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IDAHO PUBLIC UTILITIES COMMISSION

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BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF IDAHO POWER)	
COMPANY'S APPLICATION FOR A)	CASE NO. IPC-E-13-16
CERTIFICATE OF PUBLIC CONVENIENCE)	
AND NECESSITY FOR THE INVESTMENT)	POST HEARING BRIEF OF THE
IN SELECTIVE CATALYTIC REDUCTION)	INDUSTRIAL CUSTOMERS
CONTROLS ON JIM BRIDGER UNITS 3 AND)	OF IDAHO POWER
4)	
_____)	

COMES NOW, the Industrial Customers of Idaho Power, and pursuant to the briefing schedule adopted by the Commission in this matter hereby provides its Post Hearing Brief on the sole issue of the applicability of Idaho Code Section 61-541.

THE APPLICATION

Idaho Power asked the Commission to, for just the second time in the statute's history, invoke Idaho Code Section 61-541 and issue a "Binding Ratemaking Treatment" order in connection with the Company's proposed Jim Bridger Plant environmental upgrades.¹ Idaho Code Section 61-541 provides, in relevant part, that:

¹ Idaho Power Application ("Application") at 8 – 11.

(2) A public utility that proposes to construct, lease or purchase an electric generation or transmission facility, or make major additions to an electric generation or transmission facility, may file an application with the commission for an order specifying in advance the ratemaking treatments that shall apply when the costs of the proposed facility are included in rates.

...

3(c) The ratemaking treatments specified in the order issued under this section shall be binding in any subsequent commission proceedings regarding the proposed facility that is the subject of the order, except as may otherwise be established by law.

The statute would tie the hands of future Commissions requiring them to put up to the entire commitment estimate for the Bridger upgrades into rates. According to Idaho Power's Application, it seeks an order from the Commission that:

Pursuant to *Idaho Code* § 61-541, the Commission provides Idaho Power with authorization and a binding commitment to provide rate base treatment for the Company's capital investment in SCR controls at Jim Bridger Unites 3 and 4 and related facilities up to the amount of the \$129,837,393 Commitment Estimate at such time the plant is placed into operation.²

The Application for Binding Ratemaking Treatment presents this Commission with several troubling policy and legal issues. For the reasons stated below, the ICIP urges rejection of Idaho Power's proposed Binding Ratemaking Treatment because it is not only bad public policy but is based on questionable legal foundations.

BINDING RATEMAKING TREATMENT IS BAD PUBLIC POLICY

According to the Company's Application, "Ms. Grow explains recent social, political and regulatory events . . . prompted the Company to make this filing."³ Although Ms. Grow did not reference any specific Idaho regulatory event prompting the Company's unusual ratemaking treatment request, she did mention political and social reasons:

The Company is requesting a CPCN and binding ratemaking treatment under Idaho Code

² *Id.* at 12.

³ *Id.* at 8.

§ 61-541 for the SCR investment because of the magnitude of the investment, the uncertainty surrounding coal-fired generation in today's political and social environment, and the amount of interest expressed by stakeholders.⁴

The Company's reference to social and political uncertainty is understandably centered on a concern that coal plant investments may become obsolete before the expected useful economic life of that investment. This focus manifests in Ms. Grow's testimony pointing out that:

Members of the IRPAC [Integrated Resource Plan Advisory Council] representing the Idaho Conservation League and Boise State University suggested an additional resource portfolio which eliminated the Company's involvement in all of its coal-fired generation plants be included and analyzed as part of the 2013 IRP.⁵

Thus, the Company's motivation in seeking Binding Ratemaking Treatment is that its coal plants may be eliminated as a resource providing electric service to Idaho Power's ratepayers. Under traditional ratemaking, were that to happen the coal plants would cease being used and useful. They would therefore be subject to disallowance in future ratemaking proceedings.

On cross examination company witnesses Grow and Youngblood acknowledged that, were the Bridger Plant to be closed, the ratepayers would still be obligated to continue paying for this new investment if their Binding Ratemaking Treatment is adopted.⁶ Forcing ratepayers to pay for a phantom plant, one that does not provide electric service, is bad public policy. The Idaho Supreme Court has ruled that including nonoperative property in rates would "make a farce of utility regulation:"⁷

Where the evidence shows that property is nonoperative, it surely cannot be the law that the Commission must include the value of such property with that which is used and

⁴ Grow, DI at 15.

⁵ *Id.* at 18.

⁶ Tr. at 46, 249.

⁷ *Boise Artesian Water Co. v. Public Utilities Commission* 40 Idaho 690, 236 P.2d 525, 529 (Idaho 1925)

useful, because to do otherwise would constitute an interference with the managerial functions of the company. Whatever powers or functions may be possessed by the owners or managers of a utility, which may not be interfered with by a Commission, users cannot be required to pay a return on property which the Commission has found on sufficient evidence is nonoperative. To hold otherwise would make a farce of utility regulation.⁸

As Dr. Reading pointed out in his testimony, it may be good *shareholder policy*, but it is bad *public policy*.⁹ Dr. Reading further testified that approval of the shareholder-centric ‘Binding Ratemaking Treatment’ shifts the risk of the potential obsolescence of this investment in the company’s coal fleet from the shareholders to the ratepayers. The appropriate ratemaking response to Binding Ratemaking Treatment should therefore result in a rate of return of only a fraction of the company’s overall rate of return to account for the reduced business risk.¹⁰

Company witness Youngblood testified as to Idaho Power’s goal:

By filing its application, the Company intended to provide the Commission with the ability to evaluate whether this investment is economically, socially, and politically prudent, and in the best interest of the Company and its customers, before the investment is made.¹¹

It is not necessary to grant the Company Binding Ratemaking Treatment in order to accomplish Idaho Power’s stated goal. The grant of a certificate of convenience and necessity (“CPCN”) provides the Company with more than adequate assurance of recovery while still affording a modicum of protection to the ratepayers in the form of a prudence review when the plant enters service to the public. For example the following language from the Commission’s order granting Idaho Power its CPCN for the Swan Falls hydro facility is typical:

By this Order we authorize Idaho Power Company to rebuild the Swan Falls hydroelectric facility. We accept its offer of a cap for the cost of the rebuild that can be passed on to ratepayers. We further recognize that, in the ordinary course of events, the

⁸⁸ *Id.*, emphasis provided.

⁹ Reading, Di at 7.

¹⁰ *Id.* at 10.

¹¹ Youngblood, Reb at 8.

Company will be allowed to recover in its revenue requirement its prudently incurred investment and expenses of the Swan Falls rebuild.¹²

But a CPCN is not a guarantee, nor should it become a guarantee if the Commission is to meet its dual obligations of protecting ratepayers and allowing the utility monopoly an opportunity to earn a fair return for its shareholders. In the same Swan Falls order quoted above, the Commission admonished:

When the Commission authorizes construction of new generation, it has not as a matter of law authorized the utility to recover from ratepayers whatever costs are invested in the new generation under all circumstances whatsoever. The regulatory compact is not so one-sided.¹³

Here, Idaho Power is asking the Commission to allow Idaho Power to recover up to its commitment estimate “under all circumstances whatsoever.” One alternative solution the Commission may consider is to utilize the flexibility built into Idaho Code § 61-541 to condition future recovery of the investment in the SCR on the continued used and useful status of the Bridger units without the need for additional ratepayer funded upgrades. The statute clearly contemplates conditional Binding Ratemaking. Section 4 provides:

Based upon the hearing record, the commission shall issue an order that addresses the proposed ratemaking treatments. The Commission may accept, deny or modify a proposed ratemaking treatment requested by the utility. In determining the proposed ratemaking treatments, the commission shall maintain a fair, just and reasonable balance of interests between the requesting utility and the utility’s ratepayers.

Binding Ratemaking Treatment, as requested by Idaho Power, includes binding the ratepayers to the SCR investment even if the Bridger Plant is mothballed or requires even more costly pollution controls in the near future that would have rendered the current upgrades uneconomic. That is not a “reasonable balance of interests” between the utility and its ratepayers. The

¹² Order No. 23520 at 1.

¹³ *Id.* at 19.

ratepayers would have no ability whatsoever to seek redress from these costs in the event these coal plants are shuttered.

“THE REGULATORY COMPACT IS NOT THAT ONE-SIDED”

The Idaho Public Utilities Commission is a legislative body when it sets rates.¹⁴ As a general rule legislative bodies may not reach into the future and bind future legislative bodies. This concept is known as the ‘reserved powers doctrine’ or the ‘rule against legislative entrenchment’ which provides that no legislature may legitimately pass a law that prohibits its amendment or repeal by later legislatures. The exception to this rule is when the legislative body enters into a contract that is binding into the future beyond the life of the initial legislative body. However, the legislative intent in entering into the contract under the modern unmistakability doctrine must be clear. The United States Supreme Court’s discussion of this issue in *U.S. v. Winstar Crop.* is instructive:

[A]lthough we have recognized that “a general law . . . may be repealed, amended or disregarded by the legislature which enacted it,” and “is not binding upon any subsequent legislature . . . the principle has always lived in some tension with the constitutionally created potential for a legislature, under certain circumstances, to place effective limits on its successors, or to authorize executive action resulting in such a limitation.

...

The impetus for the modern unmistakability doctrine was thus Chief Justice Marshall’s application of the Contract Clause to public contracts. Although that Clause made it possible for state legislatures to bind their successors by entering into contracts, it soon became apparent that such contracts could become a threat to the sovereign responsibilities of state governments.¹⁵

Thus, when this Commission acts in its legislative rate setting function it, may bind future commissions by contract but only to the extent such contract does not become a “threat to the

¹⁴ *Application of Utah Power & Light Co.* 107 Idaho 446, 448-449, 690 P.2d 901, 903-904 (Idaho 1984)

¹⁵ *U.S. v. Winstar Corp.*, 518 U.S. 839, 873 – 874, 116 S.Ct. 2432, 2454, 135 L.Ed2d 964 (1996)

sovereign responsibilities” of the State of Idaho acting through its public utilities commission. There is no bright line test for determining whether a particular contract impugns on the state’s sovereign responsibilities. The Court in *Winstar* explained:

The application of the doctrine will therefore differ according to the different kinds of obligations the Government may assume and the consequences of enforcing them. At one end of the spectrum are claims for enforcement of contractual obligations that could not be recognized without effectively limiting sovereign authority, such as a claim for rebate under an agreement for a tax exemption. Granting the rebate, like enjoining enforcement, would simply block the exercise of the taxing power, . . .and the unmistakability doctrine would have to be satisfied. At the other end are contracts, say, to buy food for the army; no sovereign power is limited by the Government’s promise to purchase and a claim for damages implies no such limitation. That is why no one would seriously contend that enforcement of humdrum supply contracts might be subject to the unmistakability doctrine. Between these extremes lies an enormous variety of contracts including those under which performance will require exercise (or not) of a power peculiar to the Government.¹⁶

Although it is clear granting Binding Ratemaking Treatment is a waiver of the State of Idaho’s sovereign power to regulate state sanctioned monopolies, whether that grant to Idaho Power satisfies the unmistakability doctrine is not clear. Indeed, it may well run afoul of the reserved powers doctrine. The Commission should therefore proceed with utmost caution lest it create needless litigation and uncertainty for subsequent commissions. Fortunately, the solution is at hand today because the Commission may, under §61-541, simply issue a CPCN similar to its Swan Falls CPCN order and not issue an order with a Binding Ratemaking commitment.

DATED this 15th day of November, 2013.

Richardson Adams, P LLP

By 
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of Idaho Power

¹⁶ *Id.* 880, 116 S.Ct. at 2457 – 2458.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of November, 2013, a true and correct copy of the within and foregoing POST HEARING LEGAL BRIEF OF THE INDUSTRIAL CUSTOMERS OF IDAHO POWER, Case No. IPC-E-13-16, was served as noted below, to:

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