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IDAHO PUBLIC UTILITIES COMMISSION

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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.)
_____)

CASE NO. IPC-E-08-22

ADA COUNTY HIGHWAY DISTRICT'S
MEMORANDUM IN OPPOSITION TO
IDAHO POWER COMPANY'S
AMENDED MOTION TO ACCEPT
CONFORMING RULE H SECTION 10
TARIFF

The Ada County Highway District ("ACHD"), in accordance with Idaho Code § 61-629
and Procedural Rule 57.03 submits this memorandum in opposition to Idaho Power Company's

ADA COUNTY HIGHWAY DISTRICT'S MEMORANDUM IN OPPOSITION
TO IDAHO POWER COMPANY'S AMENDED MOTION TO ACCEPT
CONFORMING RULE H SECTION 10 TARIFF - 1

("Idaho Power" or "Company") Amended Motion to Accept Conforming Rule H Section 10
Tariff.

I. INTRODUCTION

In a May 25, 2011, Opinion, the Idaho Supreme Court set aside Section 10 and 11 of Idaho Power's Rule H Tariff, which purported to allocate utility relocation costs between Idaho Power and Private Beneficiaries when Public Road Agencies require Idaho Power to relocate its facilities on public rights-of-way. *See Ada County Highway Dist. v. Idaho Public Utilities Commission*, 253 P.3d 675 (Idaho 2011) ("*ACHD v. IPUC*"). Under Section 10, Private Beneficiaries would have been required to reimburse Idaho Power for all or a portion of its utility relocation costs if the Idaho Public Utilities Commission (the "Commission") determined that a public road improvement project that necessitated utility relocation was for the benefit of Private Beneficiaries. Section 11 required Public Road Agencies and other parties to "use their best efforts to find ways to eliminate the cost of relocating utility facilities." In its Opinion, the Idaho Supreme Court reached the following conclusions:

- (1) ACHD has the authority to determine if Idaho Power's facilities incommode the public use of any road, highway, or street and also has the authority to require Idaho Power to relocate its facilities at Idaho Power's cost and expense.
- (2) The Commission does not have authority to determine whether a utility relocation on public rights-of-way is for the benefit of Private Beneficiaries;
- (3) The Commission does not have authority to adjudicate disputes between Idaho Power and Private Beneficiaries as to utility relocation costs;
- (4) The Commission does not have authority to order "other parties" including Public Road Agencies, to minimize relocation costs or to otherwise comply with Idaho Code § 40-210.

(5) The percentage of road improvement costs that a third party agrees to pay a Public Road Agency may bear no relationship to the percentage of the relocation costs that allegedly benefit the third party.

Idaho Power has now requested, pursuant to Idaho Code § 61-629, that the Commission approve a modified version of Rule H Tariff Sections 10 and 11. Under that statute, the Commission “may alter or amend the order appealed from to meet the objections of the court.” *Id.* (emphasis added). ACHD objects to Idaho Power’s newly proposed Section 10 because it does not meet the objections of the Idaho Supreme Court. Instead, it contains language that directly contradicts the Idaho Supreme Court’s Opinion.

First, the proposed Section 10 inappropriately attempts to incorporate the original version of Section 11, which the Court rejected. The Court concluded that the Commission does not have the authority to require Public Road Agencies or others parties to use their best efforts to minimize the cost of relocating utility facilities. The legislature has already enacted this requirement through the adoption of Idaho Code § 40-210.

Second, the proposed Section 10 purports to give Idaho Power authority to “determine[] 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.” According to the newly proposed Section 10, if Idaho Power determines that a utility relocation was for the benefit of Private Beneficiaries, Idaho Power will seek to recover whatever portion of the relocation costs Idaho Power determines was for the benefit of the Private Beneficiaries. This provision is directly contrary to the Idaho Supreme Court’s

conclusion that the Commission does not have the “authority to determine whether the relocation, in whole or in part, is for the benefit of a third party.” See *ACHD v. IPUC*, 253 P.3d at 682-83.

Third, Section 10 provides that if one or more Private Beneficiaries disputes Idaho Power’s relocation costs allocation, “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.” Section 10’s provision that the Commission will resolve a dispute over what portion of relocation costs are attributable to the benefit of private beneficiaries is directly contrary to the Idaho Supreme Court’s express conclusion that the Commission does not have the “authority to determine whether the relocation, in whole or in part, is for the benefit of a third party.” *Id.* It is also directly contrary to the Commission’s admission to the Idaho Supreme Court that the Commission “could not adjudicate the dispute between the third party and Company.” *Id.* Accordingly, ACHD respectfully asks the Commission to deny Idaho Power’s motion and/or in the alternative requests the Commission to enter a Rule H Section 10 Tariff consistent with the Court’s decision and in compliance with Idaho Code § 61-629.

II. BACKGROUND

A. Idaho Power’s October 30, 2008 Application to Modify its Rule H Tariff

On October 30, 2008, Idaho Power filed an Application with the Commission seeking authority to modify its line extension tariff commonly referred to as the “Rule H” Tariff, which generally sets forth Idaho Power’s rates and charges for certain services and regulates new service attachment and distribution line installations or alterations. R., Vol. I, pp. 1-56. Prior to

Idaho Power's Application, Rule H did not address utility relocations on public rights-of-way, leaving issues related to utility relocation on public rights-of-way to regulations adopted by Public Road Agencies like ACHD. In connection with the 2008 Application, however, Idaho Power sought to add two new sections, "Section 10" – allocating cost responsibility for utility relocations required to public road improvement projects on public rights-of-way -- and Section 11. R., Vol. I, pp. 22-23; R. Vol. IV, pp. 648-678.

Section 10, as proposed by Idaho Power, purported to allocate utility relocation costs between Idaho Power and Private Beneficiaries when Public Road Agencies require Idaho Power to relocate its facilities on public rights-of-way. More specifically, as proposed by Idaho Power, Section 10 would have required Private Beneficiaries to pay Idaho Power for the percentage of relocation costs equal to the extent to which the public road improvement project is for the benefit of Private Beneficiaries.

On July 1, 2009, the Commission issued Order No. 30853, granting Idaho Power's Application to modify Rule H. R., Vol. II, pp. 313-326. ACHD filed a Petition for Reconsideration, requesting reconsideration and clarification of the Commission's approval of Section 10. R. Vol. II, pp. 341-357. ACHD objected on grounds that Section 10 exceeded the Commission's authority and encroached upon ACHD's Resolution 330, which regulates utility relocations on public rights of way within ACHD's jurisdiction. Notably, Section 10's relocation cost allocation model was patterned after, although not identical to, ACHD's Resolution 330.

After briefing and a hearing, the Commission issued Order No. 30955, which approved a modified version of Section 10 and added a new section – "Section 11" – to Rule H. R. Vol. IV,

pp. 648-678. Section 11 purported to mandate that Idaho Power and “other parties” involved in public road projects “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.” *Id.* at 659-660; 678.

B. The Idaho Supreme Court Appeal

On January 10, 2010, ACHD filed an appeal to the Idaho Supreme Court from the Commission’s final order on grounds that Section 10 and Section 11 of Rule H exceeded the authority granted to the Commission by the legislature. The scope of the Idaho Supreme Court’s review of an order from the Commission is governed by Idaho Code § 61-629, under which the Idaho Supreme Court determines “whether the commission has regularly pursued its authority.” Under this standard, an order of the Commission is set aside if the order is in excess of the Commission’s jurisdiction. *See Idaho Power Co. v. Idaho Public Utilities Comm’n*, 99 Idaho 374, 379, 582 P.2d 720, 725 (1978); *Washington Water Power Co. v. Kootenai Env’tl. Alliance*, 99 Idaho 875, 878, 591 P.2d 122, 125 (1979) (setting aside a Commission order where the Commission was “without jurisdiction to issue the orders which are the subject of this appeal”).

The primary issue addressed by the Idaho Supreme Court on appeal was whether Section 10 and Section 11 exceeded the Commission’s authority by providing that the Commission may determine whether a utility relocation, in whole or in part, is for the benefit of a third party. The Idaho Supreme Court noted that the Commission “has the authority to determine the costs that Company can charge a private person who requests services from Company.” *See ACHD v. IPUC*, 253 P.3d at 682. However, the Court held that Section 10 exceeded the Commission’s authority because it goes much further than that. Specifically, the Court explained:

Under Section 10, when a Public Road Agency 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.

Id. at 682-83. Thus, the express holding of the Idaho Supreme Court was that the Commission does not have “the authority to determine whether the relocation, in whole or in part, is for the benefit of a third party.” *Id.*

A related issue presented to the Idaho Supreme Court was whether the Commission has authority to resolve disputes between Idaho Power and Private Beneficiaries related to relocation costs. As to this issue, there was significant disagreement between Idaho Power and the Commission.

Section 10 has never contained a dispute resolution provision, either in the form proposed by Idaho Power or as approved by the Commission. Nevertheless, Idaho Power has taken the position throughout the Commission and Idaho Supreme Court proceedings that the Commission has the authority to resolve disputes between Private Beneficiaries and Idaho Power regarding what portion of utility relocation costs must be paid by Private Beneficiaries. In connection with the Commission proceedings, Idaho Power submitted a flowchart purporting to explain the division of jurisdiction between the Commission and Public Road Agencies. R., Vol. III, p. 535. Idaho Power suggested that Public Road Agencies would have jurisdiction to determine when Idaho Power must relocate its facilities in public rights-of-way and to “determine[] the percentage amount, if any, a road improvement will benefit a third party.” *Id.* According to ADA COUNTY HIGHWAY DISTRICT’S MEMORANDUM IN OPPOSITION TO IDAHO POWER COMPANY’S AMENDED MOTION TO ACCEPT CONFORMING RULE H SECTION 10 TARIFF - 7

Idaho Power, however, the Commission would have jurisdiction over how Idaho Power “[c]ollects third-party percentage share of relocation costs based on same percentage Roadway Agency charged third-party.” *Id.* Idaho Power further took the position that the Commission would have “Dispute resolution” jurisdiction with regard to disputes between Idaho Power and Private Beneficiaries. *Id.*

The Commission disagreed with Idaho Power’s position that the Commission should resolve disputes between Idaho Power and Private Beneficiaries with regard to reimbursement of utility relocation costs. On appeal, the Commission explained that “[t]here is no dispute resolution term in any part of the line extension tariff, and no discussion by the IPUC of a dispute resolution provision in either Order No. 30853 or Order No. 30955.” *See* Respondent Brief of the Idaho Public Utilities Commission, p. 26.

Notwithstanding the Commission’s clear statement on appeal that the Commission does not have authority to resolve disputes between Idaho Power and Private Beneficiaries, Idaho Power continued to insist that the Commission should and could resolve such disputes. For example, Idaho Power stated in its briefing to the Idaho Supreme Court that, “[i]f a dispute between Idaho Power and a private beneficiary should arise concerning cost recovery by Idaho Power, the Commission would have jurisdiction to resolve the reimbursement dispute.” *See* Respondent Idaho Power’s Brief, pp. 30-31.

The question of whether the Commission has authority to resolve disputes between Idaho Power and Private Beneficiaries was addressed during the Idaho Supreme Court oral argument. Counsel for the Commission confirmed that the Commission does not have authority to adjudicate disputes between Idaho Power and Private Beneficiaries as to the portion of relocation

costs that must be paid by Private Beneficiaries. The Idaho Supreme Court addressed that admission in its written opinion:

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.

ACHD v. IPUC, 253 P.3d at 683.

After concluding that the Commission does not have “the authority to determine whether the relocation, in whole or in part, is for the benefit of a third party,” and after confirming that the Commission does not have authority to adjudicate disputes between Idaho Power and Private Beneficiaries, the Idaho Supreme Court set aside Section 10. *Id.* The Idaho Supreme Court also set aside Section 11 because it found that the Commission did not have the authority to order Public Road Agencies or other parties to use their best efforts to minimize the cost of relocating utility facilities. *Id.*

C. New Proposed Section 10

Idaho Power has proposed new modifications to Rule H, which Idaho Power asserts are consistent with the Idaho Supreme Court’s recent opinion setting aside the prior versions of Section 10 and Section 11. ACHD objects to the newly proposed Section 10 on the basis that it violates Idaho Code § 61-629 and is inconsistent with the Court’s decision.¹

¹ ACHD negotiated with Idaho Power in a good faith attempt to reach an agreement on acceptable language without success. The new Section 10 language must meet the objections of the Idaho Supreme Court and it should not expand or deviate from the Opinion.

III. ANALYSIS

Idaho Code § 61-629 sets forth the procedure and standard applied when an order of the Commission is set aside by the Idaho Supreme Court as follows:

Upon the hearing the Supreme Court shall enter judgment, either affirming or setting aside or setting aside in part the order of the commission. 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.

Id. (emphasis added).

ACHD objects to Idaho Power's Amended Motion to Accept Conforming Rule H Section 10 Tariff because the proposal does not "meet the objections of the court," as required by Idaho Code § 61-629. Instead, Idaho Power's proposal expressly contradicts the Idaho Supreme Court's opinion.

The Idaho Supreme has expressly held that the Commission does not have "authority to order 'other parties' [including Public Road Agencies] to use their best efforts to minimize relocation costs" or to otherwise comply with Idaho Code § 40-210. *ACHD v. IPUC*, 253 P.3d at 683. Despite this clear holding, Idaho Power's newly proposed language invokes Idaho Code § 40-210 in the second sentence of Paragraph 1, stating as follows:

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.

See proposed Section 10, ¶1.

The Idaho Supreme Court has expressly held that the Commission does not have authority under Idaho Code § 40-210 and the second sentence of the proposed first paragraph of

Section 10 expressly contradicts the Idaho Supreme Court's opinion and does not "meet the objections of the court," as required by Idaho Code § 61-629. Accordingly, the second sentence of the first paragraph of Idaho Power's proposed Section 10 should be stricken.

The Idaho Supreme Court has expressly held that "[w]hen ACHD determines that a utility must remove or locate its facilities that are within the public right-of-way, the Public Road Agency is not required to bear any of the utilities cost of doing so. [cite omitted] The utility must proceed with the relocation. . . . The utility is required to complete the relocation regardless of whether it is reimbursed by a third party." *ACHD v. IPUC*, 253 P.3d at 680-81. The second paragraph of Idaho Power's proposed Section 10, purports to assume jurisdiction and control over, and otherwise expressly limit, those instances when a Public Road Agency can require Idaho Power to relocate or remove its facilities and when it will bear the cost of such relocation 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.

See proposed Section 10, ¶2 (emphasis added).

The Idaho Supreme Court has made it clear that the Commission has absolutely no authority or jurisdiction over any Public Road Agency's decision to require the relocation or removal of a utility's facilities from the public rights-of-way. Yet, Idaho Power's proposed second paragraph of Section 10 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. The proposed second paragraph of Section 10 expressly contradicts the Idaho Supreme Court’s opinion and does not “meet the objections of the court,” as required by Idaho Code § 61-629. Accordingly, the second paragraph of Idaho Power’s proposed Section 10 should be stricken.

The Idaho Supreme Court has expressly held 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 v. IPUC*, 253 P.3d at 682-83. Despite this clear holding, Idaho Power’s newly proposed language purports to allow Idaho Power to determine whether a utility relocation is for the benefit of Private Beneficiaries 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.

See proposed Section 10, ¶3 (emphasis added).

Idaho Power’s proposed Section 10 then goes on to provide that the Commission will adjudicate any cost allocation dispute between Idaho Power and Private Beneficiaries as follows:

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.

Id. (emphasis added). This provision expressly contradicts the Idaho Supreme Court's conclusion, and the Commission's admission, that the Commission does not have authority to adjudicate disputes between Idaho Power and Private Beneficiaries. *See ACHD v. IPUC*, 253 P.3d at 83 ("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.").

The third paragraph of Idaho Power's proposed Section 10 does not "meet the objections of the court," as required by Idaho Code § 61-629. Accordingly, the third paragraph of Idaho Power's proposed Section 10 should be stricken.

Proposed language that is consistent with the Idaho Supreme Court's Opinion and complies with Idaho Code § 61-629 is attached hereto as Attachment No. 1.

IV. CONCLUSION

For the foregoing reasons, Idaho Power Company's Amended Motion to Accept Conforming Rule H Section 10 Tariff should be denied.

DATED THIS 25th day of January, 2012.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By


Merlyn W. Clark, ISB No. 1026
Attorneys for Ada County Highway District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of January, 2012, I caused to be served a true copy of the foregoing ADA COUNTY HIGHWAY DISTRICT'S MEMORANDUM IN OPPOSITION TO IDAHO POWER COMPANY'S AMENDED MOTION TO ACCEPT CONFORMING RULE H SECTION 10 TARIFF by the method indicated below, and addressed to each of the following:

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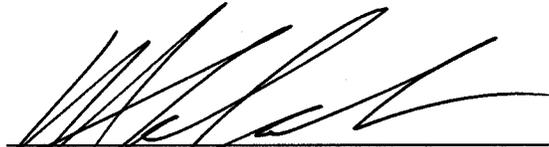
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TO IDAHO POWER COMPANY'S AMENDED MOTION TO ACCEPT
CONFORMING RULE H SECTION 10 TARIFF - 14

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Merlyn W. Clark

ADA COUNTY HIGHWAY DISTRICT'S MEMORANDUM IN OPPOSITION
TO IDAHO POWER COMPANY'S AMENDED MOTION TO ACCEPT
CONFORMING RULE H SECTION 10 TARIFF - 15

**BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION
CASE NO. IPC-E-08-22
ADA COUNTY HIGHWAY DISTRICT**

ATTACHMENT NO. 1

RULE H
NEW SERVICE ATTACHMENTS
AND DISTRIBUTION LINE
INSTALLATIONS OR
ALTERATIONS
(Continued)

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). 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.

11. Existing Agreements

This rule shall not cancel existing agreements, including refund provisions, between the Company and previous Applicants, or Additional Applicants. All Applications will be governed and administered under the rule or schedule in effect at the time the Application was received and dated by the Company.