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 IDAHO PUBLIC UTILITIES COMMISSION

Attorney for Respondent, City of Eagle, Idaho

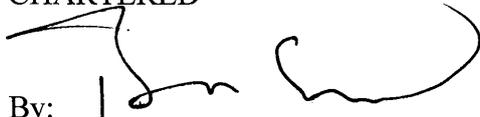
**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

<b>IDAHO POWER COMPANY,</b>	)	
	)	<b>Case No. IPC-E-04-4</b>
<b>Complainant</b>	)	
	)	
<b>vs.</b>	)	<b>MOTION TO DISMISS</b>
	)	
<b>CITY OF EAGLE, IDAHO,</b>	)	
	)	
<b>Respondent.</b>	)	
_____	)	

The City of Eagle, Idaho, by and through its attorneys of record, Moore Smith Buxton and Turcke, Chartered, moves the Commission to dismiss the Complaint by Idaho Power Company, for failure to exhaust its statutory remedies, under I.C. §§67-5270 – 5279 and I.R.C.P. 84, and because there are no conflicting orders as required under I.C. §67-6528.

DATED at Boise, Idaho, this 9<sup>th</sup> day of September, 2004.

MOORE SMITH BUXTON & TURCKE,  
 CHARTERED

By:   
 \_\_\_\_\_  
 Bruce M. Smith  
 Attorney for City of Eagle, Idaho

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT I HAVE THIS 9<sup>th</sup> DAY OF SEPTEMBER, 2004, SERVED THE FOREGOING RESPONSE TO THE **MOTION TO DIMISS** IN CASE NO. IPC-E-04-4, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

Donald L. Howell, II  
Idaho Public Utilities Commission  
472 West Washington Street  
Boise, ID 83720-0074

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Monica B. Moen  
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Idaho Power Company  
P.O. Box 70  
Boise, Idaho 83707-0070

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Boise, ID 83701

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<b>IDAHO POWER COMPANY,</b>	)	
	)	<b>Case No. IPC-E-04-4</b>
<b>Complainant</b>	)	
	)	
<b>vs.</b>	)	<b>MEMORANDUM IN SUPPORT OF</b>
	)	<b>MOTION TO DISMISS</b>
<b>CITY OF EAGLE, IDAHO,</b>	)	
	)	
<b>Respondent.</b>	)	
_____	)	

On February 11, 2004, Idaho Power Company brought this Complaint before the Idaho Public Utilities Commission seeking an order allowing Idaho Power to construct a 138kV line on its choice of three route options with no additional cost to the City, or allowing Idaho Power to construct the line underground along three alternative route options, with the citizens of the City bearing the burden of the of the incremental increase in cost for the underground installation.

Idaho Power had previously submitted an Application for a Conditional Use Permit to Construct a 138kV Sub-Transmission Line and a Height Exception Request to Construct Utility Poles in Excess of 35-feet, Case Number CU-09-02 (the "Application"). After several public hearings on the Application, the City Council of the City of Eagle unanimously voted to deny the Application.

**ORIGINAL**

The Idaho Public Utilities Commission (“PUC”) has never issued an order with regard to the installation of the subject lines.

### ARGUMENT

1. Idaho Power has Failed to Exhaust its Remedies to Contest the City’s Decision to Deny Idaho Power’s Conditional Use Permit Application No. CU-09-02.

Idaho Code §50-328 grants cities the authority to regulate utility transmission systems.

Specifically:

All cities shall have power to permit, authorize, provide for and regulate the erection, maintenance and removal of utility transmission systems, and the laying and use of underground conduits or subways for the same in, under, upon or over the streets, alleys, public parks and public places of said city; and in, under, over and upon any lands owned or under the control of such city, whether they may be within or without the city limits.

It is under this statute that the City is able to issue conditional use permits regarding the installation of power lines over and upon any lands owned or under the control of the City. As mentioned previously, Idaho Power submitted a CUP application to the City requesting permission to site the 138kV line on the Eagle Bypass route. See *Complaint*, ¶ 8. After numerous public hearings, in which the City Planning and Zoning Commission and the City Council considered public testimony and a professional cost analysis, the City determined to deny Idaho Power’s application.

Once CU-09-02 was denied, Idaho Power had appeal options under either I.C. §§ 67-5270 through 67-5279 or pursuant to I.R.C.P. 84. Both sections provide for the judicial review of decisions made by the City. However, Idaho Power refused to avail itself of either option. Idaho Power’s appeal options were clearly defined and Idaho Power chose not to exercise those options. Idaho Power cannot now circumvent the statutory appeals process by filing this Complaint with the PUC. Idaho Power is now seeking to use the PUC in an effort to avoid its

responsibilities under the Idaho Code. The PUC is bound to comply with the City's local ordinances. I.C. §67-6528 ("The state of Idaho, and all its agencies, boards, departments, institutions, and local special purpose districts, shall comply with all plans and ordinances adopted under this chapter unless otherwise provided by law.") Idaho Power's Complaint should be dismissed since it has failed to exhaust its statutory remedies and the relevant statutes of limitations have now run.

2. Idaho Power's Complaint should be dismissed because there are no conflicting orders as required by Idaho Code §67-6528.

Even if the PUC determines that Idaho Power is following the proper process to achieve a remedy from the City's decision, the PUC does not have the authority to hear this Complaint pursuant to Idaho Code §67-6528. Idaho Code §67-6528 discusses the applicability of municipal ordinances on state agencies.

If a public utility has been ordered or permitted by specific order, pursuant to title 61, Idaho Code, to do or refrain from doing an act by the public utilities commission, any action or order of a governmental agency pursuant to titles 31, 50 or 67, Idaho Code, in conflict with said public utilities commission order, shall be insofar as it is in conflict, null and void if prior to entering said order, the public utilities commission has given the affected governmental agency an opportunity to appear before or consult with the public utilities commission with respect to such conflict.

This statute is inapplicable to the Complaint filed by Idaho Power. Even though the City's order was issued pursuant to Idaho Code Title 67, the City's order does not conflict with any existing PUC order. In order for the City's order to be null and void, the order must conflict with a previous PUC order. To date, the PUC has not issued any order with regard to the installation of lines through the City of Eagle.

Idaho Power is now seeking to create a conflict by asking the PUC to issue an order in conflict with the order previously issued by the City. Even if the PUC issues an order regarding

the installation of the subject lines, the PUC has not given the City an opportunity to appear before the PUC with respect to the conflict *prior to* the issuance of the City's order. In order to utilize this statute, Idaho Power should have sought an order from the PUC before going to the City to request a conditional use permit. Its failure to do so prohibits Idaho Power from now seeking a conflicting order from the PUC and prohibits the PUC from even considering this Complaint. Consequently, Idaho Power's Complaint should be dismissed.

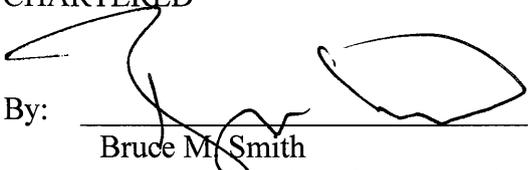
The City agrees that the PUC has authority over the installation of public utilities. However, that authority does not extend so far as to allow Idaho Power to ignore the City's local land use ordinances and procedural obligations set in place by the Idaho Legislature. Nor is there any statutory authority allowing the PUC to assess a surcharge against the City, simply because the City is enforcing its own rules and regulations. The Complaint filed by Idaho Power must be dismissed.

### CONCLUSION

Idaho Power has failed to exhaust its statutory appeal remedies by refusing to appeal the City's order pursuant to the Administrative Procedure Act or Rule 84 of the Idaho Rules of Civil Procedure. Additionally, the PUC does not have the jurisdiction to hear this Complaint pursuant to I.C. §67-6528. Consequently, this Complaint must be dismissed in its entirety.

DATED at Boise, Idaho, this 9<sup>th</sup> day of September, 2004.

MOORE SMITH BUXTON & TURCKE,  
CHARTERED

By: 

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Bruce M. Smith  
Attorney for City of Eagle, Idaho

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