Office of the Secretary
Service Date
November 30, 2009

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** **ORDER NO. 30955**

On October 30, 2008, Idaho Power Company filed an Application seeking authority to modify its line extension tariff commonly referred to as the "Rule H" tariff. Specifically, the Company sought to increase the charges for installing new service lines and relocating existing electric distribution facilities. On July 1, 2009, the Commission issued Order No. 30853 partially approving the Company's request to modify its Rule H tariff. The Ada County Highway District (ACHD), City of Nampa, Association of Canyon County Highway Districts (collectively "the Districts"), and the Building Contractors Association ("BCA" or "Contractors") all filed timely Petitions for Reconsideration. The Districts argued that the Commission exceeded its statutory authority in approving the changes to Section 10 of the tariff ("Relocations in Public Road Rights-of-Way"). BCA objected to changes to the line extension rate structure concerning "allowances" or credits for the installation of new service and the elimination of subdivision lot refunds. On July 29, 2009, Idaho Power filed an answer to the petitions.

In Order No. 30883 issued August 19, 2009, the Commission granted in part and denied in part the petitions for reconsideration. The Commission granted reconsideration to the Districts to review their legal arguments and set oral argument for October 13, 2009. The Commission partially granted reconsideration to the Contractors and scheduled an additional evidentiary hearing regarding the appropriate line extension allowances contained in Rule H. The evidentiary hearing was held on October 20, 2009. Final reconsideration briefs were filed by BCA and Idaho Power on October 27, 2009. On November 9, 2009, the Contractors filed a Petition for Intervenor Funding.

After reviewing the initial record, the reconsideration testimony and briefs, and the intervenor funding petition, the Commission issues this final Order on reconsideration affirming,

rescinding, amending and clarifying parts of our initial Order pursuant to *Idaho Code* § 61-624. The Commission's textual changes to Rule H are contained in the Appendix to this Order.

BACKGROUND

A. The Application

Idaho Power's last request to update its Rule H tariff was in 1995. In its present Application, Idaho Power proposed modifications to its existing Rule H tariff that reorganize sections, add or revise definitions, update charges and allowances, modify refund provisions, and delete the Line Installation Agreements section. Idaho Power proposed separate sections for "Line Installation Charge" and "Service Attachment Charges." Within the Service Attachment Charges section, Idaho Power separates the overhead and underground service attachments, updates the charges for underground service attachments less than 400 amps, and outlines the calculation for determining the charges for underground service greater than 400 amps. The "Vested Interest Charges" section was reworded and some definitions were removed. The available options and calculations in this section were not changed. Engineering charges, temporary service attachment charges, and return trip charges were updated in the "Other Charges" section.

The Company asserted that the Line Installation and Service Attachment Allowances section was modified and updated to reflect current costs associated with providing and installing "standard terminal facilities" for single-phase and three-phase service and line installations. The Company's proposal to provide a new customer with an installation credit or "allowance" equal to the installed costs of "standard" overhead distribution facilities (e.g., transformers, meters, wiring) is intended to provide a fixed credit toward the cost of constructing terminal facilities and/or line installations for customers requesting new service under Rule H. Tr. at 128. The fixed allowance is based upon the cost of the most commonly installed facilities and attempts to mitigate intra-class and cross-class subsidies by requiring customers who need more costly facilities to pay a larger portion of the cost to serve them. The proposal also modifies Company-funded credit allowances inside subdivisions. Idaho Power maintains that these revisions to the tariff specifically address the Company's desire that customers pay their fair share of the cost for providing new service lines or altering existing distribution lines.

Idaho Power proposed to provide "Vested Interest Refunds" to developers of subdivisions and new customers inside existing subdivisions for new service line installations

that were not part of the initial service installation in the subdivision. The Company also proposed to change the availability of Vested Interest Refunds from a five-year period to a four-year period and discontinue all refunds for subdivision lots.

Idaho Power also added a new Section 10 entitled "Relocations in Public Road Rights-of-Way" to address the recovery of costs when the Company has to relocate its facilities pursuant to *Idaho Code* § 62-705. The section identifies when and to what extent the Company would be responsible for relocation costs and when it could recover costs from third-party beneficiaries. Specifically, this section outlines cost recovery when road improvements are for the general public benefit, for third-party beneficiaries, and for the benefit of both the general public and third-party beneficiaries.

B. The Prior Final Order

On July 1, 2009, the Commission issued final Order No. 30853 approving the Company's increased allowances, miscellaneous costs, language regarding highway relocations, and the requested changes to format and definitions. The Commission further approved a "cap" of 1.5% on general overhead costs and maintained the existing five-year period for Vested Interest Refunds.

The Commission determined that the updated charges and installation allowances for line installations represent an appropriate "contribution" from new customers requesting the service, thereby relieving one area of upward pressure on rates. The Commission specifically noted that the costs of new power generation and transmission lines cannot be charged to only new customers. The Commission found that when it is possible to allocate the cost of new distribution facilities to new customers, it is appropriate to charge such facilities to the customers who use them. As a result, the Commission found the Company's proposed fixed allowances of $1,780 for single-phase service and $3,803 for three-phase service represent a fair, just and reasonable allocation of line extension costs.

The Commission also declined to grant the Company's request to reduce the time limitation within which to receive Vested Interest Refunds from five years to four years. The Commission reasoned that more refunds may be made in the fifth year now that building activity has slowed. Although the Building Contractors Association requested that the refund period be extended to ten years, the Commission found such request was not supported by documentation

or argument. Therefore, the Commission determined it reasonable to maintain a five-year period for Vested Interest Refunds.

The Commission also found that it is reasonable to discontinue refunds for subdivision lots. Since 1995, as lots were sold the Company would reimburse a portion of the line extension costs that developers were required to advance to Idaho Power prior to construction. These reimbursements were by subdivision lots. The Commission discontinued the subdivision lot refunds for three reasons. First, the Commission increased the initial "allowance" or credit for new service to new customers. Customers may receive a $1,780 allowance for each single-phase transformer installed or a $3,803 allowance for each three-phase transformer. Order No. 30853 at 10. A transformer may serve multiple customers. Second, the Commission rejected BCA's argument to increase the lot refunds because its proposal included inappropriate costs and the costs were miscalculated. *Id.* at 12. The Commission found the increased allowance was properly based on the average cost of distribution facilities (the Standard Terminal Facilities) for a new customer. After providing the increased allowances to a developer, allowing any lot refunds to "the developer would exceed the distribution investment" for a new customer. *Id.* Finally, discontinuing subdivision lot refunds reduces the growth of rate base that results from such refunds.

Generally, parties requesting the relocation of utility facilities are obligated to pay for the costs of the relocation. However, the State and its political subdivisions can require the relocation of utility facilities located in the public right-of-way pursuant to their police powers. Idaho Power proposed, and the Commission approved, Section 10 as a mechanism to determine who is responsible for the costs of certain relocations in the public right-of-way. The Commission specifically noted that Section 10 in no way grants Idaho Power or the Commission authority to impose relocation costs on a public road agency. Order No. 30853 at 13. The Commission found it persuasive that if a public road agency determines that a private third party should pay for a portion of a road improvement project, it is a reasonable and appropriate indication of responsibility for the allocation of utility relocation costs incurred as a result of the road improvement project. Furthermore, based on concerns noted by the parties, Idaho Power was directed to clarify and resubmit the definitions of "Local Improvement District" and "Third-Party Beneficiary."

PETITIONS FOR RECONSIDERATION

A. The Districts

Ada County Highway District (ACHD), City of Nampa (Nampa), and the Association of Canyon County Highway Districts (ACCHD), (collectively, "the Districts"), allege that the Commission's approval of Section 10 in Rule H exceeds the Commission's authority granted by statute. Section 10 addresses relocation costs in public rights-of-way. ACHD further maintains that Section 10 violates the Idaho Constitution by requiring highway agencies and other public entities to pay for the relocation of utility facilities in public rights-of-way. ACHD Petition at 11. Nampa and ACCHD also argue that the Commission's Order fails to clarify the definitions of "Third-Party Beneficiary" and "Local Improvement District." Petitions at 2.

B. BCA

Building Contractors Association (BCA or Contractors) alleges in its Petition for Reconsideration that the Commission's Order "approves an inherently discriminatory rate structure for line extensions by imposing unequal charges on customers receiving the same level and conditions of service." BCA Petition for Reconsideration at 1. BCA also disputes the Commission's decision to discontinue "its heretofore longstanding policy that new customers are entitled to a Company investment in distribution facilities equal to that made to serve existing customers in the same class." *Id.* at 11.

C. The Order Granting and Denying Reconsideration

On August 19, 2009, the Commission issued Order No. 30883 granting in part and denying in part the parties' Petitions for Reconsideration. The Commission acknowledged the limits of its authority in Order No. 30853 by stating that "Section 10 in no way grants Idaho Power or this Commission authority to impose [relocation] costs on a public road agency." Order No. 30853 at 13. The Order further clarified that "[j]ust as the Commission cannot compel the highway agency to pay for the relocation of utility facilities in the public right-of-way made at the agency's request, the agency cannot restrict the Commission from establishing reasonable charges for utility services and practices." *Id.* However, given the complexity of the constitutional and jurisdictional arguments posed by the Districts on reconsideration and the Company's acknowledgement that the terms "Local Improvement District" and "Third-Party Beneficiary" should be clarified, the Commission found it appropriate to grant the Districts'

petitions regarding the disputed language in Section 10 of the Rule H tariff. In order to adequately address the issues raised on reconsideration, the Commission first directed that Idaho Power supply new language for Section 10, including the clarification of the definitions for "Third-Party Beneficiary" and "Local Improvement District." *Id.* at 11. Idaho Power was directed to file its updated Section 10 language with the Commission and the parties no later than August 28, 2009.

The Petition for Reconsideration filed by BCA was granted in part and denied in part. The Commission found it appropriate to grant reconsideration on the limited issue of the amount of appropriate allowances. As stated in its final Order, "[t]he Commission recognizes that multiple forces put upward pressure on utility rates." Order No. 30853 at 10. Allowances are intended to reflect an appropriate amount of contribution provided by new customers requesting services in an effort to relieve one area of upward pressure on rates. BCA was directed to address what allowance amount is reasonable based on the cost of new distribution facilities.

Reconsideration was denied regarding the five-year vested-interest refund period and the per-lot refunds. The Commission found that the Contractors provide no cogent argument or documentation on why the period should be expanded to 10 years. Having determined that the new service allowance of $1,780 is based upon the cost of a single-phase transformer and conductors, ("standard terminal facilities") that can serve multiple customers (three or more), the Commission found that BCA's requested refund of $1,000 per lot for a subdivision developer would exceed the costs of new extension facilities. *Id.* at 11-12.

ISSUES ON RECONSIDERATION

A. Legal Standards

Reconsideration provides an opportunity for a party to bring to the Commission's attention any question previously determined and thereby affords the Commission with an opportunity to rectify any mistake or omission. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). The Commission may grant reconsideration by reviewing the existing record by written briefs, or by evidentiary hearing. IDAPA 31.01.01.311.03. If reconsideration is granted, the Commission must complete its reconsideration within 13 weeks after the deadline for filing petitions for reconsideration. *Idaho Code* § 61-626(2).

B. Motions to Strike

On September 21, 2009, Idaho Power filed a motion to strike portions of the affidavit of Dorrell Hansen submitted by ACHD in support of its motion for reconsideration. Idaho Power maintains that portions of Mr. Hansen's testimony constitute inadmissible evidence because they lack proper foundation, lack personal knowledge, lack relevance and contain conclusory or speculative statements. On October 5, 2009, ACHD filed a brief opposing Idaho Power's motion to strike. ACHD noted that the Idaho Supreme Court has recognized that "the law governing the Commission contemplates a rule of liberality in the reception of evidence." *Application of Lewiston Grain Growers*, 69 Idaho 374, 380, 207 P.2d 1028, 1032 (1949).

At oral argument on October 13, 2009, the Commission denied Idaho Power's motion to strike portions of the affidavit of Dorrell Hansen. Rule 261 of the Idaho Public Utilities Commission's Rules of Procedure provides that

> 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. . . . All other evidence may be admitted if it is a type generally relied upon by prudent 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.

IDAPA 31.01.01.261. The Commission determined that it was capable of considering the information provided and, based on its expertise, give it the proper weight.

On October 6, 2009, ACHD filed a motion to strike all or portions of the written prefiled testimony of Scott Sparks, David Lowry and Greg Said filed by Idaho Power. ACHD argued that the prefiled testimony of Idaho Power's witnesses was inadmissible because it failed to comply with Rule of Procedure 250 requiring that testimony in formal hearings be given under oath. IDAPA 31.01.01.250. On October 8, 2009, Idaho Power filed a notice with the Commission opposing ACHD's Motion to Strike. Idaho Power requested that argument be held on its Motion during the oral argument scheduled for October 13, 2009.

At the technical hearing conducted by the Commission on October 20, 2009, each of ACHD's objections was considered and each was denied. The written testimony of Idaho Power's witnesses expressed the Company's positions on matters regarding the Rule H tariff. The witnesses had firsthand knowledge of the matters to which they testified. Moreover, the

witnesses were available at both the oral argument and technical hearing for cross-examination.

At the October 20, 2009, technical hearing BCA moved to strike certain portions of the written testimony of Idaho Power witness Greg Said as hearsay. The Commission reserved a ruling on BCA's Motion to Strike until Mr. Said had an opportunity to testify. BCA was advised to renew its objection if Mr. Said's live testimony did not provide adequate explanation regarding its concerns. The hearsay concerned information provided to Mr. Said from another witness and the other witness was present at the hearing. BCA renewed its objection. The Commission overruled the objections. Tr. at 263, 261-64. BCA later declined to cross-examine the other witness on the information that was the subject of the initial objections. Tr. at 299.

C. The Districts' Legal Arguments

The Districts make several legal arguments to support their position that Section 10 (Relocation Costs in Public Rights-of-Way) and several definitions in Section 1 (Definitions) should be stricken from Rule H. The Districts generally assert that Section 10 intrudes in the highway districts' exclusive jurisdiction and is unconstitutional because it obligates highway agencies and other local government entities to pay for utility relocation costs. The Districts also dispute the definitions for "Third-Party Beneficiary" and "Local Improvement Districts" as used in Section 10. The Districts argue that a local improvement district (LID) should not be considered a "Third-Party Beneficiary." They maintain that an LID is an entity of local government and, as such, should not be required to reimburse a utility for relocation costs. These legal arguments are discussed in greater detail below.

1. Exclusive Jurisdiction. The Districts maintain that the highway districts possess exclusive jurisdiction over the public rights-of-way. Thus, Section 10 of Rule H is beyond the jurisdictional authority of the Commission because it seeks to usurp the exclusive jurisdiction of the State's public road agencies. ACHD Petition at 2. In a related argument, the Districts maintain that Section 10 is unconstitutional and an illegal attempt to abrogate or amend the common law rule that utilities placing their facilities along streets and highways gain no property right and must move their facilities at their own expense upon demand.

Idaho Power acknowledges the common law rule that the utility's use of the public road right-of-way is subordinate to the paramount use of the public. Idaho Power does not dispute or contest the public road agencies' authority to require relocation of utility facilities. Reply Brief on Reconsideration at 3-4. However, Idaho Power asserts that the public road

agencies do not have the authority, once the utility complies with the relocation request, to determine how the utility will seek subsequent reimbursement from third parties benefiting from the facilities' relocation. The Company maintains that the Commission alone is vested with the authority to determine how utility costs should be allocated.[1]

Commission Findings: At the outset, we note there is agreement between the Districts and Idaho Power regarding some of the underlying legal issues. More specifically, the Districts and Idaho Power agree that road agencies have exclusive jurisdiction to supervise highways and public rights-of-way. ACHD Brief at 3; Joint Brief at 2; Idaho Power Reply Brief on Reconsideration at 3-4. As the Idaho Court of Appeals noted in *Worley Highway District v. Kootenai County*, highway agencies have exclusive jurisdiction over all highways including the power to construct, maintain, and repair public highways as well as to establish design standards and use standards. 104 Idaho 833, 835, 663 P.2d 1135, 1137 (Ct. App. 1983) *citing Idaho Code* §§ 40-1310 and 40-1312. The parties also agree that Idaho Power has a permissive right only to use the public rights-of-way for its facilities and that public road agencies have the exclusive authority to determine when relocation of utility facilities within the public right-of-way is necessary so as not to incommode the public use. ACDH Brief at 5-6; Joint Brief at 2; Idaho Power Reply Brief at 4; *see also Idaho Code* §§ 62-701 and 62-705. As our Supreme Court noted in *State ex rel. Rich v. Idaho Power Co.*, the common law rule in Idaho is that "streets and highways belong to the public and are held by the governmental bodies and political subdivisions of the state in trust for use by the public, and that only a permissive right to use, and no permanent property right can be gained by [utilities] using them." 81 Idaho 487, 498, 346 P.2d 596, 601 (1959); Idaho Constitution, Art. XI, § 8 ("the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such a manner as to infringe . . . the general well being of the state.").

ACHD argues that Section 10 should be removed in its entirety from Rule H. The Districts maintain that as written, Section 10 intrudes upon the road agencies' exclusive jurisdiction. ACHD argues that "Rule H, Section 10 will effectively dictate the policies and procedures of highway districts and local road agencies regarding electric utility relocations. It

---

[1] "[T]he Commission has the authority to determine the inclusion as an operating expense in a utility's rate base either in part or in whole 'costs' incurred by a utility." *Washington Water Power v. Kootenai Environmental Alliance*, 99 Idaho 875, 880, 591 P.2d 122, 127 (1979).

will impact the operation of highway districts and local road agencies in their negotiations and relationships with third parties and developers concerning road improvement projects. . . ." Tr. at 17; ACHD Brief on Reconsideration at 7; Joint Brief at 3. ACHD also insists that Section 10 conflicts with the District's Resolution No. 330[2] governing utility relocations. Finally, the Districts also maintain that the Commission has no authority over the relocation of utility facilities in the public rights-of-way because such relocations are "not a service, product or commodity under *Idaho Code* §§ 61-502 and 61-503." ACDH Brief on Reconsideration at 10. The Commission does not agree with these three arguments.

First, the Commission affirms that highway agencies have the authority to determine when Idaho Power must relocate its distribution facilities and whether any other party is responsible for paying for the road improvement costs. However, once the highway agency determines that a private party (e.g., a developer) must shoulder all or a portion of the road improvement costs, then it is the Commission that establishes the costs for utility relocation pursuant to *Idaho Code* §§ 61-502, 503, and 507. This is the purpose of Section 10. The Commission's ability to set relocation costs arises only after the highway agency determines that it or another party is responsible for road improvement costs. Likewise, when a highway agency asks Idaho Power to relocate facilities not in the public right-of-way (e.g., facilities in an easement), Rule H would apply. Idaho Power Reply Brief at 6; *see also* Resolution 330, § 1.A.(2) (if the utility has facilities on private property that must be relocated, "the actual cost of such relocation shall be the responsibility of the District").

Second, as amended below, Section 10 is compatible with and not in opposition to Resolution No. 330. As explained by ACHD, Resolution No. 330 addresses utility relocations and determines which party bears the cost of relocations. For example, if ACHD requires the relocation of utility facilities to accommodate right-of-way improvement "sponsored or funded by Ada County Highway District," then such relocation costs "shall be the responsibility of the utility." Resolution 330, Section 1(A). This section follows the common law rule in Idaho that utilities must relocate their facilities so that the highway agency may make improvements. *Rich v. Idaho Power*, 81 Idaho at 501, 346 P.2d at 603.

---

[2] Resolution 330 is a mechanism promulgated more than 20 years ago by ACHD for the allocation of costs of road improvements. Idaho Power patterned its Rule H, Section 10 after the language in Resolution 330.

As amended, Section 10(a) of Rule H incorporates this concept. Sections 2 and 3 of Resolution 330 address instances where utility relocations are either partially-funded or fully-funded by "another individual, firm or entity." In other words, after ACHD has determined that a private purpose (as opposed to a public purpose) is the impetus for a specific relocation, Resolution 330 and Rule H provide that such private party should also be responsible for defraying the cost of relocating utilities within the public right-of-way for that project. For example, Section 3(A)(2) of Resolution 330 provides that when utility "relocations are required as a result of improvements being made by a developer within the public rights-of-way which were not scheduled to have otherwise been made by [ACHD] within three years of the date said improvements are actually commenced, then the responsibility for the costs of utility . . . relocations shall be that of the developer." (Emphases added.) This provision of Resolution 330 requires the developer to pay Idaho Power for the relocation of utility facilities located within the public right-of-way. Thus, Rule H, Section 10 mirrors or complements Resolution 330. Clearly Resolution 330 contemplates circumstances where third parties will pay Idaho Power for the cost of relocating the Company's distribution facilities located in the public right-of-way.

The language of Section 10 in no way usurps the authority of ACHD or any other highway district or political subdivision because it does not attempt to give Idaho Power or this Commission any authority that a highway district would otherwise hold. It is because the allocations of Resolution 330 have worked so effectively in the past 20 years that Idaho Power proposed it as a model for the allocation of relocation costs within its Rule H, Section 10. Tr. at 27.

Third, we reject ACHD's argument that the relocation of Idaho Power's facilities from the public right-of-way is not a "service or product" provided by the utility. As indicated above, the Districts recognize that there are instances where relocation costs are assigned to another individual, firm or entity such as a developer. In such cases, Section 10 provides the basis for Idaho Power to recover its relocation costs from the developer. The relocation of Company facilities is a "practice" or "service" subject to our jurisdiction. *Idaho Code* §§ 61-502 and 61-503 authorize the Commission to establish the just and reasonable rate or charge "for any service or products or . . . the rules, regulations, practices, or contract . . . affecting such rates." In addition, *Idaho Code* § 61-507 provides that the Commission "shall prescribe rules and regulations for the performance of any service." (Emphases added.) Indeed, Rule H "applies to

requests for electric service under [various schedules] that require the installation, alteration, relocation, removal, or attachment of Company owned distribution facilities." See Rule H at 1.

As the Supreme Court observed in *Washington Water Power v. Kootenai Environmental Alliance*, the Commission has authority over services or practices "which do or may affect the rates charged or the services sought or rendered which are within the Commission's ratemaking functions." 99 Idaho at 881, 591 P.2d at 128. Where the Districts require that a third party pay for the road improvement costs of Idaho Power's facilities within a public right-of-way or where the road agency requires Idaho Power to move its facility located in its easements, Section 10 and the other sections of Rule H fall within the Commission's ratemaking functions. *Id.* Even in those cases where a developer would pay only a portion of relocation costs, the calculation of such costs is set out in Rule H.

Fourth, during oral argument ACHD noted the Legislature's recent enactment of *Idaho Code* § 40-210 supports the argument that the Districts have exclusive jurisdiction over public rights-of-way. Tr. at 8-9. While we do not dispute that the Districts have exclusive jurisdiction, we find enactment of Section 40-210 is the Legislature's attempt to condition the common law rule that utilities must relocate their facilities in the public right-of-way at their own expense. *Mountain States Tel. & Tel. Co. v. Boise Redevelopment Agency*, 101 Idaho 30, 34, 607 P.2d 1084, 1088. Enactment of Section 40-210 earlier this year represents the Legislature's intent to contain or limit the cost of relocating utility facilities where possible. In pertinent part, Section 40-210 provides that

> it is the intent of the legislature that the public highway agencies and utilities engage in proactive, cooperative coordination of highway projects through a process that will attempt to effectively minimize costs, limit the disruption of utility services, and limit or reduce the need for present or future relocation of such utility facilities.
>
> . . . the public highway agency shall, upon giving written notice of not less than thirty (30) days to the affected utility, meet with the utility for the purpose of allowing the utility to review plans, understand the goals, objectives and funding sources for the proposed project, provide and discuss recommendations to the public highway agency that would reasonably eliminate or minimize utility relocation costs, limit the disruption of utility service, eliminate or reduce the need for present or future utility facility relocation, and provide reasonable schedules to enable coordination of the highway project construction and such utility facility relocation as may be necessary. While recognizing the essential goals and objectives of the public

> highway agency in proceeding with and completing a project, the parties shall use their best efforts to find ways to (a) eliminate the cost to the utility of relocation of the utility facilities, or (b) if the elimination of such cost is not feasible, minimize the relocation cost to the maximum extent reasonably possible.

Idaho Code § 40-210(1-2), 2009 Sess. Laws, ch. 142, § 1 (emphasis added). Here it is clear that the Legislature intends for public road agencies and utilities to eliminate or minimize relocation costs "to the maximum extent reasonably possible." Thus, we find that the enactment of this statute reflects the Legislature's clear intent that public highway agencies and utilities have an affirmative duty to eliminate the costs of utility relocations, or if elimination of such costs are not feasible, minimize the relocation costs "to the maximum extent reasonably possible."

Given the enactment of *Idaho Code* § 40-210, we find it appropriate to amend Rule H by adding another section. New Section 11 (set out in the Appendix to this Order), requires that Idaho Power participate in project design or development meetings once it has received written notice from the public road agency. By participating in the project design or development meetings, we believe that Idaho Power will be in a better position to eliminate or minimize relocation costs to the maximum extent reasonably possible.

Finally, it is a standard practice for a utility to charge for relocating its facilities. This practice is consistent with the fundamental ratemaking principle of "cost causation" – that, to the extent practicable, utility costs should be paid by those entities that cause the utility to incur the costs. If this principle were not followed, additional costs incurred at the request of both public and private entities would be shifted to all other ratepayers. This would not result in a "just and reasonable" rate as required by statute. *Idaho Code* § 61-502, 61-503, 61-507. In summary, we find Section 10 as amended in the Appendix to be fair, just and reasonable.

2. Local Improvement District (LID) and Definition of "Third-Party Beneficiary."

The next issue has two interrelated parts. First, the Districts object to including LIDs in the definition of "third-party beneficiary" in Section 1 and Section 10 of Rule H. Nampa and the Canyon County Districts argue that the definition of "third-party beneficiary" is too broad and that LIDs should not be subject to the payment of utility relocation costs as a third-party beneficiary under Section 10(c). Joint Brief at 5-6. ACHD argues that including LIDs "in the definition of third party beneficiary . . . 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." ACHD Brief on Reconsideration at 17. Second, because an LID is an "entity of local government," LIDs (like road agencies) should not be charged for the relocation of utility facilities when LID's request that such facilities be relocated for a public purpose.

Idaho Power urges the Commission to include LIDs in the definition of "third-party beneficiary" and allow Idaho Power to collect relocation costs from LIDs. Brief on Reconsideration at 9-10. Idaho Power argues that:

> First, a LID is not a public road agency that is charged with operating and maintaining public roads. An LID is simply a vehicle by which taxation can occur but not be included in the general budget of a public road agency. The only function the LID performs is to collect money. Where the local improvement district is paying for the road improvements in question, the local improvement district should also pay for the costs of relocating the power lines as required for the improvements. The local improvement district typically derives funding from adjacent private businesses and landowners and those parties, who are directly benefitting from the power line relocation, should bear the costs of the relocation rather than the utility's customers as a whole. Idaho Power does not believe it is unreasonable to expect a LID to include an amount to cover the cost of utility facility relocation in the amount of money it will fund.

Idaho Power Brief on Reconsideration at 9-10; *see also* Tr. 28-30. Based on problems the Company has experienced with collecting relocation costs for LIDs in the past, the Company maintains that it would be very easy for LIDs to include the cost of utility relocations in their initial funding. *Id.* at 10.

Commission Findings: The Commission first takes up the issue of whether LIDs should be held responsible for utility relocation costs. Pursuant to the Local Improvement District Code (*Idaho Code* §§ 50-1701 *et seq.*), Idaho cities, counties and highway districts are vested with the power to create LIDs. *Idaho Code* §§ 50-1702(a) and 50-1703(a). An LID may be formed to make one or more of the following public improvements: To lay out or widen any street, sidewalk, alley or off-street parking; to pave or resurface curbs, gutters, sidewalks; to construct, repair or maintain sidewalks, crosswalks, sanitary sewers and storm sewers; to construct or repair street lighting; to plant or install landscaping; to acquire and construct parks or other recreational facilities and "to do all such other work and to incur any such costs and expenses as may be necessary or appropriate to complete any such improvements. . . ." *Idaho Code* § 50-1703(a)(13), (1-12).

Idaho Power urges us to include LIDs within the definition of third-party beneficiary so that Idaho Power can seek reimbursement for its relocation costs when an LID needs to have utility facilities relocated to accommodate the LID improvements. Tr. at 28-29. Because LIDs are merely a funding mechanism, the Company insists that an LID should pay for the relocation of utility facilities in the public rights-of-way. *Id.* at 28-30. Idaho Power also argues that an LID is not a public road agency. "It is not charged with operating and maintaining public roads and it does not control the public rights-of-way." *Id.* at 28.

Although the Commission believes that it is reasonable to expect that an LID would include the cost of necessary utility facility relocations as part of the total funding amount of the district improvement, and that an LID *may* reimburse the utility for the cost of relocating its facilities within the public right-of-way (*Idaho Code* § 50-1703(12 and 13), we are not persuaded that the Commission can compel such reimbursement. As indicated above, cities, counties and highway districts (the same entities that control public rights-of-way) may create a local improvement district to make the public improvements authorized by law. *Idaho Code* §§ 50-1702(a), (c); 50-1707.

In *Village of Lapwai v. Alligier*, 78 Idaho 124, 130, 299 P.2d 475, 479 (1956), our Supreme Court held that the "power of the state and its political subdivisions to require removal of a nuisance or obstruction, which in any way interferes with the public use of streets and highways cannot be questioned." (Emphasis added). Lapwai passed an ordinance requiring that a private water company remove its facility from the streets and alleys of Lapwai so the village could construct and install its own water system. The Court noted that the city exercised the police power conferred by the state and was performing a governmental function. *Id.* at 128, 299 P.2d at 477-78.[3] In *Lapwai*, the relocation was not for the purpose of making a roadway improvement but was the exercise of the police power for another governmental purpose – the installation of a municipal water system.

In a more recent case, our Supreme Court reaffirmed that the common law rule, i.e., utilities must relocate their facilities in the public right-of-way at their own expense, is not absolute but is subject to legislative or constitutional conditions. In *Mountain States Tel. & Tel.*

[3] The Court did note that the buried water pipes did not interfere with the use of the streets and alleys. Consequently, the Court modified the city's order to remove the pipes by allowing the water company to decide whether to remove them or not at its option. *Id.* at 130, 299 P.2d at 479.

Co. v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980), the Court was confronted with the question of whether the Legislature had modified the common rule by providing that the redevelopment agency must pay for the costs of relocating utility facilities in the public right-of-way. The Court concluded that although the urban renewal statute "permitted 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 the utilities." *Id.* at 35-36, 607 P.2d at 1088-89. Idaho Power has not provided us with any au thority that the Legislature has modified the common law that would require LIDs formed by cities, counties or highway districts to reimburse utilities for relocating facilities in public rights-of-way.

Our decision regarding LIDs and urban renewal districts is further supported by an opinion issued last week by the Court in *Urban Renewal Agency of the City of Rexburg v. Hart*, No. 77 (Nov. 25, 2009). In *Rexburg*, the Court affirmed an earlier ruling that an urban renewal agency is not the "alter ego" of the local municipality that created the renewal agency even if the city council appoints "itself to be the board of commissioners" of the urban renewal agency . . . ." *Id.*, slip op. at 5 *affm'g Boise Redevelopment Agency v. Yick Kong*, 94 Idaho 876, 499 P.2d 575 (1972). The Court further observed in *Rexburg* that a renewal agency is "*entirely separate and distinct from the municipality*" and the renewal agency acts "as an arm of state government . . . to achieve, perform and accomplish the public purposes prescribed and provided" in the Urban Renewal Law. *Id.*, slip op. at 5 (italicize original and underline added). Thus, the renewal agency exercises the state's police power to achieve the public improvements authorized by statute.

Although we believe it is reasonable for an LID to include the necessary costs of relocating utility facilities, we decline to include in Section 10 a provision requiring LIDs to pay for the relocation of such facilities. The Commission has no power to legislate a change in this area and require LIDs to pay utility relocation costs in the public rights-of-way. We further observe that Rule H has not specifically addressed this issue in the past. We order the Company to modify Section 10 to remove any requirement that LIDs be required to pay relocation costs for utility facilities located in the public rights-of-way as set out in the Appendix. While it appears that LIDs (and urban renewal districts) *may* and reasonably should pay for utility relocation costs that are part of the project, we cannot compel the payment of such costs.

Our LID decision also necessitates changes to the definition of "Third-Party Beneficiary" in Section 1 as set out in the Appendix to this Order. Idaho Power shall delete the term "Local Improvement Districts" from the term "Third-Party Beneficiary." In addition, we direct the Company to change the term of "Third-Party Beneficiary" to "Private Beneficiary" to conform with our decision above.[4]

3. Private Occupancy. ACHD next takes issue with Section 10(d). This subsection states:

> d. Private Right of Occupancy – Notwithstanding other provisions of this Section 10, 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 cost of Relocation is borne by the Public Road Agency.

ACHD argues that this provision imposes a duty upon road agencies to pay for utility relocation costs within the public right-of-way. ACHD also argues that this provision violates various provisions of the Idaho Constitution "because it establishes a requirement upon [governmental road agencies] to pay for utility relocations."[5] ACHD Brief on Reconsideration at 11, 17. Nampa and the Canyon County Districts also argue that this section infringes on public road agencies' ability to negotiate utility relocation costs on a case-by-case basis with utilities and developers. Joint Brief at 3.

On reconsideration, Idaho Power witness David Lowry explained that a "prior right of occupancy" may arise when a public road agency expands the public right-of-way to include or encompass an area where Idaho Power has facilities under a prior private easement. Lowry Direct at 5.

Commission Findings: At the outset, we note that the text of this subsection is somewhat confusing because it indicates that the Company has a private right of occupancy within a public right-of-way. However, the Company explained in its Brief on Reconsideration that this "prior right of occupancy" may arise when a road agency "expands its public right-of-

---

[4] Although ACHD takes issue with the definitions of "Public Road Agency" and "Local Improvement District" in Section 1 of Rule H it fails to provide any specific argument on the alleged error committed by the Commission in adopting these definitions. Nevertheless, the Commission believes that amending the definition of Public Road Agency and Local Improvement District will clarify the scope of Rule H and in particular the operation of Section 10. Our changes to these two definitions are reflected in the Appendix to this Order.

[5] Article VIII, § 2 and Article VII, § 17 for the Idaho Transportation Department and Article VIII, § 4 for local road agencies.

way to include land where utility facilities are located on a private easement." Idaho Power Reply Brief on Reconsideration at 15. In previous instances, to accommodate ACHD, Idaho Power and ACHD have entered into written agreements that provide that a subsequent relocation of distribution facilities within certain designated areas where a private right of occupancy existed will be borne by the road agency. This allows the utility to look to the road agency for future relocation costs as an alternative to compensation for expanding across the utility's private easement. As Idaho Power explained, expanding the public right-of-way to encompass the Company's private easement without compensation "would constitute an unlawful taking under both Article 1 § 14 of the Idaho Constitution and the Fifth Amendment of the United States Constitution."

This understanding also comports with ACHD's Resolution 330 Section 1.A.(2). This provision of Resolution 330 provides that

> If a utility . . . has facilities located on private property, with a right of occupancy other than its right to locate in a public right-of-way, and the District requires that any facility so located be relocated, the actual costs for such relocation shall be the responsibility of the District. Such costs shall be exclusive of profit allowances.

(Emphasis added.) In order to assist with the clarification of Section 10, we add two definitions to Section 1 of Rule H. The first added definition is "Easement" (which means the Company's legal right to use the real property of another for the purpose of installing or locating electric facilities). Second, we add a definition for "Prior Right of Occupancy." Adding these definitions and amending Subsection d. of Section 10 will improve clarity a nd allow road agencies the flexibility of negotiating relocation costs on a case-by-case basis. It also reflects the current practice of the Company and road agencies such as ACHD.

4. Advance Payment of Relocation Costs. The Districts take exception to language in Section 10 that requires Idaho Power to be paid in advance by third parties for Idaho Power's relocation work in public rights-of-way. More specifically, the disputed language provides: "All payments from Third-Party Beneficiary to the Company under this Section [10] shall be paid in advance of the Company's relocation work, based on the Company's Work Order Cost." (Emphasis added.) The Districts assert that this provision is an attempt "to regulate how quickly a public utility is required to" relocate its distribution facilities. ACHD Reconsideration Brief at

12; *see also* Tr. at 57. ACHD insists that requiring all relocations in the public right-of-way to be paid in advance will unduly interfere with the project's timetable. Tr. at 57.

For its part, Idaho Power expresses serious concerns about receiving reimbursement for its relocation costs on a project that it did not initiate. Tr. at 32. The Company asserts that it loses its leverage to recover relocation costs from third parties after the Company has already relocated its facilities. *Id.* Under Rule H, the Company is generally paid in advance of starting construction, unless mutually agreed otherwise. Rule H, § 2(I).

Commission Findings: We agree with the Districts that requiring advance payments may hinder the timely completion of improvements and relocations within the public rights-of-way. While we appreciate the fact that advance payments eliminate or reduce the risk of non-payment to Idaho Power for recovering relocation costs, we find that the Company has other alternatives. First, pursuant to *Idaho Code* § 40-210, Idaho Power is permitted to participate in the project development meeting of the highway agency. Instead of simply responding to the highway agency's direction to relocate its facilities, Section 40-210 provides utilities with an opportunity to participate in the planning process for the purpose of eliminating or minimizing their relocation costs.

Second, Idaho Power has other recourses to recover its relocation costs. For example, it may terminate service to a developer if the developer refuses to pay. Utility Customer Rule 302 provides that a utility may terminate service to a small commercial customer for failure to pay past due amounts. The Company also has other collection and legal remedies at its disposal. Consequently, we order the Company to amend this provision of Section 10 to read "All payments from Private Beneficiaries to the Company under this section shall be based upon the Company's work order costs." This change is shown in the Appendix.

5. Section 10 "Savings Clause." At oral argument, ACHD also took issue with the "Savings Clause" contained in Section 10. This part of Section 10 states that:

> This Section [10] shall not apply to utility relocations within public road rights-of-way of Public Road Agencies which have adopted legally binding guidelines for the allocation of utility relocation costs between the utility and Third-Party Beneficiaries that are substantially similar to the rules set out in Section 10 of Rule H.

ACHD argued that this is another instance where Section 10 intrudes on the road agencies to adopt "legally binding guidelines that [are] substantially similar to [Section 10] or else they're

null and void." Tr. at 58. In other words, "this provision of Rule H, Section 10 states that if our legally binding guidelines are not similar then they're invalid." Tr. at 61.

Idaho Power noted that Section 10 was modeled on ACHD's Resolution No. 330 which was adopted by the District in 1986. Tr. at 27. The Company noted that Resolution 330 has worked well for more than 20 years and that is one reason why Idaho Power modeled Section 10 on Resolution 330. The Company maintained that if a road agency had adopted utility relocation guidelines that were "substantially similar, [then] Section 10 wouldn't take precedent over" the adopted guidelines. Tr. at 34.

Commission Findings: We find that the "Savings Clause" of Section 10 does not operate to invalidate or void a road agency's legally enacted guidelines for the allocation of utility relocation costs. By its terms quoted above, Section 10 is not applicable if a road agency has adopted similar policies addressing the allocation of utility relocation costs.

D. BCA's Issues

The Building Contractors Association (BCA) first argues that Rule H as recently approved by the Commission is inconsistent with the methodology established in the last Rule H case revision completed in 1997. Order No. 26780 (Case No. IPC-E-95-18). BCA asserts the former line extension charges were calculated on a level of investment equal to that made to serve existing customers in the same class. Second, BCA argues that the Company's proposed allowances treat new and existing customers differently by allocating the additional cost of facilities to new customers. Finally, BCA alleges that inflation, not growth, is the actual source of increased costs to extend new distribution plant.

Idaho Power explains that the Line Installation and Service Attachment Allowances section of Rule H was modified and updated to reflect current costs associated with providing and installing "standard terminal facilities" for single-phase and three-phase service and line installations. The fixed allowance is based upon the cost of the most commonly installed facilities and attempts to mitigate intra-class and cross-class subsidies by requiring customers with greater facilities requirements to pay a larger portion of the cost to serve them. Idaho Power contends that there are two principal drivers that effect growth in rates over time – inflation and growth-related costs. The Company maintains that the growth in rates over the past five years has outpaced pure inflation, demonstrating that growth is not paying for itself. Post-hearing brief at 2. If the "cost-causers" do not pay, then electric rates for other utility customers will be

higher. This result would not reflect a just and reasonable rate as required by *Idaho Code* § 61-503.

Commission Findings: The Contractors first assert that our recently approved changes to Rule H are inconsistent with the methodology that the Commission adopted in the 1995 Rule H case. BCA implied that the Commission cannot change its methodology from the 1995 case. We reject this argument. As our Supreme Court noted, "Because regulatory bodies perform legislative as well as judicial functions in their proceedings, they are not so rigorously bound by the doctrine of *stare decisis* that they must decide all future cases in the same way as they have decided similar cases in the past." *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996) *citing Intermountain Gas Co. v. Idaho PUC*, 97 Idaho 113, 119, 540 P.2d 775, 781 (1975). "So long as the Commission enters sufficient findings to show that its action is not arbitrary and capricious, the Commission can alter its decisions." *Washington Water Power v. Idaho PUC*, 101 Idaho 567, 579, 617 P.2d 1242, 1254 (1980).

In the present Rule H proceeding, the Commission is addressing a fundamental principle of utility regulation: To the extent practicable, utility costs should be paid by those that cause the utility to incur the costs. If the "cost-causers" do not pay, the electric rates for other customers will be higher. Different circumstances exist now than did in 1995.

Line extension charges offset the cost of physically connecting the new customer to Idaho Power's system. We affirm our Order No. 30853 and find that the amount of $1,780 is based on the current installation cost of standard terminal facilities for single-phase service to new residential customers. Order No. 30853 at 10; Tr. at 140-41, 267. Standard terminal facilities include a single-phase transformer and the cost of the wiring between the Company's existing distribution facilities and the new customer's terminal facilities (the transformer), and any secondary wiring between the transformer and junction boxes. Tr. at 267. Depending upon the geographic configuration of customer locations, transformers can serve multiple customers. Tr. at 237. Because the allowance is calculated on a per transformer basis and not a per customer basis, the allowance inside and outside subdivisions provides the same Company investment. Permitting a per customer allowance rather than a per transformer allowance could lead to an allowance inside subdivisions that is greater than the cost of the terminal facilities required to provide service. Order No. 30853 at 12; Tr. at 276-77.

At the reconsideration hearing, BCA's witness Dr. Richard Slaughter argued that the line extension allowance or lot refund should be equal to $1,232 per lot (single residential customer). Tr. at 234. As Company witness Greg Said explained,

> Dr. Slaughter's recommended mechanism treats developers of residential subdivisions more favorably than individual customers seeking connections outside of subdivisions. [His per lot mechanism] tends to provide allowances in subdivisions that exceed the cost of standard terminal facilities with the excess allowances offsetting the cost of primary conductor and secondary conductor. Such treatment is inconsistent with the treatment of residential customers outside of subdivisions who do not receive an allowance greater than the cost of standard terminal facilities.

Tr. at 270. Mr. Said also explained that Dr. Slaughter's $1,232 cost per lot refund proposal inappropriately includes costs from substations, meters and service conductors which are not part of line extension costs. Tr. at 277, 274-76. On reconsideration, we reaffirm our previous decision that allowances should be based upon the cost of standard terminal facilities and not on a per lot basis. Allowances of $1,780 for single-phase service and $3,803 for three-phase service ensure that customers are treated and charged equitably based on standard overhead service costs, thereby mitigating intra-class and cross-class subsidies. Consequently, the Commission finds that Idaho Power's proposed fixed allowance of $1,780 for single-phase service and $3,803 for three-phase service represents a fair, just and reasonable allocation of line extension costs.

Finally, the Contractors argue that the Rule H revision makes a new customer pay greater upfront line extension charges to defray "some of the costs that would otherwise be charged to existing ratepayers for new generation and transmission," thus running afoul of *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 690 P.2d 350 (1984). We reject this contention. In *Homebuilders*, our Supreme Court determined that the Commission could not impose a charge on only new customers to recover the costs of additional generating resources that served all or "existing" customers. Here, the Commission is addressing distribution costs not resource costs. We are setting line extension charges based on the costs of standard terminal facilities that will be used to serve only the customer who is charged.

More importantly, the Supreme Court noted that there is no discrimination between "new" customers and "old" customers when the Commission sets new line extension charges. *Homebuilders*, 107 Idaho at 421, 690 P.2d at 356. More specifically, the Court noted that no discrimination is present "when a non-recurring charge [e.g., a line extension charge] is imposed

upon a new customer because the service they require demands an extension of existing distribution or communication lines and a charge is imposed to offset the utility's capital investment [in serving new customers]." *Id.*

Idaho Power's line extension charges are imposed only on those customers who will be served by the new facilities. The new facilities will provide service only to those customers who pay for them. The line extension allowances and charges are based upon the cost of terminal facilities. Once new customers pay the nonrecurring charge/line extension costs, they become existing customers and pay pursuant to the same rate schedule as all other existing customers in their class. As such, there is no distinction between new and existing customers in regard to nonrecurring rates and no rate discrimination. *Idaho Code* § 61-315.

INTERVENOR FUNDING

A. The Application for Funding

On November 9, 2009, Building Contractors filed an Application for Intervenor Funding in this case pursuant to *Idaho Code* § 61-617A and the Commission's Rules of Procedure, IDAPA 31.01.01.161-165. In its Petition, BCA claimed the following fees and costs:

Legal Fees	Hours	Total
Michael Creamer, Partner	152.0	$38,000.00
Elizabeth Donick, Associate	5.5	$ 852.50
Justin Fredin, Associate	3.0	$ 585.00
Tami Kruger, Paralegal	5.8	$ 580.00
Total Legal Fees:	166.3	$40,017.50
Costs: Copies		$ 1,021.09
Total Work and Costs:		$41,038.59
Consultant: Richard Slaughter	113.12	$19,926.66
Total Fees and Expenses:		$60,965.25

BCA maintains that it was actively involved in evaluating Idaho Power's proposed changes to its Rule H line extension tariff and the economic impacts these changes would have on BCA members and the general public. The Contractors contend that the factual and policy issues raised by this case were complex and important. BCA alleges that it consistently sought findings and conclusions throughout the proceedings that new customers were entitled to a level

of per-customer Company investment in distribution facilities on par with existing customers. Petition for Intervenor Funding at 2.

BCA states that it retained Dr. Richard Slaughter as a consultant and expert witness based on his familiarity with Idaho Power's rate structure and, specifically, its line extension tariff. BCA maintains that Dr. Slaughter's testimony provided a historical and factual foundation regarding Idaho Power's existing Rule H tariff, its embedded distribution costs, and the sources of increasing costs of service to the Company. Dr. Slaughter argued that it was inflation, not customer growth, causing upward pressure on rates. *Id.* at 3.

BCA argues that the Commission's Order No. 30883 granting, in part, its request for reconsideration implicitly, if not explicitly, recognizes that BCA identified important issues that warranted further consideration. Consequently, BCA maintains that they materially contributed to the proceedings. *Id.* at 4.

BCA next alleges that the costs and expenses incurred from participation in this case were all reasonable and necessary. It also contends that, as a non-profit association that relies on voluntary membership and voluntary contributions, the costs and expenses have been a significant financial burden. BCA claims that voluntary contributions have dropped significantly due to the struggling economy and the depressed local real estate sector. As a result, BCA states that it has imposed significant budget cuts and mandatory days off for its staff. *Id.* at 5.

BCA maintains that its expenses were incurred to advance policies that benefit not only BCA members, but also the public at large. BCA points out that its position differed from that of any other party, including Staff. BCA asserts that it materially contributed to the decision in this case "and to the public debate about issues of population growth and energy costs and the appropriate allocation of those costs as between new customers and the Company's existing ratepayers." *Id.* at 6.

Idaho Power did not file a response to BCA's request for intervenor funding.

B. Standards for Intervenor Funding

Idaho Code § 61-617A and Rules 161-165 of the Commission's Rules of Procedure provide the legal standards for awarding intervenor funding. Section 61-617A(1) declares that it is "policy of this state to encourage participation at all stages of all proceedings before the commission so that all affected customers receive full and fair representation in those proceedings." Accordingly, the Commission may order any regulated utility with intrastate

annual revenues exceeding $3,500,000 to pay all or a portion of one or more parties' legal fees, witness fees, and reproduction costs not to exceed a combined amount of $40,000. *Idaho Code* § 61-617A(2). The Commission's determination of whether to award intervenor fees and costs in a particular proceeding shall be based on the following standards:

1. Did the intervenor materially contribute to the decision rendered by the Commission;

2. Whether the alleged costs of intervention are reasonable in amount and would be a significant financial hardship for the intervenor to incur;

3. Did the recommendation(s) made by the intervenor differ materially from the testimony and exhibits of the Commission Staff; and

4. Did the testimony and participation of the intervenor address issues of concern to the general body of users or consumers.

Idaho Code § 61-617A(2)(a-d).

Rule 162 of the Commission's Rules of Procedure provides the procedural requirements with which an application for intervenor funding must comply. The application must contain: (1) an itemized list of expenses broken down into categories; (2) a statement of the intervenor's proposed finding or recommendation; (3) a statement showing that the costs the intervenor wishes to recover are reasonable; (4) a statement explaining why the costs constitute a significant financial hardship for the intervenor; (5) a statement showing how the intervenor's proposed finding or recommendation differed materially from the testimony and exhibits of the Commission Staff; (6) a statement showing how the intervenor's recommendation or position addressed issues of concern to the general body of utility users or customers; and (7) a statement showing the class of customer on whose behalf the intervenor appeared. IDAPA 31.01.01.162.

Commission Findings: At the outset, BCA's request for intervenor funding regarding its actions for the entirety of these proceedings must be addressed. In Order No. 30896 the Commission denied a request made by BCA for intervenor funding based on its failure to comply with procedural requirements. BCA filed its request nearly two months after the 14-day deadline established by Commission rules. Therefore, $28,386.35 of the $60,965.25 presently requested by BCA has already been denied by this Commission.

BCA's request for expenses incurred during the reconsideration phase of this case in the amount of $32,578.90 was timely filed. Next, *Idaho Code* § 61-617A(2) and Rule 165 of the

Commission's Rules require that the Commission find that: (a) BCA's involvement in this case must have materially contributed to the Commission's final decision; (b) the costs of intervention awarded are reasonable in amount; (c) the costs of intervention are a significant hardship for BCA[6]; (d) the recommendations of BCA differed materially from the testimony and exhibits of Commission Staff[6], and; (e) BCA addressed issues of concern to the general body of ratepayers.

1. Material Contribution. The Commission finds that BCA's arguments did not materially contribute to our final decision in this case. BCA, in large part, recycled its arguments and reasoning from Idaho Power's 1995 Rule H filing. Indeed, clarification was repeatedly necessary during the technical hearing as to which case BCA was referencing – 1995 or the present Application. Tr. at 176, 258-59, 296. The argument BCA presented regarding new and existing customers was similar to the argument it presented in the 1995 prior case. As in the 1995 Rule H case, the Commission was not persuaded by BCA's arguments. Accordingly, the Commission cannot find that BCA's actions materially contributed to our final decision in this case.

2. General Body of Users and Reasonable Costs. Because much of BCA's advocacy addressed the line extension policies of the 1995 Rule H case, we find much of the reconsideration legal fees and expert fees to be unreasonable. BCA was permitted to present evidence on the "limited issue of the amount of the appropriate allowance." Order No. 30883 at 4. "BCA may address what allowance amount is reasonable based on the cost of new distribution facilities." *Id.* Here BCA spent considerable resources addressing issues other than the appropriate allowance amount. *Idaho Code* § 61-617A(2)(b). Moreover, BCA advocacy does not address issues of concern to "the general body of users or consumers." *Id.* at (2)(d).

We conclude that the request for intervenor funding of BCA fails to meet the requirements of *Idaho Code* § 61-617A and Commission Rule 165. Therefore, BCA's request for intervenor funding in this case is denied in its entirety.

ULTIMATE FINDINGS OF FACT

Idaho Power is a public utility pursuant to *Idaho Code* §§ 61-119 and 61-129. The Commission has jurisdiction over this matter pursuant to Title 61 of the Idaho Code. The

[6] We find that the costs represent a hardship for BCA and that BCA's positions materially differed from the Staff's positions.

Commission amends Idaho Power's Rule H tariff as explained above and as set out in the Appendix.

ORDER

IT IS HEREBY ORDERED that the Petitions for Reconsideration field by ACHD, the City of Nampa, and the Association of Canyon Highway Districts is partially granted and partially denied. As set out above, the Commission's prior Order No. 30853 is amended and clarified pursuant to *Idaho Code* § 61-124.

IT IS FURTHER ORDERED that the Building Contractors Association's request to amend Rule H and Order No. 30853 is denied.

IT IS FURTHER ORDERED that the Building Contractors Association's Petition for Intervenor Funding is denied.

IT IS FURTHER ORDERED that Idaho Power shall file new Rule H tariff sheets consistent with this Order. The changes set out in this Order and the rest of Rule H shall become effective for services rendered on or after December 1, 2009.

IT IS FURTHER ORDERED that Idaho Power shall submit to the Commission, no later than January 1 of each year, updated allowance amounts for single- and three-phase service to reflect current costs for "standard" terminal facilities.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this Case No. IPC-E-08-22 may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 30th day of November 2009.

JIM D. KEMPTON, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

MACK A. REDFORD, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

O:IPC-E-08-22_ks_dh_Reconsideration

Section 1 Additions and Amendments:

Easement is the Company's legal right to use the real property of another for the purpose of installing or locating electric facilities.

Prior Right of Occupancy is a designated area within the public road right-of-way where the Company and the Public Road Agency have agreed that the costs of the Relocation of facilities in the designated area will be borne by the Public Road Agency. For example, a Prior Right of Occupancy may be created when the Public Road Agency expands the public road right-of-way to encompass a Company Easement without compensating the Company for acquiring the Easement but the parties agree in writing that the subsequent Relocation of distribution facilities within the designated area will be borne by the Public Road Agency.

Local Improvement District (LID) is any entity created by an authorized governing body under the statutory procedures set forth in Idaho Code, Title 50, Chapter 17 or Idaho Code § 40-1322. For the purpose of Rule H, the term LID also includes Urban Redevelopment projects set forth in Idaho Code, Title 50, Chapter 20.

Public Road Agency is any state or local agency which constructs, operates, maintains or administers public road rights-of-way in Idaho, including where appropriate the Idaho Transportation Department, any city or county street department, or a highway district.

Private Beneficiary is any individual, firm or entity that provides funding for road improvements performed by a Public Road Agency or compensates the Company for the Relocation of distribution facilities as set forth in Section 10. A Private Beneficiary may include, but is not limited to, real estate developers, adjacent landowners, or existing customers of the Company.

10. Relocation Costs in Public Road Rights-of-Way

The Company often locates its distribution facilities within state and local public road rights-of-way under authority of Idaho Code § 62-705 (for locations outside Idaho city limits) and the Company's city franchise agreements (for locations within Idaho city limits). At the request of a Public Road Agency, the Company will relocate its distribution facilities from or within the public road rights-of-way. The Relocation may be for the benefit of the general public, or in some cases, be a benefit to one or more Private Beneficiaries. Nothing in this Section bars a Local Improvement District (LID) from voluntarily paying the Company for Relocations.

The Company's cost of Relocations from or within the public road rights-of-way shall be allocated as follows:

a. Road Improvements Funded by the Public Road Agency – When the Relocation of distribution facilities is requested by the Public Road Agency to make roadway improvements or other public improvements, the Company will bear the cost of the Relocation.

b. Road Improvements Partially Funded by the Public Road Agency – When the Public Road Agency requires the Relocation of distribution facilities for the benefit of itself (or an LID) and a Private Beneficiary, the Company will bear the Relocation costs equal to the percentage of the Relocation costs allocated to the Public Road Agency or LID. The Private Beneficiary will pay the Company for the Relocation costs equal to the percentage of the road improvement costs allocated to the Private Beneficiary.

c. Road Improvements not Funded by the Public Road Agency – When the Relocation of distribution facilities in the public road rights-of-way is solely for a Private Beneficiary, the Private Beneficiary will pay the Company for the cost of the Relocation.

d. Prior Right of Occupancy – When the Company and the Public Road Agency have entered into an agreement regarding a Private Right of Occupancy, the costs of Relocation in such designated area will be borne by the Public Road Agency, or as directed in the agreement.

All payments from Private Beneficiaries to the Company under this Section shall be based on the Company's Work Order Cost.

This Section shall not apply to Relocations within public road rights-of-way of Public Road Agencies which have adopted legally binding guidelines for the allocation of utility relocation costs between the Company and other parties that are substantially similar to the rules set out in Section 10 of Rule H.

11. Eliminating or Minimizing Relocation Costs in Public Road Rights-of-Way

Pursuant to Idaho Code § 40-210, the Company will participate in project design or development meetings upon receiving written notice from the Public Road Agency that a public road project may require the relocation of distribution facilities. The Company and other parties in the planning process will use their best efforts to find ways to eliminate the cost of relocating utility facilities, or if elimination is not feasible, to minimize the relocation costs to the maximum extent reasonably possible. This provision shall not limit the authority of the Public Road Agency over the public road right-of-way.