



DISTRICT requesting reconsideration and clarification of the IPUC's approval of Rule H Section 10 relating to utility relocations. On that date, the Association of Canyon County Highway Districts and the City of Nampa also filed petitions for reconsideration of the IPUC's approval of Rule H Section 10. Additionally, the Building Contractors Association filed a petition for reconsideration of other portions of Rule H. On August 19, 2009, the IPUC issued *Order No. 30883* granting reconsideration and also directed Idaho Power to clarify the definition of "third party beneficiary" and "local improvement district". As directed by the IPUC, Idaho Power on August 28, 2009, filed modifications to Rule H Section 10. Idaho Power's August 28, 2009 filing also made modifications to Rule H Section 1 "Definitions" and, in particular, modified the definition of "Local Improvement District" and added definitions of "Public Road Agency" and "Third-Party Beneficiary", (collectively, these modifications to Rule H Section 1 are referred to below as "applicable portions of Rule H Section 1").

ACHD has considered IPUC *Order No. 30853*, IPUC *Order No. 30883*, and the modified Rule H Section 10 and applicable portions of Rule H Section 1 and renews its objections as stated in its PETITION FOR RECONSIDERATION/CLARIFICATION BY ADA COUNTY HIGHWAY DISTRICT as well as its original comments submitted March 3, 2009. As will be demonstrated below, Rule H Section 10 and applicable portions of Rule H section 1, as modified by Idaho Power, are unauthorized usurpations of the clear and exclusive jurisdiction of Idaho's highway districts and public road agencies by the IPUC. To the extent that Rule H Section 10 and applicable portions of Rule H Section 1 are applicable to the state or any entity of local government, including but not limited to public road agencies and local improvement districts, it is a violation of the Idaho Constitution. Rule H Section 10 and applicable portions of Rule H

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Section 1 are also unconstitutional and legally unauthorized abrogations or amendments of the common law rule that utilities pay the cost of relocation of their facilities within the public rights-of-way.

ACHD hereby requests that the IPUC issue an Order reversing its earlier decisions and striking Rule H Section 10 and applicable portions of Rule H Section 1 from Rule H.

## II.

### ARGUMENT

#### **A. As Modified by Idaho Power, Rule H Section 10 and Applicable Portions of Rule H Section 1 are an Illegal Encroachment Into ACHD's Exclusive Jurisdiction**

On August 28, 2009, pursuant to *Order No. 30883*, Idaho Power filed a modified Rule H, which included changes to Rule H Section 10 and Rule H Section 1. As modified, Rule H Section 10 and applicable portions of Rule H Section 1 are an illegal encroachment into ACHD's exclusive jurisdiction.

Pursuant to Idaho law, highway districts have *exclusive* general supervision and jurisdiction over all highways and public rights-of-way within their highway system and full power to establish design standards and to establish use standards.

Idaho Code § 40-1310(1) & (8) provide as follows:

#### **40-1310. POWERS AND DUTIES OF HIGHWAY DISTRICT COMMISSIONERS.**

(1) The commissioners of a highway district have *exclusive general supervision and jurisdiction over all highways and public rights-of-way within their highway system, with full power to construct, maintain, repair, acquire, purchase and improve all highways within their highway system*, whether directly or by their own agents and employees or by contract. Except as otherwise provided in this chapter in respect to the highways within their highway system, a highway district shall have all of the powers and duties that would by law be vested in the commissioners of the county and in the district directors of highways if the highway district had not been organized. Where any highway within the

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limits of the highway district has been designated as a state highway, then the board shall have exclusive supervision, jurisdiction and control over the designation, location, maintenance, repair and reconstruction of it. The highway district shall have power to manage and conduct the business and affairs of the district; establish and post speed and other regulatory signs; make and execute all necessary contracts; have an office and employ and appoint agents, attorneys, officers and employees as may be required, and prescribe their duties and fix their compensation. Highway district commissioners and their agents and employees have the right to enter upon any lands to make a survey, and may locate the necessary works on the line of any highways on any land which may be deemed best for the location.

(Emphasis added.)

(8) The highway district board of commissioners shall have the *exclusive general supervisory authority over all public highways, public streets and public rights-of-way under their jurisdiction, with full power to* establish design standards, *establish use standards*, pass resolutions and establish regulations in accordance with the provisions of title 49, Idaho Code, and control access to said public highways, public streets and public rights-of-way. (Emphasis added.)

Pursuant to Idaho Code § 40-1312, this grant of power to the highway districts is to be liberally construed and all necessary powers are to be implied.

40-1312. GRANT OF POWERS TO BE LIBERALLY CONSTRUED. The grant of powers provided in this chapter to highway districts and to their officers and agents, shall be *liberally construed, as a broad and general grant of powers*, to the end that the control and administration of the districts may be efficient. The enumeration of certain powers that would be implied without enumeration shall not be construed as a denial or exclusion of other *implied powers* necessary for the free and efficient exercise of powers expressly granted. (Emphasis added.)

In *Worley Highway District v. Kootenai County*, 104 Idaho 833, 663 P.2d 1135 (Idaho App., 1983), the Idaho Court of Appeals considered powers and authorities granted to highway districts under the predecessors to Idaho Code § 40-1310 and Idaho Code § 40-1312 and stated as follows:

It is clear to us that [Idaho Code § 40-1310] together with [Idaho Code § 40-1312] gives highway commissioners broad powers to administer highways within their districts. Their domain includes not only the “exclusive general supervision and jurisdiction over all highways,” but also “full power to construct, maintain, repair,

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and improve all highways within the district.” *This language makes the legislature's intent clear that in the area of construction, maintenance, and day-to-day operation of highways, the prerogative of the highway commissioners is exclusive.* (Emphasis added.) *Worley Highway District v. Kootenai County*, 104 Idaho at 835.

Additionally, Idaho Code § 40-1406 provides in pertinent part:

40-1406. POWERS AND DUTIES OF HIGHWAY COMMISSIONERS -- ONE HIGHWAY DISTRICT IN COUNTY -- HIGHWAY POWERS OF CITIES IN COUNTY ABOLISHED -- LAWS IN CONFLICT SUPERSEDED. The highway commissioners of a county-wide highway district shall exercise *all of the powers and duties provided in chapter 13 of this title*, and are empowered to make highway ad valorem tax levies as provided by chapter 8, of this title.

\* \* \*

Wherever *any provisions* of the existing laws of the state of Idaho are *in conflict* with the provisions of this chapter, the provisions of *this chapter shall control and supersede* all such laws. (Emphasis added.)

Therefore, to the extent that *any* law of the state of Idaho is in conflict with the highway districts’ exclusive jurisdictional authority over the public rights-of-way as granted in Code §§ 40-1310(1), 40-1310(8), 40-1312, and 40-1406, such laws are superseded by these provisions of Idaho law.

In *Village of Lapwai v. Alligier*, 78 Idaho 124, 299 P.2d 475 (1956), the Idaho Supreme Court said, “[i]n the exercise of its powers and duties with respect to its streets and alleys, the municipality [highway district] acts as agent of the state. In discharging a mandatory duty imposed by the state, the municipality performs a governmental function [cites omitted] within the police power conferred by the state.” *Village of Lapwai v. Alligier*, 78 Idaho at 128.

The highway district’s exclusive control and jurisdiction over the public rights-of-way includes the unqualified ability to demand that electric utility facilities within the public rights-of-way relocate per Idaho Code § 62-705. Pursuant to Idaho Code § 62-705, utility use of public

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lands is permissive and remains subject to the authority of a city, county or highway district. It is noteworthy that Idaho Code § 62-705 does not provide express or implied authority for utilities to charge for relocations. Local governing entities, such as highway districts and public road agencies, hold such land in trust for the public and must protect the public use. *State v. Idaho Power Company*, 81 Idaho 487, 346 P.2d 596 (1959). Highway districts have the exclusive authority to determine whether and when relocation of utility facilities within the public right-of-way is necessary so as to not incommode the public use. In *State v. Idaho Power Company*, the Idaho Supreme Court stated:

The permissive use of public highways, which the legislature by I.C. §§ 62-701 and 62-705 accords to utilities, is in recognition of the time honored rule existing in this state, that streets and highways belong to the public and are ***held by the governmental bodies and political subdivisions of the state in trust*** for the use by the public, and that only a permissive right to use, and no permanent property right can be gained by those using them. . . . This is but a recognition of the fundamental proposition that [Idaho Power's and Mountain States Telephone's] ***permissive use of the public thoroughfares is subordinate to the paramount use thereof by the public.*** (Emphasis added.) 81 Idaho at 498, 515.

See also, *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency*, 101 Idaho 30, 32, 607 P.2d 1084 (1980).

Under the common law rule, "utilities bear the expense of relocating their facilities in public rights of way when necessary to make way for proper governmental use of the streets." *Mountain States Telephone and Telegraph Co.*, 101 Idaho at 32. As noted by the Idaho Supreme Court in *State v. Idaho Power Company*, "[l]ong before the adoption of our Constitution, the people adopted the common law as the rule of decision in all cases not otherwise provided by law. . . . 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

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expense.” 81 Idaho at 501. The highway district’s exclusive authority and jurisdiction over the public right-of-way necessarily includes the exclusive power to determine who pays for the utility relocation. This is consistent with, and supported by Idaho Code §40-1312 which, as noted above, is an affirmative statement by the Idaho legislature that the power to the highway districts is to be liberally construed with all necessary powers to be implied.

Acting in its role as agent of the state per *Village of Lapwai v. Alligier*, and performing its governmental function with police power conferred by the state, ACHD exercised its exclusive jurisdiction over utility relocations (including financial liability for utility relocations) with the adoption of Resolution 330 in September 1986 (a copy of which is attached as Exhibit “A” to the Affidavit of Susan Slaughter which is attached hereto as Attachment “1”). Resolution 330 reflects the work of representatives of ACHD, the Boise City Department of Public Works and various utility organizations and establishes guidelines for utility and sewer relocations within the public rights-of-way under the jurisdiction of ACHD. Resolution 330 addresses utility and sewer relocations in a comprehensive fashion including assignment of financial responsibility, and establishment of operational procedures, in three different scenarios: 1) utility and sewer relocations are required because improvements in the public right-of-way are sponsored or funded by ACHD; 2) utility and sewer relocations are required because improvements in the public right-of-way are partially funded by ACHD and partially funded by another party; and 3) utility and sewer relocations are required because improvements in the public right-of-way do not involve the participation or funding of ACHD.

Accordingly, ACHD requests that the IPUC issue an Order reversing its earlier decisions and striking Rule H Section 10 and applicable portions of Rule H Section 1 from Rule H.

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**B. As Modified by Idaho Power, Rule H Section 10 and Applicable Portions of Rule H Section 1 are Beyond the Jurisdiction of the IPUC.**

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 (1979). In *Alpert v. Boise Water Corporation*, 118 Idaho 136, 795 P.2d 298 (1990), the Idaho Supreme Court cited *Washington Water Power Co. v. Kootenai Environmental Alliance* and other Idaho precedent reaching back to 1963 stating:

The Idaho Public Utilities Commission exercises limited jurisdiction and has ***no authority other than that expressly granted to it by the legislature.*** [cite to *Washington Water Power Co.*]. The Idaho Public Utilities Commission has ***no authority*** other than that given to it by the legislature. It exercises a limited jurisdiction and ***nothing is presumed*** in favor of its jurisdiction. *United States v. Utah Power & Light Co.*, 98 Idaho 665, 570 P.2d 1353 (1977); *Lemhi Tel. Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692 Idaho 692, 571 P.2d 753 (1977); *Arrow Transp. Co. v. Idaho Public Utils. Comm'n.*, 85 Idaho 307, 379 P.2d 422 (1962). As a general rule, administrative authorities are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the statutes reposing power in them and ***they cannot confer it upon themselves***, although may determine whether they have it. If the provisions of the statutes are not met and compliance it not had with the statutes, no jurisdiction exists. (Emphasis added.) *Alpert v. Boise Water Corporation*, 118 Idaho at 140

Additionally, in *Utah Power & Light Co. v. Idaho Public Utilities Commission*, 107 Idaho 47, 685 P.2d 276 (1984) the Idaho Supreme Court said, “[t]he Idaho Public Utilities Commission has no authority other than that given to it by the legislature. It exercises a limited jurisdiction and nothing is presumed in favor of its jurisdiction.” *Utah Power & Light Co. v. Idaho Public Utilities Commission*, 107 Idaho at 52.

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The IPUC is not granted authority to determine what may or may not incommode the public use as it pertains to public rights-of-way. In *Village of Lapwai v. Alligier*, 78 Idaho 124, 299 P.2d 475 (1956), the Idaho Supreme Court established clear lines of authority over the public rights-of-way and the relocation of utility facilities within public rights-of-way, stating:

***“. . . the [Public Utilities Law] 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. Moreover, the legislature, in providing for the use of streets and alleys by utilities, expressly required the consent of the municipal authorities, and authorized the municipal authorities to impose reasonable regulations upon such use. The legislature recognizing the duty it imposes upon the municipality to control and maintain its streets and alleys, has preserved to the municipality the power to deny their use to a utility, or to impose reasonable regulations thereon, when necessary to the use of such streets and alleys by the public in the usual manner. . . we conclude that the village was not required to procure the consent of the [public utilities] commission as a condition to discontinuance of appellants’ service and their ouster from its streets and alleys.”*** (Emphasis added) *Village of Lapwai v. Alligier*, 299 P.2d at 478.

Rule H Section 10 and applicable portions of Rule H Section 1 are beyond the jurisdictional authority of the IPUC because they seek to affirmatively regulate the state’s highway districts, public road agencies, entities of government, third parties, and developers and impose upon them the duty to pay for mandatory utility relocations in an unreasonable, one size fits all approach. The state’s highway districts, public road agencies, entities of government, third parties and developers are not “public utilities” as defined in Idaho Code § 61-129. Idaho Code § 61-101 provides, “[t]his act shall be known as “The Public Utilities Law” and shall apply to the public utilities and public services herein described and the commission herein referred to.”

In *Order No. 30853* at page 13, the IPUC asserts jurisdiction via Idaho Code §§ 61-502 and 61-503. It is erroneous for the IPUC to find that these provisions of the Idaho Code, which

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relate to rates and charges for services, products or commodities, provide the IPUC the jurisdiction and authority it has exercised in this matter. Mandatory relocation of utility facilities from the public rights-of-way is not a service, product or commodity. It is only by an unreasonable and irrational stretch of logic that the IPUC characterizes a mandatory relocation of utility facilities located in the public right-of-way permissively and subordinately to the public, to be “services”. Certainly, per *Washington Water Power Co. v. Kootenai Environmental Alliance*, Idaho Code §§ 61-502 and 61-503 authorize the IPUC to determine whether utility costs associated with mandatory relocations may be included in a utility’s rate base, but this is the limit of the IPUC’s jurisdiction and authority in this matter. Idaho Code §§ 61-502 and 61-503 in no way, express or implied, provide the IPUC with the jurisdiction or authority to affirmatively intervene in the exclusive jurisdiction of the state’s highway districts and public road agencies and thereby impose upon highway districts, public road agencies, entities of government, third parties, and developers the duty to pay for such relocations.

The IPUC’s jurisdiction and authority to determine whether utility charges, services or practices are unjust, unreasonable, discriminatory or preferential does not expressly or impliedly provide the IPUC with the jurisdiction or authority to impose upon public road agencies, entities of government, third parties, and developers the duty to pay for such relocations and thereby affirmatively intervene in the exclusive jurisdiction of the state’s highway districts.

Moreover, the IPUC’s jurisdiction and authority to determine whether utility charges, services or practices are unjust, unreasonable, discriminatory or preferential does not expressly or impliedly provide the IPUC with the jurisdiction or authority to dictate the operation of public road agencies and thereby affirmatively intervene in the exclusive jurisdiction of the state’s

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highway districts. Rule H Section 10 and applicable portions of Rule H Section 1 dictate the operation of public road agencies in at least two ways. First, they effectively dictate the substance of any guidelines that public road agencies might develop for the allocation of utility relocation costs. Second, they will artificially and inappropriately inject the allocation of utility relocation costs into any development agreement between highway districts and third parties.

It is noteworthy that Idaho Code § 62-705 does not provide express or implied authority for utilities to charge for relocations and no such authority is granted to the IPUC in Idaho Code § 62-705. That the people have reserved the common law right to require the utilities to relocate facilities permissively located within the public right-of-way cannot mean to give utilities or the IPUC the authority to decide who pays for the relocation. Clearly, with the adoption of Section 10 Rule H, the IPUC has overstepped its jurisdictional bounds.

Rule H Section 10 and applicable portions of Rule H Section 1 are an unprecedented illegal usurpation of the highway districts' *exclusive* general supervision and jurisdiction over all highways and public rights-of-way. Through the adoption of Rule H Section 10 and applicable portions of Rule H Section 1, the IPUC will effectively dictate the policies and procedures of highway districts and local road agencies regarding electric utility relocations, impact the operation of highway districts and local road agencies in their negotiations and relations with third parties and developers concerning road improvement projects, and regulate and control electric utility relocations by assigning financial liability for such relocations. Such is strictly in the power and authority of the highway districts and should be left in the hands of the highway districts, working in a coordinated effort with local government officials and utility companies to develop an approach that is mutually beneficial.

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Additionally, with the following provision, Rule H Section 10 attempts to regulate how quickly a public utility is required to make the relocation: “All payments from Third Party Beneficiaries to the Company under this Section shall be paid in advance of the Company’s Relocation work, based on the Company’s Word Order Cost.” Thus, the IPUC is taking away from the highway districts and public road agencies the exclusive right, authority and jurisdiction to require the public utility to relocate its facilities on the highway district’s schedule. ACHD has experienced problems in the past getting public utilities to relocate utility lines in a timely manner. See, Affidavit of Dorrell Hansen, attached hereto as Attachment “2”. Rule H Section 10 explicitly takes ACHD’s exclusive authority to control the timing of the relocation of utilities and transfers it to the IPUC and the utilities. Rule H Section 10 will jeopardize the timing and schedule of road project development and construction and the public’s use of the right-of-way. See, Affidavit of Dorrell Hansen, attached hereto as Attachment “2”.

ACHD is unaware of any similar move by the IPUC since its formation nearly 100 years ago. ACHD questions this aggressive and unprecedented move now, at this time.

ACHD requests that the IPUC overturn its clearly erroneous finding that “Section 10 does not explicitly or implicitly usurp the public road agencies’ authority to manage and control their rights-of-way” (*Order No. 30853*, page 12) and that it reverse its earlier decision and strike Rule H Section 10 and the applicable portions of Rule H Section 1 from Rule H.

In *Order No. 30853* at page 9, the IPUC notes Idaho Power’s acknowledgement that public road agencies such as ACHD have “sole and complete [exclusive] jurisdiction to determine when relocation is required to avoid incommoding the public” and that “in regard to the costs of utility facility relocations to determine utility rates and charges, the Commission has

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exclusive jurisdiction”, but that somehow, with regard to utility relocations, the public road agencies and the IPUC will “exercise jurisdiction concurrently”. Unfortunately, it appears in *Order No. 30853* at page 13 that the IPUC has accepted Idaho Power’s unfounded and incongruous position that two entities, each with exclusive jurisdiction, can exercise jurisdiction concurrently.

As previously stated, acting in its role as agent of the state per *Village of Lapwai v. Alligier*, and performing its governmental function with police power conferred by the state, ACHD exercised its exclusive jurisdiction over utility relocations (including financial liability for utility relocations) with the adoption of ACHD Resolution 330 in September 1986. Rule H Section 10 usurps ACHD Resolution 330 and ACHD’s exclusive jurisdiction as outlined above. Additionally, Rule H Section 10 is in conflict with ACHD Resolution 330. As stated by the Idaho Supreme Court in *State v. Poynter*, 70 Idaho 438, 220 P.2d 386 (1950), “[t]he state and a municipal corporation may have concurrent jurisdiction over the same subject matter and in which event the municipality may make regulations on the subject notwithstanding the exercise of state regulations thereon, ***provided the regulations or law are not in conflict.***” (Emphasis added.) *State v. Poynter*, 70 Idaho at 441. Additionally, it must be noted that in modifying Rule H Section 10 to provide that Rule H Section 10 will not apply if a public road agency has adopted “legally binding guidelines” with “substantially similar” terms, Idaho Power has highlighted the point that there can be no concurrent jurisdiction where regulations of a local entity and a state entity are in conflict. Thus, pursuant to *State v. Poynter* concurrent jurisdiction as proposed by Idaho Power and accepted by the IPUC cannot exist with regard to utility relocations from the public rights-of-way.

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In adopting Rule H Section 10 and applicable portions of Rule H Section 1, the IPUC erroneously assumes that the public (rate payers) does not benefit from road projects funded by entities of government including but not limited to local improvement districts, as well as those funded by third parties, and developers; in fact, the opposite is quite true. The public (rate payers) benefits tremendously from road projects funded by entities of government including but not limited to local improvement districts, as well as those funded by third parties, and developers; this is evidenced by the fact that upon completion, such road projects are commonly accepted for the public by highway districts for ownership and maintenance as public right-of-way per Idaho Code § 40-1310. Additionally, 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.

Improvements, whether funded by an entity of government, including but not limited to local improvement districts, as well as those funded by third parties or developers, do provide certain local benefits, but the improvements also ultimately provide benefits to the general public. 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 and public road agencies have been exclusively authorized to evaluate such benefits, determine funding responsibilities and establish funding mechanisms where appropriate, and determine whether relocation of utility facilities is necessary so as to not incommode the public. It is beyond the jurisdiction of the IPUC to determine what does or does not constitute a general public benefit versus a third party benefit versus a shared benefit. Moreover, such a determination is well beyond the expertise and role of the IPUC. The IPUC

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does not have the jurisdiction to act as arbiter in any dispute over public benefit, third party benefit, or shared benefit and to do so under Rule H Section 10 and applicable portions of Rule H Section 1 usurps the exclusive authority and jurisdiction of highway districts and public road agencies to govern the public use and safety of the public rights-of-way.

Moreover, the Idaho Supreme Court has clearly stated that the permissive use of the public right-of-way is a benefit which utilities and their rate payers enjoy and they and their rate payers should bear the burden of relocation from the public right-of-way when requested:

A further answer to the argument that relocation costs should be paid by highway users is, that [Idaho Power's and Mountain States Telephone's] permissive use of the highways is for the benefit of the utilities and their subscribers and relocation costs should therefore be paid by them as an incident of such benefit; . . . *State v. Idaho Power Company*, 81 Idaho at 505.

Neither Idaho Power nor the IPUC can simply ignore the compelling policy issues expounded by the Idaho Supreme Court in the foregoing quotation from *State v. Idaho Power Company*.

ACHD requests that the IPUC overturn its clearly erroneous finding that Idaho Code §§ 61-502 and 61-503 expressly or impliedly provide the IPUC with the concurrent jurisdiction or authority to affirmatively intervene in the exclusive jurisdiction of the state's highway districts and public road agencies.

ACHD also questions the wisdom of singling out electric utilities for treatment. In *Order No. 30853*, at page 13, the IPUC praises the concept of maintaining "consistency between the agencies", yet, with the adoption of Section 10 of Rule H, the IPUC has singled out electric utilities. This creates a lack of consistency between and among the public utilities in Idaho.

Accordingly, ACHD requests that the IPUC issue an Order reversing its earlier decisions and striking Rule H Section 10 and applicable portions of Rule H Section 1.

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**C. As Modified by Idaho Power, Rule H Section 10 and Applicable Portions of Rule H Section 1 are Unconstitutional**

In *State v. Idaho Power Company*, the Idaho Supreme Court struck down as unconstitutional, Idaho Code § 40-120(27) which imposed upon the Idaho Board of Highway Directors (predecessor to the Idaho Department of Transportation) an affirmative obligation to pay for utility relocations associated with state highway projects. The Idaho Supreme Court ruled that Idaho Code § 40-120(27) violated both Article 8 § 2 and Article 7 § 17 of the Idaho Constitution. *State v. Idaho Power Company*, 81 Idaho at 515.

Article 8 § 2 of the Idaho Constitution prohibits the state from giving, loaning, or aiding in any manner the credit of the state to any individual, association, municipality or corporation. Article 7 § 17 of the Idaho Constitution mandates that proceeds from any tax on gasoline shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of Idaho and that no part of such funds shall by transfer of funds or otherwise, be diverted to any other purposes whatsoever. Article 8 § 4 of the Idaho Constitution is the local government analogue to Article 8 § 2 and prohibits counties, cities, and other political subdivisions from loaning pledging the credit or faith, directly or indirectly, in any manner, to or in aid of any individual, association, municipality or corporation.

In *Order No. 30853*, at page 13, and again in *Order No. 30883*, at page 2 the IPUC makes the clearly erroneous findings: “Section 10 in no way grants Idaho Power or this Commission authority to impose such costs on a public road agency”. ACHD directs the IPUC to Subsection d of Section 10 which states: “. . . where the Company has a private right of occupancy for its power line facilities within the public road right-of-way, such as an easement or other private right, the costs of the relocation is borne by the Public Road Agency.” Applying *State v. Idaho*

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*Power Company*, it is clear that Subsection d of Section 10 clearly imposes a duty upon the state and public road agencies such as cities, counties or highway districts to pay for utility relocations associated with road projects, and therefore violates Article 8 § 2 and Article 7 § 17 of the Idaho Constitution (state) Article 8 § 4 of the Idaho Constitution (highway districts and other public road agencies) because it establishes a requirement upon the state and such entities of local government to pay for utility relocations.

The holdings of *State v. Idaho Power Company* apply to other entities of local government by virtue of Article 8 § 4 of the Idaho Constitution, including but not limited to, local improvement districts. Inclusion of any entity of local government, including but not limited to local improvement districts, in the definition of third party beneficiary as provided in the new Rule H Section 1, is a clear violation of Article 8 § 4 of the Idaho Constitution because it establishes a requirement upon such entities of local government to pay for utility relocations.

Idaho Power's revisions to Rule H Section 10 and Rule H Section 1, with the modification of "Local Improvement District" and addition of the definitions of "Public Road Agency" and "Third-Party Beneficiary", served only to rearrange these terms as expressed in the previous iteration of Rule H Section 10 as adopted by the IPUC in *Order No. 30853*. As originally adopted, Rule H Section 10 essentially defined the terms "Public Road Agency" and "Third-Party Beneficiaries", with use of text and parentheses. The previous version of Rule H Section 10 explicitly included a reference to "local improvement districts" in attempting to define the term "Third Party Beneficiaries". The previous version of Rule H Section 10 explicitly set out the definition of "Local Improvement District" as including "any local improvement district created under the statutory procedures set forth in Idaho Code Title 50,

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Chapter 17.” Thus, as revised, Rule H Section 10 and the applicable portions of Rule H Section 1 continues to include and be applicable to local improvement districts which may be created by any entity of local government such as a city, highway district or public road agency and therefore continues to violate the Idaho Constitution.

IPUC has erroneously found that Rule H Section 10 does not violate the Idaho Constitution. (*Order No. 30853*, page 13 and *Order No. 30883*, at page 2). ACHD requests that the IPUC issue an Order reversing its earlier decisions and striking Rule H Section 10 and applicable portions of Rule H Section 1.

**D. As Modified by Idaho Power, Rule H Section 10 and Applicable Portions of Rule H Section 1 is an illegal attempt to abrogate or amend the Common Law Rule**

In *State v. Idaho Power Company*, the Idaho Supreme Court discussed the common law rule as follows: “[l]ong before the adoption of our Constitution, the people adopted the common law as the rule of decision in all cases not otherwise provided by law. . . . *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.*” (Emphasis added) 81 Idaho at 501. As noted above, in *State v. Idaho Power Company*, the Idaho Supreme Court struck down as unconstitutional, Idaho Code § 40-120(27) which established upon the Idaho Board of Highway Directors (predecessor to the Idaho Department of Transportation) an affirmative obligation to pay for utility relocations associated with state highway projects. In addition to finding Idaho Code § 40-120(27) to be a violation of Article 8 § 2 and Article 7 § 17 of the Idaho Constitution as discussed in the preceding section *II C*, the Idaho Supreme Court also indicated that Idaho Code § 40-120(27) was an unconstitutional abrogation of the common law rule.

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We are aware of the basic rule that, inasmuch as our Constitution is a limitation and not a grant of power, the legislature has plenary power in all matters except those prohibited by the Constitution. [cite omitted] Expressions of this rule, as it relates to the power of the legislature to change the common law obligation of utilities to pay the cost of relocation of their facilities, recognize that the legislature is powerless in the premises if there is a constitutional limitation upon the exercise of such power. *And [Idaho Power's and Mountain States Telephone's] assertion that the legislature may abrogate the common law rule must be so circumscribed.* The constitutional limitation upon the exercise of such legislative power is expressed [cites omitted] as follows: 'The common-law obligation of a utility to relocate its own structures \* \* \* in connection with a grade crossing \* \* \* program continues until the *Constitution* and statute expressly provide otherwise.' (Emphasis added.) (Emphasis supplied.) *State v. Idaho Power Company*, 81 Idaho at 503-504.

If Idaho Code § 40-120(27), a *statute* attempting to abrogate or modify the common law rule was contrary to the Idaho Constitution's limitation on power, then without question, Section 10, Rule H, an *administrative rule* of the IPUC is certainly contrary to the Idaho Constitution's limitation on power. Clearly, Rule H Section 10 and the applicable portions of Rule H Section 1 are violations of the Idaho Constitution's limitation on power to abrogate or amend the common law rule that utilities pay the cost of relocation of their facilities from the public rights-of-way.

Supporting the conclusion that the common law rule applies any time a utility is requested to relocate its facilities from the public rights-of-way, is *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency*, 101 Idaho 30, 607 P.2d 1084 (1980), in which the Idaho Supreme Court found that the common law rule prohibited the utilities from obtaining reimbursement of their relocation costs from an urban renewal agency. Citing to *State v. Idaho Power Company*, the Idaho Supreme Court said:

The rule at common law that utilities must relocate at their own expense is not an absolute, however, but is subject to legislative provision to the contrary, and also subject to any constitutional prohibition or requirement. [cite to *State v. Idaho Power Company*] We must thus decide whether the legislature has provided that the B.R.A must pay the costs of relocation. While I.C. §§ 50-2007(h) and 50-

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2018(j)(3) permit payment of such costs, they do not appear to be mandatory. ***In the absence of clear legislative direction we decline to abolish the common law rule and establish a rule requiring relocation costs to be paid to permissive users such as utilities.*** (Emphasis added.) *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency*, 101 Idaho at 34-35.

It cannot be argued that there is a difference between urban renewal agencies and local improvement districts such that would justify a different treatment under *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency* for local improvement districts. Indeed, both urban renewal agencies and local improvement districts are created by entities of local government and each are granted the power to install, construct, and reconstruct streets and similar public facilities and each have the power to acquire property by purchase and condemnation.

As demonstrated above in Section II. B., Idaho Code §§ 61-502, 61-503, and 62-705 in no way, express or implied, provide the IPUC with the jurisdiction or authority to affirmatively intervene in the exclusive jurisdiction of the state's highway districts and thereby impose upon public road agencies, entities of government, third parties, and developers the duty to pay for such relocations within the public rights-of-way. Moreover, Idaho Code §§ 61-502, 61-503, and 62-705 are completely absent of *any* legislative direction or intent that utilities should be entitled to recover their costs of relocation within the public rights-of-way. In the absence of "clear legislative direction" no such intent can be presumed or authority assumed by the IPUC.

ACHD requests that the IPUC strike Rule H Section 10 and applicable portions of Rule H Section 1 in light of the clear constitutional limitation on power to abrogate the common law rule as expressed by the Idaho Supreme Court in *State v. Idaho Power Company* and in light of a complete lack of legislative direction or authority regarding reimbursement of utility relocation

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costs in Idaho Code §§ 61-502, 61-503, and 62-705 per *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency*.

Rule H Section 10 and applicable portions of Rule H Section 1 continue to include an overly broad and potentially troublesome definition of “third party beneficiary” which would include a highway district and its duly created and established local improvement district. As discussed above, road improvements benefit the general public as a whole, whether undertaken as a highway district planned and coordinated project or by another entity improving its own facilities.

As noted in the preceding section, the principles of *State v. Idaho Power Company* and *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency* apply equally to all other entities of local government including, but not limited to, local improvement districts established by highway districts under Idaho Code § 40-1322. The inclusion of *any* entity of local government, including but not limited to local improvement districts created by highway districts and public road agencies, in the definition of third party beneficiary is yet another violation of Article 8 § 4 of the Idaho Constitution and the common law rule that utilities pay the cost of relocation of their facilities within the public rights-of-way.

ACHD requests that the IPUC overturn its erroneous finding that Section 10 may include *any* local improvement districts. (*Order No. 30853*, page 13). ACHD requests that the IPUC issue an Order reversing its earlier decisions and striking Rule H Section 10 and applicable portions of Rule H Section 1.

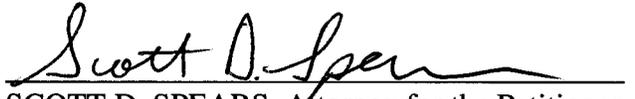
### III.

### CONCLUSION

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As demonstrated above, Rule H Section 10 and applicable portions of Rule H section 1 as modified by Idaho Power are unauthorized usurpations of the clear and exclusive jurisdiction of Idaho's highway districts and public road agencies by the IPUC. To the extent that Rule H Section 10 and applicable portions of Rule H Section 1 are applicable to the state or any entity of local government, including but not limited to public road agencies and local improvement districts, it is a violation of the Idaho Constitution. Rule H Section 10 and applicable portions of Rule H Section 1 are also an unconstitutional and legally unauthorized abrogation or amendment of the common law rule that utilities pay the cost of relocation of their facilities within the public rights-of-way. ACHD hereby requests that the IPUC issue an Order reversing its earlier decisions and striking Rule H Section 10 and applicable portions of Rule H Section 1.

Respectfully submitted this 11<sup>th</sup> day of September, 2009.

  
SCOTT D. SPEARS, Attorney for the Petitioner,  
Ada County Highway District

**CERTIFICATE OF SERVICE**

I hereby certify that on the 11<sup>th</sup> day of September, 2009, I caused to be delivered by hand or by e-mail and U.S. Mail (postage pre-paid) in the manner indicated, a true and correct copy of the foregoing ADA COUNTY HIGHWAY DISTRICT'S BRIEF ON RECONSIDERATION AND CLARIFICATION upon the following parties:

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ADA COUNTY HIGHWAY DISTRICT



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