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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Glens Ferry Cogeneration Partners, Ltd.

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

IDAHO POWER COMPANY,)
) CASE NO. IPC-E-08-20
Complainant)
vs.) GLENN'S FERRY COGENERATION
) PARTNERS, LTD'S OPPOSITION TO
GLENN'S FERRY COGENERATION) IDAHO POWER COMPANY'S MOTION
PARTNERS, LTD, a Colorado limited) TO DISMISS WITHOUT PREJUDICE
partnership,)
)
Respondent.)
)

COMES NOW, Glens Ferry Cogeneration Partners, Ltd. ("Respondent"/"Glens Ferry"), by and through undersigned counsel, and files this objection to Idaho Power Company's Motion to Dismiss Without Prejudice, pursuant to Rule 57.03 and Rule 256.04 of the Idaho Public Utilities Commission's Rules of Procedure.

BACKGROUND

On October 16, 2008, Idaho Power Company filed a "Petition for Declaratory Order and Formal Complaint for Breach of Contract" (herein "Complaint") with this Commission. In its Complaint, Idaho Power makes certain factual allegations and concludes with a Prayer

for Relief in which this Commission is asked to adjudicate whether or not a certain contract has been breached and to further adjudicate that Idaho Power is entitled to an award of damages as a remedy for said alleged breach of contract. A summons was issued by the Commission on October 21 2008, notifying Glens Ferry that it had 21 days to respond to Idaho Power s complaint. Idaho Power immediately began filing discovery requests. On November 10, 2008, Glens Ferry filed with the Commission a Motion to Dismiss for Lack of Subject Matter Jurisdiction. Subsequently, on November 14, 2008, Glens Ferry filed a Motion to Stay Discovery. On November 24, 2008, the parties filed a joint motion regarding scheduling and discovery.

On January 13, 2009, Idaho Power filed (1) a brief opposing Glens Ferry's Motion to Dismiss and (2) a Request for Oral Argument on the limited issue of whether the Commission has subject matter jurisdiction over the Complaint. Glens Ferry did not oppose Idaho Power's motion for Oral Argument. The Commission found that "oral argument may be helpful in clarifying the issues that have been raised by the parties in Glens Ferry's Motion to Dismiss and responses thereto," and set oral argument on the limited question of its breach of contract subject matter jurisdiction for Tuesday, March 3, 2009. IPC-E-08-20 Notice of Hearing, 02.12.09.

Since that time, Glens Ferry has engaged in good faith settlement negotiations with Idaho Power to no avail, despite repeated efforts and numerous proposals designed to make Idaho Power ratepayers whole without inflicting an unjustifiable penalty on Respondent. At the outset of negotiations, Glens Ferry advised Commission Staff of such negotiations and no decision on the merits of Respondent's Motion to Dismiss for Lack of Subject Matter

Jurisdiction has been rendered. Glens Ferry continued to periodically apprise Commission Staff of its ongoing settlement efforts during the ensuing two-plus years.

On June 23rd of this year, Glens Ferry contacted Commission Staff and requested that the Commission proceed with rendering its decision based on the record before it, due to the failed negotiation efforts. Respondent likewise notified counsel for Complainant that same day of its request to the Commission.

Nearly two months later, Idaho Power filed its belated Motion to dismiss its own Complaint, without prejudice.

ARGUMENT

While Glens Ferry agrees that Idaho Power's Complaint should be dismissed, it should be dismissed on the merits with prejudice.

A Motion to Dismiss without prejudice cannot be granted where the party making the motion has delayed resolution of the matter and where, among other things, the other party has been prejudiced by such delay.

The two primary factors in determining whether a dismissal with prejudice is appropriate are "a clear record of delay and ineffective lesser sanctions, which must be bolstered by the presence of at least one "aggravating" factor, including: 1) delay resulting from intentional conduct, 2) delay caused by the plaintiff personally, or 3) delay causing prejudice to the defendant." *Lee v. Nickerson*, 146 Idaho 5, 189 P.3d 467, 471 (Idaho 2008); *Kugler v. Maguire*, No. 36644, P. 3 [Idaho Court of Appeals, Nov. 4, 2010] citing *Ashby v. Western Council, Lumber Prod. & Indus. Workers*, 117 Idaho 684, 686-87, 791 P.2d 434, 436-37 (1990); *see also Adams v. Reed*, 138 Idaho 36, 39, 57 P.3d 505, 508 (Ct. App. 2002).

In the present case, all three of the alternate “aggravating factors” are present:

1. Prejudice to Respondent: Glens Ferry has been prejudiced by Idaho Power’s conduct, which has resulted in unnecessary legal fees expended in fully litigating the issue of the Commission’s subject matter jurisdiction over Idaho Power’s breach of contract Complaint, not to mention travel and other costs associated with the protracted settlement negotiations. This prejudice to Glens Ferry would be further exacerbated by the continued legal uncertainty created by a dismissal of Idaho Power’s Complaint without prejudice. In addition, Glens Ferry would be further prejudiced if it were to have to expend additional resources at some point in the future re-arguing the very issue already fully presented to the Commission for decision;
2. Delay caused by the Complainant: Instead of objecting to Glens Ferry’s initial Motion to Dismiss for lack of subject matter jurisdiction, Idaho Power could have withdrawn its Complaint more than two years ago and avoided wasting the Commission’s and Glens Ferry’s time in the interim; and
3. Delay caused by intentional conduct: Idaho Power has steadfastly refused all of Glens Ferry’s good faith settlement offers and has, instead, engaged in delay tactics such as throwing up red herring arguments regarding an irrelevant change in ownership of Glens Ferry’s owners during the two-plus years it has dangled Glens Ferry’s hopes of a business-to-business settlement on the line. Glens Ferry has been, and continues to be, the “Seller” under the Firm Energy Sales Agreement (“FESA”) that is the subject of the parties’ dispute. Any change in the ownership of its owners is irrelevant and Idaho Power’s claims to the contrary are yet another example of its bad faith attempts to delay resolution of the parties’ dispute.

In addition, because of the Commission’s specialized, albeit limited, jurisdiction there is no option of lesser sanctions against Idaho Power (e.g., a Rule 11 sanction against Idaho Power under the Idaho Rules of Civil Procedure, or an award of attorney fees against Idaho Power) for proffering a frivolous argument regarding the Commission’s jurisdiction over a breach of contract claim that flies in the face of long-standing Idaho Supreme Court precedent to the contrary, and then filing a “Never Mind” motion more than two years and untold dollars later.

The issue presented to the Commission by Idaho Power’s Complaint and

Glenns Ferry's Motion to Dismiss for lack of subject matter jurisdiction has been fully briefed and argued to the Commission, and should be decided on the merits. To do otherwise would be tantamount to approving Idaho Power's waste of the Commission's and Glenns Ferry's time and resources, and would serve to invite other parties in the future to behave likewise. Given the Commission's and the State of Idaho's limited resources, such a result should not be countenanced.

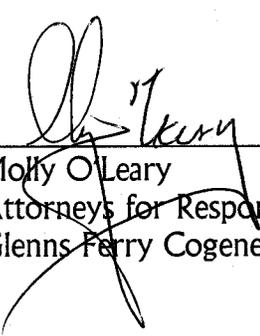
CONCLUSION

For the forgoing reasons, Glenns Ferry opposes Idaho Power's Motion to Dismiss Without Prejudice and hereby renews its request that Idaho Power's breach of contract Complaint be dismissed by the Commission for lack of subject matter jurisdiction.

DATED this 30th day of August, 2011.

Richardson & O'Leary, PLLC

By


Molly O'Leary
Attorneys for Respondent
Glenns Ferry Cogeneration Partners, Ltd.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of August, 2011, I caused a true and correct copy of the foregoing OPPOSITION TO MOTION TO DISMISS WITHOUT PREJUDICE to be served by the method indicated below, and addressed to the following:

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Signed: 
Nina Curtis