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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF INTERMOUNTAIN GAS COMPANY FOR A DECLARATORY ORDER RELATING TO THE RESALE OF NATURAL GAS FOR USE IN MOTOR VEHICLES	)	**CASE NO. INT-G-10-01**
	)	**COMMENTS OF COMMISSION STAFF**

COMES NOW the Commission Staff by and through its attorney of record, Donald L. Howell, II, and respectfully submits these comments in the above referenced case.

On March 4, 2010, Intermountain Gas (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.

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 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 a 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 the Idaho Public Utilities Law (*Idaho Code* §§ 61-116, 61-117, 61-129) does not specifically address the resale of natural gas. Application at 3. The Idaho statutes referenced by Intermountain Gas in its Petition are set out below.

> 61-116. GAS PLANT. The term "gas plant" when used in this act includes 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 gas (natural or manufactured) for light, heat or power.
>
> 61-117. GAS CORPORATION. The term "gas corporation" when used in this act includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any gas plant for compensation, within this state, except where gas is made or produced on and distributed by the maker or producer through private property alone solely for his own use or the use of his tenants and not for sale to others.
>
> 61-129. PUBLIC UTILITY. The term "public utility" when used in this act includes every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, water corporation, and wharfinger, as those terms are defined in this chapter and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction,

> control and regulation of the commission and to the provisions of this act: provided, that the term "public utility" as used in this act 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 or mediately or immediately, performs the services or delivers such commodity to or for the public or some portion thereof.

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's leasing of "dark" optic-fiber cables was not the provision of a 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 for the resale of 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.

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

[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 dark fiber to Albertson's and the City of Boise does not constitute a "telecommunications service" as defined by *Idaho Code* § 62-603([13]). Staff believes that the facts in the Petition are distinguishable because the offering of dark fiber was not a utility service unlike the resale of natural gas.

does not envision any changes in its existing rate tariffs. If its Petition is granted, Intermountain proposes to sell natural gas to resellers utilizing its existing tariffs.

STAFF COMMENTS

1. Idaho Law. In its Petition, Intermountain Gas states that it is unaware of any Idaho Court or Commission decision which addresses the resale of natural gas for use as a transportation fuel. The Commission Staff agrees with this assessment. The Company further asserts that Idaho statutory law "does not specifically address [the] resale of natural gas; however, Idaho Code Sections 61-116, 61-117 and 61-129 may bear indirectly on this issue." *Id.* Staff believes 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, 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). In this instance, Intermountain Gas stated that third parties intend to resell compressed natural gas to the public for use as motor vehicle fuel.

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). The starting point for construing a statute is the literal wording of the statute. *Wolfe v. Farm Bureau Insurance*, 128 Idaho 398, 404, 913 P.2d 1168, 1174 (1996). When interpreting a statute, courts 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). 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). There is no occasion for judicial construction of a

statute unless it is ambiguous, absurd, or in conflict with other statutes. *Gibson v. Bennett*, 140 Idaho 270, 108 P.3d 417 (2005).

Idaho Code § 61-129 provides that a person or corporation that in turn, delivers a utility service or commodity to the public is a public utility. As explained in the Petition, Intermountain foresees selling natural gas to its customer, who in turn, will compress the gas and sell the CNG for motor vehicle fuel to the public.

2. Other States. 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.

The Petition also mentions 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 1953 § 54-2-1(9)(c). Interestingly, the Utah law allows the local gas distribution company (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, 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 Preemption. Staff now turns to Section 404(b) of the Energy Policy Act of 1992. The Supremacy Clause of the United States Constitution declares that the federal

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

Constitution and the laws of the United States "shall be the supreme law of the land." Art. VI, Cl. 2. Once constitutional authority is evident, the inquiry turns to the scope of federal preemption. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1998-99 (1986). Preemption may occur when Congress enacts federal statutes that express a clear intent to preempt state law or where federal law acts as a barrier to state regulation. *Id.* The critical question in any preemption analysis is whether Congress intended federal law to supersede 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). Consistent with the language of Section 404(b) set out above, it is Staff's belief that federal law was intended to preempt 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. If Congress intended to permanently preempt states from regulating the area of compressed natural gas, 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. Indeed, this appears to be the case with the statute in Utah.

4. Safety Regulation. 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.* In its Petition, Intermountain Gas suggests that the Commission should continue to regulate the safety and natural gas facilities "but only to the point where Intermountain's facility or pipeline connects to the customer's metering device." Application at 4. The California PUC agreed with this proposition and held that safety on the "service station side of the meter should be the responsibility of others just as gasoline pump safety is." *PG&E*, 124 P.U.R. 4th at 125.

Staff believes 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. 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 "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 sets out 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, it appears that the safety regulations applicable to fueling CNG vehicles are covered by the International Fire Code and under the authority of the State Fire Marshall and others.

STAFF RECOMMENDATION

In summary, Staff concludes that Section 404(b) preempts the Commission's economic regulation for the resale of CNG for use as motor vehicle fuel. In addition, Staff also asserts that the International Fire Code prescribes the safety requirements for CNG fueling stations. Consequently, Staff recommends that the Commission grant the Petition.

Respectfully submitted this 13th day of May 2010.

Donald L. Howell, II
Deputy Attorney General

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 13TH DAY OF MAY 2010, SERVED THE FOREGOING **COMMENTS OF THE COMMISSION STAFF,** IN CASE NO. INT-G-10-01, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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