John R. Hammond, Jr., ISB No. 5470
FISHER LAW GROUP, LLP
U S Bank Plaza, 5th Floor
101 South Capitol Boulevard
P.O. Box 1308
Boise, Idaho 83701
(208) 331-1000
(208) 331-2400 facsimile
jrh@battfisher.com

Attorneys for Avimor, LLC

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR APPROVAL OF AN AGREEMENT BETWEEN AVIMOR, LLC AND IDAHO POWER TO PROVIDE ELECTRIC TRANSMISSION AND SUBSTATION FACILITIES TO THE AVIMOR MULTI-USE DEVELOPMENT	)	**Case No. IPC-E-06-23** **MEMORANDUM IN SUPPORT OF PETITION FOR RECONSIDERATION OF COMMISSION FINAL ORDER NO. 30322**

COMES NOW Avimor, LLC, an Idaho limited liability company, by and through its attorneys of record, Fisher Law Group, LLP, and pursuant to Idaho Public Utilities Commission Rules of Procedure 331 and *Idaho Code* § 61-626, files this Memorandum in support of Avimor, LLC's ("Avimor" or the "Company") previously filed Petition for Reconsideration (the "Petition").

In general, Avimor asserts that Final Order No. 30322 is unreasonable, unlawful, erroneous, unduly discriminatory and not in conformance with the facts of record and/or applicable law. Specifically, Avimor contends:

1) The Commission's rationale for denying the Special Facilities Agreement, that it will place a great financial burden and undue risk on existing ratepayers, is not supported by substantial and competent evidence in the record.

2) The Commission's findings in Order No. 30322 discriminate against Avimor in violation of *Idaho Code* § 61-315, and also violates the Equal Protection Clause of the United States and Idaho Constitutions; and,

3) New information provided to Avimor as a result of the filing of Idaho Power Company's ("IPCo") new rate case, Case No. IPC-E-07-08, shows that the average per customer connection cost for transmission and substation equipment cost is now $1,100.00.

Avimor also requests that the Commission clarify or amend Order No. 30322 to allow it to receive refunds based not only on the number of residential connections, but also upon the kva ratings of the distribution transformers serving non-residential connections.[1] Staff did not oppose this feature of the Special Facilities Agreement (the "SFA") and Avimor believes that the Commission intended that this was allowable, but the language in the Discussion section of Order No. 30322 does not expressly address the issue.

ARGUMENT

1. The Commission's sole reason for denying approval of the Special Facilities Agreement and the alternate proposal made by Avimor in its Reply Comments, that is that either will place a great financial burden and undue risk on existing ratepayers, is not supported by substantial and competent evidence in the record.

[1] For example, Avimor's wastewater treatment plant falls into this category.

In Order No. 30322 at p. 1, the Commission found "[b]ased on the record presented, the Commission has determined the Special Facilities Agreement as written places too great a financial burden on Idaho Power's existing ratepayers, and the Commission accordingly denies approval of the Special Facilities Agreement as filed." A review of the record demonstrates that there is a lack of substantial and competent evidence in the record to justify the Commission's rejection of the SFA and Avimor's alternate proposal based on these grounds.

Avimor has offered evidence in the record regarding potential rate impacts that could result from approval of the SFA as originally written stating:

> [T]he Project's overall impact on IPCo's entire customer base if the payments are refunded to Avimor is very small. If the Commission were to accept the original [SFA], which Avimor is not proposing, Avimor were to receive a full refund of the payments **and** IPCo were to file a general rate case every year where the Commission authorized inclusion of the cost of the refund payments to the Utility into rates, the impact on customer rates would be 0.01% per year for 10 years, creating an overall impact of 0.1% when the full cost of the Facilities was authorized to be included in rates. After the recovery of all refunds and their inclusion in rates, any additional customers in that area would connect to the system at little or no cost for IPCo and its ratepayers. In fact, additional connections may provide downward pressure on rates because the transmission and distribution substation equipment would already be paid for. Under Avimor's Proposal, the negligible rate impacts of the [SFA] will be further mitigated.

Avimor Reply Comments at p. 8-9 (emphasis added). No party disputed the results of Avimor's rate impact calculation or the fact that this impact would be further mitigated if Avimor's alternate proposal were adopted, that is to base a full refund of the advance upon the connection of 1,103 customers for recovery of its advance rather than 685, as proposed in the original SFA. Avimor still believes its alternative proposal is sound and will mitigate any minimal increase in customer rates, if at all, over a period of years, at

which time IPCo will have new customers to help recover the cost of the new infrastructure investment.

While it is true that Avimor does not dispute Staff's calculations regarding the per customer investment for similar facilities, the Company does not agree that these figures should be the sole measure of establishing a refund amount for the SFA.

First, it is patently unfair to the Company to compare the SFA refund amount as proposed by Avimor in its Reply Comments to the average currently embedded in rates. This is because the later figure is significantly depreciated and includes all utility connections prior to 2003. As such, it does not accurately reflect the current average cost which IPCo is incurring to connect new customers today. This is clearly shown by the Commission's recognition that this average rose to $1,000.00, as calculated from IPCo's last two rate cases. As will be discussed later, this average cost continues to rise. Even though this average cost per customer for transmission and distribution substation equipment provides a reference point for the Commission to consider, it still is an average of connections to IPCo's system which are both higher and lower than $1,000.00. As such, there should be no dispute that current customer rates as authorized by the Commission include connection costs for transmission and distribution substation equipment which exceed this average. An example of this is the Commission's inclusion of higher transmission and distribution substation equipment costs in rates as a result of the Hidden Springs special facilities

agreement. To not allow similar treatment is simply not consistent with the Commission's past and current practices.

Finally, as argued in the Company's Reply Comments, virtually all new equipment IPCo purchases, whether for a development such as Avimor or for any other need, will cause at least some upward pressure on rates because it is more expensive than older, partially depreciated equipment. Under Commission's rationale logically played out, if IPCo needs equipment that is more expensive than older, depreciated equipment already in rates, the utility would only be allowed to recover up to the average amount already in rates. As a result, IPCo would not be able to recover its costs and would be hard-pressed to make the appropriate investments to keep its system functioning properly. In addition, establishing a precedent that the refund amount for advances in these situations should be set at an average cost likely insures that other developments or connections whose per connection cost for transmission and distribution substation equipment is lower than this average will demand to receive a refund of their advance at a higher rate, thus accelerating rate impacts.

Based on the foregoing, there is no substantial and competent evidence in the record showing there will be an undue burden placed on all ratepayers if the SFA is approved.

2. The Commission's findings in Order No. 30322 discriminate against Avimor in violation of *Idaho Code* § 61-315, and also violates the Equal Protection Clause of the United States Constitution and as such, the Commission has not regularly pursued its authority.

The Commission did not discuss Avimor's discrimination and Equal Protection argument in the Discussion section of Order No. 30322. However, it did mention this argument in the IPCo Reply Comment section of the Order. IPCo argued that the SFA terms impose a non-recurring charge on Avimor to offset the costs of the utility's capital investments required to deliver electricity to the Avimor development and that the Idaho Supreme Court in *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 419, 690 P. 350 (1984) specifically stated that it's holding there did not involve a situation where " non-recurring charge is imposed upon new customers because the service they require demands an extension of existing distribution or communication lines and a charge is imposed to offset the cost of the utility's capital investment."[2]

The Commission has broad authority to regulate and fix the rates and charges assessed by Idaho's public utilities for services. *Idaho Code* § 61-502; *Building Contractors Association v. IPUC*, 128 Idaho 534, 538, 916 P.2d 1259, ___ (1996). *Idaho Code* § 61-301 requires that all rates and charges must be just and reasonable. In conjunction with this, *Idaho Code* § 61-315 prohibits either preferential or discriminatory treatment of ratepayers by public utilities stating:

> 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.

[2] In Case No. UWI-W-07-01, Order No. 30345, the Commission also opined that it was not determining fees or rates to be paid by utility customers in this case and thus *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 419, 690 P. 350 (1984) was not applicable. To the extent this same reasoning applies to the instant case it simply does not make sense as the Commission and its Staff have clearly based their decisions upon what impact the SFA will have on customer rates and attempted to use the Commission's ratemaking authority to justify the result. Avimor is clearly a utility customer of IPCo by virtue of the SFA. In addition, Avimor will be purchasing power from IPCo for its waster water treatment facility and other buildings in the development it will own.

> The commission shall have the power to determine any question of fact arising under this section.

Idaho Code § 61-315 (emphasis added). *See also, Idaho Code* §§ 61-301 (requiring imposition of only just and reasonable charges by utilities); 61-502 (authorizing the Commission to correct unjust or preferential rates); *Utah-Idaho Sugar v. Intermountain Gas Co.,* 100 Idaho 368, 597 P.2d 1058 (1979). Not all differences in a utility's rates and charges as between different classes of customers constitute unlawful discrimination or preference under § 61-315. A reasonable classification of utility customers may justify the setting of different rates and charges for the different classes of customers. *Utah-Idaho Sugar Co. v. Intermountain Gas Co., supra.* 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, economy of operation and the actual differences in the situation of the consumers for the furnishing of the service. *Utah-Idaho Sugar Co. v. Intermountain Gas Co., supra.* The Court has stated that it has not found one criterion to be necessarily more essential than another. Nor did it find the criteria as listed above as being exclusive stating:

> Each case must depend very largely upon its own special facts and <u>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</u>. It is, after all, very much a question of sound and well-instructed judgment. (citation omitted).

Kiefer v. City of Idaho Falls, 49 Idaho 458, 467, 289 P. 81, 84 (1930)(emphasis added). In *Agricultural Products Corporation v. Utah Power & Light Company,* 98 Idaho 23, 557 P.2d 617 (1976) the Court elaborated on this stating:

> Under the procedure we adopt here, a determination of undue discrimination or preference must first be made in a rate proceeding *wherein all pertinent factors are considered,* including, among others, the provisions of the special contract, the relationship between the contracting parties, the cost of service, the financial condition of the utility, and the effect of contract rates on other customers.

In the *Homebuilders* case, Washington Water Power requested approval for a seasonal commodity rate that would serve as a signal to all electric customers regarding the utility's higher cost of resource supply in winter and thus encourage energy conservation. 107 Idaho at 417, 690 P.2d at 352. The Commission rejected this proposal in favor of a one-time, non-recurring contribution charge of $50.00 per installed kilowatt of capacity for all new customers who used electricity for space heating. *Id.* at 418, 790 P.2d at 353 (emphasis added). Because this charge would result in a typical contribution charge of between $1,000.00 and $2,000.00 per new residential customer, the Idaho State Homebuilders Association petitioned to intervene in the case and ultimately appealed the Commission's Order. *Id.*

In its decision, the Idaho Supreme Court concluded that the contribution charge unlawfully discriminated between Washington Water Power's "new" and "old" customers, rejecting the notion that only "new" customers are responsible for the level of resource demand in the winter months. *Id.* at 421, 690 P.2d at 356. Although the record established that increased demand necessitated an increased reliance on more expensive resources, the Court concluded that the resultant increased costs did not equate with a "difference in criteria of cost of service or difference in condition of service as between the two classes." *Id.* Further, the Court reasoned that 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. *Id.*

In the *Building Contractors* case, the Court reviewed a portion of a general rate order by the Commission, which increased the amount of hook-up fees Boise Water Corporation ("Boise Water") may charge for new connections to its water service system from July 25, 1994, forward. The Building Contractors maintained that the hook-up fees approved by the Commission unlawfully discriminated against Boise Water customers connecting new service on or after July 25, 1994, based on the fact that the new hook-up fees allocate the entire incremental cost of new resource plant construction to new customers. The old fees did not contain incremental or marginal capital investment costs of new plant construction. This new allocation they argued was premised on the flawed idea that only new customers are responsible for increased resource demand.

In its decision, the Court noted that similar to *Homebuilders,* the pattern, nature, and time of Boise Water customers' usage did not change on July 25, 1994, nor did the conditions of service. Similarly, the quantity of water used by Boise Water's individual customers before July 25, 1994, does not differ from the quantity used by individual customers added to the system after that date. *Id.* The Court further reasoned that while it is true that the cost of service has increased, the cost has increased proportionately for each Boise Water customer and there is no difference in the cost of service between customers who connected to Boise Water's system before July 25, 1994, and those who have connected or will connect to the system from that date forward. The Court further noted that each new customer has contributed to the need for new facilities and that to the extent that the new hook-up fees are based on an allocation of the incremental cost of

new plant construction required by growth and by the Safe Drinking Water Act solely to new customers, the fees unlawfully discriminate between old and new customers in violation of *Idaho Code* § 61-315.

It seems the Commission's reasoning for not recognizing that the *Building Contractors* and *Homebuilders* cases are not applicable is based on dicta from the Court in the *Homebuilders* decision. Although not an issue before the Court in that case it stated, "the instant case presents no factors such as when a non-recurring charge is imposed on new customers because the service they require demands an extension of existing distribution or communication lines and a charge is imposed to offset the cost of the utility's capital investment." *Homebuilders*, 107 Idaho at 421, 690 P.2d at ____.

First, as the issue described above from the *Homebuilders* case was not squarely before that Court and was merely a situation it offered comment on, it is uncertain what its decision would be on such an issue as the Court has recognized that each case depends largely on its own facts. *See Kiefer v. City of Idaho Falls,* 49 Idaho 458, 467, 289 P. 81, 84 (1930); *Agricultural Products Corporation v. Utah Power & Light Company,* 98 Idaho 23, 557 P.2d 617 (1976). Thus, even were the above factual situation present, the Court would look beyond the nature of the extension to additional factors to determine whether discrimination or preference was resulting. *Id. See also Utah-Idaho Sugar Co. v. Intermountain Gas Co., supra*

Second, the Avimor/IPCo SFA does not involve a "non-recurring charge." A charge is defined as "the price of, or rate for, something." *Black's Law Dictionary. Black's Law Dictionary* also generally describes a rate in the public utilities context to mean "a charge for a service open to all and upon the same terms." Avimor is not being

charged or being required to contribute funds as a charge for the construction of infrastructure under the SFA. Rather, it is advancing the costs for construction with the opportunity for refund. Refund amounts will be included in rates which will affect Avimor as a ratepayer. As such, Avimor asserts that not only is the advance ultimately going to be charged to Avimor as a ratepayer, but also the advance and refund mechanisms of the SFA are conditions upon which Avimor will receive services and facilities necessary for such service. This treatment was provided for in the SFA to be consistent with IPCo's Rule H. Rule H provides that in cases of new connections to the system an applicant for service may be required to advance costs to complete such connection. The applicant then has an opportunity to obtain a refund as a "Vested Interest Holder," which under Rule H "is an entity that has paid a refundable Line Installation Charge to the Company for a Line Installation." *I.P.U.C No. 28, Tariff 101, Original Sheet H-3* (June 1, 2006). To the extent the Court's statement regarding extensions of service in *Homebuilders* is construed as controlling to that particular situation, it simply does not apply to this case as Avimor has made an advance with the opportunity for refund and not paid a one-time charge or contribution with any opportunity to recoup its funds. Avimor asserts that it is possible that the facts in this case may present a case of first impression. As such, it cannot be answered with certainty whether the Court would extend the dicta in *Homebuilders* to this case. What is certain is that the ability of the Commission to treat "new" customers differently from "old" customers is subject to substantial legal doubt as demonstrated by the *Homebuilders* and *Building Contractors* cases.

In this case, Avimor is clearly a "new" customer of IPCo by virtue of the terms of the SFA. Further, it is undisputed that Avimor's relationship as a customer to IPCo will continue as it will connect as a customer to the new infrastructure and purchase energy from the utility for its waste water treatment plant, commercial and retail facilities in the development and further facilities to maintain the development.

The failure to accord Avimor the same or similar treatment as old customers demonstrates that the Commission is not recognizing the fact that IPCo has undoubtedly added new connections to the system involving transmission and distribution substation equipment which are above and below the average cost cited by the Commission. As stated previously, it is undisputed that these costs above and below the average have been included in customer rates. This is clearly demonstrated by the Hidden Springs special facilities agreement. This fact is illustrated by the Hidden Springs special facilities agreement where the developer agreed to advance the entire cost for the design and construction of the distribution substation equipment with the opportunity to receive refunds from IPCo. According to IPCo, the per customer investment for this distribution substation equipment was approximately $2,333 per customer.[3] Hidden Springs was eventually refunded its entire advance at a rate of $2,333 per customer connection, which refunds were authorized to be included in rates by the Commission in 2004. *See* Order No. 29505, Case No. IPC-E-03-13.[4] It is safe to assume that if the Hidden Springs

[3] IPCo response to Avimor Request No. 4: "The approximate cost of the Hidden Springs substation construction project was $700,000. At an estimated average electrical load of ten average kilowatts, the three megawatt station would serve about 300 homes (provided there was no non-residential load served). Under these assumptions, the cost per home of that project was $2,333."

[4] Email from Tim Tatum, IPCo Company Analyst, dated March 20, 2007, "[u]nder the agreement between Hidden Springs and IPCo, Hidden Springs was required to pay the full construction cost of the substation over two payments, both issued in 1998. As the subdivision phases were completed, Hidden Springs ultimately received full reimbursement of its original financial contribution. The total cost of the Hidden Springs substation was subsequently included into rate base for the purpose of determining customer rates."

facilities were built today, the electrical distribution substation costs would be more expensive than in 1998.[5] Based upon foregoing, it is clear that based on its past practices the Commission should consider strongly allowing Avimor to receive a refund amount higher than the average cost per connection for transmission and distribution substation equipment. The Hidden Springs case provides the Commission with guidance with what a reasonable refund amount could be for a similar development. Based on the foregoing, the Commission could and should at least authorize Avimor to recover $2,300 per customer connection for distribution substation equipment as no reason is given for any different consideration in this case.

In addition, *Idaho Code* § 61-315 provides specifically that:

> 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.

Idaho Code § 61-315 (emphasis added). The Commission's decision to treat terms for the provision of facilities to the Avimor development radically differently than that of the Hidden Springs agreement and the general reality that there are many connections currently in IPCo's rates that are higher than $1,000.00 is unjustified. Other than its claim that it will place an undo burden on existing ratepayers, which clearly is not demonstrated by the evidence in this case, the Commission has cited no reason to treat Avimor differently based upon other factors, such as quantity of electricity used, differences in conditions, economy of operation and the actual differences in the situation of the consumers for the furnishing of the service. As such, Avimor respectfully

[5] Using a CPI increase in costs of 3% per year this cost would have been more than $3,000 in 2007.

questions the Commission's legal authority to deny approval of the SFA or Avimor's alternate proposal.[6]

3) New information has been provided to Avimor as a result of the filing of Idaho Power Company's ("IPCo") new rate case, Case No. IPC-E-07-08, showing that the average per customer connection cost is now $1,100.00.

As a result of IPCo's new rate case, the utility was able to provide Avimor with an updated average cost figure for transmission and distribution substation equipment per customer. This information has been reviewed by Alden J. Holm, a certified public accountant and licensed to practice in the State of Idaho. *See Affidavit of Alden J. Holm.* Mr. Holm's conclusion is that based on the same methodology Staff has used to calculate the average cost of $1,000.00, IPCo's new calculation of $1,100.00 is accurate. At a minimum, if the Commission decides that the refund amount under the SFA should be based on IPCo's average per customer cost for transmission and distribution substation equipment per customer, it should use the more updated average of $1,100 as provided by IPCo and discussed in the Affidavit of Alden J. Holm.

REQUEST FOR RELIEF

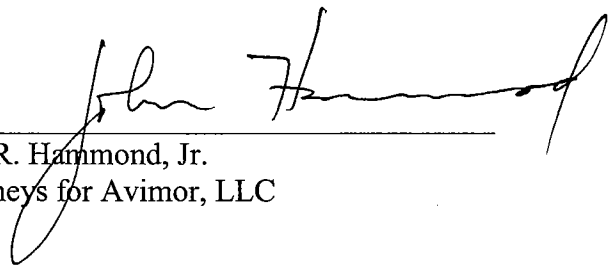
Based on the foregoing, Avimor respectfully requests that the Commission grant Avimor's Petition for Reconsideration and allow the SFA to contain the refund provisions which are proposed by Avimor's Reply Comments. In the alternative, Avimor requests that the Commission raise the refund amount to be allowed under the SFA to $1,100.00 to more accurately reflect the average costs which IPCo is currently incurring per residential customer for transmission and distribution substation equipment.

[6] In addition, to Avimor's argument regarding discrimination it also asserts that the Commission's decision violates the Equal Protection Clause of the United States and Idaho Constitutions as the Commission is treating Avimor differently than it has others similarly situated.

Finally, Avimor also requests that the Commission clarify or amend Order No. 30322 to allow it to receive refunds based not only on the number of residential connections, but also upon the kva ratings of the distribution transformers serving non-residential connections.

DATED This 29th day of June, 2007.

FISHER LAW GROUP, LLP

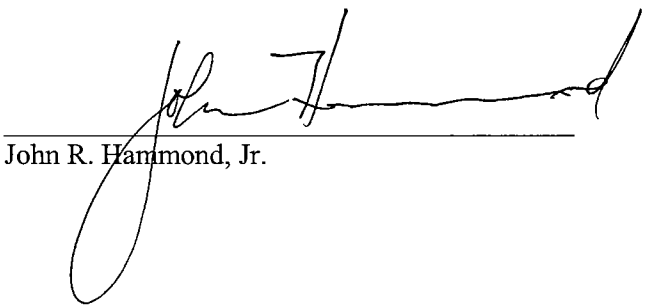


John R. Hammond, Jr.
Attorneys for Avimor, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 29th day of June, 2007, I caused to be served the foregoing upon all parties of record in this proceeding as indicated below:

Jean Jewell IDAHO PUBLIC UTILITIES COMMISSION 472 W. Washington Street P. O. Box 83720 Boise, Idaho 83720-5983 jjewel@puc.state.id.us	[ ] [ ] [x] [ ]	Certified Mail First Class Mail Hand Delivery Facsimile
Monica B. Moen IDAHO POWER COMPANY P. O. Box 70 Boise, Idaho 83707-0070 mmoen@idahopower.com	[ ] [x] [ ] [ ]	Certified Mail First Class Mail Hand Delivery Facsimile
Weldon Stutzman IDAHO PUBLIC UTILITIES COMMISSION 472 W. Washington Street P. O. Box 83720 Boise, Idaho 83702-5983 Weldon.stutzman@puc.idaho.gov	[ ] [ ] [x] [ ]	Certified Mail First Class Mail Hand Delivery Facsimile



John R. Hammond, Jr.