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February 10, 2012

VIA HAND DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho 83702

Re: Case No. IPC-E-08-22
**IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY
FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF
RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE
INSTALLATIONS**

Dear Ms. Jewell:

Enclosed for filing please find an original and seven (7) copies of Idaho Power Company's Answer to the Ada County Highway District's Memorandum in Opposition to Idaho Power Company's Amended Motion to Accept Conforming Rule H Section 10 Tariff in the above matter.

Very truly yours,

Lisa D. Nordstrom

LDN:csb
Enclosures

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IDAHO PUBLIC
 UTILITIES COMMISSION

Attorneys for Idaho Power Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE)	
APPLICATION OF IDAHO POWER)	CASE NO. IPC-E-08-22
COMPANY FOR AUTHORITY TO)	
MODIFY ITS RULE H LINE)	IDAHO POWER COMPANY'S
EXTENSION TARIFF RELATED TO)	ANSWER TO THE ADA COUNTY
NEW SERVICE ATTACHMENTS AND)	HIGHWAY DISTRICT'S
DISTRIBUTION LINE INSTALLATIONS.)	MEMORANDUM IN OPPOSITION
)	TO IDAHO POWER COMPANY'S
)	AMENDED MOTION TO ACCEPT
)	CONFORMING RULE H SECTION 10
)	TARIFF
)	

Pursuant to the Idaho Public Utilities Commission's ("Commission" or "IPUC") RP 57 and RP 256, Idaho Power Company ("Idaho Power" or "Company"), by and through its attorneys of record, hereby submits its Answer to the Ada County Highway District's ("ACHD") Memorandum in Opposition to Idaho Power Company's Amended Motion to Accept Conforming Rule H Section 10 Tariff filed on January 25, 2012.

I. BACKGROUND

Following is a summary of the proceedings which have led to Idaho Power's current Answer to ACHD's Memorandum in Opposition in this case.

A. Commission Order No. 30853.

On November 30, 2009, the Commission issued Order No. 30853 approving the addition of Sections 10 and 11 to Idaho Power's Rule H line extension tariff. Sections 10 and 11 set forth certain rules authorizing Idaho Power to recover the cost of distribution line relocations from public road rights-of-way from private beneficiaries.

B. ACHD v. IPUC.

ACHD objected to Sections 10 and 11 and appealed the Commission's decision in Order No. 30853 to the Idaho Supreme Court, claiming that Sections 10 and 11 exceeded the Commission's statutory authority. The Supreme Court issued its decision in *Ada County Highway Dist. v. Idaho Public Utilities Commission*, 253 P.3d 675 (Idaho 2011) ("*ACHD v. IPUC*") on May 25, 2011, holding that Sections 10 and 11 exceeded the Commission's authority under Idaho's public utility statutes.

C. Amended Section 10.

In response to the Supreme Court's decision in *ACHD v. IPUC*, Idaho Power filed its Amended Motion to Accept Conforming Rule H Section 10 Tariff with the Commission on January 11, 2012 ("Conforming Motion"). The Conforming Motion proposes to replace Rule H Sections 10 and 11, which the Supreme Court found to be deficient in *ACHD v. IPUC*, with a new amended Rule H Section 10 ("Amended Section 10"). Idaho Power's Conforming Motion was made under Idaho Code § 61-629, which provides that if an order of the Commission is set aside in whole or in part by the Supreme Court, any party to the proceeding may file a motion with the Commission to amend the order appealed from to meet the objections of the Court.

Idaho Power consulted with ACHD in an attempt to reach an agreement on the wording of Amended Section 10. As described in the Conforming Motion, Idaho Power

and ACHD reached agreement on the wording of the first two paragraphs of Amended Section 10, but ACHD did not agree with the wording of the final sentence of the third paragraph of Amended Section 10. Idaho Power and ACHD were not able to reach agreement on this sentence and Idaho Power proceeded with its filing of the Conforming Motion.

D. ACHD's Memorandum in Opposition.

In response to Idaho Power's Conforming Motion, ACHD filed its Memorandum in Opposition on January 25, 2012. ACHD's Memorandum in Opposition objects to all three paragraphs of Idaho Power's Amended Section 10, asserting that the language of Amended Section 10 "expressly contradicts the Idaho Supreme Court's opinion" in *ACHD v. IPUC*.

II. ARGUMENT

Idaho Power believes that Amended Section 10 conforms with the Supreme Court's decision in *ACHD v. IPUC* and should be adopted by the Commission, notwithstanding the objections raised by ACHD in its Memorandum of Opposition. Following is an analysis of the three paragraphs contained in Amended Section 10, including a rebuttal of the objections raised by ACHD to each paragraph.

A. Section 10, Paragraph 1.

The first paragraph of Amended Section 10 reads as follows:

The Company often locates its distribution facilities within state and local public road rights-of-way under authority of Idaho Code § 62-705 (for locations outside Idaho city limits) and the Company's city franchise agreements (for locations within Idaho city limits). When the Company is notified of a road improvement project pursuant to Idaho Code § 40-210, the Company will meet with the Public Road Agency as provided in Idaho Code § 40-210.

This paragraph replaces the former Rule H Section 11 which the Supreme Court found exceeded the Commission's jurisdiction in *ACHD v. IPUC*. The former Section 11 read as follows:

11. Eliminating or Minimizing Relocation Costs in Public Road Rights-of-Way.

Pursuant to Idaho Code § 40-210, the Company will participate in project design or development meetings upon receiving written notice from the Public Road Agency that a public road project may require the relocation of distribution facilities. The Company and other parties in the planning process will use their best efforts to find ways to eliminate the cost of relocating utility facilities, or if elimination is not feasible, to minimize the relocation costs to the maximum extent reasonably possible. This provision shall not limit the authority of the Public Road Agency over the public road right-of-way. (Emphasis added.)

The Supreme Court held that Section 11's reference to "and other parties" exceeded the authority of the Commission because the Commission did not have authority to order "other parties" to use their best efforts to minimize relocation costs. This point has been corrected in the first paragraph of Amended Section 10, which is directed exclusively at Idaho Power: ". . . the Company will meet with the Public Road Agency as provided in Idaho Code § 40-210." This is a simple instruction for Idaho Power to meet with public highway agencies on public road projects as contemplated in § 40-210, which states in part:

(2) In furtherance of the legislative intent expressed in subsection (1) of this section, public highway agencies engaged in a public highway project that may require the relocation of utility facilities, or any private party working with a public highway agency on a project that may require the relocation of utility facilities in connection therewith, shall permit the affected utility to participate in project development meetings. In addition, at the beginning of the preliminary design phase of the project, the public highway

agency shall, upon giving written notice of not less than thirty (30) days to the affected utility, meet with the utility for the purpose of allowing the utility to review plans, understand the goals, objectives and funding sources for the proposed project, provide and discuss recommendations to the public highway agency that would reasonably eliminate or minimize utility relocation costs, limit the disruption of utility services, eliminate or reduce the need for present or future utility facility relocation, and provide reasonable schedules to enable coordination of the highway project construction and such utility facility relocation as may be necessary. While recognizing the essential goals and objectives of the public highway agency in proceeding with and completing a project, the parties shall use their best efforts to find ways to (a) eliminate the cost to the utility of relocation of the utility facilities, or (b) if elimination of such costs is not feasible, minimize the relocation costs to the maximum extent reasonably possible. (Emphasis added.)

The first paragraph of Amended Section 10 has been modified to meet the findings of the Supreme Court in *ACHD v. IPUC*, does not affect ACHD, and should be adopted by the Commission.

B. Section 10, Paragraph 2.

The second paragraph of Amended Section 10 reads as follows:

If a Public Road Agency determines that the Company's facilities incommode the public use of any road, highway or street, the Public Road Agency can require the Company to relocate or remove the facilities. If a Public Road Agency determines that the Company's facilities must be relocated or removed because they incommode the public use of the road, highway or street, the Company will relocate its distribution facilities from or within the public road rights-of-way and the Company will bear the costs of such relocation.

ACHD claims in its Memorandum in Opposition that this paragraph should be stricken because it "attempts to establish limits as to when a Public Road Agency 'can require' Idaho Power to relocate or remove its facilities from the public rights-of-way and when Idaho Power will bear the cost of such relocation." ACHD Memorandum in

Opposition at 11-12. Idaho Power disagrees with this interpretation. As with the first paragraph above, the second paragraph of Section 10 has no application whatsoever to Public Road Agencies and does not in any way restrict the rights of Public Road Agencies to require utilities to relocate or remove their facilities from public road rights-of-way under Idaho law.

The purpose of the second paragraph is simply to describe how Idaho Power typically relocates its facilities from road rights-of-way in Idaho. This background description is helpful as a lead-in to paragraph three, which provides substantive rules for Idaho Power's recovery of relocation costs from Private Beneficiaries. The second paragraph is not intended to provide an exhaustive list of all conditions under which Idaho Power is to relocate or remove its facilities from the public road right-of-way. It simply states, by far, the most common reason for descriptive purposes – where the Company's facilities "incommode the public use" (as referenced in Idaho Code § 62-705, authorizing electric utilities to locate their facilities in county road rights-of-way). Nothing in the second paragraph is inaccurate or detracts in any way from the legal rights of Public Road Agencies to require utilities to relocate their facilities from road rights-of-way at the cost of the utility.

C. Section 10, Paragraph 3.

The third paragraph of Amended Section 10 reads as follows:

If the Company determines that one or more Private Beneficiaries has, directly or indirectly through a Public Road Agency, requested that the Company's facilities be relocated or removed for the benefit of the Private Beneficiaries, the Company will use reasonable efforts to recover that portion of the total Relocation or removal costs attributable to the request from the Private Beneficiaries. If the Private Beneficiaries dispute the Company's calculation of the Private Beneficiaries' cost responsibility, either the Company

or the affected Private Beneficiaries may initiate a proceeding to have the Commission establish the reasonableness of the Company's calculation of the Relocation or removal cost responsibility as between the Company and the Private Beneficiaries.

ACHD argues in its Memorandum in Opposition that the third paragraph of Amended Section 10 should be stricken, in part because "The Idaho Supreme Court expressly held [in *ACHD v. IPUC*] that the Commission does not have 'authority to determine whether the relocation, in whole or in part, is for the benefit of a third party.'" ACHD Memorandum in Opposition at 12. ACHD should read the third paragraph more closely. In order to conform with the Supreme Court's holding, the third paragraph of Amended Section 10 now focuses on a "request" from a Private Beneficiary for the relocation of Idaho Power facilities from the road right-of-way. The request from the Private Beneficiary may be made either "directly or indirectly through a Public Road Agency." The Supreme Court stated unequivocally that when a private party (Private Beneficiary) *requests* utility services such as relocation of utility facilities, the Commission's primary jurisdiction is invoked.

The Supreme Court stated in *ACHD v. IPUC* at 682:

IPUC certainly has the authority to determine the costs that Company can charge a private person who requests services from Company. However, Section 10 goes further than that. Under Section 10, when a Public Road Agency [FN3] requires that Idaho Power relocate its distribution facilities, IPUC has the authority to determine whether the relocation, in whole or in part, is for the benefit of a third party. If it determines that it is, then Section 10 would allocate all or a portion of the costs of relocation to that third party. Thus, IPUC could require a third party to pay for services that the third party did not request from Company if IPUC determined that a relocation required by a Public Road Agency benefited the third party. IPUC has not pointed to any statute granting it that authority. (Emphasis added.)

This paragraph sets forth the Supreme Court's basis for concluding that the original Section 10 exceeded the Commission's authority. However, unlike ACHD, Idaho Power does not believe the Supreme Court stated that the Commission never has authority to determine who should pay for a relocation of utility facilities located in the public right-of-way. Idaho Power believes that the critical distinction in the Supreme Court's analysis is whether the Private Beneficiary has requested service from Idaho Power. Under this analysis, the Commission could in fact allocate costs to a Private Beneficiary if it were determined that the Private Beneficiary requested the relocation services in question from Idaho Power.

ACHD also asserts that the third paragraph of Amended Section 10 should be stricken because it states that the Company or a Private Beneficiary may request that the Commission establish the reasonableness of the "Company's calculation of the Relocation or removal cost responsibility as between the Company and the Private Beneficiaries." According to ACHD, the Commission cannot make such a determination based on the Supreme Court's holding in *ACHD v. IPUC*. Idaho Power disagrees.

The Supreme Court found that power line relocations represent a "service" by Idaho Power ("The performance of any service indicates action by the public utility, which reasonably includes removing and reinstalling distribution facilities") and also held that the Commission has authority to review and approve the costs of such services ("IPUC certainly has the authority to determine the costs that Company can charge a private person who requests services from Company"). See *ACHD v. IPUC* at 682.

Thus, it is clear from the Supreme Court's decision that (1) relocating facilities is a service performed by Idaho Power and (2) the Commission has authority to determine

the costs Idaho Power can charge to parties who request such services. This is precisely the process described in the final sentence of Amended Section 10:

If the Private Beneficiaries dispute the Company's calculation of the Private Beneficiaries' cost responsibility, either the Company or the affected Private Beneficiaries may initiate a proceeding to have the Commission establish the reasonableness of the Company's calculation of the Relocation or removal cost responsibility as between the Company and the Private Beneficiaries.

ACHD cites another portion of the Supreme Court's holding in *ACHD v. IPUC* which references the Commission's statements in oral argument relating to the Commission's jurisdiction:

During oral argument, IPUC admitted that it could not adjudicate the dispute between the third party and Company. It also admitted that if Company wanted to recover relocation costs from a third party, it would have to sue in court and Section 10 would not apply.

See *ACHD v. IPUC* at 683. Whether the Commission could adjudicate a dispute between the third party and the Company under the previous Section 10 would have been an important issue for the Commission to address if that section were still under review. However, it is crystal clear that the Commission *does* have authority to adjudicate a dispute under the Amended Section 10, based on the Supreme Court's holding that facility relocations are a service and that "IPUC certainly has the authority to determine the costs that Company can charge a private person who requests services from Company." *Id.* at 682. The Commission adjudicates such disputes between utilities and their customers all the time.

As to the reference to the Company's need to "sue in court" to enforce Section 10, this is an accurate statement to the extent that if the Commission were to find that a Private Beneficiary owes a certain amount to Idaho Power for relocation services

performed for the Private Beneficiary, then the Company would have to sue in court to actually collect the amount owed if the Private Beneficiary did not pay. This is Idaho Power's standard procedure whenever a third party does not pay an amount owed to the Company, whether the payment is for a power bill or for other services provided by the Company.

III. CONCLUSION

For the reasons described herein, Idaho Power maintains that Amended Section 10 is in conformance with the Supreme Court's decision in *ACHD v. IPUC*. The Supreme Court held that the Commission could not require a third party to pay for services that the third party did not request from the Company, and Amended Section 10 now expressly requires a direct or indirect request for relocation services by the Private Beneficiary. Accordingly, Amended Section 10 is within the Commission's scope of authority as described in *ACHD v. IPUC*.

Respectfully submitted this 10th day of February 2012.



LISA D. NORDSTROM
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of February 2012 I served a true and correct copy of IDAHO POWER COMPANY'S ANSWER TO THE ADA COUNTY HIGHWAY DISTRICT'S MEMORANDUM IN OPPOSITION TO IDAHO POWER COMPANY'S AMENDED MOTION TO ACCEPT CONFORMING RULE H SECTION 10 TARIFF upon the following named parties by the method indicated below, and addressed to the following:

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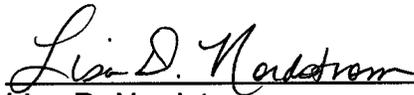
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