

J. Frederick Mack, ISB # 1428
HOLLAND & HART LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 2527
Boise, Idaho 83701-2527
Telephone: (208) 342-5000
Facsimile: (208) 343-8869
fmack@hollandhart.com

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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Build Idaho Inc.

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

BUILD IDAHO INC'S PETITION
FOR RECONSIDERATION

Comes Now Build Idaho Inc. (hereinafter "Build Idaho"), by and through its attorneys of record, Holland & Hart LLP and pursuant to Idaho Code § 61-626 submits this Petition for Reconsideration of the Idaho Public Utilities Commission's (hereinafter "Commission" or "IPUC") Order No. 32476, dated March 7, 2012 (hereinafter "March 7, 2012 Order") and pursuant to the express directive of such Order that "any person interested in this Order" shall have 21 days in which to file a motion for reconsideration. Build Idaho is a non-profit organization working with commercial and residential builders in its request for reconsideration of IPUC's Order No. 32476.

I. INTRODUCTION

On October 30, 2008, Idaho Power filed an Application with the IPUC seeking regulatory authority to modify its Line Extension Tariff, referred to as the Rule H" Tariff, specifically relating to New Service Attachments and Distribution Line Installations. The proposed modified Tariff included a new section, Section 10, which attempted to allocate responsibility for the costs incurred "for utility relocations required by public road improvement projects on public rights-of-way." As proposed, Section 10 required Private Beneficiaries to pay to Idaho Power a 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 filed its Order No. 30853 granting Idaho Power's Application to modify Rule H. ACHD petitioned for reconsideration, noting that Section 10 exceeded the Commission's authority and encroached upon ACHD's Resolution 330, a Resolution that fully regulated utility relocations on public rights-of-way that fell within the jurisdiction of ACHD. The Commission rejected ACHD's objections and thereafter issued its Order No. 30995 which approved Section 10, and added a new Section 11 to the Rule H Tariff. ACHD pursued review of the Commission Order with the Idaho Supreme Court which issued its decision on May 25, 2011 setting aside Sections 10 and 11 of the amendments to Rule H approved by IPUC Order No. 30995. *Ada County Highway District v. Idaho Public Utilities Commission*, 253 P.3d 675 (Idaho 2011) (hereinafter "ACHD v. IPUC").

Subsequent to entry of the Opinion by the Supreme Court and pursuant to I.C. § 61-629, Idaho Power sought Commission approval of a modified version of section 10, purportedly seeking to "alter or amend the order appealed from to meet the objections of the court." Pursuant to Order No. 32476, the Commission approved the revised version of section 10. However, the

revised version, approved by the Commission, does not "meet the objections of the court" and, in fact, blatantly ignores the Supreme Court directives.

II. ARGUMENT

The authority of a Public Road Agency to compel a utility to relocate its facilities within a public right-of-way is well established. In *State ex rel Rich v. Idaho Power Co.*, 81 Idaho 487, 501 (Idaho 1959), the court unambiguously stated: "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." The Supreme Court interpreted Idaho Code 62-705 and affirmed this common law rule in *ACHD v. IPUC*, noting:

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. (citations 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.

253 P.3d at 680-81. The Commission is respectfully requested to temper its consideration of this Petition for Reconsideration with the directive of the Supreme Court in mind. At no point in its Opinion did the Supreme Court overrule or otherwise place in to question its prior precedent set forth in *State ex rel Rich v. Idaho Power*, *Supra*.

In concluding that Section 10 did not usurp ACHD's exclusive jurisdiction over public rights of way, the Court held:

Section 10 provides that when Company is required to relocate its distribution facilities within a public right of way for the benefit of a Private Beneficiary, such entity may be required to pay some or all of the costs incurred by company in doing so. (footnote omitted). When ACHD determines that a utility must remove or relocate its facilities that are within a public right of way, ACHD is not required to bear any of the utilities costs of doing so. *Mountain States Tel. & Telegraph Co. v. Boise Redevelopment Agency*, 101 Idaho 30, 33, 607 P.2d 1084, 1087 (1980). The utility must proceed with the relocation. Because ACHD does not bear any of that cost, there is no need for it to have authority to determine whether some third party should reimburse the utility for all or a portion of the cost. Whether some third party reimburses the Company after the relocation has

been completed is not an issue of concern to ACHD. Determining whether there will be reimbursement from a third party is simply not necessary in order for ACHD to freely and efficiently exercise powers expressly granted it.

253 P.3d at 680-81. The conclusion of the Court that ACHD has neither a reimbursement obligation nor any enforceable interest in determining if and to what extent reimbursement from a third party is compelled does not establish the right of the utility to seek reimbursement from third parties. In fact, the IPUC's attempt to regulate the obligations of third parties to a utility when the utility relocates its facilities within a public right of way is the exact reason the Supreme Court concluded that by adopting Section 10 the IPUC exceeded its authority.

In reaching the conclusion that IPUC exceeded its authority, the Court held:

IPUC certainly has the authority to determine the costs that Company charge a private person who *requests services* from Company. (Emphasis added)

253 P.3d at 682. Thus, if a third party including a real estate developer within Build Idaho requests a line extension or other relocation of utility services, Idaho Power has the right to charge that third party the costs incurred by the utility in making such change. However, the Court continued:

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, [under Section 10] 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 benefitted the third party. IPUC has not pointed to any statute granting it that authority. We hold that the provisions of Section 10 discussed above exceed the authority of IPUC. Therefore, we set aside Section 10.

253 P.3d at 683. The Supreme Court thus reached two indisputable conclusions: First, the Court confirmed ACHD's exclusive right to compel a utility to relocate its facilities located within a public right-of-way, without any cost to be imposed upon ACHD. Second, relocation expense

can be charged to a private person or entity or if that private person "requests services from Company."¹ All attempts by the IPUC to "require a third party to pay for services that the third party did not request from [the utility]" were rejected by the Court as exceeding the authority of IPUC.² The Court could not have stated the principle more succinctly and clear: Even if a relocation benefitted a private party, IPUC would exceed its authority by any attempt to compel the private party to pay for the [beneficial] service it did not request.³

The third paragraph of Section 10 does not "meet the objections of the court" because it authorizes the Commission to treat public agencies relocation request as if it is a request for service from a third party.

¹ In fact, Section 6 of Rule H specifically addresses a relocation request by a third party, and requires that third party to pay "a non-refundable charge equal to the Cost Quote."

² Surprisingly, IPUC continues to assert the right to determine whether a relocation, demanded by a Road Agency, nonetheless benefits a third party and further to determine the amount of reimbursement of costs that the third party must pay to the utility. This assertion is in direct contradiction to the admissions made by IPUC before the Supreme Court:

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. (footnote omitted).

253 P.3d at 683.

³ The Supreme Court recognized that under Idaho Code section 61-507, the IPUC can "prescribe rules and regulations for the performance of any service . . . by any public utility." The IPUC can, therefore, "determine the costs that [Idaho Power] can charge a private person who requests services from [Idaho Power]." 253 P.3d at 682. However, as the Supreme Court noted, IPUC failed to point to any statute granting it the authority to "require a third party to pay for services that it did not request from [Idaho Power] if IPUC determined that a relocation required by a Public Road Agency benefitted the third party." 253 P.3d at 683. Thus, a demand for relocation of services asserted by a Public Road Agency, that expressly or nominally benefits a third party, is not the "performance of any service" by a utility so as to grant regulatory authority to the IPUC.

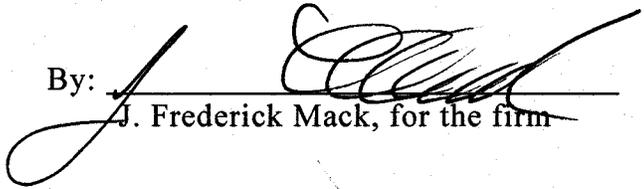
III. CONCLUSION

For the reasons stated herein, Build Idaho respectfully requests that the IPUC reconsider its decision as set forth in Order No. 32476. The Commission is bound by the decisions issued by the Idaho Supreme Court. Any alterations or amendments must fully "meet the objections of the court". The Court made clear in its decision, ACHD v. IPUC, that the Commission has no statutory authority to determine if, under what circumstances, and in what amount a private party must reimburse a utility that relocates its facilities within a public right-of-way where the relocation request is made by a Public Road Agency. Under the Commission's enabling legislation, a relocation request/demand by a Public Road Agency cannot be construed as an implied relocation request by private individuals or entities that the Commission or the utility determine are beneficiaries of the relocation.

RESPECTFULLY SUBMITTED.

Dated this 28th day of March, 2012.

HOLLAND & HART LLP

By: 

J. Frederick Mack, for the firm

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Commission Staff

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

U.S. Mail
Hand Delivered
Overnight Mail
Telecopy (Fax)

**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
Hand Delivered
Overnight Mail
Telecopy (Fax)

The Kroger Co.

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

U.S. Mail
Hand Delivered
Overnight Mail
Telecopy (Fax)

Merlyn W. Clark

D. John Ashby
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
Boise, ID 83701

U.S. Mail
Hand Delivered
Overnight Mail
Telecopy (Fax)



of HOLLAND & HART LLP

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