

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

**IN THE MATTER OF THE APPLICATION)
OF UNITED WATER IDAHO INC. FOR) CASE NO. UWI-W-07-01
AUTHORITY TO AMEND AND REVISE)
CERTIFICATE OF PUBLIC CONVENIENCE)
AND NECESSITY NO. 143 AND FOR) ORDER NO. 30345
APPROVAL OF A SPECIAL FACILITIES)
AGREEMENT WITH AVIMOR LLC.)**

On January 10, 2007, United Water Idaho Inc. filed an Application requesting approval of an amendment to its Certificate of Public Convenience and Necessity and of a Special Facilities Agreement the Company signed with Avimor LLC. Avimor is a developer and the name of its project located north of Boise. United Water requested expansion of its certificated area to add approximately 4,500 acres of the Avimor property.

On February 14, 2007, the Commission issued a Notice of Application and Notice of Modified Procedure to process United Water's Application. A Petition to Intervene and to file reply comments was filed by Avimor and was approved by the Commission. Staff filed written comments on March 16, 2007 and the City of Eagle filed written comments on March 19, 2007. Reply comments were filed by United Water and by Avimor on April 13, 2007.

The Commission convened a hearing for oral argument on the filings on May 11, 2007. The City of Eagle filed a Petition to Intervene on that date, and the City's Petition was granted at the hearing. Tr. pp 5-6.

THE APPLICATION

United Water's Application states that Avimor is an Idaho Limited Liability Company engaged in the development of residential planned communities. The property owned by Avimor is known as Spring Valley Ranch, and consists of approximately 23,000 acres several miles north of Boise. The first phase of the Avimor development will be nearly 700 residential and commercial building lots on approximately 860 acres.

All but 80 acres of the Avimor property are outside United Water's certificated service area, and the property "is not within the authorized territory of any other public utility water corporation under the jurisdiction of the Commission." Application p. 3. In order for United Water to provide service to the project, it is necessary for the Company to extend

facilities to the project, primarily 30,500 feet of 16-inch transmission main line, a booster station, and a 600,000-gallon water storage reservoir.

United Water and Avimor entered into a Special Facilities Agreement (SFA) providing the terms for construction of the necessary facilities. The Application states that the terms and conditions of the SFA “are generally consistent with the terms and conditions of other special facilities agreements approved by the Commission and with United Water’s Rules and Regulations 74-77.” Application p. 4. The Application also states, however, because of “the unique nature and size of the Project,” some matters were individually negotiated, including “the financial terms of the Project-on-site, off-site mains and over sizing, refunds of on-site advances and over sizing,” and “off-site main reimbursement.” Application pp. 4-5.

Avimor will provide the construction costs for the necessary facilities, estimated at approximately \$6.3 million. The parties agreed in the SFA to classify approximately 18,000 feet of the transmission line as “on-site main,” and approximately 12,500 feet as “off-site main.” The SFA provides for refunds to Avimor for costs of the on-site main, booster station and storage reservoir as customers are connected to the facilities, or approximately \$4.6 million of the total costs. The remainder of the facilities’ costs, approximately \$1.9 million, would be contributed by Avimor without refund.

STAFF COMMENTS

The Staff made three recommendations in its filed comments. First, Staff recommended that only Phase 1 of the project, comprising approximately 860 acres, be added to United Water’s certificated area. Second, Staff recommended the Commission open a docket to determine whether conditions should be placed on expansion of United Water’s Certificate beyond Phase 1. Finally, Staff recommended the Commission deny approval of the SFA as submitted and require the agreement be changed to provide for developer contribution of the entire 30,500 feet of transmission main.

Staff’s recommendation that only the first phase area be added to United Water’s service area is based on uncertainty of the cost and availability of water for additional development. Staff believes United Water may have an adequate water supply for Phase 1 but not for build-out of the additional service area requested in the Company’s Application. Given the desert location of the project and limited ground water supply in the area, Staff is concerned about the cost to obtain an additional water source and the resulting impact on United Water’s

existing ratepayers. Staff stated “that the impact on United Water customer rates must be evaluated to determine if an expanded area is in the public interest” before granting a Certificate to the area requested in United Water’s Application. Staff Comments p. 3.

Staff also recommended the Commission open a docket to obtain evidence about water supply costs and develop alternative solutions to mitigate the potentially large investment that might be required, and ultimately would be borne by United Water customers. Staff noted that if the entire development area is placed within United Water’s certificated service area, the Company may be obligated to provide water to the project regardless of cost, and legal constraints may limit further contributions from the developer or new customers in the area.

Staff briefly discussed two Idaho Supreme Court decisions that place restrictions on new customer fees to pay a utility’s capital costs if such fees unreasonably discriminate between old and new customers. The decisions were entered in *Building Contractors Association of Southwestern Idaho, Inc. v. Idaho Public Utilities Commission*, 128 Idaho 535, 916 P.2d 1259 (1996) and *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 14, 690 P.2d 350 (1984). Staff noted key distinctions between the facts in this case and in the cases before the Court, neither of which involved an uncertificated area to be added to the utility’s service area. In addition, the Supreme Court specifically noted in the *Washington Water Power* case that the facts before it did not involve a situation where “a non-recurring charge is imposed upon new customers because the service they require demands an extension of existing distribution or communication lines and a charge is imposed to offset the cost of the utility’s capital investment.” 107 Idaho at 421. Staff believes the Commission should consider placing conditions on United Water’s Certificate if it is amended to include an area larger than Phase 1 of the Avimor development.

Regarding the SFA, Staff believes the terms are not consistent with existing United Water tariffs. Staff noted that United Water’s tariffs require that all of the distribution costs to serve new development be contributed by the developer without refund. Existing rules also specify that the cost of special facilities such as boosters and storage reservoirs can be advanced by the developer and refunded over time as new customers are connected.

The SFA identifies those facilities that are subject to advance and refund, including the storage tank at a cost of \$788,418, a booster pumping station (\$1,250,481) and 18,000 feet of the 16-inch water transmission main (\$2,519,944). The Agreement identifies only 12,500 feet of

the main, as an off-site portion of the transmission main, as being contributed by the developer. Staff agreed that the costs for the storage tank and booster pumping station should be advanced. Staff did not agree that a part of the transmission main should be identified as “on-site,” subject to refund to the developer. Staff noted that United Water’s tariff Rules 74 through 77 identify special facilities to be paid for by a developer subject to refund. Transmission main is not included as a special facility that qualifies for advance and refund, whether it is identified as on-site or off-site. Staff therefore recommended that Avimor contribute without refund all of the costs of the 16-inch water main. The amount of investment subject to refund by Staff’s proposal is \$2,038,899, rather than the \$4,558,843 specified in the Facilities Agreement.

Staff reviewed the refund formula in the Agreement, which results in a refund amount of approximately \$600 per hookup. At that amount, it would require approximately 3,400 customers to provide the refund amount identified by Staff (\$2,038,899). Staff believes the refund amounts established in the SFA are consistent with United Water’s tariff Rule 75.

In summary, Staff recommended approval of United Water’s certificated area expansion to serve Phase 1 of the project, accepting that the Company has an adequate water supply to serve that portion of the development. Staff recommended the Commission deny expansion of United Water service area beyond Phase 1 until evidence is obtained to determine whether conditions should be placed on a certificate to the remaining development area. Staff further recommended the Commission deny approval of the SFA unless it is modified to require that all transmission main costs be contributed by the developer without the potential for refund.

CITY OF EAGLE COMMENTS

The City of Eagle in its comments described apparent discrepancies in the information filed with United Water’s Application regarding the Avimor property the Company intends to serve. The City noted that the SFA states that “additional sources of supply capacity will be required for development in the Spring Valley Ranch and other areas outside of the project that are within the company’s service area expansion.” City of Eagle Comments p. 2. The City asserted “it is reasonable to have United Water disclose, and appropriate for the Commission to examine, the water resources to be utilized by United Water.” *Id.* To obtain that information, the City of Eagle supported Staff’s recommendation for a hearing on the source of water needed to serve the Avimor project beyond Phase 1. Tr. pp. 39-40.

REPLY COMMENTS OF AVIMOR AND UNITED WATER

The separate reply comments filed by United Water and Avimor on April 13, 2007 discuss legal issues and respond to Staff's comments. Avimor's comments provide additional information on water conservation measures included in the project. For ease of discussion here we will refer to United Water's reply comments, with the acknowledgment that Avimor presented the same or similar arguments in its comments.

United Water disagrees with Staff's recommendations to limit expansion of the Company's certificated area to Phase 1 of the Avimor development and contends that Staff focused its public interest discussion too narrowly on the potential impact on rates paid by the existing general body of United Water ratepayers. United Water identified additional considerations it believed should be taken into account in assessing the public interest issues. First, United Water noted that utility service rates inevitably rise: "It has never been the law, and could not be the law that a utility customer on the day he or she connects to the utility system obtains a right to perpetual service at the rate in effect on that date." United Water Reply Comments p. 4.

Second, United Water argued that "new" customers are entitled to fair treatment. United Water Reply Comments p. 5. In response to Staff's argument that "the cost burden is more appropriately placed on the developers that profit when water is provided to these lands," United Water pointed out it is "not the developer that will ultimately bear the burden of added source of supply costs, but rather it is United Water customers who purchase lots within the development." United Water Reply Comments p. 5.

A third public interest concern identified by United Water is "discouraging the proliferation of small independent water companies." United Water stated that "Avimor at one time appeared to have the intent and ability to form its own water company, and United Water sought to negotiate a SFA that would prevent that result, while remaining consistent with Commission rules." United Water Reply Comments p. 5. Because small for-profit water companies may have difficulties in providing safe, reliable service at reasonable prices, United Water argued that the "proposal to shift United Water's source of supply costs to new development goes in the wrong direction from the public interest standpoint of discouraging creation of small water companies." United Water Reply Comments p. 6.

United Water also contends that the Company's Application is consistent with existing rules that allocate costs of system expansions – “developers contribute the cost of line extensions and terminal facilities while source of supply and related facilities are funded through rate base investment and included in rates paid by all customers.” United Water Reply Comments p. 6.

United Water next addressed Staff's recommendation that the Commission consider placing conditions on expansion of United Water's Certificate beyond Phase 1 of the development, perhaps including a requirement “that the developer make a non-refundable contribution to future source of supply costs.” United Water Reply Comments p. 8. United Water argues that Staff's legal analysis supporting its recommendation to consider conditions on future Certificate expansions is questionable. Staff in its comments referenced *Idaho Code* § 61-526 for Commission authority to place conditions on a utility's construction or extension of facilities. United Water asserts that this section applies only when new construction may interfere with the operation of the system of another utility already constructed. United Water pointed out there is no issue of United Water's proposed facilities interfering with those of another utility, but instead, “United Water seeks to extend its facilities to an area unserved by any existing utility.” United Water Reply Comments p. 9.

United Water also disagrees with Staff's assertion that the two Idaho Supreme Court cases have no application to this case and do not restrict the Commission's authority to place conditions on expansion of a certificated area. United Water argues the *Homebuilders* and *Building Contractors* cases contain a broad holding that “the ability of the Commission to treat ‘new’ customers differently from ‘old’ customers is subject to substantial legal doubt.” United Water Reply Comments p. 10. Recognizing the facts here are different than in the court cases, United Water nonetheless stated “the thrust of the language in each case seems clear--imposing the cost of growth solely on new customers is prohibited discrimination.” United Water Reply Comments p. 10. The Company also argues that, in the two cases, “the Supreme Court has strongly stated a rule of public utility law in Idaho – old customers are just as responsible for the cost of rising demand as new customers and attempts to assign those costs to new customers are unlawful discrimination.” United Water Reply Comments p. 11 (footnote omitted).

United Water also asserts that Staff's recommendation to open a new docket to consider possible conditions of further expansion of United Water's certificated area is not likely to be productive. United Water first points out that its "proposed division of cost responsibilities is fully consistent with its existing rules and regulations," and that its Application "should be evaluated under its approved rules and regulations at the time its application was filed, not under a new, but undefined set of rules." United Water Reply Comments p. 12. United Water next asserts that, based on its argument of the meaning of the Supreme Court decisions, that "any new method of shifting growth related costs to new customers and/or developers will be subject to substantial legal doubt." United Water Reply Comments p. 12.

Finally, regarding the costs of the transmission main, United Water argues "the treatment proposed in the SFA is reasonable in this case and the Commission should accept it." United Water Reply Comments p. 14. The agreement divides the transmission line between on-site (18,000 feet) and off-site (12,500 feet), and provides for the off-site portion cost (approximately \$1,750,000) to be contributed by Avimor without refund, while the on-site costs (approximately \$2,520,000) would be advanced by Avimor and subject to refund. To support its argument that its proposal is reasonable, United Water argues that refunds are payable only when customers are connected to the system and providing revenue. Second, United Water contends that the transmission main line is different than normal distribution mains because it is not designed for distribution purposes but as part of an integrated facility plan to deliver water to and from the project. United Water Reply Comments p. 15. Finally, United Water argued that the transmission line in this case is the same as supply lines connected to storage reservoirs, which were eligible for refund in other subdivisions.

DISCUSSION

Although Staff, United Water and Avimor each discussed *Idaho Code* § 61-526 and its relevance to this case we conclude the section is not applicable. Section 61-526 addresses a Certificate of Public Convenience for the construction of new facilities. United Water did not request a Certificate for the construction of facilities in this case.

We also conclude the *Homebuilders* and *Building Contractors* cases are not applicable to this case. Both court cases involve fees or rates to be paid by retail customers. *Idaho Code* § 61-315 prohibits a public utility from establishing or maintaining "any unreasonable difference as to rates, charges, service, facilities or in any other respect, either as

between localities or as between classes of service.” The Supreme Court has held that Section 61-315 implies that as the Commission fixes rates and charges, “the Commission’s authority may only be exercised in such a way as to fix non-discriminatory, and non-preferential rates and charges.” *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 419, 690 P.2d 350 (1984). The Commission is not determining fees or rates to be paid by utility customers in this case. Instead, we must decide what terms and conditions are appropriate for an amendment to United Water’s Certificate of Public Convenience and Necessity. The Commission’s authority in this area is clear, and is not diminished by the statutory prohibition against unreasonable differences in retail rates paid by customers.

United Water requested an amendment to its existing Certificate to add approximately 4,500 acres of the Avimor property to its authorized service area. As all parties agree, a request for a Certificate of Public Convenience and Necessity is an inquiry into whether the present or future public convenience and necessity require granting the Certificate. Further, *Idaho Code* § 61-528 authorizes the Commission, when granting a certificate, to “attach to the exercise of the rights granted by said certificate, such terms and conditions as in its judgment the public convenience and necessity may require.” *See also Cambridge Telephone Co., Inc. v. Pine Telephone System, Inc.*, 109 Idaho 875, 712 P.2d 576 (1985) (A certificate of public convenience and necessity is subject to and contingent upon statutory conditions, regulations and restrictions, so Commission had jurisdiction, as a condition of the certificate, to review extension of service into an unserved area within an already certified area.)

We find on the record in this case that it is appropriate to grant United Water’s request for an amendment to its Certificate as requested in its Application, without placing terms and conditions on the Certificate. United Water received a request for service to the area, and the Company is capable of providing service. The Commission makes no determination in this case whether the investments made by the Company pursuant to the SFA “are prudently incurred and recoverable in a future rate proceeding,” as United Water requested in its Application.

The Commission does not, however, approve the SFA as filed. United Water’s tariff provisions for construction of special facilities have been in place since resolution of litigation in Case No. UWI-W-96-4 in 1997. Those terms provide, and the Commission always intended, that the requesting developer contribute the transmission and distribution facilities without refund. No distinction is made for “off-site” or “on-site” transmission lines. We are not

persuaded by United Water's characterization of part of the water main as something other than a transmission line required to bring water to the project. Accordingly, the Commission does not approve the SFA as filed, but will approve it if amended to require contribution of the entire transmission main by Avimor. United Water is directed to revise its tariff to make it clear that transmission and distribution facilities necessary to serve a new development are to be contributed by the developer without refund.

The Commission also concludes that before United Water expands its service beyond Phase 1, it must file an update with the Commission. We want assurance that future expansion can be done at a reasonable cost. We disagree with Staff's view that a utility is required to provide service within its certificated area regardless of the cost. The Company is directed to provide to the Commission, prior to commencing construction of facilities to serve the Avimor property beyond the first phase, information on source of supply to serve the additional area and associated costs. The Company must also file all Special Facilities Agreements for approval.

Finally, one aspect of the development deserves mention. Avimor in its comments described the water conservation measures it is building into its project:

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 re-use, 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 Re-use Rules that regulate water reclamation. 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 Reply Comments pp. 4-5. According to the SFA, Avimor's engineers have determined Phase 1 will require approximately 500 gallons of water per minute at peak demand at full build-out. The Commission commends Avimor for the impressive water conservation measures it is including in its project. In our desert environment, the frugal use of water is very important and we are pleased that the developer is making it a priority.

O R D E R

IT IS HEREBY ORDERED that United Water's Application for amendment to its Certificate of Public Convenience and Necessity, to include the area identified in Exhibit E to the Special Facilities Agreement, is approved.

IT IS FURTHER ORDERED that United Water's Application for approval of the Special Facilities Agreement as submitted is denied.

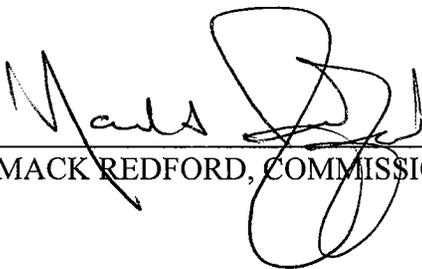
IT IS FURTHER ORDERED that United Water provide to the Commission, prior to commencing construction of facilities to serve the Avimor property beyond Phase 1, source of supply to serve the additional development and associated costs. The Company is directed to file all Special Facilities Agreements for approval. In addition, United Water is directed to revise its tariff to make it clear that transmission and distribution facilities necessary to serve a new development are to be contributed by the developer without refund.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 19th
day of June 2007.


PAUL KJELLANDER, PRESIDENT


MARSHA H. SMITH, COMMISSIONER


MACK REDFORD, COMMISSIONER

ATTEST:


Jean D. Jewell
Commission Secretary

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