



LARRY D. RIPLEY
Senior Attorney

January 4, 2002

Ms. Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 W. Washington Street
P.O. Box 83720
Boise, Idaho 83720-0074

Re: Case No. GNR-E-01-02
Idaho Power Company's Opening Brief

Dear Ms. Jewell:

Enclosed for filing with the Commission are an original and seven (7) copies of Idaho Power Company's Opening Brief regarding the above-described case.

I would appreciate it if you would return a stamped copy of this transmittal letter for our files.

Very truly yours,

Larry D. Ripley

LDR:jb
Enclosures

c: Dean J. Miller
Stuart F. Feldstein
Ronald L. Williams

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

CABLE ONE, INC.,)	
)	
Petitioner, Complainant,)	CASE NO. GNR-E-01-02
)	
vs.)	IDAHO POWER COMPANY'S
)	OPENING BRIEF
IDAHO POWER COMPANY,)	
)	
Respondent.)	
_____)	

Pursuant to the Stipulation of the parties, Idaho Power Company ("Idaho Power" or "the Company") herewith submits its Opening Brief in this matter.

INTRODUCTION

As has been agreed by the parties, Cable One, Inc. ("Cable One") provides cable television service and offers high speed internet access to customers in Idaho communities served by Idaho Power. Idaho Power permits Cable One to attach to its poles and thus Cable One has wires and auxiliary equipment attached to poles

owned by Idaho Power. Cable One and Idaho Power have been unable to agree as to the rates for continued pole attachment service that Idaho Power will charge Cable One. Cable One thereupon filed a complaint with the Idaho Public Utilities Commission separating its complaint into (1) a request for determination that it was entitled to pole attachment rates based upon a specified formula, and (2) that once the Commission determined issue No. 1, that the Commission set the appropriate pole attachment rates for Cable One. Cable One, Idaho Power and ICTA¹ have agreed that the first issue to be resolved is the manner and method by which the rates to be charged Cable One can be determined by the Commission. That issue has been succinctly stated in the stipulation of the parties wherein it was agreed that the initial issue to be determined was the following:

INITIAL ISSUE

Whether Cable One is entitled to pole attachment rates based on a “cable only” formula and the formula set forth *In the Matter of the Washington water Power Company v. Benewah Cable Company et. al.*, Case No. U-1008-206, Order No. 19229; or whether Idaho Power may charge pole attachment rates based on a different formula.

NO PREDETERMINED FORMULA FOR POLE ATTACHMENT RATES

Under 47 U.S.C. § 224(c)(1) (2000), the Telecommunications Act of 1996 (TA96) specifically provides that the Federal Communications Commission “may not regulate rates, terms, and conditions for, or access to, pole attachments when these matters are regulated by the state.” As is set forth in Cable One’s petition to this

¹ The Idaho Cable Telecommunication Association (“ICTA”) was permitted to intervene in this matter by order of the Commission.

Commission, Paragraph VIII, at p. 3, the Idaho Public Utilities Commission has certified that it regulates rates for pole attachments. Accordingly, for purposes of this discussion, a determination does not have to be made if the providing of internet service by Cable One has removed Cable One from the jurisdiction of the Commission under Idaho Code § 61-538 (cable television attachments) and that this proceeding should be conducted under Idaho Code § 61-514 (public utility attachments). Both provisions provide for dispute resolution concerning the use of Idaho Power's poles by Cable One.

Idaho Code § 61-538 provides in pertinent part:

Whenever a public utility and a cable television company are unable to agree upon the rates, terms or conditions for pole attachments or the terms, conditions or cost of production of space needed for pole attachments, then the commission shall establish and regulate the rates, terms and conditions, . . . To the extent applicable, the procedures set forth in title 61, Idaho Code, shall apply under the provisions of this section.

Idaho Code § 61-514 provides in pertinent part:

Whenever the commission, after a hearing had upon its own motion or upon complaint of a public utility affected, shall find that public convenience and necessity require the use by one (1) public utility of the . . . poles . . . belonging to another public utility, . . . and that such public utilities have failed to agree upon such use or the terms and conditions or compensation for the same, the commission may by order direct that such use be permitted, and prescribe a reasonable compensation and reasonable terms and conditions for the joint use.

It is also clear that the Commission's jurisdiction under Idaho Code § 61-514 and Idaho Code § 61-538 are "dispute resolution" statutes. That is, the Commission's jurisdiction to resolve a dispute is triggered when one of the parties to the dispute invokes the jurisdiction of the Idaho Public Utilities Commission. For purposes of further discussion, Idaho Power will assume that Cable One's pole attachment rates should be set under

Idaho Code § 61-538. Idaho Power emphasizes, however, that whether or not Idaho Code § 61-538 is the applicable provision, the result is the same. The Commission has jurisdiction to resolve the dispute, and both Cable One and Idaho Power have agreed to that premise.

The dispute that the Commission must determine is whether or not there is a predetermined formula for arriving at what the pole attachment rate should be. Certainly the aforementioned statutes providing the Commission's jurisdiction over pole attachment fee disputes do not require the application of a specific pole attachment fee formula by the Commission. To the contrary, the statutes grant broad authority to the Commission in resolving pole attachment fee disputes. Idaho Code § 61-538 states in pertinent part that:

Whenever a public utility and a cable television company are unable to agree upon the rates, terms or conditions for pole attachments or the terms, conditions or cost of production of space needed for pole attachments, then the commission shall establish and regulate the rates, terms and conditions, and cost of providing space needed for pole attachments so as to assure a public utility the recovery of not less than all the additional costs of providing and maintaining pole attachments nor more than the associated capital cost and operating expenses of the utility attributable to that portion of the pole, duct, or conduit used for the pole attachment including a share of the required support and clearance space.

These pole attachment fee guidelines do not in any way dictate that the Commission must apply a "cable only" formula as argued by Cable One. As far as Idaho Power is concerned, this is a matter of first impression, as prior to the current dispute, pole attachment rates have always been amicably resolved between Idaho Power and the party desiring to attach to Idaho Power's poles. Further, the "cable only" formula

proposed by Cable One is not pertinent, as Idaho Code § 61-538 makes no reference to, or distinction between, “cable only” and other attachments.

Cable One’s reliance upon *In the Matter of the Washington Water Power Company v. Benewah Cable Company et. al.*, Case No. U-1008-206, Order No. 19229 (November 7, 1984), as being a precedent for how Idaho Power’s pole attachment rates should be determined is misplaced. Clearly, that order is confined to the parties as well as the facts that were presented in that proceeding. Idaho Power was not a party to that proceeding and was not a participant in any way. The Commission makes it clear in its Order No. 19229 that it accepted the representations of the parties for purposes of that proceeding. The Commission, for example, specifically reserved for another case “the question of whether embedded cost methods must be used to calculate cable pole attachment rates when the parties do not agree on their use.” Order No. 19229, p. 4. A reading of the Commission’s order can lead to no other conclusion but that the Commission determined that it would accept the contentions of the parties in the proceeding. To contend that this order somehow restricts the positions taken by the parties or the evidence that can be submitted in a determination of what Idaho Power’s pole attachment rates should be for Cable One is without any support in law or in fact.

The Commission’s jurisdiction having been triggered under a dispute resolution statute, the dispute should be resolved based upon the positions taken by the parties and the evidence submitted by both sides. A decision of the Commission issued nearly twenty years ago involving another electric utility in the state of Idaho is simply not pertinent. RP 151 and 152 provide the basis upon which the Idaho Commission will resolve the dispute once it is brought before the Commission. Just as a rate proceeding

involving either the general rates of Avista or Scottish Power are not binding upon the Commission when making a determination as to what the rates for Idaho Power should be, neither is a cable attachment order issued by the Commission for another electric utility in the state of Idaho binding upon Idaho Power or the Commission.

In summary, The Commission should rule that it will determine the appropriate pole attachment rates to be charged Cable One by Idaho Power based on the positions taken by the parties and the evidence submitted in the proceeding to set such rates. In making such a determination, the Commission is not bound to follow any particular formula, and the Commission should rule that Cable One is not entitled as a matter of law to pole attachment rates based on a “cable only” formula and the formula set forth *In the Matter of the Washington Water Power Company v. Benewah Cable Company et. al*, Case No. U-1008-206, Order No. 19229. Idaho Power should be free to submit for consideration by the Commission any evidence or any formula that it deems appropriate for the determination of Idaho Power’s pole attachment rates to be charged Cable One.

DATED at Boise, Idaho, this 4th day of January, 2002.

LARRY D. RIPLEY
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of January, 2002, I served a true and correct copy of the within and foregoing IDAHO POWER COMPANY'S OPENING BRIEF upon the following named parties by the method indicated below, and addressed to the following:

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