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IDAHO PUBLIC
UTILITIES COMMISSION

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BEFORE THE
IDAHO PUBLIC UTILITIES
COMMISSION

UNITED ELECTRIC CO-OP, INC., Complainant, v. THE CITY OF BURLEY, IDAHO, Respondent.	Docket No. C15-E-23-01 **UNITED ELECTRIC CO-OP INC.'S REPLY TO THE CITY OF BURLEY'S ANSWER AND REQUEST TO DISMISS UNITED'S FORMAL COMPLAINT FOR VIOLATION OF CONTRACT ENTERED INTO PURSUANT TO THE IDAHO ELECTRIC SUPPLIER STABILIZATION ACT and ANSWER TO THE CITY OF BURLEY'S PETITION FOR DECLARATORY ORDER**

COMES NOW, the Complainant, United Electric Co-op, Inc.[1] and jointly files its Reply to the City of Burley, Idaho's[2] combined Answer and request to dismiss United's Complaint and also files its Answer to the City's Petition for Declaratory Ruling.

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[1] Herein "United Electric" or "United."
[2] Herein the "City" or "Burley."

I.
REPLY TO THE CITY'S ANSWER AND REQUEST TO DISMISS

A. THE CITY'S REQUEST TO DISMISS (A.K.A RULE 12(b)(6) MOTION) SHOULD BE DENIED

1. The City's Request to Dismiss Should be Denied Because it is Not based in Fact or Law.

The City's Answer follows the general structure of an answer to a complaint. It contains specific denials and admissions to discreet assertions in United's Complaint. However, it is entirely lacking any factual or legal arguments. Nevertheless, the City concludes its Answer with the following "requests' for relief:

> *Wherefore, the City of Burley, Idaho respectfully requests that the Commission dismiss the Complainant's Complaint in full and award the City of Burley, Idaho the following:*
>
> *1. Entry of an order dismissing United Electric Co-op's Complaint.*
>
> *2. Entry of an order awarding the City of Burley, Idaho its attorney fees and costs incurred in defending the Complaint.*
>
> *3. Any further relief to which the City of Burley, Idaho may be entitled.*

None of the City's Requests for relief are supported by legal analysis/argument or factual assertions. The City's Requests for relief appear to be nothing more than afterthoughts appended to its Answer. Therefore, for these, and for the reasons noted below, the Commission should deny the City's "Request" (motion?) to dismiss United's Complaint.

2. The City's Request Does Not Conform with the Commission's Rules of Procedure.

The City failed to provide either substantive argument or legal authority in support of its "Request." Therefore, in order to reply, it is first necessary to attempt to parse out the unarticulated legal theory and factual basis upon which the City's "Request" relies. The only,

and the most apropos of the Commission's rules of procedure to the City's Request, is Rule 56 which specifically addresses a "motion to dismiss." Therefore, the City's Request should have complied, at a minimum, with the Commission's established standard for motions to dismiss pursuant to Rule 56 of its Rules of Procedure. IDAPA 31.01.01.056.02. Rule 56 requires all motions to dismiss to "[r]efer to the particular provision of statute, rule, order, notice, or other controlling law upon which they are based." IDAPA 31.01.01.056.02. The City's Request to dismiss does not refer to any (let alone a "particular") provision of statute, rule, order, notice or controlling law upon which it is based. The City has failed to meet this threshold requirement for lodging its Request, a.k.a. motion to dismiss.

The Commission also looks to Idaho's Rules of Civil Procedure in its adjudication of motions involving complaint proceedings. See *Grand View PV Solar II v. Idaho Power Co., IPUC* Case No. IPC-E-11-15, Order No. 32580, at 6-7 (June 21, 2012). Under the Idaho Rules of Civil Procedure, a motion to dismiss that does not refer to evidence[3] beyond the pleadings is only proper under Rule 12(b) of the Idaho Rules of Civil Procedure, which provides that:

> [E]very defense, in law or fact, to a claim for relief . . . must be asserted in the responsive pleading . . . But a party may assert the following defenses by motion:
>
> (1) lack of subject-matter jurisdiction,
> (2) lack of personal jurisdiction,
> (3) improper venue,
> (4) insufficient process,
> (5) insufficient service of process,
> (6) failure to state a claim upon which relief can be granted,
> (7) another action pending between the same parties for the same cause.

[3] In which case the pleading would have to be deemed a motion for summary judgement. Because the City makes no reference to extrinsic evidence, such a motion is in apposite here. Indeed, as noted, the City's 'motion' does not refer to any evidence at all, let alone any evidence beyond the pleadings.

The City offers no "defense in law or fact" in its responsive pleading to United's Complaint. Nor has the City asserted any of the enumerated defenses, by motion or otherwise. Nevertheless, through the process of elimination, the only possible rule upon which the City's Request to dismiss must be based is 12(b)(6) which is a motion to dismiss for "failure to state a claim upon which relief can be granted." The other provisions of Rule 12 are inapplicable on their face, to wit: Rules 12(b)(1), and (2) are inapplicable because jurisdiction is admitted by the City.[4] Rule 12(b)(4), "venue," is subsumed in the jurisdiction admission. Rules 12(b)(5) and (6), "improper service of process", are also subsumed in the jurisdiction admission. Finally, Rule 12(b)(7) is not applicable as there is no assertion of multiple actions involving the City and United. Thus, through the process of elimination, the only Idaho Rule of Civil Procedure the City could possibly be relying upon to support its "Request" for dismissal is Rule 12(b)(6) for "failure to state a claim upon which relief may be granted."

In Idaho, a "court may grant a motion to dismiss for failure to state a claim... only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief." *Harper v. Harper* 122 Idaho 535, 536, 835 P.2d 1346 (Ct. App. 1992). All reasonable inferences are drawn in favor of the non-moving party. *Losser v. Bradstreet,* 145 Idaho 670, 673, 183 P.3d 758, 761 (2008). In ruling on a motion to dismiss, the issue "is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Id.* "A motion to dismiss must be resolved solely from the pleadings and all facts and inferences from the record are viewed in favor of the non-moving

[4] See Answer at ¶¶ 34 and 35.

party." *Taylor v. McNichols,* 149 Idaho 826, 832-833, 243 P.3d 642, 648-649 (2010). A motion to dismiss should "be granted only in the unusual case in which the plaintiff includes allegations showing on the face of the complaint that there is some insurmountable bar to relief." *Harper,* supra at 536, 835 P.2d at 1347.

Thus, as the above summary of the legal standards applicable to a motion to dismiss demonstrate, the City has extraordinarily high hurdles to overcome before its "Request" (motion) to dismiss can be granted. That it has failed to overcome those extraordinarily high hurdles is apparent in light of the fact that it has offered absolutely no factual basis and no legal argument or citation whatsoever in support of its bare bones detached-from-the-facts-and/or-the-law request that the Commission dismiss United's complaint.

The City's Request that the Commission issue an order dismissing United's Complaint fails to meet even the basic procedural requirements for such a dispositive motion. The City's motion also fails to address, let alone meet, the substantive and legal prerequisites for such a motion. Because the City offers no legal or factual arguments in support of its "Request" to dismiss its "Request" for dismissal must be denied.

THEREFORE, United Electric Co-op, Inc. respectfully requests the Commission issue its order denying the City's Request to dismiss its Complaint.

B. THE CITY'S REQUEST FOR ATTORNEY FEES AND COSTS SHOULD BE DENIED

1. The City's Request for an Attorney Fee Award is Dependent Upon its Flawed Motion to Dismiss

The City's unusual request for attorney fees is inexorably entwined with its Request for

the Commission to dismiss United's Complaint. Should the Commission deny the City's Request then it is a given that its request for attorney fees fails without the need for further analysis.

2. The Commission has no Authority to Award Attorney Fees

Regardless of the Commission's decision on the merits relative to the City's Request to dismiss, it still must deny its request for an award of attorney fees. Under the Public Utilities Law, the Commission does not have authority to award attorney fees other than as part of an intervenor funding award pursuant to Idaho Code § 61- 617A[5]. See *Idaho Power Company v. Idaho PUC,* 102 Idaho 744, 639 P.2d 442 (1981). See also, *In Re: United Electric Co-op, and Southside Electric, Inc. for an Order Approving a Service Territory Allocation Agreement Pursuant to Idaho Code § 61-333(1)*, IPUC Docket No. GNR-E-03-10, Order No. 29349 at p. 4.

C. RESPONDENTS AVER THE COMPLAINANT IS ENTITLED TO RELIEF

Repeatedly throughout its Answer, the City makes the unusual (for a respondent in a complaint action) assertion that "*Respondents aver the Complainant [Petitioner] is entitled to relief.*" This identical assertion is made, without supplementing context, in nine separate paragraphs.[6] Given its repetitive appearance throughout the City's pleading, it may or may not be assumed to be a typographical error. If it is a typographical error, then United does not object to the Commission's allowing Respondent to amend its answer in order to provide an erratum correcting the error. If it is not a typographical error, then the admission is sufficient additional

[5] Intervenor funding awards are not relevant here because they are not available in matters involving non-regulated entities such as a municipal or cooperative electric service suppliers.

[6] See ¶¶ 1, 4, 5, 12, 14, 33, 36, 38 and 40..

basis for the Commission to deny the City's Request to Dismiss.

D. UNITED STANDS READY FOR AN EVIDENTIARY HEARING IN ANTICIPATION OF FILING ITS OWN DISPOSITIVE MOTION(S)

The City admits that the Suntado facility is in United Electric's currently existing service territory (¶ 11):

> *Respondents admit the Suntado facility is currently in United Electric's currently existing service territory.*

On the other hand, the City denies that "the site in question is wholly within the Commission approved service territory of" United. (¶¶ 13, 18) The City has also denied many of the factual allegations in United's Complaint relating to the City's usurpation of United's exclusive rights to provide electric service to the Suntado site. (¶¶ 19 – 26). Therefore, given the conflicting factual assertions, it is premature for United to lodge its own dispositive motions. United is, however, prepared to proceed immediately to an evidentiary hearing in order to resolve outstanding factual issues in anticipation of lodging its own dispositive motion(s) and/or to create a complete record upon which the Commission may make its ultimate findings of fact and conclusions of law.

E. UNITED'S PRAYER

Therefore, United Electric Co-op, Inc., respectfully requests the Commission issue its order denying the City of Burley's Motion to Dismiss United's Complaint.

United Electric Co-op, Inc. also seeks an order from the Commission denying the City's request for attorney fees.

II.
ANSWER TO THE CITY'S PETITION FOR DECLARATORY ORDER

A. PRELIMINARY MATTER

1. Burley is Not Rupert and Visa Versa

The City's Petition for Declaratory Order (herein "Petition") provides:

> COMES NOW, the City of Burley, . . . and pursuant to [citation omitted], respectfully submits its Petition for Declaratory Order regarding Order 29281. As grounds, Burley states as follows: . . . [7]

The Order upon which Burley's Petition is based does not involve the service territory agreement between United Electric (or any of its predecessors) and the City of Burley. Order No. 29281 was issued by the PUC in Case No. GNR-E-03-09, the case title of which is:

> THE MATTER OF THE APPLICATION OF UNITED ELECTRIC CO-OP, INC. AND THE CITY OF RUPERT FOR AN ORDER APPROVING A SERVICE TERRITORY AGREEMENT PURSUANT TO IDAHO CODE § 61-333(1)."[8]

Order No. 29281 does not involve, in any way, the City of Burley and hence, the City of Burley has no standing to seek a declaratory judgment as to its applicability or lack of applicability to the contractual relationship between Burley and United Electric.

2. Order No. 29281 is not Substantive

Order No. 29281 upon which the City seeks this Commission's guidance is a combined "Notice of Application" and a "Notice of Modified Procedure." The only matter finally decided

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[7] Answer and Petition at p. 7.
[8] Capitalization in original, underscoring provided.

in Order No. 29281 is that interested persons had twenty-one days from July 3, 2003, in which to lodge comments on the service territory agreement between the City of Rupert and United Electric Co-op. The City of Burley did not file comments in that matter. Therefore, it has no interest, whatsoever in the procedure the Commission adopted for its deliberations on whether or not to approve or reject United's service territory agreement with the City of Rupert.

3. Corrected Reading of the City's Petition

The failure to properly identify the order upon which its Petition seeks this Commission's declaratory judgment is potentially fatal to the instant pleading. It is also relatively easily remedied by the City. The City could initiate a new pleading (or possibly even simple errata notice) correctly identifying the Commission's decision with which it is concerned. Therefore, in the interests of preservation of the Commission's (and the parties') scarce resources, United will *assume* for purposes of its Answer to Burley's Petition that the City's reference to Order No. 29281 is, in fact a reference to Order No. 29355 -- in which order the Commission approved the service territory agreement between the City of Burley and United Electric Co-op and which order is referenced multiple times in United's complaint filed in this matter.

B. THE COMMISSION HAS NO JURISDICTION TO ENTERTAIN THE CITY'S PETITION

1. Introduction – The Basis for the City's Request

The City's Answer and Petition focuses on the Commission Order which approved a service territory agreement between the two parties pursuant to the Electric Supplier Stabilization

Act[9] (hereinafter "ESSA"). Burley seeks, in its Answer and Petition:

> [A] declaratory ruling from the Commission regarding the 2003 order[10] entered by the Commission. Specifically, Burley respectfully asks the Commission to enter an Order that the previous territory service agreement of the parties can be terminated by either party…[11]

Historically, the Commission had no role in the implementation of the ESSA. Only via the most recent amendments[12] to that statute did the legislature assign the Commission a role, albeit extremely limited in scope, in the implementation and enforcement of the ESSA. And such Commission involvement in the ESSA's implementation, as discussed in detail below, is strictly limited to just approval or rejection of service territory agreements between electric suppliers.[13] The ESSA gives the Commission no jurisdiction to, as requested by the City, modify or terminate service territory agreements once they are approved. In sum, the ESSA does not give the Commission jurisdiction to grant Burley the relief it seeks.

A complete analysis of the issues implicated in the City's Petition requires an historical understanding of the ESSA and how and why the Commission was assigned its restricted role in its implementation – which implementation role, as noted, is stringently restricted to just either approving or rejecting service territory agreements.

2. Background –ESSA

Prior to enactment of the initial version of the ESSA in 1957, the Commission only had jurisdiction over territory disputes between regulated investor-owned electric utilities. The

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[9] Herein "ESSA." Idaho Code §§ 61-332 et. seq.
[10] See discussion , supra, as to which order is being referenced.
[11] Petition at pp. 7 – 8.
[12] In 2000, discussed infra.
[13] Idaho Code Section 61-333.

Commission lacked jurisdiction to resolve service territory disputes among the three different types of electric 'utilities' operating in Idaho[14]. The problem of such limited jurisdiction was first highlighted in the Idaho Supreme Court Case of *Clearwater Power Co. v. Washington Water Power Co.*, 78 Idaho 150, 299 P.2d 484 (1956). In 1956, the court in *Clearwater* ruled that because the PUC does not have jurisdiction over cooperatively owned electric utilities, it could not entertain a complaint by a cooperative utility against an investor-owned utility. The Court in *Clearwater* ruled that:

> The power thus given to the commission to prevent interference by extensions of a public utility into territory already served, is limited to territory already served by "another public utility", and the complaint which the commission is authorized to hear is the "complaint of the public utility claiming to be injuriously effected." [citation omitted]. The commission is given no authority by that section to hear the complaint of cooperatives.[15]

The next year (1957) the legislature enacted its first iteration of today's ESSA by prohibiting public utilities and cooperative electric utilities from serving customers already receiving service from one or the other.[16] Notably, the 1957 version of the ESSA did NOT give the PUC jurisdiction over disputes between investor-owned utilities and cooperatives. Instead of vesting the PUC with enforcement powers, the Legislature left enforcement of the 1957 version of the ESSA to the District Courts -- not the PUC. Also of note is the fact that municipal electric utilities were not included in the 1957 iteration of the ESSA.

It was certainly foreseeable that the failure of the 1957 version of the ESSA to include municipalities would be problematic. That problem was litigated in 1961 in a dispute between

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[14] Cooperatives, municipalities and investor-owned utilities.
[15] *Id.* at 154, 299 P.2d at 485.
[16] Idaho Sess. Laws 1957, Ch. 133, p 226.

the City of Burley and Unity Power & Light, (United's predecessor). *See, Unity Light & Power v. Burley*, 83 Idaho 285, 361 P.2d 788 (1961). In 1961, the Court in *Unity Light & Power* ruled that because the 1957 iteration of the ESSA did not include municipal utilities in its definition, the cooperative electric utility could do nothing to prevent a municipal electric utility from encroaching into the cooperative's service territory. According to the Court:

> If the legislature intended to subject municipalities to this Law it should have done so specifically. The evil sought to be remedied by this Law appears, to have been the pirating of customers between cooperative associations, and public utilities subject to regulation onder the Public Utilities Law. [citing *Clearwater Power* supra] We have nothing before us to indicate that the legislature considered or intended to include municipal corporations.[17]

The dispute in *Unity Power & Light* was initially litigated in district court (not the PUC) before it was finally resolved by the Supreme Court because the PUC had no jurisdiction over municipal electric utilities or cooperative electric utilities and because the 1957 version of the ESSA vested enforcement jurisdiction in the district courts.

Hence, in 1961, as noted in the *Unity Light & Power* case, no entity had jurisdiction to resolve electric service territory disputes between cooperatives and municipalities or between municipalities and investor-owned utilities. This jurisdiction "gap" was closed in 1963 when the Legislature amended the ESSA to prohibit municipal corporations (along with investor-owned utilities and cooperative associations) from pirating the respective customers of one another.[18] The 1963 iteration of the ESSA still did not vest enforcement or implementation authority with the PUC. Redress under the 1963 version of the ESSA act was solely jurisdictional in district

[17] *Unity Light & Power* at 289, 361 P.2d at 790.
[18] Idaho Sess. Laws 1963 Ch. 259, p. 685.

courts.

Significantly, the 1963 iteration of the ESSA enacted what is currently codified as Idaho Code Sections 61-333A and 61-333B.[19] These sections provide the only means by which a municipal electric utility may extend service into territory that it annexes and which annexed territory is already being served by a cooperative (or investor-owned) electric utility.

The 1963 version of the ESSA, like its predecessors, did not last long. Amendments were precipitated by more litigation between the City of Burley and one of United's predecessor cooperative utilities. In 1965, litigation ensued between the City of Burley and Rural Electric Co. over which utility would be allowed to serve a particular new customer. At that time, Idaho Code Section 61-333 attempted to provide a bright line standard for the provision of electric service to new customers. It granted the right to serve new customers to the utility owning an electrical line within 1,000 feet of the new customer. If more than one utility had a line within 1,000 feet, then the utility with the closest line to the new customer would be entitled to provide service. However, the Idaho Supreme Court ruled that the statute was too vague to be enforceable. See, *Rural Elec. Co. v. Burley,* 89 Idaho 112, 403 P.2d 580 (1965). In the *Rural v. Burley* case the customer in question had a large parcel of property on which both the city and the cooperative had poles and lines. The Court asked the following, non-so-rhetorical, questions:

> The question is where is the 'new customer'. Is he everywhere on the property? Is he where the building is situated. What if there is more than one building? The section [Idaho Code Section 61-333] is silent.
>
> ...

[19] Discussed in detail, infra.

> The provisions of 61-333, I.C. pertaining to customers not previously served by anyone (either where one utility has lines within 1,000 feet or where both have the lines) is too vague and uncertain to enforce. To decide how we locate the customer under the myriad possibilities in different cases would be for the Court to legislate and this we are prohibited from doing.[20]

Thus, the legislature returned to the drawing board in 1970 and once again amended the Idaho Code addressing electric utility service territory integrity issues. The 1970 amendments provided a comprehensive and, so-far, defensible set of rules for allocating new customers between competing electric service providers and included specific definitions that addressed the vagueness concerns expressed by the Supreme Court in *Rural Elec. Co. v. Burley*. It also, for the first time, denominated the statute as the "Electric Supplier Stabilization Act." However, the 1970 amendments still did NOT grant the PUC any jurisdiction or enforcement authority over the ESSA. In addition, the newly revised ESSA specifically denied that the PUC had any jurisdiction over cooperative or municipal electric utilities.[21] Significantly relevant here, and for the first time, the ESSA also specifically allowed for electric service providers to enter into contracts allocating customers and service territories among themselves. However, those contracts were not subject to approval or review by the PUC or even by the courts.[22]

The most recent amendments to the ESSA (2000)[23] were enacted in response to anti-trust litigation involving a cooperative (Snake River Valley Elec. Ass'n) and an investor-owned utility (PacifiCorp now dba Rocky Mountain Power).[24] That litigation focused on the provisions in the

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[20] *Id.* at 118, 403 P.2d 580, 583.
[21] Idaho Sess. Laws 1970, Ch. 142, p. 417.
[22] Idaho Sess. Laws 1970, Ch. 142, §7, p. 421, "Authorizing contracts among electric suppliers to resolve territories, consumers and to transfer facilities."
[23] Idaho Sess. Laws 2000, Ch. 1, 1st E.S., p. 3. See also Idaho Sess. Laws 2000, Ch, 29, p. 35.
[24] *Snake River Valley Elec. Ass'n v. PacifiCorp,* 357 F.3d 1042 (9th Cir), cert. denied, 543 U.S. 956 (2004)

ESSA allowing for agreements allocating territories and customers between electric suppliers. The Ninth Circuit Court of Appeals ruled in the *Snake River* case that service territory allocation agreements that are not directly sanctioned (reviewed and approved) by the State exposes the parties to those agreements to anti-trust liability.[25] Thus, all service territory agreements entered into pursuant to the ESSA created potential anti-trust liability because those agreements, although permitted under the ESSA, were not supervised by the State (reviewed or approved). In order to avoid anti-trust liability, private anti-competitive agreements must be actively supervised (reviewed and approved) by the State. In order to avoid anti-trust liability for their participants, the state needed to find a way to "actively supervise" the service territory agreements permitted by the ESSA.

3. Commission Jurisdiction under the ESSA is Limited to Approval or Rejection and Enforcement – not Reformation or Repeal of Service Territory Allocation Agreements.

The legislature solved the service-territory-allocation-agreement anti-trust problem by requiring all service territory allocation agreements to be approved by the PUC. The 2000 amendments to the ESSA added the following provisions to Idaho Code Section 61-333:

> The commission [PUC] shall, after notice and opportunity for hearing, review and approve or reject contracts between cooperatives, between cooperatives and public utilities and between public utilities. The commission shall, after notice and opportunity for hearing, review and approve or reject contracts between municipalities and cooperatives, as well as between municipalities and public utilities, provided however, the commission shall have jurisdiction only over cooperatives and public utilities in such approvals.[26]

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[25] *Id.* Private parties (including municipalities) receive anti-trust immunity only if their anticompetitive actions (e.g. service territory allocation agreements) are made pursuant to a clearly articulated state policy and are actively supervised by the state. This is knowns as the Parker Immunity Doctrine named for the leading case of *Parker v. Brown* 317 U.S. 341 (1943).

[26] Underscoring provided.

With respect to such contracts Section 61-333 also provides:

> Any contract validly entered into and approved by the commission after notice and opportunity for hearing shall be binding and shall be legally enforceable pursuant to this act, or by any other remedy provided by law.

Finally, the 2000 amendments moved the enforcement of the ESSA from the state district courts to the PUC. Newly revised Section 61-333A provides:

> (1) Any electric supplier or consumer whose rights under this act shall be violated or threatened with violation may file a complaint with the commission against an electric supplier and any other person responsible for the violation.
>
> (2) After notice and opportunity for hearing, the commission shall make findings of fact and conclusions of law determining whether this act or any orders issued under this act have been violated or threatened to be violated and shall determine whether there is actual or threatened irreparable injury as to the electric supplier or consumer whose rights are violated or threatened with violation as a basis for granting relief.[27]
>
> (3) The relief to be granted under this section for violation of this act shall forbid further acts in violation of such orders, shall order the removal of any electric connections, facilities or equipment that constitute the violation, or a combination thereof necessary to enforce compliance with this act.

Thus, for the very first time, the PUC was given a modest role in both the implementation and enforcement of the ESSA.

The Commission's implementation role is limited to either the approval or the rejection of service territory allocation agreements. A role this commission fulfilled when it issued Order No. 29355. That implementation role is, however, strictly limited to just the power to "approve or reject" service territory allocation agreements. It is important to underscore the distinction

[27] Reference to "irreparable injury" is likely an anachronistic holdover from the pre-2000 ESSA. The 2000 amendment removed the reference to 'equitable' remedies and specifically provided for remedies, 'relief" at law (making a finding of irreparable injury unnecessary). See the current text of subparagraph 3 in Section 61-333A.

between 'enforcement' and 'implementation' of the ESSA in order to understand why the City's Petition for Declaratory Ruling is not jurisdictional with the Commission, while United's Complaint is properly lodged with the PUC. The City seeks to improperly expand the Commission's jurisdiction over implementation of the ESSA beyond merely 'approving' or 'rejecting' service territory agreements. The City is asking the Commission to re-write the agreements, which the ESSA does not give the Commission the authority to do. United's complaint on the other hand, is firmly anchored in the Commission's enforcement authority found in Section 61-334A which provides for remedies for violations of the ESSA.

4. The Commission has no Jurisdiction to Grant the City's Request for Declaratory Order

It is one of the fundamental jurisdictional premises of the Idaho public utility law that the Idaho Commission does not have jurisdiction over cooperatively owned or municipally owned electric utilities. This basic jurisdictional divide has existed in the Idaho Code since the enactment of the public utility law in 1913. See *Idaho Code §§ 61-104, 61-119, 61-129.*

It is also one of the fundamental tenants of the Idaho Public Utilities law that the Commission is a creature of limited jurisdiction and may only act in areas specifically designated to it by the Legislature. "It has been firmly established that the PUC has no authority not given to it by statute." *Utah Power & Light Co. v. Idaho Public Utilities Comm'n,* 107 Idaho 47, 52, 685 P.2d 276, 281 (1984).

As discussed in detail above, the legislature has limited the PUC's role in implementing

the ESSA to either the "approval" or the "rejection" of such agreements.[28] The City asks the Commission to issue an order declaring that its service territory allocation agreement with United "can be terminated by either party." This the Commission cannot do. The Commission simply is not authorized to issue orders changing the agreed upon terms in service territory allocation agreements. It is only authorized by the legislature to either "approve" or "reject" such contracts.

The City's Request would expand the Commission's jurisdiction, which only the legislature may do. "The Public Utilities Commission has no inherent power; its powers and jurisdiction derives in its entirety from the enabling statutes, and nothing is presumed in favor of its jurisdiction." *Lemhi Telephone Co. v. Mountain States Tel. & Tel. Co.,* 98 Idaho 692, 696, 571 P. 2d 753, 757 (1977) (internal quotation omitted). The general rule is stated in 2 Am. Jur. 2d Administrative Law § 282, as:

> Administrative agencies are tribunals of limited jurisdiction, and nothing is presumed in favor of an agency's jurisdiction. As a general rule, agencies have only such adjudicatory jurisdiction as is conferred on them by statute. Their jurisdiction is dependent entirely upon the validity and the terms of the statutes reposing power in them, and they cannot confer jurisdiction on themselves.

Nor can parties unilaterally convey jurisdiction upon administrative agencies, as the City is clearly attempting to do here by asking the Commission to declare that the "territory service agreement can be terminated by either party."

The consequence of such termination, according to the City would be that "the provisions of Idaho Code §61-333B would govern the re-negotiation of a territory service agreement

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[28] Idaho Code § 61-333

between the parties."[29] Of course, as shown above, the Commission is not allowed to declare that the service territory agreement can be terminated by either party. Thus, the consequences the City speculates that would take place as a result of such a ruling are speculative and false. Regardless, however, the provisions of Idaho Code § 61-333B only come into play when the parties do not have, and cannot agree upon, a territory service agreement. Despite the City's assertion to the contrary, Section 61-333B is only applicable in the event the annexing utility and the cooperative utility fail to reach a voluntary service territory allocation agreement encompassing the area to be annexed. Because the parties here already have voluntarily entered into a service territory agreement encompassing the annexed areas in question, application of Section 61-333B is moot.

Regardless of its inapplicability in the instant situation, the City fundamentally misconstrues the mechanics of Section 61-333B. That section does not facilitate the "re-negotiation of a territory service agreement," instead it presupposes that no such agreement can be negotiated. In such a situation, the annexed territory may be served by the municipality if, and only if, the following conditions have been met:

1. a unanimous vote of the city council to annex; and
2. the annexation is approved on a special ballot at the next general election by the electors in the municipality; and
3. the annexation is approved on a special ballot by the members of cooperative at an election called to coincide with the same general election in the municipality, and
4. the parties are able to arrive at a fair price for the purchase of the existing

[29] Answer/Petition at p. 8.

> cooperatively owned facilities – or obtain a court order setting the fair price.

This process is not available to the City when it has already entered into a valid and enforceable service territory allocation agreement as is the case with the City and United.

As discussed in detail above, the Commission's implementation authority with regard to such agreements is limited to either their "approval" or their "rejection." The Commission is not empowered to interpret those agreements for any purposes, let alone to rule that they are terminable.

5. The City's "Factual and Legal Basis" Supporting its Petition are Irrelevant

For the Commission to actively consider the factual and legal basis supporting the City's petition for declaratory order, it would have to, in the first instance, have the legal authority to do more than just "approve" or "reject" the service territory agreement at issue. Even if it agrees with all of the basis for the City's Petition, the Commission's hands are tied. It cannot do more than what the legislature empowered it to do – which is to either "approve" or "reject" the agreement. It cannot reform, repeal, adjudicate, alter, impose new terms or declare the validity or invalidity of a service territory agreement. The City's Request is simply beyond the Commission's authority to respond. That said, a brief response to the City's various factual and legal basis may prove helpful to the Commission in its deliberations. The City's arguments are addressed in turn, below.

> *"i. The members who negotiated and entered the 1985 Territory Service Agreement, and the 2003 amendment are no longer members of the bodies who have the authority to negotiate and enter these Agreements".*

Generally, a city council may not bind itself or future city councils to a governmental

affairs decision. However, the general rule is inapplicable to city council decisions dealing with public utilities. According to McQuillin, *The Law of Municipal Corporations:*

> [C]ontracts for public utilities, such as water supply, gas, electricity, etc., are generally considered as relating to the business affairs of the municipality, rather than the legislative or governmental powers, and it is permissible they bind the municipality beyond the term of office of the officers making the contract.[30]

Whether or not an electric service territory agreement comes under the rubric of a contract for public utilities may, or may not, be argued. Regardless, however, of the distinction between the legislative and governmental powers of the City Council, or its ability or lack of ability to bind itself and future city councils, is the underlying fact that the agreement at issue here is embodied and approved in a final order of the Idaho PUC.[31] The service territory agreement is not a standalone contract entered into between the City and a third party. It is an agreement that has been sanctioned and approved by the Idaho legislature acting by and through its delegated powers to the Idaho PUC. The legislature gave the PUC the power to "approve" or "reject" the City's agreement with United. The state's approval of the City's contract with United therefore has the sanction of state policy superseding any ability the City otherwise may have to terminate its contract merely because of changed personnel sitting in the council's chambers.[32] Attempting to void the agreement that has been approved by the Commission also runs afoul of the prohibition against collateral attacks on final commission orders found in Idaho Code § 61-625 which provides that all orders of the Commission which have become final and non-

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[30] McQuillin Mun Corp § 29.101, 3rd Ed. 1999.
[31] Order No. 29355
[32] See Lawrence, David; Popular Government, *Contracts that Bind the Discretion of Governing Boards,* p. 38, Summer 1990.

appealable shall not be attacked collaterally.

Thus, it is irrelevant whether the members of the Burley City Council in 1985 are still on that Council today. Likewise, it is irrelevant whether the members of the United Board of Directors in 1985 are still on that Board today. The City is asking the Commission to declare a contract that it approved to be terminable at the option of the parties to that contract. To do so gives the contracting parties the unilateral power to void the PUC order that approved the contract – a classic example of an illegal collateral attack on a final Commission order.

> *"ii. No clause exists in any of the TSAs which prevents either party from terminating the TSAs to renegotiate another."*
>
> According to the City's Petition for Declaratory Order:
>
> There are no clauses in any of these agreements which explicitly prohibits the parties from being able to exercise a termination for any reason at all. Even more shocking, the TSAs do not schedule regular and anticipated renewal periods.[33]

Basic contract law, 101, provides that the lack of mutuality defeats the enforceability of a contract. Thus, if either party were allowed to willy-nilly terminate the service territory agreements between the City and United then there would be no service territory agreements in the first place. More fundamental, however, is the fact that these agreements have been approved by an order of the PUC. Thus, they may only be terminated either by the terms that were in existence at the time the Commission approved them, or if no such inherent termination terms existed at the time of Commission approval, then they may only be terminated with the prior consent of the Commission.[34]

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[33] Answer/Petition at p. 9.

[34] The Commission has approved several service territory agreements involving municipalities that have no expiration date and no renegotiation timeline. See *GNR-E-03-9* (City of Rupert and United Electric); *IPC-E-17-10*

For the Commission to approve termination of these agreements, the City would have to make a showing that termination "is in conformance with the provisions and purposes of this act [the ESSA]." Given United's pending complaint against the City for violations of its service territory agreement, unleashing the City from its service territory agreement would be detrimental to "further[ing] the purposes of" the ESSA which are to "promote harmony among and between electric suppliers."[35]

"iii. Despite waiving conflict, there was a flagrant conflict of interest from representation throughout the proceedings between the City of Burley and United Electric Co-op"

It is unclear what remedy the City is seeking from this Commission in light of its accusations that its attorneys had a conflict of interest throughout the process of negotiations and PUC approvals for its service territory allocation agreements with United. That fact, if it is a fact, is irrelevant to the Commission's ultimate findings of fact that the agreements were in the public interest and that the agreements furthered the purposes of the ESSA. Perhaps the City would find a more jurisdictionally appropriate ear at the Idaho State Bar Commission.

"iv. Pursuant to Idaho Code 61-333B, statutory methods are available for citizens to not be forced into using one service provider over another based on an agreement entered into 37 years ago."

The City's concern about "citizens [being]…forced into using one service provider over another" rings hollow because its entire pleading is designed to establish an exclusive City controlled electric service territory in which all "citizens" will be "forced" to take service from

(City of Rupert and Idaho Power Company); and *GNR-E-03-11* (City of Heyburn and United Electric).
[35] Idaho Code § 61-332(2)

the City of Burley. It also rings hollow because United generously offered to (and without compensation or reciprocal treatment) amend its service territory agreement to allow the City to provide electric service to a new customer (Suntado), but the City refused to even acknowledge United's offer.[36] The City's complaint about monopoly electric service providers taking away the customer's ability to choose his or her electric utility is a bell it probably doesn't really want to ring. The mechanics of Idaho Code § 61-333B are discussed in detail above.

C. THE CITY'S REQUEST FOR ATTORNEY FEES MUST BE DENIED

As it did in its Answer and Request to Dismiss, the City asserts that it is entitled to an award of attorney fees from the Commission to "cover the costs incurred in bringing this Petition for Declaratory Order."[37] The City's request for attorney fees must fail with the Commission's denial of its underlying Petition for Declaratory Order. In addition, however, just as it failed to do so in its Answer and Request to Dismiss, the City fails to cite the Commission to any legal authority upon which such an award of attorney fees could be based. That failure is because there is no legal basis for the Commission to award attorney fees to the City. This issue is addressed in detail, supra, in United's response to the City's request for attorney fees in its Answer and Request to Dismiss. The Commission should deny the City's request for attorney fees in the City's Petition for Declaratory Order because there is no legal basis for such an award.

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[36] See United's Complaint at ¶¶ 19- 26.
[37] Answer/Petition at p. 12.

D. PRAYER FOR RELIEF

Wherefore, United Electric Co-op, Inc. respectfully requests the Commission issue its order denying the City of Burley's Petition for a Declaratory Order to the effect that the existing service territory allocation agreements that were the subject of Commission Order 29355 are terminable at will by either party.

United Electric Co-op, Inc. also respectfully requests the Commission issue its order denying the City's request for an award of attorney fees in this matter.

RICHARSON ADAMS, PLLC

Peter J. Richardson, ISB # 3195

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April 2023, I caused to be served the foregoing "UNITED ELECTRIC CO-OP INC.'S REPLY TO THE CITY OF BURLEY'S ANSWER AND REQUEST TO DISMISS UNITED'S FORMAL COMPLAINT FOR VIOLATION OF CONTRACT ENTERED INTO PURSUANT TO THE IDAHO ELECTRIC SUPPLIER STABILIZATION ACT AND ANSWER TO THE CITY OF BURLEY'S PETITION FOR DECLARATORY ORDER" by electronic service only to the following:

Jan Noriyuki, Secretary
Idaho Public Utilities Commission
jan.noriyuki@puc.idaho.gov

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