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IDAHO PUBLIC UTILITIES COMMISSION

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Attorneys for Intervenor: Association of Canyon County Highway Districts

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
)
) **COMMENTS OF**
) **INTERVENOR**
) **ASSOCIATION OF CANYON**
) **COUNTY HIGHWAY**
) **DISTRICTS**

The ASSOCIATION OF CANYON COUNTY HIGHWAY DISTRICTS (“ACCHD”) hereby submits the following comments in the above-captioned matter pursuant to the Idaho Public Utilities Commission’s (“IPUC”) January 21, 2009 *Notice of Modified Procedure, Notice of Scheduling*, Order No. 30719, and March 11, 2009 *Notice of Extension of Comment Deadline*, Order No. 30746.

I. The IPUC does not have Jurisdiction to Authorize Proposed Section 10.

Idaho Code § 40-1310(1) provides that highway district commissioners have “exclusive general supervision and jurisdiction over all highways and public rights-of-way within their

highway system.” These broad powers include the right to own and control land, to change highway locations, to construct and repair highways, and establish standards and regulations. Idaho Code § 40-1310. These supervisory powers include the authority to demand relocation of utilities using the public right-of-way under Idaho Code §62-705.

Idaho Power is authorized to use public highways for its facilities only so long as it does so “in such manner and at such points as not to incommode the public use of the road or highway.” Idaho Code § 62-705. Utility use of public lands is permissive and remains subject to the authority of a city, county, or highway district. Local governing entities, such as highway districts, hold such land in trust for the public and must protect the public use. *Rich v. Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959). As such, highway districts have the exclusive authority to determine that relocation of utility facilities is necessary so as not to incommode public use.¹ This includes the power to require relocation at the utility’s cost.

The jurisdiction of the IPUC 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 highway district 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). Although *Lapwai* references municipal authority, the reasoning is equally applicable to other governing bodies with authority over the rights-of-way,

¹ For background on permissive use and the public trust see *Rich v. Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959).

such as highway districts. The *Lapwai* case found that since the authority over public lands remains with the governing authority that IPUC consent is not required for a governing entity requiring utility relocation. 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.

The IPUC does not have authority to approve Idaho Power's proposed Rule H – Section 10. The proposed terms would place the IPUC in the position of having to determine what does or does not constitute a general public benefit versus a third party benefit versus a shared benefit. This determination is outside the expertise and role of the IPUC. Approving proposed Section 10 would cause the IPUC to act outside its jurisdiction and usurp the authority of highway districts to govern the public use and safety of public highways.

The issues implicit within the proposed Section 10 are more appropriately a matter for negotiation between Idaho Power and the highway districts. One example of such an approach has already been accomplished in an agreement between Idaho Power and the Ada County Highway District. See *Comments of the Ada County Highway District*, March 3, 2009, and ACHD Resolution 330. The highway districts making up the ACCHD have also pursued agreements with utilities to standardize how relocations are handled. These agreements are the appropriate mechanism for addressing relocation costs and concerns.

ACCHD advises that the IPUC delete the proposed Section 10 and any other parts of the proposed Rule H that attempt to regulate the relocation of utilities on highway district land. Such relocation regulation is outside the jurisdiction of the IPUC.

II. Problems with the Definition and Treatment of Third Party Beneficiaries

Proposed Section 10, in trying to apportion relocation costs, focuses on the idea of third-party beneficiaries. The notion seems to be that some improvements are made for the general public and other improvements are made only for the benefit of an identifiable “third party.” Section 10 does not clearly define what constitutes a third party beneficiary, providing only examples: “private or public third parties such as real estate developers, local improvement districts, or adjacent landowners.” This definition is problematic and overly broad.

First, the definition allows a third party to be private or public. The inclusion of a possibility of a public third party beneficiary is troublesome. Public governing bodies overlap. Highway districts border each other and may have joint agreements sharing in maintenance. Projects in municipalities may impact and benefit highway district facilities. For instance, a municipal water project may lead to construction that benefits highway district facilities. The water project is for the general public so the municipality would not be required to pay relocation costs. However, the benefit to the highway district could be construed so that the highway district is considered a “third party beneficiary” and now is required to pay relocation costs to Idaho Power. Therefore ACCHD requests that the definition of “third party beneficiary” be amended to delete reference to public entities or political subdivisions.

Additionally, the definition of third party beneficiaries includes local improvement districts (LIDs). It is not clear whether this reference to local improvement districts is limited to the current definition in Rule H or to local improvement districts in general.² Regardless the inclusion of local improvement districts as a third party beneficiary conflicts with the authority

² Rule H defines a local improvement district as being under Idaho Code §50-2503, which provides for the formation of such a district for distribution line installation or alteration. Rule H – Section 9 covering Local Improvement Districts is also concerned only with §50-2503 LIDs. Highway districts are granted the power to create local improvement districts for a variety of other purposes as well. See Idaho Code §40-1322 and chapter 17 of title 50. Should Section 10 be approved by the IPUC, ACCHD requests that this portion be clarified so that local improvement districts as third-party beneficiaries are limited only to the definition included in Rule H.

of the highway district to require relocation of utilities. The legislature has given highway districts the authority to organize local improvement districts as a funding mechanism for certain improvements. See Idaho Code § 40-1322. Such improvements do provide certain local benefits, but the improvements also ultimately provide benefits to the general public as a whole.

For example, a new subdivision may receive certain benefits from a new turn-out lane, but the general public benefits as well as the turn-out lane provides relief for the general flow of traffic. Highway districts have been authorized to evaluate such benefits, provide for local assessments or impact fees as a funding mechanism, and determine whether relocation is necessary so as not to incommode the public use. A utility is not granted such authority and the IPUC is not authorized to make such determinations.

Therefore ACCHD requests that local improvement districts be removed from the definition of “third-party beneficiaries.”

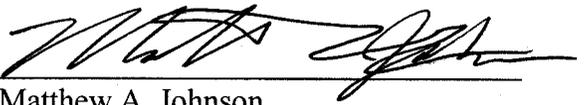
III: Constitutional Concerns

ACCHD also notes and re-emphasizes the concern of the Ada County Highway District that the proposed Section 10 may be unconstitutional. See ACHD Comment No. 2 in *Comments of Ada County Highway District*, March 3, 2009. For this reason, ACCHD also requests that the IPUC delete language in the proposed Rule H Tariff attempting to regulate relocation of utilities in the public right-of-way.

The Association of Canyon County Highway Districts appreciates the Commission’s consideration of these comments.

Dated this 17th day of April, 2009.

WHITE PETERSON

By: 

Matthew A. Johnson

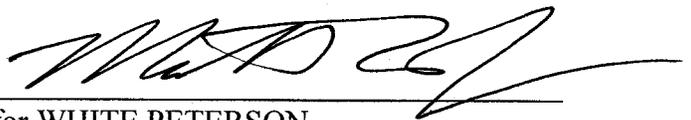
Attorneys for the City of Nampa

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 17th day of April, 2009, a true and correct copy of the above and foregoing instrument was served upon the following by the method indicated below:

<p>Lisa D. Nordstrom Barton L. Kline Scott Sparks Gregory W. Said IDAHO POWER COMPANY P. O. Box 70 Boise, ID 83707-0700</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> lnordstrom@idahopower.com <input checked="" type="checkbox"/> bkline@idahopower.com <input checked="" type="checkbox"/> ssparks@idahopower.com <input checked="" type="checkbox"/> gsaid@idahopower.com</p>
<p>Kristine A. Sasser Deputy Attorney General IDAHO PUBLIC UTILITIES COMMISSION 472 W. Washington (83702) P. O. Box 83720 Boise, ID 83720-0074</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> kris.sasser@puc.idaho.gov</p>
<p>Michael C. Creamer Given Pursley LLP 601 W. Bannock St. Boise, ID 83702 for BUILDING CONTRACTORS ASSOCIATION OF SOUTHWESTERN IDAHO</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> mcc@givenspursley.com</p>
<p>Michael Kurtz, Esq. Kurt J. Boehm, Esq. Boehm, Kurtz & Lowry 36 E. Seventh Street, Suite 1510 Cincinnati, OH 45202 for The Kroger Co.</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> mkurtz@BKLawfirm.com <input checked="" type="checkbox"/> kboehm@BKLawfirm.com</p>
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