

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

<b>IN THE MATTER OF UNITED WATER</b>	)	
<b>IDAHO'S TARIFF ADVICE TO INCREASE</b>	)	<b>CASE NO. UWI-W-03-1</b>
<b>CUSTOMER RATES TO RECOVER THE CITY</b>	)	
<b>OF BOISE'S 4% FRANCHISE FEE.</b>	)	<b>ORDER NO. 29359</b>
	)	

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In August 2003 United Water Idaho filed a tariff advice requesting a revision to its Tariff Schedule 8. In Tariff Schedule No. 8, Sheet 10B, United Water proposed to recover from its customers the municipal franchise fee imposed by the City of Boise. More specifically, the proposed tariff revision reflects an increase in the City of Boise's franchise fee from 3% to 4%. The Company requested an effective date of October 1, 2003.

At our August 18, 2003 public decision meeting, the Commission "approved" the tariff revision as part of our Consent Agenda for the meeting. On September 12, 2003, the Commission Staff asked the Commission to reconsider this matter and two issues in particular – 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, Staff questioned whether ratepayers should be obligated to pay the increased 1% franchise fee.

Staff shared its concerns with representatives of United Water and the City of Boise. On September 17, the Staff and United Water asked the Commission to postpone reconsideration of this matter so that the parties could engage in further discussions and provide the Staff with pertinent documents. Following these discussions, United Water and the City both submitted letters responding to the Staff's substantive issue. The Commission took-up this matter at our September 29 public decision meeting. Having reviewed the Staff's memorandum and the two responses, we issue this Order.

**THE COMMISSION'S PRIOR ACTION**

On August 6, 2003, United Water filed a tariff advice accompanied by "a proposed revision to United Water Idaho's Schedule 8, Sheet 10B." Tariff Advice Letter (emphasis added). 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.” This matter was subsequently placed on the Commission’s next decision meeting agenda as “Consent Agenda” item No. 5. At the public decision meeting of August 18, there was no discussion about any of the items on the Consent Agenda. Subsequently, a vote was taken and the motion to approve the items on the Consent Agenda – including the 4% franchise fee – was passed unanimously.

## **BACKGROUND**

As mentioned above, the Staff has asked the Commission to review our actions regarding United Water’s Tariff Advice increasing the City’s franchise fee from 3% to 4%. To recover the franchise fee, United Water in turn charges its Boise customers the fee as a surcharge. United Water and the City do not disagree with the Staff’s recommendation regarding the procedural issue. However, they do dispute the Staff’s assertions that question the validity of the 1% increase in the franchise fee. To facilitate our review of the procedural and substantive issues, the Staff’s memorandum discussed the franchise fee statutes, the City’s 1995 franchise fee Ordinance, a brief history of the City-United Water negotiations that preceded the 1995 Ordinance, and the Commission procedures for recording the franchise fees assessed by municipalities.

### ***A. The Franchise Fee Statute***

In February 1995, the Idaho Legislature considered 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 Boise City's representative "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 clause. 1995 Sess. Laws Ch. 226, § 3. Instead of becoming effective on July 1 pursuant to *Idaho Code* § 67-510 and Article III, § 22 of the Idaho Constitution, the Bill becomes effective when it is signed by the Governor. The Bill passed both houses of the Legislature without a dissenting vote and was signed by the Governor on March 20, 1995.

### ***B. Boise's Franchise Ordinances***

The City and United Water's predecessor Boise Water (hereinafter United Water) entered into a franchise agreement in 1978 that set a 3% franchise fee payable to the City. 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 existing franchise agreement would soon expire on November 1, the City passed Resolution No. 12508 extending the 1978 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%, but subsequently 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 United's Ben Heppler dated Sept. 19, 1994. As negotiations continued, the City again extended the 1978 franchise agreement by Resolution to November 1, 1994. Ordinance No. 5564 dated Aug. 23, 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 a further 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. In the November 28, 1994 memorandum and another

memo dated January 10, 1995, the City Engineer states that the 1978 franchise fee was extended to November 1, 1994. Although there was no franchise agreement past November 1, United purportedly reported to the Staff 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 another 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 Engineer's copy of this letter provided to the Staff also contains a handwritten, underlined notation that "law could change."

The City and the utility were still negotiating when HB 329 was introduced in the 1995 Legislature. United submitted its bid to the City on February 28, 1995 – the same day that HB 329 was introduced in the House State Affairs Committee. 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 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 15<sup>th</sup> 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).

Staff also asserted that other sections of the Ordinance are relevant to our 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.

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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).

To summarize the timeline of events, the twice-extended 1978 franchise Ordinance expired on November 1, 1994. *Idaho Code* § 50-329A capping franchise fees at 3% became effective on March 20, 1995. Finally, the new franchise fee Ordinance (retroactive to November 1, 1994) was passed by the City Council and approved by the Mayor on April 11, 1995. Also on April 11, the Council and Mayor approved Resolution No. 13326 that authorized a summary of the franchise Ordinance to be published in the *Idaho Statesman*. Thus, the franchise Ordinance was adopted by the City 22 days after the enactment of the 3% franchise fee cap in *Idaho Code* § 50-329A and was retroactive to November 1, 1994 – the date when the last extension to the 1978 franchise expired.

### ***C. Commission Procedures to Record the Franchise Fees***

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 service area in Idaho. 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.

On 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 a 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 utility’s tariffs, the utility’s service representatives and the Staff could readily refer to the fee schedule when answering inquiries about franchise fees. 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

### *A. Procedural Issue—“Approve” or “Accept for Filing”*

1. Staff. As previously mentioned, the Staff recommended that the Commission reconsider its “approval” of the increase in the Boise City franchise fee. The Staff made two recommendations. First, the Staff recommended that the Commission confirm that tariff advices containing only franchise fees are not generally subject to the Commission’s approval. Rather than submit the franchise fee tariffs for approval, Staff should recommend that such tariff advices be “accepted for filing.” This would be consistent with the Commission’s 1995 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, Staff suggested that the Commission 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 has often stated, 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. United Water. United Water agreed with the Staff’s recommendation that utility tariff sheet “specifying franchise fees may be ‘accepted for filing’ rather than ‘approved.’” United Water Response at 1. The Company asserted that a municipal franchise fee “is not a rate or charge for utility service that necessarily requires commission approval.” *Id.* The Company noted that filing franchise fees with the Commission provides useful information when the Commission receives billing inquiries from utility customers. Both United Water and the City recommended that the Company’s tariff schedule be “accepted for filing.” *Id.* at 3; City Response at 2.

### *B. The Validity of the Franchise Ordinance*

1. Staff. In reviewing United Water’s Tariff Advice, Staff questioned the validity of the City’s franchise fee Ordinance. Staff suggested that the Commission consider initiating a formal investigation to examine the increase in the franchise fee.<sup>1</sup> In analyzing the validity of

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<sup>1</sup> The Staff also questioned whether it was prudent for United Water to agree to the retroactive Ordinance after the Legislature had passed *Idaho Code* § 50-329A limiting franchise fees to 3%. The Commission does not address the merits of this second issue.



the City's franchise fee Ordinance No. 5623, the Staff first examined whether the Ordinance is exempt from the 3% cap in *Idaho Code* § 50-329A. 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).

Staff next examined the related question concerning the retroactivity of the franchise Ordinance. *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, Staff questioned whether the exception clause in *Idaho Code* § 50-329A(2) represents clear legislative intent that cities may enact franchise ordinances retroactively.

If *Idaho Code* § 50-329A does not represent clear intent to allow retroactivity, Staff next scrutinized whether other statutes might 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.

Staff also asserted that *Idaho Code* § 50-901 may be pertinent. 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. . . ." Staff questioned how a franchise ordinance that cannot be passed until a minimum of 30 days after its

introduction and cannot “take effect” until it is published, can be made effective retroactive to November 1, 1994.<sup>2</sup>

Finally, the Staff questioned whether Article XI, § 12 of the Idaho Constitution prohibits the retroactive effect of the franchise fee Ordinance. This constitutional provision 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.” As previously mentioned, Staff reported that United Water disclosed 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. 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 Sess. Law, Ch. 160, § 3; *Butler*, 98 Idaho at 858, 574 P.2d at 546. In other words, the City claimed the Session Law “cured” or validated its 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. 98 Idaho at 859, 574 P.2d at 547. The Court stated 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.* Staff suggested the retroactivity of the City’s Ordinance that imposed franchise fees for transactions (United Water’s bills) already passed and rendered might be prohibited by Article XI, § 12.

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<sup>2</sup> In the City’s Resolution No. 13326 approving the newspaper summary of the franchise fee Ordinance the Staff noted 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.

2. The City and United Water Responses. The City characterized the Staff's analysis as essentially inviting the Commission to review an eight-year old franchise Ordinance. The City maintained that the Staff has not presented "a complete picture of the events giving rise to the franchise agreement and the interplay of the franchise agreement with the passage of *Idaho Code* Section 50-329A." City Response at 1. The City insisted that if the Commission were to initiate an investigation the "legality of the legislative procedures followed in the passage of the City's . . . franchise ordinance would be fully supported." *Id.*

United Water and the City also raised a more fundamental issue. They both argued that the Commission is not the appropriate forum for deciding whether the Boise City Ordinance is invalid. They asserted that the Commission is an entity with a limited jurisdiction and an examination of the City's Ordinance would exercise judicial functions normally reserved for the courts. United Water at 1; City at 1-2. Although United Water recognized that the Commission is a quasi-judicial agency, it argued the Commission should refrain from construing the statutes in the Idaho Municipal Code and exploring the laws of retroactivity. United Water stated while "the Staff Memorandum raises interesting questions on these topics, they are questions for a court to decide, not the Commission." United Water at 2.

In conclusion, both the City and United Water request the tariff advice be "accepted for filing" and that the Commission "not express any opinion – favorable or unfavorable – regarding the validity of the Boise City ordinance." United Water at 3.

### **DISCUSSION**

We first address the procedural issue raised by the Staff. As the Staff noted, the Commission usually does not "approve" franchise fees because these fees are established by municipalities. Although the Commission does not approve franchise fees, we encourage utilities to record franchise fees in an appropriate tariff schedule. Because franchise fees routinely appear on utility bills pursuant to *Idaho Code* § 50-329A, utility service representatives and Staff members should be made aware of the various franchise fees enacted by municipalities. Having a franchise fee delineated in a tariff schedule allows the Consumer Staff and the utility to answer billing or franchise fee inquiries from customers.

Because the Commission does not establish franchise fees, we believe that it is appropriate to mark these tariff schedules as "accepted for filing" to distinguish this administrative activity from the Commission's "approval" of rates and charges pursuant to *Idaho*

*Code* §§ 61-301, 61-502, 61-503, 61-622, and 61-623. As we have noted in other cases, price lists or tariff schedules “accepted 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. Consequently, the minutes of our August 18 public decision meeting shall be modified to reflect that United Water’s revision to its Schedule 8, Sheet 10B is “accepted for filing” as conditioned below. United’s Tariff Sheet 10B shall be effective on October 1, 2003.

Turning to the substantive issue, we believe the Staff has raised significant questions regarding the validity of the City’s franchise fee and the 1% increase. The Staff suggests that the Commission initiate a formal inquiry into this matter. A formal investigation would allow us to develop a record and allow interested parties to offer evidence and arguments. Although our record is limited at this point, there are several observations that are appropriate.

First, it is clear from the plain reading of *Idaho Code* § 50-329A and its legislative history that the Legislature intended franchise fees not exceed 3% as the general rule. Our recollection of circumstances surrounding passage of HB 329 was that several municipalities were contemplating the implementation of franchise fees. In order to create a uniform franchise structure, the Legislature passed 50-329A. Second, it is also apparent that the Legislature intended this statute to become effective immediately by attaching an emergency clause to House Bill 329. Finally, it also appears that the City’s franchise fee Ordinance was intended to be retroactive to the time when the 1978 franchise fee lapsed on November 1, 1994. Thus, we are confronted with two primary questions: (1) Does *Idaho Code* § 50-329A or some other law permit the City to make its franchise ordinance effective retroactively prior to the enactment of HB 329; and (2) is the franchise fee ordinance unconstitutional pursuant to Article XI, Section 12?

Despite these intriguing questions, we decline to initiate an investigation into this matter. Although the Public Utilities Law vests the Commission with authority to investigate matters affecting utilities and enforce provisions of the constitution and statutes of this state affecting public utilities, we find that the substantive issues presented here are best resolved by a court rather than the Commission. Our decision here comports with the Supreme Court’s opinion in *Alpert v. Boise Water Corporation*, 118 Idaho 136, 795 P.2d 295 (1990). In *Alpert*, several parties asserted that only the Commission has jurisdiction to determine “the validity of franchise fees paid to the cities by the utilities which are eventually passed onto the consumers

and ratepayers.” 118 Idaho at 138, 795 P.2d at 300. The Court rejected this argument and held that these issues “are best resolved by the courts.” *Id.* at 118 Idaho at 140, 795 P.2d at 302.

Our decision to refrain from investigating the substantive issues raised by the Staff does not resolve these questions. We believe these questions should be addressed and answered by a court of law. Consequently, it is appropriate to direct United Water to initiate a case in a court of competent jurisdiction to resolve these questions. Although we have accepted United Water’s tariff advice for filing, we put the Company on notice that the 1% increase effective October 1, 2003 is subject to refund if a court invalidates the Ordinance or franchise fee increase. United Water shall provide the Commission with the Court’s opinion within twelve (12) months from the date of this Order. During this period, the Company shall maintain an accounting of the 1% increase in the franchise fee.

### **ORDER**

IT IS HEREBY ORDERED that United Water Idaho’s Schedule No. 8, Sheet 10B that reflects an increase in the City of Boise’s franchise fee from 3% to 4% is “accepted for filing” effective October 1, 2003 as conditioned in this Order.

IT IS FURTHER ORDERED that United Water seek a Court decision to determine whether the City’s Ordinance No. 5623 and the 1% franchise fee increase are legally valid.

IT IS FURTHER ORDERED that the 1% increase is subject to refund by United Water until such time as the Company provides the Commission with judicial confirmation addressing the validity of the City’s Ordinance and franchise fee increase. United Water shall file a copy of the Court’s opinion within twelve (12) months of the date of this Order. If a court action is not initiated or a court invalidates the Ordinance or fee increase, the Commission shall decide in a subsequent proceeding how the refund amount will be returned to customers.

THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in this Case No. UWI-W-03-1 may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in this Case No. UWI-W-03-1. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

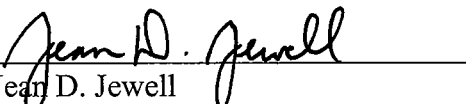
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this ~~October~~ <sup>November</sup> 3<sup>rd</sup>  
day of ~~October~~ 2003.

  
PAUL KJELLANDER, PRESIDENT

  
MARSHA H. SMITH, COMMISSIONER

  
DENNIS S. HANSEN, COMMISSIONER

ATTEST:

  
Jean D. Jewell  
Commission Secretary

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