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IDAHO PUBLIC
UTILITIES COMMISSION

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IDAHO POWER COMPANY,)
)
Complainant,)
)
v.)
)
CITY OF EAGLE, IDAHO,)
)
Respondent.)
_____)
)
EAGLE RIVER, LLC,)
)
Intervenor.)
)
_____)

CASE NO. IPC-E-04-04

IDAHO POWER COMPANY'S MEMORANDUM
IN OPPOSITION TO THE MOTION OF THE
CITY OF EAGLE, IDAHO TO DISMISS

COMES NOW, Idaho Power Company ("Idaho Power" or the "Company") and,
in accordance with RP 056 and the schedule set by the Commission on September 10,
2004, hereby submits its Memorandum in Opposition to the Motion of the City of Eagle,
Idaho (the "City" or "Eagle") to dismiss the above-referenced matter. Said Motion was filed

**IDAHO POWER COMPANY'S MEMORANDUM IN OPPOSITION
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with the Idaho Public Utilities Commission ("IPUC" or the "Commission") by the City on September 9, 2004.

I.

BACKGROUND

On February 11, 2004 and in accordance with the provisions of Idaho Code §§ 61-501, 61-503 and 61-508, Idaho Power filed a complaint against the City of Eagle in which the Company requested that the Commission issue an Order directing Idaho Power to construct improvements to its existing electric transmission system within the corporate boundaries of the City to secure adequate service to its customers. In particular, the Company requested that the Commission issue an Order directing Idaho Power to construct additional 138-kV transmission facilities on one of two transmission corridors through the City.

Alternatively, if the City insists that the needed 138-kV transmission facility be located on alternative routes or buried underground, the Company requested permission from the Commission to collect a surcharge from customers located within the corporate boundaries of Eagle. The surcharge would cover the incremental cost associated with the difference in cost between either underground construction and overhead construction or using an alternative route selected by the City instead of the routes proposed by the Company.

The Commission held a hearing on this matter on September 9 and 10, 2004. Immediately prior to commencement of the hearing, the City filed its Motion to Dismiss this action and its Memorandum in support thereof. In its Memorandum, the City alleges (1) that Idaho Power failed to exhaust its remedies to contest the City's decision to deny the

Company's Conditional Use Permit Application No. CU-09-02 and (2) that Idaho Power's Complaint should be dismissed because there are no conflicting orders as required by Idaho Code §67-6528. The Company respectfully requests that the City's Motion be denied on the basis of the following arguments.

III.

ARGUMENTS

A. Idaho Power's Complaint Is Not An Appeal Of The City's Decision To Deny the Company's Application For A Conditional Use Permit To Allow The Placement Of Utility Poles That Exceed The City's 35-Foot Height Limitation.

Contrary to the City's characterization of Idaho Power's Complaint before the IPUC as an appeal of the decision of the City to deny Idaho Power's application for a Conditional Use Permit ("CUP") from the City, Idaho Power, in accordance with Idaho Code §61-508 is seeking an Order from the IPUC finding that the Company's proposed improvements to its existing facilities located within the corporate limits of the City of Eagle ought reasonably be made to secure adequate services or facilities within the Company's service area. The Company did not file its Complaint in this matter as an appeal of the decision of the City in which the City denied Idaho Power's application for a Conditional Use Permit to allow the installation of electrical power poles that would exceed the City's height limitations. The facts in this case support that contention.

The Company filed its Complaint with the Commission on February 11, 2004, three months before the City Council of the City of Eagle issued its Findings of Fact and Conclusions of Law denying Idaho Power's CUP application for an exception to the City's

height restrictions to allow the construction of utility poles.¹ Instead, after unsuccessful efforts by the parties over the past five years to find an alternative to extend a 138-kV transmission line through the City that was both agreeable to the City and equitable to Idaho Power's ratepayers generally, the Company filed its Complaint with the Commission pursuant to Idaho Code §61-508 to seek a Commission Order either directing the Company to construct the requisite improvements to its transmission facilities in accordance with the Company's proposed alternatives or to permit the Company, in accordance with Idaho Code §61-502, to file a tariff to establish a surcharge to be added to the rates charged the Company's customers within Eagle to recover the incremental difference in the cost between the Company's proposed alternatives and the City's favored options.

Idaho Power is a public utility supervised and regulated by the IPUC. Idaho Power, as a public utility, is required to "furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and as shall be in all respects adequate, efficient, just and reasonable." Idaho Code §61-302. Idaho Code §61-501 vests the Commission "with the power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of this [Idaho Public Utilities Law]."

After a hearing upon its own motion or upon complaint, the IPUC is empowered by Idaho Code §61-508 to make and serve an order upon a public utility to make such additions, extensions, repairs or improvements to or changes to its physical plant, equipment

¹ On May 11, 2004, the City issued its Findings of Fact and Conclusions of Law denying Case No. CU-0-02 in which Idaho Power requested a Conditional Use Permit for a height exception to construct utility poles that exceed the City's 35-foot height limitations.

and facilities that ought to be reasonably made “to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities.”

In February 2004, it became clear to Idaho Power, after almost five years of attempting to negotiate an acceptable means of extending transmission facilities thorough Eagle to meet increasing electric loads in western Ada County, that it was not likely that the City and the Company could agree on an alternative to permit construction of that facility by May 2005 when the capacity of the present system would be exceeded. Therefore, evoking Idaho Code §61-508, the Company filed its Complaint with the Commission on February 11, 2004. In the Complaint, Idaho Power sought an Order from the IPUC directing the Company to build the needed transmission facility in an overhead configuration on one of the two alternate routes identified by the Company or, if the Commission selected the alternatives favored by Eagle, that the Company be permitted to collect the incremental difference in cost as a surcharge from Eagle customers.

Thus, by way of its Complaint filed in February 2004, since the City had not yet rendered its decision concerning Idaho Power’s application for approval of the Company’s CUP, Idaho Power clearly was not seeking an appeal of a decision made by the City. Instead, because it was apparent to the Company that the parties were unlikely, in a timely manner, to agree on either the means of constructing the necessary facilities or who would pay the incremental difference in cost for the facilities favored by the City to “secure adequate service or facilities,” Idaho Power filed its Complaint with the Commission to obtain an IPUC Order directing that the Company to erect the necessary improvements “in the manner and within the time specified in said order.” See Idaho Code §61-508.

The City's arguments with respect to the alleged failure of Idaho Power to exhaust its remedies to contest the City's decision to deny the Company's application for a CUP are flawed. Clearly, Idaho Power's Complaint does not seek to appeal a decision of the City that had, at the time of filing of the Complaint, not even been made. Instead, the Company seeks a statutorily permitted order from the IPUC directing the Company to install, in accordance with its duties, adequate electrical services and facilities. As a result, the City's motion to dismiss Idaho Power's Complaint must be denied.

B. The City's Authority To Regulate Idaho Power's Transmission System Pursuant To Idaho Code §50-328 Is Not Unfettered And Idaho Power's Complaint Is Properly Before The IPUC.

Idaho Power's Complaint requesting that the Commission issue an Order directing the Company to construct improvements to its electric transmission system to secure adequate service to its customers is properly before this Commission. The City has misinterpreted the scope of its authority under Idaho Code §50-328. The limits on the City's power was recognized in *Village of Lapwai v. Alligier*, 78 Idaho 124, 299 P.2d 475 (1956), where the Court stated:

[T]he legislature, in providing for the use of streets and alleys by utilities, expressly required the consent of the municipal authorities, and authorized the municipal authorities to impose reasonable regulations upon such use. Thus, the legislature . . . has preserved to the municipality the power to deny their use to a utility, or to impose reasonable regulations thereon, *when necessary to the use of such streets and alleys by the public in the usual manner.*

Id., 78 Idaho at 129, 299 P.2d at 478 (Emphasis added, citation omitted). Although the legislature has preserved the rights of cities to control the use of its streets, the Idaho Supreme Court has determined that cities' control over utility facilities is limited. Denying use of or conditioning the use of a municipality's streets by a utility is limited to those

circumstances when the utility's use of the street would conflict with "the use of such streets and alleys by the public in the usual manner." *Id.* The City must assure that placement of the proposed transmission poles are not a nuisance and do not obstruct or interfere with the use of the City's streets and alleys in the usual manner.

The City acknowledges that the Company's proposal to extend the proposed 138-kV transmission line along the route identified as the Eagle Bypass in its CUP application filed with the City is "along the same route as the existing power lines that parallel the highway, to the new Star, Idaho, substation." See Findings of Fact and Conclusions of Law Case Number CU-9-02, Exhibit 119 at 1 of 13. The City notes that "[t]he existing power line is within easements or public rights-of-way that extend through both residential and commercial areas of the City." *Id.*, Exhibit 119 at 4 of 13.

Within its Findings of Facts and Conclusions of Law in this case, the City never claims that its denial of the use of the City's streets as proposed by the Company is necessary to assure the "use of such streets and alleys by the public in the usual manner." *Village of Lapwai*, 78 Idaho at 129, 299 P.2d at 478. In fact, it notes that the proposed transmission line will be constructed along the same route as existing power lines. Instead, the City objects to the proposed transmission line on aesthetic grounds.

The City asserts that "[t]he proposed conditional use for the construction of an overhead sub-transmission line and height exception for utility poles to exceed the maximum of 35-feet is not in accordance with the general objectives of the Comprehensive Plan nor Eagle City Code Title 8." See Findings of Fact and Conclusions of Law Case Number CU-9-02, Exhibit 119 at 12 of 13 (Emphasis in original). The City stated that "[t]he overhead line

also conflicts with the city's goal to "[s]trive to create an aesthetically pleasing community and protect the unique natural beauty and small town character of the City." *Id.* (Citation omitted).

The City concluded that "[t]he requirement for those who develop properties within the City to place utilities serving said development underground should be applied equally to Idaho Power service projects." *Id.* Developers within Eagle are required to bury utilities serving their developments at their expense. Thus, based upon the City's conclusion, Idaho Power's general body of customers, not the City, would be required to pay the entire cost of burying the proposed transmission line as it traverses the City. It is this conclusion that places this matter directly within the jurisdiction of the IPUC.

The IPUC was created by act of the Idaho legislature in 1913. S.L. 1913 Chap. 61. "By that act, such power as municipalities may have had to control and regulate public utilities was withdrawn and transferred to the commission." *Village of Lapwai*, 78 Idaho at 129, 299 P.2d at 478. Although Idaho Code § 50-328 provides limited municipal regulation of utility facilities, that statute and other Idaho statutes do not authorize the City of Eagle to require that Idaho Power and its general ratepayers bear the cost of placing the Company's transmission lines underground as those lines traverse Eagle.

By mandating that "[t]he requirement for those who develop properties within the City to place utilities serving said development underground should be applied equally to Idaho Power service projects," the City has gone beyond the authority permitted under Idaho Code §50-328. See Findings of Fact and Conclusions of Law Case Number CU-9-02, Exhibit 119 at 12 of 13. Whether Idaho Power should bear the cost of burying its transmission system through the City of Eagle so as to conform with City policies and

ordinances is within the jurisdiction of the Idaho Public Utilities Commission and Idaho Power is entitled to a full hearing before the Commission on the merits.

The City is only interested in the tangible results of its decision – the placement underground of Idaho Power’s transmission facilities that the City has determined conflict with the City’s efforts to create an “aesthetically pleasing community and protect the unique natural beauty and small town character of the City.” *Id.* (Citation omitted). Idaho Code §50-328, while requiring municipal consent for the use of its streets by utilities, does not permit the City to legislate on the subject of who is to pay for the conditions imposed upon Idaho Power by the City in order for the Company to extend its transmission system through the City of Eagle.²

The issue presently before the IPUC has implications for all of Idaho Power’s customers and it would be unlawful to bypass the Commission in addressing the issues that have rate implications for all of the Company’s consumers. Under Idaho’s statutory scheme, the IPUC is authorized generally to prescribe terms and conditions under which an electric utility shall extend its lines, the manner in which costs shall be borne and the appropriate charge for such services. The general rule governing administrative matters is that courts should decline to take initial jurisdiction of a matter within the competence of an administrative agency specially created to handle such matters. *See Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350 (1907)(originating and defining the concept of primary jurisdiction). There is no need to depart from this standard practice in this instance.

² “Municipal corporations in Idaho may exercise only those powers granted to them by the state Constitution or the legislature.” *Albert v. Boise Water Corp.*, 118 Idaho 136, 142, 795 P.2d 298, 304 (1990).

The very fact that the parties have attempted to negotiate a solution to the extension of a proposed transmission line through the City for almost five years attests to the complexity of the matter. The various aspects of the placement of electrical transmission lines underground necessarily involves considerations peculiarly within the expertise of the Commission. The financial considerations alone warrant extensive Commission study. The courts are reluctant to assert jurisdiction and preempt the Commission in matters which the Commission is especially empowered to resolve. *See generally, Idaho Power Co. v. Idaho Pub. Util. Comm'n*, 108 Idaho 943, 703 P.2d 707 (1985). Thus, the present matter is appropriately before the Commission and the Commission has jurisdiction to hear this matter. Therefore, the City's motion to dismiss the Company's case should be denied.

C. The IPUC Has The Authority To Hear Idaho Power's Complaint Despite The Fact That The Commission Has Not Issued A Previous Order In Conflict With The City's Decision To Deny Idaho Power's Application For A Conditional Use Permit.

The City argues that the Commission must dismiss Idaho Power's Complaint because the IPUC does not have the authority to hear the Complaint. The City suggests that, in cases in which Idaho Power is required to seek prior approval from a municipality in order to erect its facilities within the corporate boundaries of that city, the Company is required to obtain a Commission Order approving construction of its proposed facilities before submitting its application to the municipality.

Citing Idaho Code §67-6528, the City argues that, because the Company did not obtain approval of the Company's plans from the IPUC prior to submitting them for approval by the City, the Commission is required to dismiss Idaho Power's Complaint on the basis that it has no authority to hear the Complaint. The City's reliance on Idaho Code §67-6528 is misplaced for the following reasons.

Idaho Code §61-302 mandates that Idaho Power, as a public facility, furnish, provide and maintain the electrical services necessary to promote the safety, health, comfort and convenience of its patrons, employees and the public. Thus, the Company is required by statute to provide electric service to its customers located within its service territory. Except in limited circumstances, Idaho Power is not required to obtain a Commission-issued Order to provide the services the Idaho legislature has previously determined to be a duty of the electrical utility.

For example, because Idaho Power already provides services within the City of Eagle, it is not required to obtain a Commission-issued Certificate of Convenience and Necessity as set out in Idaho Code §61-526 in order to extend necessary facilities through the City. In addition, because Idaho Power did not intend to impose a surcharge on Eagle residents to construct the proposed transmission line on a route selected by the Company, it was not required to obtain prior approval from the Commission in accordance with Idaho Code §61-502. Thus, there are circumstances in which Idaho Power can operate in accordance with the duties set out in the Idaho Code without obtaining the prior approval or consent of the IPUC.

The City misinterprets the purpose of Idaho Code §67-6528 to require that, in all instances, Idaho Power must first obtain Commission approval of a proposal to extend or improve its facilities within a city before it can apply to the city for the necessary authorization required by any of the city's land use requirements. Because Idaho Power did not obtain prior Commission approval of its proposal to extend a 138-kV transmission line through Eagle before the City rendered its decision to deny the Company's application for approval of a CUP, the City asserts the Commission is not permitted to hear Idaho Power's Complaint.

The City overlooks the first critical condition imposed upon a governmental agency in determining the applicability of Idaho Code §67-6528, namely that “*if a public utility has been ordered or permitted by specific order [of a public utilities commission] . . . to do or refrain from doing an act,*” then, any action or order of that governmental agency . . . in conflict with said . . . order, shall be insofar as it is in conflict, null and void.” (Emphasis added).

In this instance, the first requirement of Idaho Code §67-6528 is that Idaho Power had to have been ordered or permitted by a specific order issued by the IPUC to do or refrain from doing a certain act. However, neither the Idaho statutes regulating the activities of Idaho Power nor those governing the Commission require Idaho Power to seek an order from the Commission permitting it to extend the proposed 138-kV transmission line from the Eagle Substation through the City to the Star Substation. The authority to construct that extension is granted to the Company in accordance with Idaho Code §61-302 and does not require issuance of an Order to do so from the Commission.

Thus, because Idaho Power was not required to obtain a prior Order from the Commission to extend its transmission facility through Eagle, Idaho Code §67-6528 does not apply in this instance and the Commission is entitled to hear Idaho Power’s Complaint. Therefore, the City’s Motion to Dismiss Idaho Power’s Complaint must be denied.

IV.

CONCLUSION

For the foregoing reasons, Idaho Power respectfully requests that the Commission deny, in its entirety, the City’s Motion to Dismiss Idaho Power’s Complaint.

Respectfully submitted this 17th day of September 2004.



MONICA MOEN
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of September 2004, I served true and correct copies of the above and foregoing IDAHO POWER COMPANY'S MEMORANDUM IN OPPOSITION TO THE MOTION OF THE CITY OF EAGLE, IDAHO TO DISMISS to the following parties:

Donald L. Howell, II	<input checked="" type="checkbox"/>	Hand Delivered
Deputy Attorney General	<input type="checkbox"/>	U.S. Mail
Idaho Public Utilities Commission	<input type="checkbox"/>	Overnight Mail
472 W. Washington Street	<input type="checkbox"/>	FAX
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