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IDAHO PUBLIC
UTILITIES COMMISSION

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 BRIEF
IN RESPONSE TO ORDER NO.
32532**

Comes Now Build Idaho Inc. (hereinafter "Build Idaho"), by and through its attorneys of record, Holland & Hart LLP and submits this Brief in response to the Commission's Order No. 32532 ("Order").

Pursuant to the Order, the Commission requested that the parties submit evidence and briefing on the issue "whether a third party may request relocation of Idaho Power's facilities that are located in a public roadway from Idaho Power." Build Idaho joins in and supports the positions asserted by Ada County Highway District ("ACHD") in any briefs and accompanying Affidavits filed with the Commission's Order.

The Commission's request demonstrates that the Commission is focused on the public policy issue rather than complying with Idaho Code 61-629, which clearly requires that the Commission is to enter an order to meet those objections of the Idaho Supreme Court's decision in *ACHD v. IPUC*, --Idaho--, 253 P.3d 678, 682 (2012) ("Decision"). Specifically, the Court held: (1) "We hold that the provisions of Section 10 discussed above exceed the authority of IPUC. Therefore, we set aside Section 10. I.C. Section 61-629." (2) "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. I.C. Section 61-629. (3) "We set aside Sections 10 and 11 of the amendments to Rule H approved in IPUC Order No. 30955." *Id.* at 683. The requirement of Idaho Code 61-629 is simple and the Commission post-Decision proceedings and Orders fail to enter an order consistent with the Court's clearly noted objections and instructions. Instead, the Commission is capitalizing on the Idaho Code 61-629 process as a fresh opportunity to take a second shot at drafting an order to legislate its public policy objectives. See April 19, 2012 Transcript at pp.22, 1.14-22. The Commission is not authorized to "alter or amend" the appeal order to the point of: (1) re-writing the order in a blatant effort to circumvent the Court's decision; (2) altering the order to significantly change provisions that were never in dispute on appeal; and (3) re-writing the order to address issues that the Court did not provide a satisfactory remedy. .

The Court's Decision is also clear in addressing all the relocation situations. First, there is simply no question that and under well established precedent of the Idaho Supreme Court, where a Public Road Agency requests, a utility must relocate its facilities at its own expense. Section 10, paragraph 2 alters the Court's Decision and well established precedent, which was never an issue in the Commission proceedings or appeal to the Court. This conclusion was affirmed in

ACHD v. IPUC, --Idaho--, 253 P.3d 678, 682 (2012). The Supreme Court further confirmed that the IPUC does not have the authority to “require that a third party pay for services that the third party did not request.” 253 P.3d at 683.

Second, where it is a third party that requests that the utility move its facilities from a public roadway, the issue is controlled by Section 6 of Rule H, not by section 10. A third party has absolutely no right to compel the utility to move its facilities. See April 19, 2012 Transcript at pp.29, 1.13-23. However, if the utility agrees to move its facilities at the request of the third party, then the utility has the right under Section 6 to compel the third party to pay specified costs.

Third, if ACHD directs the utility to move its facilities, then the issue is controlled by ACHD v. IPUC, *Supra* in which the Supreme Court held that the IPUC does not have the authority to require payment from a third party even if facts exist to suggest that the relocation that is requested of and required by the Public Road Agency “benefited a third party.” 253 P.3d at 682-83. However, the Supreme Court’s Decision doesn’t preclude Idaho Power from suing a third party to recover relocation costs. 253 P.3d at 683. (“None of the parties posited a legal theory upon which Company could recover from the third party, and we express no opinion on that issue.”)

While policy reasons may exist both in support of and in opposition to imposing costs upon a third party in such situations, those policy concerns raise issues for legislative scrutiny and do not fall within the authority of the Commission. Equally important, any attempt by the Commission at this point to review, analyze, adjudge and assert jurisdiction of the merits of such policy issues, would violate Idaho Code section 61-629, which authorizes the Commission to

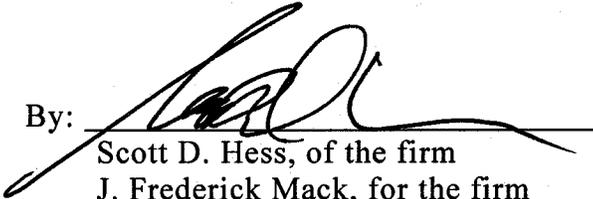
enter an Order “to meet the objections of the [Supreme] court”, but not to engage in legislative fact finding and policy analysis.

Accordingly, Build Idaho responds to the inquiry from the Commission set forth in Order No. 32532 by noting that a third party may request that a utility relocate its facilities that are in a public roadway, and that if the request comes from the third party to the utility, the utility has authority to require payment of specified costs as set forth in Section 6. Where the request to move utility facilities comes from a Public Road Agency, even if the request benefits a third party, Section 10 and established Idaho law requires that the utility accomplish the relocation and bear the costs of such relocation. The Supreme Court’s Decision does not preclude or impair the utility’s ability to pursue any legal remedy in court against a third party to recover relocation costs. 253 P.3d at 683.

RESPECTFULLY SUBMITTED.

Dated this 18th day of May, 2012.

HOLLAND & HART LLP

By: 

Scott D. Hess, of the firm
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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