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September 21, 2009

VIA HAND DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
P.O. Box 83720
Boise, Idaho 83720-0074

Re: Case No. IPC-E-08-22
Rule H

Dear Ms. Jewell:

Enclosed for filing please find an original and seven (7) copies of Idaho Power Company's Motion to Strike Portions of the Affidavit of Dorrell R. Hansen in the above matter.

Very truly yours,

Lisa D. Nordstrom

LDN:csb
Enclosures

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Attorneys for Idaho Power Company

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION)
OF IDAHO POWER COMPANY FOR) CASE NO. IPC-E-08-22
AUTHORITY TO MODIFY ITS RULE H)
LINE EXTENSION TARIFF RELATED TO) IDAHO POWER COMPANY'S
NEW SERVICE ATTACHMENTS AND) MOTION TO STRIKE PORTIONS
DISTRIBUTION LINE INSTALLATIONS.) OF THE AFFIDAVIT OF DORRELL
) R. HANSEN
)
)

COMES NOW, Idaho Power Company ("Idaho Power"), in accordance with the Idaho Public Utilities Commission's Rules of Procedure ("RP") 56, 261, and 265, as well as Rules 401, 402, 602, 701, and 702 of the Idaho Rules of Evidence ("IRE"), hereby objects and moves the Commission for an Order striking certain paragraphs from the Affidavit of Dorrell R. Hansen submitted in support of Ada County Highway District's ("ACHD") Brief on Reconsideration and Clarification. Idaho Power moves the Commission to strike, in their entirety, paragraphs 3, 6, and 8 and to strike portions of paragraphs 12 and 13 from the Affidavit of Dorrell R. Hansen.

I. INTRODUCTION

Idaho Power makes this evidentiary objection and moves the Commission to strike portions of the Affidavit of Dorrell R. Hansen on the grounds that certain portions of Mr. Hansen's testimony contain inadmissible evidence that lack proper foundation, lack of personal knowledge, lack relevance, and containing conclusory or speculative statements. Specifically, paragraph 3 lacks of relevance and paragraphs 6 and 8 are legal conclusions based upon inadmissible opinion testimony. Additionally, paragraphs 12 and 13 contain conclusory and speculative statements that lack foundation. These paragraphs must be stricken because they fail to comply with minimum evidentiary standards.

II. ARGUMENT

A. Standard of Admissibility.

RP 261 provides that the Idaho Rules of Evidence are generally followed by the Commission. "Rules as to the admissibility of evidence used in the district courts of Idaho in non-jury civil cases are generally followed, but evidence (including hearsay) not admissible in non-jury civil cases may be admitted to determine facts not reasonably susceptible of proof under the Idaho Rules of Evidence." RP 261. As such, the Commission "may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or inadmissible on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho." RP 261. While recognizing that the Commission is not bound by the Idaho Rules of Evidence, such Rules will be utilized to establish each proposition to strike paragraphs from the Affidavit of Dorrell R. Hansen.

B. Inadmissible Portions of the Affidavit of Dorrell R. Hansen.

RP 51 allows for affidavits to be filed in support of any pleading, including applications, petitions, complaints, motions, answers, and consent agreements. However, the evidence set forth therein should satisfy the rules for admissibility for it to be considered. The following paragraphs, or portions of paragraphs, of the Affidavit of Dorrell R. Hansen are inadmissible evidence to be stricken from the Affidavit of Dorrell R. Hansen and excluded accordingly.

1. Paragraph 3 Must be Stricken in Its Entirety.

In paragraph 3 of his Affidavit, Mr. Hansen testifies, "All documents attached as exhibits in this affidavit are true and correct copies of the documents." (Hansen Aff. at 1). As filed with the Commission and served upon Idaho Power, Mr. Hansen's Affidavit neither attaches nor identifies with particularity any exhibits. Therefore, paragraph 3 lacks of relevant evidence and is not admissible. IRE 401 and 402. Striking this paragraph will avoid any future confusion regarding what evidence has been considered by the Commission in this matter.

2. Paragraphs 6 and 8 Must be Stricken in Their Entirety

In paragraphs 6 and 8 of his Affidavit, Mr. Hansen testifies:

6. Under the Idaho Code, ACHD has exclusive jurisdiction, authority, and control over all roads in Ada County and all roads in the cities in Ada County, except for Interstate 84, Interstate 184 and state highways under the jurisdiction and control of the Idaho Transportation Department. See Idaho Code Title 40, Chapters 13 and 14.

(Hansen Aff. at 2).

8. Pursuant to Idaho Code 62-705, utilities have the right to locate in the public rights-of-way, however, the right of the utilities to use the public rights-of-way cannot be regarded as a permanent property right. Generally, when a road project impacts a utility in the public right-of-way, the utility is responsible for relocations and adjustments in a manner and at such places as to not to inconvenience public use.

(Hansen Aff. at 2). Each of these paragraphs describes the application of Idaho law by ACHD and further contains citation to the corresponding Idaho Code sections as support. A witness may only testify on matters of which he has personal knowledge. IRE 602. No foundation has been laid establishing Mr. Hansen as a witness qualified to interpret the Idaho Code or opine on the legal issues before the Commission.

The Affidavit is ambiguous as to whether Mr. Hansen is attempting to testify as a lay witness or as an expert witness. If Mr. Hansen's Affidavit is intended as testimony of a lay witness, it is not based on actual knowledge, nor is it rationally based on his perception as a witness, nor is it helpful to a clear understanding of his testimony or the determination of a fact in issue. IRE 701. Therefore, each of these paragraphs consists wholly of legal conclusions given by a lay witness. "A lay witness is never permitted to give his opinion on a question of law." *Hawkins v. Chandler*, 88 Idaho 20, 26, 396 P.2d 123, 126 (1964).

Even if Mr. Hansen's Affidavit is intended as testimony of an expert witness, no foundation has been laid establishing Mr. Hansen's qualifications to interpret Idaho law. These paragraphs are improper opinion testimony and must be struck.

3. Paragraphs 12 and 13 Must be Partially Stricken.

In paragraphs 12 and 13 of his Affidavit, Mr. Hansen testifies:

12. I have extensive knowledge of ACHD's interactions with utilities in Ada County, including Idaho Power, on issues involving utility relocations in the public rights-of-way on road projects. The Utility Division was created in an effort to coordinate the relocation of utilities on road projects. *Historically, ACHD has had extensive problems in getting some utilities to relocate in a timely manner. The lack of coordination of utilities for road projects has caused delay and contractor claims for road projects.*

(Hansen Aff. at 3 (emphasis added)).

13. I have reviewed the Idaho Public Utilities Commission Rule 10, which transfers ACHD's authority to control the timing of the relocation of utilities to Idaho Power. *Rule 10 will severely [sic] impact ACHD's statutory responsibility to develop road projects and the public's use of the right-of-way.*

(Hansen Aff. at 3 (emphasis added)). Neither paragraph 12 nor 13 assist the Commission, the trier of fact, because neither meets the basic criteria for admissibility. Each paragraph lacks of any foundation establishing the basic information that might make them relevant, including, who or what utilities ACHD has had problems with, when such problems occurred, and the circumstances of the situation(s) from which such problems arose. There is utterly no explanation as to why "Rule 10 will severely [sic] impact ACHD's statutory responsibility to develop road projects" Without this basic information, how can the Commission determine either the credibility or the relevance of the purported testimony?

"Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency [for a supporting affidavit]." *Esser Elec. v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 917, 188 P.3d 854, 859 (2008)

(applying evidentiary requirements of Idaho R. Civ. Pro. 56(e)). The italicized portion of paragraph 12 creates the implication that ACHD's problems have been with Idaho Power; however, no facts are presented that validate such implications. The italicized portion of paragraph 12 is a conclusory and speculative statement that wholly lacks of foundation. Further, paragraph 13 contains speculative and conclusory statements of what could happen, not statements of what has actually happened. The italicized portions of paragraphs 12 and 13 are inadmissible evidence and should be struck accordingly.

III. CONCLUSION

For the foregoing reasons, Idaho Power respectfully requests that the Commission grant, in its entirety, this Motion to Strike.

DATED at Boise, Idaho, this 21st day of September 2009.


LISA D. NORDSTROM
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21ST day of September 2009 I served a true and correct copy of IDAHO POWER COMPANY'S MOTION TO STRIKE PORTIONS OF THE AFFIDAVIT OF DORRELL R. HANSEN upon the following named parties by the method indicated below, and addressed to the following:

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