

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 ACQUISITION OF)	
CERTAIN ASSETS OWNED BY IDAHO)	ORDER NO. 32940
POWER COMPANY.)	

On July 16, 2013, J.R. Simplot Company filed an Application with the Commission, pursuant to *Idaho Code* § 61-328, for approval of Simplot's purchase and acquisition of certain assets owned by Idaho Power Company. Simplot's Application states that Idaho Power provides electrical service to Simplot's potato processing facility in Caldwell, Idaho (the Plant) pursuant to Idaho Power's Schedule 19. Simplot seeks to purchase some of the Idaho Power-owned facilities beyond the point of delivery.

Simplot requested that the Commission process its Application by Modified Procedure. Staff recommended the filing be processed as a Petition, in order to compel Idaho Power to respond. Idaho Power responded on August 28, 2013, by filing a Motion to Dismiss for Lack of Subject Matter Jurisdiction. On September 6, 2013, Simplot filed an Answer to Idaho Power's Motion to Dismiss. By this Order, we grant Idaho Power's Motion to Dismiss.

THE PETITION

Simplot asserts that it is closing its existing Plant and constructing a modern, state of the art potato processing facility immediately adjacent to the existing Plant. In closing the Plant, Simplot would like to purchase some of the Idaho Power-owned facilities.

Simplot states it and Idaho Power agree that the net book value of the facilities that Simplot wants to purchase is approximately \$119,725. However, the parties have been unable to agree on a purchase price. Simplot has offered to purchase the facilities for \$85,910. Idaho Power has offered to sell the facilities for \$272,928.

Simplot asserts, pursuant to *Idaho Code* § 61-328 and Order No. 32426, a Commission proceeding is necessary before a utility can sell or transfer ownership of any of its distribution facilities. Simplot further alleges it is the Commission's responsibility to determine the facility's value and whether the transaction is in the public interest. Filing at 2.

Simplot maintains it is willing to bear the responsibility of operating, maintaining and replacing the facilities. Simplot further asserts the sale and purchase of the Idaho Power facilities will have “absolutely no adverse impact (either on rates or service) on Idaho Power’s other ratepayers.” Filing at 7.

After reviewing Simplot’s filing as well as the applicable statutes and rules, Staff recommended the Commission construe Simplot’s filing as a Petition and, pursuant to IPUC Rule of Procedure 57, require Idaho Power to answer the petition within 21 days of the issuance of the Commission’s Notice of Petition.

IDAHO POWER’S MOTION TO DISMISS

Idaho Power states that Simplot wishes to purchase Idaho Power assets which Idaho Power is not willing to sell on Simplot’s terms. The Company argues that *Idaho Code* § 61-328 (under which Simplot brings its Petition) 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.” Motion at 2. Based on this reasoning, Idaho Power asserts that “without Idaho Power’s willingness to sell its property at an agreed upon price, the Commission lacks subject matter jurisdiction.” *Id.*

Idaho Power argues that “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. Idaho Power further contends that Simplot’s request contravenes the intent of *Idaho Code* § 61-328, is contrary to the public interest, and would constitute an unlawful taking under the Fifth Amendment.

SIMPLOT’S ANSWER

Simplot maintains that it engaged in good faith negotiations with Idaho Power to buy certain facilities and filed its Application with the Commission consistent with Idaho Power’s tariff and prior Commission Orders. Answer at 3. Simplot explains that Idaho Power’s Rule M (governing the purchase of utility-owned facilities installed beyond the point of delivery) was created by the Company during its last general rate case in response to industrial customer complaints that Idaho Power’s facilities charges were too high. “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.” *Id.* at 5. Idaho Power proposed, and the Commission adopted, Rule M which anticipated that, if the Company and customer cannot agree on a price, either party could ask the Commission to determine the appropriate price. *Id.* at 6.

Simplot argues that the Commission’s broad grant of authority over all “rates, fares, tolls, rentals, charges or classifications” pursuant to *Idaho Code* § 61-502 provides ample authority for the Commission’s jurisdiction to decide this matter. Simplot adds that *Idaho Code* § 61-503 allows the Commission to set the price for Simplot’s purchase. Further, Simplot argues that “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.” *Idaho Code* § 61-523, Answer at 9.

Simplot denies that the pending Application amounts to a contract dispute between it and Idaho Power. Simplot maintains that it is “seeking to invoke the provisions of the Company-proposed Rule M – a tariff duly approved by this Commission.” Answer at 12. Simplot argues that, because tariffs have the force of law, Idaho Power is bound by the terms of Rule M. Simplot reasons that Idaho Power’s position requires a customer to “continue paying Idaho Power’s monopolist rate for the facilities charge or agree to Idaho Power’s unilateral sale price.” Answer at 13.

Simplot further contends that Idaho Power’s claim of lack of subject matter jurisdiction is an impermissible collateral attack on the Commission’s final Order that approved Rule M and the process for determination of a sales price. Moreover, Simplot asserts that principles of judicial estoppel bar Idaho Power from gaining an advantage by taking one position, only to seek a subsequent advantage by taking an incompatible position. Answer at 15. Simplot also argues that the doctrines of laches and res judicata bar Idaho Power’s Motion.

On September 9, 2013, Simplot filed a Motion asking the Commission to take official notice of portions of the testimony and exhibits in Case No. IPC-E-11-08. Simplot contends that “[i]n order to respond to the legal issues raised by Idaho Power’s Motion the Commission will need to fully understand the genesis of Rule M and Idaho Power’s positions with regard to customer purchases of facilities owned by Idaho Power on the customer side of the meter.” Motion at 3.

IDAHO POWER'S "SUPPLEMENTAL" FILING

"In light of the confusion expressed in Simplot's Answer to Idaho Power's Motion to Dismiss," Idaho Power filed a supplemental brief on September 13, 2013. Supplement at 1. Idaho Power asserts that "nothing in the last rate case conferred jurisdiction on the Commission to order an involuntary sale of Idaho Power's property." *Id.* The Company points out that the Commission "clearly stated that a proceeding to determine the value of such facilities would be necessary." *Id.* at 2. However, Idaho Power argues that "at no point in the rate case, nor in Rule M, did Idaho Power agree to a process whereby it could be forced, against its will, to sell its used and useful property—particularly at a price the Company has determined would be to the detriment of other customers and its shareholders." *Id.* at 4.

Idaho Power maintains that, "if Simplot truly believes that Idaho Power's proffered sale price (which the Company has determined is the price at which the sale will not adversely impact other customers and its shareholders) is, in fact, 'exorbitant,' Simplot has the option of purchasing the equipment from a third-party." *Id.* at 5.

DISCUSSION AND CONCLUSIONS

Idaho Power is an electric corporation and public utility pursuant to *Idaho Code* §§ 61-119 and 61-129. The Commission has jurisdiction over public utility matters generally pursuant to Title 61 of the Idaho Code and the Commission's Rules of Procedure. IDAPA 31.01.01.000 *et seq.* Specifically, pursuant to *Idaho Code* §§ 61-328 and 61-523, the Commission has jurisdiction to ascertain the value of utility property and to approve the sale of utility property.

As a preliminary matter, Simplot asked the Commission to take official notice of several portions of the testimony and exhibits in Case No. IPC-E-11-08. The Commission may officially notice its own orders, notices, rules, certificates and permits. IDAPA 31.01.01.263.01(a)(1). Accordingly, the Commission hereby takes official notice of the notices and Orders issued in Case No. IPC-E-11-08. The testimony and exhibits contained in the prior case exist as a matter of public record. Contrary to Simplot's assertions, we cannot find that the testimony and exhibits offered are "commonly known and beyond dispute." Motion at 3. While the existence of the documents is undisputed, the testimony and exhibits reflect the argument and opinion of parties in a previous Commission case. The content of the documents is not binding as a matter of law. Accordingly, we deny Simplot's Motion. However, to the extent that the

testimony and exhibits are used in a Commission Order to reach a finding and/or conclusion, the matters are officially noticed.

Although its customers typically own, operate, and maintain facilities and equipment beyond Idaho Power's point of delivery, some customers ask the Company to assume these obligations. A customer could request that Idaho Power install and maintain distribution facilities for a variety of reasons, e.g., because the customer lacks the capital or expertise to fund, design, install, and maintain necessary facilities or because the customer does not want the responsibility of maintaining such facilities. In Case No. IPC-E-11-08, the Industrial Customers of Idaho Power (ICIP) argued that the facilities charges assessed by Idaho Power were unreasonable, excessive and improperly calculated. Don Sturtevant, Corporate Energy Manager for Simplot, testified on behalf of ICIP that Simplot "would like to opt-out of the facilities charge, and take on the responsibility for electrical distribution facilities on Simplot property." Case No. IPC-E-11-08, Tr. at 473; Order No. 32426 at 29. In response to ICIP's position, Idaho Power proposed that the Commission adopt a new tariff – Rule M. Rule M would allow facilities customers the opportunity to request to purchase Company-owned facilities installed beyond the delivery point.

Ultimately, the Commission found persuasive "the testimony offered by the ICIP and other witnesses that customers ought to be provided with an option to purchase distribution facilities dedicated to their specific use and located on their premises." Order No. 32426 at 32. The Commission stated that, "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." *Id.* The Commission approved Rule M and it became effective on January 1, 2012.

Pursuant to Rule M, Simplot asked to purchase the Company-owned facilities installed beyond Idaho Power's point of delivery. However, Simplot and Idaho Power were unable to agree on a reasonable price. In response to failed negotiations, Simplot filed the present case requesting the Commission to set a price for the distribution facilities that Simplot wishes to purchase.

As previously stated, the Commission has jurisdiction, pursuant to statute, to ascertain the value of utility property and to approve the sale of utility property. However, implicit in the Commission's authority is the utility's willingness to sell. *Idaho Code* § 61-328 does not

provide the Commission with the authority to compel a utility to sell its property. Consequently, we grant Idaho Power's Motion to Dismiss based on the Commission's lack of jurisdiction to compel the Company to sell its property. A valuation of the property by the Commission is meaningless if the Company is unwilling to sell at anything less than its stated price.

Oftentimes the effect of a proposal cannot be accurately measured until after approval and implementation. Such is the case here. Rule M does little, if anything, to advance the interests of Idaho Power's distribution facilities customers if Idaho Power can single-handedly shut down negotiations. However, Simplot is not left without a remedy. We encourage Idaho Power and Simplot to continue negotiations. We believe that there is enough flexibility in the valuation of the distribution facilities for both parties to move further toward an agreeable price. If negotiations fail, Simplot can choose to accept the sales price offered by Idaho Power or it may choose to purchase its own distribution facilities. Either approach would satisfy Simplot's ultimate goal – eliminating its current obligation to pay Idaho Power's facilities charges. Alternatively, Simplot can ask the Commission to review whether the cost and calculation of Idaho Power's facilities charges is fair, just and reasonable to the Company's customers.

ORDER

IT IS HEREBY ORDERED that Simplot's Motion that Official Notice be taken of testimony and exhibits is denied.

IT IS FURTHER ORDERED that Idaho Power's Motion to Dismiss for Lack of Jurisdiction is granted.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 5th
day of December 2013.



PAUL KJELLANDER, PRESIDENT

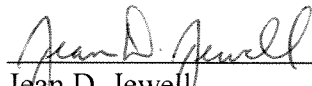


MACK A. REDFORD, COMMISSIONER



MARSHA H. SMITH, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

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