

DECISION MEMORANDUM

TO: COMMISSIONER ANDERSON
COMMISSIONER HAMMOND
COMMISSIONER LODGE
COMMISSION SECRETARY
COMMISSION STAFF
LEGAL

FROM: CHRIS BURDIN
DEPUTY ATTORNEY GENERAL

DATE: AUGUST 8, 2023

SUBJECT: IN THE MATTER OF UNITED ELECTRIC CO-OP INC.'S FORMAL COMPLAINT FOR VIOLATION OF CONTRACT ENTERED INTO PURSUANT TO THE IDAHO ELECTRIC STABILIZATION ACT; CASE NO. C15-E-23-01.

On February 22, 2023, United Electric Co-op, Inc. ("United") filed a formal complaint ("Complaint") with the Idaho Public Utilities Commission ("Commission"). United alleges that the City of Burley, Idaho ("Burley" or "City"), violated a series of service agreements ("Agreements") related to the allocation of the respective electric service territory and customers by and between the City and United, which were entered into pursuant to the Idaho Electric Stabilization Act ("ESSA"), and that have been approved by order of the Commission. Specifically, United's Complaint concerns the construction of a milk processing facility ("Facility") that is being built by Suntado, LLC ("Suntado"). United states that the Facility is wholly within United's service territory.

United requests that the Commission issue an order: (1) prohibiting the City from engaging in further acts in violation of the Agreements; (2) prohibiting the City from providing electric service to the Facility; and (3) requiring the City to remove all electrical connections, facilities and/or equipment installed to serve the Facility.

On March 23, 2023, the Commission issued a Summons to Burley directing the City to file a written answer to the Complaint within twenty-one (21) days of the service date of the Summons.

Burley's Answer

On March 29, 2023, Burley filed an answer ("Answer") to the Complaint, and a petition for declaratory order ("Petition"). Burley specifically denies some of United's Background and locational Factual Allegations:

13. Exhibit 6, in addition to showing the location of the proposed new Suntado facility, also shows the boundary between the City of Burley's service territory and United Electric's service territory. As is apparent from Exhibit 6, although the Suntado site abuts on two sides the boundary dividing the City and United's respective service territories, it is entirely within the boundaries of United's exclusive service territory.

13. The Respondents deny the allegations of Paragraph 13.

17. The location of the Suntado proposed processing plant on the site in question may be generally described as being bounded by 16th Street on the south, the railroad on the east and roughly by Washington Street on the west. The northern and eastern boundaries of the lot are conterminous with the existing boundary separating United's service territory from the City's service territory. It is located at approximately the 1200 through 1600 blocks on the north side of 16th Street and west of the railroad right-of-way in the City of Burley

17. The Respondents deny the allegations of Paragraph 17

18. The site in question is wholly located within the Commission approved service territory of United Electric Co-op, Inc.

18. The Respondents deny the allegations of Paragraph 18.

Burley generally denies all of United's remaining Factual Allegations and all three of United's Counts in the Complaint.

Burley requests that the Commission dismiss the Complaint in full and award it: (1) Entry of an order dismissing United Electric Co-op's Complaint; (2) Entry of an order awarding Burley its attorney fees and costs; and (3) Any further relief to which the City of Burley, Idaho may be entitled.

Burley's Petition

Burley filed its Petition pursuant to Commission Rule of Procedure 101. Burley's states that its Petition is based on Commission "Order 29281."¹

¹ It appears that Burley's reference to Order No. 29281 is an error. Staff believes that the correct order is Order No. 29355.

Burley requests a declaratory ruling from the Commission finding that the previous territory service agreement between the parties may be terminated by either party at any time. Burley argues that the provisions of *Idaho Code* § 61-333B would then govern the re-negotiation of a territory service agreement between the parties. Burley presents four arguments in its Petition:

1. 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.
2. No clause exists in any of the TSAs which prevents either party from terminating the TSAs to renegotiate another.
3. 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.
4. 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.

Burley requests that the Commission enter a Declaratory Order: (1) stating that Burley and United both are entitled to terminate the 2003 Territory Service Agreement with reasonable notice to the other party; (2) stating that the provisions of *Idaho Code* § 61-333B are now meant to govern the negotiations between the parties; (3) awarding Burley attorney's fees and costs; and (4) any other relief the Commission sees fit.

Order No. 35855

On July 21, 2023, the Commission issued a Notice of Petition for Declaratory Judgment and Notice of Evidentiary Hearing. Order No. 35855. The order provides in relevant part:

YOU ARE HEREBY NOTIFIED that the Commission shall conduct an evidentiary hearing in this matter on **MONDAY, AUGUST 14, 2023, starting at 11:00 a.m. (local time).** The evidentiary hearing will be held at the **Idaho Public Utilities Commission, 11331 W. Chinden Boulevard, Building 8, Suite 201-A, Boise, ID 83714**. The evidentiary hearing shall be on the singular factual dispute concerning the physical location of the Facility as it relates to Burley and United's respective service territories as defined by the current agreements and amendments. For the purposes of the evidentiary hearing the Commission shall consider the Agreements between the parties valid and enforceable.

YOU ARE FURTHER NOTIFIED that the Parties shall file hearing briefs with supporting affidavits and exhibits by **July 31, 2023**. The hearing briefs shall contain a statement of the issue, a recitation of the party's position, and any factual support for that position. Each party shall also file copies of any exhibits it expects to produce and discuss at the hearing. If the parties intend to call witnesses, the parties shall also file prepared testimony.

YOU ARE FURTHER NOTIFIED that the evidentiary hearing shall be conducted in accordance with the general rules outlined in the Commission's Rules of Procedure. As the complainant, United shall present its evidence first in the form of oral argument, submission of evidence and exhibits, and if applicable, witness testimony. Respondent Burley shall then present its evidence in similar fashion. United may then be given a chance to rebut. At the conclusion of the hearing, the Commission may request that the parties submit closing briefs before the Commission issues its decision.

YOU ARE FURTHER NOTIFIED that all testimony and exhibits in this matter must comport with the requirements of Commission Rules of Procedure 231 and 267. IDAPA 31.01.01.231 and .267.

Order No. 35855 at 4.

Party Filings

On July 31, 2023, United filed a Hearing Brief and the direct testimony of Michael T. Darrington.

On July 31, 2023, Burley filed an Evidentiary Hearing Brief.

United's Motions

On August 3, 2023, United filed motions ("Motions") to: (1) strike Burley's Evidentiary Hearing Brief in its entirety; (2) admit on the record Mr. Michael T. Darrington's direct testimony; (3) vacate the Evidentiary Hearing schedule for August 14, 2023; and (4) requesting an order finding that the Suntado Facility is being constructed on property that is wholly located within United's exclusive service territory.

1. Procedure on Motions

United requests that the Commission issue its order granting the motions on less than fourteen days' notice. United represents that it has complied with Commission Rule of Procedure Rule 256 by personally informing all parties of the pendency of these Motions and of United's request for substantive and procedural relief on less than fourteen days' notice.

2. Strike Burley's Brief

United argues that Burley's pleading affirmatively disregards Order No. 35885's explicit ground rules and fails to even mention the question of where the Facility is located in relation to the parties' respective service territory boundaries, which is the sole purpose of the evidentiary hearing and required briefing. Motions at 4.

3. Vacate Hearing

United argues that Burley has failed to make any offer of proof on the sole question at hand and has ignored the Commission's directive to address the single question relevant to the evidentiary hearing. *Id.* at 7-8. United believes that an evidentiary hearing is unnecessary in light of Burley's failure to address the sole issue identified in Order No. 35855 and failure to proffer a scintilla of evidence countering United's showing that the Suntado Facility is wholly located within United's exclusive service territory. *Id.* at 8.

4. Admit Darrington Testimony

United argues that Mr. Darrington's testimony directly addresses the singular factual dispute at issue by providing a solid evidentiary foundation for the admission of and reliance on Exhibits 6 and 12 from United's Complaint, which provide graphics (maps) as well as narrative descriptions of the location of the Suntado Facility in relation to the existing electric service territory boundaries between United and Burley. Motions at 6.

United contends that Mr. Darrington's testimony is the only offer of proof on the singular question at issue in this phase of this proceeding, and United requests that should the Commission grant United's motion to vacate the evidentiary hearing, the Commission admit Mr. Darrington's testimony into the record as proof of the location of the Suntado Facility in relation to the electric service territory boundaries between Burley and United. *Id.*

5. Evidentiary Finding Order

Based upon the above arguments, United requests that the Commission make a finding of fact that the Suntado Facility is wholly located within United's exclusive service territory. *Id.* at 9-10.

STAFF COMMENTS

Staff has reviewed the briefings of the parties and the motions.

1. Procedure on Motions

Staff believes that United has complied with Commission Rule of Procedure Rule 256.

2. Strike Burley's Brief

Staff has reviewed Burley's hearing brief and Staff believes that the brief does not comply with the requirements of Order No. 35855. Burley's brief does not present any substantive or evidentiary information on the issue of the physical location of the Facility.

3. Vacate Hearing

Based on its review of the submissions, Staff does not believe that an evidentiary hearing will produce any additional substantive or factual evidence for the Commission to consider.

4. Admit Darrington Testimony

If the Commission grants the motion to vacate the evidentiary hearing, Staff does not object to Mr. Darrington's direct testimony being admitted to the record.

5. Evidentiary Finding Order

Based on its review of the submissions, Staff does not believe that Burley has presented any evidence to support a factual claim that the Suntado Facility is not located wholly within United's service territory. It appears that Burley wishes to jump straight into its legal arguments regarding the validity and enforceability of the current territory agreements between the parties and Burley has abandoned any argument on the physical location of the Facility.

COMMISSION DECISION

Does the Commission wish to:

1. Grant or Deny United's Motion to Strike Burley's Evidentiary Hearing Brief?
2. Grant or Deny United's Motion to vacate the Evidentiary Hearing?
3. Grant or Deny United's Motion to admit Mr. Darrington's direct testimony?
4. Grant or Deny United's Motion to for an order finding that the Suntado Facility is wholly located within United's exclusive service territory?



Chris Burdin
Deputy Attorney General

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