

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION)
 OF IDAHO POWER COMPANY FOR) CASE NO. IPC-E-08-22
 AUTHORITY TO MODIFY ITS RULE H)
 LINE EXTENSION TARIFF RELATED TO)
 NEW SERVICE ATTACHMENTS AND) ORDER NO. 32476
DISTRIBUTION LINE INSTALLATIONS.)

In October 2008, Idaho Power Company filed to revise Section 10 of its Rule H tariff. Idaho Power proposed to add Sections 10 and 11 to clarify cost responsibilities incurred when the Company relocates its facilities placed in public roadways. Section 11 of the tariff mirrored statutory language requiring the Company “and other parties” to use their best efforts to find ways to eliminate or minimize costs to relocate utility facilities in public roads. The Ada County Highway District (ACHD) appealed to the Idaho Supreme Court following the Commission’s approval of Sections 10 and 11 of the tariff. In a decision entered May 25, 2011, the Supreme Court concluded that the tariff does not infringe on ACHD’s exclusive jurisdiction over public rights-of-way. *Ada County Highway District v. Idaho Public Utilities Commission and Idaho Power Company*, 151 Idaho 1, 253 P.3d 675 (2011). The Supreme Court also concluded, however, that provisions of Section 10 and Section 11 exceeded the authority of the Commission. Accordingly, the Supreme Court set aside those sections of the tariff, returning the case to the Commission.

Idaho Power filed a Motion to Accept its Conforming Rule H Section 10 tariff on July 14, 2011, and then began discussions with ACHD regarding the proposed language. The Company made changes to the new Section 10 as a result of those discussions, but ultimately the parties were not able to reach full agreement on language to present to the Commission. Accordingly, Idaho Power filed its amended Motion on January 11, 2012, asking the Commission to accept its revised Section 10. ACHD filed a Memorandum in Opposition to the Company’s Motion on January 26, 2012, and Idaho Power filed an Answer to ACHD’s Memorandum on February 10, 2012.

The Supreme Court Decision

The Commission’s consideration of the Company’s revised tariff begins with a review of the Supreme Court decision entered May 25, 2011. ACHD argued on appeal that

Section 10 of the tariff usurps ACHD's exclusive jurisdiction over public rights-of-way, and presented specific arguments or examples to support its proposition. The Court addressed each point raised by ACHD, and rejected each. The Court also concluded, however, that provisions of Sections 10 and 11 exceeded the Commission's authority.

A. The Tariff does not Infringe on ACHD's Authority or Jurisdiction

The first ACHD argument the Court considered, that by adopting Section 10 "the IPUC will effectively dictate the policies and procedures of Public Road Agencies regarding electric utility relocations", was summarily rejected. The Court stated simply that ACHD "does not point to any provision in Section 10 by which IPUC attempts to do so." *ACHD v. IPUC*, 151 Idaho 1, 253 P.3d 675, 679 (2011).

The next ACHD argument was also rejected by the Court. ACHD asserted that Section 10 impacted Public Road Agencies in their negotiations with third parties and developers concerning road improvement projects. As described by the Court, "[t]he contention is that one of the bargaining chips ACHD has in negotiating with developers is the authority to rule upon whether the developer will have to reimburse Company for any of the cost of relocating its electrical distribution facilities. ACHD can get a developer to pay more money to it if the developer does not have to reimburse Company." *ACHD v. IPUC*, 253 P.3d at 679. The Court found no legal basis for the authority claimed by ACHD, stating: "That ACHD finds that authority useful does not mean it is a power granted to it by the legislature." *Id.*

Next, the Supreme Court considered ACHD's argument that Section 10 will "regulate and control electric utility relocations by assigning financial liability for such relocations." *ACHD v. IPUC*, 253 P.3d at 679. Section 10 might have required a third party to pay Idaho Power the costs to move its facilities if such relocation was for the third party's benefit. The Court stated that "ACHD does not explain how requiring a third party to reimburse Company for relocation costs enables IPUC to 'regulate and control electric utility relocations.'" *Id.* ACHD argued that it has exclusive authority to assign cost responsibility for utility relocations in roadways, and quoted portions of *Idaho Code* § 40-1310. The Court concluded that "none of powers granted to ACHD in the above-quoted statute [*Idaho Code* § 40-1310] provide that ACHD can determine whether a third party is required to reimburse a utility for all or a portion of its cost of relocating the utility's distribution facilities that are in a public right-of-way." *ACHD v. IPUC*, 253 P.3d at 680.

The Court also rejected ACHD's argument that the cost assignment authority it claimed is implied in the statutes describing ACHD's jurisdiction. Noting that a utility must move its facilities at the request of a road agency, and that ACHD does not bear any of that cost, the Court concluded that there is no need for ACHD to have authority to determine whether a third party will reimburse the utility: "Whether some third party reimburses the Company after the relocation has been completed is not an issue of concern to ACHD." *ACHD v. IPUC*, 253 P.3d at 681.

Finally, the Court considered ACHD's argument that Section 10 would create inefficiencies by involving the Commission in scheduling and potential disputes that arise in road improvement projects. However, "[m]issing from ACHD's argument is any reference to a provision in Section 10 that purports to prevent ACHD from resolving such disputes involving Company, or that purports to have IPUC resolve those disputes, or that purports to regulate electric utility relocations on public rights-of-way." *ACHD v. IPUC*, 253 P.3d at 681. The Court thus rejected all ACHD arguments that Section 10 interfered with its authority, concluding "ACHD has not pointed to any provision in Section 10 that infringes upon ACHD's power or jurisdiction." *Id.*

B. Provisions of Sections 10 and 11 Exceeded the Commission's Authority

The Court next considered whether adoption of Section 10 exceeded the Commission's authority. The Court first rejected ACHD's argument that relocation of utility facilities is not a "service" as described in the Commission's jurisdictional statutes. The Court concluded that the Commission's construction of the word *service*, to include relocation services, is reasonable, quoting from *Idaho Code* § 61-507: "the Commission shall prescribe rules and regulations for the performance of any *service* or the furnishing of any commodity of the character furnished or supplied by any public utility." *ACHD v. IPUC*, 253 P.3d at 682. The Court held that the performance of any service reasonably includes removing and re-installing distribution facilities located in public roadways. *Id.*

After holding that the relocation of distribution facilities is the performance of a service under Section 61-507, and thus within the Commission's ratemaking authority, the Court nonetheless concluded that Section 10 exceeded the Commission's authority. The Court affirmed that the Commission "certainly has the authority to determine the costs that Company can charge a private person who requests services from company." *ACHD v. IPUC*, 253 P.3d at

682. Section 10, however, goes further than that because “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.” *ACHD v. IPUC*, 253 P.3d at 682-83 (italics added). Because no statute grants the Commission that authority, the Court concluded that the adoption of Section 10 exceeded the Commission’s authority.

Finally, the Court also concluded that Section 11 of the tariff exceeded the authority of the Commission. Section 11 mirrored *Idaho Code* § 40-210, a provision enacted in 2009 intended to create a proactive, cooperative process for road agencies and utilities to plan projects so as “to effectively minimize costs, limit the disruption of utility services, and limit or reduce the need for present or future relocation services of such utility facilities.” *Idaho Code* § 40-210(1). Paragraph 2 of the statute includes an admonition that, “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 elimination of such costs is not feasible, minimize the relocation costs to the maximum extent reasonably possible.” *Idaho Code* § 40-210(2) (italics added). The Court found unauthorized a nearly identical sentence in Section 11 that stated “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.” *ACHD v. IPUC*, 253 P.3d at 683. Noting that “other parties” could include ACHD and other entities not regulated by the Commission, the Court stated that “[a]lthough the legislature has the authority to order public highway agencies to use their best efforts to minimize the cost of relocating utility facilities, IPUC does not have that authority.” *Id.* The Court accordingly set aside Section 11.

Idaho Power’s Revised Tariff and Motion

Idaho Power filed its amended Motion on January 11, 2012, asking Commission approval of its revisions to Rule H to conform with the Supreme Court’s decision. The revised Section 10 contains three paragraphs. New Section 11 is one short paragraph stating that the tariff does not cancel existing agreements and that all applications for relocation services will be governed under the rule or schedule in effect at the time the application was received by Idaho Power. The proposed Section 11 is not in dispute.

Idaho Power in its Motion represents that it made changes to Paragraph 1 of Section 10 as a result of discussions with ACHD, and that ACHD agreed to the proposed modifications.

Similarly regarding Paragraph 2, Idaho Power represents that ACHD recommended and Idaho Power agreed to make changes “to more clearly reflect the public road agency’s role in determining that facilities located in public rights-of-way must be relocated or removed when they incommode the public use.” Idaho Power Amended Motion, p. 2. The first two paragraphs of revised Section 10 are as follows:

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). When the Company is notified of a road improvement project pursuant to Idaho Code § 40-210, the Company will meet with the Public Road Agency as provided in Idaho Code § 40-210.

If a Public Road Agency determines that the Company’s facilities incommode the public use of any road, highway, or street, the Public Road Agency can require the company to relocate or remove the facilities. If a Public Road Agency determines that the Company’s facilities must be relocated or removed because they incommode the public use of the road, highway, or street, the Company will relocate its distribution facilities from or within the public road rights-of-way and the Company will bear the costs of such relocation.

Idaho Power’s Amended Motion further represents that ACHD and the Company agreed to clarifications to the first sentence of the third paragraph of Section 10. That paragraph concerns the Company’s efforts to recover relocation or removal costs when a third party requests relocation services. Idaho Power stated that the only disagreement from ACHD is in the last sentence proposed by Idaho Power. Idaho Power Amended Motion, p. 2. The third paragraph of revised Section 10 states:

If the Company determines that if one or more Private Beneficiaries has, directly or indirectly through a Public Road Agency, requested that the Company’s facilities be relocated or removed for the benefit of the Private Beneficiaries, the Company will use reasonable efforts to recover that portion of the total Relocation or removal costs attributable to the request from the Private Beneficiaries. If the Private Beneficiaries dispute the Company’s calculation of the Private Beneficiaries’ cost responsibility, either the Company or the affected Private Beneficiaries may initiate a proceeding to have the Commission establish the reasonableness of the Company’s calculation of the Relocation or removal cost responsibility as between the Company and the Private Beneficiaries.

Idaho Power contends the last sentence of the paragraph is appropriate and necessary. The Supreme Court acknowledged that the Commission has authority to determine the costs that Idaho Power can charge a private person who requests service from the Company, but the Court “does not address the respective rights and responsibilities of the Commission, the private party, and the Company when the private party requests a relocation of utility facilities located in a public road right-of-way.” Idaho Power Amended Motion, pp. 2-3. Idaho Power contends the last sentence makes clear that private parties requesting utility relocation services are responsible to pay relocation costs associated with their projects. In addition, the Company asserts that the proposed language notifies parties that the Commission in its ratemaking capacity may determine the reasonableness of the Company’s charges for providing relocation services if there is concern that the Company incorrectly calculated its costs. Idaho Power Amended Motion, p. 3.

ACHD’s Memorandum

ACHD filed a Memorandum in Opposition to Idaho Power’s Amended Motion on January 26, 2012. ACHD sets out five conclusions it believes the Supreme Court reached in its decision, and asserts that the tariff as revised “contains language that directly contradicts the Idaho Supreme Court’s Opinion.” ACHD Memorandum, p. 3. ACHD presents three main arguments for the Commission’s rejection of Idaho Power’s revisions to Section 10. We will address ACHD’s objections in our review of the revised terms of the tariff.

Contrary to Idaho Power’s representations, ACHD claims it reached no agreement regarding any of the language in the revised sections.

Commission Decision

When an Order of the Commission is set aside in whole or in part by the Supreme Court, the Commission thereafter “may alter or amend the order appealed from to meet the objections of the court.” *Idaho Code* § 61-629. The specific objections of the Court were twofold: Section 10 impermissibly authorized the Commission to require a third party to pay for relocation services *not requested* by the party, and Section 11 too broadly directed parties not regulated by the Commission to comply with the statutory obligation to plan road projects so as to minimize the relocation of utility facilities. Revisions to the tariff that address these specific Supreme Court objections can be approved by the Commission.

A. The Revised First Paragraph

ACHD objects to the second sentence in the first paragraph of the revised Section 10. The sentence reads: “When the Company is notified of a road improvement project pursuant to Idaho Code § 40-210, the Company will meet with the Public Road Agency as provided in Idaho Code § 40-210.” A similar provision in Section 11 of the objectionable tariff was set aside only because it included a reference to “other parties” that will comply with *Idaho Code* § 40-210. The revised sentence removes the reference to “other parties”, and now confirms only Idaho Power’s legal obligation to meet with road agencies when notified of a project by the agency. ACHD nonetheless objects to the revised language, apparently based merely on the reference to Section 40-210 in the sentence. ACHD states the Court “held that the Commission does not have authority under *Idaho Code* § 40-210 and the second sentence of the proposed first paragraph of section 10 expressly contradicts the Idaho Supreme Court’s opinion.” ACHD Memorandum, p. 11.

The second sentence in the first paragraph appropriately addresses the objection of the Supreme Court by removing the reference to “other parties.” Accordingly, the Commission approves the first paragraph in the revised Section 10.

B. The Revised Second Paragraph

ACHD also objects to the second paragraph of the revised tariff. That paragraph is the following:

If a Public Road Agency determines that the Company’s facilities incommode the public use of any road, highway, or street, the Public Road Agency can require the company to relocate or remove the facilities. If a Public Road Agency determines that the Company’s facilities must be relocated or removed because they incommode the public use of the road, highway, or street, the Company will relocate its distribution facilities from or within the public road rights-of-way and the Company will bear the costs of such relocation.

ACHD contends the paragraph “attempts to establish limits as to when a Public Road Agency ‘can require’ Idaho Power to relocate or remove its facilities from the public rights-of-way and when Idaho Power will bear the cost of such relocation.” ACHD Memorandum, p. 12. ACHD asserts the paragraph “expressly contradicts the Idaho Supreme Court’s opinion and does not ‘meet the objections of the court.’” *Id.*

ACHD's objection to the second paragraph cannot result from the Court's decision, or from reasoned logic. First, the paragraph is virtually identical to language in the appealed tariff, and the Court did not set aside the provision. The revised paragraph does not address an objection raised by the Court because no objection was stated. Second, the paragraph is no more than a statement of the well-established common law rule requiring utilities to move facilities that incommode the public's use of roadways. The first sentence is almost a quote of the Supreme Court's statement of the rule: "If ACHD determines that Company's facilities incommode the public use of any road, highway, or street, ACHD can require Company to relocate the facilities." *ACHD v. IPUC*, 253 P.3d at 678. ACHD does not state a valid objection to the second paragraph, and the Commission thus approves it.

C. The Revised Third Paragraph

ACHD objects to the third paragraph in the revised tariff, which is the following:

If the Company determines that if one or more Private Beneficiaries has, directly or indirectly through a Public Road Agency, requested that the Company's facilities be relocated or removed for the benefit of the Private Beneficiaries, the Company will use reasonable efforts to recover that portion of the total Relocation or removal costs attributable to the request from the Private Beneficiaries. If the Private Beneficiaries dispute the Company's calculation of the Private Beneficiaries' cost responsibility, either the Company or the affected Private Beneficiaries may initiate a proceeding to have the Commission establish the reasonableness of the Company's calculation of the Relocation or removal cost responsibility as between the Company and the Private Beneficiaries.

ACHD incorrectly states that the Supreme Court's decision includes a holding that "the Commission does not have 'authority to determine whether the relocation, in whole or in part, is for the benefit of a third party.'" ACHD Memorandum, p. 12, *quoting* from *ACHD v. IPUC*, 253 P.3d at 682-83. The phrase ACHD quotes from the Court decision is not part of a holding, it is part of the Court's description of the application of the old tariff, as follows:

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.

ACHD v. IPUC, 253 P.3d at 682-83 (italics added to phrase quoted by ACHD). It is clear in this context that the Court's objection was to the possibility the Commission "could require a third party to pay for services that the third party did not request." It is a misstatement to say "the express holding of the Idaho Supreme Court was that the Commission does not have 'the authority to determine whether the relocation, in whole or in part, is for the benefit of a third party.'" ACHD Memorandum, p. 7.

Section 10 would have authorized the Commission in some circumstances to require a third party to pay for services that the third party did not request from Idaho Power. A holding that the Commission is not authorized to direct a third party to pay for services it did not request from Idaho Power is noticeably different than saying the Court expressly held the Commission is not authorized to determine whether facility relocation benefited a third party. In response to the Court's concern that the earlier tariff allowed a cost determination against a party for services not requested, the tariff as revised applies only where a third party requests relocation services. The revised sentence thus addresses the Court's objection, and can be approved.

Finally, ACHD objects to the second sentence in the third paragraph. ACHD states the provision contradicts a Supreme Court conclusion, and Commission admission, that "the Commission does not have authority to adjudicate disputes between Idaho Power and Private Beneficiaries." ACHD Memorandum, p. 13. ACHD argued on appeal that Section 10 purported to give the Commission authority to resolve disputes between road agencies and unregulated entities involved in a project. In response to ACHD's argument, the Commission pointed out that no part of the Rule H tariff contained a dispute resolution provision. In its Memorandum, ACHD now correctly points out that "Section 10 has never contained a dispute resolution provision," and that on appeal "the Commission explained that '[t]here is no dispute resolution term in any part of the line extension tariff, and no discussion by the IPUC of a dispute resolution provision in either [Final] Order No. 30853 or [Final Order on Reconsideration] Order No. 30955.'" ACHD Memorandum, p. 8. It twists this context for ACHD to assert the Commission made a "clear statement on appeal that the Commission does not have authority to resolve disputes between Idaho Power and Private Beneficiaries." *Id.*

Later in its Memorandum, ACHD parenthetically quotes the following dicta in the Court's decision: "During oral argument, IPUC admitted that it could not adjudicate the dispute between the third party and Company. It also admitted that if Company wanted to recover relocation costs from a third party, it would have to sue in court and Section 10 would not apply." *ACHD v. IPUC*, 253 P.3d at 683. The old tariff required a third party to pay the same percentage of Idaho Power's relocation costs as ACHD had determined the third party would pay for the entire road project. In this context, the Commission agreed it could not adjudicate a dispute between Idaho Power, ACHD and the third party over ACHD's determination of cost responsibility. Nor can the Commission award money damages. Idaho Power would have to pursue that remedy in court.

Nowhere does the Court's decision say the Commission cannot adjudicate a dispute between Idaho Power and a third party involving services requested by the party under a proper Idaho Power tariff. In fact, the Court specifically affirmed that "IPUC certainly has the authority to determine the costs that Company can charge a private person who requests services from Company." *ACHD v. IPUC*, 253 P.3d at 682. Similarly, the Commission has authority to resolve a dispute between Idaho Power and the person requesting service over the determination of those costs. *Idaho Code* § 61-612 authorizes the Commission to hear complaints regarding "any act or thing done or omitted to be done by any public utility including any rule, regulation or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation of any provision of law or of any order or rule of the commission."

Idaho Power's tariff revisions properly address the objections of the Supreme Court. The first sentence of paragraph three, however, can be improved by removing two phrases. The first phrase of the sentence ("If the Company determines that") is superfluous. The focus properly is on a request made by the third party, made either directly or indirectly through a road agency. Likewise, the phrase "for the benefit of the Private Beneficiaries," is not necessary. Presumably if a private party makes a request for relocation service, it is for the requester's benefit. Without the two phrases, the sentence would read: "If one or more Private Beneficiaries has, directly or indirectly through a Public Road Agency, requested that the Company's facilities be relocated or removed, the Company will use reasonable efforts to recover that portion of the total Relocation or removal costs attributable to the request from the Private Beneficiaries."

The Commission approves the revised Sections 10 and 11 of Idaho Power's Rule H tariff, including the change to the first sentence of paragraph three discussed above. The Company is directed to file the appropriate tariff sheets consistent with this decision.

ORDER

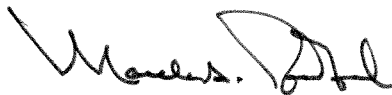
IT IS HEREBY ORDERED that Idaho Power Company file revised tariff sheets for Sections 10 and 11, Rule H, as set forth in this decision.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

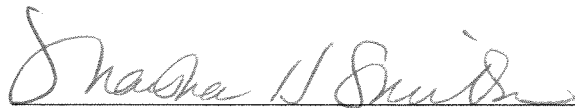
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 7th day of March 2012.



PAUL KJELLANDER, PRESIDENT

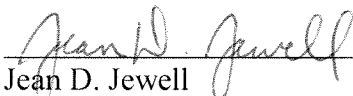


MACK A. REDFORD, COMMISSIONER



MARSHA H. SMITH, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

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