July 9, 1996

Roy C.  Moulton

60 E Wallace Ave

PO Box 631

Driggs, ID 83422

Re: Packsaddle Water Corporation/Burrell

Dear Roy:

I received your letter dated June 24, 1996, regarding Packsaddle Water Corporation’s well lot encroachment on Mr. Burrell’s property.  You asked what the Commission’s position would be on an offer for free water privileges in perpetuity in exchange for the use of an easement on the Burrell’s land.

Although I cannot represent to you what the Commission would rule on this matter if it came before them, however, I can explain to you how the Commission has ruled in previous cases with similar facts.

The applicable code section is Idaho Code § 61-315—Discrimination and Preferences Prohibited.  The statute reads as follows:

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.  No public utility shall establish or maintain any unreasonable difference as to rates, charges, services, facilities or in any other respect, either as between localities or as between classes of service.  The Commission shall have the power to determine any question of fact arising in this section.

You may want to review some of the annotations referenced in the Idaho Code under this statute.

In a recent case before the Commission, the Commission addressed a similar issue.  In re: Atlanta Power Company, ATL-E-93-1, the Commission addressed the issue of whether the Company offering free electrical services for a limited time in exchange for purchase of hydro generation facilities and distribution equipment whether this violated Idaho Code § 61-315.  In that case, Commission Staff contended that providing power without billing violated the Idaho Code \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ that this practice was discriminatory.  The Staff cited previous Commission cases, Davenport v. Idaho Metals Company, PUCI case F-473, Order 850, PUR 1922 D 406, which states that a contract to furnish free telephone services as part of the consideration or purchase price of the telephone system is discriminatory.  The Company argued that had there not been an arrangement to provide free electricity, the purchase price of the facility would have been greater, thus would have increased the Company’s rate base and authorized return.  The Company further states because there was excess capacity in the hydro generating system it was a prudent thing for the Company to do.  The Company argues that for an action to be discriminatory it must constitute an unreasonable discrimination against other customers; it must not impose additional costs on them.  The Commission found that the parties mischaracterized the issue as being free electricity.  Rather the Commission found that the obligation arose as partial consideration for the underlying purchase of the hydro generation facility and distribution equipment.  The Commission finds that facts of that specific case more unique and merit special consideration and treatment in assessing the reasonableness of the Company’s action.  The Commission placed great rate on the combined existence of significant excessive capacity in its hydro generating system and in an incredibly small \_\_\_\_\_\_\_\_\_\_ customer base.  The Company is attempting to satisfy its obligation in a manner that has the least adverse economic consequences to its customers, thus the customers are neither prejudiced nor disadvantaged.  Finally the Commission ruled that the current situation for Atlanta Power was acceptable because there is no associated costs assigned to the Company’s other customers.

Although the case of Atlanta Power, the Commission upheld the contract for free electricity on unique circumstances and facts.  Upon reviewing other cases that have previously been before the Commission, the Commission after considering the questions of fact have ruled in several cases that free service is discriminatory and should not be permitted.  See in re: Pocatello Gas and Company, PUCI case F-401, Order 868, PUR 1923C, 25; in re: Mountain States Telephone & Telegraph Company, PUCI case F-627, Order 1100, PUR 1928A, 269.  For the Commission to determine whether the proposed agreement that you have explained in your letter, the Commission will evaluate the facts to determine whether the situation is in violation of the Idaho Code.

Now that Packsaddle is a certified public utility, it has the right of imminent domain which may be exercised for public use on just compensation.

You may consider some type of easement or lease agreement with the Burrell’s when negotiating the encroachment of the well lot upon the Burrell’s private property.  As I have mentioned earlier, the Commission does not have this matter before them and has not ruled upon this issue, so I am unable to say how the Commission would rule upon the facts of this circumstance.  However, as I have mentioned above, the Commission has had similar issues before them and has been reluctant to approve free utility services without unique facts and circumstances.

I hope this helps you in evaluating what is the best option for your client.  If you have further questions, you may give me a call at (208) 334-0314.

Sincerely,

Susan E.  Hamlin

Deputy Attorney General

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