

DECISION MEMORANDUM

TO: COMMISSIONER KJELLANDER
COMMISSIONER SMITH
COMMISSIONER HANSEN
COMMISSION SECRETARY
COMMISSION STAFF

UWI - W - 03 - 01

FROM: DON HOWELL, DEPUTY ATTORNEY GENERAL

DATE: SEPTEMBER 15, 2003

SUBJECT: UNITED WATER'S TARIFF ADVICE REFLECTING AN INCREASE IN THE FRANCHISE FEE ASSESSED BY THE CITY OF BOISE FROM 3% TO 4%.

At its August 18, 2003 public Decision Meeting, the Commission reviewed a tariff filing by United Water Idaho reflecting an increase in the Boise City franchise fee from 3% to 4% effective October 1, 2003. Staff placed the matter on the Commission's "Consent Agenda." The Commission "approved" the tariff revision as part of the Consent Agenda. Immediately after the Decision Meeting, United Water's counsel and I discussed the Commission's action. This and subsequent discussions have resulted in this memorandum.

Passage of United Water's franchise fee agenda item raises two questions—one procedural and one substantive. First, should the Staff have recommended and should the Commission have "approved" this tariff revision, or should the Commission have simply "accepted for filing" the revised tariff sheet? Second, should ratepayers be obligated to pay the increased 1% franchise fee? These issues are discussed below.

BACKGROUND

The historical facts underlying the issues are undisputed. Both United Water and the City provided documents and information used to prepare this memo. United Water and the City do draw different inferences and legal conclusions from these facts.

A. Procedural History

On August 6, 2003, United Water filed a tariff advice accompanied by "a proposed revision to United Water Idaho's Schedule 8, Sheet 10B." (Emphasis added). Tariff Advice Letter. United's tariff Sheet 10B sets forth the municipal franchise fees "imposed on the

Company by municipal corporations and billed separately by the Company to its customers within the corporate limits of a municipality.” Schedule 8, Sheet 10B. The proposed tariff revision reflects an increase in the City of Boise’s franchise fee from 3% to 4%. On July 22, 2003, the City adopted Resolution No. 17692 to increase the franchise fee to 4% effective October 1, 2003. “[A]ccordingly, an effective date of this tariff change of October 1, 2003 is requested” by the Company. Tariff Advice Letter.

After reviewing the proposed tariff revision, the Staff prepared an ex parte recommendation pursuant to procedural Rule 134.03, IDAPA 31.01.01.134.03. In its decision memorandum, the Staff recommended that the tariff revision “be approved with an effective date of October 1, 2003 as proposed by the Company.” Staff Decision Memorandum dated August 13, 2003. This matter was subsequently placed on the Commission’s next Decision Meeting agenda as “Consent Agenda” item No. 5. At the Decision Meeting of August 18, there was no discussion about any of the items on the Consent Agenda. Subsequently, a vote of was taken and the motion to approve the items on the Consent Agenda – including the 4% franchise fee – was passed unanimously.

After the meeting, I spoke to the Company’s counsel. We initially discussed the validity of the increase, but United’s counsel subsequently concluded that the increase was valid.

B. Boise’s Franchise Ordinances

The City and United Water’s predecessor (Boise Water, hereinafter United) entered to a 1978 franchise agreement that set a 3% franchise fee payable to Boise. This franchise agreement was to expire on November 1, 1993. In October 1993 the City and United began negotiating a new franchise agreement. Because the franchise agreement would soon expire on November 1, the City passed Resolution No. 12508 extending the franchise for 120 days, or to approximately March 1, 1994.

In their continuing negotiations, the City initially considered increasing the 3% franchise fee to 5%, then proposed a graduated increase “to 4% in 1994 and 5% in 1995. That [increase] would be in keeping with the approach used in raising the franchise fees for the cable companies.” City Engineer’s memo dated Jan. 3, 1994. United objected to the “3% to 4% and the 4% to 5%” fee increases but the City insisted that the increases be included in the franchise agreement. City Letter to Ben Heppler dated Sept. 19, 1994. As negotiations continued, the City again extended the 1978 franchise agreement by Resolution to November 1, 1994.

In a memo dated November 28, 1994, the City Engineer observed that the City and United had reached "consensus" on most of the terms for a new franchise agreement. These terms included a provision in Section 7 of the draft franchise ordinance to increase the fee to 4% upon passage of a Council Resolution and an increase to 5% "when at least two years have elapsed at the 4% rate." City Engineer's Memo at pp. 1-2. Another negotiated term was the length of the agreement. The 1978 franchise agreement was for 15 years but the City wanted a shorter term and suggested 8 years. The Company requested 10 years. *Id.*

Despite these continuing negotiations, the City did not extend the franchise agreement beyond November 1, 1994. Although there was no franchise agreement past November 1, United reported that it collected the 3% franchise fee from customers.

With the general consensus on terms, the City unexpectedly determined that the franchise was subject to the public bidding process. Accordingly, the City issued a public request for bids for a non-exclusive water system franchise on February 23, 1995. Bids were to be returned no later than March 1, 1995. The City's bid request anticipated that bid/ordinance negotiations would take place on or about April 11, 1995 and Council approval on April 18, 1995.

In preparation for the bid, the City advised United in a Letter dated February 24, 1995, that the City would be willing to consider a longer term for the franchise agreement. The City and Company subsequently settled on 21 years – presumably so that Capitol Water and United Water's Franchise Agreements would both run until 2016. Attached to this letter was a draft of the proposed franchise ordinance dated January 5, 1995 that, for the first time, included language making the ordinance retroactive to November 1, 1994. The draft indicated the following changes (deletion by strike out and additions by underline):

Section 8. Duration and Acceptance of Franchise. This Franchise and the rights, privileges and authority hereby granted will ~~take effect and~~ be in full force and effect as of November 1, 1994 from and after final passage hereof, as provided by law, and shall continue in full force and effect for a term of twenty-one (21) years. . . .

City Engineer Letter to Heppler dated Feb. 24, 1995, Atch. p. 8. The City's copy of this letter also contains a handwritten, underlined notation that "law could change."

United submitted its bid to the City on February 28, 1995. The City and the utility were still negotiating a new franchise agreement when franchise fee legislation was introduced in

the 1995 Legislature. After nearly 15 months of negotiations, the first reading of the franchise ordinance was scheduled for March 7, 1995.

On April 11, 1995, the City of Boise passed Ordinance No. 5623 granting United Water's a nonexclusive franchise to operate within the City of Boise. The franchise fee schedule is set out in Section 7. In pertinent part, this Section contains the consensus terms and requires United Water to

pay to the CITY during each month of this Franchise an amount equal to three percent (3%) of the gross operating revenues during the preceding month from the sale of water and water services within the corporate limits of the CITY. The three percent franchise rate may be changed to four percent (4%) upon passage of a resolution by the Boise City Council. The Boise City Council may pass a second resolution during the term of this Franchise Agreement raising the franchise rate to five percent (5%) provided twenty-four (24) months have passed since passage of the prior resolution. Each payment shall be made monthly to the Boise City Accounting Department, with payments due on August 1, November 1, ~~of each franchise year~~ the 15th of each month following each billing period. Such payments will be based upon actual revenues as recorded on [United's] Records. This payment shall be in addition to any other fee, tax or payment owed to the CITY; and shall be in addition to any other permit fee or charges which [United] is obligated to pay; pursuant to the provisions of ordinances and statutes now in existence or hereinafter enacted.

Ordinance No. 5623, § 7 (underline emphasis added and strikeout language original).

There are several other sections of the Ordinance that are relevant to this review.

These additional sections are set out below.

Section 8. Duration and Acceptance of Franchise. This Franchise and the rights, privileges and authority hereby granted will be in full force and effect as of November 1, 1994 and shall continue in full force and effect for a term of twenty-one (21) years, provided that within thirty (30) days after the date of the passage of this Ordinance [United] shall file with the City Clerk, its unconditional acceptance of this franchise and promise to comply with and abide by its provisions, terms and conditions. Such acceptance and promise shall be in writing and duly executed and sworn to be or on behalf of [United] before a notary public or other officer authorized by law to administer oaths. [United] shall pay all costs and expenses associated with the publication of this Franchise Agreement Ordinance as required.

...

Section 12. Severability. The provisions of this Ordinance are hereby declared separable and if any section, clause or phrase hereof is hereafter

declared invalid and unconstitutional, the same shall not affect the validity of the remaining portions of this Ordinance.

Section 13. This Ordinance shall be in full force and effect after its passage, approval and publication and retroactively to November 1, 1994.

Ordinance No. 5623, §§ 8, 12-13 (emphasis added). Although the franchise Ordinance was adopted by the City 22 days after the enactment of the 3% franchise fee cap in *Idaho Code* § 50-329A (discussed below), the Ordinance was retroactive to November 1, 1994 – the date when the last extension to the 1978 franchise expired.

C. The Statutory Framework

While United was preparing its bid in response to the City's RFP in February 1995, the Idaho Legislature was considering a bill to regulate municipal franchise fees and cap such fees at 3%. House Bill (HB) 329 was introduced in the State Affairs Committee on February 28, 1995 and is codified at *Idaho Code* §§ 50-329 and 50-329A. Among other things, the title of the Bill stated that it was "to provide restrictions and limitations on [city] franchise fees." 1995 Idaho Sess. Laws, Ch. 226. As noted in the "Statement of Purpose" which accompanied HB 329,

This legislation limits the right of cities to impose franchise fees on electric, gas and water utilities. Currently many cities claim the right to impose fees without limit for the franchises they grant to these utilities. This bill clarifies that a city may assess a franchise fee which does not exceed one percent but that no franchise fee may exceed that amount without the agreement of the utility. . . . In no case shall franchise fees exceed three percent.

Statement of Purpose, HB 329 (1995) (emphasis added).

HB 329 amended *Idaho Code* § 50-329 (Franchise Ordinances – Regulations) and added a new section 50-329A to the Code. In pertinent part, the new section provides:

50-329A. FRANCHISE ORDINANCES -- FEES. (1) This section applies to franchises granted by cities to electric, natural gas and water public utilities, . . . which provide service to customers in Idaho and which shall also be known as "public service providers" for purposes of this section. Notwithstanding any other provision of law to the contrary, cities may include franchise fees in franchises granted to public service providers, only in accordance with the following terms and conditions:

(a) Franchise fees assessed by cities upon a public service provider shall not exceed one percent (1%) of the public service provider's "gross revenues" received within the city without the consent of the public service provider or the approval of a majority of voters of the city voting on the

question at an election held in accordance with chapter 4, title 50, Idaho Code. In no case shall the franchise fee exceed three percent (3%), unless a greater franchise fee is being paid under an existing franchise agreement, in which case the franchise agreement may be renewed at up to the greater percentage, with the consent of the public service provider or the approval of a majority of voters of the city voting on the question at an election held in accordance with chapter 4, title 50, Idaho Code. . . .

(b) Franchise fees shall be collected by the public service provider from its customers within the city, by assessing the franchise fee percentage on the amounts billed to customers for the sale, transmission and/or distribution of electricity, natural gas or water by the public service provider within the city. The franchise fee shall be separately itemized on the public service provider's billings to customers.

...

(2) This section shall not affect franchise agreements which are executed and agreed to by cities and public service providers with an effective date prior to the effective date of this act.

Idaho Code § 50-329A (emphasis added). The Minutes of the House State Affairs Committee reflect that the City's representative, Ken McClure, "spoke in support of [HB 329], stating it is the result of compromise on both sides." Committee Minutes (Feb. 28, 1995); Senate Minutes (March 10, 1995).

HB 329 also contained an emergency enactment section. 1995 Sess. Laws Ch. 226, § 3. The Bill passed both houses of the Legislature without a dissenting vote and was signed by the Governor on March 20, 1995. Thus, *Idaho Code* § 50-329A was enacted 22 days before the franchise ordinance was passed by the City Council and approved by the Mayor on April 11, 1995. Section 50-329A was enacted and effective nearly two months (actually 58 days) before United Water formally accepted the terms of the franchise Ordinance pursuant to Section 8 of the Ordinance.

D. Commission Procedures

After enactment of HB 329, Idaho Power Company submitted a tariff advice containing necessary tariff revisions "to implement the recently enacted Legislation (H.B. 329)." Tariff Advice No. 95-03. More specifically, Idaho Power sought approval of a new tariff schedule 95 which would list the various franchise fees imposed by cities within Idaho Power's Idaho service area. The Company's transmittal letter also asked for procedural guidance regarding the

implementation and collection of franchise fees. Although *Idaho Code* § 50-329A(1)(b) provides that the franchise fee shall be separately itemized on the utility customer's bill, the Company wanted to know whether franchise fees should be listed in the utility's tariffs/schedules. Typically, a utility may only charge those rates contained in its tariffs and schedules approved by the Commission. *Idaho Code* § 61-313 (no utility shall charge a different rate for any service rendered than set out in its tariff schedules).

In a decision memorandum dated June 22, 1995, the Commission Staff recommended that utilities file tariff advices identifying the franchise fees imposed by each municipality. Although *Idaho Code* § 50-329A is "self-executing," i.e., it specifies that the franchise fee will be individually listed on a customer's bill, the Commission Staff (and presumably the utilities) wanted to know which cities imposed franchise fees and the amount of the fees. By including the franchise fee in the Company's tariffs, the utility's service representatives as well as Staff Consumer Assistance Investigators would be able to answer inquiries about utility bills for franchise fee customers by easily consulting the tariffs. Having the fees on file would assist both the utility and Staff in answering customer billing inquiries. Recording the franchise fees would simply use the existing tariff mechanism. As is the case with Title 62 tariffs/price lists, franchise fee tariffs were to be "accepted for filing" to distinguish that the Commission was not actually approving such fees.

QUESTIONS PRESENTED

1. Procedural. As previously mentioned, the Staff recommended and the Commission "approved" the Consent Agenda item regarding the increase in the franchise fee. However, the Commission has yet to approve the Minutes of the August 18 meeting. The Commission may desire to clarify its August 18 action regarding the Boise franchise fee. First, the Commission may wish to remind the Staff that tariff advices containing only franchise fees are not generally subject to the Commission's approval. Once a municipality enacts a franchise fee, the statute itself requires that the fee "be separately itemized on the . . . billings to the customers." *Idaho Code* § 50-329A(1)(b).

It may be more appropriate for the Commission Staff to recommend that a particular tariff advice addressing a franchise fee be "accepted for filing." Just as the Commission does not establish the rates for Title 62 telecommunications services, the Commission does not set or establish franchise fees. Like Title 62 tariffs or price lists, a tariff sheet containing a list of

franchise fees should normally be stamped as “accepted for filing.” This would be consistent with the Commission’s 1995 guidance policy. For example, when United Water’s Schedule 8, Sheet 10B was revised to reflect the City of Eagle’s 1% franchise fee effective May 15, 2003, the Commission noted that this tariff sheet was “accepted for filing.”

Second, the Commission may also clarify and/or correct its minutes from the August 18 Decision Meeting to remove any doubt that it did not and does not approve of franchise fees. As the Commission is aware, accepting price lists or tariffs for filing is an administrative function “that should not and does not imply Commission approval” of a specific fee or rate. Order Nos. 25933 at 14; 27100 at 57; 28427 at 4-6.

2. Substantive. The substantive issue has two parts. The first question concerns whether the franchise fee Ordinance is exempt from *Idaho Code* § 50-329A and its franchise fee cap. United Water and the City believe that the franchise Ordinance is valid and not subject to the cap. This question requires an analysis of the relationship between the franchise fee statute and the City’s franchise Ordinance No. 5623. By its terms, *Idaho Code* § 50-329A states that cities may impose a franchise fee “only in accordance with the following terms and conditions: . . . In no case shall the franchise fee exceed three percent (3%). . . .” However, this statute contains an exception clause in paragraph (2). Paragraph 2 states that this statute “shall not affect franchise agreements which are executed and agreed to by cities and public service providers with an effective date prior to the effective date of this” statute. *Idaho Code* § 50-329A(2). United Water and the City maintain that this exception clause is applicable to the City’s franchise Ordinance because: 1) it was “executed and agreed to” by the parties; and 2) it has “an effective date prior to the effective date of” Section 50-329A.

Staff believes there is also a related question concerning retroactivity. *Idaho Code* § 73-101 provides “No part of these compiled laws [i.e., the Idaho Code] is retroactive, unless expressly so declared.” Thus, in Idaho “a statute is not applied retroactively unless there is ‘clear legislative intent to that effect.’” *Gailey v. Jerome County*, 113 Idaho 430, 432, 745 P.2d 1051, 1053 (1987) quoting *City of Garden City v. City of Boise*, 104 Idaho 512, 515, 660 P.2d 1355, 1358 (1983). Courts in Idaho apply the same principles in construing municipal ordinances as they do in the construction of statutes. *Cunningham v. City of Twin Falls*, 125 Idaho 776, 874 P.2d 587 (Ct. App. 1994). Thus, the question becomes does the exception clause in *Idaho Code* §

50-329A(2) represent clear legislative intent that cities may enact franchise ordinances retroactively?

If *Idaho Code* § 50-329A does not represent clear intent, are there other statutes which authorize the city to enact franchises retroactively? *Idaho Code* § 50-329 provides that “No ordinance granting the franchise in any city shall be passed on the day of its introduction, nor for thirty (30) days thereafter No franchise shall be created or granted by the city council otherwise than by ordinance.” This portion of Section 50-329 was enacted and effective before the March 1995 amendments contained in HB 329. Query whether a franchise ordinance that cannot be passed until a minimum of 30 days after its introduction, can be effective retroactively?

Idaho Code § 50-901 may also be instructive. This statute requires “all ordinances of a general nature, unless otherwise required law, shall, before they take effect . . . [be published] in at least one (1) issue of the official newspaper of the city. . . .” If the City’s franchise fee ordinance cannot “take affect” until it is published, query whether the City’s franchise fee can be retroactive to November 1, 1994?¹

Finally, Article XI, § 12 of the Idaho Constitution provides that the Legislature “shall pass no law . . . which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already passed.” Does the retroactive franchise fee pose new liabilities on transactions (i.e., monthly billings) already passed? As previously mentioned, United Water informally stated that it collected the 3% franchise fee between the period of November 1, 1994 and the passage of the Ordinance on April 11, 1995.

The Idaho Supreme Court addressed this constitutional provision in *Butler v. City of Blackfoot*, 98 Idaho 854, 574 P.2d 542 (1978). In that case, the City of Blackfoot attempted to collect the expenses of various city improvements and beautification costs that arose prior to the creation of a local improvement district (LID) as part of the LID costs. See 1967 Local Improvement District Code (Title 50, Chapter 17). One argument presented by the City was that these pre-LID costs may be appropriately included in the LID costs (and ultimately collected from property owners) because the Legislature subsequently enacted a Session Law that purportedly ratified and validated any previously defective LID assessments against property owners. 1976

¹ In the City’s Resolution No. 13326 approving the newspaper summary of the franchise fee Ordinance to be considered on April 11, 1995, the Resolution states that “Idaho Code 50-329 and 50-901 require that ordinances granting franchises be published in the Idaho Statesman after approval by the Council and prior to taking effect.” (Emphasis added). The summary of the Ordinance states that the “effective date of the Ordinance is the date of its passage, approval and publication.” There is no mention in the summary that the Ordinance is retroactive.

Sess. Law, Ch. 160, § 3; *Butler*, 98 Idaho at 858, 574 P.2d at 546. In other words, the Session Law “cured” or validated the City’s attempt to collect the pre-LID costs as part of the LID.

The Court held the Session Law that purportedly validated the collection of the assessments, and specifically the costs prior to the creation of the LID, was prohibited by Article XI, § 12 of the Idaho Constitution. 98 Idaho at 859, 574 P.2d at 547. The Court stated that Article XI, § 12 “not only prohibits retroactive legislation in appropriate cases, but also prohibits the imposition of laws imposing new pecuniary liability ‘in respect to transactions or considerations already passed.’” *Id.* Query whether the retroactivity of the City’s Ordinance imposing franchise fees in respect to transactions (United Water’s bills) already passed and rendered?

As previously mentioned, United Water and the City contend that the Ordinance is valid. United Water also suggested that the Commission may lack the appropriate jurisdiction to construe these non-PUC statutes and to decide these legal questions. The Company infers that these questions are best addressed in the Courts rather than the Commission. The Staff recognizes that the aforementioned statutes fall outside Title 61 or 62 of the Idaho Code.

The second substantive question is assuming the Ordinance is valid, was it prudent for the Company to agree to the 4% increase (and potentially 5%) after the Legislature had passed a statute limiting franchise fees to 3%? The issue of prudence must be viewed in the context of the circumstances under review. In this instance the utility and the City had been involved in prolonged negotiations for approximately 15 months. The previous franchise agreement had expired on November 1, 1994 and the new Ordinance was to be retroactive to that date. The City and United Water had apparently reached consensus on the terms. Finally, United Water may have been unaware of HB 329 and the 3% cap. Or, United Water may have relied on the exception clause of paragraph (2) and assumed the cap and the statute would not apply to the City-United Water agreement.² These later facts are not known to the Staff.

As evident in the August 6 tariff advice, United Water sought to pass the increased cost (i.e., the fee) onto ratepayers. Staff believes recovery of the increased fee is a ratemaking issue over which the Commission exercises jurisdiction. The City’s franchise ordinance does not require United Water to collect the franchise fee from its municipal customers. The City simply imposes the fee on the utility. From its perspective, the City does not care whether the ratepayers

² As previously mentioned, the City knew about HB 329 because its representative spoke in favor of the Bill.

or shareholders pay the franchise fee. Given the tariff advice, the Company obviously believes that it is reasonable to recover to the increased franchise fee from ratepayers.

In its August 6 tariff advice, the Company submitted a "proposed revision to United Water Idaho's Schedule 8, Sheet 10B." (Emphasis added). The tariff advice also requested an effective date of October 1, 2003 to coincide with the effective date of the ordinance increasing the fee to 4%. *Id.* *Idaho Code* § 61-503 grants the Commission the authority to investigate a "single rate . . . charge, classification, rule, regulation, contract or practice . . . and to establish new rates." *Idaho Code* § 61-622 provides that no "public utility shall raise any rate . . . except upon a showing before the commission and a finding by the commission that such increase is justified." *Idaho Code* §§ 61-622 and 61-623 allow the Commission to suspend a proposed rate increase for a period of 30 days plus 5 months from the proposed effective date so that the Commission may investigate the reasonableness of a proposed rate increase.³

Again, United Water believes that the Ordinance is valid and that it is reasonable to pass the increase on to customers. United Water does not oppose the Commission simply accepting the new tariff for filing. The Company has suggested that the Commission not express any opinion regarding the validity of the City franchise Ordinance. Given the questions raised in this memo, the Staff has provided it to the City and United Water in the event they wish to respond to the issues raised in the memo.

COMMISSION DECISION

1. Procedure. Does the Commission wish to clarify its action regarding the United Water tariff advice from the August 18 Decision Meeting? Did the Commission intend to approve the tariff containing Boise City's 4% franchise fee? Does the Commission "accept" the tariff advice for filing?

2. Substantive. Does the Commission wish to address either substantive issue? Anything else?



Don Howell

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³ If an investigation is initiated, Staff would suggest that the increased fee not be suspended but collected subject to refund. The City could also extend the effective date of the increase for a period of time to allow this matter to be reviewed. Or, the City could agree to collection of the funds in an United Water account and distributions from the account would occur when the matter is decided.