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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF THE J. R. SIMPLOT COMPANY TO PURCHASE AND ASSUME OWNERSHIP OF CERTAIN IDAHO POWER OWNED FACILITIES AND TO SET A PURCHASE PRICE THEREFORE	)	**CASE NO. IPC-E-13-17** J. R. SIMPLOT COMPANY'S ANSWER TO IDAHO POWER'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

INTRODUCTION AND SUMMARY

COMES NOW the J. R. Simplot Company ("Simplot") and, pursuant to Rule 57(3) of the Rules of Procedure of the Idaho Public Utilities Commission ("Commission"), submits this Answer to Idaho Power Company's ("Idaho Power" or the "Company") Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion"). As explained below, Idaho Power itself proposed the process by which Simplot has asked the Commission to determine the sale price for distribution facilities placed by Idaho Power on Simplot's side of the meter. Idaho Power proposed the sale process as part of its response to arguments, by Simplot and many others, in the last general rate case that Idaho Power's facilities charge is exorbitant and inescapable. The Commission adopted Idaho Power's proposed sale process. At Idaho Power's own request, the process by which the Commission determines the sale price is part and parcel with the other

terms and rates contained in Idaho Power's facilities charge. The Commission's determination to adopt Idaho Power's proposed sale process as a part of the facilities charge was consistent with Idaho utility law. It was not appealed by any party.[1]

In reliance on Idaho Power's sale process adopted by this Commission, Simplot engaged in good faith negotiations to buy certain facilities and have Idaho Power remove other facilities from Simplot's existing Caldwell plant. Idaho Power's Motion fails because it ignores the Commission's final order on the matter, and Idaho Power's own inconsistent position – all in yet another attempt to thwart Simplot's now multi-year effort to get out from underneath of Idaho Power's unfair facilities charge. The Commission should swiftly reject Idaho Power's Motion and expeditiously approve the sale at Simplot's proposed price, which is consistent with all prior Commission orders on the topic.

ARGUMENT

1. IDAHO POWER'S MOTION IGNORES THE RELEVANT REGULATORY BACKGROUND AND OVERLOOKS THAT SIMPLOT'S APPLICATION AND PROPOSED SALE COMPORT WITH IDAHO POWER'S OWN TARIFF ADOPTED BY THIS COMMISSION AT IDAHO POWER'S REQUEST.

This case is a follow-on proceeding to Idaho Power's last general rate case (Docket No. IPC-E-11-08), where the Commission addressed a challenge to Idaho Power's exorbitant and unfair facilities charge for industrial customers. Ever since that proceeding, Idaho Power's Commission-approved tariff contains Rule M, which is titled "Facilities Charge Service." Simplot has attached Rule M as Attachment 1 to this Answer. Rule M provides for and governs the sale of company-owned facilities that are located on the property of Idaho Power's customers

[1] Because the underlying testimony and order in the general rate case (Docket No. IPC-E-11-08) are so intertwined with the issues raised by Idaho Power's Motion, Simplot is contemporaneously filing a motion for official notice of the relevant portions of the testimony to allow for it to be a part of the record in this proceeding. This Answer will cite the official transcript in that proceeding as "Tr." and exhibits as "Ex."

which are used solely to provide service to a particular customer. Rule M provides:

> 3. Sale of Company-Owned Facilities
>
> Customers paying a facilities charge may request to purchase Company-owned facilities installed beyond the Point of Delivery. All sales of facilities must be approved by the Commission and meet the following provisions:
>
> a. Idaho Code Section 61-328
>
> b. No mixed ownership of facilities. A Customer purchasing Company-owned facilities installed beyond the Point of Delivery must purchase all facilities listed on the DFI for that location.
>
> c. The customer must provide the operation and maintenance of all facilities installed beyond the Point of Delivery after the sale is complete.
>
> d. The Customer must prepay engineering costs for sales determinations taking greater than 16 estimated hours of preparation. Sales determinations equal to or less than 16 estimated hours of preparation will be billed to the Customer as part of the sales agreement, or after the engineering is completed in instances where the sale is not finalized.

Idaho Power's Motion fails to mention Rule M. Nor does it even allude to the fact that Simplot's Application (deemed a Petition pursuant to Order No. 32870) is fully compliant with Idaho Power's tariffs and this Commission's prior orders.

In fact, in its last general rate case, Idaho Power proposed the very process that Simplot initiated in this case. In the Commission's final Order in that case, the Commission relied on the recommendation of Idaho Power's witness Youngblood that the Commission adopt Rule M, to wit:

> Mr. Youngblood explained the Company's proposal to give facilities charge customers the option of buying Company-owned facilities. The Company created a new Rule M (Facilities Charge Service), which would consolidate facility charge rules. This will enable the Company to more efficiently manage tariff issues related to facilities charge services. Under the propose Rule M, customers may ask to buy Company-owned facilities installed beyond the delivery point. The Commission must approve all sales and they must meet the following

conditions:

> Compliance with *Idaho Code* § 61-328;
>
> No mixed-ownership of facilities;
>
> The customer must provide the O&M of all facilities installed beyond the delivery point after the sale; and
>
> The customer must pay for engineering costs for determination of the sale.
>
> Tr. at 251 -52. He said *Idaho Code* § 61-328 provides that the sale of facilities must not adversely impact remaining customers or customer rates. Tr. 252 – 53. Further, the Company would need to ensure the appropriate equipment is in place at the delivery point so no equipment failure would degrade the Company's reliability and service to remaining customers. Tr. at 253. If the proposed sale meets these conditions, the Company would make a filing with the Commission asserting that such sale is in the public interest. *Id.*

Order No. 32426 at 25 - 26 (footnotes omitted).

The Company made this proposal in response to arguments by the Industrial Customers of Idaho Power ("ICIP"), of which Simplot is a member, that provided witnesses on the issue. Specifically, ICIP and Simplot witnesses argued that the never-ending 20.4% annual charge for fully depreciated distribution assets was exorbitant, and that customers had in fact paid for these facilities many times over in some circumstances – justifying transfer of the facilities to the customer. The record demonstrated that Idaho Power had installed facilities on Simplot's premises that had a total initial investment value of $4,252,088, yet Simplot was burdened with a never-ending, *annual* charge of $867,426 for those facilities. Tr. 465-466. A witness from Simplot testified, "Since this equipment has been installed, we have paid around $14 million or three point four (3.4) times its installed investment already. We have two items that are sixty-six (66) years old and have paid for those items almost seven (7) times." Tr. 465-466. ICIP also demonstrated that the Company's interpretation of its tariff for removal of the facilities subjected

the customer to unfair processes and charges – particularly in circumstances where the customer had already paid for the full value of the facilities many times over. *See, e.g.,* Tr. at 406-07. In short, the record demonstrated that Idaho Power had created an unfair charge that did not work for many customers and had provided inadequate options for customers to *stop* paying this never-ending charge.

Faced with these arguments, Idaho Power supported a sale process overseen by the Commission instead of outright transfer of facilities to the customer or some other modification to the removal process. Idaho Power even proposed Rule M as part of its rebuttal testimony. *See* Tr. at 253-254. Idaho Power's witness Youngblood testified, "The Company is proposing to create a new rule, Rule M - Facilities Charge Service, which would fully describe the Company's rules and policies for providing facilities charge services." Tr. at 251; *see also* Idaho Power Ex. 52 (containing Idaho Power's proposed Rule M). Idaho Power further explained that through Rule M "the Company has provided a new option for customers who may request to purchase Company-owned facilities installed beyond the point of delivery." *Id.*

Most importantly, Idaho Power's witness explained the sale process under Idaho Power's proposed Rule M, as follows:

> If the Company's proposed tariff language is adopted and approved by the Commission, and if and when a customer requests the purchase of facilities beyond the Company's point of delivery, the Company would attempt to determine a mutually agreed upon price for the sale of the facilities prior to bringing the sales transaction to the Commission for approval. *If a sales price cannot be mutually agreed upon, the Company* ***or the customer may initiate a proceeding before the Commission in order to determine the appropriateness of the price.***

Tr. at 253-54 (emphasis added). Nowhere did Idaho Power's testimony indicate that Idaho Power's proposed sale price would be the only option.

The Commission relied on Idaho Power's testimony in approving Rule M. The Commission's understanding of the mechanics of how that new rule is to be implemented is illustrated by its liberal quotations from Idaho Power's witness's testimony:

> He [Idaho Power witness Youngblood] said the Company does not propose a specific methodology for determining the facility sales price. Rather, the Company simply proposes changing its tariffs to allow for the buyout option. *Id.* He stated that if the Commission approves the Company's Rule M tariff, and if a customer asks to buy facilities, the Company would attempt to agree with the customer on a sales price before bringing the proposed sale to the Commission. Tr. at 253-54. ***If the Company and customer cannot agree on a price, either of them could ask the Commission to determine the appropriate price.*** Tr. at 254.

Id. at p. 26 (emphasis provided). Nothing could be clearer. Idaho Power proposed, in the event of a disagreement as to price, that "either of them could ask the Commission to determine the appropriate price." Now Idaho Power asserts the Commission lacks jurisdiction to entertain a request from the first customer to lodge a request that the Commission determine the appropriate price.

In its findings in Order No. 32426 the Commission clearly relied on Idaho Power's testimony:

> The Company conceded in its rebuttal testimony that customers ought to be able to purchase distribution facilities dedicated to their specific use and located on their premises. In particular, if a customer wants to bear the responsibility of operating, maintaining and replacing such facilities, then we believe there ought to be an opportunity for the customer to purchase the assets on a case-by-case basis. Pursuant to *Idaho Code* § 61-328, a proceeding to determine the values of such facilities would be necessary.

Order No. 32426 at 32. The Commission even instructed the Company to "explain new Rule M to its facilities charge customers and provide each customer with the 'Acknowledgement Form' so that customers will be aware of the option to purchase the distribution facilities for which they are assessed facilities charges." *Id.* at 33.

Idaho Power was represented by legal counsel in that docket. Although having ample opportunity to do so, the Company's counsel never once even suggested that the methodology that it proposed this Commission adopt for customers to purchase facilities beyond the point of delivery was in any way illegal or outside of the scope of this Commission's authority.[2] That case was only decided less than two years ago. While Idaho Power's one-hundred-and-eighty degree flip on this issue is remarkable, this Commission should not allow itself to be whip-sawed in this manner.

2. THE COMMISSION'S APPROVAL OF IDAHO POWER'S PROPOSED SALE PROCESS WAS PROPER BECAUSE THE COMMISSION HAS BROAD AUTHORITY TO VALUE UTILITY PROPERTY AND TO SET RATES FOR THE PROVISION OF ELECTRIC SERVICE.

The Commission's authority over the provision of utility service is very broad – unquestionably broad enough to cover the rates at which Idaho Power sells its facilities beyond the meter. Idaho Code Section 61-502 provides:

> Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rates, fares, tolls, rentals, charges or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursions or commutation tickets, or that the rules, regulations, practices, or contracts or any of them affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provision of law, or that such rates, fares, tolls, rentals, charges or classifications are insufficient, the commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices or contracts to be thereafter observed and in force and shall fix the same by order as hereinafter provided…

The proposed sale of utility-owned facilities to a ratepayer was the result of arguments that Idaho

[2] Indeed, Idaho Power's witness was under oath and its counsel moved the testimony to be entered into the record without objection or correction as to legal infirmity.

Power had subjected its customers to a never-ending and exorbitant annual facilities charge of 20.4% of the initial value of fully depreciated equipment, and provided no realistic option to stop paying that charge through reasonable removal provisions or otherwise. In adopting Idaho Power's requested sale process embodied in Rule M, the Commission surely acted well within its authority provided by the all-encompassing phrase in the statute providing the Commission authority over all "rates, fares, tolls, rentals, charges or classifications . . . for any service or product or commodity . . . or that the rules, regulations, practices or contracts . . . ." I.C. § 61-502.

In addition to Section 61-502, however, which clearly grants the Commission authority to set the rate for purchase, Section 61-503 provides:

> The commission shall have power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate, fare, toll, rental, charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates fares tolls, rentals, charges, classifications, rules, regulations, contracts or practices, or any thereof, of any public utility, and to establish new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices or schedule or schedules in lieu thereof.

The Idaho Code is unambiguous – the rate for the sale of facilities on the customer side of the meter is a contract or practice of a public utility inexorably tied to the provision of utility service including Idaho Power's facilities charge and a customer's options to *stop* paying that charge.

Idaho Power is, essentially, arguing that it is not a public utility offering to sell electric plant that is currently being used to provide utility service. Idaho Power trivializes this Commission's role in fulfilling its most basic of functions – setting rates:

> Simplot's Application attempts to use I.C. § 61-328 to further its own private business interests (at the expense of other Idaho Power customers) by requesting the Commission to override Idaho Power's proffered sale price, which the Company has already determined is representative of the property's fair sale

value.

Motion at 9.

Of course, the impact on Idaho Power's other customers cannot be known until this Commission makes that determination. The "property" is "electric plant" as defined in Idaho Code Section 61-118 to include "all real estate, fixtures, and personal property owned, controlled, operated or managed in connection with or to facilitate the production, generation, transmission, delivery or furnishing of electricity." In addition, the Commission values utility property in Idaho – not the utility in its sole and unchecked discretion. Idaho Code Section 61-523 provides, "The commission shall have power to ascertain the value of the property of every public utility in this state and every fact which, in its judgment, may or does have any bearing on such value." Certainly, Idaho Power's opinion as to the value of the "property" may be relevant to the Commission's deliberations, but Idaho Power cannot usurp the Commission's statutory duty.

Idaho Power further asserts:

> Idaho Power is certainly cognizant of the important and necessary role the Commission plays in regulation of various aspects of the Company's business; however, the sale of Idaho Power's used and useful property, at a price the Company has determined it is not willing to sell at, is not an appropriate area of regulation. To be clear, Idaho Power is not the only entity that owns the type of equipment Simplot wishes to purchase nor does Idaho Power wish to act as a common distributor of such equipment for customers like Simplot.

Motion at 9.

Idaho Power ignores that eliminating the ability of monopolists to unilaterally determine the price for electric service, including the sales price of electric plant used and useful in providing that service, is precisely why we have a public utilities commission in the first

instance. Idaho Power is the only electric utility monopolist with which Simplot may legally do business. No other entity is permitted to provide the service Idaho Power provides, and Simplot is stuck paying the facilities charge or Idaho Power's excessive removal costs unless and until this Commission remedies the situation. Again, pursuant to Rule M, Idaho Power is required to offer its customers, like Simplot, the option to purchase Company-owned facilities on the Customer's side of the meter. Idaho Power owns, operates and maintains those facilities, and charges rates set by the Commission. This tariff and the sale option are part and parcel with the other elements of the facilities charge, and without the option to purchase at a price set by the Commission the entire facilities charge would need to be re-examined – particularly for removing the facilities from the customer's premises or otherwise enabling a customer to *stop* paying the charge.

At page 8 of its Motion, Idaho Power asserts that, it has the burden for demonstrating to the Commission the criteria set forth in Idaho Code Section 61-328 and concluded, "Simplot cannot take the utility's place as an applicant in assuming that burden." In support of that unremarkable statement Idaho Power cites *In the Matter of the Application of Rocky Mountain Power for Authority to Sell St. Anthony Hydroelectric Generation Plant,* 2013 WL 3973729, 1 (Order No. 32822), and states the "applicant" as referred to in subsection (3) refers to the utility. *Id.* Yet Order No. 32822 is a mere "Notice of Application." It contains no findings of fact, nor any conclusions of law. The order does not address the issue of whether the utility is solely able to be an applicant or carry the burden of proof under the statute. Indeed, the quoted word "applicant" never even appears in the order.

At page 6 of its Motion, Idaho Power asserts that the Commission itself has

acknowledged that it may not "require a utility to enter into what should be a consensual contract." *See Id.* (citing *In the Matter of the Application of PacifiCorp (d/b/a Pacific Power & Light Company) and the Washington Water Power Company,* PPL-E-94-1, WWP-E-94-1, Order No. 25753, at 8 (1994)). [3] The consensual contract the Commission referred to was a possible service territory agreement between Washington Water Power ("Water Power") and neighboring cooperative electric utilities that are not subject to the Commission's jurisdiction. Unlike in this case, Water Power was not providing electric service to the cooperative utilities pursuant to a Commission approved tariff.

The case cited by Idaho Power, on the other hand, does instruct what happens when a utility fails to follow both the letter and spirit of Commission approved tariffs:

> Every public utility, including The Washington Water Power Company, is under a statutory duty to "comply with each and every requirement of every order, decision, direction, rule or regulation." *Idaho Code § 61-406.* A regulated utility must also comply with its filed and approved tariffs. *Idaho Code § 61-313.* To remedy violations the Public Utility Law includes provision for the Commission to enforce its Orders, rules and other statutory obligations. *Idaho Code § 61-701* et seq. More specifically, *Idaho Code § 61-706* provides that any utility that fails to comply with any Commission Order shall be subject to civil penalty of not more than $2,000 for each offense....
>
> Rather than imposing the statutory maximum penalty of $2,000 per day, we preliminarily conclude that the Commission should instead assess a civil penalty of $2,000 for each month the Company has violated its line extension tariffs.

Order No. 25753 at 12. The Commission stressed the importance of utility's adherence to tariffs and imposed the fine against Water Power for failing to do so, "even in the absence of evidence showing an immediate injury to the public." *Id.*

Likewise, Idaho Power's reliance on the Idaho Supreme Court cases holding the

[3] Idaho Power's Motion cited page 8, but the most relevant passage appears on page 11.

Commission lacks jurisdiction to adjudicate contract disputes is misplaced. Motion at 6-7. Simplot is seeking to invoke the provisions of the Company-proposed Rule M – a tariff duly approved by this Commission. Rule M is not a contract between Simplot and Idaho Power. Rule M applies generally to all of Idaho Power's ratepayers that have Company-owned facilities on their side of the meter. It is black letter utility law that tariffs have the force of law, *see Southern Pacific Co. v. Brown, Alcantar & Brown, Inc.*, 409 F.2d 1331, 1332 (5th Cir. 1969), and tariffs establish the liability of a recipient of services covered by the tariff, even if the recipient was quoted a different price, *see Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 97, 35 S.Ct. 494, 495 (1915), or the recipient was a party to a contract under which the services were to be provided at a different price, *see Texas & Pacific Railway Co. v. Mugg & Dryden*, 202 U.S. 242, 245, 26 S.Ct. 628 (1906).

Idaho Power's Motion drifts even further off point to rely on several cases from California. *See* Motion at 7-8. The Commission is not bound by California Public Utility and Railroad Commissions' decisions reaching decades into the past. Even if it were, Idaho Power has not asserted that any of these cases addressed a situation where the utility itself proposed that the Commission set the sale price in the event of a disagreement. These California cases are wholly inapplicable to this Idaho case.

Idaho Power also conflates the question of who has the burden of demonstrating the criteria of Idaho Code Section 61-328 with the question of who may initiate the sale proceeding. Section 61-328 is not restrictive and does not prohibit or invalidate Idaho Power's Rule M sale procedure or the Commission's order adopting it. One of the fundamental purposes of the statute is to protect the ratepayers in the event of the acquisition of an incumbent utility by a third party.

The legislative intent for the 2000 amendment to Section 61-328 provides insight:

> It is therefore the policy of the state of Idaho to regulate acquisitions of public utilities which provide electric energy in a manner that promotes the public interest.

Idaho Sess. Laws 2000, ch. 224, § 2, p. 619 (emphasis provided). That said, the substantive provisions of the statute still require the Commission's authorization prior to the sale of any utility asset, even outside of the context of an outright acquisition. But nowhere does the statute purport to protect the utility from selling assets to a customer at a price set by the Commission.

Idaho Power's reading of the statute would forever bar a ratepayer with Company-owned facilities on its property from ever accessing the Commission for a valuation determination of the electric plant being used to serve it. The catch-22 proposed by Idaho Power requires the customer, such as Simplot, to continue paying Idaho Power's monopolist rate for the facilities charge or agree to Idaho Power's unilateral sale price.[4] Furthermore, by being forced to accept Idaho Power's sale offer and signing an agreement or other contract for the purchase, the customer would then be barred from subsequently challenging its agreement with Idaho Power when it brings a Section 61-328 application to the Commission for approval of the agreement.

By effectively barring the door to the Commission for ratepayers, Idaho Power will be able to exercise its monopoly powers and force any customer seeking a valuation to accept Idaho Power offer's with no recourse. This case demonstrates the unfair results that will occur. Simplot merely asked to purchase the facilities at a price comparable to that Idaho Power agreed to provide to the Sinclair Oil Company for facilities at the Sun Valley Village – which was the book value of the equipment. *See Application* at 2-4.[5] Yet Idaho Power would require Simplot

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[4] The only other option is to *pay* Idaho Power to remove Idaho Power's facilities, after having already overpaid for years under the facilities charge.

[5] Simplot also asked that the price be reduced for overpayments to Idaho Power. The issue of overpayments

to pay *twice* the book value. *Id.* at 2 and Ex. 3. The two cases would appear to present similar situations – aside from the fact that Simplot challenged the facilities charge in a rate case and Sun Valley did not. Idaho Power thus hopes to abuse its monopoly power by arbitrarily discriminating against certain customers. Idaho law expressly prohibits such discrimination. *See* I.C. § 61-315 ("No public utility shall, as to rates, charges, service, facilities *or in any other respect*, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage" (emphasis added)). The Commission unquestionably had authority to prevent this discriminatory outcome when it approved Idaho Power's proposed sale process in the last general rate case.

3. IDAHO POWER'S MOTION IS BARRED AS AN IMPERMISSIBLE COLLATERAL ATTACK.

Idaho Power is barred from making its claim of lack of subject matter jurisdiction because that argument is an impermissible attack upon a final Order of the Commission and is prohibited by Idaho Code Section 61-625. That statute provides that, "[a]ll orders and decisions of the commission which have become final and conclusive shall not be attacked collaterally." Thus the law of the case is now settled and the Commission's December 30, 2011, Order cannot be attacked on appeal or collaterally. The Idaho Supreme Court has explained that:

> The legislature has afforded the orders of the Commission a degree of finality similar to that possessed by judgments made by a court of law. I.C. § 61-625. ...Final orders of the Commission should ordinarily be challenged either by a petition to the Commission for [reconsideration] or by appeal to this Court as provided by Idaho Code § 61-626 and 627; Idaho Const. Art. 5, § 9. A different rule would lead to endless consideration of matters previously presented to the Commission and confusion about the effectiveness of Commission orders.

Utah-Idaho Sugar Co. v. Intermountain Gas Co. 100 Idaho 368, 373-74, 565 P.2d 1058, 1063-64

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was not addressed in the Sun Valley case, and it is not clear that there were any overpayments by Sun Valley.

(1979). Final Orders of the Commission must be challenged either by petitioning the Commission for reconsideration, or by appeal to the Idaho Supreme Court. Idaho Power did neither.

4. JUDICIAL ESTOPPEL BARS IDAHO POWER'S "FAST AND LOOSE" ATTEMPT TO BENEFIT FROM INCONSISTENT POSITIONS.

"Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Sword v. Sweet*, 140 Idaho 242, 252, 92 P.3d 492, 502 (2004) (quoting *Rissetto v. Plumbers and Steamfitters Local 343,* 94 F.3d 597, 600 (9th Cir.1996)). The doctrine is intended to "protect against a litigant playing fast and loose with the courts" and to "protect the dignity of the judicial process." *Id.* (quoting *Rissetto,* 94 F.3d at 600).

This doctrine is not limited to judicial proceedings. The Ninth Circuit decision relied upon by the Idaho Supreme Court explained that the doctrine has equal applicability to proceedings, such as this one, that are administrative in nature, as follows:

> [M]any cases have applied the doctrine where the prior statement was made in an administrative proceeding, and we are not aware of any case refusing to apply the doctrine because the prior proceeding was administrative rather than judicial. *See Chaveriat v. Williams Pipe Line Co.,* 11 F.3d 1420, 1427 (7th Cir.1993) ("Though called *judicial* estoppel, the doctrine has been applied, rightly in our view, to proceedings in which a party to an administrative proceeding obtains a favorable order that he seeks to repudiate in a subsequent judicial proceeding.") (collecting cases); *Smith v. Montgomery Ward & Co.,* 388 F.2d 291, 292 (6th Cir.1968) (position taken in workers' compensation proceeding estopped party in subsequent personal injury action); *Simo v. Home Health & Hospice Care,* 906 F.Supp. 714, 718 (D.N.H.1995) (Social Security Administration disability proceeding); *UNUM Corp. v. United States,* 886 F.Supp. 150, 158 (D.Me.1995) (Maine Bureau of Insurance approval proceeding); *Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Auth.,* 731 F.Supp. 747, 750 (E.D.La.1990) (Interstate Commerce Commission proceeding); *Muellner v. Mars, Inc.,* 714 F.Supp. 351,

> 357-58 (N.D.Ill.1989) (SSA proceeding) (applying Illinois law). This rule has been justified on the ground that "[t]he truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law." *Muellner,* 714 F.Supp. at 357 (*quoting Dept. of Transp. v. Coe,* 112 Ill.App.3d 506, 510, 68 Ill.Dec. 58, 445 N.E.2d 506 (4th Dist.1983)).

Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d at 604.

The doctrine unquestionably applies here, and there is little doubt that Idaho Power would be estopped from pressing its "gotcha" argument in any appeal. Again, Idaho Power's rate case testimony proposed, "If the Company and customer cannot agree on a price, either of them could ask the Commission to determine the appropriate price." *See* Order No. 32426 at pp. 25-26 (citing and relying upon Idaho Power's testimony). Now that the Commission and Simplot have taken up Idaho Power on its offer, the Company argues that the Commission and Simplot cannot "override Idaho Power's proffered sale price, which Company has already determined is representative of the property's fair sale value." Motion at 9. Nothing could be more inconsistent. Judicial estoppel bars Idaho Power from changing its position *after* inducing the Commission to approve its sale procedure in Rule M. *See Rissetto,* 94 F.3d at 600 (noting that all federal circuits recognizing the doctrine apply it to subsequent proceedings when the inconsistent position was *actually* adopted in the prior proceeding, while others do not even require the position be adopted).

5. THE DOCTRINE OF LACHES BARS IDAHO POWER'S MOTION.

"The defense of laches is a creation of equity and is a specie of equitable estoppel." *Sword*, 140 Idaho at 249, 92 P.3d at 499 (citing *Huppert v. Wolford*, 91 Idaho 249, 257, 420 P.2d 11, 19 (1966)). The elements of laches are met here: (1) Idaho Power alleges Simplot's Application invades Idaho Power's rights, (2) Idaho Power delayed in asserting its rights, having

had notice and an opportunity do so during the last rate case, (3) Simplot lacked knowledge Idaho Power would assert it rights at this time, and (4) Simplot would be injured or prejudiced if Idaho Power's jurisdictional defense is not held to be barred. *See Huppert*, 91 Idaho at 257, 420 P.2d at 19.

In this case, the delay is undeniable, and Simplot unquestionably "has been injured or placed to a disadvantage by the delay." *Grover v. Idaho Public Utilities Commission*, 83 Idaho 351, 357, 364 P.2d 167, 170 (1961) (finding delay in filing petition for rehearing did not constitute laches because at that time I.C. § 61-626 contained no deadline for filing such a petition). In reliance on Idaho Power's proposed sale process, Simplot expended time and effort to negotiate in good faith with Idaho Power and arranged its business affairs for closure of its existing Caldwell facility based on the assumption that the Commission would set a fair price for sale of the facilities at issue. Idaho Power waited until after negotiations failed and only a few months prior to the date that Simplot intends to commence operations at its new Caldwell facility to argue for the first time that the Commission lacks authority to implement the sale process Idaho Power proposed. Requiring Simplot to accept Idaho Power's unfair price at twice the facilities' book value at this late date prejudices Simplot. Idaho Power's argument is barred by laches.

6. IDAHO POWER'S TAKINGS ARGUMENT FAILS.

Idaho Power's takings argument is also misplaced. *See* Motion at 10-11. According to Idaho Power, requiring a "reduced sale price" of anything less than Idaho Power's proposed price set at *twice* the book value would constitute a "diminution in the value of the Company's investment backed expectations." *Id.* at 10. Idaho Power fails to mention, however, that to

qualify for a regulatory taking its investment back expectations must be *reasonable*. *See Sprenger, Grubb and Assoc., Inc. v. Cit of Hailey*, 127 Idaho 576, 582, 903 P.2d 741, 747 (1995). Expecting to obtain twice the book value on a sale for equipment used to overcharge Simplot (for decades in many instances) is not reasonable.

Likewise, because Idaho Power proposed the sale process as a means to deflect other proposed revisions to its facilities charge tariff, it cannot now claim its own sale process constitutes a physical taking. In addition to judicial estoppel and laches, the doctrine of res judicata bars this argument. *See City of Caldwell v. Roark*, 98 Idaho 897, 900, 575 P.2d 495, 498 (1978) (holding that prior judgment is res judicata as to all defenses that could have been raised in prior action). The time to argue that the sale process would constitute a physical taking was in the general rate case. Instead, Idaho Power proposed Rule M and explained, "If a sales price cannot be mutually agreed upon, the Company *or the customer may initiate a proceeding before the Commission in order to determine the appropriateness of the price.*" Tr. at 253-54. Idaho Power cannot now claim that "requiring" it to follow its own sale process constitutes a physical taking.

CONCLUSION

For the reasons set forth above, the Commission should deny Idaho Power's Motion to Dismiss. The Commission unquestionably has jurisdiction to, in Idaho Power's own words "*determine the appropriateness of the price*" offered by Idaho Power under Rule M.

RESPECTFULLY SUBMITTED this 6th day of September 2013

RICHARDSON ADAMS, PLLC

By _____
Peter J. Richardson
Of Attorneys for J.R. Simplot Co.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September 2013, copies of the foregoing Reply of the J. R. Simplot Company to Idaho Power's Motion was delivered to:

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