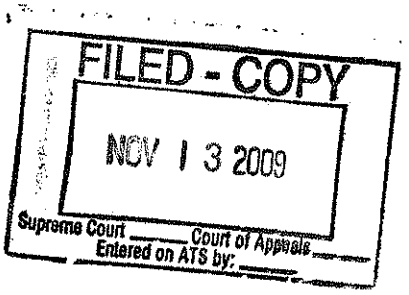
11-13-2009

City of Idaho Falls v. Fuhriman Respondent's Brief Dckt. 36721

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE THE VALIDITY OF THE POWER SALES AGREEMENT AND THE CREDITWORTHINESS AGREEMENT BETWEEN THE CITY OF IDAHO FALLS AND THE BONNEVILLE POWER ADMINISTRATION	SUPREME COURT DOCKET NO. 36721-2009 BONNEVILLE COUNTY DISTRICT COURT NO. 2009-1736
THE CITY OF IDAHO FALLS, PETITIONER-RESPONDENT, v.. JARED FURHIMAN, MAYOR, INTERVENOR-APPELLANT.	



RESPONDENT'S BRIEF

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF BONNEVILLE, CASE NO. CV 09-1736
HONORABLE DARREN B. SIMPSON, DISTRICT JUDGE PRESIDING

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE

The City concurs in the Mayor's statement of the case.

ADDITIONAL ISSUES PRESENTED ON APPEAL

None.

ATTORNEY FEES ON APPEAL

The City does not seek attorneys fees on appeal.

ARGUMENT

I. ARTICLE VIII, § 3'S VOTING REQUIREMENT DOES NOT APPLY TO ORDINARY AND NECESSARY EXPENSES THAT ARISE IN THE ORDINARY ADMINISTRATION OF LOCAL GOVERNMENT AFFAIRS.

A. INTRODUCTION.

This Court should affirm the District Court's holding because the City's obligations under the Renewal Power Sales Agreement are ordinary and necessary expenses within the meaning of Art. VIII, § 3 of the Idaho Constitution, and therefore no authorizing vote is required. That section provides, in pertinent part, as follows:

> No city shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof . . . Any indebtedness or liability incurred contrary to this provision shall be void: *Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state*....(emphasis added).

In this case, the Mayor does not dispute the District Court's finding that the City's obligations under the Renewal Power Sales Agreement are "ordinary" within the meaning of Art.

VIII, § 3.[1] Thus, the only issue before this Court is whether those obligations are "necessary." The City asserts that its payment obligations under the Renewal Power Sales Agreement constitute "ordinary and necessary expenses" within the meaning of the Constitution because they arise in the ordinary course of local government affairs and submits that the present appeal can be resolved by referring to the constitutional debates and the extensive case law regarding the ordinary and necessary expense proviso within Art. VIII, § 3.

B. DRAFTERS' INTENT AND ART. VIII, § 3'S PROVISO CLAUSE.

The proceedings and debates of the Idaho Constitutional Convention of 1889 contain an extensive discussion of local government finance and the purpose of Art. VIII, § 3. Those proceedings show that although "[m]any convention delegates wanted to severely limit the ability of local governments to incur indebtedness,"[2] the drafters also recognized that the ongoing administration of local government and the need of local governments to fulfill statutory duties and legal obligations required some flexibility in a local government's ability to incur debt without submitting each potential obligation or expenditure to a vote.[3]

The initial draft of Art. VIII, § 3 would have prohibited any municipal debt or obligation which extended beyond one year without approval of two-thirds of the voters at a special election.[4] The delegates quickly realized that the original draft of Art. VIII, § 3 "went too far in limiting local government."[5] Recognizing that the strict voting requirements in the original text

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1 Appellant's Brief, at 6.

2 Dennis C. Colson, *Idaho's Constitution: The Tie that Binds* 198 (1991).

3 For instance, Judge William Claggett expressed concern that Art. VIII, § 3 as originally drafted – without the proviso – would severely impede the "ordinary administration of [local government] affairs." I.W. Hart, *Proceedings and Debates of the Constitutional Convention of Idaho*, 588 and 591 (1912); *see also* the City's Brief to the District Court, dated March 17, 2009, at § A.1., pp. 19-20 (R. Vol. II at 552-53).

4 Colson, *supra*, at 198-99.

5 *Id.* at 199.

of Art. VIII, § 3 would create an untenable situation for local governments, Judge William Claggett, one of the most respected members of the convention, observed that the proposed debt limitation would severely impede the "ordinary administration of [local government] affairs."[6] He noted that:

> [I]f you pass that section in the way it is you will absolutely require that when a witness wants to get his fees, after he has attended upon the court, before he can do it the county commissioners have got to stop and submit at a special election to the whole vote of the people as to whether they will pay them or not.[7]

To avoid this impractical and unrealistic state of affairs, he proposed the following language: "*Provided*, That this section shall not be construed to apply to any ordinary indebtedness created under the general laws of the state."[8]The delegates' comments make clear that this exception[9] was a compromise intended to give governmental authorities the freedom to incur indebtedness when necessary to the efficient administration of local government, while still preserving the integrity of the Idaho Constitution's "spirit of economy."[10] The delegates recognized that the orderly and efficient administration of local government required that certain debts—"ordinary indebtedness" under Judge Claggett's proposal—be exempt from the voting requirements of Art. VIII, § 3. Judge Claggett's comments provide a clear statement of the intent of the drafters in inserting the proviso clause:

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6 Hart, *supra*,. at 588.

7 *Id.*

8 *Id.* at 586.

9 This exception is referred to as the "proviso" clause. See *City of Boise v. Frazier*, 143 Idaho 1, 3, 137 P.3d 388, 390 (2006).

10 *Id.* at 5, 137 P.3d at 392 (quoting *Williams v. City of Emmett*, 51 Idaho 500, 505, 6 P.2d 475, 476 (1931).

> I simply call the attention of the convention to the fact that the way it [Art. VIII, § 3] reads now it would prohibit the issuance of county scrip to pay the ordinary indebtedness absolutely imposed upon the county as provided by law, in case there should be any heavy expenses, as suggested by Mr. Hampton, exceeding the current revenues of that year; *and that it is intended to apply to special indebtedness*, I should judge.[11]
>
> ***
>
> I offered this proviso to call the attention of the convention to this matter. We don't want to go over this too fast. For instance, the general laws of the state will provide that the witness fees are so much, the mileage fees are so much, all the expenses of the county government are fixed by law. Those expenses are paid annually by the issuance of county scrip, or paid as they arise by the issuance of county scrip. We all know that in the practical administration of county government, *that there sometimes will be extraordinary expenses, I mean extraordinary expenses in the ordinary administration of affairs*. I am not speaking now of special indebtedness at all, but the ordinary general indebtedness which is incurred in the way of administration of county affairs . . .[The purpose of the proviso] *is to limit the section* [Art. VIII, § 3] *to such indebtedness as does not arise under the ordinary administration of the county.*[12]

The delegates knew that in the "ordinary" course of affairs, local governments would sometimes encounter "extraordinary" expenses that cumulatively exceeded the budget for the current year.[13] These "extraordinary expenses," which the Framers intended to be exempt from the voting requirements, were separate from "special indebtedness," which all of the delegates agreed required prior voter approval. Several of the delegates gave practical examples of the type of extraordinary expenses that should not require a public vote. Delegate Weldon Heyburn

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11 Hart, *supra*, at 587 (emphasis added).

12 *Id.* at 588-589 (emphasis added).

13 As the City explained in its Brief to the District Court, Judge Claggett's statement about "extraordinary expenses in the ordinary administration of county affairs...." referred to expenses occurring within the ordinary administration of county affairs which exceeded available revenues within a county's budget year. In contrast, his reference to "special indebtedness" meant expenditures which are unusual, infrequent, and not occurring in the customary administration of the county. *See* the City's Brief to the District Court at § III.A.1, at p. 20-21, and p. 21, footnote 25 (R. Vol. II at 553-54).

noted that "[t]he expenses of the criminal court instead of being upon the litigants as in civil cases are upon the county," and in the event of "an unusual number of capital cases," the expenses could easily exceed the revenue allocated for criminal trials in a given year.[14] Explaining why such expenses should not require a vote, Delegate Heyburn said "[w]e don't want to have any part of our court expenses in doubt . . . and we don't want to call a county election for the purpose of making up a deficit of four or five hundred dollars at the end of the year."[15] Delegate Peter Pefley, the mayor of Boise, gave another example of the type of "ordinary and necessary" maintenance expenditures that municipalities would periodically encounter.

> We have streams running adjacent through the city that in time of high water, and ditches all the time, that are liable as I said to break away and run down through the city, and if we had to wait to hold an election and get two-thirds of the voters to ratify another levy, the whole city might be ruined before it could be abated, and I would not like to see anything of that kind occur.[16]

Importantly, the drafters' debates concerning the proviso clause focused on the ordinary *character* of the municipal obligations, rather than any particular urgency driving the need for the expenditure. The examples cited above show that the drafters intended that municipalities be able to incur those obligations which were essential to the ordinary administration of governmental affairs without an authorizing election and that Art. VIII, § 3's voting requirement was reserved for those expenditures which William Claggett referred to as "special indebtedness."[17]

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14 Hart, *supra*, at 590-91.

15 *Id.* at 591.

16 *Id.* at 592.

17 *Id.* at 588-589.

C. *THE CHARACTER OF THE DEBT, NOT THE PRACTICALITY OF HOLDING AN ELECTION, DETERMINES WHETHER AN OBLIGATION IS ORDINARY AND NECESSARY.*

It is clear from the constitutional convention that the drafters recognized that a certain class of "ordinary" debt could properly be incurred regardless of the practicality of first submitting the matter to the voters. This, of course, was the whole thrust behind the proviso clause. The Framers understood that the voting requirement only applied to "such indebtedness as does not arise under the ordinary administration of the [local government]."[18] Thus, the analysis under the proviso clause depends on a finding that the *character* of the proposed indebtedness is the type of debt that arises under the ordinary administration of local government affairs,[19] or in other words, the obligation is essential to a local government's ability to fulfill its customary or recurring governmental or proprietary functions.

The drafters did not intend that the proviso's applicability would depend on a finding that it is impractical to hold an election. Perceptive observers then and now have recognized that presenting every issue of multi-year municipal debt to the voters would be impractical and completely unworkable.[20] Delegate Weldon Heyburn noted that, "Elections are held in our county at an expense of eight or nine hundred dollars – for the purpose of determining whether or not you shall issue $500 worth of warrants – that is the practical application of the principle, and it is hardly worthwhile to go to this expense."[21] However, this discussion of practicality is merely a by-product of the underlying ordinary and necessary analysis. Merely because it is possible to delay an expenditure long enough to conduct a public vote does not necessarily mean

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18 *Id.* (comments of William Claggett).

19 *Id.*

20 In a recent decision, Justice Jim Jones of the Idaho Supreme Court observed, with regard to the voter approval requirement of Art. VIII § 3, that "[I]t is a virtual impossibility to present every multi-year governmental contract or lease to the public for a vote." *In re University Place/Idaho Water Center Project*, 146 Idaho 527, 199 P.3d 102, 122 (2008) (J. Jones, J., specially concurring).

21 Hart, *supra*, at 591 (comments of Weldon Heyburn).

a city or county must do so. The Framers did not intend to tie local officials' hands to the point where unsound or absurd results would follow. Rather the proviso was grounded in the need for practicality in administering the ordinary affairs of local government.

Early Idaho case law similarly reflects the intent of the drafters that municipalities could properly incur a certain class of routine debt necessary for the ordinary administration of governmental affairs without first submitting the matter to the voters. In *Butler v. City of Lewiston*,[22] for instance, the Idaho Supreme Court upheld the issuance of bonds to fund the payment of salaries of city officers and employees, "other necessary municipal expenses," and a tort judgment against the city, finding that these were "ordinary and necessary expenses" within the meaning of Art. VIII, § 3.[23] In *Hickey v. City of Nampa*,[24] the Court held that bonds issued to fund debts incurred to repair and replace a city's water system which had been destroyed by fire, purchase firefighting equipment, pay the salaries of officers and pay other "*necessary expenditures in the maintenance of the municipal government*" were "ordinary and necessary expenses" within the meaning of Art. VIII, § 3.[25] In *Corum v. Common School Dist. No. 21*[26] the Court held that "[t]he employment of teachers by trustees of common school districts was a duty imposed upon them by law, and the cost thereof was an 'ordinary and necessary expense'...."[27] Other Idaho cases also demonstrate that those debts which, by their character,

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22 11 Idaho 393, 83 P. 234 (1905).

23 *Id.* at 404, 83 P. at 238; *see also* the City's Brief to the District Court at § III.A.1, pp. 22-23 (R. Vol. II at 555-56).

24 22 Idaho 41, 124 P. 280 (1912).

25 *Id.* at 43, 124 P. at 280 (emphasis added); *see also* the City's Brief to the District Court at § III.A.1, pp. 23-24 (R. Vol. II at 556-57).

26 55 Idaho 725, 47 P.2d 889 (1935).

27 *Id.* at 730, 47 P.2d at 891 (emphasis added); *see also* the City's Brief to the District Court at § III.C.3., p. 38 (R. Vol. II at 571).

are essential to the ongoing administration and maintenance of local government and the fulfillment of legal obligations are "ordinary and necessary expenses."[28]

On the other hand, the Framers did intend Art. VIII, § 3's voting requirement to apply to what they called "special indebtedness," meaning, as stated by Judge Claggett, those debts which do not arise in the ordinary course of administering local government—in other words, long-term indebtedness issued or incurred to finance large capital projects. Subsequent decisions of the Idaho Supreme Court reflect this intent, namely, *Bannock County v. C. Bunting & Co.* (issuance of warrants for the purchase of land for a courthouse must be submitted to a vote),[29] *Dunbar v. Board of Com'rs of Canyon County* (construction of a bridge is not "ordinary and necessary"),[30] *Asson v. City of Burley* (contracts unconditionally obligating cities to pay debt issued to finance the construction of nuclear power plants are not "ordinary and necessary").[31]

Determining what constitutes an "ordinary and necessary" expense is necessarily a case-by-case, fact-specific analysis.[32] The Framers but did not articulate any particular framework or

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28 *See Thomas v. Glindeman,* 33 Idaho 394, 195 P. 92 (1921) (snow and ice removal on public streets, and police and fire protection) , *Jones v. Power Co.*, 27 Idaho 656, 150 P. 35 (1915) (construction of a jail in a newly created county), *Bannock County v. Bunting*, 4 Idaho 156, 37 P. 277 (1894) (acquisition of a temporary jail), *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970) (repair, replacement and expansion of existing municipal airport facilities determined to be unsound, inadequate and unsafe, *Board of County Com'rs of Twin Falls County v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1974) (improvements to hospital facilities to comply with state safety standards), *Ray v. Nampa School District #131,* 120 Idaho 117, 814 P.2d 17 (1990) (employment contract with maintenance electrician for a school district), *Hanson v. City of Idaho Falls*, 92 Idaho 512, 514, 446 P.2d 634, 636 (1968) (salaries of public employees), and *Loomis v. City of Hailey,* 119 Idaho 434, 807 P.2d 1272 (1991) (repair and replacement of system components of public works projects). *See also* the City's Brief to the District Court at § III.A.2, pp. 27-28 and § III.C.3 (R. Vol. II at 560-61).

29 4 Idaho 156, 37 P. 277 (1894).

30 5 Idaho 407, 49 P. 409 (1897).

31 105 Idaho 432, 670 P.2d 839 (1983).

32 The Court recognized this principle by its statement in *City of Boise v. Frazier* that "[w]hether a proposed expenditure is ordinary and necessary depends on the surrounding circumstances of each case." 143 Idaho at 7, 137 P.3d at 394.

litmus test with which to determine whether an expenditure was ordinary and necessary and thus exempt from Art. VIII, § 3. Several of the delegates gave examples of the types of projects which would constitute "ordinary and necessary expenses,"[33] but the Framers established no bright line rule by which to measure such indebtedness. Consequently, early Supreme Court case law quickly recognized that a determination of whether a given expense arises in the ordinary administration of local government affairs—and thus is ordinary and necessary—necessarily requires a case-by-case analysis that takes into account all of the facts and circumstances associated with the proposed indebtedness and the particular purpose for which the debt will be used.

The following are examples of expenditures which, after a careful analysis of the facts associated with the indebtedness, have been held by the Idaho Supreme Court to be "ordinary and necessary expenses":

- Snow and ice removal on public streets, and police and fire protection[34]
- Construction of a jail in a newly created county[35]
- Repair, replacement and expansion of existing municipal airport facilities determined to be unsound, inadequate and unsafe[36]
- Improvements to hospital facilities to comply with state safety standards[37]

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33 Hart, *supra*, at 584-94 (The delegates suggested that "heavy county expenses," "court expenses," "any emergency," "extraordinary expenses," "witness fees," "mileage fees," "repairing ditches and water courses and any part of the ordinary legitimate expenses of running county government," would qualify as "ordinary and necessary").

34 *Thomas v. Glindeman*, 33 Idaho 394, 195 P. 92 (1921).

35 *Jones v. Power Co.*, 27 Idaho 656, 150 P. 35 (1915).

36 *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970).

37 *Board of County Com'rs of Twin Falls County v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1974).

- Contract to procure a school teacher and payment of the teacher's salary[38]
- Employment contract with maintenance electrician for a school district[39]
- Salaries of public employees[40]
- Replacement of water system[41]
- Repair and replacement of system components of public works projects[42]

The case-by-case analysis which the Court has used to determine that these expenditures were ordinary and necessary shows that, as the Framers intended, the *character* of the obligation is the key factor in determining whether an expense arises in the ordinary administration of government affairs and thus exempt from Art. VIII, § 3's voting requirements.

D. THE ORDINARY AND NECESSARY ANALYSIS AFTER FRAZIER.

In *City of Boise v. Frazier*, the Court held that financing the construction of a new multi-level airport parking structure was not an ordinary and necessary expense.[43] The Court noted in *Frazier* that "urgency," compelled by the need to protect public safety can, in certain circumstances, make the expenditure necessary within the meaning of Art. VIII, § 3.[44] On the facts before it, the Court appropriately found that construction of a new multi-level parking

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38 *Corum v. Common School Dist. No. 21*, 55 Idaho 725, 47 P.2d 889 (1935).

39 *Ray v. Nampa School District #131*, 120 Idaho 117, 814 P.2d 17 (1990).

40 *Butler v. City of Lewiston*, 11 Idaho 393, 83 P. 234 (1905); *Hickey v. City of Nampa*, 22 Idaho 41, 124 P. 280 (1912); *Hanson v. City of Idaho Falls*, 92 Idaho 512, 514, 446 P.2d 634, 636 (1968) ("One of the most fundamental and necessary expenses of municipal government is that which is incurred in the provision of adequate police protection for persons and property. Certainly it could not be argued in good faith that the weekly or monthly compensation of municipal employees is not an ordinary and necessary expense within the proviso of art. VIII, § 3.").

41 *Hickey v. City of Nampa*, 22 Idaho 41, 124 P. 280 (1912).

42 *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991).

43 143 Idaho 1, 137 P.3d 388 (2006).

44 *Id.* at 6-7, 137 P.3d at 393-394.

garage was not urgent, and thus not necessary.[45] However, the City submits that urgency is not the litmus test for determining whether governmental obligations are ordinary and necessary.

In *Frazier*, the Court confirmed that "[w]hether a proposed expenditure is ordinary and necessary depends on the surrounding circumstances of each case."[46] This suggests that the presence of urgency is not a bright-line rule applicable to all potential government expenses. Rather the Court's statement shows that urgency is only one factor, among others, that could satisfy the "necessary" prong. Importantly, *Frazier* did not overrule any of the Court's prior decisions, nor did the Court suggest that the *Frazier* rule superseded any of the Court's prior Art. VIII, § 3 precedent. Thus, previous Idaho Supreme Court decisions interpreting Art. VIII, § 3 continue to be instructive in discerning what constitutes an ordinary and necessary expense. Importantly, the Court in *Frazier* specifically acknowledged that earlier Art. VIII, § 3 cases were correctly decided even where urgency was not a factor.[47]

For example, the *Frazier* court acknowledged that "expenses incurred in the repair and improvement of existing facilities can qualify as ordinary and necessary expenses."[48] Both of the cases on which the *Frazier* court relied for that proposition, *City of Pocatello v. Peterson* and *Bd. of County Comm'rs of Twin Falls County v. Idaho Heath Facilities Authority*, discuss the role public safety plays in the analysis. However, neither case discussed any sort of urgency or emergency requiring that the expense be made in the designated year.[49] This led to the Court's

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45 *See* City's Brief to the District Court at § III.C.3, pp. 39-40 (R. Vol. II at 572-73).

46 143 Idaho at 7, 137 P.3d at 394.

47 *Id.* at 6, 137 P.3d at 393 (affirming the holdings of *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970) and *Bd. of County Comm'rs of Twin Falls County v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1974)).

48 *Id.* (citing *Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 and *Peterson*, 93 Idaho 774, 473 P.2d 644).

49 *See Peterson*, 93 Idaho 774, 473 P.2d 644 and *Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588.

acknowledgement in *Frazier* that the urgency which it had associated with the necessary prong was a malleable concept and that various factors—some of which have nothing to do with "immediacy" or "emergency"—may satisfy the "necessary" prong of the proviso's test. "The required urgency can result from a number of possible causes, *such as* threats to public safety, the need for repairs, maintenance, or preservation of existing property, or a legal obligation to make the expenditure without delay."[50] It is important to note that the list of factors which the *Frazier* court stated could stand in the place of urgency was illustrative, *not* exclusive. Thus, after a case-by-case analysis focusing on the character of the proposed debt, courts may find that other different factors can satisfy the necessary prong, urgency being but one of them.[51]

Nowhere during the constitutional convention did the Framers indicate that expenses must be "urgent" in order to fall under the proviso. As noted above, the delegates gave examples of the types of expenses they believed would fall under the proviso. While some expenses, such as "any emergency" or repairing damaged ditches and watercourses[52] do suggest that an element of urgency could be indicative of an ordinary and necessary expense, other examples the Framers provided are absolutely devoid of any urgency whatsoever. Clearly the payment of "witness fees," "mileage fees," and "the ordinary legitimate expenses of running county government" do not convey a sense of urgency. Judge Claggett's comments to the Constitutional Convention regarding "ordinary indebtedness" and "extraordinary expenses in the ordinary administration of affairs"—both of which are encompassed by the proviso clause—are particularly instructive.[53]

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50 *Frazier*, 143 Idaho at 6-7, 137 P.3d at 393-94 (emphasis added).

51 *Id.* at 6, 137 P.3d at 393 ("expenses incurred in the *repair* and *improvement* of existing facilities can qualify as ordinary and necessary under the proviso clause") (emphasis added).

52 *See* Hart, *Supra*, at 587 and 592.

53 *Id.* at 588. Judge Claggett's comments indicate that the proviso clause covers expenditures which qualify as "the ordinary general indebtedness which is incurred in the way of administration of county affairs." *Id.*

Moreover, analyzing the proviso terms separately, as this Court has required,[54] leads to the conclusion that first one must evaluate the character of the obligation. As the City has argued above, an expense may be considered "necessary" where the character of the obligation is such that it arises in the ordinary administration of local government affairs—in other words if it is essential to the government's administration of its ordinary or customary functions.

The obligation at issue in *Frazier* involved a large-scale, capital project (*i.e.*, "special indebtedness"), an obligation that quite clearly was not a customary, recurring or core function arising in the ordinary administration of the City of Boise's affairs. After analyzing the character of the obligation in *Frazier*, this Court noted that such an obligation would only fall under the proviso clause if there were an urgency for making the expense.[55] In reaching its holding, the Court specifically distinguished the *Peterson* and *Idaho Health Facilities Authority* cases by noting that the character of the obligations in those cases was "necessary," within the meaning of the proviso, because of the "impact on public safety."[56] The obligation in *Frazier* did not arise in the ordinary course of governmental affairs, it was not a repair or improvement to an existing facility, it was not a response to a public health concern or public safety need, and it was not urgent. Thus, based on the circumstances of that case, the Court was correct to hold that the obligation was not necessary under Art. VIII, § 3.

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54 *See, e.g., Asson v. City of Burley*, 105 Idaho 432, 441, 670 P.2d 839, 848 (1983) ("We note at the outset that this proviso consists of two requirements: (1) that the expense be ordinary and necessary, and (2) that it be authorized by the general laws of the state.")

55 *Frazier*, 143 Idaho at 5, 137 P.3d at 392.

56 *Id.* at 6, 137 P.3d at 393. *See also Peterson*, 93 Idaho 774, 473 P.2d 644 and *Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588. The *Peterson* court did not hold that the expansion of the airport was "urgent." Rather it held that *repairing* airport facilities, which "have become obsolete and have ceased to provide the necessary safety demanded by air travelers," was an ordinary and necessary expense, thus obviating the need for a bond election. 93 Idaho at 778-79, 473 P.2d at 648-49.

The City submits that the specific holding of *Frazier* does not apply to circumstances similar to the obligations under the Renewal Power Sales Agreement, where the character of the debt is such that it arises in the ordinary administration of local government affairs. [57] Rather, the *Frazier*'s holding is applicable only in circumstances where a case-by-case analysis of the character of the obligation shows that it is a large, capital project, is not a repair or improvement to an existing facility, does not impact public health or safety, is not urgent, or meets a need that can be satisfied by other means.[58]

II. THE CITY'S OBLIGATIONS UNDER THE RENEWAL POWER SALES AGREEMENT ARE ORDINARY AND NECESSARY EXPENSES BECAUSE THEY ARE ESSENTIAL TO THE CITY'S ABILITY TO PROVIDE RELIABLE, LOW-COST ELECTRICAL SERVICE – A FUNCTION WHICH ARISES IN THE ORDINARY ADMINISTRATION OF THE CITY'S AFFAIRS.

A. A FINDING OF URGENCY IS NOT REQUIRED HERE BECAUSE THE OBLIGATIONS UNDER THE RENEWAL POWER SALES AGREEMENT ARISE IN THE ORDINARY ADMINISTRATION OF LOCAL GOVERNMENT AFFAIRS.

Purchases of cost-based power supplies under the Renewal Power Sales Agreement are essential to the City's ability to provide its residents with reliable and affordable electricity.[59] Simply because the power supplies to be acquired pursuant to the Renewal Power Sales Agreement need not and will not be delivered or paid for immediately does not make such power

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57 The City does not contend that merely because an expense is necessary or essential to fulfill a governmental function it will automatically fall under the proviso. In the *Asson* case, discussed below, the court found that a city's participation in the construction of a nuclear power generating plant did not fall within the proviso because they were not "ordinary" expenses where there was "a colossal undertaking, fraught with financial risk." Thus, the proviso contains two checks on a municipality's ability to incur debt without a vote: the expense must be "ordinary" *and* the expense must also be "necessary."

58 *See Frazier*, 143 Idaho at 6, 137 P.3d at 393 (noting that the obligation in *Frazier* could not qualify as a repair or improvement because "the expansion is so profound as to constitute an entirely new construction in every meaningful sense").

59 *See* Affidavit of Jo A. Elg in Support of Petition for Judicial Confirmation dated March 13, 2009 (the *"Elg Affidavit"*) at p. 4, ¶¶ 8-9 (R. Vol. II at 518). *See* also Affidavit of Jacqueline Flowers in Support of Petition for Judicial Confirmation dated March 12, 2009 (the *"Flowers Affidavit"*) at pp. 3 and 10, ¶¶ 8 and 28 (R. Vol. II at 506 and 513), Elg Affidavit at pp. 7-10, ¶¶ 18-23 (R. Vol. II at 521-24) and the Report of Mooney Consulting, dated November 25, 2009 (the *"Mooney Report"*), at p. 27 (R. Vol. I at 62).

acquisitions any less "necessary" to the City or its inhabitants. While the City has developed local hydroelectric generating resources and has sought to develop additional thermal generating sources to complement its hydroelectric supplies, the City depends materially on wholesale power supplies to meet the requirements of the customers served by the System. The provision of reliable, low cost supplies of electricity to residential, commercial and industrial customers is necessary to the City's ability to promote and protect the public welfare and the local economy, and thus is an expense that arises in the ordinary administration of local government affairs. The Idaho Legislature recognized the vital role of reliable, cost effective and stable electrical energy in our society when it enacted Idaho Code § 50-342A(1), to provide specific authority for municipal utilities to enter into joint ownership arrangements for power projects. In enacting that section, the Legislature found and determined that:

> Securing long-term electric generation and transmission resources at cost-based rates is essential to the ability of municipal utilities to provide reliable and economic electric services at stable prices to the consumers and communities they serve and is essential to the economy and the economic development of their communities and to the public health, safety and welfare. [60]

The purchase of wholesale power supplies is no different than providing water, sewer or sanitation services, or any other routine "pay-as-you-go" expense associated with the regular operation of municipal government and the fulfilling of duties that arise in the ordinary administration of the City's affairs.[61] It is every bit as essential to fulfilling the "ordinary legitimate expenses of running [local] government" as the payment of the salaries of municipal

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60 Idaho Code § 50-342A(1); *see also* Idaho Code §§ 50-325 and 50-342(b).

61 In *Asson v. City of Burley*, the Supreme Court differentiated between true "power purchase contracts" and other types of "long-term debt obligations" involving large, capital construction projects and suggested that a bona-fide power purchase agreement would, by its very nature, be an ordinary and necessary municipal expense. 105 Idaho 432, 443, 670 P.2d 839, 850 (1983).

employees, the purchase of water for distribution to consumers, the removal of snow and ice on public streets, and ensuring adequate police and fire protection.[62]

It is often in the best interest of a city to enter into multi-year contracts for regular and recurring services that enable the city to perform basic governmental services or fulfill statutory duties. A multi-year contract often provides cost savings and reduced administrative costs. A multi-year contract can provide stability and avoid payment of unnecessary administrative costs associated with frequent supplier changes. Quite frequently, a multi-year franchise contract is necessary to induce a franchisee to undertake significant capital expenditures in order to supply a much needed commodity or service such as sanitation services or fire protection services.[63]

Cities in Idaho routinely enter into multi-year contracts for essential services such as health insurance for municipal employees, maintenance and repair of public safety dispatch equipment and computers, purchase of critical fuel supplies for public safety vehicles, provision of sanitation collection services, and fire protection or police and public safety services. Even janitorial service contracts sometimes require multi-year commitments in order to secure economical or favorable terms. Idaho Falls has a three-year contract in place with the unions for its electrical workers and firefighters, a two-year contract for health insurance for its employees and a thirty-year contract with Bonneville for the transmission of power from the Federal Power System to Idaho Falls Power. It also frequently enters into short term multi-year supplemental power contracts as necessary to shape its electrical load and meet seasonal power demands. [64]

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62 *Thomas*, 33 Idaho 394, 195 P. 92; *Loomis*, 119 Idaho 434, 807 P.2d 1272; *Butler*, 11 Idaho 393, 83 P. 234; *Hickey*, 22 Idaho 41, 124 P. 280; *Hanson*, 92 Idaho 512, 446 P.2d 634.

63 *See e.g. Plummer v. City of Fruitland*, 140 Idaho 1, 7, 89 P.3d 841, 847 (2004) ("A solid waste supplier needs a long-term commitment from its municipal customers so it can obtain financing which is necessary to purchase the amount of equipment and type of equipment required to best service [its] citizens . . .")

64 As discussed in the Elg Affidavit and the Engineer's Report, Idaho Falls Power projects that its allocation of power under the Renewal Power Sales Agreement will be approximately 3 aMW less than the System's net power supply requirements. Thus, during the term of the Renewal Power Sales Agreement, the City will still need to execute agreements for supplemental power in order to meet the System's power requirements,

None of these multi-year contracts are considered "urgent," yet they are necessary within the meaning of Art. VIII, § 3. The payment obligations under these arrangements, as well as under the Renewal Power Sales Agreement, are essential to the City's ability to perform the functions which arise in the ordinary administration of the City's affairs, and any "indebtedness or liability" they may create is an ordinary and necessary expense of the City within the meaning of Art. VIII, § 3.

B. THE RENEWAL POWER SALES AGREEMENT IS A "PAY-AS-YOU-GO" CONTRACT FOR SERVICES RENDERED.

The specific contractual terms for the sale of power by Bonneville under the Renewal Power Sales Agreement make it clear that the Renewal Power Sales Agreement is a true service contract for the purchase of power on a "pay-as-you-go" basis. Under the Renewal Power Sales Agreement, Bonneville commits to sell and the City commits to purchase specified monthly blocks of power (the "Block" power supply product) as well as a percentage of the actual output of Bonneville's federal power system (the "Slice" power supply product).[65] The City will purchase this power as it would pay for purchases under any other service contract—by making monthly payments, in arrears, and only for power made available by Bonneville during the preceding month.[66]

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beyond the power supplied by Bonneville under the Renewal Power Sales Agreement. Those supplemental power contracts will undoubtedly require multi-year commitments. Repetitive elections for the purpose of submitting to the voters the question of entering into supplemental power purchase agreements would be highly inefficient and costly, and would significantly hinder Idaho Falls Power's primary objectives of facilitating maximum rate stability and maintaining low rates. Thus, the present case is important not only to confirm the City's authority to enter into and perform the Renewal Power Sales Agreement, but also to clarify the City's ability to purchase supplemental power supplies under "true" power purchase agreements that extend beyond a single year. See discussion of the City's supplemental power needs in the City's Brief to the District Court, at § III.E.2, pp. 45-47 (R. Vol. II at 578-80).

65 Renewal Power Sales Agreement, §3.2.

66 *See* Elg Affidavit at pp. 11, 13 and 14, ¶¶ 28, 32 and 35 (R. Vol. II at 525, 527 and 528); *see also* §§ 3.2 and 16.1 of the Renewal Power Sales Agreement (R. Vol I at 98 and 137). Bonneville's power supply operation "makes available" power to the City by delivering it to the points of receipt under the City's firm

The Renewal Power Sales Agreement does not contain any provision unconditionally obligating the City to make payments to Bonneville regardless of whether Bonneville delivers any power (*e.g.*, a "Hell-or-High-Water" provision, as was the case in *Asson*, discussed below). While Section 3.2 of the Renewal Power Sales Agreement obligates the City to pay for power that Bonneville in fact makes available regardless of whether the City elects to take delivery of the power, this provision is tempered by the "Uncontrollable Force" provisions of the Renewal Power Sales Agreement which excuses failures to perform by the City due to events beyond its control, including specifically any failure of the facilities of the System that prevent Idaho Falls Power from delivering power to its customers. The City is not required to make payments if Bonneville does not make power available to the City.[67]

Under the Renewal Power Sales Agreement, the City will not issue bonds or other debt to fund its payment obligations, it will not be exposed to any construction risk and it will not guarantee the debts or obligations of any third party. Bonneville has used the federal power system—consisting of 31 federal hydroelectric projects and several non-federal hydroelectric and thermal projects in the Pacific Northwest, representing 225 separate generating units (referred to herein as the *"Federal Power System"*)—to provide the City with reliable, low-cost power since 1963 and to other preference customers dating back to the 1930s. Bonneville is now committing to use those same existing and operating power supply resources to serve the City with cost-

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transmission contract with Bonneville's transmission operation under which power is transmitted to the System. *See* Elg Affidavit at p.14, ¶ 35 (R. Vol. II at 528).

67 There are, of course, certain risks inherent in purchasing power from Bonneville. For example, under the "Slice" power supply product, Idaho Falls Power will pay a flat monthly fee for a specified percentage of the output of the Federal Power System. The City's per-unit cost of power will be lower in high water years when the Federal Power System produces more electricity, but will be higher in low water years when production is reduced. However, there is no realistic possibility that the City will receive no power under the "Slice" product – the Federal Power System includes dozens of generating projects and 225 separate generating units, all of which have operated reliably for many years. *See* Elg Affidavit at pp. 9-10 and 12-13, ¶¶ 22 and 28-30 (R. Vol. II at 523-24 and 526-27).

based power for another seventeen years under the Renewal Power Sales Agreement. Under the terms of the Renewal Power Sales Agreement, only the firm generation from the existing resources of the Federal Power System is used to serve the City, and Bonneville has no statutory authority to construct new facilities to provide this service.[68]

The Renewal Power Sales Agreement is analogous to other service contracts previously upheld by the Idaho Supreme Court. For example, in *Corum* the Court determined that a contract to hire a teacher and pay the teacher's monthly salary was, even though it extended beyond the current annual budget, indeed an "ordinary and necessary expense" not subject to the voting requirements of Art. VIII, § 3.[69] Similarly, in *Ray*, the Court held that multi-year employment contracts for school employees were "ordinary and necessary" within the meaning of Art. VIII, § 3, despite the fact that such contracts extended beyond a single budget year.[70] The procurement of long-term power supply services to meet the needs of an existing and operating municipal electric utility is no different than the procurement of the services of school district employees on a multi-year basis.

Purchases of electric power supplies are just as necessary as other types of ordinarily-occurring municipal expenses, such as the payment of city officials' and employees' salaries, which were upheld by the Court in *Butler* and *Hickey* as expenses that "clearly come within the proviso."[71] Such purchases are just as important as the continual payment of policemen retirement benefits upheld in *Hanson*. And such purchases are just as essential as the ongoing repair of municipal property upheld in *Peterson* and *Hickey* and the provision of municipal services like snow and ice removal upheld in *Thomas*.

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68 *See* Elg Affidavit at p. 9, ¶ 22 (R. Vol. II at 523); *see also* Mooney Report at p. 27 (R. Vol. I at 62).

69 55 Idaho at 730, 47 P.2d at 891.

70 120 Idaho at 120, 814 P.2d at 20.

71 *Butler*, 11 Idaho at 404, 83 P. at 238.

These types of municipal expenditures, while they may obligate a city on a long-term basis, are entirely different from the "special indebtedness" at issue in *Frazier* and other "capital projects" cases, such as *Dunbar*, *Bannock County* and *Asson*. The obligations at issue in each of these cases entailed financing the construction of new, large-scale capital projects—expenditures certainly not regularly occurring in the ordinary administration of government affairs. In contrast, expenditures incurred to pay for city and school district employee salaries and retirement benefits, repairs to municipal property and general municipal services—including power purchases by a municipal electric utility to provide electric services—clearly do not involve financing capital projects. Rather, these are ongoing, regularly occurring municipal expenditures for essential services. The Framers did not intend to subject these types of necessary expenditures to a vote, and it would be absurd to do so. These types of expenditures are simply "ordinary and necessary expenses" within the plain meaning of those terms.

By executing the Renewal Power Sales Agreement the City has simply committed to continue to pay for an ordinary and necessary expenditure that it already pays for and would continue to pay for anyway. If the City did not enter into the Renewal Power Sales Agreement, it would still have to purchase its power supply needs from other sources (since it cannot immediately acquire or construct a new generating facility).[72] In this event, the City would include the cost of power purchases in its annual budget every year, and pay for power as services are received. As the District Court observed,

> [a] contract to buy power in the future is simply a promise to continue to pay for a municipal budgetary item in the future. In other words, the City already pays for electrical power for its residents. *It shall continue to pay for electrical power for its citizens in one form or another out of its annual budget.* That the particular form or [sic] electric power purchase before the Court involves a substantial savings over a seventeen (17) year period

72 Elg Affidavit at p. 9, ¶ 21 (R. Vol. II at 523).

> does not erase the fact that *the City is not creating or incurring a new debt*, but paying for power from it [sic] annual budget. In so doing, the City is capturing a significant savings by promising to buy in the future, from Bonneville Power, an already budgeted item.[73]

As discussed above, it is often in a city's best interest to execute a multi-year contract for municipal services. In the case of the Renewal Power Sales Contract, however, it is absolutely essential. Purchasing power on an annual or more frequent basis would subject the City to significant market risk and price volatility. As discussed in the Mooney Report and the affidavits of Idaho Falls Power management, the City has no meaningful alternative to the Renewal Power Sales Agreement.[74] In the absence of the Renewal Power Sales Agreement, the City would be forced to obtain short-term power supplies in the wholesale market for most of the System's requirements. The prices, terms and risks of wholesale market supplies are substantially less advantageous to the City than the Renewal Power Sales Agreement and would expose Idaho Falls Power and the consumers it serves to increased power supply costs, as well as unacceptable price volatility and reliability risks.[75]

In summary, the Renewal Power Sales Agreement is a true service contract for essential power supply services. It creates only a "pay-as-you-go" obligation of the City to pay for services rendered. Accordingly, the Renewal Power Sales Agreement is clearly within the established precedents of the Idaho Supreme Court for multi-year employment contracts and other ordinarily and regularly-occurring municipal expenses.

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73 Order Granting Petition for Judicial Confirmation at 5 (emphasis added).

74 *See* Mooney Report at pp. 24-28 (R. Vol. I at 59-36), Elg Affidavit at pp. 7-10, ¶¶18-23 (R. Vol. II at 521-24) and Flowers Affidavit at p. 10, ¶¶ 28-30 (R. Vol. II at 513).

75 Elg Affidavit at p. 9, ¶ 19 (R. Vol. II at 523).

C. *THE CITY'S OBLIGATIONS UNDER THE RENEWAL POWER SALES AGREEMENT ARE ORDINARY AND NECESSARY EXPENSES UNDER ASSON V. CITY OF BURLEY.*

Asson v. City of Burley is the only decision of the Idaho Supreme Court applying Art. VIII, § 3 to a power purchase agreement and, prior to the Court's decision in *Frazier*, was perhaps the leading case on the meaning of the proviso clause. Accordingly, a discussion of the *Asson* case and a comparison of the City's payment obligations under the Renewal Power Sales Agreement to the participants' agreement (the *"Participants' Agreement"*) with the Washington Public Power Supply System (*"WPPSS"*) at issue in *Asson* is instructive in this case.[76]

In *Asson*, five Idaho cities that operate municipal electric utilities, together with dozens of other utilities in the Pacific Northwest, executed the Participants' Agreement for the purchase of "project capability" of two proposed nuclear power plants. Under the "dry hole" liability provision of the Participants' Agreement, the participating utilities were unconditionally obligated to pay their shares of debt service on all bonds issued by WPPSS to finance the plants, regardless of the fact that construction of the plants might never be completed and the participants might never receive any electricity.[77] After issuing over $2 billion of bonds, WPPSS could not obtain further financing, the nuclear power projects were terminated and WPPSS proceeded to enforce the payment obligations of the participating utilities on the outstanding Bonds. The Court in *Asson* found that the Participants' Agreement was void as to the Idaho cities because no authorizing election had been held, the cities' payment obligations were not "ordinary" and they were "underwriting another entity's indebtedness in return for merely the possibility of electricity."[78]

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76 105 Idaho 432, 670 P.2d 839.

77 *Id.* at 443, 670 P.2d at 850.

78 *Id.* at 443, 670 P.2d at 850.

In contrast to the WPPSS Participants' Agreement, the Renewal Power Sales Agreement imposes no construction risk or "dry hole" liability upon the City. As discussed above, no debt will be issued or incurred by Bonneville to finance the cost of new generating facilities to serve the City under the Renewal Power Sales Agreement, and Bonneville has no statutory authority whatsoever to undertake any such facilities.[79] Rather, only the existing and operating generating facilities of the Federal Power System will be used to serve the City and the City will, on a pay-as-you basis, purchase power, at Bonneville's costs, from these facilities. Accordingly, the Renewal Power Sales Agreement is a *bona fide* services contract and the City's payment obligations under it are ordinary and necessary expenses.

It cannot be emphasized enough that here, no new capital project is being financed—no new courthouse as in *Bannock County*, bridge as in *Dunbar,* nuclear power plant as in *Asson* or parking garage as in *Frazier.*[80] The Renewal Power Sales Agreement is simply a true, "pay-as-you-go" service contract. Thus, unlike the agreements at issue in *Asson,* in this case the obligations encompassed within Renewal Power Sales Agreement are both ordinary and necessary. They do not constitute special indebtedness. Rather, these obligations are expenses which arise in the ordinary administration of local government affairs.

III. THE CITY'S OBLIGATIONS UNDER THE RENEWAL POWER SALES AGREEMENT ARE ORDINARY AND NECESSARY BECAUSE THE PROVISION OF ELECTRICITY IS A DUTY THE CITY IS LEGALLY OBLIGATED TO PERFORM.

The District Court determined that because the City has a legal obligation to provide its residents with electricity, the City's payment obligations under the Renewal Power Sales

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79 *See* Federal Power Act, 16 U.S.C. § 791a, *et seq.*

80 *See* § I.C, *supra.*

Agreement are expenses the City is legally obligated to perform "promptly," thus satisfying the "urgency" component of *Frazier*.[81]

The City contends that the District Court was correct in finding that the City has a legal duty to provide power to its citizens, although for different reasons than those cited by the District Court. [82] The City acknowledges that the Mayor is correct in his assertion that the City is not a "public utility" within the meaning of Idaho Code § 61-302.[83] Nevertheless, the City asserts that the District Court correctly found that "the expense of providing electrical power to its citizens is a duty the City is legally obligated to perform."[84] Under the Idaho statutory framework, cities are authorized to construct, own and operate electric generating and transmission facilities. Once they choose to exercise that authority, they assume a legal duty to their citizens to supply electrical energy for the health, welfare, and benefit of their citizens. It is that legal duty, assumed by the City, which supports the District Court's conclusion that obligations evidenced by the Renewal Power Sales Agreements were necessary expenses within the meaning of Art. VIII, § 3. Thus, this Court can uphold the District Court's decision, albeit applying a different statutory framework than was used by the District Court below.

Idaho cities may assume a duty to provide or cause to be provided necessary utility services, including electricity, to their inhabitants. This duty was recognized in *Alpert v. Boise Water Corp.*, where the Court recognized that Idaho cities are authorized to either provide utility services directly to their residents or grant a franchise to other entities to provide the necessary

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81 *See* Order Granting Petition for Judicial Confirmation at 10-11 (R. Vol. II at 620-21).

82 It has long been held by Idaho courts that a determination of a lower court may be affirmed on alternate grounds. *See, e.g., BECO Const. Co., Inc. v. J-U-B Engineers, Inc.*, 145 Idaho 719, 724, 184 P.3d 844, 849 (2008) (quoting *J.R. Simplot Co., Inc. v. Idaho State Tax Comm'n,* 120 Idaho 849, 853, 820 P.2d 1206, 1210 (1991).

83 Appellant's Brief at 7-8.

84 Order Granting Petition for Judicial Confirmation at 10 (R. Vol. II at 620).

utility services.[85] Specifically, the Court spelled out the duty of a city, once it elects to provide utility services:

> It is the duty of the municipality to light its public streets and to furnish its inhabitants with the means of obtaining gas at their own expense, and having the power by legislative grant to erect and maintain gasworks for that purpose, it necessarily follows that it had the implied power to contract with others to furnish it in like manner . . .[86]

Where a municipality has undertaken to provide essential electric utility services directly to its inhabitants pursuant to Idaho Code § 50-325, the municipality has a duty to continue to provide electric utility services at reasonable rates. That duty has been recognized by the Idaho Legislature, first, in Idaho Code § 50-325 which authorizes judicial review of municipal electric utility rates. Additionally, Idaho Code § 50-326 prohibits a city that owns an electric power plant or transmission and distribution system from selling or leasing the same before the question has been submitted to the taxpayers at a special election – thus, by inference, recognizing that a city may not abandon its assumed duty without a public referendum approving such course of action. Finally, Idaho Code §§ 50-325 and 50-327 prohibit a city which operates a power plant from selling power that is not "excess power," defined as power that is *not needed* by the city or its inhabitants. These sections are indicative of the essentiality of electricity to a city's residents and support the imposition of a binding duty to provide necessary electric services at reasonable prices to its customers, once a municipality elects to assume the role of a municipal utility provider.

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85 118 Idaho 136, 141, 795 P.2d 298, 303 (1990). Specifically with respect to the provision of electricity, the *Alpert* decision recognized cities must provide the necessary services pursuant to the authority granted in Idaho Code § 50-325, or else cause the services to be provided pursuant to a grant of franchise authority pursuant to Idaho Code §§ 50-329 through 50-330. *Id.*

86 *Id.* at 142, 795 P.2d at 304.

year utility contracts are 'expenses the [City] . . . was legally obligated to perform promptly.'"[90] As the statutory framework cited above indicates, the City has assumed a legal duty to continue to provide electric power at reasonable rates, and that duty is satisfied by City's prompt assumption of the obligations imposed by the Renewal Power Sales Agreement.

Although the District Court premised its decision upon a finding that the City's obligations under Renewal Power Sales Agreement were in performance of a legal duty to supply essential utility services, nevertheless, this Court should also find that those obligations are ordinary and necessary expenses because by their nature they are essential to the performance of a usual or customary governmental function. Accordingly, this Court may affirm the District Court's conclusion on alternate grounds.

IV. BECAUSE THE CITY'S OBLIGATIONS UNDER THE RENEWAL POWER SALES AGREEMENT ARE ORDINARY AND NECESSARY, THE CITY'S OBLIGATIONS UNDER THE CREDITWORTHINESS AGREEMENT ARE ALSO ORDINARY AND NECESSARY.

The City, like all of Bonneville's preference customers who will purchase the Slice product under their renewal power sales agreements beginning in 2011, was required to enter into a Creditworthiness Agreement with Bonneville. Under the Creditworthiness Agreement, upon the occurrence of certain events Bonneville may in the future require the City to post cash collateral or a letter of credit issued by a commercial bank to secure its payment obligations under the Renewal Power Sales Agreement. The cash or letter of credit is required to be in an amount equal to 12% of the City's total annual power payments to Bonneville. If Idaho Falls Power fails to pay a power bill under the Renewal Power Sales Agreement, Bonneville would have the right to draw on the cash or the letter of credit to satisfy the unpaid amount.

Idaho case law is very clear that the Creditworthiness Agreement does not create a new or separate obligation apart from the Renewal Power Sales Agreement. In *Butler*, the City of

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90 *Id.* at 10 (R. Vol. II. at 620).

The duty of a municipal electric utility to continuously provide electric services is further imposed by Idaho Code § 50-302, which requires a municipality to act for the general welfare of its inhabitants.[87] Where electricity is so essential and necessary to the public health, safety and welfare in our modern world—indeed, without electricity, businesses, households, government and essential facilities (such as hospitals) simply could not function—it cannot be asserted that a municipal electric utility has any lesser duty than that of an investor-owned public utility to continually provide its customers with essential electricity at reasonable rates, once it assumes the role of a municipal provider.[88] In sum, the duty of a municipal electric utility to provide electricity is, for all practical purposes, comparable to that of a "public utility" under the Idaho Public Utilities Law. For purposes of Art. VIII, § 3, that duty amounts to a legal obligation that must be performed promptly (and continuously) by the City.

The District Court held that the City's obligations under the Renewal Power Sales Agreement were necessary by analyzing those obligations under *Frazier*.[89] As noted above, the City does not believe that *Frazier*'s analytical framework is applicable to the type of obligations at issue in this case. Nevertheless, assuming *arguendo*, that the District Court was correct in applying *Frazier* to the instant case, the District Court was correct in holding that the obligations under the Renewal Power Supply Contract were "necessary" under *Frazier* because the "multi-

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87 Idaho Code § 50-302 states, "Cities *shall* make all such ordinances, bylaws, rules, regulations and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act [Title 50] granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry." (Emphasis added)

88 The Idaho Legislature has recognized the essential nature of affordable electricity to the public health, safety and welfare in authorizing municipal electric utilities to participate in joint electric generation and transmission projects in Idaho Code § 50-342A, wherein the Legislature declared that "securing long-term electric generation and transmission resources at cost-based rates ... is *essential to the economy and the economic development of [municipal] communities* and *to the public health, safety and welfare.*"

89 Order Granting Petition for Judicial Confirmation at 9-11 (R. Vol. II. at 619-21).

Lewiston issued warrants to pay for certain municipal expenses, including the salaries of city officers and employees and a tort judgment against the city, and subsequently determined to issue bonds to fund the warrants. The Court determined that "[t]he bonds proposed to be issued are to be issued for the purpose of funding the outstanding warrant indebtedness of the city. Such bonds will not increase the legal indebtedness of the city, but simply change the form of existing indebtedness from warrant to bond. . . The question arises, then, whether the warrant indebtedness which is sought to be changed to bonded indebtedness arose from the ordinary and necessary expenses authorized by the general laws of the state."[91] After an examination of the expenses funded with the warrants, the Court held that these were "ordinary and necessary expenses" within the meaning of Art. VIII, § 3, and that the funding bonds were validly issued without the need for an authorizing election.[92]

Similarly, in *Hickey*, the City of Nampa proposed to issue bonds to fund warrant indebtedness previously incurred to pay for repairs and replacements to the city's water system, salaries of city officers, firefighting equipment and other "necessary expenditures in the maintenance of the municipal government."[93] The Court held that these expenditures were "ordinary and necessary expenses" within the meaning of Art. VIII, § 3, and that the bonds were treated as a continuation of the original "ordinary and necessary expense" represented by the warrants. The Court stated:

> Having determined that the indebtedness for which the warrants were issued is lawful, and that the warrants are binding and valid obligations of the city, it follows ... that the council might authorize and issue funding bonds without submitting the question to a vote of the people. This was not the creation of any new

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91 11 Idaho at 403-04, 83 P. at 238.

92 *Id.*

93 22 Idaho at 43, 124 P. at 280.

> indebtedness, but was rather the changing of the form of the indebtedness, or paying an ordinary debt already incurred.[94]

Applying the decisions of the Supreme Court in *Butler* and *Hickey,* if the amounts payable by the City under the Renewal Power Sales Agreement constitute "ordinary and necessary expenses" then the amounts posted or paid by the City under the Creditworthiness Agreement, whether as a posting of cash and replenishment of amounts drawn or a posting of a letter of credit and reimbursement to the bank of amounts drawn, must also constitute "ordinary and necessary expenses". No new obligation of the City is created under the Creditworthiness Agreement, rather, there is merely a change in form of the City's original obligation under the Renewal Power Sales Agreement which itself was an "ordinary and necessary expense". This is, in substance, identical to the issuance of bonds to fund warrant indebtedness, where the warrants are redeemed and the city's original obligation takes the form of repayment to the bond holders.

CONCLUSION

The City's obligations under the Renewal Power Sales Agreement are ordinary and necessary expenses within the meaning of Art. VIII, § 3. The drafters of the Idaho Constitution intended that municipal governments be able to incur ordinary indebtedness without an authorizing election. The proceedings and debates of the Framers of the Idaho Constitution, and the holdings of Idaho cases interpreting the proviso clause of Art. VIII, § 3 show that it is the character of the obligation that determines whether it is ordinary and necessary. Idaho case law also makes it clear that an expense is "necessary" within the meaning of the proviso clause where it is essential to fulfill a local government's customary, regular or recurring functions. The provision of reliable, affordable electric utility services is a duty the City is practically and legally obligated to perform. The City's obligations under the Renewal Power Sales Agreement arise in the ordinary administration of local government affairs because they are essential to the

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94 *Id.* at 46, 124 P. at 281.

City's ability to provide reliable, cost-efficient resources to residents of the City. Consequently, the City's obligations under the Renewal Power Sales Agreement are "necessary" within the meaning and intent of Art. VIII, § 3 even though no "urgency" exists.

Because the City's payment obligations under the Renewal Power Sales Agreement are "ordinary and necessary expenses," it follows that any obligations the City would incur under the Creditworthiness Agreement are also "ordinary and necessary." No new obligation of the City is created under the Creditworthiness Agreement, rather, there is merely a change in form of the original obligation which itself is an "ordinary and necessary expense."

This Court should affirm the decision of the District Court.

Respectfully submitted this 11th day of November, 2009.

HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivering, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 11th day of November, 2009.

DOCUMENT SERVED: BRIEF IN RESPONSE TO APPEAL OF JUDICIAL CONFIRMATION OF RENEWAL POWER SALES AGREEMENT

ATTORNEY SERVED:

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Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses.

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Dated and certified this 11th day of November, 2009.

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