

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

LC 50

Idaho Power Company

**STOP IDAHO POWER'S
MEMORANDUM IN SUPPORT
OF MOTION FOR CONTESTED
CASE HEARING**

I. INTRODUCTION

For the reasons that follow, Intervenor Stop Idaho Power supports Move Idaho Power's Motion for Contested Case Hearing.

II. DISCUSSION

By way of background, there are generally two types of issues that are addressed and adjudicated by administrative tribunals, *i.e.*, questions of “legislative fact” and questions of “adjudicative fact.” See Chartrand v. Coos Bay Tavern, Inc., 298 OR 689, 696 P.2d 513 (1985). The former encompass broad issues of policy and its application to particular circumstances; the determination of legislative facts is generally more subjective and generally involves a great degree of discretion. The latter generally are the “who, what, when, and where”-type questions that are capable of objective proof requiring evidence. *Id.* When adjudicative facts are involved processes and procedures that are best suited to objective establishment of those facts are invoked; for example, in an adjudicative hearing witnesses are sworn and their testimony taken by some form of transcription or recording, and those witnesses are subject to cross examination. Whether there is a “need” for the Boardman to Hemingway 500-kV transmission line (“B2H Line”) clearly falls within the latter category.

The Energy Facility Siting Council (“EFSC”) has explicitly recognized that questions of “need” are of the adjudicative-fact variety. For example, determinations of the need for power related to the siting of new powerplants have in the past involved months of hearings with testimony taken under oath and subject to cross examination; while there certainly are many examples of this approach in the EFSC's long experience, one early instance was Portland General Electric's application for a site certificate for the Pebble Springs Nuclear Plant, which hearings were both exhaustive and contentious, ultimately resulting in a determination by ALJ Lowell Bergen that PGE had not established a need for the project. For the same reasons that a contested-case hearing was appropriate in the Pebble Springs proceedings, such a hearing is appropriate here.

Stop Idaho Power recognizes that Integrated Resource Plan proceedings are generally not subject to contested-case procedures. In the context of the Public Utility Commission's jurisdiction, such treatment may be appropriate, for an acknowledgment of an IRP does not bind either the applicant or the Commission's future actions. For example, Stop Idaho Power understands that a utility with an acknowledged IRP may deviate from that plan so long as it is subsequently able to justify its actions; by the same token, acknowledgment does not bind the Commission in subsequent ratemaking proceedings held for the purpose of determining whether the costs incurred in implementing the acknowledged plan can be recovered.

The problem in the instant docket is that the EFSC regulations recognize that the Commission's acknowledgment of an IRP conclusively binds EFSC on the question of whether there is a need for the B2H Line. OAR 345-023-0020(1).¹ This conclusive

¹ “The Council shall find that the applicant has demonstrated need for the facility if . . . [the facility] is identified for acquisition in the short-term plan of action of an energy resource plan” OAR 345-023-0020(1).

effect of the Commission's acknowledgment obviously raises due process concerns if the Commission fails to hold a contested case to determine the adjudicative-fact question of need. Moreover, it appears the the legal problems run deeper: By specifying that an acknowledged IRP conclusively establishes the “need” for the a transmission line like the B2H Line, the EFSC rule itself appears to have exceeded the scope of the legislation upon which it is based. The pertinent legislation is ORS 469.501(L), which involves the effect that an IRP acknowledged by the Commission may have on the Council's determination of need. ORS 469.501, dealing with the Council's adoption of standards for the siting, construction, operation, and retirement of facilities, specifies that the standards may address,inter alia, nongenerating facilities. Regarding standards for such nongenerating facilities in the context of least-cost plans, the Oregon legislative assembly required that the standards address –

(L) The need for proposed nongenerating facilities as defined in ORS 469.503, consistent with the state energy policy set forth in ORS 469.010 and 469.310. The council *may consider* least-cost plans when adopting a need standard or in determining whether an applicable need standard has been met. . . .

Emphasis added. Quite simply, “may consider” did and does not authorize a wholesale transfer of the determination of need for the line to a sister agency using procedures suited only for the determination of legislative facts. Thus the rule, being *ultra vires* the legislation, is void.

III. CONCLUSION

Stop Idaho Power recognizes that the problem of dealing with a contested-case hearing is not of the Commission's creation – it is the EFSC rules that create this difficulty. Due process considerations strongly counsel that the “need” for the B2H line be determined using contested-case procedures in order to determine, as a matter of

fact, whether there is a need for that line. Employing less than contested-case procedures raises the possibility that any ultimate EFSC determination of need for the line will be set aside on due process grounds and/or on the grounds that the Oregon Legislative Assembly did not authorize the use of less stringent procedures to determine such need – notwithstanding OAR 345-23-0010.

For the foregoing reasons Stop Idaho Power respectfully supports Move Idaho Power's and Nancy Peyron's motion for contested-case procedures.

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CERTIFICATE OF SERVICE

I CERTIFY THAT I SERVED THE FOREGOING DOCUMENT ON THE FOLLOWING PERSONS/ENTITIES LISTED BELOW ON MARCH 16, 2010 BY MAIL, EXCEPT FOR PERSONS/ENTITIES WHO ARE MARKED WITH A "W", IN WHICH CASE I SERVED SUCH PERSON/ENTITY BY EMAIL.

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