STATE OF IDAHO)
County of KOOTENAI)ss

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

KOOTENAI ELECTRIC COOPERATIVE, INC., an Idaho nonprofit corporation, *Plaintiff*, vs. **SUNDANCE INVESTMENTS, L.L.L.P., an Idaho Limited Liability Limited Partnership,** *Defendant*.	Case No. **CV 2012 810** **MEMORANDUM DECISION AND ORDER DISMISSING THE CASE DUE TO LACK OF STANDING; ALTERNATIVELY, GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on cross-motions for summary judgment.

On January 25, 2012, Kootenai Electric Cooperative, Inc. (KEC) brought this declaratory judgment action against Sundance Investments, L.L.L.P. (Sundance). Complaint for Declaratory Judgment, pp. 1-6. Six months later, KEC filed its First Amended Complaint for Declaratory Judgment on July 11, 2012. On July 28, 2012, Sundance appeared and disqualified the district judge originally assigned to this case, whereupon the case was assigned to the undersigned district judge. Sundance answered on November 28, 2012. In that "Answer", Sundance also made a counterclaim for declaratory relief against KEC. Answer, pp. 7-9. Up to this point, the timing in the present case lacks the sense of urgency one would expect to see in a declaratory judgment action.

As soon as the answer was filed, the Court noticed up a scheduling conference for December 18, 2012. At that hearing, the parties indicated they would prefer a court trial in October, 2013. A two-day court trial was scheduled at that time for October 7, 2013. On January 15, 2013, KEC filed its Answer to Counterclaim. On August 5, 2013, the parties filed a Stipulation to Vacate Trial, which was scheduled to occur in two months. The stipulation was "…on the grounds and for the reason that the parties need additional time concerning the production of certain information regarding third parties." The Court scheduled a status conference on October 16, 2013. At that hearing, the Court scheduled the court trial for May 24, 2014.

On March 4, 2014, KEC and Sundance both filed their Motions for Summary Judgment.

KEC is a non-profit cooperative that provides electrical energy to its members. Declaration of Doug Elliott, p. 3 ¶ 8; Memorandum in Support of Motion for Summary Judgment, p. 2. KEC has adopted articles of incorporation, bylaws, policies, procedures rules and regulations. *Id.,* p. 3 ¶ 10. To become and stay a member of KEC, members must contribute to the cooperative's financial expenses and margins. *Id.,* p. 3 ¶ 9; p. 4 ¶ 13.

Moreover, pursuant to KEC Policy No. 3-4, to become a member of KEC, an applicant is required to "[c]omplete a Line Extension request form and provide the required documents listed in the Line Extension Procedure Section" and "[p]ay the total extension costs as identified on the Line extension quotation form prior to the start of construction". *Id.,* pp. 3-4 ¶ 16; Exhibit D. "[T]he Line Extension costs for a subdivision development include the cost of the infrastructure of "backbone" that's necessary to initially provide service to the lots." *Id.*, p. 5 ¶ 17.

Sundance owns a real property development in Kootenai County where it intends to construct a residential housing development. *Id.*, p. 5 ¶ 20. Sundance acquired this property at a Sherriff's Sale. Affidavit of Roger Anderson, p. 7 ¶ 28. Prior to the Sherriff's Sale, the development property was owned by The Ridge at Black Rock Bay, Inc., which entity had previously acquired it from The Ridge at Black Rock Bay Homes, Inc. Memorandum in Support of Defendant/Counterclaim Plaintiff Sundance Investments, L.L.L.P.'s Motion for Summary Judgment (Sundance's Memorandum in Support of Summary Judgment), p. 2. On May 19, 2006, a Promissory Note for the benefit of Sundance was executed by The Ridge at Black Rock Bay Homes, Inc., and secured by a Deed of Trust recorded against the development property. *Id.* The grantor was later amended to The Ridge at Black Rock Bay Homes, Inc. *Id.* On February 13, 2008, The Ridge at Black Rock Bay Homes, Inc. recorded a plat of the development property, which created twenty residential lots. *Id.* at p. 3.

Subsequently, on June 2, 2008, The Ridge at Black Rock Bay Homes, Inc. and KEC entered into an Electric Service Agreement. Affidavit of Roger Anderson, Exhibit G. Pursuant to that agreement, KEC provided "all necessary equipment for the backbone electrical system to serve the 20 residential lots and the water pump within the development. . . . The line extension costs for the backbone system for the 20 lots and the water pump is $282,100." *Id.* The agreement further allowed The Ridge at Black Rock Bay, Inc. to make payment over time by "paying KEC $14,848 for each lot sold or conveyed " with the entire balance owing on or before December 31, 2012, regardless of the number of sales or conveyances made. *Id.* The agreement provided in the event The Ridge at Black Rock Bay, Inc. defaulted, KEC was entitled to foreclose its mortgage and sue for collection. *Id.* On June 25, 2008, KEC recorded a mortgage

against the development property to secure the obligations owed to it under the agreement. Affidavit of Roger Anderson, Exhibit H. This mortgage was subordinate to Sundance's Deed of Trust. *Id.*

In 2009, The Ridge at Black Rock Bay, Inc. defaulted on its obligations to Sundance under the Promissory Note, which was secured by the Deed of Trust. Sundance's Memorandum in Support of Summary Judgment, p. 5. Litigation was initiated in Kootenai County Case number CV 2009-4519, where multiple parties, including Sundance and KEC asserted claims or security rights to the development property. *Id.* The Kootenai County District Court determined that Sundance's Deed of Trust was first in priority and KEC's rights under its mortgage were subordinate to Sundance's claim. Affidavit of Roger Anderson, Exhibit N.

On June 1, 2010, after the litigation was initiated, KEC recorded a Notice Regarding Electric Service. Affidavit of Roger Anderson, Exhibit M; Declaration of Doug Elliott, Exhibit G. "The Notice provides that 'KEC only provides electric service to its members'; that 'KEC has no obligation to provide electric service to a member until all line extension costs due it have been paid.'; That 'KEC has no duty to provide electric service to a lot except and until KEC has been paid the sum of $14,484.00 per lot, plus any line extension costs applicable to such lot.'" Declaration of Doug Elliott, p. 6 ¶ 21. The line extension cost per lot was later amended to $11,981.61. KEC's Memorandum in Support of Motion for Summary Judgment, p. 12; Declaration of Melissa Newcomer, p. 3, ¶ 9.

After Sundance acquired the development property, Sundance requested KEC provide service connections between the electrical backbone and two lots within the development property. Sundance's Memorandum in Support of Summary Judgment, p. 6. "KEC refused to provide service connections to residential lots in the [development

property] from the backbone, unless Sundance paid the obligation of The Ridge at Black Rock Bay, Inc. for the cost associated with the backbone." Affidavit of Roger Anderson, p. 8 ¶ 29. Sundance made a demand for service to KEC on November 9, 2011. *Id.,* Exhibit Q.

Sundance is not a member of KEC. KEC now seeks a declaratory judgment that, among other things, "the payment of the Line Extension costs for each lot in the Development is a mandatory condition to becoming a member of KEC and receipt of electrical energy for each lot in the Development", that the above mentioned requirement is fair and reasonable, and not arbitrary or capricious, and as such, Sundance is required to make such payment to be a member of the cooperative and receive electrical energy. KEC's Memorandum in Support of Motion for Summary Judgment, p. 13; Declaration of Doug Elliott, p. 6 ¶ 24.

In turn, Sundance seeks declaratory judgment that it has no liability to reimburse KEC for the Line Extension costs incurred under the Electric Service Agreement since it was not a party to that agreement, and membership to KEC cannot be conditioned on such repayment. Answer, p. 8; Sundance's Memorandum in Support of Summary Judgment, p. 14.

Hearing on the cross motions for summary judgment seeking declaratory judgment was held on March 27, 2014. The Court took the motions under advisement at that time.

II. STANDARD OF REVIEW.

"Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Brewer v. Washington RSA No. 8 Ltd. Partnership,* 145 Idaho 735, 738 184 P.3d 860, 863 (2008) (quoting *Badell v.*

Beeks, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). "Where the parties have filed cross-motions for summary judgment relying on the same facts, issues and theories, the parties effectively stipulate that there is no genuine issue of material fact that would preclude the district court from entering summary judgment." *Intermountain Forest Mgmt., Inc. v. Louisiana Pac. Corp.,* 136 Idaho 233, 235, 31 P.3d 921, 923 (2001) (citing *Davis v. Peacock,* 133 Idaho 637, 640, 991 P.2d 362, 365 (1999)). The absence of a genuine issue of material fact is not established merely by the fact that both parties have moved for summary judgment. *Id.* (citing *Kromrei v. AID Ins. Co.,* 110 Idaho 549, 551, 716 P.2d 1321 (1986)). Rather, the court must assess the merits of each party's motion. *Id.* (citing *Stafford v. Klosterman,* 134 Idaho 205, 207, 998 P.2d 1118, 1119 (2000)). When the case will be tried before the court, rather than before a jury, the court "is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences." *Huskinson v. Nelson*, 152 Idaho 547, 550, 272 P.3d 519, 522 (2012) (citing *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust,* 144 Idaho 233, 237, 159 P.3d 870, 874 (2007)).

III. ANALYSIS.

A. Introduction.

Since, both parties filed motions for summary judgment on substantially the same issues, facts and theories, and because the Court will be the trier of fact at trial, the Court is free to draw the most probable inferences in construing the facts and should affirm those inferences if reasonably supported by the record. *See Nordstrom v. Guindon*, 135 Idaho 343, 345, 17 P.3d 287, 289 (2000).

Both parties seek relief under the Idaho Uniform Declaratory Judgment Act, Idaho Code § 10-1201 *et seq.* "Action for declaratory judgment may invoke either remedial or preventive relief, and may relate to right that has been breached or is yet in dispute, or status that is undisturbed but endangered, but generally cannot be maintained unless involving some specific adversary question or contention based on existing state of facts." *Wood v. Class A. Sch. Dist. No. 25*, 78 Idaho 75, 78, 298 P.2d 383, 385 (1956) (citing *State ex rel. Miller v. State Board of Education*, 56 Idaho 210, syl. 5, 52 P.2d 141 (1935); *Ayers v. General Hospital*, 67 Idaho 430, 182 P.2d 958 (1947)). A "court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." I.C. § 10-1206. "This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered." I.C. § 10-1212.

"[A] declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists [which] precludes courts from deciding cases which are purely hypothetical or advisory." *Wylie v. State, Idaho Transp. Bd.*, 151 Idaho 26, 31, 253 P.3d 700, 705 (2011) (citing *State v. Rhoades,* 119 Idaho 594, 597, 809 P.2d 455, 458 (1991)). "Justifiability is generally divided into subcategories—advisory, opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions." *Id.* (quoting *Miles v. Idaho Power Co.,* 116 Idaho 635, 369, 778 P.2d 757, 761 (1989)). "[T]he doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Idaho Branch Inc. of Associated Gen. Contractors of Am. v. Nampa Hwy. Dist. No. 1,* 123 Idaho 237, 240,

846 P.2d 239, 242 (Ct. App. 1993) (citing I.C. §§ 10-1205 –1206). "To have standing a plaintiff must show the existence of an actual controversy which can be resolved or terminated by the action." *Id.* The inquiry focuses on "whether the party seeking to invoke the court's jurisdiction has 'alleged such a personal stake in the outcome of the controversy as to assure the concrete adversariness which sharpens the presentation upon which the court so depends for illumination of difficult constitutional questions.'" *Id.* at 241, 846 P.2d at 243 (quoting *Duke Power Co. v. Carolina Env. Study Group,* 438 U.S. 59, 72, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978)). This is more than a "generalized grievance shared by other citizens and taxpayers." *Id.*

"A cooperative may promulgate appropriate and reasonable rules governing the admission and conduct of **members**." *First Federal Savings and Loan Association of Twin Falls v. East. End Mutual Electric Co., Ltd. (First Federal)*, 112 Idaho 762, 766, 735 P.2d 1073, 1077 (Ct. App. 1987) (emphasis added) (citing *Sutton v. Hunziker*, 75 Idaho 395, 272 P.2d 1012 (1954); *Appeal of Two Crow Ranch, Inc.*, 159 Mont. 16, 494 P.2d 915 (1972); *King v. Farmer's Electric Coop., Inc.*, 56 N.M. 552, 246 P.2d 1041 (1952)). "Whether the conditions [are] reasonable should be measured by whether they [are] 'fair, proper, just, moderate, suitable under the circumstances' or 'fit and appropriate to the end in view.'" *Stevenson v. Prairie Power Co-op., Inc.*, 118 Idaho 31, 33, 794 P.2d 620, 622 (1990) (quoting *Black's law Dictionary*, 1138 (5th ed. 1979) (cited in *Giacobbi v. Hall*, 109 Idaho 293, 297, 707 P.2d 404, 408 (1985)). Moreover, conditions are enforceable unless they are contrary to public policy. *First Federal,* 112 Idaho 762, 766, 735 P.2d 1073, 1077 (citing *Capital Electric Power Association v. McGuffee,* 226 Miss. 227, 83 So.2d 837 (1955), *overruled on other grounds, Tideway Oil Programs, Inc. v. Serio,* 431 So.2d 454 (Miss.1983); *Ohio Power Co. v. Village of*

Attica, 23 Ohio St.2d 37, 261 N.E.2d 123 (1970); *McCrady v. Western Farmers Electric Cooperative,* 323 P.2d 356 (Okla.1958)).

Overarching this lawsuit is the current state of the law in Idaho regarding cooperatives. KEC can require any property owner who wishes to pay for electrical service to pay prior to receiving service and becoming a member of the cooperative. There is no doubt about that state of the law in Idaho. The Idaho Court of Appeals held:

> Our focus, then, is narrowed to the charge against the membership interest. In this regard, it is important to remember that a cooperative is an association of individual members who hold personal ownership interests in the cooperative's enterprise. PACKEL at 114–15. Here, because the enterprise consists of furnishing electrical service to property owned by each member, the membership certificate is described in the bylaws as "appurtenant" to that property. Membership follows title. Consequently, when title changes hands, the new owner may request a transfer of the previous owner's membership—subject, of course, to any conditions imposed elsewhere in the bylaws. Payment of a charge upon the membership, arising from a delinquency in the member's account, is one of those conditions.
>
> When a charge upon the membership is asserted against an incoming member, it is tantamount to a charge upon the membership certificate. Such charges may be authorized by statute or, as in this case, by contract embodied in the bylaws. PACKEL at 134–35. They are analogous to liens upon shares of stock in business corporations and are binding upon transferees who have actual or constructive notice of them. *Id. See also* 11 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 5262–5264 (Rev.1986). In this case First Federal received constructive notice when the cooperative recorded its claim of lien before the trustee's sale. The claim not only asserted a lien upon real property but also contained the following language: "NOTICE IF [sic] FURTHER GIVEN that electrical energy or service will not be furnished by claimant to the above described real property until said sum has been paid in full to claimant."
>
> This charge constitutes a restraint upon the right to transfer membership. Indirectly, it also represents a restraint upon the proposed transferee's right to join the cooperative. A cooperative may promulgate appropriate and reasonable rules governing the admission and conduct of members. *See Sutton v. Hunziker,* 75 Idaho 395, 272 P.2d 1012 (1954); *Appeal of Two Crow Ranch, Inc.,* 159 Mont. 16, 494 P.2d 915 (1972); *King v. Farmer's Electric Coop., Inc.,* 56 N.M. 552, 246 P.2d 1041 (1952). Such restraints are enforceable unless they are arbitrary or contrary to

> public policy. *Capital Electric Power Association v. McGuffee,* 226 Miss. 227, 83 So.2d 837 (1955), *overruled on other grounds, Tideway Oil Programs, Inc. v. Serio,* 431 So.2d 454 (Miss.1983); *Ohio Power Co. v. Village of Attica,* 23 Ohio St.2d 37, 261 N.E.2d 123 (1970); *McCrady v. Western Farmers Electric Cooperative,* 323 P.2d 356 (Okla.1958).

First Federal, 112 Idaho 762, 765-66, 735 P.2d 1073, 1076-77. Thus, KEC's policy that requires payment before membership and electrical service is legal unless that policy is arbitrary, contrary to public policy, or unreasonable. The Idaho Court of Appeals found that what contravenes public policy for a public utility is completely different as compared to an electrical cooperative:

> Whether the charge contravenes public policy is a more difficult question. Courts in other jurisdictions often have refused, in the absence of a statutory command or a valid lien against the property, to impose upon a new property owner the burden of unpaid "utility" charges incurred by the prior owner. *See generally,* Annot., *Electricity, Gas or Water Charges,* 19 A.L.R.3d 1227 (1968). However, a close analysis of the cases reveals that their discussions of public policy turn largely upon the nature of the service provider. Broadly speaking, there are three types of providers: municipalities, publicly regulated utilities (including publicly regulated cooperatives), and unregulated private cooperatives or corporations.
>
> Municipalities and publicly owned or operated entities long have been required to serve buyers of property within their geographical jurisdictions, regardless of prior defaults by the sellers, unless otherwise provided by statute. *E.g., Farrell v. Ward,* 53 A.2d 46 (D.C.Mun.Ct.App. 1947); *Home Owners' Loan Corporation v. Logan City,* 97 Utah 235, 92 P.2d 346 (1939). This broad requirement has been applied in analogous cases to publicly regulated utility companies. Because such companies are imbued with a "public duty" to serve patrons in the area, they generally have no right to require a purchaser to pay the seller's arrearage before resuming service. *United States v. Springwood Village,* 168 F.Supp. 885 (S.D.N.Y.1958); *New Orleans Gas Light and Banking Co. v. Paulding,* 12 Rob. 378 (La.1845); *Turner v. Revere Water Co.,* 171 Mass. 329, 50 N.E. 634 (1898); *Title Guarantee & Trust Co. v. 457 Schenectady Avenue, Inc.,* 260 N.Y. 119, 183 N.E. 198 (1932), *cert. denied,* 289 U.S. 741, 53 S.Ct. 659, 77 L.Ed. 1488 (1933); *Becker v. Brooklyn Edison Co.,* 121 Misc. 96, 200 N.Y.S. 319 (Mun.Ct.N.Y.1923).
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> As a corollary of this broad requirement, a "no shut-off" rule has been applied to publicly regulated rural electrification cooperatives. *See Yates v. White River Valley Electric Cooperative, Inc.,* 414 S.W.2d 808 (Mo.Ct.App.1967). Some courts have treated electric power cooperatives organized under the federally funded Rural Electrification Administration

> as public utilities or public service corporations. *E.g., Application of Trico Electric Cooperative, Inc.,* 92 Ariz. 373, 377 P.2d 309 (1962) (public service corporation); *Ohio Power Co. v. Village of Attica, supra* (public utility).
>
> However, the record in this case does not indicate that the East End cooperative is a product of federal funding. More importantly, under Idaho law, nonprofit cooperatives like East End are *not* regulated. *See* I.C. § 61–104. **Our Legislature evidently has determined that this type of service provider, which typically serves a limited group of customers and is owned by the customers themselves, merits a lesser degree of public intrusion upon its freedom of contract. Members of such an incorporated cooperative may, by mutual agreement, adopt regulations governing changes in membership and the suspension or resumption of the cooperative's service. So long as these regulations are not arbitrary and do not infringe upon a fundamental public policy such as nondiscrimination, the regulations are enforceable. We discern no fundamental public policy that is impaired by placing a charge upon a certificate of membership in a cooperative, in order to collect an arrearage in the member's account.**
>
> **Accordingly, we hold that such a charge may be imposed, pursuant to duly promulgated bylaws of an unregulated, private, nonprofit cooperative, as a condition of transferring an interest in the cooperative to a prospective new member who has notice that the charge must be paid before service will be furnished.** We have not been cited, nor have we found, cases contrary to this precise holding. Neither do we find that the district judge reached a different result upon any articulated public policy ground. Rather, he suggested simply that First Federal was entitled to a "new" membership. We disagree. The cooperative's bylaws do not provide for the creation of a "new" membership with respect to property identified to an existing membership. Indeed, by linking each membership to the property served, and by providing for transfers of membership, the bylaws implicitly preclude such "new" membership schemes. **First Federal has no right to demand a membership on terms that violate the cooperative's valid bylaws.** PACKEL at 123–25. We conclude that the judge erred by suggesting otherwise.

112 Idaho 762, 766-67, 735 P.2d 1073, 1077-78. (bold added).

B. Neither Party Has Standing to Maintain a Claim for Declaratory Relief.

Focusing on the parties seeking relief, as opposed to the relief being sought, this Court finds neither KEC nor Sundance have standing to request declaratory judgment, resulting in dismissal of KEC's complaint and Sundance's counterclaim. As discussed

immediately above in *Idaho Branch Inc. of Associated Gen. Contractors of Am. v. Nampa Hwy. Dist. No. 1,* and below *Harris v. Cassia County,* focus on the parties as opposed to the relief sought is the correct focus. With that focus, neither KEC nor Sundance have standing to request their declaratory judgments.

It is undisputed by the parties that Sundance is not a member of KEC. KEC has stated that it is not required to accept Sundance as a member. KEC's Reply Memorandum in Support of Motion for Summary Judgment, p. 5. If Sundance was actually a member of KEC, Sundance would have standing to seek declaratory judgment against KEC, and, vice versa, KEC would have standing to seek declaratory judgment against one of its members. In the current position, Sundance is like any other member of the community that does not have a personal stake in the policies of KEC. Sundance's relative position to KEC in this lawsuit is based solely upon Sundance's *potential* to be a member of KEC *in the future*. And instead of paying money to KEC to become a member, Sundance has chosen to file its counterclaim requesting this Court force KEC to allow Sundance to become a member without paying any monies. Answer, pp. 5-8, III. Counterclaims; p. 8, IV. Prayer for Relief, ¶ 2(B) ("That KEC may not condition membership of or to the lots within the Development, as that phrase is defined in Plaintiff's First Amended Complaint, upon Sundance's payment of any portion of said 'Line Extension Costs,' as defined."). KEC's relative position to Sundance in this lawsuit is based upon KEC's *potential* to have the lot owners of Sundance as its electrical customers, KEC's *potential* to recoup from Sundance KEC's investment in its backbone that is already installed. Instead of waiting to be sued by Sundance, KEC has chosen to file this lawsuit asking this Court declare that if Sundance wishes to become a member of KEC *in the future*, it must first pay

KEC $193,579.85 for KEC's Line Extension Cost. First Amended Complaint for Declaratory Judgment, p. 5, ¶ 1.

Similarly, KEC has failed to seek declaratory judgment against an existing member of the cooperative. If Sundance is not a member, there is simply no party with standing against which KEC is seeking declaratory, preventative, injunctive or remedial relief. As the instant matter stands, there is no controversy "definite and concrete, touching on the legal relations of parties having adverse legal interests." *Harris v. Cassia County,* 106 Idaho 513, 516, 681 P.2d 988, 991 (1984) (quoting *Aetna Life Insurance Co.,* 300 U.S. 227, 240-41, 57 S.Ct. 461, 464).

Looking at the statutory and case law cited above, the parties here simply have no standing. According to *Wood v. Class A. Sch. Dist. No. 25*, 78 Idaho 75, 78, 298 P.2d 383, 385 (1956), an, "[a]ction for declaratory judgment may invoke either remedial or preventive relief, and may relate to right that has been breached or is yet in dispute, or status that is undisturbed but endangered, but generally cannot be maintained unless involving some specific adversary question or contention based on existing state of facts." And under I.C. § 10-1212, "[t]his act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered." This Court finds there is no remedial relief here; there is nothing to remedy. KEC cannot force Sundance to pay what The Ridge At Black Rock Bay, Inc., failed to pay. Sundance cannot force KEC to provide its lot owners electricity. Neither KEC's nor Sundance's rights have been breached by the other.

Under I.C. § 10-1206, a "court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." If the Court

granted KEC the relief requested, and declared that if Sundance wishes to become a member of KEC *in the future*, it must first pay KEC $193,579.85 for KEC's Line Extension Cost, such declaration would not force Sundance to pay anything now and would not force Sundance to become a member.

According to *Wylie v. State, Idaho Transp. Bd.*, 151 Idaho 26, 31, 253 P.3d 700, 705 (2011) (citing *State v. Rhoades,* 119 Idaho 594, 597, 809 P.2d 455, 458 (1991)), "[a] declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists [which] precludes courts from deciding cases which are purely hypothetical or advisory." That is precisely what has been presented to this Court by both sides, a question to which necessarily has a "hypothetical or advisory" answer. KEC wants this Court to tell Sundance they don't become members unless they pay, and Sundance wants this Court to tell KEC that KEC can't tell Sundance that they have to pay before becoming a member.

Neither KEC nor Sundance discuss standing in their written submissions to the Court. At oral argument, the Court asked counsel for KEC why either party has standing. Counsel for KEC answered that *First Federal* "appears" to give some standing to the parties in the present case. This Court disagrees. There are similarities between *First Federal*, and there are differences. What is clear is that in *First Federal*, the Idaho Court of Appeals did not discuss standing. Like KEC, "East End Mutual Electric Company, Ltd., is a non-profit cooperative association organized more than sixty years ago for the purpose of delivering electrical energy to its members." *First Federal,* 112 Idaho 762, 763, 735 P.2d 1073, 1074. "In 1976 Glenn Walker became a member of the cooperative and began receiving electrical service to his property." *Id.* "In 1980, Walker obtained a loan from First Federal…the loan was secured by a deed

of trust on the same property." 112 Idaho 762, 763-64, 735 P.2d 1073, 1074-75. Walker then experienced financial difficulties and became delinquent on his electrical account. 112 Idaho 762, 764, 735 P.2d 1073, 1075. The cooperative discontinued Walker's electrical service in 1985, and that same year Walker became delinquent to First Federal on his loan. *Id.* First Federal began non-judicial foreclosure proceedings, but before the trustee's sale, the cooperative recorded a lien for the unpaid power charges in the amount of $1,098.00. *Id.* First Federal then bought the property for the balance on its deed of trust, and because First Federal was in a superior position, the cooperative's recorded lien was wiped out in the sale. *Id.* First Federal then asked the cooperative to resume electrical service, and "…the cooperative declined, explaining that its service was limited to members but that First Federal could succeed to Walker's membership if it complied with all requirements of the bylaws, including payment of the arrearage on Walker's membership account." *Id.,* First Federal sued for declaratory judgment that it was entitled to membership without paying the arrearage. *Id.* The district court held First Federal was entitled to a "new" membership and the cooperative appealed. *Id.* The Idaho Court of Appeals reversed the district court:

> Accordingly, we hold that such a charge may be imposed, pursuant to duly promulgated bylaws of an unregulated, private, nonprofit cooperative, as a condition of transferring an interest in the cooperative to a prospective new member who has notice that the charge must be paid before service will be furnished. We have not been cited, nor have we found, cases contrary to this precise holding.

112 Idaho 762, 767, 735 P.2d 1073, 1078. In making that decision, the Idaho Court of Appeals held the standard was: "So long as these regulations are not arbitrary and do not infringe upon a fundamental public policy such as nondiscrimination, the regulations are enforceable." *Id.* The Idaho Court of Appeals then held: "We discern no

fundamental public policy that is impaired by placing a charge upon a certificate of membership in a cooperative, in order to collect an arrearage in the member's account."

A few years after *First Federal* was decided, the Idaho Supreme Court in *Stevenson v. Prairie Power Cooperative, Inc.,* 118 Idaho 31, 794 P.2d 620 (1990), made it clear that in order for the trial court to enforce the cooperative's regulations, those regulations must not only not be arbitrary and not infringe upon a fundamental public policy, those regulations must also be "reasonable." The Idaho Supreme Court held:

> In support of its standard in *East End* that a cooperative's "restraints are enforceable unless they are arbitrary or contrary to public policy," the Court of Appeals cited *Capital Electric Power Association v. McGuffee,* 226 Miss. 227, 83 So.2d 837 (1955), *overruled on other grounds, Tideway Oil Programs, Inc. v. Serio,* 431 So.2d 454 (Miss.1983). In *McGuffee* the Mississippi Supreme Court cited *Sutton* [*Sutton v. Hunziker*, 75 Idaho 395, 272 P.2d 1012 (1954)], but distinguished it because of the differences in the law of Mississippi. 83 So.2d at 843. *Sutton* is the law of Idaho, not *McGuffee.* Reasonableness is the rule here in cases of this type.

118 Idaho 31, 34, 794 P.2d 620, 623.

At oral argument, counsel for Sundance argued the parties had standing before this Court because KEC's policy was arbitrarily applied. The analogy was made by Sundance's counsel that if KEC's policy excluded a specific racial minority group, that would be arbitrary, and that group would then have standing to sue KEC. Since KEC applied its policy arbitrarily to Sundance, Sundance has standing. Sundance's circular argument does not create standing. As discussed above, *Idaho Branch Inc. of Associated Gen. Contractors of Am. v. Nampa Hwy. Dist. No. 1,* and *Harris v. Cassia County* hold this Court must focus on the parties as opposed to the relief sought is the correct focus. With that focus, as discussed above, neither KEC nor Sundance have

standing to request their declaratory judgments. At present, they simply have no relationship with each other. Additionally, as discussed below, KEC's policies were not and are not unreasonable, nor were they or are they being arbitrarily applied.

While there is some simplistic basis to KEC's argument that *First Federal* "appears" to give some standing to the parties in this instant lawsuit, that "appearance" is only because the Court of Appeals did not discuss such. But in *First Federal*, there was more of a relationship between the parties than in the instant case. First Federal became the owner of land which belonged to Walker, and when that land belonged to Walker the cooperative furnished electrical service. All First Federal wanted was the power turned back on, but First Federal didn't want to pay Walker's delinquent bill. In the present case, there is nothing to turn on. All we have here is an "Electric Service Agreement" that outlined the terms The Ridge At Black Rock Bay, Inc. was to pay KEC for installing the backbone. That agreement was breached by The Ridge At Black Rock Bay, Inc. Sundance has made it clear it isn't bound to recompense KEC for the breach by The Ridge At Black Rock Bay. KEC has made it clear it has no duty to provide Sundance electrical service. There is no relationship between the parties here. In *Stevenson v. Prairie Power Cooperative, Inc.,* 118 Idaho 31, 794 P.2d 620, discussed above, Stevenson and Sun Valley Ranches, Inc., were members and customers of Prairie Power Cooperative. They had an existing relationship at the time the cooperative changed its policy to require an advance payment by Stevenson and Sun Valley of 100% of the power costs for the upcoming irrigation season. 118 Idaho 31, 794 P.2d 620. There was evidence that Prairie Power Cooperative changed its policy when it found out Sun Valley had filed a bankruptcy plan and already owed Prairie Power Cooperative $10,000.00. 118 Idaho 31, 33, 794 P.2d 620, 622. The Idaho Court of Appeals and then the Idaho Supreme Court both held that the district court

erred in granting summary judgment to Prairie Power Cooperative where the district court found the cooperative's new policy was reasonable, as there was a dispute of material fact, specifically noting this was to be a jury trial in that case. 118 Idaho 31, 32, 794 P.2d 620, 621. Standing was not discussed in *Stevenson*.

The fact that *First Federal* and *Stevenson* were decided by the Idaho appellate courts without discussion of "standing" is not sufficient to cause this Court find that KEC and Sundance have standing in the present case. The pre-existing and ongoing relationship between the cooperatives and its existing customer (in *Stevenson*) and its successor to its prior customer (in *First Federal*) explain why standing was not an issue in those cases. In the present case there simply is no relationship. Neither KEC nor Sundance have standing. Accordingly, KEC's complaint for declaratory relief must be dismissed, and Sundance's counterclaim for declaratory relief must be dismissed.

Authority from other jurisdictions supports this finding that the parties lack standing. In *Ohio Power Co., v. Village of Attica*, 23 Ohio St.2d 37, 261 N.E.2d 123, 52 O.O.2d 90 (Ohio 1970), the Ohio Supreme Court specifically discussed standing. 23 Ohio St.2d 37, 38, 261 N.E.2d 123, 124. The Ohio Supreme Court held Ohio Power, a public utility, clearly had standing regarding a dispute as to whether the Village of Attica could contract with an electrical cooperative (North Central Electrical Cooperative) for a new franchise for power, or, if instead the Village of Attica was required to contract with Ohio Power, with whom it had an existing franchise. Because Ohio Power had the existing franchise, the Ohio Supreme Court held Ohio Power had standing to protect its "vital interest." 23 Ohio St.2d 37, 38-39, 261 N.E.2d 123, 124. The Ohio Supreme Court then analyzed whether the cooperative had acted as a public utility, which it

needed to in order to be able to contract with the Village of Attica. 23 Ohio St.2d 37, 39-44, 261 N.E.2d 123, 124-128.

There are several reported cases dealing with apartment “cooperatives.” These cases stand for the proposition that a mere prospective purchaser of a cooperative apartment is not a third-party beneficiary of any agreements between the cooperative and its current tenant-shareholders. *Leonard v. Kanner,* 248 A.D.2d 260, 261, 670 N.Y.S.2d 433, 434 (N.Y.A.D.1st Dept. 1998) ("Plaintiff was a party to the sale agreement only and was neither a party to nor an intended third-party beneficiary of the existing proprietary lease."); *Woo v. Irving Tenants Corp.*, 276 A.D.2d 380, 714 N.Y.S.2d 277 (N.Y.A.D.1st Dept. 2000) ("because plaintiff was a mere contract vendee of shares in defendant residential cooperative corporation, and, accordingly, not a party to, or a third-party beneficiary of, the proprietary lease between the cooperative corporation and the owner of contracted for shares, he was without standing to enforce the proprietary lease against the cooperative or its president "); *Pober v. Columbia 160 Apartments Corp.*, supra 266 A.D.2d 6, 697 N.Y.S.2d 620 (N.Y.A.D.1stDept. 2000)("as mere contract vendees of shares allocated to an apartment in defendant Columbia 160 Apartments, remained strangers to the cooperative corporation's proprietary lease and consequently were without standing to invoke the rights of the seller thereunder."); *GSG Holdings, Inc. v. Multi Boro Realty Corp.,* 240 A.D.2d 159, 160, 658 N.Y.S.2d 271, 272 (N.Y.A.D.1stDept. 1997) (a prospective purchaser of a cooperative apartment "cannot be heard to demand that the corporation comply with various provisions of the proprietary leases and the offering plan that assertedly require its transfer of the subject shares, since said buyer has no contract with the corporation and is not beneficiary of the instruments it seeks to enforce.")

C. Alternatively, Summary Judgment is Granted as to KEC's Limited Prayer for Relief in its Complaint, and Denied as to Sundance's Counterclaim.

If the Court is mistaken and the parties *do* have standing to bring their claims and counterclaims, this Court finds, in the alternative, that KEC is entitled to summary judgment on the limited claim in its complaint (that if Sundance wants service and membership, it must first pay KEC), and Sundance is not entitled to summary judgment on its counterclaims. This Court wrestled with the fact that this "alternative" ruling may be construed as an "advisory" opinion, but the Court has determined that this result (declaring that if Sundance wants service and membership, it must first pay KEC) follows from the same legal analysis regarding electrical cooperatives discussed above, which, in part, resulting in this Court finding the parties lack standing.

KEC asks this Court declare that if Sundance wishes to become a member of KEC, it must first pay KEC $193,579.85 for KEC's Line Extension Cost. First Amended Complaint for Declaratory Judgment, p. 5, ¶ 1. Without deciding the amount owed, the Court finds if Sundance wishes to become a member of KEC and receive service, it must pay the Line Extension Costs, whatever they might be. As a matter of law, that is an appropriate request under *First Federal*, and there is no dispute of material fact that KEC's policies are reasonable, not contrary to public policy, and not arbitrarily applied. Accordingly, summary judgment for KEC is appropriate. The Court is not declaring, nor has it been asked to declare, that Sundance must pay the Line Extension Costs. All the Court is declaring is that if Sundance wishes to have electrical service, and wishes to be a member of KEC, it must pay the Line Extension Costs. Sundance is free to not pay those costs and not have power and not be a member of KEC.

In Sundance's counterclaim, it requests this Court force KEC to allow Sundance to become a member without paying any monies. Answer, pp. 5-8, III. Counterclaims;

p. 8, IV. Prayer for Relief, ¶ 2(B) ("That KEC may not condition membership of or to the lots within the Development, as that phrase is defined in Plaintiff's First Amended Complaint, upon Sundance's payment of any portion of said 'Line Extension Costs,' as defined."). This is a request that is not allowed under *First Federal.* This is a request that is not allowed under *Clearwater Power Co. v. Washington Water Power Co.,* 78 Idaho 150, 155, 299 P.2d 484, 486 (1956) ("A consumer in the territory of [the nonprofit electrical cooperative] who was not a member of a cooperative, whether because the cooperative did not accept him as a member, or he chose not to join or remain a member, could, if located within the economic reach of [a public utility company's] lines, compel [the public utility] to extend its service to him.") The electrical cooperative cannot be similarly compelled. And, there is no dispute of material fact that KEC's policies are reasonable, not contrary to public policy, and not arbitrarily applied. Accordingly, summary judgment for Sundance must be denied.

If the parties have standing to seek a declaratory judgment, then the Court must determine whether the rules governing admissions to KEC are reasonable, not contrary to public policy and not arbitrarily applied. KEC argues that to become a member of KEC and receive electrical energy, an applicant must agree to comply with the Articles of Incorporation, bylaws, written policies, procedures, resolutions, rules and regulations adopted by the board of directors. KEC's Memorandum in Support of Summary Judgment, p. 9. One such condition or rule is to pay the Line Extension cost. *Id.* KEC argues "[t]he purpose of the rule is 'to provide a fair and uniform method of extending, upgrading and modifying all electric facilities within the Kootenai Electric Cooperative (KEC) service territory." *Id.* at pp. 9-10 (citing KEC Policy No 3-4 §II.A.). KEC claims this requirement is reasonable. Reply to Memorandum of Defendant/Counterclaim Plaintiff Sundance Investments, L.L.L.P. in Opposition to Motion for Summary

Judgment of Plaintiff/Counterclaim Defendant Kootenai Electric Cooperative, Inc. (KEC's Reply Memorandum in Support of Summary Judgment), p. 5. KEC contends by enforcing the rule it is fulfilling its fiduciary duty to its members to not accept new members at the detriment of other members. KEC's Memorandum in Support of Summary Judgment, p. 5, ¶ 15, citing Elliot Declaration, ¶ 28. KEC argues allowing Sundance to become members without paying the Line Extension cost, would require other KEC members to absorb the cost, in contravention of that duty. *Id*., p. 6, ¶ 16, citing Elliot Declaration, ¶ 29. Moreover, KEC contends if Sundance becomes a member without paying the Line Extension costs, it would be unjustly enriched with the benefit of membership without paying the costs, at the detriment of others. *Id*., pp. 10-11. As such, KEC maintains if Sundance wants to be a member of KEC, it must pay the Line Extension cost. KEC's Reply Memorandum in Support of Summary Judgment, p. 8.

Sundance argues the policies relied upon by KEC requiring Sundance to pay the Line Extension cost are unreasonable and arbitrary, and have been discriminatorily applied. Memorandum in Support of Defendant/Counterclaim Plaintiff Sundance Investments, L.L.L.P.'s in Opposition to Motion for Summary Judgment of Plaintiff/Counterclaim Defendant Kootenai Electric Cooperative, Inc. (Sundance's Memorandum in Opposition to Summary Judgment), pp. 5-10. Sundance claims it is unreasonable for KEC to impose a policy conditioning its membership on payment of the Line Extension costs when that debt was incurred when KEC funded the "backbone extension for The Ridge at Black Rock Bay without adequate security and without following up to protect KEC's lien rights." Sundance's Memorandum in Opposition to Summary Judgment, p. 6. Sundance maintains it is unreasonable to condition

membership upon repayment of a burden that was incurred by another, which KEC could have prevented and, as such, unjust enrichment is inappropriate. *Id.,* pp. 8, 13.

The Court finds KEC's policies to be reasonable, not contrary to public policy and not arbitrarily applied. Sundance's argument that KEC's policy requires Sundance to pay for a debt incurred by KEC before Sundance's membership, is not persuasive given the fact that it is based on a contract Sundance was not a party to.

"Why" KEC installed its backbone has absolutely no relevance. Whether KEC installed the backbone as part of their obligation for the June 2, 2008, Electric Service Agreement between KEC and The Ridge At Black Rock Bay, Inc., whether KEC installed the backbone on speculation, or whether the backbone fell out of the heavens landing pre-assembled on KEC's easement, is without relevance.

The fact that The Ridge At Black Rock Bay, Inc. failed to pay on the Electric Service Agreement, and thus, incurred a debt which remains unpaid is, likewise, not relevant. What is relevant is that KEC has installed the backbone at its expense, has not been paid for it, and as a result, under its policies and *First Federal*, it has no duty to provide power to Sundance or accept it as a member. If KEC built the backbone as a purely speculative act, with no Electric Service Agreement, it would still be allowed to demand payment of the Line Extension Cost by Sundance in order for Sundance to receive power and become a member.

Payment of the Line Extension Cost is a *quid pro quo* for membership and electrical service. That is not unreasonable. That is not contrary to public policy. That is not arbitrary. The fact that there is an unpaid debt by The Ridge At Black Rock Bay, Inc., does not change the fact that there is a *quid pro quo* for membership and electrical service. The corollary to Sundance's argument that "We shouldn't have to pay for The Ridge's debt" is "We should get something for nothing", "We should get electrical

service and membership for free." Whether the debt owed KEC by The Ridge At Black Rock Bay and KEC's lien was wiped out in foreclosure is, likewise, not relevant. Yet this fact, that foreclosure wiped out the debt and KEC's lien, is the absurd basis for Sundance's claim that "We should get electrical service and membership for free."

KEC's argument that its new members (if the Court were to force KEC to provide electrical service and membership to Sundance without payment of the Line Extension Cost) who do not pay the Line Extension cost are being unjustly enriched as compared to its existing members is, also, not relevant. It is true, Sundance would get something for nothing. That sounds like unjust enrichment. However, the impact on KEC's current members has already been visited upon them. The backbone is already in place. KEC has expended resources to provide the backbone. KEC has received no money from anyone for that expenditure. KEC's existing members have already been burdened. The prospective unjust enrichment to Sundance is not what is relevant. What is relevant is that KEC has reasonable policies that, as a non-profit cooperative, require its members to contribute equitably to the capital of the cooperative. Elliott Declaration, pp. 2, 3, ¶¶ 6, 7. While what Sundance asks might be unjust enrichment, that misses the point. What Sundance requests would force KEC to violate its own policies placing an undue burden on its existing members in order to provide Sundance with electrical service.

Sundance also argues the membership requirement is being arbitrarily and discriminatorily applied by KEC, since it allowed one of the lots in the development to connect to the backbone without paying the Line Extension cost. Sundance's Memorandum in Opposition to Summary Judgment, pp. 8, 13. Sundance states "[t]he owner of that lot was allowed to obtain service through the backbone system installed by KEC without a concomitant payment of a proportionate share of the backbone

costs." *Id.,* p. 8. No citation to any evidence is given to support that bald assertion. In Sundance's Answer, p. 7, Part III, ¶ 17, Sundance makes the claim "KEC authorized and permitted service to a lot in the Development, thereby waiving any claim or right to remove the improvements." However, KEC disputes that claim. In its Answer to Counterclaim, p. 5, ¶ XIII, KEC claims "Responding to the allegations of paragraph 17, Counterclaim Defendant denies that it has authorized and permitted service to a lot in the development without payment, or otherwise waived any claim or right to remove the improvements." Sundance claims the Plat of the Estates at Black Rock Bay created twenty lots, but only nineteen lots were encumbered by KEC's mortgage, and the twentieth lot was not required to pay a proportionate share of the backbone cost in order to obtain residential service. Sundance's Memorandum in Support of Defendant/Counterclaim Plaintiff Sundance Investments L.L.L.P.'s Motion for Summary Judgment, p. 7, citing Anderson Affidavit at Ex. G. Roger Anderson is a general partner in Sundance. Anderson Affidavit, p. 2, ¶ 3. Anderson claims Exhibit G to his Affidavit is a copy of the "Electric Service Agreement" between the Ridge at Black Rock Bay and KEC. Anderson Affidavit, p. 4, ¶ 12. The Court can find no language in that Electrical Service Agreement that requires KEC to deliver power to that one lot at The Ridge at Black Rock Bay, Inc. Sundance has provided evidence that KEC has received funds for two of the lots in "The Estates." Affidavit of John F. Magnuson in Suport of Defendant/Counterclaim Plaintiff Sundance Investments, L.L.L.P.'s Motion for Summary Judgment, Exhibit A (Melissa Newcomer deposition), p. 39. KEC does not directly discuss Sundance's argument that KEC acted arbitrarily by providing service to one of the twenty lots. KEC obliquely argues:

> The manner of payment by Sundance Investments' predecessor for three (3) lots, including Lot 5, Block 1 was pursuant to the Electrical Service Agreement, which KEC is not seeking to enforce against Sundance

> Investments. KEC merely requires, as a condition of membership, that Sundance Investments, or any other applicant, pay its equitable proportionate share of the Line Extension cost. That requirement is consistent with a fundamental principle of all cooperatives, and therefore cannot be said to be arbitrary and capricious or unreasonable.

Response to Memorandum in Support of Defendant/Counterclaim Plaintiff Sundance Investments, L.L.L.P.'s Motion for Summary Judgment, p. 4.

> Again, KEC is not seeking to enforce the Electric Service Agreement, nor is KEC forcing Sundance Investments or its successor, transferees and assigns to become members. If Sundance Investments, or its successors, transferees and assigns wish to become a member of KEC and receive electrical energy, they must pay their equitable proportionate share of the Line Extension Costs.

Id., p. 5.

> KEC did not take a different position than its original position. The original position was pursuant to an Electrical Service Agreement with the developer. KEC is not seeking to enforce that Agreement against Sundance Investments.

Id., pp. 5-6. While there is evidence KEC accepted money from one of the lot owners, maybe two, there is no admissible evidence showing KEC is providing power to one or more of the lot owners. Had it done so, it would seem Sundance is a member of KEC and this entire dispute is misplaced. Even if KEC is providing power to a lot owner, that does not arise to arbitrary application of KEC's policies. The Court finds this to be the case because even if a lot owner is being provided electricity, that would appear to have been accomplished under the Electrical Service Agreement, and KEC has made it clear it is not seeking to enforce that agreement, but instead wants Sundance to pay its proportionate share of the Line Extension Costs. They are two separate things. Sundance is trying to conflate the two in order to make its argument that KEC is arbitrarily applying its policies.

Further, Sundance requests KEC's policies be interpreted against KEC as KEC is the drafter, claiming they are ambiguous. Sundance's Memorandum in Support of

Defendant/Counterclaim Plaintiff Sundance Investments L.L.L.P.'s Motion for Summary Judgment, pp. 9-10. The Court finds there is no ambiguous language in KEC's policies.

Much of the briefing involved the differing amounts per lot KEC claims Sundance would have to pay prior to Sundance receiving electricity and becoming a member of KEC. This Court finds it need not reach that amount. KEC is free to establish its own price per lot. The choice of Sundance then becomes whether it wishes to pay that amount.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED all claims of plaintiff and counterclaims of defendant are DISMISSED due to a lack of standing by either party.

IT IS FURTHER ORDERED, alternatively, plaintiff's Motion for Summary Judgment is GRANTED, and defendant's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED the court trial scheduled for May 27, 2014, is VACATED.

Entered this 1st day of May, 2014.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Darrin L. Murphey	667-7625	Brent G. Schlotthauer	765-4702
John F. Magnuson	667-0500		

_____
Jeanne Clausen, Deputy Clerk