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Building Contractors v. Public Utilities Appellant's Reply Brief Dckt. 37293

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE BUILDING CONTRACTORS ASSOCIATION OF SOUTHWESTERN IDAHO, Appellant, v. IDAHO PUBLIC UTILITES COMMISSION, and IDAHO POWER COMPANY, Respondents.	Docket No. 37293-2010

APPELLANT'S REPLY BRIEF

Appeal from the Idaho Public Utilities Commission
Commissioner Marsha H. Smith, Presiding

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Appellant The Building Contractors Association of Southwestern Idaho ("BCA") hereby replies to arguments raised in Respondents' Briefs filed by the Idaho Public Utilities Commission ("Commission") and Idaho Power Company ("Idaho Power" or "Company").[1]

I. INTRODUCTION

In each of their briefs, the Commission and Idaho Power emphasize the standard of review recognized by this Court that gives substantial deference to the Commission's technical expertise, its evaluation of evidence, and its fact finding. However, this case has less to do with issues of fact than it does issues of law—namely, whether the Commission's action violates Idaho's laws prohibiting rate discrimination. It is the province of this Court, not the Commission, to decide whether, as a matter of law, the Commission's Order 30955 imposes an unlawfully discriminatory rate and charge structure against new customers.

Indeed, in two prior cases in which the Commission sought to shift more of a utility company's costs to new customers, this Court found that the Commission had exceeded its authority by authorizing illegally discriminatory rates/charges, despite (predictably) the Commission's arguments it had not. BCA submits that just as in *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 690 P.2d 350 (1984) ("*Homebuilders*") and *Boise Water Corp. v. Public Utilities Comm'n*, 128 Idaho 534, 916 P.2d 1259 (1996) ("*Boise Water*") the Commission's arguments fail here too.

[1] In this Reply, the Commission's Respondent's Brief is cited as "IPUC Brief" and the Company's Respondent's Brief is cited as "IPCo Brief." BCA's initial Appellant's Brief is cited as "BCA Brief."

Given the Commission's track record on the new customer/cost-shifting issue, and the propensity for such cost-shifting to result in unlawful discrimination, BCA respectfully requests this Court take a hard look at the effect of the Commission's Order 30955 on new customer charges and recognize that the tariff approved by the Commission is discriminatory and unjustified. Specifically, BCA urges the Court to examine the discriminatory results that flow from the Commission's abandonment of its own longstanding principle governing line extensions that required the Company to provide an allowance toward line extensions to serve each new customer that approximated its per-customer embedded costs and required the new customer to pay those line extension costs over and above the embedded cost-based allowance.

That principle was enunciated by the Commission in the 1995 Rule H Tariff Case ("1995 Case") based on the Company's express assurance, and the Commission's finding, that allowances pegged to embedded costs provide a level playing field as between existing and new customers. By re-grading the playing field based on a single conclusory statement that "different circumstances exist now than did in 1995," the Commission runs afoul of this Court's decisions in *Homebuilders* and *Boise Water* and the Commission's statutory duty to set non-discriminatory rates and charges that are just and reasonable.

In this Reply, BCA also responds to Respondents' arguments concerning the Commission's denial of BCA's request for intervenor funding. A plain reading of the statute and rules governing intervenor funding warrants a finding that BCA timely filed its request following the filing of post-hearing briefs at the conclusion of the Commission's proceeding. Moreover, it is arbitrary and capricious for the Commission to find that BCA did not represent the general

body of users or consumers in this case, when the Commission had previously ruled precisely the opposite in a similar proceeding and awarded BCA intervenor funding. The Commission also abused its discretion in finding that BCA did not materially contribute to the case and that BCA's fees and costs for its participation on reconsideration were "unreasonable." BCA's efforts below were focused on the same issues argued here on appeal to ensure the Commission abides by this Court's anti-discrimination rulings in *Homebuilders* and *Boise Water* and its own ruling in the 1995 Case establishing allowances based on embedded costs to maintain equal treatment of existing and new customers.

Finally, BCA responds to Respondents' argument against awarding BCA attorney fees on appeal as against the Commission under Idaho Code § 12-117 or, alternatively, under the private attorney general doctrine. BCA presents facts and argument supporting the modification of the holding in *Owner-Operator Independent Drivers Ass'n, Inc. v. Idaho Public Utilities Comm'n*, 125 Idaho 401, 871 P.2d 818 (1994) ("*OOIDA*"), that the Commission may not be assessed attorney fees on appeal under I.C. § 12-117 because it is a "legislative agency." In the alternative, BCA argues that it has met the requirements of an award under the private attorney general doctrine through its advocacy of the right of all new customers to pay non-discriminatory rates and charges.

II. ARGUMENT

A. Understanding the interrelationship between line extension charges, allowances, embedded costs, and rates is essential to understanding this case.

BCA described the interrelationship between allowances, charges, embedded costs and rates in the BCA Brief at 8-12. The discussion is summarized here for the Court's convenience and, hopefully, for clarification.

At the outset, BCA agrees with the basic proposition that, to the extent "cost-causers" (here, new customers requesting connection to the Idaho Power system) do not pay for a component of their electric service (here, line extension costs), electric rates for all customers will be higher than they would otherwise be. IPCo Brief at 4; IPUC Brief at 19; Order 30955, p. 21; R. Vol. IV, p. 668. This is because the Company either recovers its line extension costs through upfront charges or through rates, and what it does not recover through one means it must recover through the other.

The line extension costs the Company is entitled to recover through rates are called its "embedded costs"—that is, those line extension costs that are not paid upfront by customers connecting to the system, but rather are "embedded" in the rate structure paid by all customers. *See* IPCo Brief at 5 n. 2 ("'Embedded costs' are a snapshot of the cost of facilities recovered in rates at a given point in time. Future rate adjustments will reflect the change in current costs over time.") Thus, with respect to line extension costs, Idaho Power recovers through rates charged to all customers, existing and new, its distribution costs that are embedded in the rates because the Company, rather than the customers who requested service, funded such costs.

With this understanding, the issue of "allowances" can be addressed. Allowances—sometimes called "company-funded allowances"—represent Idaho Power's investment, rather than new customers' upfront investment, in distribution facilities that the Company is authorized to recoup through electric rates paid by all customers. IPUC Brief at 5 ("The allowances credited to new customers are funded by Idaho Power, [are] included in the Company's rate base and are eventually recovered in the rates for all customers"); *see also* R. Vol. I, p. 168 (IPUC Staff Comments); *see also* R. Vol. I, p. 26. (definition of "Line Installation Allowance" in proposed version of 2009 Rule H Tariff included with Application).

If line extension allowances and embedded costs sound similar, that is because they are; they both represent Idaho Power's investment in distribution facilities to serve new customers that the Company is authorized to recover through electric rates paid by all customers.

So long as allowances do not exceed embedded costs, the Company will recover its allowance/investment through existing rates, with no resulting "upward pressure" on rates. Idaho Power's main witness, Mr. Gregory Said, testified to this:

> Q. [by Mr. Creamer] To the extent that the Company's investment in distribution facilities to serve new customers does not exceed its current embedded costs for distribution facilities, then the Company's current rates are sufficient to recover the costs of the new facilities; would you agree with that?
>
> A. [by Mr. Said] For that particular element of rates, yes. . . .
>
> Q. Mr. Said, if the revenues that the Company receives for – from its new customers are sufficient to recover the embedded costs that the Company has for line extensions and distribution facilities, then there is no upward pressure on rates, is there?

A. Again, for that component.

Tr., Vol. II, p. 121, LL. 1-8; p. 123, LL. 17-23 (Said Cross). BCA's main witness, Dr. Richard Slaughter, agreed:

> . . . embedded cost approximates the Company's per customer level of investment in distribution plant that it can recover through existing rates. To the extent that the Commission desires to relieve upward pressure on rates, then limiting the Company's investment in distribution to serve new customers to its current per customer embedded costs for distribution facilities providing the same service to existing customers accomplishes this.

Tr. Vol. II, p. 233, L. 2 through p. 234, L. 5.

On the other hand, an allowance that exceeds embedded cost will tend to cause "upward pressure" on rates because the allowance/investment is greater than the amount the Company can recover through existing rates. Conversely, an allowance that is less than embedded cost will result in excess earnings to the Company on its distribution investment because the new customer double pays for a portion of his/her distribution facilities—once upfront and once through rates. Tr. Vol. II, p. 245, LL. 20-25. (The amount of double payment would be equal to the difference between the allowance provided and the embedded cost recovered though rates.)

B. The Commission-approved Rule H tariff unlawfully discriminates as between new and existing customers and as between new customers who share a transformer.

1. The new Rule H tariff discriminates.

Here, the Commission has pegged allowances to an arbitrary standard based on the cost of terminal facilities rather than to the portion of line extension costs embedded in rates as it had been previously. IPUC Brief at 17 ("The 1995 allowance was tied to an estimate of what new customer distribution costs were embedded in rates."); Order 30955 at 22 ("allowances should be

based upon the cost of standard terminal facilities . . . ."). The Commission and Idaho Power assert that "[b]ecause the [new Rule H tariff] allowance is calculated on a per transformer basis and not a per customer basis, the allowance inside and outside subdivisions provides the same Company investment." IPUC Brief at 12; IPCo Brief at 9; Order at 21; R. Vol. IV, p. 668. This statement is true insofar as it states the obvious—that a per transformer allowance provides the same Company investment per transformer regardless of where that transformer is located. The problem is that Idaho law is not concerned with discrimination amongst transformers; rather, it prohibits discrimination between customers.

Under the per transformer allowance methodology, the only new customers who receive a full allowance are those who do not share a transformer with another customer. The many new customers who share transformers (i.e. who reside within subdivisions) will not receive the full benefit of a per transformer allowance. This is discriminatory as between new customers.

Moreover, the new customer who receives an allowance that is less than embedded costs (i.e. the new customer who shares a transformer), but pays the same rate as an existing customer who received an allowance equal to embedded costs, is being discriminated against as compared to the existing customer. This is because the new customer is being double-billed for a portion of her cost to connect to the system while the existing customer was not.[2]

[2] BCA recognizes that it might be permissible (i.e. non-discriminatory) for the Company to provide a less-than-embedded cost allowance to new customers if there were some after-the-fact true-up or if the new customers also paid a different rate than existing customers (i.e. a rate that did not include the portion of other customers' distribution facility costs embedded in existing rates). But either of these could be a difficult accounting process. *See* Tr. Vol. II, p. 245, LL. 22-25.

Neither Idaho Power nor the Commission dispute that customers sharing transformers (up to ten) will receive a lesser allowance (i.e. lesser Company investment). IPCo Brief at 20 ("subdivision developers with lots that share a transformer will receive a pro rata share of the transformer allowance."); IPUC Brief at 25 ("Because customers share a transformer, Idaho Power incurs lower costs to connect customers to its system"). They instead argue that this disparity is warranted because it guarantees "the same Company investment" and because a per lot allowance would give subdivision developers a "windfall." IPCo Brief at 19; *see also* IPUC Brief at 25. This argument is a red herring.

The important point is that, to be non-discriminatory, each customer in a class paying the same rate should receive the same level of Company allowance/investment because that puts them on a level playing field in terms of the charges they thereafter pay to receive the same service. To alleviate its concern over "windfalls" to developers, the Commission should provide a per customer, not per transformer, allowance and work out an appropriate system of allowances and refunds as it did under the 1995 Rule H tariff. *See* BCA Brief at 8-9 (discussing how refunds and allowances worked under the prior Rule H tariff). The fact is, there were no "speculative lots," IPCo Brief at 24, to create a windfall under the prior Rule H tariff's refund provisions because developers received no refunds until new customers connected to the system. *Id.*

2. *The new Rule H tariff violates* Homebuilders *and* Boise Water.

The Commission and Idaho Power argue that *Homebuilders* and *Boise Water* do not apply to this case. This is not surprising since, in both those cases, this Court held that Commission-approved charges were unlawfully discriminatory despite the Commission's and

applicant-utilities' urging to the contrary. But the Commission and Idaho Power are mistaken; this Court's analyses in those cases are directly relevant to the new customer charges at issue here. In addition, those cases require the Commission to set non-discriminatory rates and charges unless there is sufficient justification for such disparity. Here, the Commission has failed to adhere to these precedents.

The BCA Brief, at 27-31, discusses why the newly-approved Rule H tariff violates *Homebuilders* and *Boise Water*. In summary, they prohibit unlawfully discriminatory charges and require the Commission to justify any difference in rates and charges through a "corresponding classification of customers that is based on such factors as cost of service, quantity of resource use, differences in the condition of service or in the time, nature or pattern of the customers' use." *Boise Water*, 128 at 539, 916 P.2d at 1264; *Homebuilders*, 107 Idaho at 420, 690 P.2d at 355 (substantively same language as quoted). The Commission did not make such a justification, nor could it on this record because there are no significant differences between new and existing customers, or between new customers who share or do not share transformers, when considering these factors. *See* Tr. Vol. II, p. 123, L. 24 - p. 125, L. 10 (Company witness Said confirming no differences between new and existing customers in terms of cost of service).

There is no dispute that the Company's line extension charges under the new Rule H tariff are different than under the tariff approved in the 1995 Case. There also is no dispute that the net effect of the change in line extension charges is that new customers will receive a smaller Company-funded allowance than existing customers received. But rather than justify this

disparity between customers based on the *Homebuilders/Boise Water* factors, the Commission and Idaho Power simply assert "no discrimination is present 'when a non-recurring charge is imposed upon a new customer' . . . ." R. Vol. IV, pp. 669-70 (Order 30955), and therefore "the Commission does not need to justify the difference in new customer Company investment based upon the factors enumerated in *Homebuilders* . . . ." IPCo Brief at 17. Respondents are mistaken.

The *Homebuilders* decision does not create a blanket exemption from its holding for those charges that are deemed non-recurring and related only to distribution facilities. The *Homebuilders* passage cited by the Commission[3] merely recites what that case is not about. To the extent *Homebuilders* recognizes that certain non-recurring charges related to distribution facilities are exempt from the prohibition on discrimination, it does not wholly exempt such charges. Rather, the passage in *Homebuilders* describes a situation where a "charge is imposed to offset the cost of the utility's capital investment." Implicit in this statement are the concepts that such a charge (1) is needed because the cost is not already recoverable through rates, and (2) is commensurate with the cost and does not produce excess earnings in distribution facilities. To the extent the cost already is being recovered through rates (i.e. that portion of the cost is embedded in rates), also imposing a non-recurring charge for that cost amounts to double-billing (which is unjust and unreasonable) and discrimination.

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[3] For the Court's convenience, the passage is reproduced here in full:

> The instant case presents no factors such as when 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.

Homebuilders, 107 Idaho at 421, 690 P.2d at 356.

In addition, there is no basis for Idaho Power's and the Commission's apparent position that non-recurring charges for distribution facilities are inherently non-discriminatory. Even without the inextricable link between charges/allowances and rates, discrimination occurs under the Commission's per transformer methodology because customers sharing transformers receive less of an allowance and ultimately are charged more than customers who do not.

Idaho Power also is wrong in its argument that "[s]o long as all potential new customers/applicants are treated in a like manner as a 'customer class,' there is no unlawful discrimination." IPCo Brief at 18. The suggestion implicit in this statement—which is made express in the sentence following—is that new customers and existing customers are different classes of customers that "are not similarly situated." *Id.* BCA recognizes that "[n]ot all differences in a utility's rates and charges as between different classes of customers constitute unlawful discrimination . . . ," *id.* (*quoting Homebuilders*; emphasis added). However, "[a]ny such difference (discrimination) . . . must be justified by a corresponding classification of customers that is based upon factors such as cost of service, quantity of electricity used, differences in conditions of service, or the time, nature and pattern of the use." *Homebuilders*, 107 Idaho at 420, 690 P.2d at 355. The Commission did not justify any difference in rates or customer classification between existing and new customers using the *Homebuilders* factors, nor could it based on the record. *See* Tr. Vol. II, p. 123, L. 24 - p. 125, L. 10 (Company witness Said confirming no differences between new and existing customers in terms of cost of service). The Commission—in Order 30955 and on appeal—and Idaho Power simply argue that the

Commission need not analyze the *Homebuilders* factors because this case involves a non-recurring charge for distribution facilities that is exempt from *Homebuilders*.

C. The Commission's and Idaho Power's arguments are premised on factual assumptions that are unsupported by evidence in the record.

1. The record does not support the assertion that growth was not paying for itself.

Idaho Power argues here, as it did before the Commission, that the Rule H modification was necessary to make "growth pay for itself." *See* IPCo Brief at 3 ("growth should pay its way"); *see also* R. Vol. I, p. 61 (Rule H tariff modifications "will take a step toward growth paying for itself"). Implicit in this assertion is an assumption that, under the previous Rule H tariff, the Company was not recovering its costs for individual line extensions from persons requesting them. However, the record contains no actual evidence of this. Despite this, the Commission on appeal concludes that "under the old methodology, revenues generated after connecting new customers were inadequate to cover the costs associated with serving those customers." IPUC Brief at 17. Significantly, the words "costs associated with serving those customers" is not the same as "costs associated with extending service to those customers." On the evidence in the record, the Commission's statement is correct only if one includes generation and transmission costs in the calculus of "costs associated with serving these customers." Otherwise, there is no evidence in the record to support a contention that Idaho Power was unable to recover its line extension costs to extend service under the prior Rule H tariff and existing rates.

Logically, evidence of this alleged inability to recover its costs for line extensions would consist of Idaho Power's financial data. However, the Company did not (and still does not) point to any such data because it apparently does not maintain it. Discovery requests from BCA and Commission Staff seeking such information produced Company responses that varied from "the requested information is not available" to ". . . many of the data requested are not collected or considered incomplete." Tr. Vol. II, p. 111, L. 4 – p. 113, L. 6. Hence, this information is missing from the record; instead, Idaho Power proferred only the bare allegation that "growth is not paying its way" through testimony offered by Mr. Said. Tr. Vol. II, p.101, LL. 1-18.

The Commission Staff noted in its Comments filed with the Commission:

> . . . Idaho Power has done no analysis to prove that growth is not paying for itself, nor has the Company done any analysis to determine specifically what amounts of allowances can relieve upward pressure on rates. . . . The Company concludes that a reduction in Company investment in new distribution plant is necessary and proposes a reduction in allowances based strictly on policy without supporting analysis.

R. Vol. I, p. 168. The Company subsequently has offered no additional evidence to correct this deficiency. Absent any data by which one could actually analyze the "critical" issue of what allowance would be appropriate to relieve an unproven "upward pressure" on rates attributable to line extension costs, it is hard to see how the Commission could find that Idaho Power justified its proposed tariff modification.

In juxtapose to the lack of evidence in the record showing that growth was not paying for itself under the prior Rule H tariff, there is evidence that, heretofore, new customers (including subdivision developers) have made significant capital contributions in aid of construction to

make up the difference between the total costs of new distribution facilities and the portion of those costs that the Company already was authorized to recover from the new customers through existing rates (*i.e.*, the embedded distribution cost). Tr. Vol. II, p. 241. And, as Dr. Slaughter testified, whether by design or coincidence, the combination of allowances and refunds (both of which the Company recovered through rates) and contributions (paid up-front by the new customer connecting to the system) under the prior Rule H Tariff appeared to have allowed the Company to recover its costs of individual line extensions from the persons requesting them because the Company's investment/allowances approximated current embedded costs. Tr. Vol. II, p. 243, L. 20 - p. 244 L. 3. As a result, the prior Rule H tariff charges/allowances presumably were "just and reasonable" and not merely "promotional" as Idaho Power suggests at page 15 of its Brief.

The *only* analyses in the record performed to determine an appropriate allowance (i.e. an allowance that the Company could recover through its existing rates) was performed by Commission Staff and by BCA's expert, Dr. Richard Slaughter. The Company made no effort to produce a different analysis in rebuttal. The Company simply stated that Staff's and BCA's numbers were too high because they included improper components.[4]

[4] BCA cautions that, at this point, the issue is not which components of the Company's distribution plant should be included in embedded costs for determining allowances. The issue is whether, going forward, embedded costs will be the controlling factor in determining the critically important amount of the allowance. *See* R. Vol. IV, p. 640 ("[w]hether the allowance is applied in exact proportions toward the terminal facilities component, the line extension component, or both, is not critical. The amount of the allowance is critical, however.").

2. *There is no evidence of different circumstances warranting the Rule H modification.*

In Order 30955 and in Respondents' briefs on appeal the reason proffered for changing the Rule H methodology was that "different circumstances exist now than did in 1995." IPUC Brief at 18 (*citing* Order 30955 at 21). Order 30955 did not elaborate on what the different circumstances might be and neither in the proceeding below nor on appeal has Idaho Power explained what different circumstances warrant the Commission's abandonment of its conclusion in the 1995 Case that new customers were entitled to allowances equal to embedded costs in order to put them on a level playing field with existing customers.

Based on the record and the briefs the apparent different circumstance precipitating the Rule H modification is that Idaho Power used to have "surplus generation and surplus transmission," but it now finds itself "generation and transmission constrained." IPCo Brief at 15. However, it is not appropriate for the Company to bankroll additional transmission and generation facilities by increasing new customer distribution facility charges (via decreasing allowances below embedded cost). *Boise Water*, 128 Idaho at 539, 916 P.2d at 1264 ("[t]o the extent that the new hook-up fees are based on an allocation of the incremental cost of new [generation and transmission] plant construction required by growth . . . solely to new customers, the fees unlawfully discriminate between old and new customers . . . .").

The only permissible way for Idaho Power to fund additional generation and transmission facilities, which are considered system-wide, is by increasing rates for all customers.

3. *There is no basis for the assertion that per transformer allowances are "just and reasonable."*

The Commission's abandonment of a per customer approach for setting line extension allowances and charges in favor of a per transformer approach precludes a rational analysis about what charges are "just and reasonable" to Idaho Power and its customers. Under the per transformer approach, the only thing to be determined is the average cost of single-phase and three-phase transformers. This completely bypasses what the Commission identified in its 1995 Order as the "critical" issue—namely, what amount of allowance represents a level of investment in line extensions that the Company can recover through existing rates paid by the new customer without imposing such costs on existing customers who did not cause them to be incurred? The answer to that question was supplied by the Company and agreed with by the Commission in the 1995 Case: it is an allowance based on the Company's embedded distribution cost, because that treats existing customers and new customers equally.

4. *BCA is not advocating for a "windfall" to developers.*

By assuming *ab initio* that an "appropriate allowance" is one equal to the cost of terminal facilities rather than one that the Company will recover through rates, the Commission and Idaho Power can then argue that providing per lot (i.e. per customer) refunds in subdivisions may result in a "windfall" to subdivision developers because developers could receive more in refunds than the Company invested in the terminal facilities. That line of reasoning overlooks the fact that developers rarely, if ever, receive allowances/refunds that make up for their own capital contributions toward distribution facilities. Under the per transformer approach, it is Idaho

Power (and its existing customers) who will reap a windfall through rates. *See* BCA Brief at 12-13 (discussing excess revenue generated by below-embedded cost allowances).

5. The record does not disclose that the Company's alleged rate pressure is attributable to line extension costs to serve new customers.

BCA does not dispute that Idaho Power faces increased costs in providing electrical service to its customers; however, the record does demonstrate that the Company's alleged failure to recover its line extension costs to serve new customers contributes to increased costs or rates.

The Company in testimony, Tr. Vol. II, p. 101, LL. 1-6, and Idaho Power in its brief, IPCo Brief at 14, refer to several recent rate cases as evidence that new customers were not paying their way. But in those cases, the Company sought to increase its revenues to fund generation and transmission facilities, or for other reasons not related to distribution. *See* IPC-E-03-13 (2003) (Danskin gas peaking plant, re-licensing of mid-Snake, Shoshone Falls, and C.J. Strike hydro plants, revise depreciation rates for electric plant in service, adjustments to account for expiration of firm wholesale power supply contracts); IPC-E-05-14 (2005) (recovery for increased cost of income taxes); IPC-E-05-28 (2005) (recognize expiration of temporary increase for income tax settlement); IPC-E-07-08 (2007) (increase return on equity to 11.5%); IPC-E-08-01 (2008) (include Danskin plant in rate base); IPC-E-08-10 (2008) (general revenue deficiency); IPC-E-08-10 (2008) (revise Rule H to change charges for underground facilities to reflect actual costs). Except for the 2008 filing to increase its charges for installing underground facilities, the

nature of these cases do not suggest that new customers are not paying their way with respect to the cost of line extensions serving them.

D. The Commission improperly denied BCA intervenor funding for participating in the proceedings below

The Commission's grounds for denying BCA's intervenor funding are inconsistent with the plain language of its rule implementing Idaho Code § 61-617A and with prior Commission decisions concerning the nature of BCA as a party in similar proceedings. Its findings in this regard also are inconsistent with the record of proceedings below.

1. BCA's initially untimely request for intervenor funding was cured by the Commission's continuance of the proceedings.

Under the Commission's Rule 164, IDAPA 31.01.01.164 implementing I.C. § 61-617A, a party requesting intervenor funding must file its request "within fourteen days after the last evidentiary hearing in a proceeding or the deadline for submitting briefs, proposed orders or statements of position, whichever is last." (Emphases added).

The Commission issued its initial Order 30853 partially approving Idaho Power's Rule H Tariff Amendment Application on July 1, 2009. R. Vol. II, p. 313. Twelve days later, BCA filed its initial request for intervenor funding. R. Vol. II, p. 327. Admittedly, that filing was made more than fourteen days after the May 1, 2009 deadline for filing response comments established in the Commission's Notice of Extension of Comment Deadline, Order No. 30746. R. Vol. I, p. 147. On July 22, 2009, BCA filed its Petition for Reconsideration. R. Vol. II, p. 358. Significantly, BCA's Petition was granted in part on August 19, 2009 by Interlocutory Order No. 30883 wherein the Commission directed the parties to file testimony and indicated that it would

set the matter for a technical hearing. R. Vol. III, p. 408. Thus, as of August 19, 2009, both a hearing date and new filing deadlines were established in the Commission's proceeding.[5] Consequently, May 1, 2009 no longer was the last deadline in the proceeding. Because this last deadline in the proceeding had not yet arrived, BCA's initial request for intervenor funding no longer was late, but rather it became premature.

The Commission issued its Order denying BCA's initial intervenor funding request on September 3, 2009, R. Vol. III, p. 428, i.e. after its order continuing the proceeding. BCA reasonably believed that the operative language of Rule 164 would be applied consistently to establish a new deadline for requesting intervenor funding for its participation in the entire proceeding based on the continued hearing schedule. BCA, therefore, did not seek reconsideration of the Commission's September 3, 2009 Order. Instead, BCA timely filed a renewed request for intervenor funding on November 9, 2009, which was within 14 days of what became the last briefing deadline in the proceeding (post-hearing briefs due October 27, 2009).

2. BCA materially contributed to the proceedings, and therefore, its fees and costs in the proceeding are reasonable.

The Commission's position that BCA did not materially contribute to the Commission's decision and that its costs were unreasonable both hinge on the same argument—namely, that BCA focused on issues the Commission believes were irrelevant to the instant proceeding. In its Petition for Rehearing, which the Commission partially granted, and in the technical hearing,

[5] Ultimately, the hearing date was set, a hearing was held on October 20, 2009, and at its conclusion the Commission established yet another deadline, October 27, 2009, for submitting post-hearing briefs. Tr. Vol. 2, p. 300.

BCA focused on the Commission's own rationale for the embedded cost methodology of establishing appropriate line extension allowances. The Commission argues that BCA lost that argument in 1995 and so was simply rehashing a losing argument in this case. IPUC Brief at 31. But the Commission is mistaken.

In 1995, BCA urged the Commission to maintain or increase the allowance and/or per lot refunds that were in effect prior to the Company's 1995 filing. R. Vol. IV, pp. 631, 639. BCA clearly did not get everything it wanted in that case, and the Commission disagreed with BCA's argument that the *Boise Water* precedent should bear on an analysis of the proposed tariff amendments. R. Vol. IV, p. 636 (Order 26780). However, at Idaho Power's urging, the Commission determined then that new customers are entitled to have the Company provide a level of investment equal to that made to serve existing customers in the same class, R. Vol. IV, p. 639, which provided BCA's members with at least some significant foothold in preventing a wholesale shifting of costs to new customers. BCA appropriately sought to hold that ground in this case.

The Commission also now insists that BCA's participation fell outside the scope of the technical hearing it ordered, which the Commission now argues was limited "to the issue whether the new 'allowance amount is reasonable based upon the cost of new distribution facilities [*i.e.*, the standard terminal facilities].'" IPUC Brief at 31, *citing* Order No. 30955. That mischaracterizes what the Commission ordered when it granted BCA reconsideration. It also is inconsistent with what BCA sought reconsideration of.

Interlocutory Order 30883, which granted reconsideration to BCA, correctly recognized that "BCA seeks reconsideration 'to establish an appropriate value of current Company embedded costs for distribution facilities, a method to true up those costs over time, and a fair method for line extension costs, allowances and refunds to be paid going forward.'" R. Vol. III, p. 407. The Commission decision in that Order then states that

> BCA may address what allowance is reasonable based on the cost of new distribution facilities. Pursuant to Rule 332 we adopt the following schedule for the limited reconsideration of how the allowances in Order No 30853 were calculated and whether the calculation had a reasonable basis . . . we grant limited reconsideration on the issue of the initial allowance. BCA will have an opportunity to present evidence of whether the allowance amount is sufficient . . . More specifically, reconsideration is granted on the issue of allowances and denied on the issues of per-lot refunds and vested interest refunds.

Id., pp. 408-410. The Commission's subsequent Notice of Technical Hearing, Order No. 30900, notified the parties that

> The Commission found it appropriate to grant reconsideration on the limited issue of the amount of appropriate allowances. BCA was directed to address what allowance is reasonable based on the cost of new distribution facilities.[6]

R. Vol. III, p. 503.

BCA pre-filed its testimony more than a month prior to the technical hearing demonstrating that an appropriate allowance is based on embedded costs and supporting an amount of $1,232. R. Vol. III, p. 443, L. 15 through p. 444, L. 2. No party moved to exclude this testimony as irrelevant, and at the hearing no objection was made to BCA's testimony as

[6] "Distribution facilities" or "distribution plant" historically have included terminal facilities and line extensions. *See* Order 26780, R. Vol. 3, p.639-640 (allowances are calculated based on the total embedded cost of distribution facilities, which is made up of two components—one portion for terminal facilities and one portion for line extensions). The Commission apparently now has redefined distribution facilities to include only "terminal facilities."

being beyond the scope of reconsideration. Nor could they have reasonably done so. BCA's testimony and cross-examination on reconsideration went directly to the issue of "the amount of appropriate allowances" in light of the increasing costs of new distribution facilities. It is only after the fact that the Commission argues that it intended the technical hearing to be limited to whether a single-phase transformer costs $1,780.[7] BCA's participation throughout this proceeding focused on material and relevant issues, and the Commissions finding in this regard and its shifting position on the scope of reconsideration is arbitrary, capricious and unsupported by the record.

3. BCA has raised issues of concern to the general body of ratepayers.

The Commission argues that BCA's costs and fees were incurred simply to benefit its members. IPUC Brief at 33. But rate discrimination, and whether the Commission gives due consideration to the potential discriminatory effect of the rates it approves, affects *all* ratepayers. This is true because utility cost reimbursement is a zero sum game, and where there is discrimination in rates, one customer or class of customers is unfairly burdened while another necessarily is unfairly benefitted. The general body of ratepayers and the public's confidence in their governing bodies are benefitted when parties such as the BCA step forward to argue for rates that are "just and reasonable" and non-discriminatory, and when necessary, pursue those arguments through our legal system. The Commission's position ignores the importance to all

[7] No technical hearing would have been required on that issue. BCA never disputed the Company's or Staff's estimates of the cost of terminal facilities. BCA argued that the only appropriate allowance was one based, at a minimum, on the Company's embedded distribution costs, regardless of whether it was provided as an up-front allowance, a per-lot refund or some combination of both, and that a "per-transformer" allowance in lieu of a "per-customer" allowance tied to embedded distribution costs resulted in discrimination.

ratepayers that no discrete class of customers be subject to preferential or discriminatory rates without sufficient justification.

The Commission also has ignored its own findings concerning BCA when it awarded BCA intervenor funding in the 1995 case, which involved the same cost-shifting tariff amendments sought by the Company here. Order 26780, R. Vol. IV, p. 644 (finding that BCA raised issues of concern to general body of ratepayers). The Commission does not explain why BCA's advocacy for a fair allowance for new customers (or the developers who build their homes) in this case is of any less importance to the general body of ratepayers than it has been previously. The Commission's finding in this respect is arbitrary and capricious.

It is surprising that Idaho Power now argues that there is no apparent class of customers from which Idaho Power could collect a charge to reimburse it for an intervenor funding award to BCA. In Order 26780 in the 1995 Rule H Tariff case, after finding that BCA had raised issues of concern to the general body of ratepayers and was entitled to intervenor funding, the Commission adopted *Idaho Power's proposal* "to collect a subdivision lot charge of $11 per lot to be effective as of the date of this Order, to reimburse the Company for the intervenor funding award [to BCA]. . . . to be removed after being in effect for one year." R. Vol. IV, p. 644.

Finally, aside from getting its math wrong concerning the percentage of all Company ratepayers that new customers added in 2009 might represent,[8] the Commission ignores the 122,581 new customers who took service between 1995 and 2008, R. Vol. 2, p. 239, under the

[8] At page 34 of its brief, the Commission asserts that "new customers represented less than .005 of a percent (2,258 ÷ 489,923 = .0046)." However, .0046 is equal to 0.46%, or roughly half a percent, not ".005 of a percent" (which is five one-thousandths of a percent).

embedded cost methodology BCA seeks to preserve here. The Commission's argument, of course, also ignores all potential new customers going forward who would otherwise be entitled to the treatment BCA has advocated.

E. BCA is entitled to its attorney fees and costs on appeal.

The standard of review of the Commission's action here is whether it regularly pursued its authority to set rates or violated any constitutional rights of the appellant in establishing the Company's Rule H allowances and charges. I.C. § 61-629; *Boise Water*, 128 Idaho at 538, 916 P.2d at 1263. Its authority to set rates may only be exercised in such a way as to fix non-discriminatory, and non-preferential rates and charges. *Homebuilders*, 107 Idaho at 419, 690 P.2d at 354. The standard for an award of attorney fees is whether the non-prevailing party acted with a reasonable basis in fact or law, I.C. § 12-117, or whether an action was pursued, brought or defended frivolously, unreasonably or without foundation. I.C. § 12-121. If the Commission has exceeded its authority, then it has acted without a reasonable basis in fact or law. *Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005).

1. BCA is entitled to attorney fees on appeal under I.C. § 12-117.

Respondents each argue that attorney fees and costs are not available under I.C. § 12-117 because (1) it is preempted by the statute providing for intervenor funding in proceedings before the Commission; and (2) it does not apply to the Commission based on this Court's prior determination that the Commission is not a "state agency." BCA disagrees with respect to the first point because the intervenor funding statute does not apply to appellate proceedings reviewing Commission decisions. On the second point, Respondents offer little argument

against BCA's request that the Court revisit its determination that the Commission is a "legislative agency" rather than a "state agency" subject to I.C. § 12-117.

a. I.C. § 61-617A does not preempt Section 12-117.

Respondents both argue that I.C. § 61-617A preempts I.C. § 12-117. IPUC Brief at 37 n. 12; IPCo Brief at 26-28. BCA disagrees. The plain language of section 61-617A authorizes the Commission to award intervenor funding to parties "in any proceeding before the Commission." This statute, then, has nothing to do with awards of fees or costs on appeal of a Commission decision to the Supreme Court. Accordingly, I.C. § 61-617A does not involve, let alone preempt any other Idaho statute or law by which the Supreme Court can award fees or costs on appeal.

b. BCA requests the Court revisit and modify its previous determination that I.C. § 12-117 does not allow for awards of attorney fees and costs against the Commission.

BCA recognizes that this Court has rejected awarding attorney fees against the Commission under I.C. § 12-117 on the ground that the Commission is a "legislative agency," and therefore, not a "state agency" subject to Section 12-117. (BCA Brief at 43, citing *Owner-Operator Independent Drivers Ass'n, Inc. v. Idaho Public Utilities Comm'n*, 125 Idaho 401, 871 P.2d 818 (1994) ("*OOIDA*")). BCA nevertheless has requested an award under I.C. § 12-117, BCA Brief at 41-42, and respectfully asks the Court to revisit its previous decisions.

BCA submits that reconsideration and reversal of *OOIDA* is warranted based on a review of the statutory definition of "state agency," the cases leading up to the *OOIDA* decision, and the statutes creating the Commission. Aside from the rationale used by the *OOIDA* Court, all indications are that the Commission is a "state agency" that should be subject to I.C. § 12-117.

The definition of a "state agency" subject to Section 12-117 is found in I.C. § 67-5201. I.C. § 12-117(4)(c). Under that definition, "agency" means "each state board, commission, department or officer authorized by law to make rules or to determine contested cases . . . ." I.C. § 67-5201(2) (emphasis added). The Commission is, of course, a "commission . . . authorized by law to make rules," *see, e.g.,* IDAPA 31.01.01.000 (stating legal authority to make rules of procedure). Thus, a plain reading of the statutes appears to subject the Commission to I.C. § 12-117.

However, in the 1994 *OOIDA* decision, this Court held that the Commission does not fall within the plain meaning of "state agency" under I.C. § 12-117 and I.C. § 67-5201 because I.C. § 67-5201 "specifically excludes from the definition of 'state agency' agencies of the legislative branch." *OOIDA*, 125 Idaho at 408, 871 P.2d at 825. The Court cited *A.W. Brown Co., Inc. v. Idaho Power Co.*, 121 Idaho 812, 819, 828 P.2d 841, 848 (1992), but offered no further explanation before deeming the Commission a "legislative agency" (for the first time in any reported Idaho case). A closer review of *A.W. Brown* and its predecessors, however, shows that the "legislative agency" moniker is not a good fit.

It appears that the term "legislative agency" was based on the following language originating in a 1955 case quoted by the *A.W. Brown* Court:

> The function of rate making is legislative and not judicial. The commission as the agency of the legislative department of government exercises delegated legislative power to make rates.

Petition of Mountain States Tel. & Tel. Co., 76 Idaho 474, 480, 284 P.2d 681, 683 (1955) ("*Mountain States*"). The *A.W. Brown* Court quoted this language in holding that the

Commission need not act pursuant to the APA when it is engaged in a legislative function such as rate-setting, because, pursuant to Section 67-5201, the APA "specifically does not apply to 'those in the legislative or judicial branch.'" *A.W. Brown*, 121 Idaho at 819, 828 P.2d at 848.

BCA recognizes that rate making is considered to be a legislative function (sometimes called "quasi-legislative"), and that the Commission "exercises delegated legislative power to make rates." *Mountain States*, 76 Idaho at 480, 284 P.2d at 683. However, like all statutorily created agencies, all of the Commission's powers, whether they be promulgating rules, determining contested cases or implementing legislative or executive directives, are delegated by the legislature. But this in and of itself should not make the Commission a so-called "legislative agency."

Many state agencies exercise what is most often considered quasi-legislative "rulemaking" authority or quasi-judicial authority—all bestowed by the Legislature—but they are considered to be "executive" or "independent" agencies, not legislative agencies or judicial agencies. *See, e.g.,* I.C. § 39-107 (creation of Board of Environmental Quality and delegation of authority to make rules). In this light, it is not apparent what the *Mountain States* Court meant when it called the Commission "the agency of the legislative department of government." *Mountain States*, 76 Idaho at 480, 284 P.2d at 683.

There was no citation to other precedent in *Mountain States* for this proposition. A review of the appellate briefs filed in *Mountain States* (obtained from the Idaho Supreme Court's

archives[9]) reveals merely that the Respondent in that case mentioned—in the context of addressing the Supreme Court's standard of review on appeal—that public utility commissions engage in the "legislative function" of rate-making and that such agencies are delegated "legislative power" to set rates. Brief of Respondent and Cross-Appellant at 9-10, *Mountain States*, 76 Idaho 474, 284 P.2d 681 (1955) (No. 8194). As far as BCA can discern, the "agency of the legislative department" language originated in the *Mountain States* decision without any supporting authority and the benefit of the parties' full briefing of the point.[10] Viewed in this light, the "agency of the legislative department of government" language was a passing remark that should not be construed as a definitive determination that the Commission is part of the legislative branch of government.

This Court has repeatedly recognized, however, that the Commission is not merely a "legislative agency" but that it also has a judicial function. *See, e.g., Rosebud Enterprises, Inc. v. Idaho Public Utilities Comm'n*, 128 Idaho 609, 917 P.2d 766 (1996) ("regulatory bodies perform legislative as well as judicial functions in their proceedings"); *Idaho State Bar Ass'n v. Idaho*

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[9] BCA has copies of the *Mountain States* briefs and will gladly provide them to the Court or the parties upon request.

[10] None of the other cases citing the *Mountain States* language shed light on its meaning. *See Grindstone Butte Mut. Canal Co. v. Idaho Power Co.*, 98 Idaho 860, 574 P.2d 902 (1978); *Intermountain Gas Co. v. Idaho Public Utilities Commission*, 97 Idaho 113, 540 P.2d 775 (1975); *Idaho Underground Water Users Ass'n v. Idaho Power Co.*, 60 P.U.R.3d 194, 404 P.2d 859 (1965). The Court in *Intermountain Gas* also cited *United States v. Jones*, 336 U.S. 641, 69 S.Ct. 787, 93 L.Ed. 938 (1949), but only for the proposition that "ratemaking essentially [is] legislative in the first instance," which BCA concedes. But so is rulemaking. In a 1921 case not cited in *Mountain States—Natatorium Co. v. Erb*, 200 P. 348, 350 (1921)—the Court stated that "the commission is an arm of the legislative authority," but this statement was made in the context of explaining that the Commission is "not a court of justice, within the meaning of Const. art. 1, § 18," and thus also does not shed light on whether the Commission is a "state agency" subject to I.C. § 12-117.

Public Utilities Commission, 102 Idaho 672, 676, 637 P.2d 1168, 1172 (1981) ("proceedings before the Commission are quasi-judicial").[11]

The statutes creating and governing the Commission support a conclusion that it is more "executive" or "independent" than "legislative." By statute, the Commission's members are appointed by the Governor (with senate approval), I.C. § 61-201, and they are subject to removal by the Governor, I.C. § 61-202, and the Commission reports annually to the Governor. I.C. 61-214. *See also Sweeney v. Otter*, 119 Idaho 135, 140, 804 P.2d 308, 313 (1990) ("The legislature must ratify certain executive appointees such as the . . . members of the Idaho Public Utilities Commission").

In their Respondent's Briefs, neither Idaho Power nor the Commission expends much effort defending the proposition that the Commission is a "legislative agency" rather than a state agency. Idaho Power merely rests on the *OOIDA* decision and does not offer any argument against BCA's suggestion that the Court revisit its determination on this point. IPCo Brief at 28. For its part, in addition to citing one of the pre-*OOIDA* cases discussed above (*A.W. Brown*), the Commission then argues that the *OOIDA* interpretation must be correct because the Legislature's post-*OOIDA* amendments to I.C. § 12-117 did not address it. IPUC Brief at 37-38.

It is true that this Court has recognized the canon of statutory interpretation that a legislature is presumed to have full knowledge of existing judicial decisions when it amends a

[11] BCA notes that this Court has recognized "[i]t is not always possible to draw a sharp line of distinction between legislative, judicial and executive powers or functions, nor does it appear necessary to the purpose of the constitutional separation of powers, to do so." *Electors of Big Butte Area v. State Bd. of Educ.*, 78 Idaho 602, 607, 308 P.2d 225, 228 (1957).

statute, *see, e.g., Ultrawall v. Washington Mut. Bank*, 135 Idaho 832, 836, 25 P.3d 855, 859 (2001), but BCA believes the use of this canon would be misplaced here. The recent amendment of I.C. § 12-117 was made specifically and expressly in response to this Court's 2009 decision in *Rammell v. Department of Agriculture*, 147 Idaho 415, 210 P.3d 523 (2009), that the statute did not allow for awards of attorney fees in administrative proceedings.[12] There is no indication that the amendment was intended to address any other cases or issues. It is speculation to suggest that the Legislature's 2010 amendment is a concurrence with a 1994 interpretation by this Court, since it is equally likely that the Legislature simply was focused on the exigencies raised by the *Rammell* decision described in the H.B. 421's Statement of Purpose.

Access to attorney fees against the Commission where it has exceeded its authority and acted arbitrarily fulfills I.C. § 12-117's purpose of "serv[ing] as a deterrent to groundless or arbitrary action and to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never have made," *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 138, 176 P.3d 126, 143 (2007), BCA respectfully requests this Court reverse its

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[12] The Statement of Purpose for H.B. 421 (the bill that amended I.C. § 12-117 in 2010) states:

> In 1989, the Idaho Supreme Court construed Idaho Code Section 12-117 to permit awards of costs and attorney fees to prevailing parties not only in court cases, but also in administrative cases. Under the statute, such awards are only made if the non-prevailing party has pursued or defended the case without a basis in fact or law. On June 1, 2009, in the case of Rammell v. Department of Agriculture, the Supreme Court reversed its 1989 decision and ruled that attorney fees could not be awarded in administrative cases. This bill will restore the law as it has existed since 1989, and it will become effective on May 31, 2009 so that those administrative cases which were pending when the Rammell decision was issued will not be adversely affected by the Supreme Courts ruling.

Statement of Purpose, R.S. 19257 (2010).

previous decisions finding the Commission is not a "state agency" subject to I.C. § 12-117, and award BCA its costs and attorney fees on appeal as the prevailing party.

2. *BCA requests the Court grant it attorney fees and costs on appeal under the private attorney general doctrine.*

As BCA asserted in its Appellant's Brief, it is entitled to an award of attorney fees under the private attorney general doctrine because its appeal in this case satisfies that doctrine's three requirements: (1) great strength or societal importance of the public policy vindicated by the litigation; (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff; and (3) the number of people standing to benefit from the decision. *Heller v. Cennarusa*, 106 Idaho 571, 578, 682 P.2d 524, 532 (1984). BCA incorporates by reference its Appellant's Brief's arguments on this point.

The Court should reject the Commission's argument that "the private attorney general doctrine is not available to award attorney fees against the state." IPUC Brief at 25. First, the case cited by the Commission for this proposition, *Kootenai Medical Center v. Bonner County Comm'rs*, 141 Idaho 7, 105 P.3d 667 (2004), did not hold that the doctrine was inapplicable to the "state," but rather that it was inapplicable to "state agencies" that are subject to I.C. § 12-117. *Id.* at 10-11, 105 P.3d at 670-71. If this Court continues to subscribe to its holding in *OOIDA*, that the Commission is not a state agency subject to I.C. § 12-117, the private attorney general doctrine should be available to BCA.

Similarly, the Court should reject the Commission's argument that the private attorney general doctrine is inapplicable in this situation because this Court has held that the private

attorney general doctrine arises from the authority of I.C. § 12-121 and that Section 12-121 has been held to "not . . . authorize an award of attorney fees on appeal of an agency ruling." IPUC Brief at 35 (*citing State v. Hagerman Water Right Owners*, 130 Idaho 718, 725, 947 P.2d 391, 398 (1997); *Duncan v. State Bd. of Accountancy*, ___ Idaho ___, ___ P.3d ___, slip op. at 6, 2010 WL 1632647 (Apr. 23, 2010)). The cited cases held that the private attorney general doctrine (which is grounded in I.C. § 12-121) is not available against a "state agency" that is subject to Section 12-117. Thus, if the Commission is not considered a "state agency" subject to I.C. § 12-117, then the statute does not preempt the private attorney general doctrine.

BCA disagrees with the Commission assertion that BCA's pursuit of this litigation does not benefit the public. IPUC Brief at 36. While it is true that BCA represents its members, many of whom are in the real estate development profession, their efforts will benefit a significant portion of the public (i.e. any residential customer who connects to Idaho Power's electrical system). Contrary to the Commission's and Idaho Power's assertions, this is a significant number of people. Idaho Power's 2009 planning projections estimate 10,000 new customers per year, or roughly 200,000 new customers, through 2029. Idaho Power, Our Energy Future: Responsible Planning (http://www.idahopower.com/AboutUs/CompanyInformation/ourFuture/responsiblePlanning.cfm) (last visited Aug. 3, 2010).[13]

[13] In this same publication, Idaho Power asserts that yearly "demand for electricity during peak-load hours is expected to increase by . . . enough electricity to power 31,800 average homes." In other words, while Idaho Power expects to add 10,000 new customers each year, electricity demand will increase by more than three times that many homes. Apparently, new customers are not the primary drivers of increased utility costs but, instead, increased use by existing customers causes increased demands on the system.

BCA also believes it unlikely that the state's Attorney General (which represents the Commission) or an individual customer would take up this issue against the Commission and Idaho Power. In short, if BCA did not champion the rights of Idaho Power's new customers, there is little chance that anyone would.

BCA has diligently pursued this matter in good faith despite substantial financial hardship because of the extreme importance of the issues, and because the Commission has, without a reasonable basis, approved a discriminatory line extension charge structure. It is inherently in the general public's interest for discriminatory practices to be challenged. If the Court determines that the Commission is insulated from awards of attorney fees when the public challenges one of its decisions, BCA submits it is then even more important for this Court to take a hard look at the Commission's actions.

BCA thus respectfully requests the Court award it attorney fees and costs either by reversing its prior ruling regarding the applicability of I.C. § 12-117 to the Commission, or under the private attorney general doctrine.

III. CONCLUSION

For the foregoing reasons, Order 30955 should be set aside and the Company's Application denied with respect to the amended line extension charges, allowances, and refunds. In addition, BCA is entitled to intervenor funding to the full extent allowed by statute. BCA respectfully requests its attorney fees and costs on appeal.

DATED this 6th day of August, 2010.

GIVENS PURSLEY LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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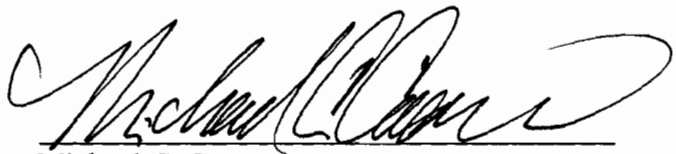

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