

1333. It is the municipality that has exclusive jurisdiction for controlling encroachments, obstacles, and traffic upon city streets and sidewalks. Idaho Code § 50-314. This includes broad authority to remove and prevent obstacles and encroachments interfering with municipal streets. *Boise City By and Through Amyx v. Fails*, 94 Idaho 840, 499 P.2d 326 (1972). Municipalities are also vested with the jurisdiction and the power to regulate utility transmission systems upon lands owned or controlled by the municipality. Idaho Code § 50-328.

Idaho Power's use of municipal property for its utility lines is permissive, as granted by the municipality and governed by franchise agreements. Idaho Code § 62-705 gives power companies authority to use public roads and streets, but specifically excepts out such right within municipal limits. Municipalities 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, municipalities 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 municipality 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). The *Lapwai* case found that authority over municipal

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

lands remains with the municipality and that the IPUC has no authority in regard to a municipality requiring utility relocation. *Lapwai* also held that IPUC consent to such relocation is not required. 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. Such a 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 municipalities to govern the public use and safety of municipal lands and streets.

The issues contemplated by the proposed Section 10 are more appropriately a matter for negotiation as a part of a franchise agreement between Idaho Power and a municipality. Such an approach, with agreement between a utility and a local governing body, 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. Similarly the City of Nampa already has addressed this issue with Idaho Power via the franchise agreement in City of Nampa Ordinance No. 3181. Such agreements are the appropriate mechanism for addressing relocation costs and concerns.

As an additional note, Nampa is concerned about testimony provided by David Lowry on behalf of Idaho Power and attached to the application. Mr. Lowry raises allegations of "inappropriate cost shifting" including specific reference to a Nampa project with regards to the Gateway Mall. This testimony ignores that local governing bodies must constantly work with developers and on managing growth. Development often leads to accompanying municipal

projects. The City of Nampa, in the Gateway Mall situation, required relocation of Idaho Power facilities because such relocation was necessary for a project the City was focused on to provide for public safety and so as to avoid interference with public use of the associated streets. The proximity of the mall and the fact that the developer had previously submitted and withdrawn a relocation request are irrelevant to whether the City was requesting relocation in the general public interest and under the authority of the City over its own property. Idaho Power's use of municipal land in this area was permissive, and the City was well within its authority to require relocation at Idaho Power's expense. To the extent Idaho Power retains concerns about such projects, the appropriate course for handling these is through improved communications with the municipalities and discussion of the franchise agreements.

Nampa 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 municipal 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 potentially 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. Cities lie in counties. Cities border with other cities. Highway districts and state transportation

agencies control certain highways. Improvements by any one of these political subdivisions on their facilities may have benefits for other political subdivisions. For instance, a widening or improvement project on a state highway may provide benefits to the municipality in which the highway runs (i.e. by construction of sidewalks, curbs, and gutters). These improvements benefit the municipality and the general public. However, under the proposed Section 10 the “third party beneficiary” language could be construed so that the municipality getting the benefit is considered a “third party” and now is required to pay relocation costs to Idaho Power. This is in direct conflict with the police power of the municipality to provide improvements and require relocation at the utility’s cost so as not to incommode the public use. Therefore Nampa 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 contravenes the exclusive authority of the municipality to require relocation of utilities to avoid incommoding the public use. The legislature has given municipalities the authority to organize local improvement districts as a funding mechanism for municipal improvements. These improvements do provide certain local benefits, but the improvements also ultimately provide benefits to the general public as a whole.

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. However municipalities are granted the power to create local improvement districts for a variety of other purposes as well. See Idaho Code §50-1791 et seq. Should Section 10 be approved by the IPUC, Nampa urges that this portion be clarified so that local improvement districts as third-party beneficiaries are limited only to the definition included in Rule H.

For example, a new subdivision or commercial development may receive certain benefits from a new turn-out lane, but the general public benefits as the turn-out lane provides relief for the general flow of traffic. Municipalities 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. Utilities are not granted such authority, nor is the IPUC authorized to make such determinations.

Therefore Nampa requests that local improvement districts be removed from the definition of "third-party beneficiaries."

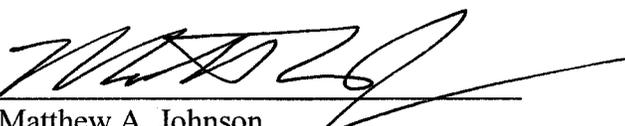
III: Constitutional Concerns

Nampa shares 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, Nampa 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 City of Nampa appreciates the Commission's consideration of these comments and urges in particular the deletion of the proposed Section 10 for the reasons stated above.

Dated this 17th day of April, 2009.

WHITE PETERSON

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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:

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