 for a customer receiving identical service within a sixty-lot subdivision.” *Id.* BCA explained the standard transformer can serve from one to ten customers, so the \$1,780 allowance will be equally apportioned among the number of new customers served by the new transformer. *Id.* BCA requested the Commission grant reconsideration or, in the alternative, clarify “that the Commission now is rejecting its heretofore longstanding policy that new customers are entitled to a Company investment in distribution facilities equal to that made to serve existing customers in the same class. . . .” *Id.* at 11, R. Vol. II at 368.

BCA’s Petition for Reconsideration was granted in part and denied in part. The Commission partially granted reconsideration for the limited issue of reviewing the appropriate allowances (e.g., \$1,780 for single-phase service and \$3,803 for three-phase service). The Commission directed BCA to address what allowance amounts are reasonable based on the cost of new distribution facilities. Order No. 30883, 2009 WL 2578516 (Idaho PUC). The reconsideration hearing was held on October 20, 2009, and post-hearing briefs were filed. Order No. 30900, R. Vol. III at 502.

On reconsideration, Idaho Power argued that the Contractors’ proposal would create an unlawful preference for developers because they would receive 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.” Idaho Power Post-

hearing Brief at 7, R. Vol. III at 603. Moreover, “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 . . . required to provide service.” *Id.*

5. *BCA’s Second Request for Intervenor Funding*

After the reconsideration hearing, BCA submitted a second request for intervenor funding under *Idaho Code* § 61-617A. R. Vol. IV at 612. In its second request, BCA again sought the funds previously denied by the Commission as untimely (\$28,386.35) in Order No. 30896. BCA also requested additional attorney fees (\$23,450), witness fees (\$8,464.16), and costs (\$664.74). Thus, BCA’s second funding request totaled \$60,965.25.⁶ Order No. 30955, Appendix A at 23.

6. *IPUC Reconsideration Order No. 30955*

a. Change in Methodology. After reviewing the additional evidence and arguments offered on reconsideration, the Commission issued its final order on reconsideration on November 30, 2009. Order No. 30955, Appendix A. In response to BCA’s request for clarification, the Commission conceded that it did change the line extension methodology from that approved in 1995. *Id.*, Appendix A at 20. Relying on case law, the IPUC explained that “Because regulatory bodies perform legislative as well as judicial functions in their proceedings, they are not so rigorously bound by the doctrine of *stare decisis* that they must decide all future cases in the same way as they have decided similar cases in the past.” *Rosebud Enterprises v.*

⁶ Under *Idaho Code* § 61-617A(2), intervenor funding in any proceeding shall not exceed the total of \$40,000 “for all intervening parties combined.”

Idaho PUC, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996) *citing Intermountain Gas Co. v. Idaho PUC*, 97 Idaho 113, 119, 540 P.2d 775, 781 (1975).

b. Affirming the Rates and Allowances. The Commission affirmed that line extension charges based on the current installation cost of standard terminal facilities for single-phase and three-phase service to new customers was just and reasonable. Order No. 30955 *citing* Order No. 30853 at 10; Tr. at 140-41, 267, Appendix A at 21. Based upon the testimony of Idaho Power witnesses, the IPUC found the appropriate allowance for single-phase service is \$1,780 and \$3,803 for three-phase service. Order No. 30955 *citing* Tr. at 140-141, Appendix A at 21-22. "Because 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." Order No. 30955 *citing* Order No. 30853 at 12; Tr. at 276-77, Appendix A at 21.

The Commission was not persuaded by BCA's argument to continue and increase the per lot refund. The IPUC found that the BCA recommended lot refunds inappropriately included costs for substations, meters, and service conductor. Order No. 30955 *citing* Tr. at 274-276, 277, Appendix A at 22. The Commission reasoned that after increasing the allowances to developers, continuing lot refunds would cause the allowances to exceed the cost of the facilities provided. Order No. 30955, Appendix A at 21-22.

c. Homebuilders Discrimination. The Commission rejected BCA's argument that the new allowances would result in unfair discrimination between "new" customers and "existing" ("old") customers. *Id.*, Appendix A at 22. The Commission found that the new tariff does not discriminate between new and existing customers as described in *Idaho State Homebuilders v.*

Washington Water Power, 107 Idaho 415, 690 P.2d 350 (1984). The Commission explained that:

In *Homebuilders*, our Supreme Court determined that the Commission could not impose a charge on only new customers to recover the costs of additional generating resources that served all or "existing" customers. Here, the Commission is addressing distribution costs 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.

More importantly, the Supreme Court noted that there is no discrimination between "new" customers and "old" customers when the Commission sets new line extension charges. *Homebuilders*, 107 Idaho at 421, 690 P.2d at 356. 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.*

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.

Order No. 30955, Appendix A at 22-23 (emphasis added). Simply put, there is no discrimination when the Commission resets line extension allowances and rates based upon costs.

The Commission concluded that the changes to the tariff addressed a fundamental principle of utility regulation: "To the extent practicable, utility costs should be paid by those that cause the utility to incur the costs." *Id.*, Appendix A at 21. Line extension charges paid above the amount of the allowance offset the cost to all ratepayers of connecting the new

customer to Idaho Power's system. The Commission found that the allowance "amount of \$1,780 is based on the current installation cost of standard terminal facilities for single-phase service to new residential customers." *Id.* The Commission specifically reaffirmed its earlier decision "that allowances should be based upon the cost of standard terminal facilities and not on a per lot basis." *Id.*, Appendix A at 22.

d. BCA's Second Intervenor Funding Request. The Commission denied BCA's \$60,965.25 funding request. First, the Commission noted that it had previously denied BCA its initial funding request of \$28,386.35 for its failure to timely submit the request. The Commission found that BCA "filed its [intervenor funding] request nearly two months after the 14-day deadline established by Commission" Rule 164, IDAPA 31.01.01.164. Order No. 30955, Appendix A at 25. The IPUC affirmed its initial decision.

As to the BCA expenditures during the reconsideration phase, the Commission found that BCA did not meet all of the funding standards of *Idaho Code* § 61-617A. In particular, BCA did not materially contribute to the Commission's final decision, BCA's requested costs were not reasonable, and BCA did not advance a position that would be of concern to the general body of ratepayers. Order No. 30955, Appendix A at 26. Consequently, the IPUC denied the request in its entirety.

ISSUES PRESENTED ON APPEAL

The IPUC contends the issues on appeal listed in BCA's brief are insufficient and incomplete, and so will state the issues consistent with I.A.R. 35, as follows:

1. The Commission adequately explained its authority and reasoning for changing its methodology from “embedded costs” to “actual facilities costs.”

2. There is sufficient evidence to support the Commission’s decision to approve customer line extension allowances based upon Idaho Power’s actual cost of standard terminal facilities.

3. The holdings of *Homebuilders* and *Boise Water* do not apply to this case.

4. The denial of BCA’s intervenor funding requests under *Idaho Code* § 61-617A were based upon substantial and competent evidence and were a proper exercise of the Commission’s discretion.

5. BCA is not entitled to an award of attorney fees on appeal under the private attorney general doctrine or *Idaho Code* § 12-117.

ARGUMENT

A. Standard of Review

The standard of review for Orders of the Commission are well settled. “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 the state of Idaho.” *Idaho Code* § 61-629.

With regard to findings of fact, if the Commission’s findings are supported by substantial, competent evidence this Court must affirm those findings, *Industrial Customers of Idaho Power v. Idaho PUC*, 134 Idaho 285, 288, 1 P.3d 786, 789 (2000), even if the Court would

have made a different choice had the matter been before it *de novo*. *Hulet v. Idaho PUC*, 138 Idaho 476, 478, 65 P.3d 498, 500 (2003). “Thus, the IPUC’s findings of fact must be affirmed unless it appears that the clear weight of the evidence is against the conclusion, or that the evidence is strong and persuasive that the IPUC has abused its discretion.” *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996). On questions of law, review is limited to the determination of whether the Commission has regularly pursued its authority. *A.W. Brown v. Idaho Power Co.*, 121 Idaho at 815, 828 P.2d at 844; *Hulet*, 138 Idaho at 478, 65 P.3d at 500.

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, the 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 Water Co. v. Idaho PUC*, 111 Idaho 331, 336, 723 P.2d 875, 880 (1986).

The Commission’s orders must present sufficient findings and contain the reasoning behind its conclusions to sufficiently allow the Court to determine that the Commission did not act arbitrarily. *Rosebud Enterprises*, 128 Idaho at 618, 917 P.2d at 775. 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 its decisions. *Id.* at 624, 917 P.2d at 781. “The burden

is on the party challenging the Commission's findings to show that they are unsupported by the evidence." *Hulet*, 138 Idaho at 478, 65 P.3d at 500.

The Commission's authority to set a regulated utility's rates is not unfettered. *Idaho Code* § 61-315 prohibits either preferential or discriminatory treatment of ratepayers by public utilities. However, on appeal, the Commission's Order or ruling will not be set aside unless it has failed to follow the law or has abused its discretion. *Application of Boise Water Corp.*, 82 Idaho 81, 86, 349 P.2d 711, 713 (1960) (citing cases). The IPUC is empowered to determine any question of fact when discrimination or preference is alleged. *Idaho Code* § 61-315.

B. The Commission Adequately Explained Its Authority and Reasoning for Changing its Methodology from "Embedded Costs" to "Actual Facilities Costs"

The Contractors maintained that Idaho Power's new line extension tariff is inconsistent with the methodology that the Commission adopted in the 1995 line extension case. The 1995 allowance was tied to an estimate of what new customer distribution costs were embedded in rates. In this case, Idaho Power requested and the Commission approved changes in the line extension allowances in part because, under the old methodology, revenues generated after connecting new customers were inadequate to cover the costs associated with serving those customers. Order No. 30955, Appendix A at 22.

BCA asserted that the Commission cannot change its methodology from the 1995 case. BCA Brief at 6. However, the Commission has broad authority granted by statute to regulate and fix the rates and charges assessed by Idaho's public utilities. *Idaho Code* §§ 61-502 and 61-503. The Public Utilities Law vests the Commission with the "power and jurisdiction to

supervise and regulate every public utility in the state and do all things necessary to carry out the spirit and intent of the provisions of this act.” *Idaho Code* § 61-501.

More importantly, this Court has held that, “Because regulatory bodies perform legislative as well as judicial functions in their proceedings, they are not so rigorously bound by the doctrine of *stare decisis* that they must decide all future cases in the same way as they have decided similar cases in the past.” *Rosebud*, 128 Idaho at 618, 917 P.2d at 775 *citing Intermountain Gas Co. v. Idaho PUC*, 97 Idaho 113, 119, 540 P.2d 775, 781 (1975); Order No. 30955, Appendix A at 21. “So long as the Commission enters sufficient findings to show that its action is not arbitrary and capricious, the Commission can alter its decisions.” *Washington Water Power v. Idaho PUC*, 101 Idaho 567, 579, 617 P.2d 1242, 1254 (1980).

In its Order No. 30955, the Commission listed the reasons why it changed the methodology. The Commission found that different circumstances exist now than did in 1995. Order No. 30955, Appendix A at 21. The new allowances for single-phase and three-phase service more appropriately reflect “the current installation cost of standard termination facilities for single-phase service to new residential customers.” *Id. citing* Order No. 30853 at 10; Tr. at 140-41, 267, Appendix A at 21. “Because the [new] 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. Permitting a per customer allowance rather than a per transformer allowance could lead to an allowance inside subdivisions that is greater than the cost of the terminal facilities required to provide service” to new customers. Order No. 30955 *citing* Order No. 30853 at 12; Tr. at 276-77, Appendix A at 21. In addition, the Commission was not

persuaded by the testimony offered by BCA's witness. The Commission agreed with Idaho Power witness Greg Said who testified that the calculations performed by BCA's witness "tends to provide allowances in subdivisions that exceed the costs of standard terminal facilities. . . ." Order No. 30955 quoting Tr. at 270; Appendix A at 22.

It is clear from Order No. 30955 that the Commission accepted certain evidence and discarded other evidence. *Industrial Customers*, 134 Idaho at 293, 1 P.3d at 794. As set out above, the Commission's findings are supported by substantial and competent evidence in the record. Consequently, the Court must affirm those findings and the Commission's decision. *Id.* at 288, 1 P.3d at 789; *Hulet*, 138 Idaho 476, 65 P.2d 498 (2003). Moreover, there are sufficient findings to show that the Commission's change in methodology is not arbitrary and capricious. *Washington Water Power*, 101 Idaho at 579, 617 P.2d at 1254.

C. There is Sufficient Evidence to Support the Commission's Decision to Approve the Line Extension Allowances Based Upon Idaho Power's Actual Cost of Standard Terminal Facilities

The Commission explained in its Order No. 30955 that, in approving Idaho Power's new line extension charges, it was addressing a fundamental principle of utility regulation: To the extent practicable, utility costs should be paid by those that cause the utility to incur the costs. Order No. 30955, Appendix A at 21. Thus, while the method of determining an appropriate allowance may have changed, the Commission's goal remains the same, e.g., to prevent an unreasonable portion of the line extension costs from being shifted to base rates paid by all customers. Utility costs should be paid by those that cause the utility to incur the costs. *Id.*

Based upon the testimony of Idaho Power witnesses, the Commission found that the appropriate allowance based upon the current installation costs of standard terminal facilities should be up to \$1,780 for single-phase service and up to \$3,803 for three-phase service to new customers. Order No. 30955 *citing* Tr. at 140-41, 267, Appendix A at 21-22. BCA's supporting testimony was unpersuasive because the calculations included inappropriate costs. The Commission observed:

At the reconsideration hearing, BCA's witness Dr. Richard Slaughter argued that the line extension allowance or lot refund should be equal to \$1,232 per lot (single residential customer). Tr. at 234. As Company witness Greg Said explained,

Dr. Slaughter's recommended mechanism treats developers of residential subdivisions more favorably than individual customers seeking connections outside of subdivisions. [His per lot mechanism] tends to provide allowances in subdivisions that exceed the cost of standard terminal facilities with the excess allowances offsetting the cost of primary conductor and secondary conductor. Such treatment is inconsistent with the treatment of residential customers outside of subdivisions who do not receive an allowance greater than the cost of standard terminal facilities.

Tr. at 270. Mr. Said also explained that Dr. Slaughter's \$1,232 cost per lot refund proposal inappropriately includes costs from substations, meters and service conductors which are not part of line extension costs. Tr. at 277, 274-76.

Order No. 30955, Appendix A at 22 (emphasis added).

The Commission also noted that moving to an allowance based upon the current costs of standard terminal facilities is more accurate because a transformer may serve multiple customers.

Specifically, the Commission clarified that:

Depending upon the geographic configuration of customer locations, transformers can serve multiple customers. Because 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. Permitting a per customer allowance rather than a per transformer allowance could lead to an allowance inside subdivisions that is greater than the cost of the terminal facilities required to provide service.

Id., Appendix A at 21 (internal citations omitted).

Idaho Power's line extension tariff had not been updated for more than 10 years. The combined effects of inflation on facilities costs, the rate of new customer growth, and changes in line extension policies over time have all been factors in putting upward pressure on rates. The Commission found that "By updating line installation charges and increasing the allowances, the appropriate amount of contribution will be provided by new customers requesting these services." Order No. 30853 at 11, R. Vol. II at 323. There is substantial and competent evidence to support the Commission's finding on allowances. *Industrial Customers*, 134 Idaho at 288, 1 P.3d at 789. These allowances mitigate intra-class and cross-class subsidies and represent a fair, just and reasonable allocation of line extension costs. Order No. 30955, Appendix at 22.

D. The Holdings of *Homebuilders* and *Boise Water* do not Apply to this Case

BCA argues that the Commission's Order No. 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*." BCA Brief at 18. Despite BCA's arguments to the contrary, the facts of this case are completely different and this case is not controlled by *Homebuilders* and *Boise Water*.⁷ In *Homebuilders*, this Court determined that the Commission could not impose a charge on only

⁷ *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 690 P.2d 350 (1984) and *Application of Boise Water*, 128 Idaho 534, 916 P.2d 1259 (1996).

new customers to recover the costs of additional generating resources to serve all or “existing” customers. 107 Idaho at 421, 690 P.2d at 356. In this case, the Commission is addressing distribution costs – not the cost of transmission or generation facilities. As the Commission made clear in Order No. 30955, it is setting new “line extension charges based on the cost of standard terminal facilities that will be used to serve only the customer who is charged.” Order No. 30955, Appendix A at 22.

More importantly, the *Homebuilders* Court indicated that there is no discrimination between “new” customers and “old” customers when the Commission is setting new line extension charges. 107 Idaho at 421, 690 P.2d at 356. Specifically, the Court indicated that no discrimination is present “when a non-recurring charge [e.g., one-time line extension 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.” *Id.* (emphasis added); Order No. 30955, Appendix A at 22-23. That is the exact situation in this case.

The Commission found that “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.” Order No. 30955, Appendix A at 23. The line extension charge is intended to offset the amount of the utility’s capital invested for each customer requesting new service. Again, setting line extension charges is the very activity mentioned by the *Homebuilders* Court as permissible and not violative of the prohibition on

discriminatory rates. 107 Idaho at 421, 690 P.2d at 356. Therefore, any argument regarding “old” and “new” customers is inapplicable to the facts of this case.

In fact, BCA concedes that the Commission can authorize charges that new customers pay for their connection facilities. “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.” BCA Brief at 7. BCA takes issue with the *amount* of the allowance, that is, the Company’s “level of investment” in new customers connecting to the system. *Id.*

BCA is correct that Idaho Power’s level of investment has changed. However, “the singular fact of a mere difference in the rates charged the various customers . . . is insufficient to establish unjustifiable discrimination. . . .” *FMC Corp. v. Idaho PUC*, 104 Idaho 265, 277, 658 P.2d 936, 947 (1983) (internal citations omitted). The new allowances are reasonably tied to the cost of the facilities being built. Order No. 30955, Appendix A at 21-23. If the cost-causers are not required to contribute more toward the costs associated specifically with their obtaining electric service, then electric rates for all customers must be increased. *Id.*, Appendix A at 21. Such a result would not be just and reasonable.

“[T]he Commission is not under a duty to set rates for different classes of customers which are either equal or uniform provided the rates set are just and reasonable. . . .” *FMC Corp.*, 104 Idaho at 275-276, 658 P.2d at 946-947 (internal citations omitted). The question is “whether the evidence as a whole in light of the circumstances of the particular case supports the differentiation, substantially, competently and with a just and reasonable result.” *Grindstone*

Butte Mutual Canal Co. v. Idaho Public Utilities Comm'n, 102 Idaho 175, 181, 627 P.2d 804, 810 (1981).

[T]he relevant criteria [to consider when forming a basis for rate differentiation include] the quantity of the utility used, the nature of the use, the time of use, the pattern of use, the differences in the conditions of service, the costs of service, the reasonable efficiency and economy of operation and the actual differences in the situation of the consumers for the furnishing of the service. Specifically, as between classes of customers within a schedule, the criteria included contribution to peak load, costs of service on peak demand days, costs of storage and economic incentives. We find such criteria as being valid considerations for rate differentiation as between classes of service, whether those classes be as between schedules or as between customers within a schedule.

Id., 102 Idaho at 180, 627 P.2d at 809.⁸

BCA also contends the new allowance structure unlawfully discriminates between customers inside and outside a subdivision. BCA Brief at 22. On the contrary, all customers requesting service are eligible for an allowance that reflects the cost incurred by Idaho Power to serve that customer. Order No. 30955, Appendix A at 23. 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. *Id.*, Appendix A at 22. Developers of subdivisions are eligible to receive the same amounts for each transformer installed within a development. *Id.* The distinction between a “service attachment” for customers and a “transformer” for developers is straightforward: service conductor and meters are not installed within subdivisions until later when homes are actually constructed and customers connect to the grid. Moreover,

⁸ Although the Court’s reasoning in *Grindstone Butte* provided some of the foundation for the *Homebuilders* decision, *Grindstone Butte* provides a more thorough analysis of the factors that the Commission must consider in setting rates and establishing charges.

[d]evelopers of subdivisions (businesses that do not take electric service). . . receive Company-funded allowances . . . to help offset their development costs. Here, developers are paying for and installing a portion of potential future customers' terminal facilities above the Company's investment as part of a business venture; they are not customers of Idaho Power. These allowances (Company investment) are credited directly to developers at a reduced cost that may or may not be passed on to home buyers (future rate paying customers).

Idaho Power Answer to Petitions for Reconsideration at 4, R. Vol. II at 387.

BCA notes that "in a subdivision a single transformer may serve multiple (up to ten) customers if those customers are located in sufficient proximity to each other, whereas, in the case of a single customer requesting service outside a subdivision, a transformer will only serve that one customer." BCA Brief at 22 (internal citations omitted). This is precisely why a per transformer allowance is more equitable. The result is not discriminatory, it is based entirely on the difference in costs to bring service to those customers inside a subdivision. Order No. 30955, Appendix A at 22; *Idaho Code* § 61-315. Because customers share a transformer, Idaho Power incurs lower costs to connect the customers to its system. BCA's position would provide an unlawful preference to developers by offering a more generous allowance for lots ("customers") inside a residential subdivision based on costs that will not be incurred by the developer for facilities that have not been constructed by Idaho Power. *Id.* Such a result is not just and reasonable.

BCA also opposed the Commission's elimination of an \$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." BCA Brief at 22. The Commission reasoned that, after allowing increased

allowances to a developer up-front, providing lot refunds would cause the allowance to exceed the cost of the facilities provided. Order No. 30853 at 12, R. Vol. II at 324. The Commission's determination was well-reasoned and based on substantial and competent evidence. *Industrial Customers*, 134 Idaho at 288, 1 P.3d at 789.

Regardless of whether construction is inside or outside a subdivision, Idaho Power's line extension tariff provides customers and developers a fixed allowance toward their required terminal facilities. Order No. 30955, Appendix A at 21. The Commission-approved allowances are based on Idaho Power's costs to install standard services and account for actual differences in the locations and services provided to customers. *Id.* This approach represents a fair, just and reasonable allocation of line extension costs. *See Grindstone Butte*, 102 Idaho at 181, 627 P.2d at 810.

E. The Denial of BCA's Intervenor Funding Requests was Based upon Sufficient Evidence and was within the Commission's Discretion

To encourage customer participation in IPUC proceedings, the Legislature authorized the Commission to award "legal fees, witness fees, and reproduction costs" to intervening parties under standards set out in *Idaho Code* § 61-617A. The Commission may order certain utilities to pay all or a portion of these fees and costs to one or more parties, not to exceed a total for all intervening parties combined of \$40,000. The narrow standards for awarding intervenor funding are set out in *Idaho Code* § 61-617A(2). The funding standards applied to BCA require that the Commission find:

- (a) BCA's involvement in this case must have materially contributed to the Commission's final decision;

- (b) BCA's costs of intervention awarded are reasonable in amount;
- (c) Its costs of intervention are a significant hardship for BCA;
- (d) The recommendations of BCA differed materially from the testimony and exhibits of Commission Staff; and
- (e) BCA addressed issues of concern to the general body of ratepayers.

Idaho Code § 61-617A; IPUC Rule 165, IDAPA 31.01.01.165).⁹ Any award of intervenor funding is within the Commission's discretion. *Idaho Fair Share v. Idaho PUC*, 113 Idaho 959, 963, 751 P.2d 107, 111 (1988) (the decision of the adjudicating body in deciding attorney fees will not be overturned on appeal absent an abuse of discretion).

BCA's initial intervenor funding request was made following issuance of the Commission's initial final Order No. 30853. BCA asked for the following fees:

		<u>Hours</u>
Attorney fees	\$16,567.50	71.6
Consultant fees	\$11,462.50	65.3
Copying	<u>\$ 356.35</u>	
Total	\$28,386.35	

BCA Funding Request at 5, R. Vol. II at 331. The Commission denied the funding request because it was filed nearly two months after the filing deadline set by IPUC Rule 164. This rule requires "an intervenor requesting intervenor funding must apply 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." IDAPA 31.01.01.164. The Commission

⁹ Funds paid by the applicable utility to an intervenor become part of the utility's costs. Section 61-617A(5) prohibits intervenor funding to intervenors "in direct competition with a public utility involved in proceedings before the Commission." The Commission is also authorized to adopt rules to implement the statute. *Idaho Code* § 61-617A(4).

found in its final Order No. 30896 that “the 14-day deadline expired on May 15, 2009. BCA did not file its request until July 13, 2009.” Order No. 30896 at 2, R. Vol. III at 429. Order No. 30896 was denoted as “A FINAL ORDER” and parties aggrieved by the Order were advised that they may seek reconsideration within 21 days pursuant to *Idaho Code* § 61-626(1). *Id.* (capitals original). BCA did not seek reconsideration of Order No. 30896.

After the reconsideration hearing, BCA filed a second request for intervenor funding. In its second request BCA again sought to recover its legal and witness expenses previously denied by the Commission in Order No. 30896. More specifically, BCA requested the \$28,386.35 originally denied, and additional attorney fees (\$23,450), witness fees (\$8,464.16), and costs (\$664.74) incurred during reconsideration for a total of \$60,965.25.¹⁰ Order No. 30955, Appendix A at 23.

BCA admitted that its initial petition was untimely, but contends that the Commission abused its discretion in denying the Contractors’ initial and subsequent request for all of its costs and fees through its second petition for intervenor funding. In its order on reconsideration, the IPUC pointed out that because BCA’s first request for intervenor funding was untimely, it would only consider the request as it pertained to the reconsideration phase of the case. *Id.*, Appendix A at 25. After reviewing BCA’s second request, the Commission determined that the Contractors’ petition did not meet all of the Section 61-617A standards for funding.¹¹ The

¹⁰ Under *Idaho Code* § 61-617A(2), intervenor funding in any proceeding shall not exceed the total of \$40,000 “for all intervening parties combined.”

¹¹ The Commission found that the costs to BCA represented a hardship and that BCA’s positions materially differed from the Staff’s positions. Order No. 30955 at n.6, Appendix A at 26.

Commission found that BCA's participation did not materially contribute to the final decision in the case (*Idaho Code* § 61-617A(2)(a)); that BCA's advocacy did not address issues of concern to "the general body of users or consumers" (*Idaho Code* § 61-617A(2)(b)); and that BCA's costs were unreasonable because its activities were beyond the scope of reconsideration (*Idaho Code* § 61-617A(2)(b)). Order No. 30955, Appendix A at 26.

1. Denial of BCA's Initial Funding Request was Appropriate

BCA argued in its brief that the Commission abused its discretion when it again denied BCA its initial intervenor funding request. BCA asserted that the Commission decided "without explanation" to again deny the initial funding request. BCA Brief at 40. Contrary to BCA's characterization, the Commission did explain its reasoning for denying the initial funding request. In Order No. 30955, the Commission stated it was being consistent with its previous decision in final Order No. 30896. In both orders, the Commission found that BCA filed its initial funding request "nearly two months after the 14-day deadline" established by Commission Rule 164, IDAPA 31.01.01.164. Order No. 30955, Appendix A at 25.

Moreover, the Commission's initial denial in Order No. 30896 was clearly labeled as a final Order ("THIS IS A FINAL ORDER.") (capitals in original). Order No. 30896 at 2, R. Vol. III at 429. As a final order, BCA's recourse was to file a petition for reconsideration as required by *Idaho Code* § 61-626 within 21 days of the issuance of Order No. 30896, i.e., by September 24, 2009. BCA did not file a petition for reconsideration within 21 days in accordance with *Idaho Code* § 61-626(1) and Rule 331.01, IDAPA 31.01.01.331.01. Having failed to exhaust its administrative remedy by filing a petition for reconsideration pursuant to Section 61-626(1),

BCA merely resubmitted its initial funding request at a later time. This was not and is not the appropriate procedure.

Idaho Code § 61-625 states that all “orders and decisions of the commission which have become final and conclusive shall not be attacked collaterally.” The initial denial of funding was a final order. Order No. 30896 at 2, R. Vol. III at 429. As this Court has noted, the Legislature has afforded the orders of the Commission a degree of finality similar to that possessed by judgments made by a court of law. *Utah-Idaho Sugar Co. v. Intermountain Gas Co.*, 100 Idaho 368, 373, 597 P.2d 1058, 1063 (1979). “Final orders of the Commission should ordinarily be challenged either by petition to the Commission for [reconsideration] or by appeal to this Court as provided by *Idaho Code* §§ 61-626 and 61-627.” *Id.* The Court recognized that a “different rule would lead to endless consideration of matters previously presented to the commission and confusion about the effectiveness of Commission orders.” *Id.* at 373-74, 597 P.2d at 1063-64.

What cannot be disputed is the fact that BCA’s initial funding request was untimely by nearly two months. The caption of BCA’s request states that it is “Late-Filed” and that it was an “inadvertent and unintentional oversight by its legal counsel with respect to the correct timing for submission of request for intervenor funding.” BCA Late-filed Petition for Intervenor Funding at 1-2, R. Vol. II at 327-28. The initial request further asks the Commission to “exercise its discretion to waive the Commission Rule 164 filing deadline.” *Id.* at 1. It would be unreasonable to award intervenor funding when BCA filed an untimely request for intervenor funding and did not file the requisite petition for reconsideration required by *Idaho Code* § 61-626. BCA should not be permitted to bootstrap its initial funding request with its second request

for intervenor funding. Having already denied BCA's initial request for intervenor funding, the Commission was simply being consistent with its final Order No. 30896. Order No. 30955, Appendix A at 25.

2. BCA Failed to Materially Contribute to the IPUC's Decision

BCA next argued that the Commission abused its discretion by finding that BCA did not materially contribute to the Commission decisions in Order No. 30955. Although it did not prevail, BCA maintained that it materially contributed through the submission of written comments, testimony, briefs, and participation during the technical hearing. BCA asserted that the Commission utilized a heightened standard in determining what amounts to material contribution. "Under the Commission's interpretation, a party only is entitled to intervenor funding if they prevail on an issue." BCA Brief at 39 (emphasis original).

In finding that BCA did not materially contribute, the Commission observed that "BCA, in large part, recycled its arguments and reasoning from Idaho Power's 1995 Rule H filing." Order No. 30955, Appendix A at 26. BCA did not present any new analysis or logic to persuade the Commission that its position warranted further consideration. BCA even conceded that "[i]t may be true that much of BCA's case today resembles the 1995 Case. . . ." BCA Brief at 38.

In partially granting BCA's petition for reconsideration, the Commission limited reconsideration to the issue of whether the new "allowance amount is reasonable based upon the cost of new distribution facilities [i.e., the standard terminal facilities]." Order No. 30955, Appendix A at 6. Most of BCA's evidence and argument on reconsideration was devoted not to the appropriate calculations of the single-phase and three-phase allowances in the new

methodology, but to urging the Commission to continue using the old methodology and increase lot refunds. *Id.*, Appendix A at 26. BCA's fixation on the old methodology was outside the scope of reconsideration. In fact, the Commission found "clarification was repeatedly necessary during the technical hearing [to determine] which case BCA was referencing – 1995 or the present application. Tr. at 176, 258-59, 296." *Id.* The Commission specifically found that it "was not persuaded by BCA's arguments. Accordingly, the Commission cannot find that BCA's actions materially contributed to our final decision in this case." *Id.*

As the finder of fact, the Commission "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 found that BCA's witness continued to argue for the old per lot methodology at an allowance of \$1,232 per lot. The Commission was persuaded from testimony offered by Idaho Power witness Greg Said that BCA's proposal "inappropriately includes costs from substations, meters, and service conductors which are not part of line extension costs." Order No. 30955, Appendix A at 22. The Commission has clearly articulated that it found that BCA's evidence on reconsideration did not materially contribute to the Commission's decision.

The Commission does not require that an intervenor's position prevail to receive funding. The pertinent standard set out in *Idaho Code* § 61-617A(2)(a) is that the intervenor "has to materially contributed to the decision." Neither the statute nor the Commission requires the intervenor to prevail. *See e.g., In re Idaho Power*, 2009 WL 2844075 (Idaho PUC) (although the intervenors did not prevail on all issues, they "added informed perspectives to the hearing record

... [and] materially contributed to the Commission's decision."); *In re Rocky Mountain Power*, 2009 WL 3159489 (Idaho PUC) (granted partial funding); *In re Idaho Power*, 2009 WL 562949 (Idaho PUC); *In re Avista*, 2008 WL 857075 (Idaho PUC). The Commission did not abuse its discretion in determining that BCA did not materially contribute to the Commission's decision.

3. *BCA's Positions did not Address Issues of Concern to the General Body of Ratepayers*

BCA next argued that the Commission abused its discretion in finding that BCA failed to raise issues of concern to the general body of ratepayers. BCA Brief at 39. In its Order, the Commission found that BCA's advocacy does not address issues of concern to the "general body of users or consumers." *Idaho Code* § 61-617A(2)(d); Order No. 30955, Appendix A at 26. BCA's costs and fees were incurred representing concerns of its members (and perhaps indirectly new customers), but not the general body of ratepayers. Allowances, and especially the eliminated lot refund, directly represent what offset a developer (or a new customer) will receive when requesting electric service. Continuing the old methodology or increasing per lot refunds does not benefit the general body of users or consumers. *Idaho Code* § 61-617A(2)(d).

In reaching its decision about "the general body of ratepayers" the Commission was relying on its own knowledge of Idaho Power's customers. *Industrial Customers*, 134 Idaho at 293, 1 P.3d at 794. The number of BCA members, developers and even new customers combined is *de minimis* when compared to "the general body of users or consumers." For example, the total number of customers served by the Company as of December 31, 2009 was 489,923. The total number of new residential customers added in 2009 was 2,258.

www.idahopower.com/AboutUs/CompanyInformation/Facts, viewed July 14, 2010. Thus, new customers represented less than .005 of a percent ($2,258 \div 489,923 = .0046$). It cannot reasonably be argued that BCA's positions represented issues of concern to the general body of ratepayers. *Idaho Code* § 61-617A(2)(d).

4. BCA's Costs were Unreasonable

The Commission also denied BCA intervenor funding on the basis of unreasonable costs. "Because much of BCA's advocacy addressed the line extension policies of the 1995 Rule H case, we find much of the reconsideration legal fees and expert fees to be unreasonable." Order No. 30955, Appendix at 26. BCA does not address or dispute this finding. BCA's evidence and arguments on reconsideration were significantly beyond the scope of reconsideration set by the Commission. Order No. 30955, Appendix A at 26. Thus, its expenses on issues beyond reconsideration were unreasonable. The Commission acted within its discretion in concluding that the request for intervenor funding failed to meet all of the requirements of *Idaho Code* § 61-617A(2)(d) and Commission Rules 161-165, IDAPA 31.01.01.161 through .165.

F. BCA is not Entitled to an Award of Attorney Fees on Appeal

BCA requested an award of attorney fees on appeal, should it be the prevailing party. BCA insisted that it is entitled to recover its fees for two reasons. First, BCA maintained it is entitled to attorney fees on appeal under the "private attorney general doctrine." BCA Brief at 41. Second, BCA argued it is entitled to fees pursuant to *Idaho Code* § 12-117. *Id.* Both assertions are without merit.

1. BCA is not Entitled to Attorney Fees on Appeal under the Private Attorney General Doctrine

Idaho is an “American Rule” state requiring “each party to bear their own attorneys fees absent statutory authorization or contractual right.” *Owner-Operator Independent Drivers Ass’n v. Idaho PUC*, 125 Idaho 401, 407, 871 P.2d 818, 824 (1994); *Heller v. Cenarrusa*, 106 Idaho 571, 578, 682 P.2d 524, 531 (1984). The private attorney general doctrine allows for an award of attorney fees when a civil 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.” *Owner-Operator*, 125 Idaho at 408, 871 P.2d at 825; *Heller*, 106 Idaho at 578, 682 P.2d at 531.

In *Kootenai Medical Center v. Bonner County Com’rs*, this Court held that the private attorney general doctrine is not available to award attorney fees against the State. 141 Idaho 7, 10, 105 P.3d 667, 670 (2004), citing *State v. Hagerman Water Right Owners (“HWRO”)*, 130 Idaho 718, 947 P.2d 391 (1997). As the Court explained in *HWRO*, the private attorney general doctrine arises from the authority of *Idaho Code* § 12-121. . . .” 130 Idaho at 725, 947 P.2d at 398. However, this Court has stated that Section 12-121 “does not . . . authorize an award of attorney fees on appeal of an agency ruling.” *Duncan v. State Bd. of Accountancy*, ___ Idaho ___, ___ P.3d ___ slip op. at 6, 2010 WL 1632647 (April 23, 2010); *Roe v. Harris*, 128 Idaho 569, 573, 917 P.2d 403, 407 (1996).

Second, even if the private attorney general doctrine applied, BCA has not satisfied the first and third elements of the doctrine. The first element requires that the litigation be pursued to benefit the public, rather than to protect private pecuniary interests. *HWRO*, 130 Idaho at 726, 947 P.2d at 399. In *HWRO*, this Court noted that if a party is protecting its own economic interests, it cannot claim that it is a public interest litigant. *Id.* at 726, 947 P.2d at 399. In this case, BCA primarily objected to reduction in the line extension allowances based upon its members that develop subdivisions.

Finally, the third element of the private attorney general doctrine – regarding the number of people standing to benefit from the decision – is not met in this case. In *Owner-Operator*, the Court found that the number of people standing to benefit was insufficient to justify an award of attorney fees. 125 Idaho at 408, 871 P.2d at 825. In *Owner-Operator*, a class action suit was brought against the Commission on behalf of “tens of thousands of motor carriers” operating in Idaho. Plaintiff’s Brief, 1993 WL 13141746 (Idaho). If the Court found that the tens of thousands of motor carriers was “insufficient to justify an award of attorneys fees,” then the number of BCA members surely cannot meet a level that justifies an award of attorney fees on appeal. For these reasons, the Contractors’ request for attorney fees under the private attorney general doctrine must be denied.

2. BCA is not Entitled to Attorney Fees on Appeal under Idaho Code § 12-117

BCA also seeks attorney fees on appeal under *Idaho Code* § 12-117. This section provides that in certain circumstances, the court “shall award the prevailing party reasonable attorney’s fees [on appeal] . . . if [the court] finds that the nonprevailing party acted without a

reasonable basis in fact or law.”¹² *Idaho Code* § 12-117(1). The facts of this case and the case law do not support such an award.

a. Reasonable Basis in Law: As a matter of law, there are two reasons BCA’s request for attorney fees on appeal must be denied. First, BCA concedes that Section 12-117 is not applicable to the IPUC. The Commission agrees. In a unanimous decision, this Court determined in *Owner-Operator* that *Idaho Code* § 12-117 is not applicable to the Commission because the IPUC “is a legislative agency not falling within the definition of a ‘state agency’ as defined by I.C. § 67-5201(1)” and used in *Idaho Code* § 12-117(4)(c). 125 Idaho at 408, 871 P.2d at 825. The Court relied on an earlier case, *A.W. Brown v. Idaho Power Co.*, 121 Idaho 812, 819, 828 P.2d 841, 848 (1992), where it found that when the Commission is setting rates – as in establishing line extension rates in this case – the Commission is acting as an agency of the legislative department of government.

Second, as this Court recently observed, the Legislature amended *Idaho Code* § 12-117 in early 2010. In amending this statute, the Legislature did not change the definition or scope of “state agency” found in Section 12-117(4)(c). When the Legislature amends a statute it is presumed that it has full knowledge of existing judicial decisions and case law. *Ultrawall v. Washington Mut. Bank*, 135 Idaho 832, 836, 25 P.3d 855, 859 (2010); *State v. Pina*, ___ Idaho ___, ___ P.3d ___, 2010 WL 963485 (March 18, 2010). When it amended Section 12-117 the

¹² Section 12-117 also allows parties to recover attorney fees, witness costs, and other expenses in administrative proceedings “[u]nless otherwise provided by statute.” In the case of the Commission’s administrative proceeding, *Idaho Code* § 61-617A provides for the recovery of “legal fees, witness fees, and reproduction costs” under specific conditions. Consequently, Section 12-117 is not applicable to IPUC proceedings and Section 61-617A is controlling.

Legislature did not alter the statute so that it would apply to the Commission. Presumably the Legislature did not intend to subject the IPUC to Section 12-117.

b. Reasonable Basis in Fact. Even if Section 12-117 were applicable, the Commission has acted with a reasonable basis in fact. The Commission acknowledged that the line extension allowances in this case represent a change in methodology from the 1995 case. Order No. 30955, Appendix at 21. The Court recognizes that regulatory bodies may change methodologies so long as the Commission can adequately explain its actions. *Rosebud*, 128 Idaho at 618, 917 P.2d at 781. The changes in methodology and line extension rates in the underlying case were intended to ensure that “utility costs be paid by those that cause the utility to incur the costs.” Order No. 30955, Appendix A at 21. If cost-causers do not pay, then the electric rates for other customers will be higher than what is just or reasonable. *Id.* The new methodology is based on actual costs of installing “standard terminal facilities” (i.e., transformers, distributing wiring, and secondary wiring between the transformer serving the new customer and junction boxes). *Id.*

The Commission acted reasonably when it discontinued the “per customer” allowance and implemented the new “per transformer” allowance, which is more reflective of current costs. In other words, retaining the old methodology would lead to allowances/lot refunds that are greater than the actual cost of terminal facilities required to provide line extensions to customers. *Id.* The IPUC also acted reasonably in denying intervenor funding to BCA given the standards set out in *Idaho Code* § 61-617A(2). Order No. 30955, Appendix A at 25-26. Consequently, the Court should deny BCA recovery of attorney fees on appeal.

CONCLUSION

As set out above, the Commission has regularly pursued its authority in approving Idaho Power's new line extension tariff. The IPUC's findings and conclusions in Order No. 30955 that approve the new line extension allowances and the new methodology are amply supported by competent and substantial evidence. The denial of BCA's intervenor funding based upon the strict standards of *Idaho Code* § 61-617A are supported by sufficient evidence and was within the Commission's discretion. Attorney fees on appeal are not authorized under the private attorney general doctrine or *Idaho Code* § 12-117. The Commission clearly did not abuse its discretion in rendering its decisions in this case.

The Commission requests that the Court affirm Order No. 30955.

DATED at Boise, Idaho this 16th day of July 2010.



Kristine A. Sasser
Donald L. Howell, II
Deputy Attorneys General

Attorneys for the
Idaho Public Utilities Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 16TH DAY OF JULY 2010, SERVED THE FOREGOING **RESPONDENT BRIEF OF THE IDAHO PUBLIC UTILITIES COMMISSION**, IN SUPREME COURT DOCKET NO. 37293-2010, BY MAILING TWO COPIES THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

LISA D. NORDSTROM
DONOVAN E. WALKER
IDAHO POWER COMPANY
1221 W. IDAHO STREET
PO BOX 70
BOISE, ID 83707-0070

MICHAEL C. CREAMER
MICHAEL P. LAWRENCE
GIVENS PURSLEY LLP
601 W. BANNOCK STREET
PO BOX 2720
BOISE, ID 83701-2720


SECRETARY

APPENDIX A
ORDER NO. 30955

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION)
OF IDAHO POWER COMPANY FOR) CASE NO. IPC-E-08-22
AUTHORITY TO MODIFY ITS RULE H)
LINE EXTENSION TARIFF RELATED TO)
NEW SERVICE ATTACHMENTS AND) ORDER NO. 30955
DISTRIBUTION LINE INSTALLATIONS.)

On October 30, 2008, Idaho Power Company filed an Application seeking authority to modify its line extension tariff commonly referred to as the "Rule H" tariff. Specifically, the Company sought to increase the charges for installing new service lines and relocating existing electric distribution facilities. On July 1, 2009, the Commission issued Order No. 30853 partially approving the Company's request to modify its Rule H tariff. The Ada County Highway District (ACHD), City of Nampa, Association of Canyon County Highway Districts (collectively "the Districts"), and the Building Contractors Association ("BCA" or "Contractors") 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"). BCA objected to changes to the line extension rate structure concerning "allowances" or credits for the installation of new service and the elimination of subdivision lot refunds. On July 29, 2009, Idaho Power filed an answer to the petitions.

In Order No. 30883 issued August 19, 2009, the Commission granted in part and denied in part the petitions for reconsideration. The Commission granted reconsideration to the Districts to review their legal arguments and set oral argument for October 13, 2009. The Commission partially granted reconsideration to the Contractors and scheduled an additional evidentiary hearing regarding the appropriate line extension allowances contained in Rule H. The evidentiary hearing was held on October 20, 2009. Final reconsideration briefs were filed by BCA and Idaho Power on October 27, 2009. On November 9, 2009, the Contractors filed a Petition for Intervenor Funding.

After reviewing the initial record, the reconsideration testimony and briefs, and the intervenor funding petition, the Commission issues this final Order on reconsideration affirming,

rescinding, amending and clarifying parts of our initial Order pursuant to *Idaho Code* § 61-624. The Commission's textual changes to Rule H are contained in the Appendix to this Order.

BACKGROUND

A. The Application

Idaho Power's last request to update its Rule H tariff was in 1995. In its present Application, Idaho Power proposed modifications to its existing Rule H tariff that reorganize sections, add or revise definitions, update charges and allowances, modify refund provisions, and delete the Line Installation Agreements section. Idaho Power proposed separate sections for "Line Installation Charge" and "Service Attachment Charges." Within the Service Attachment Charges section, Idaho Power separates the overhead and underground service attachments, updates the charges for underground service attachments less than 400 amps, and outlines the calculation for determining the charges for underground service greater than 400 amps. The "Vested Interest Charges" section was reworded and some definitions were removed. The available options and calculations in this section were not changed. Engineering charges, temporary service attachment charges, and return trip charges were updated in the "Other Charges" section.

The Company asserted that the Line Installation and Service Attachment Allowances section was modified and updated to reflect current costs associated with providing and installing "standard terminal facilities" for single-phase and three-phase service and line installations. The Company's proposal to provide a new customer with an installation credit or "allowance" equal to the installed costs of "standard" overhead distribution facilities (e.g., transformers, meters, wiring) is intended to provide a fixed credit toward the cost of constructing terminal facilities and/or line installations for customers requesting new service under Rule H. Tr. at 128. The fixed allowance is based upon the cost of the most commonly installed facilities and attempts to mitigate intra-class and cross-class subsidies by requiring customers who need more costly facilities to pay a larger portion of the cost to serve them. The proposal also modifies Company-funded credit allowances inside subdivisions. Idaho Power maintains that these revisions to the tariff specifically address the Company's desire that customers pay their fair share of the cost for providing new service lines or altering existing distribution lines.

Idaho Power proposed to provide "Vested Interest Refunds" to developers of subdivisions and new customers inside existing subdivisions for new service line installations

that were not part of the initial service installation in the subdivision. The Company also proposed to change the availability of Vested Interest Refunds from a five-year period to a four-year period and discontinue all refunds for subdivision lots.

Idaho Power also added a new Section 10 entitled "Relocations in Public Road Rights-of-Way" to address the recovery of costs when the Company has to relocate its facilities pursuant to *Idaho Code* § 62-705. The section identifies when and to what extent the Company would be responsible for relocation costs and when it could recover costs from third-party beneficiaries. Specifically, this section outlines cost recovery when road improvements are for the general public benefit, for third-party beneficiaries, and for the benefit of both the general public and third-party beneficiaries.

B. The Prior Final Order

On July 1, 2009, the Commission issued final Order No. 30853 approving the Company's increased allowances, miscellaneous costs, language regarding highway relocations, and the requested changes to format and definitions. The Commission further approved a "cap" of 1.5% on general overhead costs and maintained the existing five-year period for Vested Interest Refunds.

The Commission determined that the updated charges and installation allowances for line installations represent an appropriate "contribution" from new customers requesting the service, thereby relieving one area of upward pressure on rates. The Commission specifically noted that the costs of new power generation and transmission lines cannot be charged to only new customers. The Commission found that when it is possible to allocate the cost of new distribution facilities to new customers, it is appropriate to charge such facilities to the customers who use them. As a result, the Commission found the Company's proposed fixed allowances of \$1,780 for single-phase service and \$3,803 for three-phase service represent a fair, just and reasonable allocation of line extension costs.

The Commission also declined to grant the Company's request to reduce the time limitation within which to receive Vested Interest Refunds from five years to four years. The Commission reasoned that more refunds may be made in the fifth year now that building activity has slowed. Although the Building Contractors Association requested that the refund period be extended to ten years, the Commission found such request was not supported by documentation

or argument. Therefore, the Commission determined it reasonable to maintain a five-year period for Vested Interest Refunds.

The Commission also found that it is reasonable to discontinue refunds for subdivision lots. Since 1995, as lots were sold the Company would reimburse a portion of the line extension costs that developers were required to advance to Idaho Power prior to construction. These reimbursements were by subdivision lots. The Commission discontinued the subdivision lot refunds for three reasons. First, the Commission increased the initial "allowance" or credit for new service to new customers. Customers may receive a \$1,780 allowance for each single-phase transformer installed or a \$3,803 allowance for each three-phase transformer. Order No. 30853 at 10. A transformer may serve multiple customers. Second, the Commission rejected BCA's argument to increase the lot refunds because its proposal included inappropriate costs and the costs were miscalculated. *Id.* at 12. The Commission found the increased allowance was properly based on the average cost of distribution facilities (the Standard Terminal Facilities) for a new customer. After providing the increased allowances to a developer, allowing any lot refunds to "the developer would exceed the distribution investment" for a new customer. *Id.* Finally, discontinuing subdivision lot refunds reduces the growth of rate base that results from such refunds.

Generally, parties requesting the relocation of utility facilities are obligated to pay for the costs of the relocation. However, the State and its political subdivisions can require the relocation of utility facilities located in the public right-of-way pursuant to their police powers. Idaho Power proposed, and the Commission approved, Section 10 as a mechanism to determine who is responsible for the costs of certain relocations in the public right-of-way. The Commission specifically noted that Section 10 in no way grants Idaho Power or the Commission authority to impose relocation costs on a public road agency. Order No. 30853 at 13. The Commission found it persuasive that if a public road agency determines that a private third party should pay for a portion of a road improvement project, it is a reasonable and appropriate indication of responsibility for the allocation of utility relocation costs incurred as a result of the road improvement project. Furthermore, based on concerns noted by the parties, Idaho Power was directed to clarify and resubmit the definitions of "Local Improvement District" and "Third-Party Beneficiary."

PETITIONS FOR RECONSIDERATION

A. The Districts

Ada County Highway District (ACHD), City of Nampa (Nampa), and the Association of Canyon County Highway Districts (ACCHD), (collectively, “the Districts”), allege that the Commission’s approval of Section 10 in Rule H exceeds the Commission’s authority granted by statute. Section 10 addresses relocation costs in public rights-of-way. ACHD further maintains that Section 10 violates the Idaho Constitution by requiring highway agencies and other public entities to pay for the relocation of utility facilities in public rights-of-way. ACHD Petition at 11. Nampa and ACCHD also argue that the Commission’s Order fails to clarify the definitions of “Third-Party Beneficiary” and “Local Improvement District.” Petitions at 2.

B. BCA

Building Contractors Association (BCA or Contractors) alleges in its Petition for Reconsideration that the Commission’s Order “approves an inherently discriminatory rate structure for line extensions by imposing unequal charges on customers receiving the same level and conditions of service.” BCA Petition for Reconsideration at 1. BCA also disputes the Commission’s decision to discontinue “its heretofore longstanding policy that new customers are entitled to a Company investment in distribution facilities equal to that made to serve existing customers in the same class.” *Id.* at 11.

C. The Order Granting and Denying Reconsideration

On August 19, 2009, the Commission issued Order No. 30883 granting in part and denying in part the parties’ Petitions for Reconsideration. The Commission acknowledged the limits of its authority in Order No. 30853 by stating that “Section 10 in no way grants Idaho Power or this Commission authority to impose [relocation] costs on a public road agency.” Order No. 30853 at 13. The Order further clarified that “[j]ust as the Commission cannot compel the highway agency to pay for the relocation of utility facilities in the public right-of-way made at the agency’s request, the agency cannot restrict the Commission from establishing reasonable charges for utility services and practices.” *Id.* However, given the complexity of the constitutional and jurisdictional arguments posed by the Districts on reconsideration and the Company’s acknowledgement that the terms “Local Improvement District” and “Third-Party Beneficiary” should be clarified, the Commission found it appropriate to grant the Districts’

petitions regarding the disputed language in Section 10 of the Rule H tariff. In order to adequately address the issues raised on reconsideration, the Commission first directed that Idaho Power supply new language for Section 10, including the clarification of the definitions for "Third-Party Beneficiary" and "Local Improvement District." *Id.* at 11. Idaho Power was directed to file its updated Section 10 language with the Commission and the parties no later than August 28, 2009.

The Petition for Reconsideration filed by BCA was granted in part and denied in part. The Commission found it appropriate to grant reconsideration on the limited issue of the amount of appropriate allowances. As stated in its final Order, "[t]he Commission recognizes that multiple forces put upward pressure on utility rates." Order No. 30853 at 10. Allowances are intended to reflect an appropriate amount of contribution provided by new customers requesting services in an effort to relieve one area of upward pressure on rates. BCA was directed to address what allowance amount is reasonable based on the cost of new distribution facilities.

Reconsideration was denied regarding the five-year vested-interest refund period and the per-lot refunds. The Commission found that the Contractors provide no cogent argument or documentation on why the period should be expanded to 10 years. Having determined that the new service allowance of \$1,780 is based upon the cost of a single-phase transformer and conductors, ("standard terminal facilities") that can serve multiple customers (three or more), the Commission found that BCA's requested refund of \$1,000 per lot for a subdivision developer would exceed the costs of new extension facilities. *Id.* at 11-12.

ISSUES ON RECONSIDERATION

A. Legal Standards

Reconsideration provides an opportunity for a party to bring to the Commission's attention any question previously determined and thereby affords the Commission with an opportunity to rectify any mistake or omission. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). The Commission may grant reconsideration by reviewing the existing record by written briefs, or by evidentiary hearing. IDAPA 31.01.01.311.03. If reconsideration is granted, the Commission must complete its reconsideration within 13 weeks after the deadline for filing petitions for reconsideration. *Idaho Code* § 61-626(2).

B. Motions to Strike

On September 21, 2009, Idaho Power filed a motion to strike portions of the affidavit of Dorrell Hansen submitted by ACHD in support of its motion for reconsideration. Idaho Power maintains that portions of Mr. Hansen's testimony constitute inadmissible evidence because they lack proper foundation, lack personal knowledge, lack relevance and contain conclusory or speculative statements. On October 5, 2009, ACHD filed a brief opposing Idaho Power's motion to strike. ACHD noted that the Idaho Supreme Court has recognized that "the law governing the Commission contemplates a rule of liberality in the reception of evidence." *Application of Lewiston Grain Growers*, 69 Idaho 374, 380, 207 P.2d 1028, 1032 (1949).

At oral argument on October 13, 2009, the Commission denied Idaho Power's motion to strike portions of the affidavit of Dorrell Hansen. Rule 261 of the Idaho Public Utilities Commission's Rules of Procedure provides that

Rules as to the admissibility of evidence used by the district courts of Idaho in non-jury civil cases are generally followed, but evidence (including hearsay) not admissible in non-jury civil cases may be admitted to determine facts not reasonably susceptible of proof under the Idaho Rules of Evidence. . . . All other evidence may be admitted if it is a type generally relied upon by prudent persons in the conduct of their affairs. The Commission's expertise, technical competence and special knowledge may be used in the evaluation of the evidence.

IDAPA 31.01.01.261. The Commission determined that it was capable of considering the information provided and, based on its expertise, give it the proper weight.

On October 6, 2009, ACHD filed a motion to strike all or portions of the written prefiled testimony of Scott Sparks, David Lowry and Greg Said filed by Idaho Power. ACHD argued that the prefiled testimony of Idaho Power's witnesses was inadmissible because it failed to comply with Rule of Procedure 250 requiring that testimony in formal hearings be given under oath. IDAPA 31.01.01.250. On October 8, 2009, Idaho Power filed a notice with the Commission opposing ACHD's Motion to Strike. Idaho Power requested that argument be held on its Motion during the oral argument scheduled for October 13, 2009.

At the technical hearing conducted by the Commission on October 20, 2009, each of ACHD's objections was considered and each was denied. The written testimony of Idaho Power's witnesses expressed the Company's positions on matters regarding the Rule H tariff. The witnesses had firsthand knowledge of the matters to which they testified. Moreover, the

witnesses were available at both the oral argument and technical hearing for cross-examination.

At the October 20, 2009, technical hearing BCA moved to strike certain portions of the written testimony of Idaho Power witness Greg Said as hearsay. The Commission reserved a ruling on BCA's Motion to Strike until Mr. Said had an opportunity to testify. BCA was advised to renew its objection if Mr. Said's live testimony did not provide adequate explanation regarding its concerns. The hearsay concerned information provided to Mr. Said from another witness and the other witness was present at the hearing. BCA renewed its objection. The Commission overruled the objections. Tr. at 263, 261-64. BCA later declined to cross-examine the other witness on the information that was the subject of the initial objections. Tr. at 299.

C. The Districts' Legal Arguments

The Districts make several legal arguments to support their position that Section 10 (Relocation Costs in Public Rights-of-Way) and several definitions in Section 1 (Definitions) should be stricken from Rule H. The Districts generally assert that Section 10 intrudes in the highway districts' exclusive jurisdiction and is unconstitutional because it obligates highway agencies and other local government entities to pay for utility relocation costs. The Districts also dispute the definitions for "Third-Party Beneficiary" and "Local Improvement Districts" as used in Section 10. The Districts argue that a local improvement district (LID) should not be considered a "Third-Party Beneficiary." They maintain that an LID is an entity of local government and, as such, should not be required to reimburse a utility for relocation costs. These legal arguments are discussed in greater detail below.

1. Exclusive Jurisdiction. The Districts maintain that the highway districts possess exclusive jurisdiction over the public rights-of-way. Thus, Section 10 of Rule H is beyond the jurisdictional authority of the Commission because it seeks to usurp the exclusive jurisdiction of the State's public road agencies. ACHD Petition at 2. In a related argument, the Districts maintain that Section 10 is unconstitutional and an illegal attempt to abrogate or amend the common law rule that utilities placing their facilities along streets and highways gain no property right and must move their facilities at their own expense upon demand.

Idaho Power acknowledges the common law rule that the utility's use of the public road right-of-way is subordinate to the paramount use of the public. Idaho Power does not dispute or contest the public road agencies' authority to require relocation of utility facilities. Reply Brief on Reconsideration at 3-4. However, Idaho Power asserts that the public road

agencies do not have the authority, once the utility complies with the relocation request, to determine how the utility will seek subsequent reimbursement from third parties benefiting from the facilities' relocation. The Company maintains that the Commission alone is vested with the authority to determine how utility costs should be allocated.¹

Commission Findings: At the outset, we note there is agreement between the Districts and Idaho Power regarding some of the underlying legal issues. More specifically, the Districts and Idaho Power agree that road agencies have exclusive jurisdiction to supervise highways and public rights-of-way. ACHD Brief at 3; Joint Brief at 2; Idaho Power Reply Brief on Reconsideration at 3-4. As the Idaho Court of Appeals noted in *Worley Highway District v. Kootenai County*, highway agencies have exclusive jurisdiction over all highways including the power to construct, maintain, and repair public highways as well as to establish design standards and use standards. 104 Idaho 833, 835, 663 P.2d 1135, 1137 (Ct. App. 1983) citing *Idaho Code* §§ 40-1310 and 40-1312. The parties also agree that Idaho Power has a permissive right only to use the public rights-of-way for its facilities and that public road agencies have the exclusive authority to determine when relocation of utility facilities within the public right-of-way is necessary so as not to incommode the public use. ACDH Brief at 5-6; Joint Brief at 2; Idaho Power Reply Brief at 4; see also *Idaho Code* §§ 62-701 and 62-705. As our Supreme Court noted in *State ex rel. Rich v. Idaho Power Co.*, the common law rule in Idaho is that "streets and highways belong to the public and are held by the governmental bodies and political subdivisions of the state in trust for use by the public, and that only a permissive right to use, and no permanent property right can be gained by [utilities] using them." 81 Idaho 487, 498, 346 P.2d 596, 601 (1959); Idaho Constitution, Art. XI, § 8 ("the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such a manner as to infringe . . . the general well being of the state.").

ACHD argues that Section 10 should be removed in its entirety from Rule H. The Districts maintain that as written, Section 10 intrudes upon the road agencies' exclusive jurisdiction. ACHD argues that "Rule H, Section 10 will effectively dictate the policies and procedures of highway districts and local road agencies regarding electric utility relocations. It

¹ "[T]he Commission has the authority to determine the inclusion as an operating expense in a utility's rate base either in part or in whole 'costs' incurred by a utility." *Washington Water Power v. Kootenai Environmental Alliance*, 99 Idaho 875, 880, 591 P.2d 122, 127 (1979).

will impact the operation of highway districts and local road agencies in their negotiations and relationships with third parties and developers concerning road improvement projects. . . .” Tr. at 17; ACHD Brief on Reconsideration at 7; Joint Brief at 3. ACHD also insists that Section 10 conflicts with the District’s Resolution No. 330² governing utility relocations. Finally, the Districts also maintain that the Commission has no authority over the relocation of utility facilities in the public rights-of-way because such relocations are “not a service, product or commodity under *Idaho Code* §§ 61-502 and 61-503.” ACDH Brief on Reconsideration at 10. The Commission does not agree with these three arguments.

First, the Commission affirms that highway agencies have the authority to determine when Idaho Power must relocate its distribution facilities and whether any other party is responsible for paying for the road improvement costs. However, once the highway agency determines that a private party (e.g., a developer) must shoulder all or a portion of the road improvement costs, then it is the Commission that establishes the costs for utility relocation pursuant to *Idaho Code* §§ 61-502, 503, and 507. This is the purpose of Section 10. The Commission’s ability to set relocation costs arises only after the highway agency determines that it or another party is responsible for road improvement costs. Likewise, when a highway agency asks Idaho Power to relocate facilities not in the public right-of-way (e.g., facilities in an easement), Rule H would apply. Idaho Power Reply Brief at 6; *see also* Resolution 330, § 1.A.(2) (if the utility has facilities on private property that must be relocated, “the actual cost of such relocation shall be the responsibility of the District”).

Second, as amended below, Section 10 is compatible with and not in opposition to Resolution No. 330. As explained by ACHD, Resolution No. 330 addresses utility relocations and determines which party bears the cost of relocations. For example, if ACHD requires the relocation of utility facilities to accommodate right-of-way improvement “sponsored or funded by Ada County Highway District,” then such relocation costs “shall be the responsibility of the utility.” Resolution 330, Section 1(A). This section follows the common law rule in Idaho that utilities must relocate their facilities so that the highway agency may make improvements. *Rich v. Idaho Power*, 81 Idaho at 501, 346 P.2d at 603.

² Resolution 330 is a mechanism promulgated more than 20 years ago by ACHD for the allocation of costs of road improvements. Idaho Power patterned its Rule H, Section 10 after the language in Resolution 330.

As amended, Section 10(a) of Rule H incorporates this concept. Sections 2 and 3 of Resolution 330 address instances where utility relocations are either partially-funded or fully-funded by “another individual, firm or entity.” In other words, after ACHD has determined that a private purpose (as opposed to a public purpose) is the impetus for a specific relocation, Resolution 330 and Rule H provide that such private party should also be responsible for defraying the cost of relocating utilities within the public right-of-way for that project. For example, Section 3(A)(2) of Resolution 330 provides that when utility “relocations are required as a result of improvements being made by a developer within the public rights-of-way which were not scheduled to have otherwise been made by [ACHD] within three years of the date said improvements are actually commenced, then the responsibility for the costs of utility . . . relocations shall be that of the developer.” (Emphases added.) This provision of Resolution 330 requires the developer to pay Idaho Power for the relocation of utility facilities located within the public right-of-way. Thus, Rule H, Section 10 mirrors or complements Resolution 330. Clearly Resolution 330 contemplates circumstances where third parties will pay Idaho Power for the cost of relocating the Company’s distribution facilities located in the public right-of-way.

The language of Section 10 in no way usurps the authority of ACHD or any other highway district or political subdivision because it does not attempt to give Idaho Power or this Commission any authority that a highway district would otherwise hold. It is because the allocations of Resolution 330 have worked so effectively in the past 20 years that Idaho Power proposed it as a model for the allocation of relocation costs within its Rule H, Section 10. Tr. at 27.

Third, we reject ACHD’s argument that the relocation of Idaho Power’s facilities from the public right-of-way is not a “service or product” provided by the utility. As indicated above, the Districts recognize that there are instances where relocation costs are assigned to another individual, firm or entity such as a developer. In such cases, Section 10 provides the basis for Idaho Power to recover its relocation costs from the developer. The relocation of Company facilities is a “practice” or “service” subject to our jurisdiction. *Idaho Code* §§ 61-502 and 61-503 authorize the Commission to establish the just and reasonable rate or charge “for any service or products or . . . the rules, regulations, practices, or contract . . . affecting such rates.” In addition, *Idaho Code* § 61-507 provides that the Commission “shall prescribe rules and regulations for the performance of any service.” (Emphases added.) Indeed, Rule H “applies to

requests for electric service under [various schedules] that require the installation, alteration, relocation, removal, or attachment of Company owned distribution facilities.” See Rule H at 1.

As the Supreme Court observed in *Washington Water Power v. Kootenai Environmental Alliance*, the Commission has authority over services or practices “which do or may affect the rates charged or the services sought or rendered which are within the Commission’s ratemaking functions.” 99 Idaho at 881, 591 P.2d at 128. Where the Districts require that a third party pay for the road improvement costs of Idaho Power’s facilities within a public right-of-way or where the road agency requires Idaho Power to move its facility located in its easements, Section 10 and the other sections of Rule H fall within the Commission’s ratemaking functions. *Id.* Even in those cases where a developer would pay only a portion of relocation costs, the calculation of such costs is set out in Rule H.

Fourth, during oral argument ACHD noted the Legislature’s recent enactment of *Idaho Code* § 40-210 supports the argument that the Districts have exclusive jurisdiction over public rights-of-way. Tr. at 8-9. While we do not dispute that the Districts have exclusive jurisdiction, we find enactment of Section 40-210 is the Legislature’s attempt to condition the common law rule that utilities must relocate their facilities in the public right-of-way at their own expense. *Mountain States Tel. & Tel. Co. v. Boise Redevelopment Agency*, 101 Idaho 30, 34, 607 P.2d 1084, 1088. Enactment of Section 40-210 earlier this year represents the Legislature’s intent to contain or limit the cost of relocating utility facilities where possible. In pertinent part, Section 40-210 provides that

it is the intent of the legislature that the public highway agencies and utilities engage in proactive, cooperative coordination of highway projects through a process that will attempt to effectively minimize costs, limit the disruption of utility services, and limit or reduce the need for present or future relocation of such utility facilities.

. . . the public highway agency shall, upon giving written notice of not less than thirty (30) days to the affected utility, meet with the utility for the purpose of allowing the utility to review plans, understand the goals, objectives and funding sources for the proposed project, provide and discuss recommendations to the public highway agency that would reasonably eliminate or minimize utility relocation costs, limit the disruption of utility service, eliminate or reduce the need for present or future utility facility relocation, and provide reasonable schedules to enable coordination of the highway project construction and such utility facility relocation as may be necessary. While recognizing the essential goals and objectives of the public

highway agency in proceeding with and completing a project, the parties shall use their best efforts to find ways to (a) eliminate the cost to the utility of relocation of the utility facilities, or (b) if the elimination of such cost is not feasible, minimize the relocation cost to the maximum extent reasonably possible.

Idaho Code § 40-210(1-2), 2009 Sess. Laws, ch. 142, § 1 (emphasis added). Here it is clear that the Legislature intends for public road agencies and utilities to eliminate or minimize relocation costs “to the maximum extent reasonably possible.” Thus, we find that the enactment of this statute reflects the Legislature’s clear intent that public highway agencies and utilities have an affirmative duty to eliminate the costs of utility relocations, or if elimination of such costs are not feasible, minimize the relocation costs “to the maximum extent reasonably possible.”

Given the enactment of *Idaho Code* § 40-210, we find it appropriate to amend Rule H by adding another section. New Section 11 (set out in the Appendix to this Order), requires that Idaho Power participate in project design or development meetings once it has received written notice from the public road agency. By participating in the project design or development meetings, we believe that Idaho Power will be in a better position to eliminate or minimize relocation costs to the maximum extent reasonably possible.

Finally, it is a standard practice for a utility to charge for relocating its facilities. This practice is consistent with the fundamental ratemaking principle of “cost causation” – that, to the extent practicable, utility costs should be paid by those entities that cause the utility to incur the costs. If this principle were not followed, additional costs incurred at the request of both public and private entities would be shifted to all other ratepayers. This would not result in a “just and reasonable” rate as required by statute. *Idaho Code* § 61-502, 61-503, 61-507. In summary, we find Section 10 as amended in the Appendix to be fair, just and reasonable.

2. Local Improvement District (LID) and Definition of “Third-Party Beneficiary.”

The next issue has two interrelated parts. First, the Districts object to including LIDs in the definition of “third-party beneficiary” in Section 1 and Section 10 of Rule H. Nampa and the Canyon County Districts argue that the definition of “third-party beneficiary” is too broad and that LIDs should not be subject to the payment of utility relocation costs as a third-party beneficiary under Section 10(c). Joint Brief at 5-6. ACHD argues that including LIDs “in the definition of third party beneficiary . . . is a clear violation of Article 8 § 4 of the Idaho Constitution because it establishes a requirement upon such entities of local government to pay

for utility relocations.” ACHD Brief on Reconsideration at 17. Second, because an LID is an “entity of local government,” LIDs (like road agencies) should not be charged for the relocation of utility facilities when LID’s request that such facilities be relocated for a public purpose.

Idaho Power urges the Commission to include LIDs in the definition of “third-party beneficiary” and allow Idaho Power to collect relocation costs from LIDs. Brief on Reconsideration at 9-10. Idaho Power argues that:

First, a LID is not a public road agency that is charged with operating and maintaining public roads. An LID is simply a vehicle by which taxation can occur but not be included in the general budget of a public road agency. The only function the LID performs is to collect money. Where the local improvement district is paying for the road improvements in question, the local improvement district should also pay for the costs of relocating the power lines as required for the improvements. The local improvement district typically derives funding from adjacent private businesses and landowners and those parties, who are directly benefitting from the power line relocation, should bear the costs of the relocation rather than the utility’s customers as a whole. Idaho Power does not believe it is unreasonable to expect a LID to include an amount to cover the cost of utility facility relocation in the amount of money it will fund.

Idaho Power Brief on Reconsideration at 9-10; *see also* Tr. 28-30. Based on problems the Company has experienced with collecting relocation costs for LIDs in the past, the Company maintains that it would be very easy for LIDs to include the cost of utility relocations in their initial funding. *Id.* at 10.

Commission Findings: The Commission first takes up the issue of whether LIDs should be held responsible for utility relocation costs. Pursuant to the Local Improvement District Code (*Idaho Code* §§ 50-1701 *et seq.*), Idaho cities, counties and highway districts are vested with the power to create LIDs. *Idaho Code* §§ 50-1702(a) and 50-1703(a). An LID may be formed to make one or more of the following public improvements: To lay out or widen any street, sidewalk, alley or off-street parking; to pave or resurface curbs, gutters, sidewalks; to construct, repair or maintain sidewalks, crosswalks, sanitary sewers and storm sewers; to construct or repair street lighting; to plant or install landscaping; to acquire and construct parks or other recreational facilities and “to do all such other work and to incur any such costs and expenses as may be necessary or appropriate to complete any such improvements. . . .” *Idaho Code* § 50-1703(a)(13), (1-12).

Idaho Power urges us to include LIDs within the definition of third-party beneficiary so that Idaho Power can seek reimbursement for its relocation costs when an LID needs to have utility facilities relocated to accommodate the LID improvements. Tr. at 28-29. Because LIDs are merely a funding mechanism, the Company insists that an LID should pay for the relocation of utility facilities in the public rights-of-way. *Id.* at 28-30. Idaho Power also argues that an LID is not a public road agency. “It is not charged with operating and maintaining public roads and it does not control the public rights-of-way.” *Id.* at 28.

Although the Commission believes that it is reasonable to expect that an LID would include the cost of necessary utility facility relocations as part of the total funding amount of the district improvement, and that an LID *may* reimburse the utility for the cost of relocating its facilities within the public right-of-way (*Idaho Code* § 50-1703(12 and 13)), we are not persuaded that the Commission can compel such reimbursement. As indicated above, cities, counties and highway districts (the same entities that control public rights-of-way) may create a local improvement district to make the public improvements authorized by law. *Idaho Code* §§ 50-1702(a), (c); 50-1707.

In *Village of Lapwai v. Alligier*,³ 78 Idaho 124, 130, 299 P.2d 475, 479 (1956), our Supreme Court held that the “power of the state and its political subdivisions to require removal of a nuisance or obstruction, which in any way interferes with the public use of streets and highways cannot be questioned.” (Emphasis added). Lapwai passed an ordinance requiring that a private water company remove its facility from the streets and alleys of Lapwai so the village could construct and install its own water system. The Court noted that the city exercised the police power conferred by the state and was performing a governmental function. *Id.* at 128, 299 P.2d at 477-78.³ In *Lapwai*, the relocation was not for the purpose of making a roadway improvement but was the exercise of the police power for another governmental purpose – the installation of a municipal water system.

In a more recent case, our Supreme Court reaffirmed that the common law rule, i.e., utilities must relocate their facilities in the public right-of-way at their own expense, is not absolute but is subject to legislative or constitutional conditions. In *Mountain States Tel. & Tel.*

³ The Court did note that the buried water pipes did not interfere with the use of the streets and alleys. Consequently, the Court modified the city’s order to remove the pipes by allowing the water company to decide whether to remove them or not at its option. *Id.* at 130, 299 P.2d at 479.

Co. v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980), the Court was confronted with the question of whether the Legislature had modified the common rule by providing that the redevelopment agency must pay for the costs of relocating utility facilities in the public right-of-way. The Court concluded that although the urban renewal statute “permitted payment of such costs, they do not appear to be mandatory. In the absence of clear legislative direction we decline to abolish the common law rule and establish a rule requiring relocation costs to be paid to permissive users such as the utilities.” *Id.* at 35-36, 607 P.2d at 1088-89. Idaho Power has not provided us with any authority that the Legislature has modified the common law that would require LIDs formed by cities, counties or highway districts to reimburse utilities for relocating facilities in public rights-of-way.

Our decision regarding LIDs and urban renewal districts is further supported by an opinion issued last week by the Court in *Urban Renewal Agency of the City of Rexburg v. Hart*, No. 77 (Nov. 25, 2009). In *Rexburg*, the Court affirmed an earlier ruling that an urban renewal agency is not the “alter ego” of the local municipality that created the renewal agency even if the city council appoints “itself to be the board of commissioners” of the urban renewal agency” *Id.*, slip op. at 5 *affm’g Boise Redevelopment Agency v. Yick Kong*, 94 Idaho 876, 499 P.2d 575 (1972). The Court further observed in *Rexburg* that a renewal agency is “*entirely separate and distinct from the municipality*” and the renewal agency acts “as an arm of state government . . . to achieve, perform and accomplish the public purposes prescribed and provided” in the Urban Renewal Law. *Id.*, slip op. at 5 (*italicize original and underline added*). Thus, the renewal agency exercises the state’s police power to achieve the public improvements authorized by statute.

Although we believe it is reasonable for an LID to include the necessary costs of relocating utility facilities, we decline to include in Section 10 a provision requiring LIDs to pay for the relocation of such facilities. The Commission has no power to legislate a change in this area and require LIDs to pay utility relocation costs in the public rights-of-way. We further observe that Rule H has not specifically addressed this issue in the past. We order the Company to modify Section 10 to remove any requirement that LIDs be required to pay relocation costs for utility facilities located in the public rights-of-way as set out in the Appendix. While it appears that LIDs (and urban renewal districts) *may* and reasonably should pay for utility relocation costs that are part of the project, we cannot compel the payment of such costs.

Our LID decision also necessitates changes to the definition of “Third-Party Beneficiary” in Section 1 as set out in the Appendix to this Order. Idaho Power shall delete the term “Local Improvement Districts” from the term “Third-Party Beneficiary.” In addition, we direct the Company to change the term of “Third-Party Beneficiary” to “Private Beneficiary” to conform with our decision above.⁴

3. Private Occupancy. ACHD next takes issue with Section 10(d). This subsection states:

d. Private Right of Occupancy – Notwithstanding other provisions of this Section 10, where the Company has a private right of occupancy for its power line facilities within the public road right-of-way, such as an easement or other private right, the cost of Relocation is borne by the Public Road Agency.

ACHD argues that this provision imposes a duty upon road agencies to pay for utility relocation costs within the public right-of-way. ACHD also argues that this provision violates various provisions of the Idaho Constitution “because it establishes a requirement upon [governmental road agencies] to pay for utility relocations.”⁵ ACHD Brief on Reconsideration at 11, 17. Nampa and the Canyon County Districts also argue that this section infringes on public road agencies’ ability to negotiate utility relocation costs on a case-by-case basis with utilities and developers. Joint Brief at 3.

On reconsideration, Idaho Power witness David Lowry explained that a “prior right of occupancy” may arise when a public road agency expands the public right-of-way to include or encompass an area where Idaho Power has facilities under a prior private easement. Lowry Direct at 5.

Commission Findings: At the outset, we note that the text of this subsection is somewhat confusing because it indicates that the Company has a private right of occupancy within a public right-of-way. However, the Company explained in its Brief on Reconsideration that this “prior right of occupancy” may arise when a road agency “expands its public right-of-

⁴ Although ACHD takes issue with the definitions of “Public Road Agency” and “Local Improvement District” in Section 1 of Rule H it fails to provide any specific argument on the alleged error committed by the Commission in adopting these definitions. Nevertheless, the Commission believes that amending the definition of Public Road Agency and Local Improvement District will clarify the scope of Rule H and in particular the operation of Section 10. Our changes to these two definitions are reflected in the Appendix to this Order.

⁵ Article VIII, § 2 and Article VII, § 17 for the Idaho Transportation Department and Article VIII, § 4 for local road agencies.

way to include land where utility facilities are located on a private easement.” Idaho Power Reply Brief on Reconsideration at 15. In previous instances, to accommodate ACHD, Idaho Power and ACHD have entered into written agreements that provide that a subsequent relocation of distribution facilities within certain designated areas where a private right of occupancy existed will be borne by the road agency. This allows the utility to look to the road agency for future relocation costs as an alternative to compensation for expanding across the utility’s private easement. As Idaho Power explained, expanding the public right-of-way to encompass the Company’s private easement without compensation “would constitute an unlawful taking under both Article 1 § 14 of the Idaho Constitution and the Fifth Amendment of the United States Constitution.”

This understanding also comports with ACHD’s Resolution 330 Section 1.A.(2). This provision of Resolution 330 provides that

If a utility . . . has facilities located on private property, with a right of occupancy other than its right to locate in a public right-of-way, and the District requires that any facility so located be relocated, the actual costs for such relocation shall be the responsibility of the District. Such costs shall be exclusive of profit allowances.

(Emphasis added.) In order to assist with the clarification of Section 10, we add two definitions to Section 1 of Rule H. The first added definition is “Easement” (which means the Company’s legal right to use the real property of another for the purpose of installing or locating electric facilities). Second, we add a definition for “Prior Right of Occupancy.” Adding these definitions and amending Subsection d. of Section 10 will improve clarity and allow road agencies the flexibility of negotiating relocation costs on a case-by-case basis. It also reflects the current practice of the Company and road agencies such as ACHD.

4. Advance Payment of Relocation Costs. The Districts take exception to language in Section 10 that requires Idaho Power to be paid in advance by third parties for Idaho Power’s relocation work in public rights-of-way. More specifically, the disputed language provides: “All payments from Third-Party Beneficiary to the Company under this Section [10] shall be paid in advance of the Company’s relocation work, based on the Company’s Work Order Cost.” (Emphasis added.) The Districts assert that this provision is an attempt “to regulate how quickly a public utility is required to” relocate its distribution facilities. ACHD Reconsideration Brief at

12; *see also* Tr. at 57. ACHD insists that requiring all relocations in the public right-of-way to be paid in advance will unduly interfere with the project's timetable. Tr. at 57.

For its part, Idaho Power expresses serious concerns about receiving reimbursement for its relocation costs on a project that it did not initiate. Tr. at 32. The Company asserts that it loses its leverage to recover relocation costs from third parties after the Company has already relocated its facilities. *Id.* Under Rule H, the Company is generally paid in advance of starting construction, unless mutually agreed otherwise. Rule H, § 2(I).

Commission Findings: We agree with the Districts that requiring advance payments may hinder the timely completion of improvements and relocations within the public rights-of-way. While we appreciate the fact that advance payments eliminate or reduce the risk of non-payment to Idaho Power for recovering relocation costs, we find that the Company has other alternatives. First, pursuant to *Idaho Code* § 40-210, Idaho Power is permitted to participate in the project development meeting of the highway agency. Instead of simply responding to the highway agency's direction to relocate its facilities, Section 40-210 provides utilities with an opportunity to participate in the planning process for the purpose of eliminating or minimizing their relocation costs.

Second, Idaho Power has other recourses to recover its relocation costs. For example, it may terminate service to a developer if the developer refuses to pay. Utility Customer Rule 302 provides that a utility may terminate service to a small commercial customer for failure to pay past due amounts. The Company also has other collection and legal remedies at its disposal. Consequently, we order the Company to amend this provision of Section 10 to read "All payments from Private Beneficiaries to the Company under this section shall be based upon the Company's work order costs." This change is shown in the Appendix.

5. Section 10 "Savings Clause." At oral argument, ACHD also took issue with the "Savings Clause" contained in Section 10. This part of Section 10 states that:

This Section [10] shall not apply to utility relocations within public road rights-of-way of Public Road Agencies which have adopted legally binding guidelines for the allocation of utility relocation costs between the utility and Third-Party Beneficiaries that are substantially similar to the rules set out in Section 10 of Rule H.

ACHD argued that this is another instance where Section 10 intrudes on the road agencies to adopt "legally binding guidelines that [are] substantially similar to [Section 10] or else they're

null and void.” Tr. at 58. In other words, “this provision of Rule H, Section 10 states that if our legally binding guidelines are not similar then they’re invalid.” Tr. at 61.

Idaho Power noted that Section 10 was modeled on ACHD’s Resolution No. 330 which was adopted by the District in 1986. Tr. at 27. The Company noted that Resolution 330 has worked well for more than 20 years and that is one reason why Idaho Power modeled Section 10 on Resolution 330. The Company maintained that if a road agency had adopted utility relocation guidelines that were “substantially similar, [then] Section 10 wouldn’t take precedent over” the adopted guidelines. Tr. at 34.

Commission Findings: We find that the “Savings Clause” of Section 10 does not operate to invalidate or void a road agency’s legally enacted guidelines for the allocation of utility relocation costs. By its terms quoted above, Section 10 is not applicable if a road agency has adopted similar policies addressing the allocation of utility relocation costs.

D. BCA’s Issues

The Building Contractors Association (BCA) first argues that Rule H as recently approved by the Commission is inconsistent with the methodology established in the last Rule H case revision completed in 1997. Order No. 26780 (Case No. IPC-E-95-18). BCA asserts the former line extension charges were calculated on a level of investment equal to that made to serve existing customers in the same class. Second, BCA argues that the Company’s proposed allowances treat new and existing customers differently by allocating the additional cost of facilities to new customers. Finally, BCA alleges that inflation, not growth, is the actual source of increased costs to extend new distribution plant.

Idaho Power explains that the Line Installation and Service Attachment Allowances section of Rule H was modified and updated to reflect current costs associated with providing and installing “standard terminal facilities” for single-phase and three-phase service and line installations. The fixed allowance is based upon the cost of the most commonly installed facilities and attempts to mitigate intra-class and cross-class subsidies by requiring customers with greater facilities requirements to pay a larger portion of the cost to serve them. Idaho Power contends that there are two principal drivers that effect growth in rates over time – inflation and growth-related costs. The Company maintains that the growth in rates over the past five years has outpaced pure inflation, demonstrating that growth is not paying for itself. Post-hearing brief at 2. If the “cost-causers” do not pay, then electric rates for other utility customers will be

higher. This result would not reflect a just and reasonable rate as required by *Idaho Code* § 61-503.

Commission Findings: The Contractors first assert that our recently approved changes to Rule H are inconsistent with the methodology that the Commission adopted in the 1995 Rule H case. BCA implied that the Commission cannot change its methodology from the 1995 case. We reject this argument. As our Supreme Court noted, "Because regulatory bodies perform legislative as well as judicial functions in their proceedings, they are not so rigorously bound by the doctrine of *stare decisis* that they must decide all future cases in the same way as they have decided similar cases in the past." *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996) citing *Intermountain Gas Co. v. Idaho PUC*, 97 Idaho 113, 119, 540 P.2d 775, 781 (1975). "So long as the Commission enters sufficient findings to show that its action is not arbitrary and capricious, the Commission can alter its decisions." *Washington Water Power v. Idaho PUC*, 101 Idaho 567, 579, 617 P.2d 1242, 1254 (1980).

In the present Rule H proceeding, the Commission is addressing a fundamental principle of utility regulation: To the extent practicable, utility costs should be paid by those that cause the utility to incur the costs. If the "cost-causers" do not pay, the electric rates for other customers will be higher. Different circumstances exist now than did in 1995.

Line extension charges offset the cost of physically connecting the new customer to Idaho Power's system. We affirm our Order No. 30853 and find that the amount of \$1,780 is based on the current installation cost of standard terminal facilities for single-phase service to new residential customers. Order No. 30853 at 10; Tr. at 140-41, 267. Standard terminal facilities include a single-phase transformer and the cost of the wiring between the Company's existing distribution facilities and the new customer's terminal facilities (the transformer), and any secondary wiring between the transformer and junction boxes. Tr. at 267. Depending upon the geographic configuration of customer locations, transformers can serve multiple customers. Tr. at 237. Because 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. Permitting a per customer allowance rather than a per transformer allowance could lead to an allowance inside subdivisions that is greater than the cost of the terminal facilities required to provide service. Order No. 30853 at 12; Tr. at 276-77.

At the reconsideration hearing, BCA's witness Dr. Richard Slaughter argued that the line extension allowance or lot refund should be equal to \$1,232 per lot (single residential customer). Tr. at 234. As Company witness Greg Said explained,

Dr. Slaughter's recommended mechanism treats developers of residential subdivisions more favorably than individual customers seeking connections outside of subdivisions. [His per lot mechanism] tends to provide allowances in subdivisions that exceed the cost of standard terminal facilities with the excess allowances offsetting the cost of primary conductor and secondary conductor. Such treatment is inconsistent with the treatment of residential customers outside of subdivisions who do not receive an allowance greater than the cost of standard terminal facilities.

Tr. at 270. Mr. Said also explained that Dr. Slaughter's \$1,232 cost per lot refund proposal inappropriately includes costs from substations, meters and service conductors which are not part of line extension costs. Tr. at 277, 274-76. On reconsideration, we reaffirm our previous decision that allowances should be based upon the cost of standard terminal facilities and not on a per lot basis. 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. Consequently, the Commission finds that Idaho Power's proposed fixed allowance of \$1,780 for single-phase service and \$3,803 for three-phase service represents a fair, just and reasonable allocation of line extension costs.

Finally, the Contractors argue that the Rule H revision makes a new customer pay greater upfront line extension charges to defray "some of the costs that would otherwise be charged to existing ratepayers for new generation and transmission," thus running afoul of *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 690 P.2d 350 (1984). We reject this contention. In *Homebuilders*, our Supreme Court determined that the Commission could not impose a charge on only new customers to recover the costs of additional generating resources that served all or "existing" customers. Here, the Commission is addressing distribution costs 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.

More importantly, the Supreme Court noted that there is no discrimination between "new" customers and "old" customers when the Commission sets new line extension charges. *Homebuilders*, 107 Idaho at 421, 690 P.2d at 356. 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.*

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.

INTERVENOR FUNDING

A. The Application for Funding

On November 9, 2009, Building Contractors filed an Application for Intervenor Funding in this case pursuant to *Idaho Code* § 61-617A and the Commission's Rules of Procedure, IDAPA 31.01.01.161-165. In its Petition, BCA claimed the following fees and costs:

<u>Legal Fees</u>	<u>Hours</u>	<u>Total</u>
Michael Creamer, Partner	152.0	\$38,000.00
Elizabeth Donick, Associate	5.5	\$ 852.50
Justin Fredin, Associate	3.0	\$ 585.00
Tami Kruger, Paralegal	<u>5.8</u>	<u>\$ 580.00</u>
Total Legal Fees:	166.3	\$40,017.50
 Costs: Copies		 <u>\$ 1,021.09</u>
 Total Work and Costs:		 \$41,038.59
 Consultant: Richard Slaughter	113.12	 <u>\$19,926.66</u>
 Total Fees and Expenses:		 \$60,965.25

BCA maintains that it was actively involved in evaluating Idaho Power's proposed changes to its Rule H line extension tariff and the economic impacts these changes would have on BCA members and the general public. The Contractors contend that the factual and policy issues raised by this case were complex and important. BCA alleges that it consistently sought findings and conclusions throughout the proceedings that new customers were entitled to a level

of per-customer Company investment in distribution facilities on par with existing customers. Petition for Intervenor Funding at 2.

BCA states that it retained Dr. Richard Slaughter as a consultant and expert witness based on his familiarity with Idaho Power's rate structure and, specifically, its line extension tariff. BCA maintains that Dr. Slaughter's testimony provided a historical and factual foundation regarding Idaho Power's existing Rule H tariff, its embedded distribution costs, and the sources of increasing costs of service to the Company. Dr. Slaughter argued that it was inflation, not customer growth, causing upward pressure on rates. *Id.* at 3.

BCA argues that the Commission's Order No. 30883 granting, in part, its request for reconsideration implicitly, if not explicitly, recognizes that BCA identified important issues that warranted further consideration. Consequently, BCA maintains that they materially contributed to the proceedings. *Id.* at 4.

BCA next alleges that the costs and expenses incurred from participation in this case were all reasonable and necessary. It also contends that, as a non-profit association that relies on voluntary membership and voluntary contributions, the costs and expenses have been a significant financial burden. BCA claims that voluntary contributions have dropped significantly due to the struggling economy and the depressed local real estate sector. As a result, BCA states that it has imposed significant budget cuts and mandatory days off for its staff. *Id.* at 5.

BCA maintains that its expenses were incurred to advance policies that benefit not only BCA members, but also the public at large. BCA points out that its position differed from that of any other party, including Staff. BCA asserts that it materially contributed to the decision in this case "and to the public debate about issues of population growth and energy costs and the appropriate allocation of those costs as between new customers and the Company's existing ratepayers." *Id.* at 6.

Idaho Power did not file a response to BCA's request for intervenor funding.

B. Standards for Intervenor Funding

Idaho Code § 61-617A and Rules 161-165 of the Commission's Rules of Procedure provide the legal standards for awarding intervenor funding. Section 61-617A(1) declares that it is "policy of this state to encourage participation at all stages of all proceedings before the commission so that all affected customers receive full and fair representation in those proceedings." Accordingly, the Commission may order any regulated utility with intrastate

annual revenues exceeding \$3,500,000 to pay all or a portion of one or more parties' legal fees, witness fees, and reproduction costs not to exceed a combined amount of \$40,000. *Idaho Code* § 61-617A(2). The Commission's determination of whether to award intervenor fees and costs in a particular proceeding shall be based on the following standards:

1. Did the intervenor materially contribute to the decision rendered by the Commission;
2. Whether the alleged costs of intervention are reasonable in amount and would be a significant financial hardship for the intervenor to incur;
3. Did the recommendation(s) made by the intervenor differ materially from the testimony and exhibits of the Commission Staff; and
4. Did the testimony and participation of the intervenor address issues of concern to the general body of users or consumers.

Idaho Code § 61-617A(2)(a-d).

Rule 162 of the Commission's Rules of Procedure provides the procedural requirements with which an application for intervenor funding must comply. The application must contain: (1) an itemized list of expenses broken down into categories; (2) a statement of the intervenor's proposed finding or recommendation; (3) a statement showing that the costs the intervenor wishes to recover are reasonable; (4) a statement explaining why the costs constitute a significant financial hardship for the intervenor; (5) a statement showing how the intervenor's proposed finding or recommendation differed materially from the testimony and exhibits of the Commission Staff; (6) a statement showing how the intervenor's recommendation or position addressed issues of concern to the general body of utility users or customers; and (7) a statement showing the class of customer on whose behalf the intervenor appeared. IDAPA 31.01.01.162.

Commission Findings: At the outset, BCA's request for intervenor funding regarding its actions for the entirety of these proceedings must be addressed. In Order No. 30896 the Commission denied a request made by BCA for intervenor funding based on its failure to comply with procedural requirements. BCA filed its request nearly two months after the 14-day deadline established by Commission rules. Therefore, \$28,386.35 of the \$60,965.25 presently requested by BCA has already been denied by this Commission.

BCA's request for expenses incurred during the reconsideration phase of this case in the amount of \$32,578.90 was timely filed. Next, *Idaho Code* § 61-617A(2) and Rule 165 of the

Commission's Rules require that the Commission find that: (a) BCA's involvement in this case must have materially contributed to the Commission's final decision; (b) the costs of intervention awarded are reasonable in amount; (c) the costs of intervention are a significant hardship for BCA⁶; (d) the recommendations of BCA differed materially from the testimony and exhibits of Commission Staff⁶, and; (e) BCA addressed issues of concern to the general body of ratepayers.

1. Material Contribution. The Commission finds that BCA's arguments did not materially contribute to our final decision in this case. BCA, in large part, recycled its arguments and reasoning from Idaho Power's 1995 Rule H filing. Indeed, clarification was repeatedly necessary during the technical hearing as to which case BCA was referencing – 1995 or the present Application. Tr. at 176, 258-59, 296. The argument BCA presented regarding new and existing customers was similar to the argument it presented in the 1995 prior case. As in the 1995 Rule H case, the Commission was not persuaded by BCA's arguments. Accordingly, the Commission cannot find that BCA's actions materially contributed to our final decision in this case.

2. General Body of Users and Reasonable Costs. Because much of BCA's advocacy addressed the line extension policies of the 1995 Rule H case, we find much of the reconsideration legal fees and expert fees to be unreasonable. BCA was permitted to present evidence on the "limited issue of the amount of the appropriate allowance." Order No. 30883 at 4. "BCA may address what allowance amount is reasonable based on the cost of new distribution facilities." *Id.* Here BCA spent considerable resources addressing issues other than the appropriate allowance amount. *Idaho Code* § 61-617A(2)(b). Moreover, BCA advocacy does not address issues of concern to "the general body of users or consumers." *Id.* at (2)(d).

We conclude that the request for intervenor funding of BCA fails to meet the requirements of *Idaho Code* § 61-617A and Commission Rule 165. Therefore, BCA's request for intervenor funding in this case is denied in its entirety.

ULTIMATE FINDINGS OF FACT

Idaho Power is a public utility pursuant to *Idaho Code* §§ 61-119 and 61-129. The Commission has jurisdiction over this matter pursuant to Title 61 of the Idaho Code. The

⁶ We find that the costs represent a hardship for BCA and that BCA's positions materially differed from the Staff's positions.

Commission amends Idaho Power's Rule H tariff as explained above and as set out in the Appendix.

ORDER

IT IS HEREBY ORDERED that the Petitions for Reconsideration filed by ACHD, the City of Nampa, and the Association of Canyon Highway Districts is partially granted and partially denied. As set out above, the Commission's prior Order No. 30853 is amended and clarified pursuant to *Idaho Code* § 61-124.

IT IS FURTHER ORDERED that the Building Contractors Association's request to amend Rule H and Order No. 30853 is denied.

IT IS FURTHER ORDERED that the Building Contractors Association's Petition for Intervenor Funding is denied.

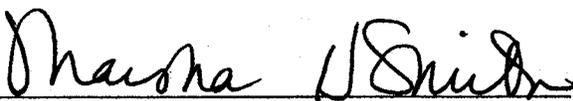
IT IS FURTHER ORDERED that Idaho Power shall file new Rule H tariff sheets consistent with this Order. The changes set out in this Order and the rest of Rule H shall become effective for services rendered on or after December 1, 2009.

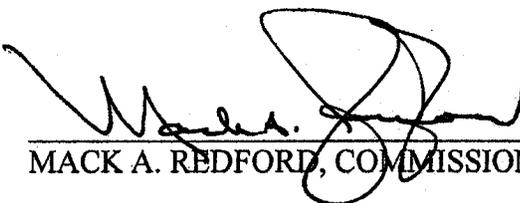
IT IS FURTHER ORDERED that Idaho Power shall submit to the Commission, no later than January 1 of each year, updated allowance amounts for single- and three-phase service to reflect current costs for "standard" terminal facilities.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this Case No. IPC-E-08-22 may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

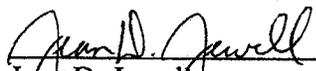
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 30th
day of November 2009.


JIM D. KEMPTON, PRESIDENT


MARSHA H. SMITH, COMMISSIONER


MACK A. REDFORD, COMMISSIONER

ATTEST:


Jean D. Jewell
Commission Secretary

O:IPC-E-08-22_ks_dh_Reconsideration