

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

<b>IN THE MATTER OF THE APPLICATION</b>	)	
<b>OF IDAHO POWER COMPANY FOR</b>	)	<b>IPUC CASE NO. IPC-E-06-23</b>
<b>APPROVAL OF AN AGREEMENT</b>	)	
<b>BETWEEN AVIMOR, LLC AND IDAHO</b>	)	
<b>POWER TO PROVIDE ELECTRIC</b>	)	
<b>TRANSMISSION AND SUBSTATION</b>	)	
<b>FACILITIES TO THE AVIMOR MULTI-USE</b>	)	
<b>DEVELOPMENT</b>	)	
<hr/>		
<b>AVIMOR, LLC,</b>	)	
	)	<b>SUPREME COURT</b>
<b>Appellant,</b>	)	<b>DOCKET NO. 34573</b>
	)	
<b>vs.</b>	)	
	)	
<b>IDAHO POWER COMPANY,</b>	)	<b>IPUC ORDER NO. 30510</b>
	)	
<b>Respondent,</b>	)	
	)	
<b>and</b>	)	
	)	
<b>IDAHO PUBLIC UTILITIES COMMISSION,</b>	)	
	)	
<b>Respondent on Appeal.</b>	)	

This Commission docket was opened on September 27, 2006, when Idaho Power Company filed an Application requesting that the Commission approve a Special Facilities Agreement (SFA) between Idaho Power and Avimor, LLC. The SFA provides for the construction of transmission and substation facilities for Avimor's planned development located in Ada County, north of Boise. Pursuant to the SFA, Avimor would advance \$4,300,000 to Idaho Power to build the facilities to serve the project, and Avimor would be eligible to receive refunds of the advance for (a) a period of ten years; (b) until 685 permanent residential customers had been connected to the facilities; or (c) until the metered demand connecting to the facilities met or exceeded 6,850 kW, whichever occurred first. As filed, the SFA provided a refund amount of \$4,300 per residential customer connecting to the facilities. On May 24, 2007, the Commission issued final Order No. 30322 denying approval of the SFA as filed. The Commission did not approve the SFA as filed, but stated it would approve an SFA that revised

the refund amount to \$1,000 for each residential customer connecting to the facilities. Order No. 30322 at 6-7. Evidence to support a \$1,000 refund amount was provided by Staff in its written comments filed December 15, 2006.

On June 14, 2007, Avimor filed a Petition for Reconsideration. As part of its Petition, Avimor submitted an affidavit stating that information filed by Idaho Power in its pending rate case, Case No. IPC-E-07-08, indicates the amount the Company invested for residential transmission and distribution facilities during 2005-2007 appears to be approximately \$1,100 per customer. If a higher refund amount were not approved, Avimor asked the Commission to approve \$1,100 for each refund per residential connection in an amended SFA.

On reconsideration, the Commission granted Avimor's request for clarification to allow it to receive periodic refunds of the advance based not only on the number of residential connections to the facilities, but also upon the kva ratings of the distribution transformers serving non-residential connections. *See* Order No. 30396 at 7. The Commission denied a higher refund amount. The Commission did not approve a \$1,100 per customer refund amount because the "calculation is based on untested data contained in [Idaho Power's rate case] pleading." Order No. 30396 at 14. The Commission found the \$1,100 calculation to be "premature and far less reliable than the Staff's [\$1,000] calculation based upon actual and final rate case data." *Id.*

On September 14, 2007, Avimor filed a Notice of Appeal to the Idaho Supreme Court from the Commission's final Order Nos. 30322 and 30396. Before proceeding with the appeal, however, Avimor, Idaho Power and Staff negotiated a Stipulation to resolve all issues on appeal. The Stipulation states an amount for refund of the advance to Avimor based on the outcome of Idaho Power's rate case, Case No. IPC-E-07-08. If the Commission's final Order in the rate case establishes that Idaho Power invested more than \$1,000 per residential customer for distribution and transmission facilities during 2005-2007, the Stipulation provides that Avimor may amend the SFA to obtain the higher amount in refunds to recover its advance. If the Commission Order establishes an amount lower than \$1,000, the SFA would retain that amount for refunds as previously approved by the Commission. Finally, if the Commission's final Order is silent on the average residential customer investment amount for transmission and distribution facilities during 2005-2007, the Stipulation provides that Avimor can amend the SFA for a refund amount of \$1,100, the amount it had calculated from data contained in the rate case.

The Stipulation along with Avimor's Motion for Approval of the Stipulation was filed on January 9, 2008. The Motion requests the Commission approve the Stipulation pursuant to Commission Rule of Procedure 274. The Stipulation itself references both Rule 274 and Rule 354 as authority for Commission approval of the Stipulation. Rule 354 directs the Commission when considering settlement of an appeal, and thus is the correct rule here. Both rules, however, authorize the Commission to "accept settlement of essentially private disputes that have no significant implications for regulatory law or policy or for other utilities or customers summarily upon the written request of the affected parties." IDAPA 31.01.01.354. *See also* IDAPA 31.01.01.274.

A significant shortcoming in the Stipulation is that it could change the refund amount in the SFA without appropriate supporting evidence in the record in this case. The Commission previously rejected a refund amount of \$1,100 because at no point in the reconsideration process was evidence to support it placed in the record. Commission Rule of Procedure 331 requires a petitioner asking for reconsideration to state "the nature and quantity of evidence or argument the petitioner will offer if reconsideration is granted." In its Petition for Reconsideration, Avimor did not ask the Commission to reopen the record to allow additional evidence, and instead asked only that reconsideration be granted "allowing the Company to file a brief with the Commission in support of its arguments as stated above." Petition for Reconsideration at 3. Avimor's Petition did indicate that new information was provided to Avimor "in the last few days as a result of the filing of Idaho Power Company's new rate case," but the Petition did not request that new information be made part of the record in this case.

The Commission granted Avimor's Petition and gave the Company until June 29, 2007 to file its brief, as the Company requested. The Commission also stated that "reconsideration shall be based upon Avimor's written brief and the record in this matter." Order No. 30372 at 2. This is a clear statement that new evidence would not be admitted and considered on reconsideration.

Avimor filed its brief on June 29, 2007, and included a section on new information provided to Avimor as a result of the filing of Idaho Power's rate case, specifically "an updated average cost figure for transmission and distribution substation equipment per customer." Avimor's Memorandum in Support of Petition for Reconsideration at 14. An affidavit of a certified public accountant was filed with the memorandum, stating in pertinent part that, based

on information in Idaho Power's rate case, "it appears that the average cost per Customer for transmission and distribution between 2005 to 2007 is \$1,100.00." No motion was made to open the record in this case for the admission of new evidence.

The Commission proceeded on reconsideration as requested and issued Order No. 30396 based on Avimor's memorandum and the record in the case. Regarding Avimor's proffered new information from Idaho Power's rate case, we noted that the "data has not been subject to examination by the parties much less been the subject of a final Commission Order." Accordingly, the Commission characterized the new information as "speculative," not having been "subject to the requisite scrutiny for competent evidence." Order No. 30396 at 14, *citing Weeks v. Eastern Idaho Health Services*, 143 Idaho 834, 153 P.3d 1180, 1184 (2007). Thus, the new information was never made part of the record in this case.

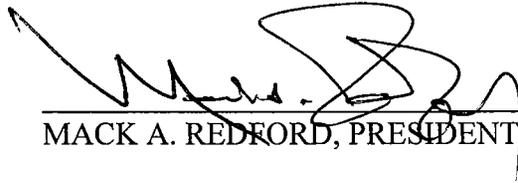
The Stipulation suffers the same infirmity as did the new information Avimor asked the Commission to consider on reconsideration. The Stipulation would change the Commission's determination of the proper refund amount based on evidence in a separate case not made part of the record in this case. It is true the Commission may take official notice of its own Orders, but the final Order in Case No. IPC-E-07-08 does not discuss the per customer average investment for transmission and substation facilities. *See* IDAPA 31.01.01.263. Indeed, the Stipulation anticipates the Commission's Order in that case will not address the average per customer investment for distribution and transmission facilities, and allows for a change in Avimor's refund amount in that event. Stipulation at 6.

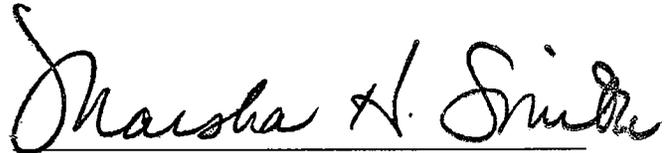
The Commission made a decision regarding the proper refund amount based on the information available to it in the record. The Stipulation would change the refund amount based on information not made part of the record, and perhaps not even fully considered in the record in a separate case. In order to accept the Stipulation, the Commission would have to change the refund amount without substantial, competent evidence in this case to support the new refund amount. Accordingly, we decline to approve the Stipulation for Settlement of Appeal.

#### **ORDER**

IT IS HEREBY ORDERED that the Stipulation for Settlement of Appeal filed January 9, 2008 is not approved by the Commission.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 29<sup>th</sup>  
day of February 2008.

  
MACK A. REDFORD, PRESIDENT

  
MARSHA H. SMITH, COMMISSIONER

  
JIM KEMPTON, COMMISSIONER

ATTEST:

  
Jean D. Jewell  
Commission Secretary

b1s/O:IPC-E-06-23\_34573\_ws