

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF)	
INTERMOUNTAIN GAS COMPANY FOR A)	CASE NO. INT-G-10-01
DECLARATORY ORDER RELATING TO)	
THE RESALE OF NATURAL GAS)	ORDER NO. 32004
)	

On March 4, 2010, Intermountain Gas Company (a subsidiary of MDU Resources Group) filed a Petition seeking a declaratory order from the Commission. More specifically, the utility seeks an order from the Commission stating that the Commission lacks “economic jurisdiction of the resale of natural gas by third party non-utilities for use in motor vehicles.” Application at 1, 2. The Company requested that its Petition be processed under Modified Procedure. *Id.* at 4.

On April 8, 2010, the Commission issued a combined Notice of Petition and Notice of Modified Procedure in this matter. The Commission invited interested persons to file comments regarding Intermountain’s Petition no later than May 6, 2010. On May 3, 2010, Staff filed a Motion for a seven-day extension of time to file comments in this case. The Commission granted the Motion at its May 5, 2010, decision meeting.

The Commission received written comments from the Treasure Valley Clean Cities Coalition (TVCCC) and the Commission Staff. Intermountain did not file reply comments. After reviewing the Petition and the comments, we grant the Petition as outlined in greater detail below.

THE PETITION FOR DECLARATORY ORDER

A. Background

Intermountain Gas states that it has been approached by third-party non-utility organizations requesting that Intermountain sell natural gas to them “for their resale for use in motor vehicles for transportation purposes.” *Id.* at 3. For example, Intermountain envisions that non-utility third parties would “compress” natural gas (CNG) and resell the CNG to other persons as fuel for their motor vehicles. The Company maintains that fleets of heavy duty vehicles appear to be the largest growing segment of the CNG market. “Currently, there are a number of western states that permit public CNG fueling stations including, but not limited to,

California, Washington, Utah and Wyoming.” *Id.* Intermountain believes that there are economic and environmental benefits for its customers and the State by encouraging the use of CNG as an alternative transportation fuel. *Id.*

B. Legal Support for the Petition

In its Petition, Intermountain Gas states that it is not aware of any Idaho Court decision which has addressed the resale of natural gas as a transportation fuel. The Company maintains that definitions in the Idaho Public Utilities Law (*Idaho Code* §§ 61-116 (gas plant), 61-117 (gas corporation), and 61-129 (public utility)) do not specifically address the resale of natural gas. Application at 3.

The Company did point to one Idaho Commission case and one California PUC case to support its Petition. In Order No. 26514, this Commission found that Idaho Power Company’s leasing of “dark” optic-fiber cables was not the provision of a public utility service as defined by Title 62.¹ Case No. IPC-E-96-9. In the California case, the California PUC ruled that persons operating service stations that resell compressed natural gas for vehicular use, other than public utilities, are not subject to rate regulation by the California Commission. *In Re Pacific Gas and Electric Company*, 124 PUR 4th 107 at pp. 125, 126 (1991).

C. Federal Preemption

Intermountain Gas also notes that Section 404 of the Energy Policy Act of 1992 may restrict the Commission’s jurisdiction over the resale of natural gas. In particular, Section 404(b) provides that:

The transportation or sale of natural gas by any person who is not otherwise a public utility, within the meaning of State law, . . . to any person for use by such person as a fuel in a self-propelled vehicle, shall not be considered to be transportation or sale of natural gas within the meaning of any State law, regulation or order in effect before January 1, 1989. This subsection shall not apply to any provision of State law . . . to the extent that such provision has as its primary purpose the protection of public safety.

Application at 4, *citing* Pub.L. 102-486, Title IV, § 404 (1992). Intermountain asserts that *Idaho Code* §§ 61-116, 61-117, and 61-129 were all enacted before January 1, 1989.

¹ The term “dark fiber” normally refers to installed fiber optic cable that is not electronically activated to allow for the transmission of information. In Order No. 26514, the Commission found that Idaho Power’s leasing of dark fiber to Albertson’s and the City of Boise does not constitute a “telecommunications service” as defined by *Idaho Code* § 62-603([13]).

As part of its declaratory order, Intermountain asks that the Commission continue to regulate the safety of natural gas facilities operated by Intermountain, but only to the point where Intermountain's facilities connect to the customer's metering device. *Id.* at 4. Intermountain does not envision any changes to its existing rate tariffs. If its Petition is granted, Intermountain proposes to sell natural gas to resellers utilizing its existing tariffs.

THE COMMENTS

A. TVCCC

TVCCC supported Intermountain's Petition. TVCCC described itself as a "local group of advocates" supporting greater usage of CNG in motor vehicles. The group believed that increasing CNG usage as a motor fuel will reduce dependency on "foreign oil, improve air quality, and promote local economic development." Approval of the Petition will encourage the expansion of the CNG markets for vehicle fuel in Idaho.

B. Staff

1. Idaho Law. Commission Staff disagreed with Intermountain's assertion that Idaho statutory law does not specifically address the resale of natural gas. Staff asserted that *Idaho Code* § 61-129 is directly on point. In pertinent part, Section 61-129 provides that

the term "public utility" as used in [the Public Utilities Law] shall cover cases both where the service is performed and the commodity delivered directly to the public or some portion thereof, and where the service is performed or the commodity delivered to any corporation or corporations, or any person or persons, who in turn, either directly or indirectly . . . delivers such commodity to or for the public or some portion thereof.

Idaho Code § 61-129 (emphasis added). In other words, Staff insisted the term "public utility" includes those persons or corporations who in turn deliver or resell a utility commodity (i.e., natural gas) to the public or some portion thereof for compensation. *Stoehr v. Natatorium Co.*, 34 Idaho 217 (1921); *Humbird Lumber Co. v. Idaho PUC*, 39 Idaho 505, 228 P. 271 (1924).

2. California and Utah Law. Staff next asserted that the California PUC case cited by Intermountain in its Petition is distinguishable. In that case, the California Commission was reviewing an application filed by Pacific Gas & Electric Company seeking to recover its expenses in developing a natural gas vehicle (NGV) program. *In re Pacific Gas and Electric Co.*, 124 P.U.R. 4th 107 (July 2, 1991). To address concerns about air quality and the importation of oil, the California Legislature directed the PUC to encourage utilities to develop

markets for low-emission vehicles such as CNG vehicles. PG&E developed a program to promote CNG usage as a motor vehicle fuel and subsequently sought cost recovery from the California PUC. The Commission observed that the California law “specifically exempts retail sales of CNG for use as a motor vehicle fuel” from PUC economic regulation.² *Id.* at 125; West’s Ann. Cal. Pub. Util. Code § 740.2 (1989). This section of the California Utility Code was subsequently amended to delete references to “compressed natural gas fueled vehicles.” In other words, the California case was responding to specific state legislation that at the time encouraged the development of infrastructure to support compressed natural gas vehicles.

Staff also observed that the Petition mentioned Utah law. Under the Utah Public Utilities Law, the definition of “gas corporation” specifically excludes the sale of natural gas where it is “compressed by a retailer of motor vehicle fuel on the retailer’s property solely for sale as a motor vehicle fuel.” Utah Code Annotated § 54-2-1(9)(c) (1953). Interestingly, the Utah law allows a regulated natural gas utility (Questar) to sell CNG to the public but otherwise limits the sale of CNG as a motor vehicle fuel to retailers of motor vehicle fuels. For example, Staff noted that petroleum retailers such as Chevron, Texaco and Phillips 66 sell CNG at some of their public fueling stations. *American Gas Magazine* at p. 25 (April 2010).

3. Federal Law. After reviewing Section 404(b) of the 1992 Energy Policy Act, Staff opined that this provision of the Energy Act preempts the Commission’s economic regulation over the sale of CNG for use as fuel in motor vehicles unless a contrary state provision was enacted after January 1, 1989. However, Staff asserted Congress did allow for States to avoid preemption by enacting laws, regulations or orders concerning the regulation of CNG as a vehicle fuel after January 1, 1989. Staff insisted that if Congress intended to permanently or broadly preempt States from regulating in the area of CNG as motor vehicle fuel, then it would not have limited the preemptive effect of Section 404(b) to merely preempting state laws and orders issued before January 1, 1989.

4. Safety. Staff asserted that if the Commission cannot exert economic jurisdiction over the resale of CNG, then it should cede jurisdiction over the safety of the resale of CNG activities to other safety authorities. Staff maintained that one of the duties of the State Fire Marshall is to enforce the International Fire Code. *Idaho Code* § 41-254. The International Fire Code is adopted in *Idaho Code* § 41-253. On a local level, fire departments or fire districts, and

² This California legislation predated the Energy Policy Act of 1992 discussed *supra*.

“in areas where no organized fire department exists the county sheriff,” shall assist the State Fire Marshall in carrying out the provisions of the International Fire Code. *Idaho Code* § 41-256(1). Section 2208 of the International Fire Code establishes the safety requirements for facilities dispensing CNG as a motor fuel. In addition, Section 2208.4 sets out the requirements for the private CNG fueling of motor vehicles. Consequently, Staff insisted that safety issues applicable to fueling CNG vehicles are adequately covered by the International Fire Code and under the authority of the State Fire Marshall and other local agencies. Thus, safety concerns would be subject to the jurisdiction of other agencies.

DISCUSSION AND FINDINGS

After reviewing the Petition and the comments, we begin our review by examining Idaho law. We agree with Staff that the Idaho Public Utilities Law does provide the Commission with jurisdiction over the resale of utility commodities. It is well settled that the primary goal of construing a statute is to give effect to the intent of the Legislature. *Sherwood v. Carter*, 119 Idaho 246, 254, 805 P.2d 452, 460 (1991). Administrative agencies are “clothed with power” to construe the law “as a necessary precedent to administrative action.” *J.R. Simplot Co. v. Idaho State Tax Comm’n*, 120 Idaho 849, 854, 820 P.2d 1206, 1211 (1991). When interpreting a statute, the Commission will normally give the language of the statute its ordinary, plain and rational meaning in order to determine the intent of the Legislature. *City of Boise v. Industrial Comm’n*, 129 Idaho 906, 935 P.2d 169 (1997).

We find that *Idaho Code* § 61-129 provides that the term “public utility” includes a corporation “who in turn, either directly or indirectly . . . delivers such [utility] commodity to or for the public or some portion thereof.” (Emphasis added.) We find that the quoted language from Section 61-129 clearly pertains to persons or corporations who in turn deliver or resell a utility commodity to some portion of the public for compensation. Accordingly, we find that there is no occasion for statutory construction because the intent of the statute is clear. As explained in the Petition, Intermountain intends to sell gas to third parties who intend to resell CNG to the public for the purpose of fueling motor vehicles.

We next find that Intermountain’s reliance on our “dark fiber” case and the California PUC case is misplaced. In the dark fiber case, Idaho Power was not providing a utility service to the public. As noted *infra* at note 1, this Commission held that the provision of dark fiber was not a utility service. Order No. 26514. Likewise, the California case is distinguishable because

that case turned on a California statute that directed the California Commission to encourage utilities to develop markets for CNG vehicles. Moreover, this statute was subsequently amended to delete the reference to CNG motor fuel.

Although we find that Idaho law grants the Commission authority over the resale of natural gas, we must now examine whether our state statute is preempted by federal law. After reviewing the legal analysis provided by Intermountain and the Staff, we determine that Section 404(b) of the Energy Policy Act of 1992 does preempt the Commission's authority over the resale of natural gas for use as a fuel in motor vehicles. We recognize that the critical question in any preemption analysis is whether Congress intended federal law to supersede state law. *Louisiana Public Service Comm'n v. FCC*, 476 U.S.C. 355, 106 S.Ct. 1890 (1986). Preemption may occur, as in this case, when Congress enacts federal statutes that express a clear intent to preempt state law. *Id.*

Section 404(b) provides in pertinent part that the sale of natural gas by any person who is not otherwise a public utility, within the meaning of state law, to any person for use by such person as a fuel in a self-propelled vehicle, shall not be considered to be transportation or sale of natural gas within the meaning of any state law, regulation or order in effect before January 1, 1989. This subsection shall not apply to any provision of State law . . . to the extent that such provision has as its primary purpose the protection of public safety.

Application at 4; Pub.L. 102-486, § 404(b) (1992) (emphasis added). The legislative history of the Energy Policy Act indicates that Congress intended to reduce the Nation's dependence on foreign oil and promote alternative fuels for motor vehicles. H.Report 102-474 (III) 1, 32 (May 1, 1991); 1992 U.S.C.C.A.N. 2534-1 (Presidential Statement). Consistent with the language set out above, we find Congress intended to preempt the Commission's economic regulation over the sale of natural gas when used as a fuel in a self-propelled motor vehicle.

Having determined that our jurisdiction over the economic resale of compressed natural gas for use as a fuel in motor vehicles is preempted, we must now address the extent of our safety jurisdiction. By the terms of Section 404(b), federal preemption does not apply to state law to the extent that such law, rule, or order has "as its primary purpose the protection of public safety." *Id.* As Staff noted in its comments, Section 2208 of the International Fire Code establishes the safety requirements for facilities dispensing CNG as a motor fuel. The International Fire Code is adopted in *Idaho Code* § 41-253. The State Fire Marshall, local fire

departments or districts, are primarily responsible for enforcing the International Fire Code. *Idaho Code* § 41-254.

Having found that our economic jurisdiction is preempted, we find that it is reasonable to cede our safety jurisdiction over the resale of CNG to other safety agencies. As is the case with petroleum service stations, we determine that the safety jurisdiction for facilities located on the “customer-side” of the meter should be the responsibility of those entities charged with enforcing Section 2208 of the International Fire Code.

In summary, we find that Section 404(b) of the 1992 Energy Policy Act preempts the Commission’s jurisdiction over the resale of natural gas for use as fuel in motor vehicles. We further find that Section 404 does not preempt any state law dealing with the resale of natural gas as a motor vehicle fuel if such state law is primarily to protect the public safety. However, we think the more reasonable approach is to allow those authorized state and local agencies to enforce the safety requirements for facilities dispensing CNG as a motor fuel. As set out above, such authority resides in the State Fire Marshall and other local agencies. Consequently, we find it reasonable to grant the Petition for a Declaratory Order.

ORDER

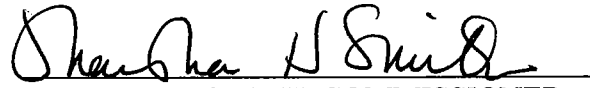
IT IS HEREBY ORDERED that Intermountain Gas Company’s Petition for a Declaratory Order is granted. Given the preemptive effect of Section 404(b) of the 1992 Energy Policy Act, the Commission will not exert ratesetting jurisdiction over the resale of natural gas for use as a fuel in motor vehicles. The Commission will continue to enforce our safety rules and regulations up to the point that Intermountain’s facilities connect to the customer’s metering device.

IT IS FURTHER ORDERED that the Commission Secretary serve a copy of this Order on Avista Utilities, the State Fire Marshall, the Division of Building Services, and the Boise Fire Department.

THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in this case may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in this case. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

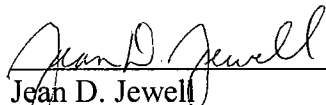
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 25th
day of June 2010.


JIM D. KEMPTON, PRESIDENT


MARSHA H. SMITH, COMMISSIONER


MACK A. REDFORD, COMMISSIONER

ATTEST:


Jean D. Jewell
Commission Secretary

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