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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Avimor, LLC

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF) **Case No. UWI-W-07-01**
UNITED WATER IDAHO, INC. FOR)
AUTHORITY TO AMEND AND REVISE)
CERTIFICATE OF PUBLIC CONVENIENCE AND) **REPLY COMMENTS OF**
NECESSITY NO. 143 AND FOR APPROVAL OF) **AVIMOR, LLC**
A SPECIAL FACILITIES AGREEMENT WITH)
AVIMOR, LLC.)
_____)

COMES NOW Avimor, LLC, an Idaho limited liability company, by and through its attorneys of record, Batt & Fisher, LLP, pursuant to Commission Order No. 30242, and submits its Reply Comments in response to the written comments of the Idaho Public Utilities Commission Staff (“Staff”), filed on March 16, 2007.¹

Introduction

On January 4, 2007, United Water Idaho Inc., (“UWI” or the “Utility”) and Avimor, LLC (“Avimor” or the “Company”) entered into a Special Facilities Agreement (“SFA”) consistent with the Utility’s Rules and Regulations 74-77. Under the terms and conditions of the SFA transmission mains, an intermediate booster station and a reservoir

¹ The City of Eagle filed comments in this case. However, Avimor is currently working with Eagle to address their concerns.

(the “Facilities”) will be built so that UWI can provide water service to Avimor’s multi-use planned community development (the “Project”). Avimor’s Project is largely outside, but contiguous to UWI’s certificated territory, thus in order to provide service to this area, the Utility must receive authorization from the Commission to expand its certificated service territory.²

Pursuant to the SFA, Avimor will advance the entire cost of Facilities to serve the Project, estimated to be \$6,308,805. Of this total cost, \$1,749,962 will be considered as a non-refundable contribution and \$4,558,843 will be considered an Avimor advance which the Company will be eligible to receive refunds for when customers are connected to the system and are producing revenue for UWI. In addition, Avimor will contribute the entire cost of constructing the distribution system in the Project without the possibility of refund.

In its Comments, Staff did not object to granting UWI a smaller expansion of its current certificated territory based on the projected size of Avimor’s first phase of development. Staff also did not object to the refund mechanism that will be employed for Avimor to recoup the advances it will make. As Staff and Avimor appear to be in agreement at least to these issues, they will not be discussed herein. However, Staff’s Comments asserted that the Commission should deny UWI’s Application to expand its certificated service territory beyond the first phase of Avimor’s development and also require amendments to the Agreement in order to alleviate its concerns over the potential rate impacts these filings could have upon UWI’s general body of ratepayers. Staff has also recommended that the Commission open a generic docket to examine various issues,

² It appears that 80 acres of the Northwest Quarter of Section 28 as shown on Exhibit E to the Application is already within UWI’s certificated territory.

including whether the Commission should impose the condition that developers and new customers be required to contribute the cost of providing additional water supply prior to the serving utility being granted an expansion of its certificate.

Avimor believes that a review of applicable law, and the facts and circumstances in this case, demonstrate that the Agreement and UWI's Application are just and reasonable in their current form and should be approved for the following reasons: 1) the public interest is served by granting UWI's Application and approving the Agreement as submitted; 2) Idaho law does not provide the Commission with authority to impose conditions on a grant of an expanded certificated area in this case; and 3) the Commission's treatment of previous SFAs that include main extensions warrants that similar treatment be given to the SFA in this case.

LEGAL FRAMEWORK

The Commission exercises limited jurisdiction and has no authority other than that expressly granted to it by the legislature. *Washington Water Power Co., v. Kootenai Environmental Alliance*, 99 Idaho 875, 591 P.2d 122 (1979). As a result, nothing is presumed in favor of its jurisdiction. *United States v. Utah Power & Light Co.*, 98 Idaho 665, 570 P.2d 1353 (1977). If the provisions of the statutes pertaining to the Commission are not met and compliance is not had with them, no jurisdiction exists. *Washington Water Power*, 99 Idaho at 879, 591 P.2d at 126.

The Commission has jurisdiction over utility rate-making matters. *Idaho Code* § 61-502 *et seq.* However, in exercising authority over rates, the Commission is forbidden to allow preferential treatment, advantage, prejudice or disadvantage between ratepayers. *Idaho Code* § 61-315; *Idaho State Homebuilders v. Washington Water Power Co.*, 107

Idaho 415, 690 P.2d 350 (1984); *Building Contractors Assn. of Southwestern Idaho, Inc., v. Idaho Public Utilities Commission*, 128 Idaho 534, 916 P.2d 1259 (1996).

AVIMOR, LLC

Initially, Avimor's Project will be an 830 acre, 685 residential unit community (+/- 10% based on actual development applications) with 75,000 square feet of commercial and retail space.³ In approving the Project, the Ada County Board of Commissioners ("Commissioners") found that:

[T]he tax base anticipated at build-out is expected to cover the costs of essential public services and government functions needed to support the project.

Board of Ada County Commissioners, Findings of Fact, Conclusions of Law and Order, 05-001-PC Report 5, at p. 10. The Commissioner's also found:

[T]he proposal sets forth sufficient and adequate mitigation for the identified economic impacts beyond normally expected incremental impacts on municipalities and other agencies and districts. . . . Therefore, in the overall scheme of things, any potential impacts the Avimor development may have would be miniscule when compared to the publicly funded impacts and sprawl development currently taking place in the City of Eagle and Boise City areas of City Impact.

Id. at p. 23 & 25 (emphasis added).

Avimor's Project has also been designed to conserve water and energy for the benefit of its residents, the Utility and the general body of ratepayers. Central to this is that the Project will have a state of the art wastewater treatment plant that will be capable of converting 300,000 gallons of wastewater daily into water clean enough for reuse, meeting both the strict permitting requirements of the National Pollutant Discharge Elimination System, an EPA permitting program that controls pollutant discharges into waters of the United States, and the Idaho Department of Environmental Quality's strict

³ 498 acres of the Project will be devoted to open space.

Reuse Rules that regulate water reclamation.⁴ The treated wastewater will be used to irrigate play fields, parks and other common areas in the Project, a practice that will both conserve valuable drinking water and reduce water costs for Avimor homeowners and businesses. Avimor's parent, SunCor Land Development, Inc. ("SunCor"), has employed this water conservation feature in other markets; for example, its master-planned community in New Mexico, Rancho Viejo, was the first community development in that state to reuse effluent for irrigating common areas. SunCor also is working on a pilot program with the state of New Mexico on aquifer recharging, from which the state will develop new regulations.⁵ In Utah, SunCor's Coral Canyon development was awarded Envision Utah's Governor's Merit Award in 2002, in part because of its water conservation program.⁶ In addition, Avimor will employ other water conservation measures into the Project by installing low water use plumbing fixtures and hot water recirculating pumps in all 585 residential units that it will build as part of the Project and will limit the use of turf on all lots and require drip irrigation for all shrubs and trees.

Although not directly related to water conservation, but consistent with conservation principles, at least 585 residential units within the Project to be built by Avimor will meet or exceed Northwest Energy Star Standards, that is, they will be 30% more energy efficient than residential construction built to state code standards. Avimor will also strongly encourage other builders working in the Project to build residential units that meet Northwest Energy Star Standards.

⁴ This facility can be expanded to convert 1,000,000 gallons of wastewater daily into usable effluent.

⁵ See www.governor.state.nm.us/press/2004/nov/113004_1.pdf.

⁶ See www.envisionutah.org/qgawards2002.

REPLY COMMENTS

1. It is in the Public Interest for the Commission to Approve the Application and the Agreement.⁷

In determining whether the public convenience and necessity would be served by granting UWI's request to expand its certificated territory requires the Commission to review and decide the public interest issues which are at the core of such an analysis. *See* Order No. 26200, Case Nos. USW-S-94-4 & MID-T-94-1 *citing Idaho Code* § 61-526; *Application of Kootenai Natural Gas Company*, 78 Idaho 621, 627, 308 P.2d 593, 596 (1957). The "public interest" is not susceptible of precise definition. *Application of Bermensolo*, 82 Idaho 254, 352 P.2d 240 (1960). In general, where the Commission is required to consider the public interest it must look to "the interest of the public, their needs and necessities and location and, in fact, all the surrounding facts and circumstances . . . to the end that the people be adequately served." *Browning Freight lines v. Wood*, 99 Idaho 174, 579 P.2d 120 (1978) quoting *Malone v. Van Etten*, 67 Idaho 294, 301, 178 P.2d 382, 385 (1947).

a. No Injury or Impact on Another Utility's Operations

In this case, UWI's request for an expansion of its certificated territory does not interfere or injure any other utility. Rather, the Utility is only seeking to extend its facilities to an unserved area based on Avimor's request. *See* Application at p. 3.

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These Reply Comments were prepared with assistance from Tim Farrell, an Idaho licensed engineer and a principal of SPF Water Engineering, LLC. Mr. Farrell has experience with public water system design and permitting, water rate development and analysis, capital improvement planning, water system operations, source water treatment, water system master planning, hydraulic modeling, water resource and groundwater evaluations and water quality investigations. Previous to SPF, Mr. Farrell was an engineer with UWI.

Further, UWI represented that it knew of no public entities, persons or corporations with whom the proposed expansion was likely to compete. *Id.* Based on the foregoing, this factor to be considered in the public interest analysis should be deemed satisfied.

b. Granting the Application is Consistent with Commission Policy

Through the Application, Avimor is committing to have UWI serve the Project within its proposed service area. In the past, the Commission has encouraged new connections to connect to existing systems rather than creating a patchwork of multiple systems. If the Commission denies UWI's Application, it is possible that a variety of small water systems will be formed to fill the void and need. Long ago the Idaho Supreme Court recognized the validity of the Commission's policy to encourage connections to existing systems when it stated:

The commission is strongly convinced that it would be wise if the General Assembly should enact legislation prohibiting the grant by municipal authorities of franchises to local utilities, where there is an established utility rendering safe, adequate and proper service at reasonable rates, already occupying the field, prior to application to and issuance by this commission of a certificate of public convenience and necessity.

In our opinion, the government which properly assumes to prescribe reasonable rates and compel adequate service by public utilities, should also protect such utilities and the public from unwise and useless competition, and the wasteful investment of capital in the unnecessary duplication of plants.

Idaho Power & Light Co. v. Blomquist, 26 Idaho 222, 242, 141 P. 1083, 1089 (1914)

(emphasis added). In addition, the Commission has also time and again recognized that with small water companies there are economic and operational challenges that they face which require a great deal of resourcefulness in order to provide safe and adequate service at just and reasonable rates. *See* Order 26524 at p. 14, EUW-W-94-1. UWI is the largest, most sophisticated and financially able utility to serve the Avimor Project.

Further, other than speculation, there are no facts in the record which demonstrate that UWI will not be able to provide adequate, safe and reliable service at just and reasonable rates to all of its customers if this Application were granted. Based on the foregoing, the public interest weighs in favor of granting UWI's request for an expanded service territory.

In addition, by granting the current Application, the Commission will avoid having to process multiple requests for expansion of UWI's certificated territory as the Project builds out and the associated issues that may arise with them. Avimor respectfully requests that the Commission consider the inefficiency of Staff's suggestion, that is to grant a minimal expansion when it is clear that UWI is qualified to provide service. As such, Avimor respectfully requests that the Commission grant UWI's Application for the expansion of its certificated territory as requested.

c. Refund Formula Based on Existing Rules

The proposed refund methodology is the same methodology that is required by the Utility's Commission-Approved tariff. Sheet No. 24 sets out the specific way that refunds will be calculated. The developer is required to advance all the costs for the special facilities it needs to serve its customers. Then, as new customers hook into the system, the developer is paid back refunds in a very specific way. The refund methodology takes into consideration a customer's annual revenue, the operating costs per customer, depreciation expense, the authorized rate of return of the utility, and the value of the plant allocable to support consumption per customer. The tariff is used so that new customers pay a fair share of the costs to serve them.

This proposed agreement is exactly what Avimor and UWI are required to do by the Commission and as such should be accepted on its face.

d. Negligible Rate Impacts

In its Comments, Staff states that it is concerned with the impact this Application and Agreement, if approved, would have on UWI's general body of ratepayers. Staff speculated that given the desert location of Avimor and the limited ground water in the area, the costs for obtaining additional water supply would likely be significantly more expensive than the costs for water supply currently embedded in rates and higher than the investment made for United Water's Columbia Water Treatment Plant. Staff also presumably recommended that the on-site main portion of Avimor's advance, as called for in the SFA, be recategorized as a contribution due to concerns about rate impacts. The facts of this case demonstrate that the rate impacts on UWI customers if the Agreement and Application are approved will be negligible.

Under the Agreement, Avimor's advances and contributions to UWI essentially amount to an interest free loan which the Utility will only repay part of incrementally as the Company connects customers to the Facilities and they begin to produce revenue for the Utility. Those amounts contributed and those advances not refunded will be kept by UWI and not impact customer rates. Refunds will be determined by a refund formula, which has been used in previous SFAs and has been found to protect UWI and ratepayers from risk. *See* Order No. 27762, Case Nos. GNR-W-97-2 & UWI-W-97-3 (Commission finding that the refund formula, tied as it is to customer connections and revenues, protects the Company's general body of existing ratepayers from harm.); Order No. 28588, Case No. UWI-W-00-04 (Staff and Commission find that refund arrangement is

advantageous to UWI because the Utility only makes investment in the Harris Ranch backbone plant when new customers are connected and only in proportion to the number of customers taking service.)

Any rate impacts will also be mitigated by the amount of time which it takes for connections to occur and begin producing revenue for UWI. Accordingly, it is likely that rate base additions will occur over a long period of time. This is further mitigated by the amount of the refund for each connection as determined by the Commission approved UWI refund formula.

Another mitigating factor is that any rate base additions resulting from refunds will not be included in customer rates until UWI receives authorization from the Commission to do so. While Avimor has no control over the timing of UWI's rate cases, the Utility generally does not file them annually. As such, it is likely that any rate impact would be spread out over general rate case filings, thus mitigating impact on customers.

Finally, the Project's overall impact on UWI's entire customer base if the payments are refunded to Avimor is very small. Because the refunds are based on the model required by sheet 24 of the approved rates, the new customers will pay for all the costs of the refunds, assuming the new additions are the same costs as the costs embedded in rates. If the Commission were to accept the original Agreement, Avimor were to receive a full refund of the advances and UWI were to file a general rate case every year where the Commission authorized inclusion of the cost of the refund payments to the Utility into rates, there would be no impact on customer rates except for the portion of new supply (if it were even needed) that is higher than the amount for supply that is already embedded in rates. Due to the fact that refunds will be spread over so many

customers and over such a long period of time, it is doubtful that there would be any short or medium-term impact from the refunds, if any. Any incremental costs over the costs embedded in rates would be spread to all customers, just as if the new customers came onto UWI's system in West Boise or some other area in the Utility's territory.

Despite the negligible rate impact, Staff states that it does not believe that it is appropriate to place the cost burden of providing water supply to projects such as Avimor on the general body of UWI ratepayers. There are several problems with this position. First, the Idaho Supreme Court has unequivocally stated that imposing the cost of growth only on new customers is prohibited discrimination. In *Building Contractors of Southern Idaho v. Idaho Public Utilities Commission*, 128 Idaho 534, 916 P.2d 1259 (1996) the Court said:

While it is true that the cost of service has increased, the cost has increased proportionately for each Boise Water customer. There is no difference in the cost of service between customers who connected to Boise Water's system before July 25, 1994, and those who have connected or will connect to the system from that date forward. Each new customer that has come into the system at any time has contributed to the need for new facilities. No particular group of customers should bear the burden of additional expense occasioned by changes in federal law that impose new water quality standards.

In *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 413, 690 P.2d 350 (1984), the Court, quoting from an expert witness went on to state that:

[T]rying to track 'casual' responsibility for costs can quickly degenerate into a metaphysical debate similar in character to the famous medieval debate over how many angels can fit in the head of a pin. From the economist's perspective, a new customer is no more responsible for the level of demand than an old customer. The need for additional capacity can be avoided either by the old customer reducing demand or by the new customer abandoning plans to purchase electricity. An old electric heat customer in an uninsulated house or an existing industrial customer with an old, energy inefficient production process or an industrial customer who could produce thermal electric energy more cheaply than

Washington Water Power, et cetera, are all as responsible for the rising demand for electric energy and power as the new home heating customer is.

Staff attempts to distinguish these cases, though based upon the fact that the area where Avimor is located is currently uncertificated, unlike those areas involved in the cases above. Based on the discussion below Avimor respectfully suggests that Staff's position is on shaky ground as discussed below.

Staff's argument first does not recognize the system-wide impacts of growth on the utility. Stated another way, Staff in its comments, seems to suggest that a new source of supply is needed as a direct result of the Avimor Project. To Avimor's knowledge, UWI plans source of supply additions based on system wide growth and adds new water supplies to meet the water demands created by this growth on a relatively short time period.⁸ Further, to Avimor's knowledge, UWI has never planned for new water supply based on ultimate build out of currently held certificated area. In the event that UWI planned new source of supply additions based on ultimate build out of currently held certificated areas, the required source of supply to meet this demand would be many multiples of existing supply requirements and would not be used and useful for decades. The reason for this sort of planning is that the Utility is adding thousands of customers each year to its system. It is this system-wide growth that is or will cause the need for additional supply and not just the addition of Avimor. Thus, to require Avimor, who will be a UWI customer as it will own various facilities in the Project that will take service from the Utility and its residents to pay for additional source of supply when that need was created by growth of the entire system, is inequitable and discriminatory.

⁸ This discussion of UWI planning was provided by Tim Farrell of SPF Water Engineering who previously was employed by UWI.

Staff's argument also requires the Commission to take a leap of faith that its argument will withstand judicial scrutiny in the face of black letter law that utilities may not discriminate based on old and new customers. *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 413, 690 P.2d 350 (1984); *Building Contractors of Southern Idaho v. Idaho Public Utilities Commission*, 128 Idaho 534, 916 P.2d 1259 (1996). Although this case involves an uncertificated area, there is no indication in the *Homebuilders* or *Building Contractors* cases that this fact would change the Court's central finding that old and new growth are both responsible for increasing demand. In addition, as discussed below, Avimor asserts that *Idaho Code* § 61-526 does not provide the Commission with authority to impose the sort of conditions on a grant of an expansion of a certificated territory. Based on the foregoing, Avimor respectfully suggests that the Commission consider this legal landscape when it considers Staff's position in this case.

e. Development Incorporating Significant Water Conservation Features is Beneficial to UWI and its Ratepayers in General

Staff has not discussed the fact that Avimor's Project is designed and will be built with water conservation as a central feature. The Commission should consider the positive impacts of the Company's water conservation measures when it makes its findings in this matter.

In general, the Idaho Legislature has articulated its policy on water conservation in *Idaho Code* § 42-250(1), which provides that:

The legislature finds that voluntary water conservation practices and projects can advance the policy of the state of Idaho to promote and encourage the conservation, development, augmentation and utilization of the water resources of this state. The legislature deems it appropriate,

therefore, to encourage and support voluntary water conservation practices and projects.

Consistent with this general policy, as early as 1991 the Commission encouraged UWI to develop a system wide plan aimed at reducing its water capacity requirements through water conservation. Order No. 23420 at p. 28, Case No. BOI-W-90-1. In this case, Staff also stated that water conservation programs could be a legitimate and cost effective means for UWI to meet its growing water demand and that the Utility should target areas where customers typically use the most water, such as watering lawns or in bathrooms. *Id.* at pp. 26-27. The Commission and Staff continue to pursue cost-effective water conservation measures in order to reduce other, costlier supply-side options. *See generally* Case Nos. UWI-W-04-04 & UWI-W-06-05.

Consistent with Idaho and the Commission's water conservation policies, the Avimor Project will have a state of the art wastewater treatment plant that will convert 300,000 gallons of wastewater daily into water clean enough for reuse. As stated previously, the treated wastewater will be used to irrigate play fields, parks and other common areas in the Project, a practice that will both conserve valuable drinking water and reduce water costs for Avimor homeowners and businesses. In addition, Avimor will employ other water conservation measures into the Project by installing low water use plumbing fixtures and hot water recirculating pumps in all 585 residential units that it will build as part of the Project and will limit the use of turf on all lots and require drip irrigation for all shrubs and trees. Avimor believes its Project contains many of the water conservation measures which the Commission is seeking to promote. As such, if Commission adopted Staff's position in this case, such an action would contradict the

conservation policy it has been seeking to promote and will punish Avimor and other developers for engaging in development that incorporates valuable conservation features.

2. Staff's Reliance on Idaho Code § 61-526 is Misplaced.

Staff, in its Comments, states that “given the size, location and uncertainty in costs associated with source of supply to serve the entire Avimor development, Staff recommends that the Commission deny expansion in the area beyond Avimor’s Phase 1 at this time.” *Comments* at p. 6. Further, Staff states that through *Idaho Code* § 61-526, the Commission should consider imposing conditions on the granting of an amendment to a utility’s certificated territory, which could include a requirement that new growth make a non-refundable contribution to future source of supply costs. As discussed below, *Idaho Code* § 61-526 does not provide the Commission with authority to impose conditions on the grant of an expansion of UWI’s as Staff suggests.

Idaho Code § 61-526 provides in pertinent part:

No . . . water corporation, shall henceforth begin the construction of a . . . line, plant, or system or of any extension of such . . . line, plant, or system, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction: provided, that this section shall not be construed to require such corporation to secure such certificate for an extension within any city or county, within which it shall have theretofore lawfully commenced operation, or for an extension into territory whether within or without a city or county, contiguous to its . . . line, plant or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it necessary in the ordinary course of its business: and provided further, that if any public utility in constructing or extending its lines, plant or system, shall interfere or be about to interfere with the operation of the line, plant or system of any other public utility already constructed, or if public convenience and necessity does not require or will require such construction or extension, the commission on complaint of the public utility claiming to be injuriously affected, or on the commission's own motion, may, after hearing, make such order and prescribe such terms and conditions for the locating or type of the line, plant or system affected as to it may seem just and reasonable[.]

Idaho Code § 61-526 (emphasis added). This provision generally requires that utilities obtain a certificate prior to commencing construction of facilities. *See generally Eagle Water Company v. Idaho Public Utilities Commission*, 130 Idaho 314, 317, 940 P.2d 1133, 1137 (1997). This general requirement is qualified though in three instances. Relevant to this case, the statute provides that in the event of a conflict between existing utilities the Commission may impose reasonable conditions on the grant of an expansion of a certificate. *See e.g., Utah Power & Light Co., v. Idaho Public Utilities Commission*, 112 Idaho 10, 13, 730 P.2d 930 (1986). Other than this authority above, no other language in the statute provides the Commission with explicit authority to impose the type of conditions that Staff recommends. The Idaho Supreme Court's analysis in *McFayden v. Public Utilities Consolidated Corporation*, 50 Idaho 651, 299 P. 671 (1931) suggests that the central purpose of the certification statute and the ability to impose conditions on the grant of a certificate is based upon:

[t]he theory of the regulation of municipal public utilities by the state through such a commission (*Public Utilities*) is to avoid competition which is now generally recognized as a needless economic waste and an entirely insufficient method of securing the necessary regulation and control. Under this method the state through its commission takes the place of competition and furnishes the regulation which competition cannot give, and at the same time avoids the expense of duplication in the investment and operation of competing municipal public utilities." (Pond, *Public Utilities*, 3d ed., sec. 901.) This doctrine is approved by this court in *Idaho Power Co. v. Blomquist*, 26 Idaho 222, Ann. Cas. 1916E, 282, 141 Pac. 1083.

McFayden, 50 Idaho at p. 658, 299 P. at p. _____. That is not the case here, as there is no conflict between utilities, and as such, the Commission does not have the reason or legal authority to impose conditions on granting an expanded certificate. A review of case law in Idaho reveals that the vast majority of cases concerning *Idaho Code* § 61-526 reviewed

by the Idaho Supreme Court involve disputes between utilities. *See Cambridge Telephone Co., Inc. v. Pine Telephone System, Inc.*, 109 Idaho 875, 712 P.2d 576 (1985); *Petrolane Gas Service, Inc. v. Idaho Public Utilities Commission*, 85 Idaho 593, 382 P.2d 777 (1963); (In answer to a affected utility asserting that granting an expanded certificated service territory to another utility would lead to an existing ratepayer subsidy Commission found it appropriate to refer to the rule in *Minneapolis Gas Co. v. Federal Power Commission*, (D.C.Cir.), 108 U.S.App.D.C. 36, 278 F.2d 870, to the effect that, in determining an application for authority to extend utility service to new areas, it is recognized that the various parts of a utility company's system need not and cannot be equally profitable.); *Application of the Kootenai Natural Gas Company*, 78 Idaho 621, 308 P.2d 593 (1957). There are no other cases beyond this scenario which discuss the Commission's ability to impose conditions on the grant of a certificate.

In this case, UWI's request for an expansion of its certificated territory does not interfere or injure any other utility. Rather, the Utility is only seeking to extend its facilities to an unserved area based on Avimor's request. As such, the language in § 61-526 which allows the Commission to impose conditions on the grant of an expansion of a certificated area is inapplicable. *See United States v. Utah Power & Light Co.*, 98 Idaho 665, 570 P.2d 1353 (1977) (" [t]he Idaho Public Utilities Commission has no authority other than that given to it by the legislature. It exercises a limited jurisdiction and nothing is presumed in favor of its jurisdiction."). Accordingly, the Commission should reject Staff's recommendation and analysis of the authority which it contends *Idaho Code* § 61-526 provides.

3. The SFA's Treatment of Transmission Line Investment is Reasonable and Consistent with Past Commission Decisions.

In the SFA, approximately 18,000 feet of transmission line is characterized as "on-site" with an estimated cost of \$2,519,944, and approximately 12,500 feet is characterized as "off-site" with an estimated cost of \$1,749,962. The cost of the "off-site" main is being contributed by Avimor without refund by the Company, while the cost of the "on-site" transmission would be advanced subject to later refund. In its Comments, Staff states that UWI's Rules and Regulations only allow for non-refundable contributions to be made by developers for transmission mains. Presumably Staff is advocating this position in order to mitigate against the rate impacts which the advances, including those for on-site mains, might cause.

For the following reasons, Avimor continues to believe the treatment of on-site mains proposed in the SFA is reasonable in this case.

First, pursuant to the SFA and Rule 75 of the Company's Rules and Regulations, as approved by the Commission, refunds are payable to Avimor only when customers are connected to the system and providing revenue to the system. The refund formula is constructed such that revenue generated from new customers off-sets the revenue requirement needed to serve those customers, thus insulating existing ratepayers from speculative risk and upward rate pressure. As a result, the refund payments UWI will make will come into rates incrementally and will have little impact on customer rates.

Second, Avimor asserts that there are technical reasons why amounts for "on-site" transmission should be treated as an advance as the design and features of this main will be beneficial to other UWI ratepayers. The Avimor backbone plant facilities included in

SFA were sized to provide 500 gpm to the Project. The ultimate capacity of the water facilities, including the booster station, transmission main and reservoir, is 2,000 gpm to Avimor and 3,500 gpm flowing water from the Broken Horn storage reservoir back to United Water's main system.⁹ The water facilities were designed with the capability to allow water to flow from Avimor to United Water if and when a new source of supply is developed on the Avimor property.¹⁰ Furthermore, this design will enable the Hidden Springs planned community to have access to water from the reservoir for emergency uses like fireflow or outages caused by the failure of the Hidden Springs reservoir for any reason. As such, due to the design and features of this transmission line, there is great potential for it to provide benefits to UWI customers. As required by the Agreement, Avimor will fund this over-sizing.

Another difference in this case is that the transmission main being constructed pursuant to the Agreement, unlike distribution mains, will not have service lines directly connected to it and as such is not considered "distribution facilities" by the National Association of Regulatory Commissioners ("NARUC"). Rather, NARUC considers transmission mains of this sort to be a supply main by definition. Please refer to Uniform System of Accounts (1996).

In addition, special facilities historically have included "backbone plant facilities" including, but not limited to, source of supply, storage and booster facilities. An integral part of backbone plant facilities are the transmission or supply mains that connect these facilities. NARUC recognizes supply mains under source of supply plant not distribution

⁹ Staff estimated the capacity at 5,000 gpm.

¹⁰ This would include any new UWI water rights or the use of a natural aquifer on the Avimor property for Utility water storage. See Direct Prefiled Testimony of Greg Wyatt at p. 4, ll. 15-23 & p. 5, ll. 1-4.

plant. As such, UWI is generally allowed to rate base transmission and supply mains when they are installed as a company project.

Supporting Avimor's position that the treatment of on-site mains in the Agreement is the testimony of UWI's General Manager which provides:

Q. Please discuss the rationale for including the on-site transmission mainline in advanced plant available for refunds on the Company's books.

A. The Avimor on-site mainline is included in advanced plant available for refunds because the line is first and foremost a transmission mainline. The line will operate as a high pressure transmission main with maximum operating pressures in excess of 200 psi (pounds per square inch). This high pressure is not typical in distribution mains, and this particular mainline will serve primarily as a source of supply line to Avimor. The transmission main is not designed for distribution purposes, but as part of an integrated facility plan to deliver water to and from the Project.

Lastly, treating transmission lines connected to storage reservoirs as advanced plant eligible for refund is consistent with prior Commission decisions concerning the Hidden Springs planned community, the Harris Ranch Planned Community and the Claremont Construction projects. In the Hidden Springs case the Commission found:

Although we believe that it is inappropriate to refund distribution and transmission facilities costs, we find the potential for refund of such costs in this case to be relatively small. We further find that the refund formula, tied as it is to customer connections and revenue, protects the Company's general body of existing ratepayers from harm.

Order No. 27762 at p. 6, Case Nos. UWI-W-97-3 and GNR-W-97-2. In the Harris Ranch case the Commission found that "the submitted Agreement mitigates the Company's development risk at Harris Ranch and provides benefit to both the Company and its customers." Order No. 28588, Case No. UWI-W-00-04; *See also Danskin Ridge*, Order No. 28377, Case No. UWI-W-00-2. According to the testimony of Greg Wyatt, the SFA

for the Claremont development project contained similar treatment of a supply line and reservoir.

Finally, of the \$4,558,843 advanced plant in the SFA, \$2,519,944 is attributed to the on-site transmission main and \$2,038,899 is attributed to the storage and booster. At the estimated \$600 refund per new customer, the Avimor development will need to connect many customers more than will be connected through Phase 1 of the Project before the advance on the storage and booster would be fully refunded, and before any advance related to the transmission main would be available for refund. Given that Avimor's Phase 1 calls for approximately 685 units, there is a strong possibility that any advance related to the on-site main will only be partially refunded to the Company prior to the expiration of the SFA in 15 years.

The SFA in this case is similar, if not identical, to each of the above Commission approved SFAs in its technical aspects and refund mechanism. Its impacts on customers will be no different than that in the above cases where the Staff and the Commission stated that this SFA arrangement removes risk for the Utility and provides benefits to its customers. Based on the foregoing, the Commission should allow UWI and Avimor to treat on-site main costs as an advance which can be refunded to Avimor as customer connect to UWI's system and begin producing revenue for the Utility.

CONCLUSION

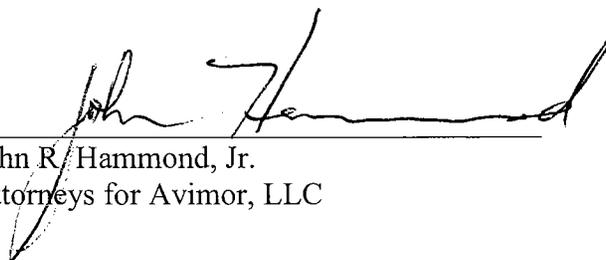
Based on the foregoing, Avimor, LLC respectfully requests:

1. That the Commission approve the expansion of UWI's service area as requested by the Application and by these Reply Comments;
2. That the Commission approve the SFA in its current form; and,

3. That the Commission grant such other and further relief as the Commission may determine proper herein.

DATED this 13th day of April, 2007.

BATT & FISHER, LLP



John R. Hammond, Jr.
Attorneys for Avimor, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 13th day of April, 2007, I served the foregoing upon all parties of record in this proceeding as indicated below:

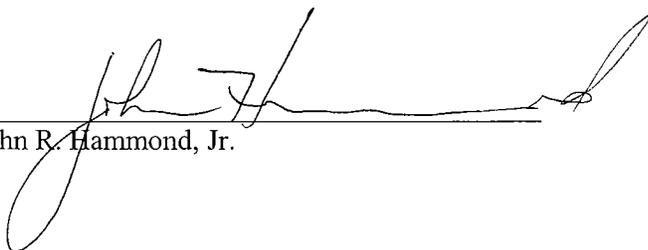
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