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June 15, 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  
Modification of Rule H Line Extension Tariff – Reply to Briefs on  
Reconsideration

Dear Ms. Jewell:

Enclosed for filing in the above-referenced matter are an original and seven (7) copies of Idaho Power Company's Reply to Briefs on Reconsideration.

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	)	REPLY TO BRIEFS ON
DISTRIBUTION LINE INSTALLATIONS.	)	RECONSIDERATION
	)	

Pursuant to the Idaho Public Utilities Commission's ("Commission") RP 255 and 332, Idaho Power Company ("Idaho Power" or "Company"), by and through its attorneys of record, hereby submits this Reply to Briefs on Reconsideration in response to Ada County Highway District's Brief in Response to Order No. 32532 ("ACHD Brief") and Build Idaho Inc.'s Brief in Response to Order No. 32532 ("Build Idaho Brief") (together the "Briefs").

**I. BACKGROUND**

On May 25, 2011, the Idaho Supreme Court issued its decision in *Ada County Highway Dist. v. Idaho Public Utilities Commission*, 253 P.3d 675 (Idaho 2011) ("ACHD

*v. IPUC*”), holding that the Commission’s approval of Sections 10 and 11 of Idaho Power’s Rule H regarding power line relocations from public road rights-of-way exceeded the Commission’s authority under Idaho’s public utility statutes. On July 14, 2011, Idaho Power filed a motion with the Commission requesting approval of a new Rule H Section 10, to replace Sections 10 and 11 which had been partially set aside by the Idaho Supreme Court in *ACHD v. IPUC*. Idaho Power subsequently held discussions with ACHD to address potential changes to the new Section 10 that would meet ACHD’s objections to the section. The parties were not able to agree on all changes to Section 10. However, Idaho Power did amend Section 10 to include several of the changes discussed with ACHD and filed the amended Rule H Section 10 for approval by the Commission on January 11, 2012.

On March 7, 2012, the Commission issued Order No. 32476, which approved Rule H Section 10 as proposed by Idaho Power, with certain modifications by the Commission (“Current Section 10”). Current Section 10 is presently in force under Rule H and is attached hereto as Attachment No. 1. ACHD and Build Idaho filed petitions for reconsideration of the Commission’s decision, and the Commission held a hearing for oral argument on the petitions on April 19, 2012 (“Oral Argument”).

On April 24, 2012, the Commission issued Order No. 32532, which granted reconsideration of Commission Order No. 32476, specifically to address third-party requests to relocate Idaho Power facilities which are located in the public road right-of-way. On May 18, 2012, ACHD, Build Idaho, and Idaho Power filed their respective briefs and affidavits in response to Order No. 32532. Idaho Power is now responding to the ACHD and Build Idaho Briefs.

## **II. ARGUMENT**

The Commission provided a very specific grant of reconsideration in Order No. 32532:

The Commission has determined to grant reconsideration solely to provide the parties an opportunity to develop the record regarding paragraph 3 of Section 10, more specifically, to clarify in the record whether a third party may request relocation of Idaho Power's facilities that are located in a public roadway from Idaho Power.

Idaho Power responded to Order No. 32532 with a specific list of projects in which third parties have requested the relocation of Company facilities located within the public road right-of-way in recent years. Exhibit A to David R. Lowry Affidavit filed with Idaho Power Company's Answer to Petitions for Reconsideration dated April 4, 2012. Neither Build Idaho nor ACHD provided any evidence or argument in their respective Briefs contrary to Idaho Power's position stated at the Oral Argument—that the Company does in fact receive requests from third parties from time to time to relocate Company facilities which are located within the public road right-of-way, with the cost of relocation being paid by the requesting party (Hearing Transcript at 28-29, 34). Thus, the sole question raised by the Commission in its grant of reconsideration in Order No. 32532 has been answered affirmatively—third parties can and do request the relocation of Idaho Power facilities that are located in a public roadway, as represented by the Company at the Oral Argument.

ACHD and Build Idaho raise other arguments in their respective Briefs which do not address the Commission's grant of reconsideration in Order No. 32532. These arguments largely repeat the positions previously stated by ACHD and Build Idaho in this proceeding, and Idaho Power's responses to those arguments are already set forth in

the record for this case. However, Idaho Power does wish to respond to several new or modified arguments ACHD and Build Idaho have included in their Briefs. While these arguments are well beyond the scope the Commission's grant of reconsideration in Order No. 32532, Idaho Power believes they should be addressed to assist the Commission in properly evaluating the pending petitions for reconsideration filed by ACHD and Build Idaho.

**A. The Commission's Authority to Alter or Amend Its Prior Order Issued in This Proceeding.**

The Commission has authority to approve Current Section 10 under Idaho Code § 61-629. Section 61-629 sets forth the process for the Idaho Supreme Court to review orders of the Commission, and the final sentence of the statute describes the procedure for the Commission to amend its orders which have been set aside in whole or in part by the Court:

In case the order of the commission is set aside or set aside in part, the commission, upon its own motion or upon motion of any of the parties, may alter or amend the order appealed from to meet the objections of the court in the manner prescribed in section 61-624, Idaho Code.

Idaho Code § 61-624 sets forth the procedures for the Commission to rescind, alter, or amend its orders:

61-624. Rescission or change of orders. The commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions.

The Commission has followed the procedures described in Idaho Code §§ 61-629 and 61-624 to modify its order partially set aside by the Idaho Supreme Court in *ACHD v. IPUC* and the Commission can accordingly proceed with its approval of Current Section 10.

ACHD and Build Idaho argue in their respective Briefs that the Commission is prohibited from making any changes to its Order partially set aside by the Idaho Supreme Court in *ACHD v. IPUC*, other than changes that address the objections of the Court. The ACHD Brief states, "After the Idaho Supreme Court's decision, the Commission is authorized only to alter or amend the order to meet the objections of the Court." (Emphasis added.) However, the word "only" is nowhere to be found in Idaho Code § 61-629. If the Idaho legislature had intended to limit the Commission's authority to alter or amend its orders set aside by the Idaho Supreme Court to the extent argued by ACHD and Build Idaho, it would have clearly said so in Idaho Code § 61-629 by stating that the Commission "may alter or amend the order appealed from only to meet the objections of the court." However, the legislature did not choose to restrict the Commission's authority in this manner, and the Commission is not limited in its review of Rule H Section 10 to make only those changes which meet the objections raised by the Court in *ACHD v. IPUC*.

**B. ACHD's Misunderstanding of the Third Paragraph of Section 10.**

The ACHD Brief suffers from a fundamental misunderstanding of the application of the third paragraph of Section 10. The ACHD Brief states, "Section 10 addresses utility relocation demands from Public Road Agencies." (Emphasis in original.) ACHD Brief, p. 2. However, the third paragraph of Current Section 10 does not focus on

relocation requests from Public Road Agencies; *it focuses on relocation requests from Private Beneficiaries*. The third paragraph of Section 10 states, "If one or more Private Beneficiaries has, directly or indirectly through a Public Road Agency, requested that the Company's facilities be relocated or removed. . . ." Attachment No. 1, third paragraph. This focus on Private Beneficiary relocation requests is further emphasized in the revised language offered by Idaho Power in its April 4, 2012, brief in this proceeding, which states "If one or more Private Beneficiaries has requested that the Company's facilities be relocated or removed. . . ." Idaho Power Company's Answer to Petitions for Reconsideration, p. 7. This language clearly demonstrates that the focus of the third paragraph of Current Section 10 is on relocation requests made by Private Beneficiaries, not requests made by road agencies as indicated by ACHD.

ACHD's mistaken belief that the third paragraph of Section 10 applies to relocation requests from Public Road Agencies rather than from Private Beneficiaries leads ACHD to the erroneous conclusion that the third paragraph violates the holding of the Idaho Supreme Court in *ACHD v. IPUC*. In actuality, the third paragraph of Current Section 10 has been modified specifically to follow the Court's holding by focusing on whether a third party has made a request to Idaho Power to relocate Company facilities from the public road right-of-way. The Idaho Supreme Court stated in *ACHD v. IPUC* that "IPUC certainly has the authority to determine the costs that Company can charge a private person who requests services from Company," but further found that Section 10 exceeded the Commission's authority because "IPUC could require a third party to pay for services that the third party did not request from Company. . . ." *ACHD v. IPUC*, 253 P. 3d at 682-83.

The revised third paragraph of Current Section 10 responds directly to the Idaho Supreme Court's holding by applying only where a Private Beneficiary has "requested that the Company's facilities be relocated or removed. . . ." As indicated above, the third paragraph of Current Section 10 states, "If one or more Private Beneficiaries has, directly or indirectly through a Public Road Agency, requested that the Company's facilities be relocated or removed. . . ." The alternative language offered by Idaho Power states, "If one or more Private Beneficiaries has requested that the Company's facilities be relocated or removed. . . ." The focus of these provisions on relocation requests made by Private Beneficiaries specifically follows the Court's holding in *ACHD v. IPUC*.

**C. Rule H Section 6 and Section 10.**

ACHD and Build Idaho also assert in their Briefs that private party requests for relocations of facilities from road rights-of-way should be covered by the relocation provisions in Section 6. However, Idaho Power believes that relocations from road rights-of-way are often viewed differently by third parties and thus it is appropriate to address such relocations separately in Section 10.

In situations where Company power lines are located on private easements, it is clear that a third party desiring to have the power line relocated must pay the cost of the relocation to Idaho Power. However, if the power line is located in a road right-of-way, the third party may believe that it is not required to pay for the relocation of the power line, particularly if the relocation was required by a Public Road Agency. Section 10 helps clarify in these instances that the third party is in fact required to pay for the relocation of facilities it wishes to have relocated from the road right-of-way, just as if the facilities were located on a private easement. This is the procedure that was followed in

the examples of third-party relocations from public road rights-of-way that Idaho Power provided as Exhibit A to Mr. Lowry's Affidavit in this proceeding, and Section 10 helps clarify to third parties that this is the proper procedure to be followed when the private party wishes to relocate Company facilities located within the public road right-of-way.

Idaho Power strives to make its tariffs clear and understandable to its customers and other interested parties, who are not always familiar with the details of the Company's service rules. Thus, while both Section 6 and Section 10 of Rule H address relocations of Company facilities at the request of third parties, the specific provisions of Section 10 provide a more complete and detailed description of the requirements for third-party relocations of Company facilities located in the public road rights-of-way. Section 10 does not conflict with Section 6 in any way, nor does it cause any harm in specifically describing the relocation rules that apply to third-party relocations from public road rights-of-way. Accordingly, Idaho Power believes that Section 10 should be retained to specifically address the important category of third-party relocations from public road rights-of-way.

**D. ACHD's Proposed Section 10.**

ACHD has proposed a revised Rule H Section 10 in Exhibit A to the ACHD Brief. While Idaho Power recognizes ACHD's effort to provide alternate language that would satisfy ACHD's concerns with Section 10, the Company believes that the three-paragraph version of Current Section 10 provides a more complete depiction of Section 10 for reference by Idaho Power's customers and other interested parties.

ACHD's proposed Section 10 combines the first two paragraphs of Current Section 10 into one paragraph.

Current Section 10:

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 to § 40-210.

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 Proposed Section 10:

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). At the request of a Public Road Agency, the Company will relocate its distribution facilities from or within the public rights-of-way and the company will bear the costs of such relocation.

Idaho Power does not support a change to the first two paragraphs of Current Section 10 because (1) the paragraphs are consistent with the Idaho Supreme Court's decision in *ACHD v. IPUC* and (2) the paragraphs would not impact ACHD.

The first paragraph of Current Section 10 was previously included in Section 11 of Rule H that was reviewed by the Idaho Supreme Court in *ACHD v. IPUC*. The Court determined that Section 11 exceeded the Commission's authority, solely due to the

inclusion of the phrase “and other parties” (*ACHD v. IPUC*, 253 P.3d at 683), as indicated below:

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.)

In response to this finding by the Idaho Supreme Court, Idaho Power replaced former Section 11 with the new sentence in the first paragraph of Current Section 10 above, which states, “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 to § 40-210.” This change satisfies the objection of the Court by removing the phrase “and other parties.” However, ACHD maintains that the sentence still exceeds the Commission’s authority because it directs ACHD to meet with Idaho Power and take other actions under § 40-210. Idaho Power disagrees with this interpretation and supports the statement of Commissioner Smith at the Oral Argument:

So why are you [ACHD] worried about us directing the Company, because when you look at section 3 there in 40-210, it says if a utility has received notice of the preliminary design meeting as set forth in subsection 2 of this section and has failed to respond or participate, such failure shall not in any way affect the ability of the public highway agencies to proceed, so that tells me that if you give the notice and a utility doesn’t participate, then you go ahead with it and they’ve lost their opportunity, so this sentence to me is telling

the utility that you better be on your toes and participate when you get the notice, and I can't in my wildest imagination see how that directs any road agency to do anything.

April 19, 2012, Transcript at p. 17, ll. 3-16.

ACHD also reiterates its objection to the phrase "incommode the public use" in the second paragraph of Current Section 10. As Idaho Power stated in its brief dated February 10, 2012, in this proceeding, the second paragraph of Current Section 10 is not intended to provide an exhaustive list of all conditions under which the Company is to relocate or remove its facilities from the public road right-of-way. Idaho Power Company's Answer to Petitions for Reconsideration, pp. 5-6. It simply states the far most common reason to relocate or remove facilities, 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 no cost to the Public Road Agency.

ACHD proposes a change to the third paragraph of Current Section 10.

Current Section 10:

If one or more Private Beneficiaries has, directly or indirectly through a Public Road Agency, requested that the Company's facilities be relocated or removed, 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 Proposed Section 10:

As set forth in Section 6, if an Applicant or Additional Applicant requests a Relocation of Company facilities within a public road right-of-way, the Applicant or Additional Applicant will pay a non-refundable charge equal to the Cost Quote.

As noted above, Idaho Power has offered alternative language for the Commission's consideration that would change the phrase "If one or more Private Beneficiaries has, directly or indirectly through a Public Road Agency, requested that the Company's facilities be relocated or removed . . ." to "If one or more Private Beneficiaries has requested that the Company's facilities be relocated or removed . . . ." Also as noted above, Idaho Power believes that the more detailed description of private party relocations from public road rights-of-way in Section 10 is beneficial for customers and other interested parties considering such relocations. In particular, the reference to the right of the Private Beneficiary or Idaho Power to initiate a proceeding to have the Commission establish the reasonableness of the Company's calculation of relocation costs for the Private Beneficiary is of significant value. Accordingly, Idaho Power supports retaining Current Section 10 in its present form, with the insertion of the alternate language for the first sentence of Section 10 if deemed appropriate by the Commission.

**III. CONCLUSION**

Based on the foregoing analysis, it is clear that Current Section 10 meets the objections of the Idaho Supreme Court in *ACHD v. IPUC*. The Court held in *ACHD v. IPUC* that the Commission could not require a third party to pay for the cost of relocating

Idaho Power facilities located in the public road right-of-way if the third party had not requested the relocation. Current Section 10 now addresses this point by applying specifically to relocation requests made by Private Beneficiaries. Current Section 10 also addresses the Idaho Supreme Court's objection in *ACHD v. IPUC* that the Commission did not have authority to direct "other parties" to comply with the meeting requirements of Idaho Code § 40-210. As noted above, this language has been removed from the first paragraph of Current Section 10, which now applies exclusively to Idaho Power's compliance with the requirements of Idaho Code § 40-210.

Because Current Section 10 complies with the objections of the Idaho Supreme Court in *ACHD v. IPUC*, the Commission should approve Current Section 10 under the authority granted to it under Idaho Code § 61-629.

Respectfully submitted this 15<sup>th</sup> day of June 2012.

  
\_\_\_\_\_  
LISA D. NORDSTROM  
Attorney for Idaho Power Company

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15<sup>th</sup> day of June 2012 I served a true and correct copy of IDAHO POWER COMPANY'S REPLY TO BRIEFS ON RECONSIDERATION upon the following named parties by the method indicated below, and addressed to the following:

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Christa Beary, Legal Assistant 

**BEFORE THE**  
**IDAHO PUBLIC UTILITIES COMMISSION**  
**CASE NO. IPC-E-08-22**  
**IDAHO POWER COMPANY**

**ATTACHMENT NO. 1**

## **10. Relocations in Public Road Rights-of-Way**

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 to § 40-210.

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.

If one or more Private Beneficiaries has, directly or indirectly through a Public Road Agency, requested that the Company's facilities be relocated or removed, 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.