July 19, 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 Burrell’s land.  Although I cannot represent to you what the Commission would rule on this matter, I can explain to you how the Commission has ruled in previous cases with similar facts.

The situation you describe raises the issue of whether free water privileges in exchange for the use of property violates Idaho Code § 61-315.  The statute reads as follows:

Discrimination and Preferences Prohibited—

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.

Idaho Code § 61-315.

The Commission addressed such an issue most recently in In re Atlanta Power Company, ATL-E-93-1, Order No. 24925 (1993).  The Commission considered whether the Company’s offering free electrical services for a limited time in exchange for purchase of hydro generation facilities and distribution equipment violated Idaho Code § 61-315.  The Commission Staff contended that providing power without billing was discriminatory.  The Staff relied on Davenport v. Idaho Metals Company, PUCI case F473, Order 850, PUR 1922D 506, in which the Commission found that a contract to furnish free telephone services as part of the consideration or purchase price of the telephone system was discriminatory.

The Company argued that had there not been an arrangement to provide free electricity, the purchase price of the hydro generation facility and distribution equipment 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 Commission, considering the unique facts of the case, upheld the contract based on the combined existence of significant excessive capacity in its hydro generating system and the small customer base.  The Commission found that Atlanta Power attempted to satisfy its obligation to purchase hydro power in a manner that had the least adverse economic consequences.  The Commission further found that the customers were neither prejudiced nor disadvantaged because there were no associated costs assigned to the Company’s other customers.

Upon reviewing other cases that have been before the Commission, the Commission has ruled in several cases that free service is discriminatory and should not be permitted.  See, In re Pocatello Gas and Company, PUCI case F401, Order 868, PUR 1923C, 25; In re Mountain States Telephone & Telegraph Company, PUCI case F627, Order 1100, PUR 1928A, 269; Davenport v. Idaho Metals Company, supra.  It seems that the Atlanta Power case is distinguished from these other cases based on unique facts and circumstances relating to hydro generating facilities and purchase contracts.

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 you described.  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.  An alternative to the agreement you have described may be some type of easement or lease agreement with the Burrells.  Also, you might already be aware that Packsaddle, as a public utility has the right of condemnation which may be exercised for public use upon just compensation.

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

Sincerely,

Susan E.  Hamlin

Deputy Attorney General

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