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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.**

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)
) **CASE NO. IPC-E-08-22**
)
) **ADA COUNTY**
) **HIGHWAY DISTRICT'S**
) **MOTION TO STRIKE**
) **ALL OR PORTIONS OF**
) **WRITTEN TESTIMONY**
) **OF SCOTT D. SPARKS,**
) **DAVID R. LOWRY,**
) **AND GREGORY W. SAID**
)
)

COMES NOW, the ADA COUNTY HIGHWAY DISTRICT (hereinafter "ACHD"), in accordance with the Idaho Public Utilities Commission's Rules of Procedure (hereinafter "RP") 56, 250, 256, 261 and 266 and hereby moves the Commission for an Order striking all or portions of the prepared written testimony of Scott D. Sparks, David R. Lowry, and Gregory W. Said submitted in support of Idaho Power's Application in the above entitled case. For the following reasons, ACHD moves the Commission to strike in its entirety, the unsworn written testimony of Scott D. Sparks, David R. Lowry, and Gregory W. Said or in the alternative, certain portions of the testimony of David R. Lowry, and Gregory W. Said as identified hereunder.

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I.
STANDARD OF ADMISSIBILITY

Idaho Code § 61-601 specifically provides that hearings of the Commission are not bound by the Idaho Rules of Evidence but that they governed by the Idaho Public Utilities Law and rules of practice and procedure adopted by the Commission. Section 61-601 states:

All hearings and investigations before the commission or any commissioner shall be governed by this act and by rules of practice and procedure to be adopted by the commission, and in the conduct thereof neither the commission nor any commissioner shall be bound by the technical rules of evidence. (Emphasis added.)

Commission Rules 250, 261 and 266 establish the standards of admissibility, which compel the exclusion of the Direct Testimony of Scott D. Sparks, David R. Lowry and Gregory W. Said in this proceeding.

RP 250 expressly requires that all testimony in formal Commission hearings be given under oath. The Rule provides:

All testimony presented in formal hearings will be given under oath. Before testifying each witness must swear or affirm that the testimony the witness will give before the Commission is the truth, the whole truth and nothing but the truth. (Emphasis added.)

RP 261 provides as follows:

The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order made, approved or confirmed by the Commission. Rules as to the admissibility of evidence used by the district courts of Idaho in non-jury civil cases are generally followed, but evidence (including hearsay) not admissible in non-jury civil cases may be admitted to determine facts not reasonably susceptible of proof under the Idaho Rules of Evidence. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or inadmissible on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho, and order the presentation of such evidence to stop. All other evidence may be admitted if it is a type generally relied upon by prudent

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persons in the conduct of their affairs. The Commission's expertise, technical competence and special knowledge may be used in the evaluation of the evidence. (Emphasis added.)

RP 266 provides that a witness's previously prepared and distributed testimony may be incorporated into the transcript of the hearing as if read, subject to the admissibility requirements of RP 261. RP 266 provides as follows:

The presiding officer may order a witness's prepared testimony previously distributed to all parties to be incorporated in the transcript as if read if timely filed pursuant to an order, notice or rule requiring its filing before hearing. Without objection, the presiding officer may direct other prepared testimony to be incorporated in the transcript as if read. Admissibility of prepared testimony is subject to Rule 261. (Emphasis added).

Under the foregoing law, it is clear that in order to be admissible, evidence and testimony presented in this proceeding must be in compliance with the rules of the IPUC. The Direct Statements of Scott D. Sparks, David R. Lowry and Gregory W. Said do not comply with RP 250, 261 and 266 and they must be stricken.

II.
UNSWORN TESTIMONY OF SCOTT D. SPARKS, DAVID R. LOWRY,
AND GREGORY W. SAID MUST BE STRICKEN

The unsworn Direct Testimony of Scott D. Sparks, David R. Lowry, and Gregory W. Said is inadmissible because it does not comply with RP 250. Moreover, it is well established that even in administrative hearings, unsworn testimony is inherently unreliable, incompetent, and lacking any evidentiary value. In *Gibraltar Mausoleum Corporation v. City of Toledo et al*, 106 Ohio App.3d 80, 665 N.E.2d 273 (1995), the Ohio Court of Appeals stated:

In order to have any evidentiary value, the witnesses affidavit, deposition or oral testimony must be under oath. . . . Although the administration of the oath at a trial or at an administrative hearing may be expressly or impliedly waived, when no such waiver is apparent on the record, unsworn testimony cannot provide the preponderance of substantial.

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reliable and probative evidence necessary to support an administrative decision. (Emphasis added).

Id. at 276. That the Commission has recognized that unsworn testimony is inherently unreliable, incompetent, and lacking any evidentiary value is obvious from its promulgation of RP 250 which as noted above, requires that all testimony to be under oath.

It is clear that the failure to comply with RP 250 renders the unsworn prepared written Direct Testimony of Scott D. Sparks, David R. Lowry and Gregory W. Said inadmissible in this case.

Failure to comply with RP 266 and 261 also renders the unsworn Direct Testimony of Scott D. Sparks, David R. Lowry and Gregory W. Said inadmissible in this case. RP 266 permits a party to submit a witness's prepared testimony if required pursuant to an order, notice or rule requiring its filing before hearing. Without objection, the presiding officer may direct other prepared testimony to be incorporated in the transcript as if read. Here, the proffered Direct Testimony does not comply with RP 250 and ACHD objects to it being incorporated in the transcript as if read. Thus, it must be excluded.

III.
PORTIONS OF WRITTEN TESTIMONY OF DAVID R. LOWRY AND
GREGORY W. SAID MUST BE STRICKEN

Separate from the fact that prepared written testimony of Scott D. Sparks, David R. Lowry, and Gregory W. Said submitted in support of Idaho Power's Application in the above entitled case is unsworn and therefore inadmissible, portions of the prepared written testimony of David R. Lowry and Gregory W. Said must be stricken from the record because it offers inappropriate legal conclusions, is irrelevant, unreliable, lacking any evidentiary value and/or argumentative and therefore inadmissible.

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A. Inadmissible Portions of the Prepared Written Testimony of David R. Lowry

ACHD hereby objects to the following portions of the prepared written testimony of David R. Lowry and moves that it be stricken from the record on the grounds that it offers inappropriate legal conclusions, is unreliable, irrelevant, and/or argumentative and therefore inadmissible pursuant to RP 261.

1. Page 2, Lines 10-12.

On page 2, lines 10-12 of his written testimony, David R. Lowry states:

“ . . . when those relocation costs should have been more appropriately borne by real estate developers.”

Clearly, this statement lacks adequate foundation and is an inappropriate attempt to offer a legal conclusion.

2. Page 3, Lines 2-5.

On page 3, lines 2-5 of his written testimony, David R. Lowry states:

“If a relocation of facilities is required due to an identified and budgeted highway project, Idaho Power is legally required to fund the relocation cost.”

This statement lacks adequate foundation and is an inappropriate attempt to offer a legal conclusion.

3. Page 3, Lines 17-20.

On page 3, lines 17-20 of his written testimony, David R. Lowry states:

“However, the current Rule H tariff does not clearly address cost responsibility for all relocations, including relocations requested by a Public Road Agency on behalf of a third party.”

This statement is an inappropriate attempt to offer a legal conclusion, is irrelevant, and is argumentative. The Commission is perfectly able to decide for itself whether Rule H clearly addresses cost responsibility for all relocation situations.

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4. Page 7, Lines 7-12.

On page 7, lines 7-12 of his written testimony, David R. Lowry states:

“ITD then requires Idaho Power and other private utility companies to fund to fund the relocation costs of their utility facilities. Correspondence between Idaho Power, ITD and the City of Nampa has been included as Exhibit No. 1 to my testimony to illustrate how this cost shifting occurs.”

This statement relating to the Idaho Transportation Department is irrelevant to the requested reconsideration by ACHD, the City of Nampa and the Association of Canyon County Highway Districts. Additionally, it is irrelevant and lacks foundation as to “other private utility companies” as well as to an assertion of “cost shifting”. Finally, ACHD notes that the Exhibit No. 1 to which Mr. Lowry refers was not labeled in compliance with RP 267.05 in that it does not provide Mr. Lowry’s title with IPC as required (see example).

5. Page 8, Lines 16-20.

On page 8, lines 16-20 of his written testimony, David R. Lowry states:

“Q. Do you believe the proposed Rule H relocation language, as described in greater detail in Mr. Spark’s [sic] testimony, will provide Public Road Agencies and the public with needed clarity as to how responsibility for relocation costs is to be apportioned”

“A. Yes.”

This question and answer is irrelevant, lacks foundation and is argumentative; additionally, it does not provide testimony or facts.

B. Inadmissible Portions of the Prepared Written Testimony of Gregory W. Said

ACHD hereby objects to the following portions of the prepared written testimony of Gregory W. Said and moves that it be stricken from the record on the grounds that it offers inappropriate legal conclusions, is unreliable, irrelevant, and/or argumentative and therefore inadmissible pursuant to RP 261.

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1. Page 3, Lines 17-22.

On page 3, lines 17-22 of his written testimony, Gregory W. Said states:

“The company believes that these clarifications will alleviate misunderstandings where certain governmental entities have forced responsibility for funding line relocation expenses onto Idaho Power customers that should have been more appropriately be [sic] borne by developers.”

This statement is irrelevant and speculative. The statement is made without foundation and is argumentative and should be reserved for argument of counsel.

2. Page 5, Lines 7-22

On page 5, lines 7-22 of his written testimony, Gregory W. Said states:

“Is growth paying for itself?
The clear answer is no. Additional revenues generated from the addition of new customers and load growth in general is not keeping pace with the additional expenses created and required to provide ongoing safe and reliable service to new and existing customers. While the provisions of Rule H have required some contributions in aid of construction for new distribution facilities, there are no requirements for contributions in aid of construction for new transmission or generation facilities which are also typically required to serve customer growth. Reducing the Company’s new customer-related distribution rate base by reducing allowances and refunds will relieve one area of upward pressure on rates and will take a step toward growth paying for itself.”

This statement lacks foundation for the conclusory statements and arguments made. This testimony is also irrelevant to the issues involved in this case. This statement is argumentative and should be reserved for argument of counsel.

3. Page 6, Lines 2-12

On page 6, lines 2-12 of his written testimony, Gregory W. Said states:

“Q. Please describe how certain governmental entities are able to force payment of line installation expenses onto Idaho Power customers that should more appropriately be borne by developers.”

“A. Under Idaho law, governmental agencies charged with constructing, operating, and maintaining road, such as the Idaho Transportation

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Department and the Ada County Highway District have the authority to require the relocation of Company-owned transmission and distribution facilities that are sited in road rights-of-way at Company expense.”

This statement is an inappropriate attempt to offer a legal conclusion.

4. Page 7, Line 4 to Page 8, Line 13

On page 7, line 4 to page 8, line 13 of his written testimony, Gregory W. Said states:

“Mr. Lowry has informed me of a number of examples where I believe governmental entities have required the relocation of Company-owned transmission and distribution facilities at Company cost instead of seeking payment from third party developers. Mr. Lowry’s testimony in this proceeding provides examples of instances where third-party developers have attempted to avoid Idaho Power’s requirement that they make contributions in aid of relocating transmission and distribution facilities for their developments. When governmental entities require Idaho Power to relocate facilities and incur costs that should be properly paid for by local developers, it results in the inappropriate shifting of costs from local developers to the general rate paying customers of Idaho Power. Mr. Sparks describes in his testimony a newly drafted Rule H provision clarifying the rules governing cost responsibility for relocations. Hopefully these clarifications will assist the highway agencies in determining when relocation costs should be borne by developers and avoid further inappropriate cost shifting from local developers to Idaho Power customers.”

“Q. Ultimately, what is the Company requesting in this proceeding?”

“A. The Company believes that as a result of Mr. Sparks’ review and evaluation of the provisions of Rule H, the revisions to Rule H as proposed in this filing are in the best interest of Idaho Power customers. The proposed Rule H language provides a more logical and readable flow, updates costs to current levels, and reduces one aspect of upward pressure on rates. In addition, the new Rule H section addressing relocation of distribution facilities for third-party development will also assist in making sure that growth pays for itself rather than transferring additional costs to Idaho Power’s rate paying customers.”

This statement is replete with conclusory, argumentative, and duplicative testimony.

Additionally, this statement includes hearsay testimony in which Mr. Said is commenting on, and asserting as true, the testimony of other witnesses. The Commission is better in a position to weigh the testimony of other witnesses and decide for itself whether to credit or discredit such

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testimony. Finally, the Commission can decide what is in the best interest of Idaho Power's customers.

IV.
COMPLIANCE STATEMENTS

1. Pursuant to RP 56.07, ACHD has reviewed all of the Commission's rules and agrees to comply with them.
2. Pursuant to RP 256.02, this Motion is made on fewer than 14 days notice for the reason that the Commission, in Order No. 30900 in the above entitled case, issued a Notice of Hearing for Oral Argument scheduling said Hearing for October 13, 2009, and a ruling on this Motion, as well as a Motion to Strike filed by IPC on September 21, 2009 and ACHD's Brief in Opposition to IPC's Motion to Strike filed on October 5, 2009, at the aforementioned hearing is anticipated. On October 6, 2009, ACHD provided actual notice of this Motion to at least one (1) representative of all parties by telephone or personal delivery.

V.
CONCLUSION

For the foregoing reasons, ACHD respectfully requests that the Commission grant this Motion to Strike and that it strike in its entirety, the unsworn written testimony of Scott D. Sparks, David R. Lowry, and Gregory W. Said or in the alternative, that it strike certain portions of the testimony of David R. Lowry, and Gregory W. Said as identified above.

Respectfully submitted this 6th day of October, 2009.



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

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 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 MOTION TO STRIKE ALL OR PORTIONS OF WRITTEN TESTIMONY OF SCOTT D. SPARKS, DAVID R. LOWRY, AND GREGORY W. SAID upon the following parties:

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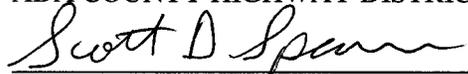
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ADA COUNTY HIGHWAY DISTRICT



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