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IDAHO PUBLIC
UTILITIES COMMISSION

August 28, 2013

VIA HAND DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho 83702

Re: Case No. IPC-E-13-17
J.R. Simplot Company's Petition – Idaho Power Company's Motion to
Dismiss

Dear Ms. Jewell:

Enclosed for filing in the above matter are an original and seven (7) copies of Idaho Power Company's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Sincerely,



Jennifer M. Reinhardt-Tessmer

JRT:csb
Enclosures

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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Idaho Power Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF)
J.R. SIMPLOT COMPANY FOR A) CASE NO. IPC-E-13-17
DETERMINATION OF PRICE)
REGARDING THE PURCHASE AND) IDAHO POWER COMPANY'S MOTION
ACQUISITION OF CERTAIN ASSETS) TO DISMISS FOR LACK OF SUBJECT
OWNED BY IDAHO POWER COMPANY.) MATTER JURISDICTION
_____)

COMES NOW, Idaho Power Company ("Idaho Power" or "Company"), pursuant to RP 56 and Idaho R. Civ. Pro. 12(b)(1), and hereby moves the Idaho Public Utilities Commission ("Commission") to issue an order dismissing J.R. Simplot Company's ("Simplot") Application and Request to Determine Price and Request for Modified Procedure ("Application")¹ for lack of subject matter jurisdiction, with prejudice.

I. INTRODUCTION

Simplot's Application asks the Commission to determine a sale price for certain Idaho Power facilities that Simplot wishes to purchase, but which Idaho Power refuses

¹ In Order No. 32870, the Commission determined it would construe Simplot's Application as a Petition, triggering an answer or response by Idaho Power.

to sell on Simplot's terms. Simplot brings its Application pursuant to *Idaho Code* § 61-328, which requires a utility to obtain authorization from the Commission in order to sell or transfer ownership of any property used in the generation, transmission, distribution, or supply of electric power. *Idaho Code* § 61-328 confers permissive jurisdiction upon the Commission to approve or deny a sale only when invoked by the utility; it does not permit a customer to unilaterally call upon the Commission to determine a sale price of the utility's assets. Therefore, without Idaho Power's willingness to sell its property at an agreed upon price, the Commission lacks subject matter jurisdiction and this matter must be dismissed.

II. BACKGROUND

A customer's option to purchase Company-owned assets located beyond the Point of Delivery² was originally addressed in Case No. IPC-E-11-08 (Idaho Power's last general rate case) in Order No. 32426. Therein, the Commission stated that customers should be provided with the option to purchase distribution facilities beyond the Point of Delivery and acknowledged Idaho Power's willingness to sell facilities to a customer in certain situations. See Order No. 32426, p. 32. Specifically, if a customer wanted to bear the responsibility of operating, maintaining, and replacing certain facilities, the customer could purchase the assets "on a case-by-case basis." *Id.*

On September 28, 2012, Simplot requested that the Company proceed with a sales price determination of certain Company-owned assets located beyond the Point of Delivery at Simplot's potato processing facility in Caldwell, Idaho. The Company calculated what it determined was a fair value of those assets, taking into consideration

² Point of Delivery as used herein refers to the junction point between the facilities owned by the Company and the facilities owned by the customer. See Idaho Public Utilities Code No. 29, Tariff No. 101, Rule B Definitions, First Revised Sheet No. B-1.

its investment in the property and economic expectations at the time of purchase, and presented its figures in a meeting held at Simplot's offices on February 6, 2013. Idaho Power representatives returned to Simplot's offices on February 14, 2013, to explain the methodology in greater detail. Following those meetings, Idaho Power received a counteroffer from Simplot, which the Company determined was far less than the fair value of the assets and if accepted, would negatively impact customers. Idaho Power rejected the counteroffer and re-extended its original offer.

On July 16, 2013, Simplot unilaterally filed its Application pursuant to I.C. § 61-328, asking the Commission to set a sale price for certain assets owned by Idaho Power at Simplot's Caldwell facility.

On July 31, 2013, Staff addressed Simplot's Application in its Decision Memorandum. Therein, Staff recommended the Commission issue a Notice of Petition, yet noted "Staff believes that *Idaho Code* § 61-328 presumes that the filing of an Application (made pursuant to this statute) would be made by the utility." Decision Memorandum, p. 2.

On August 7, 2013, the Commission issued its Notice of Petition ordering Idaho Power's response. Order No. 32870.

III. ARGUMENT

A. Legal Standard for the Commission's Review.

A motion to dismiss is reviewed under the same standard as a motion for summary judgment, and should be granted when the pleadings, depositions, affidavits, and admissions on file show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *McDonald v. Paine*, 119 Idaho 725,

810 P.2d 259 (1991); *Meridian Bowling Lanes v. Meridian Athletic Ass'n, Inc.*, 105 Idaho 509, 670 P.2d 1294 (1983); *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002).

Pursuant to Idaho Rule of Civil Procedure 12(b)(1), a complaint may be dismissed for lack of jurisdiction over the subject matter. Here, Idaho Power asserts a “facial” attack on the Commission’s jurisdiction, as Simplot has failed to allege facts upon which subject matter jurisdiction can be based. See *Owsley v. Id. Indust. Comm’n.*, 141 Idaho 129, 133 (2004).

B. There is No Legislative Authority Conferring Jurisdiction over a Disputed Sale Price to the Commission.

As the Commission is aware, it “has no inherent power; its powers and jurisdiction derive entirely from the enabling statutes and ‘nothing is presumed in favor of its jurisdictions.’” *Lemhi Telephone Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 696 (1977) quoting *Arrow Transp. Co. v. Idaho Public Utilities Comm’n*, 85 Idaho 307, 379 P.2d 422 (1963). Only when jurisdiction is clear may the Commission exercise the power granted to it by statute. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 591 P.2d 122 (1979). The jurisdiction of the Commission is strictly construed. *Lemhi*, 98 Idaho at 696, 571 P.2d at 757.

Pursuant to RP 52, Simplot’s Application must refer to the particular provisions of statute, rule, or other controlling law upon which it is based, which triggers the Commission’s jurisdiction over the subject matter. See RP 52. Simplot’s Application fails to cite any authority that confers jurisdiction on the Commission to determine a

price for purposes of a private sale of Idaho Power's used and useful property³ or to compel the sale of said property, because no such authority exists.

The only statute Simplot cites as controlling authority in its Application is *Idaho Code* § 61-328, which provides that no electric utility may dispose of generating property without the authorization of the Commission:

Electric utilities — Sale of property to be approved by commission.

(1) *No electric public utility* or electrical corporation as defined in chapter 1, title 61, Idaho Code, owning, controlling or operating any property located in this state which is used in the generation, transmission, distribution or supply of electric power and energy to the public or any portion thereof, shall merge, sell, lease, assign or transfer, directly or indirectly, in any manner whatsoever, any such property or interest therein, or the operation, management or control thereof, or any certificate of convenience and necessity or franchise covering the same, except when authorized to do so by order of the public utilities commission.

(2) *The electric public utility or electrical corporation* shall file a verified application setting forth such facts as the commission shall prescribe or require. The commission shall issue a public notice and shall conduct a public hearing upon the application.

(3) Before authorizing the transaction, the public utilities commission shall find:

(a) That the transaction is consistent with the public interest;

(b) That the cost of and rates for supplying service will not be increased by reason of such transaction; and

³ While Idaho Power acknowledges the Commission's authority to determine a value of certain utility-owned property for purposes of ratemaking, such authority does not extend to a price determination for purposes of a private sale. See I.C. § 61-523 and *Application of Utah Power & Light Co. v. Public Utilities Comm'n.*, 107 Idaho 446, 451, 690 P.2d 901, 906 (1984) citing *Artesian Water Co. v. Public Utilities Commission*, 40 Idaho 690, 700, 236 P. 525, 527 (1925) ("value" for purposes of statute authorizing the Commission to ascertain value of public utility property in determining rate base does not necessarily mean market value or sale value, but the value of that which the utility employs for public convenience).

(c) That the applicant for such acquisition or transfer has the bona fide intent and financial ability to operate and maintain said property in the public service.

The applicant shall bear the burden of showing that standards listed above have been satisfied.

(4) The commission shall have power to issue said authorization and order as prayed for, or to refuse to issue the same, or to issue such authorization and order with respect only to a part of the property involved. The commission shall include in any authorization or order the conditions required by the director of the department of water resources under section 42-1701(6), Idaho Code. The commission may attach to its authorization and order such other terms and conditions as in its judgment the public convenience and necessity may require.

I.C. § 61-328 (emphasis added).

The plain language of the statute provides that the Commission's jurisdiction is triggered by a utility's verified application requesting the Commission to authorize the sale of its property. I.C. § 61-328(2). Whether the Commission has jurisdiction to force a utility to sell its used and useful property at a certain price has not been specifically addressed by this Commission; however, the Commission has clearly acknowledged its inability to "require a utility to enter into what should be a consensual contract." *In re PacifiCorp*, 1994 WL 713849, 8 (Order No. 25753). A utility's sale of its used and useful property is just that—a consensual contract—limited only by the Commission's oversight to ensure it meets appropriate standards pursuant to I.C. § 61-328. See *Afton Energy, Inc. v. Idaho Power Co.*, 111 Idaho 925, 929, 729 P.2d 400, 404 (1986) ("A public utility has the right to enter into a private contract but the state can modify that contract when it falls outside the parameters of an appropriate standard."). The Idaho Supreme Court has also ruled that such consensual contracts are beyond the

Commission's jurisdiction, even if one of the parties is a public utility. See *Lemhi*, 98 Idaho at 696, 571 P.2d at 757-58 (Contract disputes should be heard by the courts "notwithstanding that the parties are public utilities or that the subject matter of the contract coincides generally with the expertise of the commission."); see also *Bunker Hill Co. v. Wash. Water Power Co.*, 101 Idaho 493, 494, 616 P.2d 272, 273 (1980) ("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, it should be heard by the Courts.").

Authorities outside of Idaho have specifically addressed whether a customer like Simplot can unilaterally invoke a commission's jurisdiction under statutes mirroring I.C. § 61-328 and responded with a resounding "No." Specifically, in addressing California's⁴ counterpart to I.C. § 61-328(2), California Public Utility Code Section 851⁵, the California Public Utilities Commission held that "[t]he only entity having standing before this Commission in an application for authority under Section 851 of the Public Utilities Code is the public utility filing the application." *Application of J.D. Transportation Co.* 69 Cal. P.U.C. 298 (1969); see also *P. T. Durfy* 4 C.R.C. (California Railroad Commission) 447 (1914) (application should be made by the owner of the property because the authority must run to such owner). Similarly, in interpreting § 51(a) of the Public Utilities Act (the predecessor statute to § 851 that contained nearly

⁴ Idaho's utility laws largely follow that of California. *Idaho Power & Light Co. v. Blomquist et al.*, 26 Idaho 222, ___, 141 P. 1083, 1087 (1914) ("Much of our public utilities law was copied from the California act.").

⁵ Cal. Pub. Util. Code § 851 provides in pertinent part "A public utility, other than a common carrier . . . shall not sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, . . . without first having either secured an order from the commission authorizing it to do so"

identical provisions), it has been held that a commission's authority is merely permissive and the commission cannot order a public utility to sell its property. See *Hanlon v. Eshleman*, 169 Cal. 200 (1915) (when an owner of an operative right does not desire to sell, the Commission cannot compel him to do so); and *H. C. Venable*, Ry.Comm.Dec. 27935, App. 19909 (May 6, 1935) (application to transfer denied when applicant explained circumstances under which he signed the application and testified that he no longer wanted to transfer the right).

While Idaho Power declines to address the substantive pricing arguments set forth in Simplot's Application, as it is Idaho Power's position that the Commission lacks the jurisdiction to even reach the merits of Simplot's Application, it should be noted that the cases Simplot cites in support of its Application all involve Idaho Power as an applicant, wherein Idaho Power appropriately assumed the burden for demonstrating to the Commission the criteria set forth in I.C. § 61-328(3). Simplot cannot take the utility's place as an applicant in assuming that burden. See *In the Matter of the Application of Rocky Mountain Power for Authority to Sell the St. Anthony Hydroelectric Generation Plant*, 2013 WL 3973729, 1 (Order No. 32822) (the "applicant" as referred to in subsection (3) refers to the utility); see also *Application of J.D. Transportation Co.* 69 Cal.P.U.C. 298 (1969) ("The burden of proof in such proceeding must be sustained by applicant, and no other party can assume the burden.").

C. Simplot's Application Contravenes the Legislative Intent of Idaho Code § 61-328.

The Legislature's purpose for enacting I.C. § 61-328 was to ensure that a public utility's sale of property (that is still used and useful) is consistent with the public interest. See Statement of Purpose RS10362, 2000 Idaho Laws Ch. 224 (H.B. 815).

Specifically, the intent of the statute was to protect customers and to require inclusion of the Director of the Department of Water Resources' conditions regarding water rights (as it pertains to hydropower water rights). *Id.*

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. 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. Simplot certainly has the option of purchasing its desired property from a third party for use beyond the Point of Delivery.

The Legislature's intent in enacting *Idaho Code* § 61-328 was to protect the public interest. Should the Commission force the Company to sell its property at a price that is less than the real value to the Company, to the detriment of customers, it would contravene the Legislature's intent in enacting the statute.

D. Forcing the Company to Sell Its Property at a Reduced Price Would Constitute a Taking.

The Fifth Amendment takings clause of the United States Constitution proscribes the taking of property⁶ without just compensation. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003); see also *Id.* Const. Art. I, § 14 (private property may be taken by the government for a public use, “but not until a just compensation” has been paid for the property). The United States Supreme Court recognizes two classifications of takings that are relevant in this matter: physical and regulatory. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). A physical taking involves permanent physical occupation by the government of private property and a non-categorical regulatory taking occurs when a government action diminishes the value of an owner’s property and his or her investment-backed expectations. *Id.*

Simplot’s Application argues that regardless of the value Idaho Power places on the facilities, “the ultimate decision-maker for determining the value is this Commission.” Application, p. 2. Should the Commission somehow find it has jurisdiction to set a reduced sale price on Idaho Power’s assets, it would constitute a diminution in the value of the Company’s investment-backed expectations. Should the Commission actually divest Idaho Power of physical ownership of its assets by not only locking Idaho Power into a sale price of its assets but also compelling the Company to sell, it would constitute a physical taking. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁶ Real property, personal property, and intangible property each may constitute the subject of a takings claim under the Fifth Amendment. *American Pelagic Fishing Co., L.P. v. U.S.*, C.A.Fed.2004, 379 F.3d 1363, rehearing *en banc* denied, certiorari denied 125 S.Ct. 2963, 545 U.S. 1139, 162 L.Ed.2d 887.

A determination as to the sale price of used and useful property, in a private sale with a customer, is a matter that should be left to the discretion of the utility. A decision by the Commission forcing a sale of the Company's private property at a price less than the amount determined by the Company to be its fair sale value, would not only exceed the authority granted to it by the Legislature, but would also constitute a taking of the Company's property.

IV. CONCLUSION AND PRAYER FOR RELIEF

Idaho Code § 61-328 does not confer jurisdiction upon the Commission to set a sale price of used and useful, utility-owned property over the utility's objection. As Commission Staff aptly noted, "*Idaho Code* § 61-328 presumes that the filing of an Application (made pursuant to this statute) would be made by the utility." Decision Memorandum, p. 2. Therefore, in the absence of the requisite subject matter jurisdiction, Idaho Power respectfully requests that the Commission dismiss Simplot's Application in its entirety, as a matter of law.

Respectfully submitted this 28th day of August 2013.



JENNIFER M. REINHARDT-TESSMER
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of August 2013 I served a true and correct copy of IDAHO POWER COMPANY'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION upon the following named parties by the method indicated below, and addressed to the following:

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