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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Consolidated Subcase No. 00-92023 (92-23)
	)	
Case No. 39576	)	STATE OF IDAHO'S RESPONSE TO IDAHO
	)	POWER COMPANY'S REQUEST FOR
	)	SCHEDULING CONFERENCE
	)	
	)	
	)	
	)	
	)	

COMES NOW, the State of Idaho, by and through its counsel of record and hereby responds to Idaho Power Company's Request for Scheduling Conference. The State of Idaho agrees that it would be helpful to have a scheduling conference during the September 4, 2008 hearing. The State strongly disagrees, however, with Idaho Power's proposed schedule and the asserted basis for it. Idaho Power's proposed schedule would unnecessarily and unfairly

prejudice the State by causing yet another months-long delay in the briefing on the State's Motion for Summary Judgment on Subordination to Ground Water Recharge ("Motion for Summary Judgment"), which has already been pending for four months.¹ As this Court recognized in its last order, the State is entitled to finally be heard on its Motion for Summary Judgment should the Motion to Consolidate be denied: "In the event the Court declines to consolidate the subcases, the Court will forthwith issue an order resuming the summary judgment proceedings according to the schedule in place at the time the stay was entered."² The State requires no further discovery to go forward on its motion, and under Idaho law, Idaho Power may not continue to postpone the hearing by simply re-asserting generalized contentions that it needs more discovery, but rather must make an affirmative, particularized showing that further discovery is necessary to present "facts essential to justify" Idaho Power's opposition to the State's Motion. I.R.C.P. 56(f).

PROPOSED BRIEFING SCHEDULE

Idaho Power is proposing that briefing on Motions for Summary Judgment not begin until December 5, 2008. Idaho Power's proposal is apparently based, at least in part, on its belief that the State of Idaho needs all the documents Idaho Power has now been ordered to produce before the State can begin its briefing. That belief is erroneous: the State requires no further discovery, and, as it has informed the Court and counsel, the State has been prepared to proceed with briefing since filing the Motion for Summary Judgment on May 7, 2008. Accordingly, the State of Idaho proposes the following briefing schedule.

- October 6, 2008, parties submit briefing on cross-motions for summary judgment.
- October 27, 2008, parties file their responses.
- November 10, 2008, parties file their reply briefs.

¹ The State filed the Motion for Summary on May 7, 2008. As the State informed the Court during the hearing of August 11, 2008, it is the State's position that it has been and continues to be prejudiced by Idaho Power's continuing attempts to delay this proceeding and prevent the State from being heard on its Motion for Summary Judgment.

² Scheduling Order Re: Motion To Consolidate And Motion For Summary Judgment at 4 (Aug. 15, 2008).

- The Court then hears the cross-motions for summary judgment sometime before November 27, 2008, which is Thanksgiving Day.

This proposed schedule is appropriate in light of the following events in this case:

- May 7, 2008 – the State of Idaho filed a Motion for Summary Judgment identifying 3 issues for consideration by this court. The State of Idaho indicated that it was willing to proceed on its motion without any additional discovery. However, Idaho Power stated that it needed to have additional discovery and subsequently presented a proposed scheduling order wherein it indicated that a first set of discovery requests could be propounded and responded to by June 25, 2008, with a second set of discovery propounded no later than July 9, 2008. Idaho Power also proposed that cross-motions for summary judgment be filed and briefed on July 28, 2008. The Court subsequently issued an order requiring that discovery responses be due June 30, 2008, additional discovery propounded on July 14, and briefing on summary judgment filed August 1, 2008.
- June 30, 2008 – Idaho Power responded incompletely to the State of Idaho's discovery request, refusing outright to respond to many of the requests and failing to make documents responsive to the other requests available to the State of Idaho until July 15, 2008.
- June 30, 2008 – Idaho Power filed a motion to strike issues set forth in the State of Idaho's motion for summary judgment which had been filed 7 weeks earlier on May 7, 2008.
- June 30, 2008 – the State of Idaho responded to Idaho Power's discovery requests and provided all documents responsive to those requests.
- July 21, 2008 – The State of Idaho filed a motion to compel seeking an order to compel discovery responses on discovery which had been propounded on May 30, 2008.
- July 29, 2008 – The Court heard Idaho Power's Motion to Strike and the State's Motion to Compel.
- August 6, 2008 - The Court denied Idaho Power's motion to strike and granted the State of Idaho's motion to compel. Despite this ruling, the State of Idaho has received no additional documents responsive to its May 30, 2008 request since the Court issued its Order compelling Idaho Power to produce documents.
- August 8, 2008 - Idaho Power filed a motion to consolidate and asked the court a third time to delay briefing on the State's motion for summary judgment while the court considered Idaho Power's motion to consolidate. During the hearing on August 11, 2008, Idaho Power represented to the Court that it could be ready to file its cross-motion for summary judgment within thirty days after the Court's hearing on the motion to consolidate.

- August 27, 2008 – Idaho Power propounded its 4th set of interrogatories, requests for admissions and requests for production, some 44 days after the date supplemental discovery was due pursuant to the Court’s May 23, 2008 Order.

On three prior occasions, the State of Idaho has been prepared to proceed with its briefing on the motion for summary judgment filed on May 7, 2008. On each of those occasions, Idaho Power has asked this court not to allow the State of Idaho to submit its briefing.

First, Idaho Power contended it needed additional discovery in order to respond to the State of Idaho’s Motion for Summary Judgment. The Court granted that request and largely adopted the discovery and briefing schedule proposed by Idaho Power.

Next, seven weeks after the State of Idaho filed its motion for summary judgment, Idaho Power filed its motion to strike 2 of the issues set forth in the State of Idaho’s motion for summary judgment and again asked the Court to delay any briefing on those issues until its motion was decided. The Court granted that request, and subsequently issued an order denying Idaho Power’s motion to strike.

Next, Idaho Power filed its motion to consolidate and again asked the Court to delay any briefing on the State’s motion for summary judgment until after that issue was decided. The Court granted Idaho Power’s request and a hearing on Idaho Power’s motion to consolidate will be heard on September 4, 2008.

Idaho Power is now asking the Court a fourth time to delay the State of Idaho’s briefing--this time for an additional three months, until December 5, 2008. Idaho Power is seeking this delay because it contends that it is “entirely illogical and inefficient to require the parties to be in briefing the remaining issue in this matter for summary disposition prior to discovery being completed.” Thus, Idaho Power proposes that briefing be submitted 25 days after the date discovery is set to conclude. Even though the discovery cut-off date is November 10, 2008, Idaho Power states only that it “believes that it may be able to prepare the remaining potentially responsive documents for production by the State.” (Emphasis added)

Idaho Power's latest proposal to delay the State of Idaho's briefing should be denied for the following reasons: First, the State of Idaho does not need the documents Idaho Power still has failed to provide in order for the State to proceed with its motion for summary judgment.

Second, Idaho Power's request ignores Idaho Rule of Civil Procedure 56(f) which allows the party opposing a summary judgment motion to obtain a stay or continuance for further discovery only if the party files a motion supported by an affidavit demonstrating that "the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." I.R.C.P. 56(f). The Idaho Supreme Court has explained that this rule requires an affirmative, particularized showing of what further discovery is sought and "how it would preclude summary judgment":

It has been noted that a party who invokes the protection of Rule 56(f) must "do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits ... and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." Further, in order to grant a motion for additional discovery before hearing a motion on summary judgment, the plaintiff has the burden of setting out "what further discovery would reveal that is essential to justify their opposition," making clear "what information is sought and how it would preclude summary judgment."

Jenkins v. Boise Cascade Corp., 141 Idaho 233, 239, 108 P.3d 380, 386 (2005) (citations omitted). Idaho Power has submitted no Rule 56(f) affidavits, nor has it demonstrated how the discovery Idaho Power seeks would preclude summary judgment.

Continuing to delay the State's Motion for Summary Judgment on the basis of Idaho Power's vague and generalized assertions is prejudicial to the State. The State of Idaho is entitled to present its brief on its motion for summary judgment. Idaho Power has been successful in its efforts to prevent the State of Idaho from submitting its brief on its motion for summary judgment for nearly 4 months. This Court should not allow Idaho Power to delay the State of Idaho's briefing any further. If after receiving that brief, Idaho Power believes that it

needs additional discovery, it can present this court with a motion filed pursuant to Idaho Rule of Civil Procedures 56 (f).

Further, even though it is the State of Idaho's belief that Idaho Power's latest discovery requests are not timely, the State of Idaho has indicated its willingness to provide a response to those requests by September 29, 2008. Under the schedule proposed by the State of Idaho, Idaho Power will have the State of Idaho's discovery responses thirty-seven (37) days before it will be required to file its responsive brief. This Court need not delay the State of Idaho's briefing until December 5.

In addition, the Court should not credit any contention Idaho Power may present that it needs further discovery to brief the issues the Company wishes to present in a cross-motion for summary judgment. The Company represented to the Court in May that it believed the recharge question could be resolved via summary judgment, and intended to file a cross-motion formulating the issues as the Company viewed them. Idaho Power told the Court it would be prepared to proceed with its motion for summary judgment on July 28th, 2008, and the Court's Order gave the parties until August 1st, 2008. Any contention that the Company needs more time to prepare a summary judgment motion and brief on the recharge question, which was one of the principal claims in the complaint the Company filed sixteen months ago, is entirely implausible.

Finally, this Court should reject Idaho Power's contention that it is somehow incapable of producing discovery and writing a response to the State of Idaho's motion for summary judgment at the same time. Idaho Power is a large company with many resources and its local counsel, out of state counsel and in house counsel are capable and have the resources to answer discovery requests and write briefs at the same time.³ Idaho Power suggests that it is somehow inefficient to pursue a motion for summary judgment while discovery is ongoing. That is not

³ Idaho Power's Denver law firm, Brownstein, Hyatt, Farber & Shrek, P.C., has offices in 10 cities in the United States. More than 200 attorneys are listed for the Denver office alone in Martindale-Hubbell.

true. In many cases dispositive motions are considered by courts while is ongoing. That was done by this Court earlier in this case and it is appropriate for this Court to do it again.

PROPOSED DISCOVERY SCHEDULE

The State of Idaho proposes the following discovery schedule:

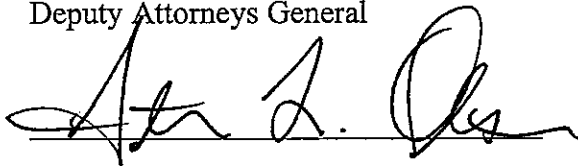
- September 6, 2008 – Idaho Power responds to the State of Idaho's Interrogatories and Requests for Admission as required by the Court Order entered on August 6, 2008.
- September 12, 2008 – Idaho Power supplements its responses to the State of Idaho's request for production pertaining to recharge.
- September 29, 2008 – State of Idaho serves its responses and any objections to Idaho Power's discovery requests.
- November 10, 2008 – Idaho Power produces all remaining documents responsive to the State of Idaho's requests for production as required by the Court's Order entered on August 6, 2008.

Respectfully submitted this 3rd day of September, 2008,

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A handwritten signature in black ink, appearing to read "Steve L. Olsen", written over a horizontal line.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of September, 2008, I caused a true and correct copy of the foregoing to be served on the following parties by the indicated methods:

Original to Clerk of the SRBA Court
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IDWR Document Depository
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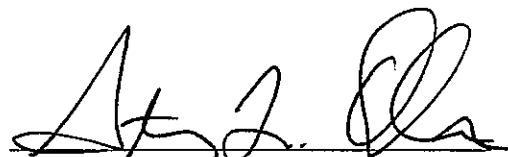
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