

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

McKAY CONSTRUCTION CO., INC.,)	
)	CASE NO. UWI-W-08-01
COMPLAINANT,)	
)	
and)	
)	
SCHMIDT CONSTRUCTION CO., INC.,)	
)	
COMPLAINANT,)	
)	
vs.)	ORDER NO. 30655
)	
UNITED WATER IDAHO INC.,)	
)	
RESPONDENT.)	

On February 19 (20), 2008, complaints against United Water Idaho Inc. (United Water; Company) were filed by the McKay and Schmidt Construction Companies (collectively Complainants or Contractors). Both Complainants requested and were denied listing on the Company's "approved contractor list" for 2008. Listing is required of contractors to qualify for installation of domestic water facilities within residential subdivisions in United Water's certificated area of service. United Water maintained that because of the cost associated with administering contractors, the recent decrease in construction, and the lack of projected projects in 2008, it was not going to add contractors to the approved contractor list in 2008. McKay requested reinstatement, having previously been on the list from 1997 to October 2005.

On July 21, 2008, the contractors filed a Petition for Clarification of the Commission's Order No. 26898 in Case No. UWI-W-96-4 wherein the Commission approved a Stipulation and Settlement Agreement (Agreement) that established a "labor in lieu of cash" program for installation of facilities within residential subdivisions. Agreement ¶ 6; RP 325. It was the contractors' contention that the Company's administrative decision to place a limit on the number of contractors included on the "approved contractor list" in its *labor in lieu of cash* program was a decision contrary to the best interests of the Company's customers and subject to Commission oversight and reversal. The Commission in Order No. 30624 found the Company's decision to cap the list of approved contractors at 10 for 2008 to be a business decision that does

not adversely affect customers and one to which the Commission should defer. The Commission found its prior Order needed no clarification and dismissed the complaints filed by the McKay and Schmidt Construction Companies.

Petition for Reconsideration

On September 11, 2008, Mike McKay, President of McKay Construction Company, [individually, and not through his attorney of record, Peter J. Richardson] filed a Petition for Reconsideration of Final Order No. 30624. *Idaho Code* § 61-626; IDAPA 31.01.01.331. In response to the Commission's Order, McKay states that it does not appear that the Commission addressed the letter from United Water dated August 22, 2005 to McKay Construction (2005 letter) wherein the Company states "when you are able to meet the required insurance coverage minimums you will be allowed to perform work on United Water Idaho projects." McKay Construction strongly feels that the Company is not honoring its stated position of placing it back on the approved contractor list. Because of this refusal, McKay Construction contends that the Company is adversely affecting McKay's ability to operate in a competitive marketplace.

On September 15, 2008, United Water Idaho filed an answer to McKay Construction's Petition for Reconsideration. RP 331.05. As a substantive matter, United Water contends that the Petition does not allege any grounds that should cause the Commission to alter its conclusions contained in Order No. 30624. As the Company pointed out in its Reply and Motion dated July 31, 2008, McKay in response to the 2005 letter, for a period of almost two and one-half years, did not take any steps to upgrade its insurance. It is unreasonable, United Water contends, to expect that the Company intended the offer contained in the 2005 letter to live in perpetuity, regardless of a change in circumstances. The legal doctrine for such a claim is known as promissory estoppel. Under that doctrine, United Water contends that a promise which is otherwise not supported by consideration may be made enforceable under these circumstances:

The elements of promissory estoppel are as follows: "(1) the detriment suffered in reliance (on the promise) was substantial in an economic sense; (2) substantial loss to the promisee acting in reliance was or should have been foreseeable by the promisor; and (3) the promisee must have acted reasonably in justifiable reliance on the promise as made. *Gillespie v. Mountain Parks Estates*, 138 Idaho 27, 59 P.3d 1227 (2002).

Here, United Water contends the Petition of McKay does not allege any facts demonstrating that McKay justifiably relied on the 2005 offer from United Water or that McKay

suffered a detriment as a result of the reliance that was substantial in an economic sense, e.g., purchase of additional equipment, etc.

United Water contends that the Petition of McKay fails to comply with the Commission's Procedural Rule 331. Relevant portions of that Rule identified by the Company are:

Petitions for Reconsideration must set forth specifically the ground or grounds why the petitioner contends that the order or any issue decided in the order is unreasonable, unlawful, erroneous or not in the conformity with the law, and a statement of the nature and quantity of evidence or argument the petitioner will offer if reconsideration is granted. RP 331.01.

The petition . . . must state whether the petitioner . . . requests reconsideration by evidentiary hearing, written briefs, comments, or interrogatories. RP 331.03.

United Water recommends that the Petition for Reconsideration be denied.

Commission Findings

The Commission has reviewed and considered the filings of record in Case No. UWI-W-08-01, our final Order No. 30624, the Petition for Reconsideration filed by McKay Construction and the related answer of United Water. We have also reviewed the relevant statutory and procedural rules regarding reconsideration of Commission Orders, i.e., *Idaho Code* § 61-626; IDAPA 31.01.01.331-333.

McKay Construction requests reconsideration of the Commission's Order No. 30624 issued August 21, 2008 in Case No. UWI-W-08-01. Mr. McKay notes that the Commission did not specifically reference the 2005 letter from United Water to McKay Construction in its Order and hopes the Commission will reconsider its decision by ordering the Company to place McKay Construction on its list of approved contractors. While not specifically mentioning the 2005 letter, this Commission's findings indicate that the Commission reviewed and considered the filings of record in Case No. UWI-W-08-01 including the underlying complaints of Schmidt and McKay and their Petition for Clarification. The 2005 letter was part of that record. In raising the significance of the 2005 letter, McKay presents what is essentially a contract argument of estoppel. While the Commission generally has jurisdiction to hear matters presented to it regarding the regulation and supervision of public utilities (*Idaho Code* § 61-501), the resolution of contract disputes is a matter that lies beyond our jurisdiction. Our Idaho Supreme Court has

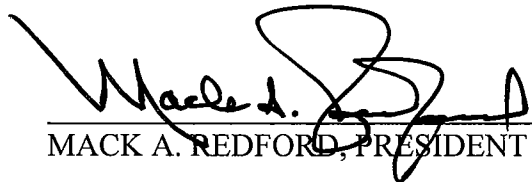
held that "the construction and enforcement of contract rights" is generally a matter which lies in the jurisdiction of the courts and not in the Public Utilities Commission." *Lemhi Telephone Company v. Mountain States Tel. & Tel. Company*, 98 Idaho 692, 696, 571 P.2d 753, 757 (1977); *Afton Energy v. Idaho Power Company*, 111 Idaho 925, 928, 729 P.2d 400 (1986). We find that McKay Construction presents no argument or offer of proof that this Commission can consider should reconsideration be granted and thus presents no reason to grant reconsideration.

ORDER

In consideration of the foregoing and as more particularly described above, IT IS HEREBY ORDERED that the Petition of McKay Construction for Reconsideration of final Order No. 30624 is denied.

THIS IS A FINAL ORDER DENYING RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this Case No. UWI-W-08-01 may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

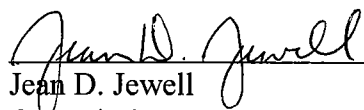
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 7th day of October 2008.


MACK A. REDFORD, PRESIDENT


MARSHA H. SMITH, COMMISSIONER


JIM D. KEMPTON, COMMISSIONER

ATTEST:


Jean D. Jewell
Commission Secretary

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