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IDAHO PUBLIC
UTILITIES COMMISSION

10 November 2008

Ms. Jean Jewell
Commission Secretary
Idaho Public Utilities Commission
472 W. Washington
Boise, ID 83702

RE: IPC-E-08-20

Dear Ms. Jewell:

We are enclosing an original and seven (7) copies of the **GLENN'S FERRY COGENERATION PARTNERS, LTS.'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION** in the above case.

A copy is included for stamping and returning to our office.

Sincerely,

Nina Curtis
Richardson & O'Leary PLLC

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IDAHO PUBLIC
UTILITIES COMMISSION

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Attorneys for Glenns Ferry Cogeneration Partners, Ltd.

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

IDAHO POWER COMPANY,

Complainant

vs.

GLENN'S FERRY COGENERATION
PARTNERS, LTD., a Colorado limited
partnership

CASE NO. IPC-E-08-20

GLENN'S FERRY COGENERATION
PARTNERS, LTD.'S MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION

COMES NOW, Glenns Ferry Cogeneration Partners, Ltd. ("Respondent"/"Glenns Ferry Cogeneration"), by and through undersigned counsel, and files this Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Rule 12(b)(1) of the Idaho Rules of Civil Procedure and Rule 56 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

GLENN'S FERRY COGENERATION
MOTION TO DISMISS

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.

In the body of its Complaint, Idaho Power asserts that this Commission has jurisdiction over its breach of contract claim without reference to a single legal authority supporting that assertion. The only authority Idaho Power references is the contract itself – which, as discussed more fully below, cannot be used to bootstrap this Commission’s limited jurisdiction to expand into a court of general jurisdiction.

Glenns Ferry Cogeneration is responding to Idaho Power’s Complaint with this Motion to Dismiss for Lack of Subject Matter Jurisdiction. Should said Motion be denied in part or in whole Respondent reserves the right to fully respond to each and every allegation in Idaho Power’s Complaint.

**THE COMMISSION MUST DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION**

Idaho Power filed its Complaint “pursuant to this Commission’s Rules of Procedure, including but not limited to RP 54 and RP 101.” Both RP 54 (dealing with Complaints) and RP 101 (dealing with Declaratory Orders) specifically require that the referenced pleading identify the legal authority upon which the complaint or petition for declaratory order is based. RP 54.02 requires a complaint to “refer to statutes, rules, orders or other controlling law involved”. Likewise RP 101.02(c) requires that a petition for declaratory order “indicate the statute, order, rule or other controlling law” upon

which the petitioner relies. Idaho Power's Complaint refers only to the contract as the source of authority for this Commission's jurisdiction. In essence, at page 4 of its Complaint, Idaho Power asserts that "The Commission has jurisdiction over this dispute" because the contracting parties so deem. The Commission recognized this flaw when it issued its order approving the contract for rate recovery purposes:

The Commission reminds the parties that jurisdiction may not be conferred on the Commission by contractual stipulation. The authority and jurisdiction of the Commission is restricted to that expressly and by necessary implication conferred upon it by enabling statutes. The nature and extent of the Commission jurisdiction to resolve actual disputes will be determined by the Commission on an individual case-by-case basis notwithstanding paragraph 21.1 of the Agreement.

Order No. 24674 at p. 3.

The Commission warned Idaho Power that contract disputes are the sole province of the judiciary when it issued its order creating the security matrix that underlies Idaho Power's contract with Glenns Ferry Cogeneration. In a docket entitled "In the Matter of the Investigation on the Commission's own Motion of Reasonable Terms for Security in Agreements Between Idaho Power Company and Cogenerators and Small Power Producers" the Commission was clear that "Contract disputes and interpretation in the event of alleged default or breach are normally appropriate for judicial determination, not Commission determination." Order No. 21800 at p. 3.

As early as 1921, the Idaho Supreme Court made clear that the Commission only has jurisdiction over public utilities:

[Y]et in every case before the Public Utilities Commission, it must in the first instance determine from the evidence before it whether the utility with which it is

seeking to deal is a public utility, for unless it be a public utility, the commission is without any jurisdiction over it whatsoever...

Natatorium Co. v. Erb, 34 Idaho 209, 215, 200 P. 348 (1921)

The Commission's jurisdiction is statutorily derived and cannot be expanded without legislative action. "The Public Utilities Commission has no inherent power; its powers and jurisdiction derives in its entirety from the enabling statutes, and nothing is presumed in its jurisdiction." *Lemhi Telephone Co. v. Mt. States Tele. & Tele. Co.*, 98 Idaho 692, 696, 571 P. 2d 753 (1977). "The power which the Commission has is that given by the legislature. It has no other. It exercises a limited jurisdiction; nothing is presumed in favor of its jurisdiction. (Citations omitted). The general rule is stated in 42 Am.Jur. 440, § 109, as:

Administrative authorities are tribunals of limited jurisdiction. Their jurisdiction is dependent entirely upon the provisions of the statutes reposing power in them; they cannot confer it upon themselves, although they may determine whether they have it. If the provisions of the statutes are not met and complied with, they have no jurisdiction."

Arrow Transportation Co. v. Idaho Public Utilities Comm'n, 85 Idaho 307, 313-314, 379 P.2d 422 (1963), citing *Malone v. Van Etten*, 67 Idaho 294, 178 P.2d 382, 383; *In the Matter of the Jurisdiction of the Oregon P. U. C.*, 201 Or. 1, 268 P.2d 605; 42 Am. Jur., Pub.Ad.Law., secs. 109, 157; I.C. § 61-808; 49 U.S.C. § 312(a).

The enabling statute for the Commission is clear and unequivocal, and narrowly circumscribes the Commission's jurisdiction:

61-501. INVESTMENT OF AUTHORITY. The public utilities commission is hereby vested with 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 act.

I.C. § 61-501 (emphasis supplied). The express scope of the Public Utilities Law is limited to the supervision and regulation of public utilities in Idaho. There is no provision

in the Public Utilities Law that requires or permits the Commission to interpret or enforce civil contracts, and such authority is not “necessary” to carry out the “spirit and intent” of the Commission’s regulatory and supervisory authority over public utilities.

The Idaho Supreme Court has ruled on the question of the Commission’s jurisdiction to interpret and/or enforce private contracts on several occasions throughout the past three decades. As was the case in *Lemhi Telephone Company v. Mountain States Telephone*, the issue presented here by Idaho Power’s Complaint is “in all manners one calling for the interpretation and enforcement of the parties’ contractual rights.” *Lemhi Telephone Co. v. Mt. States Tele. & Tele. Co.*, 98 Idaho at 696. The Supreme Court held in that case:

Generally, construction and enforcement of contract rights is a matter which lies in the jurisdiction of the courts and not the Public Utilities Commission. This is true notwithstanding that the parties are public utilities or that the subject matter of the contract coincides generally with the expertise of the commission. If the matter is a contractual dispute, it should be heard by the courts.

Id., citing *New York, Susquehanna & Western R. Co. v. Follmer*, 254 F.2d 510 (3d Cir. 1958); *Gibson v. City Telephone Co.*, 411 P.2d 551 (Okl.1966); *Sydnor Pump and Well Co. v. Taylor*, 201 Va. 311, 110 S.E.2d 525 (1959); *Appalachian Power Co. v. John Stewart Walker, Inc.*, 214 Va. 524, 201 S.E.2d 758 (1974); *Katz Drug Co. v. Kansas City Power and Light Co.*, 303 S.W.2d 672.

Similarly, in *Bunker Hill Co. v. Washington Water Power Co.*, 101 Idaho 493, 494; 616 P. 2d 292 (1980), the Idaho Supreme Court held that:

Here, as in *Lemhi*, the parties’ dispute arises from differing constructions and interpretations of the contract rights of the parties. While one of the parties is a public utility, and while the general area of power supply may be one in which the Commission is presumed to have expertise, nevertheless, the matter remains a contractual dispute involving the legal interpretation of a contract which historically lies within the jurisdiction of the courts. Hence, no jurisdiction is

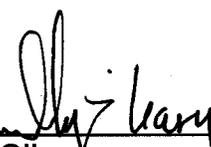
vested in the Public Utilities Commission and the refusal of the Commission to grant Bunker Hill's motion to dismiss was error.

Based on the foregoing, there can be no dispute that the Commission lacks jurisdiction over the subject matter of Idaho Power's Complaint and, as the Commission correctly noted in its Order No. 24674, the parties cannot contractually confer such jurisdiction upon the Commission.

WHEREFORE, Respondent respectfully prays that the Commission dismiss Idaho Power's Complaint for lack of subject matter jurisdiction. Respondent stands ready for oral argument on its Motion if the Commission so desires.

DATED this 10th day of November, 2008.

By



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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of November, 2008, I caused a true and correct copy of the MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION TO THE IDAHO PUBLIC UTILITIES COMMISSION to be served by the method indicated below, and addressed to the following:

Jean Jewell
Secretary
Idaho Public Utilities Commission
472 W Washington Street
Boise ID 83702

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Electronic Mail

Bruce C Jones
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bruce@jonesandschwartzlaw.com

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Electronic Mail

Signed 
Nina Curtis