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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO RATEBASE THE INVESTMENT REQUIRED FOR THE REBUILD OF THE SWAN FALLS HYDROELECTRIC PROJECT	**CASE NO. IPC-E-90-2**
IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE RATEBASING OF THE MILNER HYDROELECTRIC PROJECT OR IN THE ALTERNATIVE A DETERMINATION OF EXEMPT STATUS FOR THE MILNER HYDROELECTRIC PROJECT	**CASE NO. IPC-E-90-8** **LEGAL MEMORANDUM OF COMMISSION STAFF**

Order No. 23380, issued on October 15, 1990, directed the parties in the Milner and Swan Falls cases to address the three legal issues set forth below. Following is Staff's response.

I. **WHAT IS THE LEGAL AUTHORITY FOR THE COMMISSION TO APPROVE RATE BASING OF THE SWAN FALLS REBUILD BEFORE THE REBUILD IS IN SERVICE? WHAT IS THE LEGAL AUTHORITY FOR THE COMMISSION TO APPROVE RATE BASING FOR THE MILNER PROJECT BEFORE THE PROJECT IS IN SERVICE?**

The critical statute upon which most legal issues in this case hinge is *Idaho Code* § 61-626 which, in pertinent part, provides:

> No . . . electrical corporation . . . shall henceforth begin the construction of a . . . plant or system . . . without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction . . . .

Staff interprets § 61-526 to require a utility to apply for and obtain a Certificate of Public Convenience and necessity *prior to construction* of a new plant. This statute thus applies to Milner, a new generation project, but not to Swan Falls, the rebuild of an existing generating project.

Further, and more importantly with respect to this issue, § 61-526 does not guarantee that investment in a plant for which a certificate has been issued will necessarily be included in the Company's rate base upon completion. It only addresses the authority to construct the plant.

Idaho Power interprets § 61-526 differently. It argues that the issuance of a certificate for Milner means that all costs reasonably incurred, up to the Company's self-imposed cap, will necessarily be included in rate base once the plant is completed and put into service. The Company has framed its Application in this manner. Staff disagrees.

Staff interprets the Company's Application, in part, as a Petition for a Declaratory Ruling by the Commission for an interpretation of § 61-526. *Idaho Code* § 67-5208 provides legal authority for making this determination.

> **Declaratory Rulings by Agencies.**--Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings of the applicability of any statutory provision or of any rule or order of the agency. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases.

Staff believes this statute allows the Commission to address the issue of rate basing the plant. Staff believes that

the Company's Application and subsequent arguments, if accepted, would force the Commission into an untenable posture. There are many events that could take place between issuance of a certificate and the date of new plant put in service for retail ratepayers, particularly if there is a 20-year delay between them. For example, there could be significant changes in energy generation technology making the certificated plant obsolete before it is dedicated to retail use. The Company's load could be drastically curtailed through the loss of large customers, thereby, making the certificated plant unnecessary.

Staff concedes that these examples present extreme scenarios. Furthermore, it would not be good policy and it has not been the habit of this Commission to issue certificates for plants and then arbitrarily refuse to allow them into rate base with findings of management/shareholder responsibility for some of the costs of the plant.

Still, it would be unwise for the Commission to unqualifiedly preapprove a plant for rate base and place risks upon the ratepayers that should be borne by the Company shareholders.

Staff is not aware of any specific legal precedents for preapproval of rate base for an uncompleted plant. This is a policy question that the Commission may address in a declaratory ruling. Staff asserts that the Commission should not preapprove Milner for rate base but limit its decision to whether to issue a certificate to authorize the Company simply to <u>construct</u> the plant, recognizing that in the ordinary course of events that

rate basing of a reasonable cost of the project is the general rule.

Although this analysis technically only applies to Milner, as a practical matter, given the Commsision's past treatment of the Swan Falls rebuild, a similar analysis is appropriate there.

II. WHAT IS THE LEGAL AUTHORITY OR PROPRIETY AS A MATTER OF POLICY OF USING AVOIDED COSTS AS A CAP FOR RATE BASING THE SWAN FALLS REBUILD? WHAT IS THE LEGAL AUTHORITY OR PROPRIETY AS A MATTER OF POLICY OF USING AVOIDED COSTS AS A CAP FOR RATE BASING THE MILNER PROJECT?

At the outset, Staff would like to point out that it is not necessary for the Commission to decide whether to use avoided costs as a cap on rate basing Milner at this juncture. This determination can and should be made after the plant has been completed.

Should the Commission wish to decide the matter now, Staff would assert that avoided costs are <u>a factor</u> in determining whether investment in a plant was reasonable. To the extent that actual costs for Milner and Swan Falls exceed the avoided cost rates, these costs could be <u>presumed</u> unreasonable subject to justification by the Company. PURPA is silent whether utilities may build their own generating projects at costs exceeding avoided costs. PURPA has not precluded state commissions from considering intangible benefits associated with given plants that may justify charging them to ratepayers at more than avoided costs. This is not the time to consider such arguments. Instead, those questions should be delayed until Idaho Power proposes to include the project in rates.

Furthermore, the Company should not be led to believe that any costs incurred up to the avoided cost rates will be presumed reasonable. All costs incurred must be judged on their own merits. The Company should not be allowed to include unreasonable costs in rate base.

IIIa. DOES THE COMMISSION HAVE THE AUTHORITY TO DECLARE IN THE ABSTRACT A CERTIFIED PLANT OR A PLANT BY STATUTE EXEMPT FROM CERTIFICATION MAY BE RATE BASED WITHOUT YET KNOWING THE COST OF RATE BASING THE PLANT IN RETAIL RATES?

Staff reiterates that the Commission should not preapprove rate basing of an unfinished plant. This does not mean, however, that a utility may not be told that its certificated project may be included in the Company's resource stack. The consequences of the failure of the Company to bring the resource on line or the risk that the plant may be rendered obsolete prior to completion should inure to the Company's shareholders, not the ratepayers.

IIIb. DOES THE COMMISSION HAVE AUTHORITY TO DECLARE IN THE ABSTRACT THAT A CERTIFIED PLANT OR A PLANT BY STATUTE EXEMPT FROM CERTIFICATION MAY BE EXCLUDED FROM RATE BASING FOR A FIXED PERIOD IN THE FUTURE WITHOUT YET KNOWING THE COST OF RATE BASING IN RETAIL RATES?

Staff has stated in prior briefing that the Commission has the option of issuing a certificate for the future public convenience and necessity. Such a certificate could contain language to exempt Milner from retail rate regulation under the conditions requested by the Company in its alternative proposal.

This does not mean that the Commission could or should preapprove rate basing of either plant prior to the expiration

of the exemption period. Staff has recommended in testimony that, under this option, the Commission should not determine the amount or the means of determining an amount for rate basing until the time that the plant is put into service for the Company's ratepayers.

IIIc. HOW ARE THE RIGHTS OF UTILITY INVESTORS AFFECTED IN THE IMPLIED INTERVAL CREATED BY SUCH A DECISION?

Assuming that the Commission opts to exempt Milner from retail rate regulation, the Company should be allowed to operate the plant or plants in any manner that it desires. Under this scenario, it must be made clear that the Company's shareholders and not the ratepayers shall bear the risk or risks identified in this memorandum relating to the two plants. The Company should not be allowed to subsidize the costs of either plant while they are under exempt status.

RESPECTFULLY submitted this 21st day of November 1990.

Michael S. Gilmore

Brad M. Purdy

BP:vld/B-136

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 21st DAY OF NOVEMBER, 1990, SERVED THE FOREGOING **LEGAL MEMORANDUM OF COMMISSION STAFF**, CASE NOS. IPC-E-90-2 and IPC-E-90-8, ON ALL PARTIES OF RECORD BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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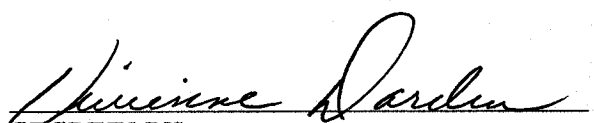

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