EDWARD J. JEWELL (ISB No. 10446)
DEPUTY ATTORNEY GENERAL
IDAHO PUBLIC UTILITIES COMMISSION
P.O. Box 83720
Boise, ID 83720-0074
Tele: (208) 334-0300
FAX: (208) 334-3762

Street Address for Express Mail:

11331 W. Chinden Blvd.
Building 8, Suite 201-A
Boise, Idaho 83714

Attorney for the Commission Staff

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IDAHO PUBLIC UTILITIES COMMISSION

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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** **REPLY 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 reply brief. In this reply brief, Staff addresses arguments raised by the other parties that Staff believes to be the most critical arguments for the Commission to consider. Arguments to which Staff does not respond are neither admitted nor denied. In these reply comments, Staff will incorporate certain arguments put forward by other parties, discuss in greater detail the controlling law, distinguish cases relied upon by the Company, respond to the Company's argument that customers were on notice that rates can change, and conclude that the Commission has the discretion to treat customers who signed up under 1:1 monthly netting differently than customers who will sign up under Net Hourly Billing.

I. Arguments Made by Other Parties Incorporated in Staff's Position.

In reviewing the comments submitted by other parties, Staff was persuaded to incorporate two arguments. The first, and most substantial, is that Staff was persuaded by the arguments of Idaho Clean Energy Association ("ICEA"), City of Boise, Idaho Conservation League ("ICL") and Vote Solar that the systems designed and installed by customers with on-site

generation to comply with the rules of 1:1 monthly netting operate and interact with the grid differently than will systems designed and installed to comply with the rules of Net Hourly Billing. The second argument that persuaded Staff was made by Idaho Power Company ("Idaho Power" or "Company"), which is the definition of an existing customer should be tied to the date the Notice of Settlement Agreement was issued by the Commission. In Staff's underlying brief, Staff made the argument that the date of distinction between new and existing customers should be the date the Settlement Agreement was signed. Staff's rationale was based on the belief that after that date it was no longer reasonable for a customer to base an investment decision on the belief that 1:1 monthly netting would continue for the repayment period of their investment. Staff's rationale remains the same, but upon further consideration, Staff believes this rationale is most supported by using the service date of the Notice of the Settlement Agreement, October 17, 2019, as the date of distinction between new and existing customers.

II. The Commission May Reasonably Differentiate Between Classes of Customers.

The Company states, "Distinctions between customers based solely on the date the individual became a utility customer have not been upheld by the Idaho Supreme Court on appeal and subsequently have been disfavored by the Commission." Idaho Power's Opening Brief at 2. Staff agrees with this statement, as far as it goes, but does not agree that it fully states the law as pertinent to this case. Staff agrees that distinctions based solely on whether a customer is new or old have been held to be unreasonable by the Court. Staff believes the more pertinent question to be: are there different facts between customers who signed up for 1:1 monthly netting and customers who will sign up for Net Hourly Billing, that the Commission can take into account, to justify establishing different treatment between the two classes of customer? To answer this question, it is critical to know which facts the Commission can take into account when determining whether there are reasonable differences between classes of customers.

In the late 1970s and early 1980s, a series of cases deferred to the Commission's decisions to establish different rates for different classes of customers for a wide variety of reasons (hereinafter, the "*Grindstone Butte II* cases"). *See Bunker Hill Company v. Washington Water Power Company*, 98 Idaho 249, 561 P.2d 391 (1977); *Utah-Idaho Sugar Company v. Intermountain Gas Company*, 100 Idaho 368, 597 P.2d 1058 (1979); *Grindstone Butte Mutual Canal Company v. Idaho Pub. Util. Comm'n*, 102 Idaho 175, 627 P.2d 804 (1981)[hereinafter *Grindstone Butte II*]; *J.R. Simplot Company v. Intermountain Gas Company*, 102 Idaho 339, 630

P.2d 131 (1981); *FMC Corp. v. Idaho Pub. Util. Comm'n*, 104 Idaho 265, 658 P.2d 936 (1983). These cases recognized the Commission can properly consider numerous factors when deciding to treat classes differently, and also recognized the Idaho Supreme Court has limited review of the Commission's decisions, as set out in *Idaho Code* § 61-629.[1]

However, later decisions from the Court, *Idaho State Homebuilders* and *Boise Water Corp.* [hereinafter the *Idaho State Homebuilders* cases], stated more succinctly the factors that the Commission can properly consider when establishing different treatment between classes of customers. The dissent in *Idaho State Homebuilders* noted the incongruity between that case and the standard described in *Grindstone Butte II*. "Today's opinion will seem to some to be inconsistent with our decision in [*Grindstone Butte II*], decided just one short year ago. . . . While today's opinion does not expressly overrule this holding, it certainly runs contrary to it." *Idaho State Homebuilders v. Idaho Pub. Util. Comm'n*, 107 Idaho 415, 690 P.2d 350, 356 (1984) (BISTLINE, J. Dissenting). This narrower statement of what the Commission can consider was repeated by the Court in *Boise Water Corp. v. Idaho Pub. Util. Comm'n*, 128 Idaho 534, 916 P.2d 1259, 1264 (1996) and referenced as dicta in *Building Contractors Ass'n of Southwestern Idaho v. Idaho Pub. Util. Comm'n*, 151 Idaho 10, 253 P.3d 684, 688 (2011) [hereinafter *Building Contractors*].

Neither of these lines of cases sets forth a neat rule of decision for the Commission to apply in this case because the facts at issue in this case, which involve export rates and producer-consumers, were not in play when the earlier cases were decided. It is a fairly recent development in the energy industry that customers are commonly both producers and consumers. Staff believes the principles of establishing rates for consumption apply to the Commission's authority to set rates for export; namely that rates must be fair, just, reasonable, non-discriminatory, and in the public interest. Therefore, while Staff believes the earlier lines of cases provide important principles for the Commission to apply, they do not dispositively answer the question currently in front of the Commission because of the unique facts of this case. Regardless whether the broader statement of factors or the narrower statement of factors define the Commission's authority to

[1] The Court recognized the well-established standard of review stated in *Grindstone Butte II* in a subsequent case, *J.R. Simplot Company v. Intermountain Gas Company*, 102 Idaho 329, 340, 630 P.2d 131, 132 (Idaho 1981)(stating, "[O]ur standards for review as set out in Grindstone II are well established. For those who are dissatisfied with the Commission's decision but have no effective appeal under the standards as set out in I.C. § 61-629 and Grindstone II, they should take their petition for redress to the legislature itself.")

distinguish between classes of customers, Staff believes valid factors support reasonable differentiation in this case under either statement of the standard.

a) *Grindstone Butte II.*

The *Grindstone Butte II* cases recognize the Commission was granted broad authority by statute to make decisions in a technical and specialized field. Nearly every party to this case who submitted a legal analysis cited to *Grindstone Butte II* as a still-current list of factors. Idaho Power's Opening Brief at 8-9, Boise City's Comments Regarding Existing On-Site Generation Customers at 9, ICEA's Brief Regarding Treatment of Existing Customers at 6. *But see* Idaho Irrigation Pumper's Association Brief Re: Treatment of Existing On-Site Generation Customers at 2 (citing *Building Contractors*), Brief of ICL and Vote Solar on Treatment of Existing Customers (not stating a legal standard).

According to the *Grindstone Butte II* cases, the Commission can use its sound and well-instructed judgment to weigh, among other factors, "every element and every circumstance which increases or depreciates the value of the property, or the service rendered" and "the reasonable efficiency and economy of operation and the actual differences in the situation of the consumers for the furnishing of the service."

> [T]he relevant criteria included the quantity of the utility used, the nature of the use, the time of use, the pattern of use, the differences in the conditions of service, the costs of service, the reasonable efficiency and economy of operation and the actual differences in the situation of the consumers for the furnishing of the service. Specifically, as between classes of customers within a schedule, the criteria included contribution to peak load, costs of service on peak demand days, costs of storage and economic incentives. (Citations omitted). 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. As this Court has stated in the past: '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. It is, after all, very much a question of sound and well-instructed judgment.'

Grindstone Butte II at P.2d 808-809 citing *Kiefer v. City of Idaho Falls*, 49 Idaho 458, 467, 289 P. 81, 84 (1930). Staff believes these factors clearly support the Commission differentiating between customers who signed up for 1:1 monthly netting and customers who will sign up for Net Hourly Billing because actual differences in the situation of the customers will impact the efficiency and operation of their systems. Customers under 1:1 monthly netting designed and installed systems to comply with the rules in place at the time. These systems are likely to have different characteristics than a system designed to meet the rules of Net Hourly Billing.

Grindstone Butte II also recognized that the Commission can consider all relevant criteria, including energy conservation, optimum use, and resource allocation when setting rates and acknowledged that the Commission's considerations can respond to current economic realities.

> Absent a legislative pronouncement to the contrary, we find it within the Commission's jurisdictional province to consider in its rate making capacity all relevant criteria including energy conservation and concomitant concepts of optimum use and resource allocation. In the proceedings below, we find no error in these considerations as made by the Commission in what it perceived as a need to develop new rate designs which would be responsive to current economic realities. It is in the public interest to make such considerations in decisions which impact upon the consumption of energy, especially in light of the advancing 'political, economic and environmental costs imposed on society.'

Grindstone Butte II P.2d at 810 (citing *Bunker Hill Co. v. Washington Water Power Co.*, 98 Idaho 249, 253, 561 P.2d 391, 395 (1977). Staff notes that the Commission, even after *Idaho State Homebuilders*, has continued to consider how rates affect energy conservation, optimum use, and resource allocation. Some examples are the proportion of fixed charges to volumetric charges and the assignment and design of demand-related charges to some customer classes. The Commission appropriately considers a broad range of factors when making these decisions.

The Court's view in the *Grindstone II* cases is consistent with the Commission's role as a legislative agency with the power to make policy decisions on a prospective basis under a broad standard of ensuring that rates are fair, just, reasonable, non-discriminatory, and in the public interest. *See e.g., Owner Operator Independent Drivers Ass'n, Inc. v. Idaho Pub. Util. Comm'n,* 125 Idaho 401, 871 P.2d 818, 825 (1994) (stating, "The Idaho Public Utilities Commission is a legislative agency"); *A.W. Brown Co., Inc. v. Idaho Power Co.*, 121 Idaho 812, 828 P.2d 841, 848

(1992) (referencing the Commission's actions as an "agency of the legislative department of government"); *Petition of Mountain States Tel. and Tel. Co.*, 76 Idaho 474, 284 P.2d 681, 683 (1955) (stating the Commission is "the agency of the legislative department of government . . . . So long as it regularly pursues its authority and remains within constitutional limitations, the courts have no jurisdiction to interfere with its determinations."). Restricting the Commission's authority to a limited subset of factors is contrary to the broad authority granted the Commission in statute and could impede the Commission's ability to ensure that its decisions are fair, just, reasonable, non-discriminatory, and in the public interest.

b) *Idaho State Homebuilders.*

The *Idaho State Homebuilders* statement of factors the Commission can consider when determining whether differences in customer classes are reasonable is narrower than the statement in *Grindstone Butte II*. "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*, P.2d at 355. The *Idaho State Homebuilders* cases do not contradict the statements in the *Grindstone Butte II* cases that each case must depend largely on its unique facts. Under the *Idaho State Homebuilders* statement of reasonable differences, the Commission still has the authority to determine that Net Hourly Billing customers are reasonably different than 1:1 monthly netting customers for a variety of reasons.

First, the list provided in *Idaho State Homebuilders* is a non-exclusive list. Second, 1:1 monthly netting customers and Net Hourly Billing customers face differences in the conditions of their service. 1:1 monthly netting customers signed up on the condition that their production and consumption would be netted monthly and that their positive net production would be carried forward indefinitely and applied to their bill as a 1:1 credit. Net Hourly Billing customers will take service on the condition that their production and consumption will be netted hourly, and positive net hourly energy will be credited at the Export Credit Rate. Third, systems installed under Net Hourly Billing will be designed to perform in a different manner than systems installed under 1:1 monthly netting. To benefit from the terms of Net Hourly Billing, an on-site generator is more likely to orient their panels more westerly to capture more energy in the late afternoon and evening hours when the customer is at home consuming energy, and they may be more likely to install batteries with their system. These systems will therefore be different in their "time, nature,

and pattern of the use." For any or all of these reasons, the Commission can recognize a reasonable difference between 1:1 monthly netting customers and Net Hourly Billing customers.

By reading *Idaho State Homebuilders* and *Boise Water Corp.* to merely state that the Commission cannot reasonably differentiate between customers solely based on when the customer comes on the system, the well-developed case law embodied in *Grindstone Butte II* will be given its due weight, and the broad discretion granted the Commission under the Public Utilities Law will be appropriately acknowledged.

III. The Company Cites to Non-Controlling Case Law in the Body of its Argument.

The Company cites a case from 1912 that has little to no bearing on the current case. In *City of Pocatello v. Murray*, the Supreme Court of Idaho held that a private resident who was operating as Pocatello Water Company could not rely on municipal ordinances as contracts to ensure a 5% rate of return over 50 years. 21 Idaho 180, 120 P. 812 (1912). The conflict predated the establishment of the Idaho Public Utilities Commission and the Idaho Public Utilities Law. In *Murray*, the Court stated that a utility could not rely on municipal ordinances to guarantee itself a fixed rate of return, and that the state has a continuing power to ensure that a private interest charges reasonable rates to serve the public under a franchise.

The difference between the Pocatello Water Company and producer-consumers of on-site generation is remarkable. Yet, the Company attempts to obviate the difference. "By engaging in the business of importing[2] electric energy back to the grid for credit, Idaho Power's existing residential and small general service customers with on-site generation have similarly 'undertaken . . . to serve the public for private gain.'" Idaho Power's Opening Brief at 13. Customers with on-site generation, as private citizens, first offset their own consumption and then sell the rest of the electricity they generate to the public utility, which then undertakes to serve the public for private gain, whereas the Pocatello Water Company served the public directly for private gain. It is uncertain why the Company is trying to collapse this difference, but if taken to its logical extreme, the Company's argument would imbue producer-consumers with the rights and responsibilities of a public utility. Doing so would unnecessarily and improperly raise a host of legal and policy concerns. For the matter at hand, *Murray* is easily distinguishable because it dealt with city ordinances and state laws that are not involved in this case.

[2] Staff understands this sentence to refer to an export by a customer-generator to the grid, even though the Company refers to "importing electric energy back to the grid for credit[.]"

The Company also references a 1989 Commission case that does not have particular relevance to the matter at hand. In IPC-E-89-5, the Commission stated that rates for consumption are subject to change and ratepayers pay a portion of all the Company's costs, not just the costs of the resources that were online when the ratepayer interconnected to the Company's system.

> It is important to remind electric utilities and potential special contract customers that this Commission has never 'vintaged' utility conditions at the time a customer begins service or expands service for the benefit of that customer. For instance, the expansion of Idaho Power's hydroelectric base into Hells Canyon in the late 1950s and early 1960s approximately coincided with the expansion of the load of its largest customer—FMC Corporation. FMC Corporation has not, however, been assigned a portion of the Hells Canyon dams as its own generation for cost-of-service purposes. Instead, FMC, as every other customer on the system, has been assigned proportionate shares of all of the Company's generation, from the low-cost hydrogenerating to the most expensive thermal projects. Similarly, special contract customers coming on in this time of surplus have no rights to continuation of their 'good deals' beyond the time of surplus.

Order No. 22489, 1989 WL 1779399 at *4. As argued in Staff's underlying brief, customers understand that rates for consumption can and will change. To hedge against future rate increases, some customers invested in on-site generation. These customers had no reason to expect, however, that the longstanding net-metering program design would change fundamentally. These customers do not seek to have the Company's conditions frozen in time; rather, they seek only to have their reasonable expectations recognized and ensure that the value of their investments, which were designed to comply with the rules in place at the time, are not unreasonably diminished.

The Company states that it is most legally defensible for the Commission to transfer existing customers to Net Hourly Billing according to the transition period established in the Settlement Agreement. Idaho Power Company's Opening Brief at 20-21. The Court has found that uniformity for uniformity's sake can also represent rate discrimination when the uniqueness of a class of customers is established. When there is substantial and competent evidence in the record establishing unique characteristics of a customer or a class, the Commission cannot establish uniform rates simply for the sake of uniformity. *Agricultural Products Corporation v. Utah Power & Light Co.*, 98 Idaho 23, 557 P.2d 617, 625 (1976); *Bunker Hill Co. Washington Water Power Co.*, 98 Idaho 249, 561 P.2d 391, 396 (1977).

IV. Notice to the Public that Rates May Change.

Staff concurs with the Company that the Commission and the Company have endeavored to notify the public that their rates are subject to change. Staff continues to believe there is a marked difference between understanding that rates may change and understanding that the fundamental program structure can change. The Company recited its efforts to warn customers that the net-metering program structure is subject to change. *See* Idaho Power Company's Opening Brief at 17-20. Staff notes that some warnings were written more clearly than others, were displayed more or less prominently, and were in place on different dates. Staff also notes that the Company felt it was necessary to pass legislation, the Residential Solar Energy System Disclosure Act, to more clearly state that the terms of the net-metering program are subject to change.

The most prominent warning provided to customers, other than that required by the recently enacted legislation, was the checkbox on the Application beginning January 1, 2017 stating, "I understand that the on-site generation and net metering service, including the rate structure and interconnection requirements, are subject to change and that current rates do not represent future pricing." This language was placed conspicuously, but does not fully address Staff's concern that customers reasonably did not grasp the difference in consumption rates and program structure. Also, the customer does not have a choice of which utility with whom they would like to interconnect, short of moving to another utility's service territory. This was a take-it-or-leave-it opportunity that had been stable for decades with a warning stating that "interconnection requirements" and "rate structure" may change at the bottom of one step in a process with a lot of steps.

Staff has reviewed the comments submitted by the public. Nearly all of them state a belief that it is unfair for the Company to go back on an agreement it had with its customers. These comments show a near uniform understanding among the public commenters that there was some level of guarantee that the net-metering program structure would not fundamentally change. All things considered, Staff believes a reasonable customer purchasing an on-site generation system could have made a long-term investment on the understanding that, while specific details and nuances of the program they were signing up for might change, the fundamental program structure would remain.

V. Conclusion.

Regardless whether the *Grindstone Butte II* factors apply, or whether the *Idaho State Homebuilders* factors apply, there are cognizable differences between customers who took service under 1:1 monthly netting and customers who will take service under Net Hourly Billing. The arguments submitted by the parties augment Staff's original position. The Commission has the discretion to determine whether these differences justify different treatment.

RESPECTFULLY submitted this 27th day of November, 2019.

Edward J. Jewell
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON THIS THIS 27TH DAY OF NOVEMBER 2019, I SERVED THE FOREGOING **REPLY 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:

LISA D. NORDSTROM
IDAHO POWER COMPANY
P.O. BOX 70
BOISE, ID 83707-0070
E-MAIL: lnordstrom@idahopower.com

TIM TATUM
CONNIE ASCHENBRENNER
IDAHO POWER COMPANY
P.O. BOX 70
BOISE, ID 83707-0070
E-MAIL: ttatum@idahopower.com
caschenbrenner@idahopower.com

BENJAMIN J. OTTO
ID CONSERVATION LEAGUE
710 N. 6TH STREET
BOISE, ID 83702
E-MAIL: botto@idahoconservation.org

ELECTRONIC SERVICE ONLY
dockets@idahopower.com

ERIC L. OLSEN
ECHO HAWK & OLSEN PLLC
P.O. BOX 6119
POCATELLO, ID 83205
E-MAIL: elo@echohawk.com
taysha@echohawk.com

ANTHONY YANKEL
12700 LAKE AVE.
UNIT 2505
LAKEWOOD, OH 44107
E-MAIL: tony@yankel.net

C. TOM ARKOOSH
ARKOOSH LAW OFFICES
P.O. BOX 2900
BOISE, ID 83701
E-MAIL: tom.arkoosh@arkoosh.com
taylor.pestell@arkoosh.com

TED WESTON
ROCKY MOUNTAIN POWER
1407 WN TEMPLE, STE. 330
SALT LAKE CITY, UT 84116
E-MAIL: ted.weston@pacificorp.com

YVONNE R. HOGLE
ROCKY MOUNTAIN POWER
1407 WN TEMPLE, STE. 320
SALT LAKE CITY, UT 84116
E-MAIL: Yvonne.hogle@pacificorp.com

BRIANA KOBOR
VOTE SOLAR
358 S 700 E, STE. B206
SALT LAKE CITY, UT 84102
E-MAIL: briana@votesolar.org

ELECTRONIC SERVICE ONLY
AL LUNA
aluna@earthjustice.org
NICK THORPE
nthorpe@earthjustice.org

DAVID BENDER
EARTHJUSTICE
3916 NAKOMA RD.
MADISON, WI 53711
E-MAIL: dbender@earthjustice.org

ABIGAIL R. GERMAINE
BOISE CITY ATTORNEY'S OFFICE
P.O. BOX 500
BOISE, ID 83701-0500
E-MAIL: agermaine@cityofboise.org

KELSEY JAE NUNEZ
IDAHO SIERRA CLUB
920 CLOVER DR.
BOISE, ID 83703
E-MAIL: kelsey@kelseyjaenunez.com

F. DIEGO RIVAS
NW ENERGY COALITION
1101 8TH AVE.
HELENA, MT 59601
E-MAIL: diego@nwenergy.org

JIM SWIER
MICRON TECHNOLOGY INC.
8000 S. FEDERAL WAY
BOISE, ID 83707
E-MAIL: jswier@micron.com

PETER J. RICHARDSON
RICHARDSON ADAMS PLLC
515 N. 27TH STREET
P.O. BOX 7218
BOISE, ID 83702
E-MAIL: peter@richardsonadams.com

PRESTON N. CARTER
GIVENS PURSLEY LLP
601 W. BANNOCK STREET
BOISE, ID 83702
E-MAIL: prestoncarter@givenspursley.com

ZACK WATERMAN
MIKE HECKLER
IDAHO SIERRA CLUB
503 W. FRANKLIN ST.
BOISE, ID 83702
E-MAIL: zack.waterman@sierraclub.org
michael.p.hecker@gmail.com

AUSTIN RUESCHHOFF
THORVALD A. NELSON
HOLLAND & HART LLP
555 7TH ST., STE. 3200
DENVER, CO 80202
E-MAIL: darueschhoff@hollandhart.com
tnelson@hollandhart.com

DR. DON READING
6070 HILL ROAD
BOISE, ID 83703
E-MAIL: dreading@mindspring.com

RUSSELL SCHIERMEIER
29393 DAVIS ROAD
BRUNEAU, ID 83604
E-MAIL: buyhay@gmail.com

Keri J. Hawker

KERI J. HAWKER
Legal Assistant to Edward J. Jewell