

DECISION MEMORANDUM

**TO: COMMISSIONER KJELLANDER
COMMISSIONER SMITH
COMMISSIONER HANSEN
COMMISSION SECRETARY
COMMISSION STAFF**

FROM: DON HOWELL

DATE: JANUARY 8, 2004

**RE: UNITED WATER'S MOTION TO ALTER ORDER NO. 29359 IN CASE
NO. UWI-W-03-1**

On December 18, 2003, United Water filed a Motion to Alter Order No. 29359 issued November 3, 2003. In essence, the Company requests that the Commission delete the requirement that ordered United Water to seek a court decision to determine whether Boise City's 1995 Ordinance No. 5623 and a recent 1% increase in the City's franchise fee are legally valid.

As part of its Motion, United Water requests authority to refund approximately \$50,000 to customers by issuing billing credits against future franchise fees. This amount represents the difference between the former 3% franchise fee and the increased franchise fee of 4% that became effective October 1, 2003. Finally, the Company has also submitted a revised Tariff Schedule No. 8 reflecting the repeal of the 1% increase and a return to the 3% franchise fee, effective December 17, 2003. The Company requests that the Commission "accept for filing" a revised Schedule No. 8, Sheet No. 10B.

BACKGROUND

In Order No. 29359 the Commission examined a United Water tariff that implemented an increase in the City of Boise's franchise fee from 3% to 4% effective October 1, 2003. United Water proposed to recover the increased franchise fee from its customers located within the municipal boundaries of Boise. In that Order, the Commission recognized that the Commission Staff raised significant questions regarding the validity of the City's 1995 franchise fee Ordinance and the recent 1% increase. Order No. 29359. The Commission declined to initiate an investigation to examine these issues. Instead, the Commission found that "these

questions should be addressed and answered by a court of law.” *Id.* at 13. Consequently, the Commission directed United Water to “initiate a case in a court of competent jurisdiction to resolve these questions.” *Id.* In addition, the Commission placed the Company on notice that the 1% increase effective October 1, 2003, “is subject to refund if a court invalidates the [franchise fee] ordinance or franchise fee increase. United Water shall provide the Commission with the Court’s opinion within twelve (12) months from the date of this Order.” *Id.* There were no petitions for reconsideration filed.

UNITED WATER’S MOTION

In its Motion, United Water requests that the Commission eliminate that provision in Order No. 29359 that requires the Company to seek a court determination regarding the legality of the 1% franchise fee increase. In support of its Motion, United Water stated that the City recently adopted Resolution No. 17959 on December 16, 2003. The effect of the new resolution is to repeal Resolution No. 17692, which authorized the 1% increase in October 2003. The Resolution repealing the increase states that the City and United Water “have determined the potential costs associated with continuing to collect the franchise fee increase warrant the repeal of the fee increase.” Resolution No. 17959 (Dec. 16, 2003). Consequently, the repeal of the previous Resolution returns the franchise fee to 3%.

Given the City’s repeal of its 1% increase, United Water asserts that the requirement to seek a court determination is moot. Motion at 2. “Because the 4% fee has been rescinded a judicial determination as to its validity would have no practical effect on the outcome.” *Id.* Thus, United Water requests pursuant to *Idaho Code* § 62-624, that the Commission amend its Order No. 29359 by deleting the requirement that the Company obtain a court decision.

The Company also seeks authority to refund the 1% franchise fees that it collected since October 1, 2003. The Company collected approximately \$50,000 in fees from customers. It estimates that the average refund per customer would be about 50¢ but could be as much as \$1.50. Consequently, the Company requests that it be authorized to return these funds to its customers in the form of a bill credit against future franchise fees rather than delivery of physical checks. *Id.* at 2. Finally, the Company has prepared revisions to its Tariff Schedule No. 8, Sheet 10B showing that Boise’s franchise fee is 3% effective December 17, 2003.

STAFF ANALYSIS

Idaho Code § 61-624 provides that the Commission may rescind, alter or amend any Order or decision issued by the Commission. This section also provides that the affected utility must be notified and provided an opportunity “to be heard” before amending a prior Order. In this case, it is the utility requesting that the Commission amend its Order.

Although the Staff believes that rescission of the franchise fee increase does not address the underlying legality of the City’s 1995 Ordinance No. 5623, the Staff does not oppose the Motion. Staff also believes that it is appropriate to refund the collected franchise fee increase to customers in the form of a credit against future franchise fees. While the Staff agrees with the credit methodology, it is concerned that customers who are no longer served by United Water may not receive a refund. The Company was unable to provide the Staff with the exact number of customers who have departed between October 1 and December 17, 2003. The Company indicated that it would have to develop a special program to generate this information. However, United Water estimated that 2,600 “final” bills were rendered during this period—with some customers leaving the system and others moving to a new location within the Company’s service territory. The Company believes that many final accounts do routinely relocate within the system. Thus, the credit could be issued to these relocated accounts.

Staff suggests that in those cases where the Company has information about the whereabouts of former customers, that it refund the credit accordingly. In those instances where the Company is unable to refund the credit, Staff believes there are two alternatives. First it may be appropriate to treat such funds as unclaimed property per *Idaho Code* §§ 14-501 *et seq.* Second, Staff’s preferred alternative is for the Commission to order the Company to follow the refund procedures set out in *Idaho Code* § 61-628 (Accounting on Appeal). In cases where a utility has collected rates that are the subject to refund on appeal, any overcharges are to be promptly returned to customers. After publishing the list of customers that have not received their refund, all monies not claimed within three months of the notice shall be paid into the State’s General Fund. In either event, Staff does not believe that it is reasonable for United Water to retain funds that were designated by the Commission as “subject to refund.”

Turning finally to the issue of the revision to the Company’s Schedule No. 8, Sheet 10B, the Staff recommends that the Commission “accept for filing” this tariff revision.

COMMISSION DECISION

Does the Commission wish to amend its Order No. 29359? Does the Commission approve providing refunds to customer by way of bill credits against future franchise fees? Does the Commission wish to address refunds to former customers of United Water during the period of October 1, 2003 to December 17, 2003? Does the Commission accept for filing revised Sheet 10B to Tariff Schedule No. 8?



Don Howell

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