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IDAHO PUBLIC UTILITIES COMMISSION

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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

ADA COUNTY HIGHWAY DISTRICT'S  
BRIEF IN RESPONSE TO IDAHO  
POWER COMPANY'S BRIEF ON  
RECONSIDERATION REGARDING  
RELOCATION REQUESTS FROM  
THIRD PARTIES

Pursuant to Order No. 32532, and in support of its Petition for Reconsideration, the Ada County Highway District ("ACHD") submits the response to Idaho Power Company's Brief on Reconsideration Regarding Relocation Request from Third Parties.

ADA COUNTY HIGHWAY DISTRICT'S BRIEF IN RESPONSE TO IDAHO  
POWER COMPANY'S BRIEF ON RECONSIDERATION REGARDING  
RELOCATION REQUESTS FROM THIRD PARTIES - 1

## I. ARGUMENT

Idaho Power has submitted an affidavit from David R. Lowry, which cites to numerous examples where private parties have made requests directly to Idaho Power to relocate its facilities on public rights-of-way. Mr. Lowry further explains that, in each one of those projects, the private party has made its relocation request and relocation payment directly to Idaho Power. ACHD does not dispute these factual assertions, and ACHD objects to any attempt to turn this matter into a fact-finding exercise. The Idaho Supreme Court did not remand this matter to the Commission to develop a factual record. Instead, the Idaho Supreme Court set aside Section 10 of Rule H because it purported to authorize the Commission to require third parties to pay the cost of utility relocations demanded by Public Road Agencies. Notwithstanding and without waiving its objections, ACHD responds to Idaho Power's briefing and Mr. Lowry's affidavit below.

In setting aside Section 10, the Idaho Supreme Court held that (1) a Public Road Agency's utility relocation demand is not a request for service from a private party and (2) the Commission does not have authority to "require a third party to pay for services that the third party did not request," even if the commission "determined that a relocation required by a Public Road Agency benefited a third party." *Ada County Highway Dist. v. Idaho Pub. Utils.*, 253 P.3d 675, 682-683 (Idaho 2011).

Idaho Code § 61-629 authorizes the Commission only to "alter or amend the order appealed from to meet the objections of the court . . ." *Id.* (emphasis added). The only question before the Commission now is whether the revised Section 10 meets the objections of the Court. The version of Section 10 approved by the Commission does not meet the objections of the

Court because it would still allow the Commission to “require a third party to pay for services that the third party did not request from Company.” *ACHD v. IPUC*, 253 P.3d at 682.

Specifically, Section 10 would allow the Commission to require a third party to pay for a Public Road Agencies utility relocation demand anytime the Commission determines that such a demand is really a request from a third party made “indirectly through a Public Road Agency.”

## II. ARGUMENT

Even before Idaho Power sought to add Section 10 to Rule H, Rule H provided for the relocation of utilities at the request of private parties. Specifically, Section 6 of Rule H provides that a private party requesting utility relocation must pay the cost of the utility relocation. *See R.*, Vol. I, p 17 (“If an Applicant or Additional Applicant requests a Relocation . . . of Company facilities, the Applicant or Additional Applicant will pay a non-refundable charge equal to the Cost Quote.”).

As implicitly recognized by Mr. Lowry’s affidavit, Section 6 applies to relocation requests from private parties, regardless of whether the relocation is on private property or on a public right-of-way. Mr. Lowry’s affidavit explains that, at the direct request of private parties, Idaho Power has relocated its facilities on public rights-of-way on numerous occasions. Mr. Lowry’s affidavit describes projects going as far back as 2004, long before Idaho Power sought to add Section 10 to Rule H. Accordingly, it is undisputed that Section 6 applies to a private party’s request that Idaho Power relocate its facilities on public rights of way.

This matter has never been about utility relocations at the direct request of private parties, and the Idaho Supreme Court has recognized that the Commission “has the authority to determine the costs that Company can charge a private person who requests services from

Company.” See *ACHD v. IPUC*, 253 P.3d at 682. Instead, the crux of this matter is and always has been whether the Commission has authority to allocate cost responsibly with regard to utility relocation demands from Public Road Agencies. Indeed, the whole purpose of adding Section 10 was to address the situation where the “Company is required to relocate distribution facilities at the request of a public roadway owner.” See Record, p. 75 (testimony of Scott D. Sparks describing the “purpose of the new section”) (emphasis added).

The Idaho Supreme Court set aside Section 10 because it would have allowed the Commission to require third parties to pay for relocation demands from Public Road Agencies, demands that the Supreme Court held are “services that the third party did not request from the Company.” *Id.* Specifically, the Court explained:

IPUC certainly has the authority to determine the costs that Company can charge a private person who requests services from Company. 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, 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 benefited the third party. IPUC has not pointed to any statute granting it that authority.

*Id.*

ACHD has no objection to Section 6 of Rule H, nor does it dispute that private parties should pay the cost of relocation requests directly made by private parties, regardless of whether the utilities are located on private property or public rights-of-way. However, Section 10, as proposed by Idaho Power and as approved by the Commission, still goes beyond the

Commission's authority. The version of Section 10 approved by the Commission purports to give the Commission authority to allocate utility relocation costs where "one or more Private Beneficiaries has, directly or indirectly through a Public Road Agency, requested that the Company's facilities be relocated or removed." (Emphasis added).

The Idaho Supreme Court has expressly held that the Commission does not have authority to "require a third party to pay for services that the third party did not request from Company," even "if IPUC determined that a relocation required by a Public Road Agency benefited the third party." *ACHD v. IPUC*, 253 P.3d at 682. The Idaho Supreme Court held that (1) a Public Road Agency's utility relocation demand is not a request for service from a private party and (2) the Commission does not have authority to "require a third party to pay for services that the third party did not request," even if the commission "determined that a relocation required by a Public Road Agency benefited a third party." *ACHD v. IPUC*, 253 P.3d at 682-83.

Idaho Code § 61-629 authorizes the Commission only to "alter or amend the order appealed from to meet the objections of the court . . ." *Id.* (emphasis added). The version of Section 10 approved by the Commission does not meet the objections of the Court because it would still allow the Commission to "require a third party to pay for services that the third party did not request from Company." *ACHD v. IPUC*, 253 P.3d at 682. Specifically, Section 10 would allow the Commission to require a third party to pay for a Public Road Agency's utility relocation demand anytime the Commission determines that such a demand is really a request from a third party made "indirectly through a Public Road Agency."

Throughout these proceedings, the Commission has expressed a public policy concern that Idaho Power should have a remedy to recover relocation costs incurred as a result of

relocation requests from private parties. As an initial matter, Mr. Lowry's affidavit indicates that the Commission's concern may not be justified. Idaho Power has no obligation to relocate its facilities at the request of a private party. Any relocation at the request of a private party is purely voluntary. As explained in Mr. Lowry's affidavit, private parties pay those relocation costs directly to Idaho Power. As set forth in Section 6, the private party must pay the quote given by Idaho Power, and Idaho Power presumably requires payment of the quote up front. Thus, it seems highly unlikely that Idaho Power would ever relocate its facilities at the request of a private party without being paid in full up front. More importantly, the Idaho Supreme Court has already explained that Idaho Power's remedy is in a court of law in the event of disputes with private parties. *ACHD v. IPUC*, 253 P.3d at 683

As explained previously by ACHD, the way to make Section 10 meet the objections of the Court is to simply delete the third paragraph of Section 10. Idaho Power claims that the only purpose of Section 10 is to allow Idaho Power to recover its relocation costs when a private party requests relocation of utility facilities located on public rights-of-way. As set forth clearly in Mr. Lowry's affidavit, Idaho Power already does recover those costs. Costs associated with any utility relocation request made directly by a private party are already recoverable under Section 6. The only thing added by the third paragraph of Section 10 is the provision that the Commission can treat a utility relocation demand from a Public Road Agency as if were an "indirect" request from a third party. The Idaho Supreme Court has already held, however, that the Commission has no such authority.

If the Commission's and Idaho Power's goal is to ensure that private parties pay for utility relocation requests actually made by private parties – as opposed to relocation demands

from Public Road Agencies – it would be very easy to accomplish that goal. All the Commission would have to do is incorporate the Section 6 language into Section 10. Specifically, the Commission could delete the third paragraph in its entirety and replace it with the following:

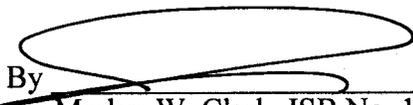
As set forth in Section 6, if an Applicant or Additional Applicant requests a Relocation of Company facilities within a public road right-of-way, the Applicant or Additional Applicant will pay a non-refundable charge equal to the Cost Quote.

### III. CONCLUSION

ACHD respectfully asks that the Commission reconsider Order No. 32476. As set forth above and in ACHD's prior briefing, the version of Section 10 approved by the Commission violated Idaho Code § 61-629 because it does not meet the objections of the Court.

DATED THIS 15 day of June, 2012.

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By 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this \_\_\_ day of June, 2012, I caused to be served a true copy of the foregoing ADA COUNTY HIGHWAY DISTRICT'S BRIEF IN RESPONSE TO IDAHO POWER COMPANY'S BRIEF ON RECONSIDERATION REGARDING RELOCATION REQUESTS FROM THIRD PARTIES by the method indicated below, and addressed to each of the following:

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