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# BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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| **IN THE MATTER OF THE PETITION OF IDAHO POWER COMPANY TO STUDY THE COSTS, BENEFITS, AND COMPENSATION OF NET EXCESS ENERGY SUPPLIED BY CUSTOMER ON-SITE GENERATION** | ) ) ) ) ) | **CASE NO. IPC-E-18-15** **BRIEF OF THE COMMISSION STAFF REGARDING EXISTING CUSTOMERS WITH ON-SITE GENERATION** |

Pursuant to Order No. 34460, Staff of the Idaho Public Utilities Commission ("Staff") submits the following brief.

## I. Background and Introduction.

The IPC-E-18-15 Settlement Agreement ("Settlement Agreement"), if approved by the Commission, would fundamentally restructure the net-metering service offered by Idaho Power Company ("Idaho Power" or "Company"). Under the existing net-metering program, which has been in place since at least 1997, Idaho Power customers have been able to net 1 kilowatt hour ("kWh") of energy produced against 1 kWh of energy consumed, netted monthly, and have been able to carry forward the credits indefinitely ("1:1 monthly netting").[1] Order No. 26750. Under the proposed net-metering program, Idaho Power customers could net on an hourly basis, with net

[1] Staff uses "1:1 monthly netting" as shorthand for the currently approved residential and small general service net-metering tariffs, Schedule 6 and Schedule 8. Staff intends the term "1:1 monthly netting" to incorporate all of the currently approved terms in Schedule 6 and Schedule 8.

hourly exports compensated at an Export Credit Rate. The Export Credit Rate is based on an avoided-cost methodology, which holds non-participants in the program harmless for program costs. The Commission has at times modified elements of the Company's net-metering program, such as implementing a project size cap and implementing and removing an overall system cap, but the Commission has never before altered the fundamental nature of the service offering. *See* Order Nos. 32846, 34046.

One aspect of the Company's net-metering program that the Settlement Agreement did not resolve was whether its terms would apply to existing customers with on-site generation ("Existing Customers"), or whether its terms would only apply to new customers ("New Customers"). Parties to the Settlement Agreement ("Parties") recognize there is a legal question regarding whether the Commission may treat Existing Customers differently than New Customers; or whether doing so would be illegal discrimination. *See also* Order No. 34046 at 24. The Parties agreed to submit this issue to the Commission separately from the Settlement Agreement, and agreed to be bound by the Settlement Agreement, if approved by the Commission, regardless of the Commission's determination on whether the Settlement Agreement applies to Existing Customers. *See* IPC-E-18-15 Settlement Agreement, Section IX. The Settlement Agreement does not define an Existing Customer.

Staff first lays out its legal analysis, which argues that the Commission may—under Idaho law and based on the specific facts of this case—reasonably treat Existing Customers differently from New Customers. Next, Staff argues that an eight-year grace period for Existing Customers would appropriately balance the interests between Existing Customers and all non-participants in the program. Finally, Staff recommends that an Existing Customer be defined as: 1) a current Schedule 6 or Schedule 8 customer; or 2) a person or entity who has submitted an on-site generation application to Idaho Power by the filing date of the Settlement Agreement, which was October 11, 2019.

## II. The Commission May Properly Establish and Maintain Rates That Recognize Reasonable Differences Between or Among Classes of Service.

The Commission is "vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of [The Public Utilities Law]." *Idaho Code* § 61-501. The Commission has wide discretion to establish and maintain rates charged by public utilities, so long as they are not "unjust, unreasonable,

discriminatory or preferential, or in any wise in violation of any provision of law . . ." *Idaho Code* § 61-502.

The scope of review of a Commission Order appealed to the Idaho Supreme Court is narrow. *See e.g., Grindstone Butte, Etc. v. Idaho Pub. Util. Comm'n*, 102 Idaho 175, 627 P.2d 804, 807 (1981). *Idaho Code* § 61-629 states, "The review on appeal shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order appealed from violates any right of the appellant under the constitution of the United States of the state of Idaho." The Commission is a creature of statute and must stay within its delegated authority, but if the Commission is not acting contrary to law, the Court shows the Commission's decisions deference. "In reviewing findings of fact we will sustain a Commission's determination unless it appears that the clear weight of the evidence is against its conclusion or that the evidence is strong and persuasive that the Commission abused its discretion." *Utah-Idaho Sugar v. Intermountain Gas Co.*, 100 Idaho 368, 597 P.2d 1058, 1066 (1979).

Whether rates are just and reasonable, and not preferential or discriminatory, depends upon whether reasonable differences justify setting different rates.

> No public utility shall, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. The commission shall have the power to determine any question of fact arising under this section.

*Idaho Code* § 61-315 (emphasis added). Idaho Supreme Court case law gives examples of reasonable differences that can support differential treatment. "Any such difference (discrimination) in a utility's rates and charges 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." *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 690 P.2d 350, 355 (1984). The "such as" indicates this is a non-exhaustive list of factors to be considered when determining whether differing rates are based on unreasonable differences. *See FMC Corporation v. Idaho Pub. Util. Comm'n.*, 104 Idaho 265, 658 P.2d 936, 948 (1983) (stating, "Each case must depend very largely upon its own special facts, and every element and every circumstance which increases or

depreciates the value of the property, or of the service rendered, should be given due consideration, and allowed that weight to which it is entitled." (citations omitted); *See also Grindstone Butte, Etc.*, 627 P.2d at 809 (stating, "We find such criteria as being valid considerations for rate differentiation as between classes of service, whether those classes be as between schedules or as between customers within a schedule. We do not find one criterion to be necessarily more essential than another. Nor do we find the criteria as listed above as being exclusive.").

The factors enumerated by the Court in *Idaho State Homebuilders*, *Grindstone Butte*, *FMC Corp.*, and related cases, address the discrete facts before the Court in those cases. The Court did not, and could not, attempt to address facts that had not yet arisen. Importantly, the bi-directional relationship of a customer to the grid, and the substantial personal investment made by a customer in an on-site generation system that has benefits to the Company's system, were not factors that existed when the Court decided these cases. The factors listed by the Supreme Court are explicitly not exhaustive and indicate that each case's unique facts must be considered. Factors that increase or decrease the value of the property or of the service should be given due consideration. *FMC Corp.*, 658 P.2d at 948 citing *Application of Boise Water Corp.*, 82 Idaho 81, 349 P.2d 711 (1960).

The reference in *Idaho State Homebuilders* to a "corresponding classification of customers" does not mean that the Commission must establish a different schedule in order to acknowledge reasonable differences among customers. Rather, the Court acknowledged that *Idaho Code* § 61-315 applies to inter- and intra-class differences.

> We have found justification for rate discrimination as between customers within a schedule and as between customers in different schedules. *Grindstone Butte Mutual Canal Co. v. Idaho Pub. Util. Comm'n*, 102 Idaho 175, 627 P.2d 804 (1981); *Utah-Idaho Sugar Co. v. Intermountain Gas Co., supra.* We have upheld as justified a demand charge applicable only to large volume, non-interruptible gas customers, *Utah-Idaho Sugar Co. v. Intermountain Gas Co., supra,* and a 19.6% increase for high volume-high load factor pump irrigators at one end of a schedule and a 34.5% decrease for low volume-low load factor customers at the other end. *Grindstone Butte, supra.*

*Idaho State Homebuilders*, 690 P.2d at 420. In *Grindstone Butte*, the Court similarly stated that classes can be between customers in a schedule. 627 P.2d at 809. More recently, in 2011, the Court reaffirmed there can be different rates among a class of customers. *Building Contractors v. Idaho Pub. Util. Comm'n*, 151 Idaho 10, 253 P.3d 684, 689 (2011).

Thus, *Idaho Code* § 61-315, when read as interpreted by the Idaho Supreme Court, prohibits the Commission from establishing or maintaining unreasonable differences in rates between or among classes of customers. The Commission thus has the discretion to acknowledge reasonable differences among a class of customers and establish different rates for some members of the class.

## III. Idaho Supreme Court Case Law That Prohibits Undue Discrimination Against New Customers Does Not Answer Whether the Commission May Reasonably Set Different Rates for Existing Customers Who Made a Significant Investment.

The Idaho Supreme Court has been clear that the Commission cannot reasonably assign costs solely to new users when all users helped create the need for the additional costs. In *Idaho State Homebuilders*, the Idaho Supreme Court overturned a Commission decision to apply a $50 per kilowatt fee to Washington Water Power customers who decided to install electric space heating after March 1, 1980.

> Here, the Commission found that customers choosing electricity for space heating purposes contributed most to Washington Water Power's needs to invest in expensive new generating facilities. Therein since the charges were only imposed on new customers, the Commission evidently assumed that only 'new' customers were responsible for the level of demand, but that premise has no basis in either the record or in economic theory.

*Idaho State Homebuilders*, 690 P.2d at 356. The Court found no justifiable reason to impose additional costs on new customers that were not imposed on existing customers because the Court found that all customers contributed equally to the need for new investment in generating resources. This does not answer the question currently in front of the Commission.

Likewise, *Boise Water Corp.* does not address the issue now before the Commission. In *Boise Water Corp.*, the same question was posed to the Idaho Supreme Court as in *Idaho State Homebuilders*; may the Commission require new customers to pay for additional facilities without requiring existing customers to shoulder some of the burden when both new and existing customers contributed to the need for the additional facilities? The answer is clearly no. *Boise Water Corp. v. Idaho Pub. Util. Comm'n*, 128 Idaho 534, 916 P.2d 1259, 1264 (1996) (stating, "Each new customer that has come into the system at any time has contributed to the need for new facilities. No particular group of customers should bear the burden of additional expense occasioned by changes in federal law that impose new water quality standards.")

A host of legal, equitable, and policy factors were not present in *Idaho State Homebuilders* or *Boise Water Corp.* that exist here. In this case, large personal investments have already been made by Existing Customers, whereas in the previous cases, the investments had not yet been made. Also, the personal investments in *Idaho State Homebuilders*, had they been made, would have contributed to greater overall utility system costs. In the present case, in contrast, the personal investments in on-site generation systems can help to reduce or defer utility investment in infrastructure that would otherwise end up in rate base and be spread among customers.

The Commission, in the underlying docket for *Idaho State Homebuilders*, substituted its preferred solution (the nonrecurring $50 per kW fee for new space heating) for the solution proposed by Washington Water Power, which was to introduce higher winter seasonal rates to discourage consumption during the system peak. The Commission's imposition of its own preferred solution, which was not advocated for by the parties to the proceeding, put the Commission's Order on different footing before the Idaho Supreme Court. Here, if the Commission approved a different treatment for Existing Customers, it would be doing so at the urging of numerous intervenors and the vast majority of public commenters.

## IV. The Commission Can Determine Whether Reasonable Factual Differences Justify Different Rates for Existing Customers.

The Commission is the trier of fact under *Idaho Code* § 61-315. It is within the Commission's authority to determine whether there are reasonable factual differences between investments made by Existing Customers in some reliance on 1:1 monthly netting and investments to be made by New Customers under the proposed net-metering program structure.

Staff believes that Existing Customers reasonably relied on a longstanding and widely understood program structure when making their investments in on-site generation. Staff recognizes that the Commission and Commission Staff have long expressed concerns that 1:1 monthly netting overcompensates customers with on-site generation for the value of the resource they are contributing to the grid. *See* Order Nos. 28951 at 12, IPC-E-01-39 Commission Staff Comments at 3-4, IPC-E-17-13 Morrison, Di at 12. Staff believes that the Settlement Agreement adequately addresses this issue going forward.

The Commission has also long recognized that customers should have the opportunity to offset their own load and energy requirements with on-site generation. Order Nos. 26750, 28951 at 11, 32880 at 3. The Commission has established and maintained the right of Idaho Power

customers to construct on-site generation behind their meters and to receive 1:1 monthly netting for over 20 years. *See* Order Nos. 26750, 28951, 32846, 34046. The Commission, therefore, should recognize the investments by Existing Customers under 1:1 monthly netting as reasonably different, or as a different condition of service, from investments made by New Customers under net hourly billing with exports valued at the Export Credit Rate.

Staff also recognizes that the Commission has repeatedly said that tariffs are not contracts and that they are subject to change. *See* Order Nos. 32280 at 4 (stating, "[T]he Commission reminds customers that net metering is a tariff rate. There is no contract associated with the service and rates are subject to change depending on future Commission decisions."); 34335 at 2 (stating, "We reiterate: Rates and rate structures are always subject to change."). Staff believes that customers largely do understand that rates for consumption change, and those making investments in on-site generation likely evaluated the economics of their on-site generation investment over a range of possible future rates for consumption, including futures with rate increases. Numerous comments reflect customers making an economic decision on the understanding that it would limit their economic exposure to increasing rates during retirement, when their income is fixed; thus showing an understanding that rates do change coupled with a belief that the fundamentals of net metering would remain in place for the foreseeable future. A customer has plenty of factors to consider when deciding to purchase an on-site generation system without having to be expected to accurately handicap the likely outcome of regulatory proceedings. Staff believes that anticipating changes in retail rates differs from reasonably predicting the wholesale restructuring of the Company's on-site generation offering.

Even if one assumes that customers considering the purchase of an on-site generation system understood 1:1 monthly netting was not guaranteed, they could not have predicted the details or timing of the changes. When the timing and proposed program structure began to emerge in confidential settlement negotiations, Parties were precluded from discussing those details with the public. Without discussing the details of confidential settlement negotiations here, Staff thinks it is fair to say that the Settlement Agreement represents significant movement from the Parties' original positions, and that no party could have accurately predicted the result of the Settlement Agreement from the outset, or even whether settlement could be achieved. Staff thanks the Parties for their candor and earnest work toward compromise in the settlement negotiations.

## V. The Commission Should Implement a Limited Duration Grace Period That Would Accomplish Many of the Goals of Grandfathering While Winding Down the Economic Burden Borne by Non-participants.

Staff understands that continuing to allow 1:1 monthly netting will impact non-participating customers. Staff believes that the impact to non-participants is properly mitigated by an eight-year grace period for Existing Customers, and the overall impact to non-participants is well within the Commission's discretion to set reasonable rates. Because the Commission began addressing the cost-shifting to non-participants issue while the cost shift issue was still relatively small, any costs picked up by non-participants to fund the ongoing 1:1 monthly netting of Existing Customers for a limited period would be very small.

Staff's recommendation to provide a grace period for Existing Customers was informed by customer comments in this case. Of the hundreds of customer comments to the Commission, the vast majority support grandfathering Existing Customers. Staff's proposal responds to the main thrust of concerns expressed in public comments. But, Staff's position is distinct from grandfathering because it does not advocate for different treatment in perpetuity; Staff asks for a grace period for a reasonable amount of time to help balance the interests.

### a. The Commission Should Consider the Relative Impact on Existing Customers in Relation to the Impact on Non-participants in the Program.

The economic impact of the Settlement Agreement on customers who invested in an on-site generation system based on 1:1 monthly netting is quite large compared to the impact on non-participants, which is quite small. Data from Idaho Power's 2017 Net Metering Report,[2] suggests that the then-current cost shift from participants to non-participants was 0.023% of residential class revenues, which is almost imperceptible in individual customer rates and is dwarfed by other, much larger rate-making inequities.[3] Because the issues of 1:1 monthly netting have largely been resolved by the Settlement Agreement going forward, and because the Commission addressed the issue while it was small, and because of the balance of the equities between Existing Customers and non-participants, Staff believes an eight-year grace period is a reasonable burden for non-participants to bear.

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[2] This is Idaho Power's most recent net-metering annual report that quantifies this subsidy. While the number of on-site generation customers has grown since then, so have residential class revenues.

[3] Idaho Power's Fixed Cost Recovery report, filed September 30, 2019, shows that residential customers are paying approximately $19.3 million annually above their cost-of-service, which means they are providing a significant subsidy to other customer classes.

Staff believes 1:1 monthly netting should only be retained for Existing Customers for as long as that customer maintains an account with Idaho Power at their current location. If an Existing Customer moves residences, Staff proposes that the 1:1 monthly netting would end. It would not follow that customer to a new building, nor would it be transferred to the next customer at that building.

**b. The Commission Should Consider an Eight-year Grace Period Based on a Preponderance of the Evidence.**

Staff believes that eight years is a reasonable amount of time that allows Existing Customers to budget and prepare for the significant changes to their utility bills. While an eight-year period will not provide the long-term investment stability these customers seek, it will give Existing Customers time to make financial adjustments rather than having changes imposed upon them merely two to three months after the terms of the Settlement Agreement have been publicly disclosed. An eight-year grace period is also similar to what PacifiCorp has proposed in its Idaho net-metering case, PAC-E-19-08, where it recommended a ten-year grandfathering period. Finally, an eight-year grace period aligns with the eight-year transition period proposed in the Settlement Agreement. Under Staff's proposal, at the end of eight years both Existing Customers and New Customers would be subject to the Settlement Agreement, and any subsequent Commission-approved modifications to the Settlement Agreement. Aligning the grace period and the transition period provides administrative clarity and efficiency.

Last, Staff believes that the transition period in the proposed Settlement Agreement is not a substitute for the eight-year grace period Staff proposes for Existing Customers. If included under the Settlement Agreement, Existing Customers would transition from 1:1 monthly netting to hourly netting at the Export Credit Rate in 25% reductions every other year for the next eight years, representing a distinctly different value proposition than what they planned for. Further, under the Settlement Agreement, the Export Credit Rate can no longer offset the Fixed Cost Adjustment, the Energy Efficiency Rider, or the franchise fees on existing customers' bills, which also reduces the value of the Export Credit Rate.

## VI. The Commission Should Define an Existing Customer as a Person or Entity Who Has Submitted an On-site Generation Application by October 11, 2019.

Staff proposes that an Existing Customer be defined as a current Schedule 6 or Schedule 8 customer, or a person or entity who has submitted an on-site generation application with Idaho Power as of the filing date of the Settlement Agreement, which was October 11, 2019.

This date is reasonable because it is the first date that the public was notified of the proposed program structure in the Settlement Agreement. Staff also proposes those customers who have filed an on-site generation application be given one year from the feasibility review for completion before their application expires. This one-year period aligns with the Company's current on-site generation interconnection and application requirements detailed in Schedule 72. Aligning the definition of Existing Customer with the filing date of the Settlement Agreement prevents a "run on the bank" scenario, but also allows customers who made substantial commitments a time-limited measure of certainty on their investment.

## VII. Conclusion.

Staff believes the Commission has the authority, based on the distinct facts of this case and the controlling law, to grant an eight-year grace period to Existing Customers. Staff believes the Commission should do so because it was reasonable for Existing Customers to have some reliance on 1:1 monthly netting, and the impact to non-participants would be minimal. Staff believes there was reasonable notice to customers on October 11, 2019, the date the Settlement Agreement was filed and made public, that the longstanding 1:1 monthly netting program was likely to change dramatically.

RESPECTFULLY submitted this 13th day of November, 2019.

Edward J. Jewell
Deputy Attorney General

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON THIS THIS 13TH DAY OF NOVEMBER 2019, I SERVED THE FOREGOING **BRIEF OF THE COMMISSION STAFF REGARDING EXISTING CUSTOMERS WITH ON-SITE GENERATION,** IN CASE NO. IPC-E-18-15, VIA ELECTRONIC MAIL & U.S. MAIL, POSTAGE PRE-PAID, TO THE FOLLOWING:

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