

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. 32592
DISTRIBUTION LINE INSTALLATIONS.)

This is a Final Order on Reconsideration in this case in which Idaho Power Company initially proposed to revise its Rule H tariff in October 2008. The Rule H tariff provides terms for Idaho Power to relocate its electric service facilities, and states that parties requesting those relocation services will pay the costs. The Company proposed to add Sections 10 and 11 to the tariff to clarify cost responsibilities when the Company relocates its facilities placed in public roadways. The Commission approved the Company's revisions to Sections 10 and 11 of its tariff in Order No. 30853 issued July 1, 2009. After further review on reconsideration, the Commission issued a Final Order on Reconsideration on November 30, 2009. See Order No. 30955. The Ada County Highway District (ACHD) appealed the Order to the Idaho Supreme Court and, in a decision entered May 25, 2011, the Court concluded that the tariff does not infringe on ACHD's jurisdiction over public rights-of-way. *Ada County Highway District v. Idaho PUC and Idaho Power Company*, 151 Idaho 1, 253 P.3d 675 (2011). The Court also determined, however, that certain provisions of Sections 10 and 11 exceeded the authority of the Commission, and set aside those sections of the tariff.

On July 14, 2011, Idaho Power filed a Motion to Accept its conforming Rule H Section 10 tariff, correcting the errors identified by the Supreme Court. Discussions between Idaho Power and ACHD followed, and the Company proposed changes to the new Section 10 as a result of those discussions. Idaho Power filed an 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 the Company filed an answer to ACHD's Memorandum on February 10, 2012.

The Commission issued final Order No. 32476 on March 7, 2012, reviewing the Idaho Supreme Court's decision, the revisions proposed by Idaho Power, and the objections filed by ACHD. The Commission reviewed all of ACHD's arguments it presented to the Court that

Idaho Power's tariff infringes on the Company's authority or jurisdiction. The Court rejected all of ACHD's arguments, and concluded that "ACHD has not pointed to any provision in Section 10 that infringes upon ACHD's power or jurisdiction." *ACHD v. Idaho PUC*, 253 P.3d at 681.

The Commission next reviewed the Court's conclusions that Sections 10 and 11 included terms that 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 [relocation] services from company," but held that Section 10 of the tariff went beyond that by potentially requiring a third party to pay for services that the party did not request from Idaho Power. *ACHD v. Idaho PUC*, 253 P.3d at 682-83. The Court also concluded that Section 11 of the tariff included a term that exceeds the Commission's authority. A sentence in Section 11 stated that "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 cost to the maximum extent reasonably possible." The reference to "other parties" could include ACHD or other entities not subject to Commission regulation, and because the Commission cannot direct other parties to use their best efforts to minimize relocation costs, the Court set aside Section 11. *ACHD v. Idaho PUC*, 253 P.3d at 683. The Commission summarized the two specific problems with the tariff identified by the Court as "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." Order No. 32476, p. 6.

Petitions for Reconsideration to Order No. 32476 were filed March 28, 2012, by ACHD and Build Idaho, Inc. Before determining whether to grant reconsideration, the Commission convened a hearing for oral argument on April 19, 2012. The Commission subsequently on April 24, 2012, granted reconsideration "solely to provide the parties an opportunity to develop the record regarding paragraph 3 of Section 10, more specifically, to clarify in the record whether a third party may request relocation of Idaho Power's facilities that are located in a public roadway from Idaho Power." Order No. 32532, p. 2. The parties were provided an opportunity to file written briefs on May 18, 2012, and responsive briefs on June 15, 2012. Idaho Power, ACHD and Build Idaho, Inc. all filed briefs on May 18, and Idaho Power and ACHD filed responsive briefs.

Correcting the Reference to “Other Parties”

Idaho Power proposed changes to its tariff to respond to the specific objections of the Idaho Supreme Court, and the Commission approved those changes in Order No. 32476. To correct the problem in Section 11 where “other parties” might have been required to meet with road agencies pursuant to *Idaho Code* § 40-210, Idaho Power revised the section to remove the reference to other parties. The Commission approved the change, now found in the first paragraph of Section 10, because “the second sentence in the first paragraph appropriately addresses the objection of the Supreme Court by removing the reference to ‘other parties.’” Order No. 32476, p. 7. The sentence now states: “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.” ACHD on reconsideration objects to the approved change to the tariff to remove a reference to other parties that are required to meet pursuant to *Idaho Code* § 40-210. ACHD contends this sentence “mandates at least three things: (1) that ACHD provide notice to Idaho Power of road improvement projects; (2) that Idaho Power meet with ACHD; and (3) that ACHD meet with Idaho Power.” ACHD Brief in Response to Order No. 32532, p. 13.

When it enacted Section 40-210 in 2009, the Legislature recognized that utility facilities and services could not reach or economically serve the residents of Idaho without making use of public highways and their associated rights-of-way. *Idaho Code* § 40-210(1). The Legislature stated its specific intent “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.” *Id.* To further the stated legislative intent, Section 40-210 provides that highway agencies engaged in a project that may require the relocation of utility facilities “shall permit the affected utility to participate in project development meetings.” *Idaho Code* § 40-210(2). Further, the section requires public highway agencies to, “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 services, 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.” *Id.* Paragraph 3 of Section 40-210 states the consequence to a utility that fails to respond or participate in meetings. In that event, “such failure to respond or participate in such meetings shall not in any way affect the ability of the public highway agencies to proceed with the project design or construction.” *Idaho Code* § 40-210(3).

We are not persuaded Order No. 32476 fails to properly address the deficiency identified by the Supreme Court. First, as we noted in Order No. 32476, the Court set aside Section 11 containing the similar sentence only because it included the reference to “other parties,” implying an overly broad directive to unregulated entities to comply with *Idaho Code* § 40-210. There is no indication in the Court’s decision that the sentence in the tariff was flawed in any other way, nor does ACHD assert that the Supreme Court’s objection was anything other than to the specific reference to “other parties.” Nothing in the Court’s decision supports ACHD’s assertion that removing the reference to “other parties” does not adequately address the Court’s decision.

Second, the Commission has a legitimate and proper concern that Idaho Power avail itself of the opportunity to meet with road agencies when receiving notices pursuant to *Idaho Code* § 40-210. If Idaho Power fails to meet with road agencies when given the opportunity, the agencies will proceed with the project design and construction. Idaho Power will have given up an opportunity to provide input regarding ways to eliminate or minimize utility relocation costs “to the maximum extent reasonably possible,” thereby frustrating the Legislature’s intent. *Idaho Code* § 40-210(2). The sentence makes it clear the Commission expects Idaho Power to participate in meetings when given the opportunity.

Third, the sentence cannot reasonably be read to direct ACHD to do anything. It simply directs Idaho Power, should ACHD decide to comply with the statute and provide notice to the Company, to respond to the notice and attend meetings when given the opportunity. The only imperative in the sentence is the phrase “the Company will meet,” and it applies only to Idaho Power and only in the event the Company receives notice of a road project. The sentence does not purport to tell a road agency it must comply with *Idaho Code* § 40-210. Should ACHD choose not to comply with the statute, no consequence to ACHD is stated or implied by the sentence. The Commission concluded in Order No. 32476 that the revised sentence

appropriately addresses the objection of the Supreme Court by removing the reference to “other parties,” and we are not persuaded by the arguments on reconsideration that this conclusion is in error.

Correcting Charges for Services Not Requested

The Commission also approved Idaho Power’s response to the Court’s objection that the old tariff might have authorized the Commission to require a third party to pay for services that the party did not request from Idaho Power. “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.” Order No. 32476, p. 9. The Commission concluded that Idaho Power’s tariff revisions properly address the objections of the Supreme Court. Order No. 32476, p. 10.

It is established with the briefs and affidavits filed on reconsideration that Idaho Power from time-to-time may receive requests from private developers to relocate facilities in public roadways. Idaho Power filed an affidavit from a Project Design Leader identifying 22 projects “in recent years where Idaho Power has relocated facilities located in the road right-of-way at the request and expense of a third party.” Affidavit of David R. Lowrey, pp. 1-2. In each case, the third party made its relocation request and relocation payment directly to Idaho Power. *Id.* This clarification confirms that it is appropriate for the Company’s tariff to address cost recovery in those circumstances, but it does not necessitate further revisions to the Rule H tariff. As we noted in Order No. 32476, “the tariff as revised applies only where a third party requests relocation services.” Order No. 32476, p. 9.

Consistent with this objective, however, the Commission does approve Idaho Power’s suggestion to remove a phrase from the first sentence of the third paragraph of Section 10. The approved tariff includes the following sentence: “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.” In Idaho Power’s Answer to Petitions for Reconsideration, and again in its reply to briefs on reconsideration, the Company proposed to remove the phrase “directly or indirectly through a Public Road Agency” from the sentence. This change is appropriate because, as we stated in Order No. 32476, “the focus properly is on a request made by a third party.” Order No. 32476,

p. 10. Removing the phrase should leave little doubt that the tariff addresses requests for relocation services made by a private third party. With the phrase removed, the first sentence of the third paragraph of Section 10 will state: “If one or more Private Beneficiaries has 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.” Idaho Power is directed to file new tariff sheets with this change to Section 10.

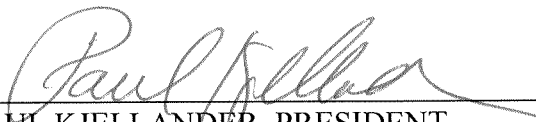
The Commission has carefully considered the arguments raised by ACHD and Build Idaho, Inc. on reconsideration and is not persuaded that Order No. 32476 is in need of correction or modification to comply with the instructions of the Idaho Supreme Court. The Commission does approve removing the phrase “directly or indirectly through a Public Road Agency” from the first sentence, third paragraph of Section 10.

O R D E R

IT IS HEREBY ORDERED that Idaho Power is directed to file new tariff sheets with the change to the first sentence of the third paragraph of Section 10 to state: “If one or more Private Beneficiaries has 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.”

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 12th
day of July 2012.


PAUL KJELLANDER, PRESIDENT


MACK A. REDFORD, COMMISSIONER


MARSHA H. SMITH, COMMISSIONER

ATTEST:


Jean D. Jewell
Commission Secretary

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