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IDAHO PUBLIC  
UTILITIES COMMISSION

Attorney for Respondent, City of Eagle, Idaho

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

**IDAHO POWER COMPANY,**

**Complainant,**

vs.

**CITY OF EAGLE, IDAHO,**

**Respondent.**

**Case No. IPC-E-04-4**

**CITY OF EAGLE'S RESPONSE TO**

**STAFF ANSWER OPPOSING THE  
CITY OF EAGLE'S MOTION TO  
DISMISS, AND**

**IDAHO POWER COMPANY'S  
MEMORANDUM IN OPPOSITION  
TO THE MOTION OF THE CITY OF  
EAGLE, IDAHO TO DISMISS**

COMES NOW, the City of Eagle ("City") and responds to the above referenced memoranda submitted by Commission Staff ("Staff") and Idaho Power Company ("IPCO")<sup>1</sup>.

**BACKGROUND**

On September 9-10, 2004, the Idaho Public Utilities Commission ("IPUC" or "Commission") conducted a hearing on IPCO's Complaint which was filed with the IPUC

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1. In the interest of brevity, the City submits a single response to both the Staff and IPCO memoranda.

February 11, 2004. Prior to the hearing, the City filed a Motion to Dismiss and raised with the IPUC the question of its authority to rule on the IPCO Complaint given IPCO's filings with the City and the IPUC. After considering the situation, the IPUC chose to proceed with the hearing. At the completion of the hearing on September 10, 2004, the IPUC directed the Staff and IPCO to respond to the City's Motion to Dismiss by September 17, 2004. The City was directed to file any necessary response by September 22, 2004. This is the City's response to the Staff and IPCO memoranda.

### ARGUMENT

The City acknowledges that this case poses complex issues regarding questions of procedure and substance. Perhaps that helps explain why the Staff and IPCO take different positions in their respective memoranda, even though both ask that the City's motion be denied. Neither Staff nor IPCO acknowledge, however, that this matter was presented to the IPUC based upon a pleading entitled Idaho Power Company v. City of Eagle, Idaho. See IPCO Complaint dated February 11, 2004. Accordingly, neither Staff nor IPCO directly address how the IPUC obtained jurisdiction over the City of Eagle or under what theory IPCO can sue the City of Eagle in the IPUC, a body of limited jurisdiction with authority over publicly regulated utilities. Both Staff and IPCO likewise overlook the procedure engaged in and selected by IPCO to secure authorization to construct a power line through the City of Eagle, and whether that process allows IPCO to ignore the very statutes that are applicable.

In its memorandum, Staff takes the position that IPCO can properly invoke the authority set forth in Idaho Code § 67-6528 and use the Staff determined "limited exception" assumed to

be in the statute to avoid the City's authority set out in Idaho Code § 50-328. According to Staff, there are two avenues for IPCO to pursue judicial review; and apparently, the Staff sees nothing wrong with IPCO changing venues in the middle of one process by suddenly switching from one process to the other if things do not appear to be working out satisfactorily in the first. This is, at the least, imminently unfair to a municipality that invests time and resources in trying to address the issues presented by a utility.

Staff does recognize the applicability of Idaho Code § 50-328 and Idaho Code § 67-6528 and makes an attempt to harmonize the two statutes, albeit in a way with which the City does not agree. Staff, however, does not adequately address the ramifications of IPCO's failure to pursue judicial review under the process it chose to pursue.

Staff also incorrectly asserts that the City's position is that "all utility construction would require a Commission Order before applying to the City for a [Conditional Use Permit]. The City does not take that position as to all utility construction. However, to invoke the authority of Idaho Code § 67-6528, it would appear that that is the process set forth in the statute, which Staff notes was a utility requested amendment to the statute. The City's position is that if the utility seeks to invoke the statute, it should likewise have to follow it.

IPCO's position is different from the Staff's. Interestingly, IPCO, now takes the position that Idaho code § 67-6528 does not apply, a position largely notable in that it goes completely against the very complaint filed by IPCO. IPCO also suggests that the City's position is that the Complaint represents an appeal of the denial of the CUP. That is incorrect. The City is now

prejudiced because IPCO did not appeal by using the procedure provided by the Idaho Legislature under the Administrative Procedure Act. Idaho Code § 67-5120.

In arguing that the Complaint does not constitute an appeal of the City's decision, IPCO points out its Complaint was filed prior to the City's decision in the CUP. IPCO memo at 5. Then IPCO keeps referring to the City's determination in its decision on the CUP to try to show why the Complaint is proper. IPCO even argues that the City's "...conclusion [on the CUP]...places this matter directly within the jurisdiction of the IPUC." IPCO memo at 8. While IPCO's position keeps changing, the City's has not. If IPCO disagreed with the City's CUP determination, IPCO had every right to appeal. It chose not to do so. It should not be allowed to avoid the review process provided for under the very process it chose to engage in. Finally, IPCO concludes its memoranda by arguing that the "authority to construct [the] extension...does not require issuance of an Order to do so from the Commission." IPCO Memo at 12. If true, then what are we doing here? The Complaint should be dismissed on this statement alone.

The core of the dispute in this matter lies in reconciling the applicability of Idaho Code § 50-328 and Idaho Code § 67-6528. To its credit, Staff recognizes that these separate statutes should be construed together so as to give effect to each. Staff Memo at 3. The City agrees. Staff also notes that there are two avenues for judicial review of certain decisions – either through judicial review pursuant to the Administrative Procedure Act or Supreme Court review of IPUC decisions. The City concurs with this as well. Where Staff's interpretation of the statutes goes astray is that the Staff position, in part, ignores the fact that it is IPCO which initiated administrative procedures through its application for a conditional use permit from the

City of Eagle, then switched processes when it appeared it might not persuade the City to see things IPCO's way. It now seeks by way of its Complaint to initiate a new proceeding before the IPUC to do an end run around its application to the City. Unfortunately, Idaho Code § 67-6528's requirement for a City decision that conflicts with a specific IPUC order is absent from this case.

As noted, IPCO suddenly takes the position that Idaho Code § 67-6528 does not even apply. IPCO Memo at 12 (“...Idaho Code § 67-6528 does not apply in this instance...”). Such a position is particularly perplexing given the very language IPCO uses in its Complaint: “Idaho Code §§ 61-508 and 67-6528 clearly demonstrate that the Idaho legislature intended that the Commission have the authority to grant the relief prayed for in this complaint”. IPCO Complaint at 10. We now have a situation where Staff takes the position that Idaho Code § 67-6528 provides the basis for IPCO's Complaint being filed with the IPUC, while IPCO says that Idaho Code § 67-6528 doesn't even apply.

The positions of Staff and IPCO both ignore that the Idaho Legislature has set forth a clear procedure for addressing this matter in a way that harmonizes both statutes, provides a process by which the legislated authority of the City is preserved, and allows the IPUC to exercise its jurisdiction over IPCO. That is by following the procedure set out in the Administrative Procedure Act.

IPCO's statement that its Complaint is not an appeal of the City's denial of its conditional use permit application is the very point the City has also made. IPCO never appealed the City's decision by availing itself of the opportunities afforded by the Administrative Procedure Act, the judicial review procedure provided it by the Idaho Legislature. Only when it appeared that it

might not convince the City to accept its demands did IPCO suddenly decide to sue the City in the IPUC, asserting as a basis for the IPUC's authority the very statute it now deems inapplicable. Rather than appeal the City's decision, IPCO has simply engaged in an end run. IPCO has changed its position so many times that it is difficult to assess what process it believes should apply.

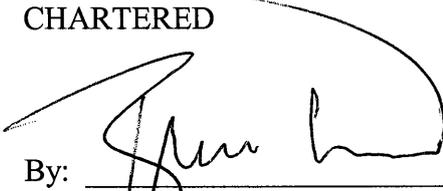
The provisions of Idaho Code § 67-6528 make clear that "if a public utility has been ordered or permitted by a specific order to do an act by the [IPUC]", then conflicting orders by a governmental agency are null and void to the extent the agency's order conflicts with the specific IPUC order. Here, there is no specific order by the IPUC. Thus, there is, by definition, no decision by the City that conflicts with a specific order of the IPUC. This situation takes one back to the Staff's position that there are two judicial review remedies available – one, administrative review under the Administrative Procedure Act and, two review of an IPUC order by the Idaho Supreme Court. Because, there is no City order in conflict with a specific IPUC order, and according to IPCO, since Idaho Code § 67-6528 doesn't even apply, then review pursuant to the APA was consistent with the initial process selected by IPCO and the process envisioned by the Idaho Legislature. IPCO failed to avail itself of this remedy, which is clearly applicable given the manner in which IPUC has proceeded. The IPUC should not validate IPCO's procedural maneuvering by allowing it to pursue its present course. The Complaint should be dismissed. This is both imminently reasonable and legally justified since IPCO now admits its claim for asserted jurisdiction is not valid.

### CONCLUSION

Idaho Power asserts that the basis for its claim as alleged in its Complaint is not valid. Furthermore, Idaho Power failed to avail itself of the remedy that was both available and consistent with the Administrative Procedure Act. Staff's position that Idaho Code § 67-6528 provides a basis for the Complaint is incorrect in that there is no specific order by the IPUC and a conflicting order by the City of Eagle. Accordingly, the IPUC is respectfully requested to dismiss the Complaint in that there is no basis for the IPUC's jurisdiction in this matter. Furthermore, according to IPCO's own memoranda, the Complaint fails to state a cause of action.

DATED this 22 day of September, 2004.

MOORE SMITH BUXTON & TURCKE,  
CHARTERED

By: 

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Bruce M. Smith  
Attorney for City of Eagle, Idaho

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT I HAVE THIS 2 DAY OF SEPTEMBER, 2004, SERVED THE FOREGOING **CITY OF EAGLE'S RESPONSE TO STAFF ANSWER OPPOSING THE CITY OF EAGLE'S MOTION TO DISMISS; AND IDAHO POWER COMPANY'S MEMORANDUM IN OPPOSITION TO THE MOTION OF THE CITY OF EAGLE, IDAHO TO DISMISS**, IN CASE NO. IPC-E-04-4, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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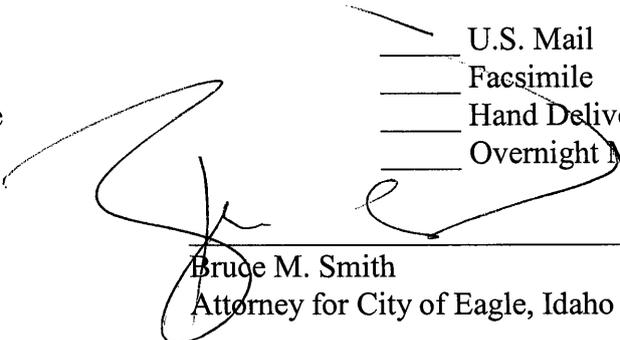
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