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IDAHO PUBLIC UTILITIES COMMISSION

Merlyn W. Clark, ISB No. 1026
D. John Ashby, ISB No. 7228
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5210
Email: mclark@hawleytroxell.com
jashby@hawleytroxell.com

Scott D. Spears
Ada County Highway District
3775 Adams Street
Garden City, Idaho 83714
Email: sspears@achd.ada.id.us

Attorneys for Ada County Highway District

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
BRIEF IN RESPONSE TO ORDER NO.
32532

Pursuant to Order No. 32532, and in support of its Petition for Reconsideration, the Ada County Highway District ("ACHD") submits the following brief.

I. INTRODUCTION

The Commission has asked the parties to submit evidence and briefing relating to the issue of third party requests for the relocation of Idaho Power's facilities located within a public

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roadway. ACHD submits this response and the accompanying affidavit of Dorrell R. Hansen in response to the Commission's request.

The Commission's inquiry does not go to the real question at issue here -- whether the proposed Section 10 meets the objections of the Idaho Supreme Court's decision. Rule H contains two sections addressing utility relocation -- Section 6 and Section 10. Section 6 addresses utility relocation costs where a private party requests a utility relocation. Under Section 6, the private party requesting utility relocation pays the cost of the utility relocation. *See R.*, Vol. I, p 17 ("If an Applicant or Additional Applicant requests a Relocation. . . of Company facilities, the Applicant or Additional Applicant will pay a non-refundable charge equal to the Cost Quote."). As explained by Mr. Harrington, "A private party could request that Idaho Power relocate or bury facilities that are currently located in the road right-of-way and we would do that at the expense of the requesting party." *See* April 19, 2012 Transcript, p. 29, ll. 14-18. The Commission's authority over such a request is not in question here. Section 6 would apply to any request for relocation from a private party, whether on private property or on a public right-of-way.

By contrast, Section 10 addresses utility relocation demands from Public Road Agencies. By its own terms, Section 10 applies only where a "Public Road Agency determines that the Company's facilities must be relocated or removed." Indeed, the whole purpose of adding Section 10 was to address the situation where the "Company is required to relocate distribution facilities at the request of a public roadway owner." *See* Record, p. 75 (testimony of Scott D. Sparks describing the "purpose of the new section"). Thus, any request for utility relocation from a private party is governed by Section 6, not Section 10.

To answer the Commission's inquiry, a private party cannot require that Idaho Power relocate its facilities on a public right-of-way. Unlike a Public Road Agency, a private party has no authority over a public right-of-way or over Idaho Power. This is simply a contractual matter between a third party and Idaho Power. ACHD is not aware of private parties making direct requests for relocation of utilities on public rights-of-way. However, if a private party were to request relocation of a utility facility located on a public right-of-way for whatever reason, Idaho Power would clearly be free to accept or reject that request. If Idaho Power were to voluntarily choose to relocate its facilities, relocation costs would be governed by Section 6. ACHD's only role would be to ensure that the relocation is in compliance with ACHD's permit standards that govern design and location of the facilities. *See* Idaho Code §§ 40-210 and 40-1310(8). Idaho Power would request a permit on behalf of the private party.

Simply stated, Section 6 addresses requests for relocation from private parties, regardless of whether the relocation is on private property or on a public right of way. Section 10 addresses Public Road Agencies' demands for utility relocation on public rights-of-way.

Idaho Power's proposed language in Section 10 addresses a third category of utility relocation request – where a public road agency demands a utility relocation on a public right-of-way that benefits a third party in whole or in part. Idaho Power's expressed concern is that Public Road Agencies will demand utility relocations for the benefit of private parties without disclosing the benefit to the private parties. Idaho Power asserted at page 3 of its Amended Motion to Accept Conforming Rule H Section 10 Tariff that “the [Court's] Opinion does not address the respective rights and responsibilities of the Commission, the private party, and the Company when the private party requests a relocation of utility facilities located in the public road right-of-way.” To

the contrary, the Idaho Supreme expressly addressed that issue. The Idaho Supreme Court held that (1) a Public Road Agency's utility relocation demand is not a request for service from a private party and (2) the Commission does not have authority to "require a third party to pay for services that the third party did not request," even if the Commission "determined that a relocation required by a Public Road Agency benefited a third party" in whole or in part. *ACHD v. IPUC*, 253 P.3d at 682-83. The Court made clear that, if Idaho Power believes a third party should pay for the Public Road Agencies' relocation demand, Idaho Power's remedy is in a Court of law. *Id.* The Court also recognized that Commission agreed that this is Idaho Power's remedy. *ACHD v. IPUC*, 253 P.3d at 683.

As the Idaho Supreme Court has made clear, Idaho Power and the Commission cannot treat a Public Road Agency's relocation demand as if it were a request for service from a private party. However, that is exactly what the revised version of Section 10 does. To the extent that Section 10 would allow Idaho Power or the Commission to treat a Public Road Agency's utility relocation demand as a request for relocation from a private party, it does not meet the objections of the Court and will, once again, be set aside by the Idaho Supreme Court.

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. In

connection with the 2008 Application, however, Idaho Power sought to add a new section, "Section 10," allocating cost responsibility for utility relocations required by public road improvement projects on public rights-of-way. R., Vol. I, pp. 22-23.

Section 10 did not purport to regulate utility relocation requests by private parties. Relocation requests from private parties were already addressed in Section 6 of Rule H.

Section 10, as proposed by Idaho Power, allocated 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 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, which asserted jurisdiction and authority over the issue of relocation of utilities within the public rights-of-way. 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.

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. ACHD appealed that decision to the Idaho Supreme Court.

B. The Idaho Supreme Court Appeal

ACHD’s appeal to the Idaho Supreme Court asserted that Section 10 and Section 11 of Rule H exceeded the authority granted to the Commission by the Legislature. 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. *Id.* 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 (emphasis added). Accordingly, the Court set aside Section 10. *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. 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.

Id. at 683. 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. *Id.* 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 (emphasis added).

Finally, the Idaho Supreme Court set aside Section 11 because the Commission does not have authority to compel Public Road Agencies' compliance with Idaho Code § 40-210. *Id.* ("Although the legislature has the authority to order public highway agencies to use their best efforts to minimize the cost of relocating utility facilities, IPUC does not have that authority.").

C. Order No. 32476

Idaho Power subsequently requested that the Commission, pursuant to Idaho Code § 61-629, issue an order approving an amended version of Rule H Section 10 that purportedly conformed with the Idaho Supreme Court's Opinion. ACHD objected to the version of Section 10 proposed by Idaho Power on grounds that it contradicts the Idaho Supreme Court's Opinion and violates Idaho Code 61-629. On March 7, 2012, the Commission issued Order No. 32476, which approved Idaho Power's proposed amended Section 10 with minor changes.

D. Order No. 32532

ACHD moved for reconsideration of Order No. 32476. The Commission held a hearing on April 19, 2012, at which oral argument was presented. The Commission then issued Order

No. 32532, which requested additional briefing and affidavits addressing whether a private party can request that Idaho Power relocate facilities located on public rights-of-way.

III. ANALYSIS

A. **The Commission Can Approve An Amended Rule H Only If It Meets The Objections Of The Court**

Idaho Code § 61-629 authorizes the Commission only to “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). The Court’s decision directs the Commission to set aside Sections 10 and 11. *ACHD v. IPUC*, 253 P.3d at 683. The statute does not allow Rule H to be amended in a way that deviates from, or is inconsistent with, the Idaho Supreme Court’s opinion in *ACHD v. IPUC*. Nor does the statute authorize Idaho Power or the Commission to fundamentally re-write Section 10 to circumvent the Court’s decision. The addition of qualifying language in the second paragraph of Section 10 is an example of Idaho Power attempting to add new provisions to Section 10 that are not a result of objections of the Idaho Supreme Court and not even part of the original Tariff application.

Idaho Power has repeatedly suggested that ACHD cannot or should not object to the proposed version of Section 10 because ACHD proposed certain language to Idaho Power. Idaho Power’s suggestion finds no support in Idaho Code § 61-629. That statute does not authorize the Commission or affected parties to negotiate for an amended order that does not meet the objections of the Idaho Supreme Court. Nor does it authorize the Commission to fundamentally re-write the Tariff. 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.

B. Questions of ACHD's Authority or Harm to ACHD are Not Relevant

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 Washington Water Power Co. v. Kootenai Envtl. 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"). As the Idaho Supreme Court held in *ACHD v. IPUC*, "[t]he Idaho Public Utilities Commission has no authority other than that given to it by the legislature." *ACHD v. IPUC*, 253 P.3d at 681. "It exercises a limited jurisdiction and nothing is presumed in favor of its jurisdiction." *Id.*

The Idaho Supreme Court "set aside" Section 10 because no statute grants the Commission "authority to determine whether the relocation, in whole or in part, is for the benefit of a third party" and because the Commission does not have the authority to "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....Therefore, we set aside Section 10." *Id.* at 682-83. The Idaho Supreme Court set aside Section 11 because the Commission does not have authority to compel Public Road Agencies' compliance with Idaho Code § 40-210. *Id.* ("Although the legislature has the authority to order public highway agencies to use their best efforts to minimize the cost of relocating utility facilities, IPUC does not have that authority. We therefore set aside Section 11."). Thus, the issue before the Commission now

is whether the proposed revisions to Section 10 meet the objections of the Court, i.e., whether they fall within the authority granted to the Commission by the legislature.

Throughout these proceedings, the Commission and Idaho Power have attempted to shift the focus from the absence of authority on the part of the Commission to whether Section 10 infringes on ACHD's authority or otherwise causes ACHD harm. For example, the first several pages of the Commission's Order No. 32476 are spent discussing the assertion that "The Tariff does not Infringe on ACHD's Authority or Jurisdiction." Idaho Power argued at the recent reconsideration hearing that "ACHD has not pointed to any provision in section 10 that infringes upon its power or its jurisdiction." *See* April 19, 2012 Transcript at p. 27, ll. 4-6.

The Commission and Idaho Power have similarly focused on their contention that Section 10 causes no harm to ACHD. *See* April 19, 2012 Transcript, p. 21, l. 11-12 (Commissioner Redford asking: "... [W]hat is the interest of the Ada County Highway District generally. I mean, why do you care?"); *see also id.* at p. 27 (Idaho Power arguing that "it is unclear how ACHD is harmed by the language that was approved in the Commission's Order issued last month.").

The validity of Section 10 does not depend on whether it infringes on ACHD's authority or otherwise harms ACHD. Instead, the relevant question is whether the Commission has the authority asserted in Section 10 and whether the revised version of Section 10 meets the objections of the Court.

C. Questions of Public Policy are Not Relevant to Whether the Revised Section 10 Meets the Objections of the Court under Idaho Code § 61-629

Discussion at the recent hearing indicated that the Commission believes that policy reasons justify the revised Section 10 language authorizing the Commission to determine that

utility relocation demands for public road agencies are really disguised requests from third parties. For example, the Commission pointed to an example of where the Commission believes the City of Nampa on one occasion demanded that Idaho Power relocate its facilities for what the Commission believes may have been solely for the benefit of a private developer. See April 19, 2012 Transcript at p. 21, l. 20 - p. 22, l. 13. The Commission then asked “what is the Commission to do to protect the ratepayers in those circumstances,” and “why should the customers of Idaho Power all throughout southern Idaho pay the share that is done for the benefit of a third party?” *Id.* Those questions inappropriately raise policy concerns. The question now before the Commission is not whether the revised Section 10 makes good policy. Under Idaho Code § 61-629, the only relevant question is whether the Commission has authority to adopt the revised Section 10 and whether the revised version of Section 10 meets the objections of the Court.

D. The First Paragraph Of The Amended Section 10 Improperly Grants The Commission Authority To Compel ACHD’s Compliance With Idaho Code § 40-210

The first paragraph of Idaho Power’s proposed Section 10 provides as follows:

The Company often locates its distribution facilities within state and local public road rights-of-way under authority of Idaho Code § 67-705 (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.

(Emphasis Added).

The first sentence of this first paragraph is consistent with the Idaho Supreme Court’s recent Opinion, but the second sentence is not. The Idaho Supreme Court clearly set aside

Section 11 of the previously proposed Rule H because it purported to require “other parties,” including ACHD to comply with Idaho Code § 40-210. *ACHD v. IPUC*, 253 P.3d at 683.

Specifically, the Court explained:

The second sentence in Section 11 states, “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.” . . . Those other parties would include ACHD and entities which are not utilities regulated by IPUC. . . . Although the legislature has the authority to order public highway agencies to use their best efforts to minimize the cost of relocating utility facilities, IPUC does not have that authority.

Id. (italics in original, underlining added).

The newly proposed language mandates that Public Road Agencies notify Idaho Power of road improvement projects pursuant to Idaho Code § 40-210. It further mandates that “the Company will meet with the Public Road Agency as provided in Idaho Code § 40-210.” Not only is that language of Section 10 unnecessary and duplicative of the statute, but it purports to place obligations on Public Road Agencies to notify and meet with Idaho Power.

Idaho Power erroneously contends that this language “does not affect ACHD.” *See* 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 (“Idaho Power’s Answer”), p. 5. The Commission agreed, stating that the first paragraph “now confirms only Idaho Power’s legal obligation to meet with road agencies when notified of a project by the agency.” The Commission further characterized ACHD’s objection as “apparently based merely on the reference to Section 40-210 in the sentence.” These statements are incorrect.

ACHD's objection is not based on the mere reference to Idaho Code § 40-210, and the first paragraph does more than merely compel Idaho Power's compliance with that statute. The provision that, "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," mandates at least three things: (1) that ACHD provide notice to Idaho Power of road improvement projects; (2) that Idaho Power meet with ACHD; and (3) that ACHD meet with Idaho Power. Just like the Commission does not have authority to compel "other parties," including public road agencies, to "use their best efforts to find ways to eliminate the cost of relocating utility facilities," the Commission does not have authority to compel public road agencies to notify and meet with Idaho Power.

Indeed, Section 10 purports to go even further than Idaho Code § 40-210, which sets forth only the "intent of the legislature" that Public Road Agencies and utilities work to reduce relocation costs. Section 10, as now written, would apparently give the Commission authority to compel Public Road Agencies' compliance with the statute. This begs the question of what the Commission will do if a Public Road Agency does not give notice to Idaho Power of road improvement projects, does not meet with Idaho Power, or otherwise does not comply with Idaho Code § 40-210 or if Idaho Power does not comply with the Order. ACHD has and will continue to comply with Idaho Code § 40-210, but it objects to any provision implying that the Commission has authority to compel ACHD's compliance.

Idaho Power asserts that the mention of the Public Road Agencies' obligations under Idaho Code § 40-210 is "innocuous" and "inconsequential," but Idaho Power's insistence on that language suggests otherwise. Idaho Power's proposed language appears to be aimed at a result

that, if a Public Road Agency does not meet with Idaho Power or otherwise comply with Idaho Code § 40-210, Idaho Power would not have to pay the cost of relocating its facilities. ACHD's compliance with Idaho Code § 40-210, however, is a legislative matter. The legislature has not given the Commission authority to enforce Idaho Code § 40-210. Accordingly, any failure to comply with Idaho Code § 40-210 must be addressed by a court, not by the Commission.

In summary, the first paragraph of Section 10 does not meet the objections of the Court because it still purports to assert authority over Public Road Agencies' compliance with Idaho Code § 40-210. If the Commission believes it is necessary to refer to Idaho Code § 40-210, Section 10 should simply state that "the Company will comply with Idaho Code § 40-210."

E. The Second Paragraph Of The Proposed Amended Section 10 Is Inconsistent With The Idaho Supreme Court's Opinion In That It Purports To Limit ACHD's Authority To Require Utility Relocations

The common law rule in Idaho is that, upon demand from a Public Road Agency, a utility must relocate its facilities located on a public right-of-way. *See State ex rel. Rich v. Idaho Power Co.*, 81 Idaho 487, 501 (Idaho 1959) ("Under the common law a utility, placing its facilities along streets and highways, gains no property right and upon demand must move its facilities at its expense."). In *ACHD v. IPUC*, the Idaho Supreme Court affirmed the common law rule, without limitation, as follows:

When 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 the proposed amended Rule H contradicts the Idaho Supreme Court's recent opinion by purporting to limit the circumstances under which ACHD can require Idaho Power to relocate its facility:

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.

(Emphasis added).

Idaho Power asserts that its proposed language "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." Instead, Idaho Power explains that the purpose of its proposed language is merely to describe the "most common reasons" for a utility relocation. Regardless of Idaho Power's intent, the language in the Proposed Amended Rule H indicates that the only circumstance under which a Public Road Agency "can require" utility relocation is "[i]f a Public Road Agency determines that the Company's facilities must be relocated or removed because they incommode the public use [of the right-of-way]."

In approving the second paragraph, the Commission incorrectly asserts that "the [second] paragraph is virtually identical to language in the appealed tariff, and the Court did not set aside the provision." The version of Section 10 previously approved by the Commission did not contain any language limiting the reasons for which a Public Road Agency could require utility

relocation. Consistent with the Idaho Supreme Court's interpretation of Public Road Agencies' rights, it simply provided: "At the request of a Public Road Agency, the Company will relocate its distribution facilities from or within the public road rights-of-way." *See R.*, Vol. IV, p. 677.

In summary, the second paragraph of Section 10 does not meet the objections of the Court because it purports to limit Public Road Agencies' authority in a way that contradicts the Idaho Supreme Court's decision. As previously suggested by ACHD, the limiting language should be deleted from the second paragraph. The second paragraph should mirror the previously approved Section 10 as follows: "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."

F. The Third Paragraph Of The Amended Section 10 Is Inconsistent With The Idaho Supreme Court's Opinion

Long before Idaho Power submitted its Application in 2008 seeking authority to modify Rule H Tariff, Rule H authorized Idaho Power to charge a private party for utility relocation costs requested by a private party. Specifically, Section 6 provides that "If an Applicant or Additional Applicant requests a Relocation, Upgrade, Conversion or removal of company facilities, the Applicant or Additional Applicant will pay a non-refundable charge equal to the Cost Quote."

The purpose of Idaho Power's Application to add Section 10 was to address the allocation of utility relocation costs where a Public Road Agency demands that Idaho Power relocate its facilities. *See Record* at pp. 75-76 (testimony of Scott D. Sparks) ("The purpose of the new section addressing relocations in public road rights-of-way is to ensure that a consistent and defined funding methodology is adhered to when the Company is required to relocate

distribution facilities at the request of a public roadway owner.") (emphasis added). Specifically, Section 10, as proposed by Idaho Power would have allowed Idaho Power to determine what portion of a Public Road Agency's utility relocation demand was for the benefit of a private party and then charge that private beneficiary for that portion of the utility relocation costs. In support of its Application to modify Rule H, Idaho Power submitted testimony from David R. Lowry. See Record at pp. 83-84. Mr. Lowry testified that, on a few occasions, private parties "have asked a city to make a relocation request to Idaho Power on their behalf and the city has not disclosed that the developer is involved." *Id.*

Section 10 was proposed to remedy the issue described by Mr. Lowry. Under Section 10, the Commission could determine the extent to which a Public Road Agency's utility demand benefits a private party and require that private party to pay for services that the private party did not request from Idaho Power.

Idaho Power and the Commission have consistently taken the position that a Public Road Agency's utility relocation demand, to the extent that it benefits a private party, is really a request for services from that private party. The Idaho Supreme Court, however, rejected that argument and held that the Commission lacks authority to require a third party to pay for a utility relocation demanded by a Public Road Agency.

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 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.

ACHD v. IPUC, 253 P.3d at 682-83 (emphasis added).

The above-quoted paragraph is the crux of the Idaho Supreme Court's decision to set aside Section 10, and it sets forth several key conclusions. First, the Court set aside Section 10 because it purported to grant the Commission "authority to determine whether the relocation [required by a Public Road Agency], in whole or in part, is for the benefit of a third party." Second, the Court recognized that, while utility relocation may be a "service," a demand from a Public Road Agency to relocate utility facilities is not a request for services from a third party. Third, the Court expressly held that the Commission does not have authority to "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." *Id.* (emphasis added).

A Public Road Agency's demand that Idaho Power relocate utility facilities on public rights-of-way is not a request from a third party. The Commission recognized as much in Order No. 32476:

It is clear in this context that the Court's objection was to the possibility the Commission "could require a third party to pay for services that the third party did not request."

Section 10 would have authorized the Commission in some circumstances to require a third party to pay for services that the third party did not request from Idaho Power.

See Order No. 32476, p. 9.

As the Commission has acknowledged, the reason the Idaho Supreme Court set aside Section 10 was because it would allow the Commission to treat a utility relocation demand from a Public Road Agency -- a demand described by the Court as a service "that the third party did not request from Company" -- as if it were a request for service from a third party. Yet, the new version of Section 10 approved by the Commission does just that. Specifically, the new version of Section 10 approved by the Commission provides as follows:

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.

Just like the prior version of Section 10, this new version allows the Commission to determine whether a utility relocation demand from a Public Road Agency is really a request for service from the third party. The Idaho Supreme Court could not have been more clear in holding that that Commission has no such authority. *See ACHD v. IPUC*, 253 P.3d at 683. The Commission has authority to charge a private party for services requested by that private party (i.e., Section 6), but it does not have authority to treat a Public Road Agency's utility relocation demand as if it were a request for service from a private party. *Id.* Accordingly, the new version of Section 10 does not meet the objections of the Court and should be deleted.

G. A Private Party's Request for Utility Relocation, Whether on Private Property or on a Public Right-of-Way, Is Governed by Section 6, Not Section 10

In apparent recognition that its proposed language contradicts the Idaho Supreme Court's opinion, Idaho Power has now suggested that the phrase "directly or indirectly through a Public Road Agency" could be deleted from the third paragraph of Section 10. Deletion of that phrase, however, would not make a difference because Section 10 would still impermissibly allow the Commission to treat a Public Road Agency's demand for utility relocation as if it were a request for service from a private party.

Rule H contains two sections addressing utility relocation -- Section 6 and Section 10. Section 6 addresses utility relocation costs where a private party requests a utility relocation. Under Section 6, the private party requesting utility relocation pays the cost of the utility relocation. *See R.*, Vol. I, p 17 ("If an Applicant or Additional Applicant requests a Relocation . . . of Company facilities, the Applicant or Additional Applicant will pay a non-refundable charge equal to the Cost Quote.").

By contrast, Section 10 addresses utility relocation demands from Public Road Agencies. By its own terms, Section 10 applies only where a "Public Road Agency determines that the Company's facilities must be relocated or removed." Indeed, the whole purpose of adding Section 10 was to address the situation where the "Company is required to relocate distribution facilities at the request of a public roadway owner." *See Record*, p. 75 (testimony of Scott D. Sparks describing the "purpose of the new section"). Thus, any request for utility relocation from a private party is governed by Section 6, not Section 10.

The Commission has asked the parties to submit evidence as to "whether a third party may request relocation of Idaho Power's facilities that are located in a public roadway from

Idaho Power.” That question is addressed in the accompanying affidavit of Dorrell R. Hansen. With all due respect, however, the question of whether a private party can request relocation of utility facilities located on a public right-of-way is not relevant to the issue of whether Section 10 meets the objections of the Court. As explained above, if a private party requests relocation of utility facilities, whether located on private property or on a public right-of-way, Section 6 would apply. Under Section 6, the private party would be required to pay the utility relocation costs. Section 10 would not be implicated because, as the Idaho Supreme Court has held, a Public Road Agency’s utility relocation demand is not a request for service from a private party.

Notably, a private party cannot require that Idaho Power relocate its facilities on a public right-of-way. Unlike a Public Road Agency, a private party has no authority over a public right-of-way. If a private party were to request relocation of a utility facility located on a public right-of-way for whatever reason, Idaho Power would be free to accept or reject that request. If Idaho Power were to voluntarily choose to relocate its facilities, relocation costs would be governed by Section 6. Alternatively, any relocation requests could be governed by private contract. Given that Idaho Power has no legal obligation to relocate its facilities located on public rights-of-way at the request of a private party, Idaho Power would presumably require payment of any relocation costs before actually performing any work. *See* April 19, 2012 Transcript, p. 29, ll. 14-18.

It is clear that Idaho Power is attempting to use Section 10 to circumvent the Idaho Supreme Court’s opinion. The Idaho Supreme Court held that (1) a Public Road Agency’s utility relocation demand is not a request for service from a private party and (2) the Commission does not have authority to “require a third party to pay for services that the third party did not

request,” even if the commission “determined that a relocation required by a Public Road Agency benefited a third party.” *ACHD v. IPUC*, 253 P.3d at 682-83. Despite those holdings, Idaho Power asserts that it can still use Section 10 to determine that a Public Road Agency’s utility relocation demand is, in whole or in part, really a request for service from a private party. Idaho Power asserted the following at the recent hearing:

We also get demands to relocate from public road agencies and sometimes it’s not always clear who is who, but what the Company is requesting here is that when a request has been made, you know, once the facilities have been moved to satisfy the demands of the public road agency that the Company determine whether or not a request has been made to relocate facilities and then make a determination based upon the facts if those costs should be recovered from the party that made that request.

See April 19, 2012 Transcript at p. 29, ll. 3-12.

ACHD does not object to Idaho Power pursuing a legal claim in a court of law against a third party to recover all or a portion of costs for relocation in the public right-of-way, which the Court preserved. Also, ACHD’s does not object that Idaho Power charges a third party for relocation requests made directly by private parties. Indeed, Section 6 already provides that private parties will pay for their own relocation requests, regardless of whether Idaho Power’s facility is located on private property of a public right-of-way. ACHD’s objection is that, as Idaho Power has indicated to be the case, Section 10 is used to treat a Public Road Agencies’ utility relocation demand as if it is a request for service from a private party.

If the Commission’s and Idaho Power’s only policy goal is to ensure that private parties pay for utility relocation requests actually made by private parties – as opposed to relocation demands from Public Road Agencies, it would be very easy to accomplish that goal. All the Commission would have to do is incorporate the Section 6 language into Section 10.

Specifically, the Commission could delete the third paragraph in its entirety and replace it with the following:

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.

IV. CONCLUSION

For the foregoing reasons, ACHD respectfully asks that the Commission reconsider Order No. 32476. The Idaho Supreme Court did not issue a remand to the Commission to re-write the Rule H Tariff, nor did it set aside only parts of Section 10 and Section 11. Instead, it expressly "set aside" Section 10 and Section 11 in their entirety. ACHD's position is that the Commission should delete Section 10 and Section 11 in their entirety as instructed by the Idaho Supreme Court. However, if the Commission adopts an amended Rule 10, it must approve a version of Section 10 that meets the objections of the Court. Attached hereto as exhibit A is a proposed version of Section 10 and 11 that complies with Idaho Code § 61-629 in that it meets the objections of the Court.

DATED THIS 18 day of May, 2012.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

Merlyn W. Clark, ISB No. 1026
D. John Ashby, ISB No. 7228
Attorneys for Ada County Highway District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18 day of May, 2012, I caused to be served a true copy of the foregoing ADA COUNTY HIGHWAY DISTRICT'S BRIEF IN RESPONSE TO ORDER NO. 32532 by the method indicated below, and addressed to each of the following:

Commission Staff

Weldon B. Stutzman
Deputy Attorney General
Idaho Public Utilities Commission
472 West Washington
P.O. Box 83720
Boise, ID 83720-0074

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail: weldon.stutzman@puc.idaho.gov
- Telecopy

Building Contractors Association of Southwestern Idaho

Michael C. Creamer
GIVENS PURSLEY, LLP
601 West Bannock Street
P.O. Box 2720
Boise, ID 83701-2720

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail: mcc@givenspursley.com
- Telecopy

City of Nampa AND Association of Canyon County Highway Districts

Matthew A. Johnson
Davis F. VanderVelde
WHITE PETERSON GIGRAY ROSSMAN NYE & NICHOLS, P.A.
5700 East Franklin Road, Suite 200
Nampa, ID 83687

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail: mjohnson@whitepeterson.com
dvandervelde@whitepeterson.com
- Telecopy

The Kroger Co.

Michael L. Kurtz
Kurt J. Boehm
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail: mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
- Telecopy

Kevin Higgins
ENERGY STRATEGIES, LLC
215 South State Street, Suite 200
Salt Lake City, UT 84111

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail: khiggins@energystrat.com
- Telecopy

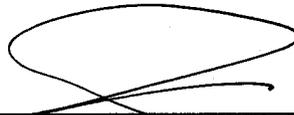
ADA COUNTY HIGHWAY DISTRICT'S BRIEF IN RESPONSE TO ORDER
NO. 32532 - 24

Build Idaho Inc.
J. Frederick Mack
HOLLAND & HART LLP
U.S. Bank Plaza
101 South Capitol Boulevard, Suite 1400
P.O. Box 2527
Boise, ID 83701-2527

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail: fmack@hollandhart.com
- Telecopy: 208.388.6936

Lisa D. Nordstrom
Patrick A. Harrington
IDAHO POWER COMPANY
1221 West Idaho Street
P.O. Box 70
Boise, ID 83707
[Attorneys for Idaho Power Company]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail: lnordstrom@idahopower.com
pharrington@idahopower.com
- Telecopy: 208.388.6936



D. John Ashby

RULE H
NEW SERVICE ATTACHMENTS
AND DISTRIBUTION LINE
INSTALLATIONS OR
ALTERATIONS

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.

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.

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.

EXHIBIT
A