



IDAHO POWER COMPANY  
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**LARRY D. RIPLEY**  
Senior Attorney

January 25, 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 Reply Brief

Dear Ms. Jewell:

Enclosed for filing with the Commission are an original and seven (7) copies of Idaho Power Company's Reply 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,

A handwritten signature in black ink, appearing to read "Larry D. Ripley". The signature is fluid and cursive.

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
	)	REPLY BRIEF
IDAHO POWER COMPANY,	)	
	)	
Respondent.	)	
_____	)	

Pursuant to the Procedural Order of the Commission, Idaho Power Company ("Idaho Power" or "the Company") herewith submits its Reply Brief in this proceeding. Since the Idaho Cable Telecommunications Association ("Association") adopted the brief of Cable One, Inc. ("Cable One"), the only brief that requires a response is the brief of Cable One.

The issue raised by Cable One can be easily postulated, that is:

Are Idaho Power and the Idaho Public Utilities

Commission bound to follow the Commission's decision *In the Matter of the Washington water Power Company v. Benewah Cable Company et. al.*, Case No. U-1008-206, Order No. 19229 (the "Benewah Decision") because it is a rule?

The response to that issue is equally evident. The Benewah Decision is not a rule that is dispositive of the rate dispute between Cable One and Idaho Power.

As set forth in Idaho Power's Opening Brief, the "methodology" by which the Commission is to resolve pole attachment rate disputes that come before it is found in the Commission's Rules of Practice and Procedure, i.e., RP 151 and 152.

151. TIMETABLE FOR DECISION--CABLE POLE ATTACHMENT PROCEEDINGS (Rule 151).

Whenever a public utility, as defined in Section 61-538, Idaho Code, and a cable television company, as defined in Section 61-538, Idaho Code, 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, and either the public utility or the cable television company files an application, complaint, or petition asking the Commission to establish and regulate rates, terms, or conditions, the Commission shall decide the case within thirty (30) days; provided, the Commission shall have the right, upon reasonable notice, to enter upon a hearing concerning the propriety of such proposed rate, term, or condition and to extend its period for considering the application, complaint, or petition an additional thirty (30) days plus five (5) months and, for good cause shown on the record, an additional sixty (60) days.

152. RULES OF PROCEDURE TO BE USED (rule 152).

These Rules of Procedure apply to all proceedings concerning the rates, terms, or conditions for cable pole attachments, provided, that any such proceeding, whether denominated an application, complaint or petition, shall be processed according to the timetable of Rule 151.

These rules set forth the methodology by which the Commission will resolve disputes brought before it. See General Order No. 168, Case No. P-300-31, April 5, 1985.<sup>1</sup> The Benewah Decision is not an end-all for all disputes involving pole attachment rates. A review of the Benewah Decision clearly reveals that the Commission's decision in that proceeding was based upon the evidence that was submitted in that proceeding. This is exactly what is contemplated under RP 151 and 152. One need only ask if the Commission even contemplated that the Benewah Decision would somehow rise to the level of satisfying the Idaho Administrative Procedures Act for rulemaking: (a) The Commission never issued a notice that it regarded the proceedings in Benewah as being rule making. (b) Except for the parties that participated in that proceeding, no notice was ever provided that the Commission considered the Benewah proceeding to be dispositive of future rate disputes. (c) The decision was never submitted to the Idaho legislature as required under the Administrative Procedures Act. (d) Idaho Power can state unequivocally that it has not used the Benewah Decision to establish pole attachment rates.

Cable One's reliance upon Attachment 1 to its brief, i.e., an FPC letter, is both misplaced as well as misinterpreted. The methodology by which cable attachment rates are to be established is found in the Commission's rules, RP 151 and 152. This is the "methodology" that is referred to when the Idaho Public Utilities Commission certified that it had a methodology by which it resolved disputes concerning pole attachment rates. To contend that the Commission was certifying the Benewah

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<sup>1</sup> It is of interest to note that the Commission does not discuss the Benewah decision dated November 6, 1984, in General Order No. 168 dated April 5, 1985. The only logical explanation is that the Commission did not believe that the Benewah decision was part of their rulemaking.


Decision as a rule as opposed to an example of the procedures that are utilized to resolve the dispute is without any justification. The Benewah Decision is not a rule that has been duly promulgated under the Idaho Administrative Act. The Commission never contended that the Benewah Decision should be considered a rule by interested parties.

Idaho Power is aware of the slip opinion issued by the Supreme Court of the United States, i.e., *National Cable & Telecommunications Association, Inc. v. Gulf Power*, 534 U.S. \_\_\_\_ (October 16, 2001). The Company, however, does not believe that the Court's opinion is relevant to the present proceeding before this Commission. The Supreme Court's opinion does not change in any way the fact that this Commission has jurisdiction over the pole attachment dispute and that the Commission's procedures set forth in RP 151 and 152 are the procedures to be followed in resolving the dispute between Idaho Power and Cable One.

In summary, Idaho Power would reiterate the statement that it made in its closing comments in its Opening Brief, i.e., 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 25th day of January, 2002.

  
LARRY D. RIPLEY  
Attorney for Idaho Power Company

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 25th day of January, 2002, I served a true and correct copy of the within and foregoing IDAHO POWER COMPANY'S REPLY BRIEF upon the following named parties by the method indicated below, and addressed to the following:

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LARRY D. RIPLEY