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Attorneys for Dry Creek Water Company LLC

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

INVESTIGATION INTO DRY CREEK)	CASE NO. DRY-W-24-01
WATER COMPANY, LLC OWNER OF A)	
WATER SUPPLY AND DISTRIBUTION)	DRY CREEK WATER COMPANY,
SYSTEM)	LLC'S REPLY COMMENTS
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COMES NOW, Dry Creek Water Company, LLC (“Dry Creek”), by and through its legal counsel, Kirton McConkie, and in accordance with Rule 203 of the Rules of Procedure of the Idaho Public Utilities Commission (“IPUC” or “Commission”) and respectfully submits its Reply in response to the Comments of the Commission Staff, dated June 12, 2024 (hereafter “Staff Comments”). Dry Creek addresses the procedural and substantive issues raised in the Staff Comments and demonstrates why Dry Creek should not be classified as a public utility subject to regulation by the Commission.

BACKGROUND

In February of 2017, Dry Creek was formed to distribute water to the Dry Creek

Ranch Homeowners' Association, an Idaho non-profit corporation ("HOA") that represents the interests of homeowners in the Dry Creek Ranch Planned Community. On a monthly basis, Dry Creek issues a single bill to its customer, the HOA. The HOA, in turn, charges residents of Dry Creek Ranch for their respective use of the water for potable and irrigation purposes. Dry Creek has not made a cumulative net profit after depreciation on the water distributed to the HOA, and in fact, has historically operated at a significant loss. Likewise, the HOA does not profit from what is collected for water expenses from the Dry Creek Ranch residents. Pursuant to the Water Delivery Agreement between Dry Creek and the HOA, the "HOA warrants that assessments to the homeowners and water users for water use will not exceed the fees and charges received from [Dry Creek] Water Company, plus the internal costs of the HOA in managing the assessments and collections and payments, but not to include any profit of the HOA."

In October of 2022, the IPUC began an investigation into whether Dry Creek was operating as an unregulated public utility. A timeline of the key exchanges that occurred in that investigation between IPUC and Dry Creek representatives between October of 2022 and March of 2023 is set forth in a memorandum authored by Albert P. Barker, which was previously provided to Deputy Attorney General Hardie. (Mr. Barker's March memorandum is attached hereto and incorporated by this reference.) After performing an informal investigation for approximately 16 months as to whether Dry Creek met the criteria to be a regulated public utility, on May 24, 2024, the IPUC issued a formal Notice of Investigation (the Order), which provided the case could be reviewed through written submissions. The Order set forth a deadline for Staff and public comments of June 12, 2024, and a Respondent reply comment deadline of June 26, 2024. Staff filed its

comments on June 12th. No public comments were filed. On June 24, 2024, Dry Creek retained the law firm of Kirton McConkie as legal counsel in these proceedings. The following day, Kirton McConkie filed an expedited petition on behalf of Dry Creek to amend the Order to extend the deadline for reply comments. At the time of this filing, a ruling on the petition to amend had not yet been received.¹

ANALYSIS

A. Dry Creek is Not Subject to Regulation by the Commission.

Under Idaho Code § 61-129, all “water corporations” are declared to be public utilities and are subject to the jurisdiction, control, and regulation of the Commission. The term “public utility” covers cases “[w]here the service is performed and the commodity delivered directly to the public or some portion thereof, and where the service is performed or the commodity delivered to any corporation or corporations, or any person or persons, who in turn, either directly or indirectly or mediately or immediately, performs the services or delivers such commodity to or for the public or some portion thereof...” I.C. § 61-129(1). The term “water corporation” includes “every corporation or person ... owning, controlling, operating or managing any water system for compensation within [Idaho].” I.C. § 61-125. Under Idaho Code § 61-104 “corporation” does not include a “mutual nonprofit or cooperative gas, electrical, water or telephone corporation or any other public utility organized and operated for service at cost and not for profit. . . .” I.C. § 61-104.

Under the plain language of Idaho law, the Commission has no authority to regulate Dry Creek because Dry Creek is not a corporation as defined in § 61-104.

¹ Having not received a ruling on the petition to amend the Order to extend the deadline for reply comments, Dry Creek is submitting preliminary reply comments. In the event the petition to amend is granted, Dry Creek respectfully reserves the right to amend and/or submit additional comments to this Reply.

Specifically, Dry Creek is not operating and never has operated as a for profit company. Rather, as evidenced by Dry Creek’s financial statements showing operational losses, Dry Creek has always been registered as a limited liability company operating on a not-for-profit basis.

B. Dry Creek is Not a Water Corporation

Even if the Commission determines that Dry Creek is a corporation under Idaho Code §61-104, the Commission must also determine that Dry Creek is a “water corporation” under Idaho Code § 61-125. The Idaho Supreme Court stated that “[t]o hold that a water corporation is a public utility, because it receives compensation for water owned by it and furnished to a limited number of inhabitants of Boise, within a limited area, would be an unreasonable interpretation of [Idaho law].” *Stoehr v. Natatorium Co.*, 34 Idaho 217, 221, 200 P. 132, 133 (1921). Such a construction of the law “may involve the question of the constitutionality of the statutes.” *Id.* The Court further held that “[i]n determining whether a corporation is a public utility, we must not lose sight of the basic principles underlying governmental control of business, nor fail to appreciate and respect constitutional limitations.” *Id.* “To hold that property has been dedicated to a public use is not a trivial thing and such dedication is never presumed without evidence of unequivocal intention.” *Id.* at 222, 200 P. at 133.

In this case, Dry Creek has not dedicated its services to public use and does not intend to dedicate any of its property to the service of the general public. Moreover, the Staff Comments point to no “evidence of unequivocal intention” that Dry Creek desires to be or has held itself out as being a public utility. In fact, Dry Creek serves only the HOA, which is itself not a regulated public utility. Dry Creek informed the Commission of this in

its December 5, 2022 letter wherein it stated “[t]he Company intends to continue serving only one customer, which is the HOA. The Company will not supply water to the public.” Absent evidence of unequivocal intent to become a utility devoted to public use, Dry Creek cannot be considered a water corporation as defined by Idaho Code § 61-125. Therefore, Dry Creek is not subject to the Commission’s jurisdiction.

C. Dry Creek’s Sole Customer is an HOA

Additionally, as described in the attached March memorandum, Dry Creek was specifically set up to solely serve the HOA. This decision was based on clear guidance from the Commission confirming that Homeowners’ Associations are specifically exempt from the regulatory oversight of the Commission and that entities with only one customer are not subject to the Commission’s jurisdiction:

IPUC Regulated Water Company - Any small water system serving more than one customer is subject to the regulatory jurisdiction of the Idaho Public Utilities Commission as provided by Idaho Code, Title 61 unless they are organized as a homeowners association, formal water district, municipality or other mutual non-profit organization represented by board members. The Commission’s jurisdiction and authority is very broad and include approval of authorized service area, rates and charges, accounting and reporting requirements, service quality, customer relation’s rules and customer information rules.

<https://puc.webstg.idaho.gov/FileRoom/PublicFiles/water/swc/SWC%20Types%20of%20Water%20utilities.pdf>.

Moreover, “[t]he furnishing of water to one person or corporation, under a contract, does not constitute a delivery of water to the public or some portion thereof.” *Humbird Lumber Co. v. Pub. Utils. Comm’n*, 39 Idaho 505, 511, 228 P. 271, 273 (1924). “A corporation becomes a public service corporation, and therefore subject to regulation as a public utility, only when and to the extent that the business of such corporation becomes devoted to a public use.” *Id.* at 512, 228 P. at 273 (quoting *Stoehr*, 34 Idaho at 221, 200

P. at 133). It is undisputed that the HOA is a private, non-profit entity charged with delivering water to its members under the terms of its agreement with Dry Creek. Furthermore, because Dry Creek provides services to only the HOA and the HOA is exempt from the Commission's oversight, Dry Creek should also be exempt. See *Humbird Lumber Co.*, 39 Idaho at 508, 228 P. at 271 (holding that a lumber company which supplied water to one customer—an exempt railroad—was not a public utility subject to the Commission's jurisdiction).

The Staff Comments contend that Dry Creek operates as a public utility because it charges the HOA, who then recoups its charges from its members. The Staff Comments also insist that because HOA members lack control over Dry Creek's operations or the rates charged for water services, regulation is necessary. Dry Creek disagrees with these characterizations. Dry Creek's primary and sole customer is the HOA entity, not the individual homeowners. The contractual relationship between Dry Creek and the HOA is a private arrangement wherein the HOA assumes responsibility for distributing water and billing the members. This arrangement does not equate to providing services to the public at large, a key criterion for public utility status under Idaho Code § 61-129(1). Moreover, the fact that HOA members are entitled to one vote for each lot owned and have the power to remove HOA Directors without cause nullifies the Staff's argument that regulation of Dry Creek is necessary to protect HOA members.

D. Financial Review

Staff's comments related to its financial review do not offer any proof to contest Dry Creek's financial statements indicating it has operated at a loss (and is projected to operate at a loss for the foreseeable future). Rather, in an effort to show that Dry Creek

should be regulated, Staff judges the adequacy of Dry Creek's current accounting practices by comparing its past accounting practices to those accounting practices required for regulatory accounting purposes. Staff quoted Idaho Code § 61-525 for the proposition that the Commission is vested with the authority to require any and all public utilities to carry a proper and adequate depreciation amount. However, as articulated above, the IPUC has no authority to regulate companies that are operating at cost. Indeed, the Idaho Supreme Court has repeatedly stated that the Commission "has no authority other than that granted to it by the legislature. It exercises a limited jurisdiction, and nothing is presumed in favor of its jurisdiction." *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 418, 690 P.2d 350, 353 (1984). Congress enacted rules allowing bonus depreciation in order to stimulate the economy and encourage asset investment, and that is exactly what has occurred here. As confirmed by Dry Creek's records, there has never been any positive cash flow, because of the tremendous expense of infrastructure (even considering bonus depreciation). Dry Creek has continued to invest (at a loss) into infrastructure, building its water company out in phases. It is forecasted it will take an additional ten million dollars of investment into infrastructure before completion.

The Staff Comments merely conclude that "[t]he use of bonus depreciation *may* show a profitable company operating at a loss for income tax purposes but maintaining profitability under generally accepted accounting principles." Dry Creek's use of bonus depreciation, by itself, does not establish that Dry Creek has relinquished its not-for-profit operating status. Moreover, it is the Commission, and not Dry Creek, that must produce evidence that Dry Creek operates for profit such that it falls under the jurisdiction of the

Commission. See I.C. § 61-104. Staff's lengthy investigation yielded no evidence of a profit. At most, a private water company was not implementing Idaho public regulatory accounting preferred practices. This isn't sufficient to impose regulation.

The financial data provided to the Staff confirms that Dry Creek is not generating profits from its operations. The mere possibility that Dry Creek would receive sufficient deferred income tax liability to render it profitable in the future does not currently make it a profitable company subject to Commission oversight. Therefore, its use of bonus depreciation is inconsequential for the purposes of this proceeding.

E. Staff's Use of Staff Non-Exclusive Criteria is Invalid

In the Staff Comments, five criteria were identified by Staff as considerations for determining the jurisdiction of the Commission over Dry Creek:

- a. Is the Company a Non-Profit or a Co-op?
- b. Does the Company operate for the service of customers at cost and not for compensation?
- c. Is the Company owned by its customers?
- d. Do the customers have control of the rates charged by the Company?
- e. Do the customers control the operations and capital expenditures of the Company?

See Staff Comments, p. 3.

The Staff Comments do not identify the source of these criteria or any legal basis for the Commission to apply these to its jurisdictional analysis of Dry Creek.

The sole issue in this case is whether Dry Creek is a water corporation operating as a public utility in Idaho thereby allowing the Commission to exercise jurisdiction over

Dry Creek. As stated previously, the IPUC “has no authority other than that granted to it by the legislature. . . and nothing is presumed in favor of its jurisdiction.” *Idaho State Homebuilders*, 107 Idaho at 418, 690 P.2d at 353. Specifically, the Commission will have jurisdiction over Dry Creek if and only if it falls under the definition of “corporation.” See I.C. § 61-104. Simply put, if Dry Creek is a (1) mutual nonprofit water corporation, (2) cooperative nonprofit water corporation, or (3) any other public utility organized and operated for service at cost and not for profit, then Dry Creek is not a corporation subject to the Commission’s jurisdiction. The Commission Staff does not have the authority to add criteria to section 61-104 to extend the Commission’s jurisdiction.

Therefore, the only relevant criteria to be applied by the Commission Staff are (i) is Dry Creek a non-profit or co-op; and (ii) does Dry Creek operate for the service of customers and not for profit. All other considerations are inappropriate in this circumstance. Therefore, the Commission should disregard all other criteria proposed by the Staff.

CONCLUSION

Based on Idaho Supreme Court precedent and the Idaho statutes and guidelines outlining the Commission’s jurisdiction, the Commission lacks jurisdiction over Dry Creek because Dry Creek does not qualify as a corporation under Idaho Code § 61-104 or a water corporation under Idaho Code § 61-125. Moreover, the policy objectives of regulating public utilities include ensuring fair rates, reliable service, and protection from monopolistic practices. In this case, regulation is unnecessary because (i) the HOA, as Dry Creek’s sole customer, has the ability to negotiate terms and rates, providing an internal check on potential abuses; (ii) the private contractual nature of the relationship

between Dry Creek and the HOA ensures that disputes can be resolved through civil litigation without involving regulatory oversight; and (iii) Dry Creek's not-for-profit operational status and in reality, significant operational losses, indicate no risk to the public at large.

DATED this 26th day of June 2024.

/s/ Ashton G. Ruff
Ashton G. Ruff
Attorney for Dry Creek Water Company

MEMORANDUM

FROM: Albert P. Barker
DATE: March 16, 2023
RE: Dry Creek Ranch Water Co.
Dry Creek HOA

The PUC wrote to “Dry Creek Ranch Subdivision Water” on October 12, 2022, stating that the PUC has information that Dry Creek Ranch Subdivision Water “may be” operating as an unregulated public utility. It described the PUC’s authority as:

Pursuant to *Idaho Code* § 61-501, the Commission has the authority to supervise and regulate every public utility operating in Idaho. Under *Idaho Code* § 61-125, a “water corporation” includes every corporation or person owning, controlling, operating, or managing any water system in the State of Idaho for compensation. A water corporation is regulated as a public utility in Idaho if it performs a service or delivers a commodity directly to the public. *Idaho Code* § 61-129. Based on this authority, Commission Staff believes Dry Creek Ranch Subdivision Water may be operating as a public utility and should be regulated by the Commission.

(emphasis added).

The PUC’s letter went on to state:

“Any water corporation operating or managing a small water system is subject to the regulatory jurisdiction of the Commission as provided by Idaho Code, unless the system is organized as a Homeowner’s Association, formal water district, municipality, or other mutual non-profit organization represented by board members.”

(emphasis added).

The PUC asked if Dry Creek Ranch Subdivision Water intended to operate as a Homeowner’s Association, mutual non-profit or other organization outside the PUC’s jurisdiction.

There is no entity known as Dry Creek Ranch Subdivision Water, so the Dry Creek Ranch Homeowners Association (HOA), which does deliver water directly to the homeowners, wrote back to the PUC in a November 2, 2022 letter, explaining that the HOA provides and intends to continue to provide water to the homeowners.

PUC staff contacted the Dry Creek Ranch HOA President Randi Meredith by telephone and confirmed to her that the HOA would not be regulated, but requested the name and contact information for the water company serving the HOA. Ms. Meredith stated that the HOA purchases water from Dry Creek Water Company and provided an address and contact information. On November 17, 2022, the PUC wrote to Dry Creek Water Company LLC (the Company), asserting that the PUC had information indicating that the Company was operating as an unregulated utility. We since learned from PUC staff that this conclusion was based on the PUC's staff review of IDEQ records of public water systems regulated by IDEQ under the Safe Drinking Water Act. In its November 17, 2022 letter the PUC asserted that it had broad regulatory authority and repeated verbatim the descriptions of the scope of its authority contained in its October 12, 2022 letter to Dry Creek Ranch Subdivision Water. The PUC again asked if water would be provided to the homeowners by a homeowner's association, mutual non-profit, or other exempt organization, and asked how the Company plans to deliver water to "customers."

Dry Creek Water Co. responded on December 5, 2022, explaining that it did not deliver water to the general public. It delivers water to a single customer – Dry Creek Ranch HOA.

The PUC responded to Dry Creek Water Co. in a letter dated January 11, 2023. The PUC explained that staff "considers the following factors" in determining jurisdiction – (1) whether the company plans to provide water to "customers" as a regulated utility; (2) whether the company provides water as a municipal corporation, mutual non-profit, cooperative water corporation or other entity organized and operated as a non-profit and (3) whether the company intends to continue to provide water to "customers". Notably the PUC dropped any reference to homeowners associations that had been included in its prior two letters. The January letter goes

on to state that staff has concluded that the Company should be regulated and will recommend that the Commission institute a formal investigation. The letter made no mention about the role of the HOA in delivering water to the general public. It is not clear from this letter or in discussions with staff and deputy AGs, how the PUC regards the role of the Dry Creek Ranch HOA in delivering water to its homeowners or whether the PUC considers HOAs as exempt from PUC jurisdiction or not.

In a meeting with staff and deputy AGs there was some indication that staff, counsel, or the Commission believed that an HOA would not qualify as a non-regulated entity, unless its board was actively controlled by the homeowners. Staff and the deputy AGs did not explain what statutory authority or PUC decision authorized such a distinction based on whether the homeowners had achieved control over the HOA. The PUC statutes provide an exclusion for “any other public utility organized and operated for service at cost and not for profit...” Idaho Code § 61-104. Unlike the reference to a “mutual non-profit” in this section, this latter provision of §61-104 does not require the non-profit to be operated by a board comprised of or controlled by individual homeowners or landowners.

Dry Creek Water System was set up years ago so that the HOA and not the Company delivered water to the general public. This decision was based on guidance from the PUC confirming that HOA’s fit with the statutory exemption from PUC jurisdiction and that entities with only one customer were not subject to PUC jurisdiction. *See* attached PUC Guidance. Importantly, Dry Creek Ranch Homeowners’ Association Inc. which delivers water to the homeowners is organized and operates as a non-profit.

The statutory underpinning the PUC’s jurisdiction involve definitions of a “corporation,” Idaho Code § 61-104; a “water corporation,” Idaho Code § 61-125; and a “public utility,” Idaho

Code § 61-129. Jurisdiction begins with the definition of a corporation, which expressly excludes any “public utility organized and operated for service at cost and not for profit.” Idaho Code § 61-104. An entity cannot be a water corporation or a public utility unless it qualifies as a corporation within the meaning of Idaho Code § 61-104.

Here the Dry Creek Ranch HOA is the entity that delivers water to the general public *i.e.* the homeowners. Dry Creek Water Co. delivers only to the HOA, a single customer, not customers and not the general public.

In *Humbird Lumber Co. v. PUC*, 39 Idaho 505, 228 P. 271 (1924), the Supreme Court held that a lumber company which supplied water to one customer – a railroad – was not a public utility subject to PUC jurisdiction. *Humbird* cited with approval the case of *Stoehr v. Natatorium Co.*, 34 Idaho 217, 200 P. 132 (1921). *Stoehr* is discussed in more detail below. Importantly, *Humbird* supports the “one customer” rule set out in PUC’s guidelines. See attached PUC Guidance. Dry Creek Water Company does maintain and operate the community water system for the HOA and the Dry Creek community under IDEQ rules. However, an entity need not be a regulated PUC public utility to have to comply with IDEQ Safe Drinking Water regulations, IDAPA 58.01.08.

In reviewing this situation, we are aware of two particularly pertinent PUC proceedings. One is a matter cited by PUC staff in the recent meeting. *In re Mayfield Springs Water Company*, Case No. MSW-W-08-01, Order No. 30628 (Aug. 26, 2008). Staff stated that the PUC determined in *Mayfield Springs* that a Water Company in the same circumstances as Dry Creek Water Company must be regulated as a public utility. That is not the case. Mayfield Springs Water Company applied to the PUC for a certificate of public convenience and necessity and admitted in a prior court proceeding that it was a regulated public utility. It did not assert

either before the PUC or the court that it was exempt from PUC jurisdiction or that the HOA was delivering water to the general public.

The second PUC proceeding of note is a recent PUC decision in *Sorrells v. Sunnyside Park Utilities, Inc.*, Case No. GNR-U-22-03, Order No. 35645 (December 27, 2022). In *Sorrells* the PUC did determine that Sunnyside was a regulated public utility. However, the grounds were different. No HOA was involved. Rather, Sunnyside delivered water to 19 commercial customers. Sunnyside argued that delivery to 19 customers was not delivery to the general public to qualify it as a public utility. Sunnyside relied on the case of *Stoehr v. Natatorium Co.*, 34 Idaho 217, 200 P. 132 (1921), which held that a company was not a public utility just because it received compensation for water furnished to a “limited number of the inhabitants of Boise.” This the Court held was not a service “devoted to a public use.” See also *Codd v. McGoldrick Lumber*, 48 Idaho 1, 279 P. 298 (1929)(affirming *Stoehr*’s holding). Sunnyside argued that it likewise only supplied water to a limited number of customers and so was exempt, like the Natatorium in *Stoehr*. *Stoehr* has not been overruled, but the PUC concluded that *Stoehr* was no longer good law and held that supplying water to 19 customers met the definition of providing water to the general public.

In addition, the PUC also stated that Sunnyside had not demonstrated that it was either organized or “operated” as a non-profit, and so was not exempt. (The PUC did not explain why “operated” was placed in quotes in the *Sorrells* decision. Nor did the deputy AGs or staff offer an explanation of what the PUC meant during the meeting with Dry Creek Water Company.). This situation is very different here, even if the HOA legal structure and the HOA delivery of water to the customers is ignored, because Dry Creek Water is not “operated” for profit, even

though not currently organized as a non-profit entity. There is no dispute, however, that the HOA is a non-profit entity, and is both as operated and organized as not for profit.

Based on Idaho Supreme Court precedent, the PUC jurisdictional statutes and guidelines, neither the Dry Creek Ranch HOA nor the Dry Creek Water Company is a regulated public utility subject to PUC jurisdiction.

Types of Water Utilities and who regulates them

The Idaho Public Utilities Commission is given the power and jurisdiction by the Idaho Legislature to supervise and regulate every water company that is a public utility in the State of Idaho. This authority is broad enough to include the power to do all things necessary to carry out the spirit and intent of the provisions of the public utilities' laws. A water company is a public utility if it is a private entity, either corporation or person, that owns, controls, operates or manages any water system for compensation within the state. Both for-profit and non-profit companies may be regulated

IPUC Regulated Water Company - Any small water system serving more than one customer is subject to the regulatory jurisdiction of the Idaho Public Utilities Commission as provided by Idaho Code, Title 61 unless they are organized as a homeowners association, formal water district, municipality or other mutual non-profit organization represented by board members. The Commission's jurisdiction and authority is very broad and include approval of authorized service area, rates and charges, accounting and reporting requirements, service quality, customer relation's rules and customer information rules.

Home Owners Association (HOA) is a legal entity that governs a subdivision, condominium or town home development or planned community. HOA is mandatory for property owners with the development. The HOA is run by a board, which is bound by the HOA bylaws and board positions are filled by election or appointment. The HOA collects a fee assessment from all owners to maintain common areas, address legal and safety issues, and enforce restrictions that are applicable to that particular residential area. The HOA also provides residents with a platform to address common concerns of the community.

Water Association is a not for-profit organization that provides oversight for a water system. Often set up similar to a HOA, with members represented by homeowners and jurisdiction is limited to water issues in a defined area.

Water District - Created by the Idaho Department of Water Resources (IDWR), through division of the state's public streams or water supplies into water districts for which the courts have adjudicated priorities of appropriations. The director also has authority to revise the boundaries of existing districts, combine two or more districts and /or abolish districts if such action is necessary to properly administer water uses. Each active water district in Idaho has a water master who oversees water distribution within the district. Title 42 Irrigation and Drainage – Water Rights and Reclamation, Chapter 6 Distribution of Water Among Appropriators, [Section 42-604](#).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of June 2024, I served the foregoing document upon the following named parties by the method indicated below, and addressed to the following:

Idaho Public Utilities Commission:	<input type="checkbox"/>	Hand Delivered
Commission Secretary	<input type="checkbox"/>	U.S. Mail
Idaho Public Utilities Commission	<input type="checkbox"/>	Overnight Mail
P.O. Box 83720 Boise, ID 83720-0074	<input type="checkbox"/>	FAX
secretary@puc.idaho.gov	<input checked="" type="checkbox"/>	Email



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