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City of Idaho Falls v. Fuhriman Appellant's Brief Dckt. 36721

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IN THE SUPREME COURT OF THE STATE OF IDAHO

THE CITY OF IDAHO FALLS)
)
 PETITIONER-RESPONDENT)
 v.)
)
 MAYOR JARED FUHRIMAN)
)
 INTERVENOR-APPELLANT]

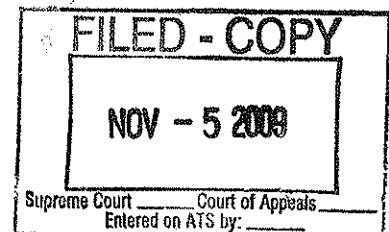
DOCKET No. 36721-2009

APPELLANT'S BRIEF

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF BONNEVILLE
Case No. CV 09-1736
The Honorable Judge Darren B. Simpson, Presiding District Judge

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II. TABLE OF CASES AND AUTHORITIES

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III. STATEMENT OF THE CASE

A. Nature of the Case

This appeal is brought by the Mayor of the City of Idaho Falls, Bonneville County, Idaho [the "*City*"] of the decision of the Seventh Judicial District Court of Bonneville County, State of Idaho [the "*District Court*"] confirming the validity of the Power Sales Agreement, Contract No. 09PB-13056 [the "*Renewal Power Sales Agreement*"] [R., Vol. I, pp. 79 – 260a] and the related Creditworthiness Agreement, Contract No. 09PB-13257, [the "*Creditworthiness Agreement*"] [R., Vol. I, pp. 261a- 269], pursuant to the Judicial Confirmation Law, Title 7, Chapter 13, Idaho Code, as amended [the "*Judicial Confirmation Law*"]. Both of the subject agreements are between the City and the United States of America, Department of Energy, acting by and through the Bonneville Power Administration ("*Bonneville*").

B. Background Facts

The City owns and operates a municipal electric utility system [the "*System*"] which provides electric utility service to customers located within the System's established service area. The System is operated by the City's Electric Division [which does business as, and is referred to herein as, "*Idaho Falls Power*"]. [Flowers Affidavit - R., Vol. II, p. 504, ¶ 1 – p. 505, ¶ 3; Elg Affidavit – R., Vol. II, p. 515, ¶ 1 – p. 516, ¶ 3.]

Idaho Falls Power owns two hydroelectric generation facilities—the Bulb Turbine Project and the Gem State Project—located on the Snake River. These Projects guarantee only a small portion of the System's electricity needs, and the City presently purchases approximately 90% of its power supply under a power purchase agreement with Bonneville that expires on September 30, 2011 [the "*2001 PSA*"]. [Flowers Affidavit – R. Vol. II, p. 509, ¶ 15 – p. 510, ¶ 19.]

To replace the 2001 PSA, the City and Bonneville have executed the Renewal Power Sales Agreement. The City intends to begin purchasing power under the Renewal Power Sales Agreement on October 1, 2011. [R., Vol. I, p. 131, ¶ 13 and pp. 182 – 185.]

The City will purchase the “Slice” and “Block” products under the Renewal Power Sales Agreement. Bonneville is requiring that all customers who will purchase the “Slice” product execute a Creditworthiness Agreement. Upon the occurrence of certain events, the Creditworthiness Agreement provides that Bonneville may require the City to post cash or a letter of credit to secure its payment obligations under the Renewal Power Sales Agreement. [Elg Affidavit – R. Vol. II, p. 527, ¶ 33 and p. 531, ¶ 46.]

C. Course of Proceedings Below

The City filed a petition under Section 7-1301, *et. seq.*, Idaho Code (“Judicial Confirmation Law”) on March 19, 2009 (the “*City’s Petition for Confirmation*”), requesting a determination that the City’s payment obligations under the Renewal Power Sales Agreement are “ordinary and necessary expenses” within the meaning of the proviso clause of Art. VIII, § 3. The City also requested a determination of the validity of the Creditworthiness Agreement, arguing that it does not create any new or additional “obligation” of the City, but is a security instrument necessary to give effect to the Renewal Power Sales Agreement. [R. Vol. I, p. 10, ¶ 16 and p. 21, ¶ 2 – p. 22, ¶ 3.]

The Mayor filed an answer in opposition to the City’s Petition on April 17, 2009, arguing that the City’s payment obligations under the Renewal Power Sales Agreement are not “necessary” because they need not be incurred on an immediate or emergency basis as required by the Idaho Supreme Court’s holding in *City of Boise v. Frazier*, 143 Idaho 1, 137 P.3d 388 [2006], and the City has ample time to conduct an authorizing election. [R. Vol. II, pp. 590 – 601.]

The District Court held a hearing on the City's Petition for Confirmation on May 7, 2009, and issued its order on June 15, 2009 (the "*Order of the District Court*"), holding that the City's obligations under the Renewal Power Sales Agreement, even if considered an "indebtedness or liability," are "ordinary and necessary expenses," all within the meaning of Art. VIII, § 3. [R. Vol. II, pp. 612 – 622.]

The District Court found that the City's payment obligations under the Renewal Power Sales Agreement are "ordinary" expenses because, given that the City owns and operates a municipal electric utility system, the City's purchase of electric power would fall within the ordinary course of municipal business and is a type of expense that may be and is likely to become necessary. [Order of the District Court – R. Vol. II, pp. 617 – 619.] The District Court also held that the City's obligations under the Renewal Power Sales Agreement are "necessary" because such expenses are the type that the City is "legally obligated to perform promptly" within the meaning of the holding in *Frazier*. The District Court determined that such expenses are the type the City is "legally obligated to perform" because the City, in its role as a "public utility," has a duty to "furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public..." citing to Section 61-302, Idaho Code, as amended. [R. Vol. II, p. 620.] The District Court determined that such expenses must be performed "promptly" because the City depends materially on wholesale market power purchases to meet System requirements, and unstructured planning would put the City at risk of significant price volatility and possible lack of supply, in breach of its duty to supply electricity to its inhabitants, and thus the "urgency" element required by the *Frazier* decision was met. [*Id.* at pp. 620 – 621.]

Lastly, noting the Mayor's concession that the Creditworthiness Agreement creates no payment obligation on the part of the City which is separate from the Renewal Power Sales Agreement, the District Court confirmed the validity of the Creditworthiness Agreement as a contract "related" to the Renewal Power Sales Agreement as there was no substantive objection thereto. [R. Vol. II, p. 622.]¹

On July 14, 2009, the Mayor filed a timely Notice of Appeal pursuant to Section 7-1309, Idaho Code, as amended. [*Id.* at pp. 626 – 629.] On August 10, 2009, the City filed a Motion for Expedited Hearing pursuant to I.A.R. 44. Such motion was granted on September 2, 2009, and the matter has been set for oral argument on February 19, 2010.

IV. ISSUE PRESENTED ON APPEAL

Whether the City's payment obligations under the Renewal Power Sales Agreement are "necessary" within the meaning of the proviso clause of Art. VIII, § 3 of the Idaho Constitution.

V. ARGUMENT

THE DISTRICT COURT'S DECISION SHOULD BE OVERRULED BECAUSE THE PAYMENT OBLIGATIONS OF THE CITY UNDER THE RENEWAL POWER SALES AGREEMENT ARE NOT "NECESSARY" EXPENSES WITHIN THE MEANING OF THE HOLDING IN FRAZIER.

The Mayor does not contest the District Court's determination that the City's payment obligations under the Renewal Power Sales Agreement are "ordinary" within the meaning of the "ordinary and necessary" proviso of Art. VIII, § 3 of the Idaho Constitution, nor does the Mayor contest the District Court's holding with respect to the

¹ The Mayor has taken the position that if the City's primary payment obligations under the Renewal Power Sales Agreement are valid, then the City's obligations under Creditworthiness Agreement are also valid. See the Mayor's Answer to Petition for Judicial Confirmation, dated April 14, 2009, at R. Vol. II, p. 593, ¶ 9, and the Mayor's Brief in Support of Answer to Petition for Judicial Confirmation, dated April 14, 2009, at R. Vol. II, pp. 600a - 601.

Creditworthiness Agreement, at least insofar as the District Court determined that the Creditworthiness Agreement does not give rise to a new obligation, but is only a security instrument designed to give effect to the Renewal Power Sales Agreement. The Mayor appeals the District Court's determination that the City's payment obligations under the Renewal Power Sales Agreement are "necessary" expenses within the meaning of the Art. VIII, § 3 proviso and the *Frazier* holding. First, the City has no "legal obligation" to incur the expense of providing electricity to its residents. Second, the City's payment obligations under the Renewal Power Sales Agreement are not "necessary" within the meaning of the *Frazier* test because they need not be incurred on an immediate or emergency basis.

The Mayor first points out that the District Court's determination that the City is "legally obligated" to incur the expense of providing electricity to its residents, on the basis of Section 61-302, Idaho Code, as amended, was erroneous. [R. Vol. II, p. 620.] Title 61 regulates only investor-owned utilities, not municipally-owned and other not-for-profit utilities such as Idaho Falls Power.² Consequently, Section 61-302, Idaho Code, as amended,

² Municipally-owned and other not-for-profit utilities are specifically excluded, by definition, from jurisdiction of the Idaho Public Utilities Law. Section 61-129, Idaho Code, as amended, defines "public utility" as

every common carrier, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, and wharfinger, as those terms are defined in this chapter and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this act....

"Corporation" is defined in Section 61-104, Idaho Code, as amended, as

a corporation, a company, an association and a joint stock association, *but does not include a municipal corporation*, or mutual nonprofit or cooperative gas, electrical, water or telephone corporation or any other public utility organized and operated for service at cost and not for profit, whether inside or outside the limits of incorporated cities, towns or villages [emphasis added].

See also Snake River Homebuilders Association v. City of Caldwell, 101 Idaho 47, 607 P.2d 1321 (1980) [because the City of Caldwell's municipally-owned utility was not a "public utility"]

does not apply to the City and thus imposes no obligation on the City to furnish its residents with electrical power.

The Mayor concedes that the City, having undertaken to own and operate the System, has a practical obligation to assure an adequate supply of electricity to the customers served by the System. Nevertheless, the Mayor argues that regardless of the practical realities, the City's payment obligations under the Renewal Power Sales Agreement are not undertaken pursuant to a legal duty and are therefore not "necessary" within the meaning of the holding in *Frazier*. Simply put, the "requisite urgency" mandated by the *Frazier* decision is not present in this case.

The language of the *Frazier* decision that was quoted (in part) and relied upon by the District Court in reaching its holding states, in its entirety, as follows: "We observe that the expenditures contemplated by the delegates [to the Constitutional Convention] involved *immediate or emergency expenditures, such as* those involving public safety, or expenses the government entity in question was legally obligated to perform promptly." 143 Idaho at 4, 137 P.3d at 391 [emphasis added]. The *Frazier* decision noted that "[t]hose expenditures [discussed by the delegates] included unavoidable expenses, such as carrying on criminal trials and abating flood damage, that could not be delayed." *Id.* Thus, the term "promptly" as used in *Frazier* was intended to describe those expenditures that must be incurred on an immediate or emergency basis, or in other words, expenditures for which there is no time to hold an election.

under the Public Utilities Law, the notice and hearing requirements of that Law were not applicable to city's action of passing resolution increasing rate charged for extending city's water mains); see also *Alpert v. Boise Water Corporation*, 118 Idaho 136, ___, 795 P.2d 298, 302 (1990) ["The public utilities law [Chapters 1-7 of Title 61, Idaho Code] establishes a comprehensive scheme for the regulation of *investor-owned* utilities by the Idaho Public Utilities Commission."] [Emphasis added].

Here, despite any practical obligation of the City to provide its residents with electricity, under the unique circumstances of this case, the Renewal Power Sales Agreement does not come within the “necessary” element as contemplated by *Frazier*. The City has secured its ability to acquire power under the Renewal Power Sales Agreement but its obligation to commence purchases of power will not commence until 2011. Such expenses are thus clearly not “immediate” or “emergency” expenses, and there is still more than enough time to hold an authorizing election. Consequently, the Renewal Power Sales Agreement is not truly “necessary” within the meaning of *Frazier*.

The Mayor does not question the importance of reliable electricity supplies to the City’s inhabitants. But the Court in *Frazier* also stated that, despite the critical nature of an airport parking structure, “the circumstances do not require the erection of a permanent parking structure on an immediate or emergency basis,” 143 Idaho at 5, 137 P.3d at 392 and went on to say “we have held that there must exist a necessity, *not simply for the expenditure*, but also for making the proposed expenditure *at or during such year*.” *Id.* at 6, 137 P.3d at 393 (emphasis added).

Lastly, the Mayor wishes to point out that in reaching its holding the District Court stated that “[t]he City’s duty to provide electrical service creates the urgency which causes the Renewal Power Sales Agreement ... to fall within the ‘necessary’ element of the proviso clause. If the City refuses to strategically plan for long-term provision of electric power for its electric utility system, particularly in the volatile market to which the parties stipulated, it risks a breach of its duty” [R. Vol. II, p. 621.]

The Mayor agrees that as a practical matter, the City must continuously and strategically plan for and acquire electric power supplies from time to time, and does not suggest the City should refuse to do so. The Mayor also concedes that, in so doing, there

may not always be time to hold an authorizing election prior to incurring expenditures to purchase power, and that in such instances the execution of power purchase contracts may constitute “immediate” or “emergency” expenditures. That is not the case here, however.

By holding an election to authorize the Renewal Power Sales Agreement the City is not, by any means, “breaching its duty” or refusing “to strategically plan for long-term provision of electric power....” Rather, it is acknowledging the long-time right the City’s citizens possess under Art. VIII, §3 to approve an obligation they will ultimately pay for. The City can still acquire power under the Renewal Power Sales Agreement beginning in 2011, if the City’s voters so authorize it. While the requirement that the City submit its long-term power purchase obligations to an election might, in limited circumstances, require the City to obtain shorter-term and potentially more expensive power supplies on less favorable terms, Art. VIII, § 3 requires the City to obtain voter approval for such long-term obligations.

VI. CONCLUSION

Despite the necessity of the City’s power purchases under the Renewal Power Sales Agreement, there exists no necessity for making such purchases during the current year, and consequently, the City’s obligations under the Renewal Power Sales Agreement are not “necessary” within the meaning of the holding in *Frazier* and Art. VIII, § 3. The District Court’s determination that the City’s obligations under the Renewal Power Sales Agreement are “necessary” within the meaning of this Court’s holding in *Frazier* was clearly erroneous.

VII. ATTORNEY FEES ON APPEAL

Appellant does not seek an award of attorney fees on appeal.

Respectfully submitted this 5th day of November, 2009.

RICHARDSON & O'LEARY, PLLC

By: 

Molly O'Leary
Attorney for Appellant

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on the 5th day of November, 2009, a true and correct copy of the within and foregoing APPELLANT'S BRIEF was served in the manner shown to:

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