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## Via HAND DELIVERY

IDAHO PUBLIC UTILITIES COMMISSION

P. O. Box 83720

Boise, ID 83720-0074

**RE: Case No. IPC-E-08-22:**

***In the Matter of the Application of Idaho Power Company for Authority to  
Modify its Rule H Line Extension Tariff Related to New Service Attachments  
and Distribution Line Installations***

**Intervenors: (1) Association of Canyon County Highway Districts; and  
(2) City of Nampa**

Dear Commission:

### **Enclosures:**

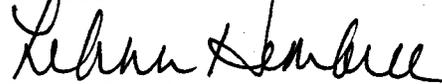
1. (original + 7 copies) *Joint Brief on Reconsideration by Nampa and ACCHD.*

Enclosed for filing with the IPUC, please find Intervenors Nampa and ACCHD's *Joint Brief on Reconsideration* in connection with the above referenced matter.

Please contact this office if you have any questions. Thank you.

Sincerely,

WHITE PETERSON



LeAnn Hembree

*Legal Assistant to Matthew A. Johnson*

Encls.

Cc: counsel of record

Clients

W:\Work\Nampa\Idaho Power - Rule H change\Letter to IPUC re filing Joint Brief Reconsider 09-11-09 lh.doc



Nampa and ACCHD are separate intervenors in this matter, but share similar concerns in their roles as public road agencies.<sup>1,2</sup> Both parties are represented by the same legal counsel. Additionally the issues raised by each are sufficiently similar such that this brief is submitted jointly in the interests of time and for the convenience of the Commission and parties.

## **I. PUBLIC ROAD AGENCIES HAVE EXCLUSIVE AUTHORITY OVER HIGHWAYS AND RIGHT OF WAYS.**

Exclusive authority over highways within city limits lies with the municipality. Exclusive authority over rights-of-way in highway districts lies with the highway district commissioners. This point was set forth in the original comments of Nampa and ACCHD, as well as the comments and petition for reconsideration of the Ada County Highway District (ACHD).

Municipalities and highway districts, as public road agencies, hold these right-of-way lands in trust for the public. Public road agencies are required to protect the public use. *State ex rel. Rich v. Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959). As such, municipalities have the exclusive authority to determine that relocation of utility facilities is necessary so as not to incommode public use. This includes the power to require relocation at the utility's cost.

Utility use of public right-of-ways is permissive and subject to the authority of the public road agency. “[The] permissive use of the public thoroughfares is subordinate to the paramount use thereof by the public.” *Id.* at 498. The public road agencies’ authority over the paramount

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<sup>1</sup> As a municipality, Nampa has the power and responsibility to supervise and control city highways under Idaho Code § 50-313 and § 50-314. Nampa also has authority over utility transmission systems on municipal land under Idaho Code § 50-328.

<sup>2</sup> Under Idaho Code § 40-1310, the Canyon County highway districts have “exclusive general supervision and jurisdiction over all highways and public rights-of-way within their highway system.”

public use necessarily includes the authority to determine that a utility relocate at its own cost.

Of course the authority of the public road agencies also allows that these agencies could pay for portions of the relocation cost or negotiate agreements for apportionment of relocation costs. ACHD has pursued such an approach with Idaho Power in ACHD's adoption, *under ACHD's own authority*, of Resolution 330. Public road agencies may also negotiate utility relocation costs on a case-by-case basis with utilities and developers. Municipalities may approach relocation cost apportionment under the municipality's authority in formulating a franchise agreement. However, these all would fall under the exclusive supervisory authority of public road agencies over utility use of the public right-of-way. Such agreements must be worked out with the public road agencies, not imposed by the IPUC.

## **II. THE IPUC DOES NOT HAVE JURISDICTION TO APPROVE SECTION 10 OF RULE H.**

IPUC's jurisdiction is limited to that expressly granted by the legislature. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 591 P.2d 122 (1979). The IPUC is not granted authority to determine what may or may not incommode the public use as it pertains to municipal land and highways. It is the function and duty of a municipality to determine whether the public use and safety is protected by such actions as road-widening, sidewalk development, or installation of a turning lane. The Public Utilities Act "does not contain any provision diminishing or transferring any of the powers and duties of the municipality to control and maintain its streets and alleys." *Village of Lapwai v. Alligier*, 78 Idaho 124, 129, 299 P.2d 475, 478 (1956). *Lapwai* found that authority over municipal lands remains with the municipality and that the IPUC has no authority in regard to a municipality requiring utility relocation. *Lapwai* also held that IPUC consent to such relocation is not

required. The IPUC is not given authority to regulate utility relocation or to take on the role of determining when utility system location may, or may not, impair the public use.

Similarly the Public Utilities Act does not give the IPUC the jurisdiction to take utility relocation costs and impose the duty to pay them on public road agencies, government entities, developers, or other third parties alleged to have specially benefitted from the improvements. Idaho Code § 67-205 provides no express or implied authority for utilities to charge third parties for relocations. If the governing public road agency determines that relocation is necessary to support the public use and safety, then the utility must relocate at its own cost.

Furthermore, the third-party beneficiary cost apportionment proposal of Section 10 overlooks that the public benefits from such road improvements, even if paid for in portion by a third party. Idaho Power suggests that “Idaho Power customers in Pocatello do not benefit from roadway improvements for a new shopping center in Nampa” but that such customers bear a portion of the relocation cost. *Idaho Power Company's Answer to Petitions for Reconsideration*, page 16. However, a customer in Pocatello does benefit. That Pocatello customer pays a lower utility rate because Idaho Power is able to make permissive use of public rights-of-way, rather than having to acquire its own private rights-of-way. Additionally, the Pocatello customer benefits when on a future visit to Nampa he or she is not stuck in traffic because that road was widened and a traffic light installed. The Pocatello customer benefits when traveling more safely on a highway through Canyon County because the highway district negotiated with developers for contributions to more quickly make certain improvements that improve traffic flow. There are always some members of the public who may see a more immediate or more frequent benefit, but the public road agencies requests for relocation are always to benefit the public use generally. If Idaho Power has concerns that in certain situations there has been “inappropriate

cost shifting” then Idaho Power needs to work to resolve such with the public road agencies. If absolutely necessary, Idaho Power may decide to pursue a remedy in the courts. However, it is not the role of the IPUC, or within the jurisdiction or expertise of the IPUC, to begin second-guessing the motivation behind public road agency requests for relocation.

### **III. THE REVISED DEFINITION OF THIRD PARTY BENEFICIARIES IS TOO BROAD.**

In the initial comments by both Nampa and ACCHD, concern was raised about the definition of “third party beneficiaries,” particularly the inclusion of location improvement districts and other government entities. Idaho Power’s clarification on the definition, including that the intent is this apply to all local improvement districts under Idaho Code Title 50, Chapter 17, does not assuage the intervenors’ concerns.

Local government entities often cooperate and work together on projects. For instance a municipality and a highway district may coordinate on a municipal water line improvement coupled with a highway district widening project. The highway district widening project would require that an Idaho Power line be relocated. However, under Section 10, the municipality will have contributed to the widening project in conjunction with repaving required by its water line improvement and therefore the municipality would be required to pay Idaho Power relocation costs. This does not make sense.

Alternatively a municipality or highway district may work with a neighborhood to form a local improvement district for the improvement of water and/or sewer facilities or for the improvement of sidewalks, curbs, and gutters. The local improvement district is a financing mechanism available to the local government body so that such improvements may be made sooner than if relying on general funds. The local improvements may have nothing to do with

electric utility lines. However, due to the improvements, reconfiguration of the road and right-of-way may be necessary, thereby requiring relocation of electric utility lines so as not to interfere with the public use and so as to protect the public safety.

Section 10 and its treatment of third party beneficiaries would interfere with the ability of the public road agencies to cooperate with other government entities, with neighborhoods, and with developments. Rather than being in position to negotiate and cooperate between parties, Section 10 imposes a scheme where now these entities are in competition with each other to minimize their contribution to the project and therefore avoid Idaho Power imposing relocation costs. This is another example of how Section 10 as proposed interferes with the exclusive authority of the public road agencies and impedes their ability to negotiate appropriately with all parties.

Rule H should be limited and returned to its original definition of local improvement districts, which contemplates only LIDs under Idaho Code § 50-2503 which are specifically related to electric utility line installation and alteration.

#### **IV. SECTION 10 IS UNCONSTITUTIONAL AND IS CONTRARY TO THE COMMON LAW.**

Intervenors, along with ACHD, have presented constitutional and common law concerns with Section 10 of Rule H. See *Comments of Intervenor City of Nampa*, *Comments of Intervenor ACCHD*, and *Comments of ACHD*. See also *Petition for Reconsideration/Clarification by ACHD*. Nampa and ACCHD hereby reaffirm those arguments and urge the IPUC to reconsider and delete Section 10 from Rule H.

**V. CONCLUSION**

Section 10 of Rule H, as proposed, is in direct conflict with the exclusive jurisdiction of public road agencies over their rights-of-way. Rather than seek to cooperate with the agencies to come to an agreement under their exclusive authority, Section 10 usurps that authority to try and force a one-size-fits-all approach on the agencies. The proposed rule interferes with the ability of public road agencies to pursue necessary road improvements. It places the IPUC in an undesirable position of second-guessing relocation requests. Section 10 also places the IPUC in a position outside its jurisdiction and expertise. The proposed Section 10 is also in violation of the Idaho constitution and in conflict with the common law. For these reasons, Nampa and the ACCHD recommend reconsideration of Order 30853.

DATED this 11<sup>TH</sup> day of September, 2009.

WHITE PETERSON

By: 

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on the 11<sup>TH</sup> day of September, 2009, a true and correct copy of the above and foregoing JOINT BRIEF ON RECONSIDERATION BY NAMPA AND ACCHD was served upon the following by the method indicated below:

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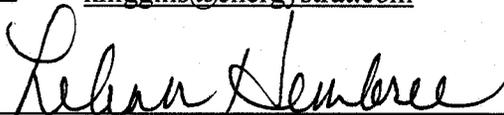
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