

Sup-E-10-02

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION)
OF IDAHO POWER COMPANY TO)
MODIFY ITS RULE H LINE EXTENSION)
TARIFF RELATED TO NEW SERVICE)
ATTACHMENTS AND DISTRIBUTION)
LINE INSTALLATIONS.)

ADA COUNTY HIGHWAY DISTRICT,)
Petitioner/Appellant,)

vs.)

IDAHO PUBLIC UTILITIES COMMISSION,)
Respondent on Appeal,)
and)

IDAHO POWER COMPANY,)
Respondent/Respondent on Appeal.)

Supreme Court Docket No. 37294-2010
Idaho Public Utilities Commission No.
IPC-E-08-22

APPELLANT ACHD'S BRIEF

Appeal from the Idaho Public Utilities Commission

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I.

STATEMENT OF THE CASE

A. Nature Of The Case

This case is about an attempt by Idaho Power and the Idaho Public Utilities Commission (“IPUC”) to usurp the Ada County Highway District’s (“ACHD”) jurisdiction over the public rights-of-way in Ada County. ACHD has been statutorily granted “exclusive” jurisdiction over the public rights-of-way in Ada County. ACHD has exercised that exclusive jurisdiction by adopting regulations that govern the relocation of utility lines on public rights-of-way. Despite the absence of statutory authority, the IPUC has approved a proposed modification to Idaho Power’s Rule H Tariff, which now purports to regulate the relocation of utility lines on public rights-of-way. The IPUC’s order approving the modification of Idaho Power’s Rule H Tariff should be set aside because it interferes with ACHD’s exclusive jurisdiction over public rights-of-way.

B. Statement Of Facts And Course Of Proceedings

1. ACHD And Other Highway Districts

The Idaho Code provides for several highway and public rights-of-way systems throughout the state of Idaho and under the jurisdiction of various state and local agencies. *See* Idaho Code § 40-201. First, the interstate highway system falls within the jurisdiction of the Idaho Transportation Department (“ITD”) and the Idaho Transportation Board. *Id.* ITD is granted broad jurisdiction over the state highway system. *See* Idaho Code § 40-301 *et seq* and § 40-501 *et seq.* Second, there is a local system of highways and rights-of-way. *See* I.C. § 40-201. The local highways and rights-of-way fall within the jurisdiction of county and/or city

highway districts. The broad and exclusive jurisdiction given to highway districts over highways and public rights-of-way within their respective districts is set forth in Idaho Code § 40-1310. ITD and the various highway districts, including ACHD, will be referred to hereinafter as the "Public Road Agencies."

ACHD is a single, county-wide highway district, which was formed by vote of the citizens of Ada County in 1972. R., Vol. III, p. 494. As a county-wide highway district, ACHD is granted the powers and duties set forth in Chapters 13 and 14 of Title 40 of the Idaho Code, including the authority to pass ordinances, rules and regulations with regard to the public rights-of-way within Ada County. See I.C. § 40-1406. Upon the formation of ACHD, the road departments of Ada County, the City of Boise, Garden City, the City of Meridian, and other incorporated cities within Ada County were disbanded, and the road systems were all transferred to ACHD. R., Vol. III, p. 494; see also I.C. §§ 40-1401, 40-1406.

2. Utility Relocation And The Common Law Rule

Public utilities commonly place their utility lines upon, along, over or under highways and public rights-of-way. See Idaho Code § 62-705 (authorizing the placement of utility lines on public roads). While utilities may place their utility lines upon, along, over or under public rights-of-way, the Idaho Legislature has limited the use by utilities of the public rights-of-way "as not to incommode the public use" thereof. *Id.*

This Court has long recognized what is known as the "common law rule" with regard to a utility's use of public rights-of-way. See *State ex rel. Rich v. Idaho Power Co.*, 81 Idaho 487, 498, 346 P.2d 596, 601 (1959). Under the common law rule, a utility's use of a public right-of-way is permissive and does not vest the utility with any property or contract right in a public

right-of-way. *Id.*; see also *Mountain States Tel. & Tel. Co. v. Boise Redevelopment Agency*, 101 Idaho 30, 32, 607 P.2d 1084, 1086 (1980). Thus, Public Road Agencies may require a utility to relocate its utility line on a public right-of-way. For example, when a Public Road Agency expands a road from two lanes to four lanes, it is common for utilities to have to relocate their utility lines to make room for the road expansion. As this Court explained in *State ex rel. Rich v.*

Idaho Power:

In any case where the facilities incommode the public use of any highway, the people, under the Constitution and the legislative enactment, reserve the right to require the utilities to relocate their facilities so as not to incommode such public use. Utilities place facilities thereon under such constitutional and legislative restriction with full knowledge of such limitation. It follows that the right of utilities to the use of public thoroughfares is not and cannot be regarded as a permanent property right.

81 Idaho at 498.

Under the common law rule, a utility is required to relocate its utility line whenever it “incommode[s] the public use” of a public right-of-way. *State ex rel. Rich v. Idaho Power*, 81 Idaho at 498 (quoting Idaho Code § 62-705). This Court has interpreted that phrase as broadly authorizing the governmental body with jurisdiction over the rights of way to “require removal of a [utility line], which in anywise interferes with the public use of streets and highways.” *Id.* at 501; see also *id.* at 499 (explaining that a utility must relocate its utility line where “it has become necessary to change the location of the [utility line] so as to accommodate them to the new public work”).

The common law rule not only requires a utility to relocate its utility line at the request of a highway district, but it also requires the utility to pay the cost of relocation. *Id.* at 501 (“Under

the common law a utility, placing its facilities along streets and highways, gains no property right and upon demand must move its facilities at its expense.") (emphasis added); *see also Mountain States Tel. & Tel. Co. v. Boise Redevelopment Agency*, 101 Idaho at 32 ("[U]tilities bear the expense of relocating their facilities in public rights of way when necessary to make way for proper governmental use of the streets.").

3. ACHD's Resolution 330

ACHD has been statutorily granted "full power to ... establish use standards, pass resolutions and establish regulations" with regard to the public rights-of-way within its jurisdiction. *See* I.C. § 40-1310(8). Pursuant to this statutory authority, ACHD adopted Resolution 330, which establishes regulations for utility and sewer relocations within the public rights-of-way under the jurisdiction of ACHD. R., Vol. III, pp. 482-492. Resolution 330, which reflects the work of representatives of ACHD, the Boise City Department of Public Works and various utility organizations, was adopted on September 25, 1986 and has now been in effect for over 23 years.

Resolution 330 addresses utility and sewer relocations in a comprehensive fashion, including assignment of financial responsibility and establishment of operational procedures under various scenarios. For example, with regard to utility and sewer relocations required because improvements sponsored or funded by ACHD are being undertaken within the public rights-of-way, Resolution 330 provides that "all relocation costs shall be the responsibility of the utility or sewer company." *Id.* at p. 484. With regard to utility or sewer relocations required as a result of rights-of-way improvements funded by a third-party developer, the "responsibility for the costs of utility or sewer relocations shall be that of the developer." *Id.* at p. 489. With regard

to utility or sewer relocations required because of improvements being undertaken within the public rights-of way that are partially funded by ACHD and partially funded by another individual, firm or entity, Resolution 330 provides that “the utility and/or sewer company shall be responsible for that portion of the relocation costs that equals the percentage of [ACHD’s] participation in the right-of-way improvement costs” and that the remaining costs “shall be the responsibility of the individual, firm or entity that provides funds for the balance of the right-of-way improvement costs.” *Id.* at p. 487.

Resolution 330 is much broader than just governing who pays for utility relocations. Rather, Resolution 330 also contains detailed regulations regarding notice given to affected parties, coordination meetings that utility and sewer companies are expected to attend and deadlines by which utility or sewer companies shall provide ACHD with engineering plans. Resolution 330 requires utility and/or sewer companies to “coordinate their activities in an attempt to eliminate duplication of roadway restoration work.” *Id.* at p. 486. Resolution 330 provides also that “all utility or sewer relocations shall be completed prior to the anticipated date of commencement of work on the right-of-way improvement by [ACHD].” *Id.*

ITD has regulated utility relocation on the interstate highway system within its jurisdiction. *See* IDAPA 39.03.43. Other highway districts throughout the state are authorized to regulate relocation of utility lines within their respective highway districts. *See* I.C. § 40-1310(8).

4. Idaho Power’s Rule H Tariff

On October 30, 2008, Idaho Power filed an Application with the IPUC seeking authority to modify its line extension tariff commonly referred to as the “Rule H” Tariff, which generally

sets forth Idaho Power's rates and charges for certain services and regulates new service attachment and distribution line installations or alterations. R., Vol. I, pp. 1-56. Prior to that time, Rule H did not address utility relocations on public rights-of-way, leaving the regulation of utility relocation on public rights-of-way to Resolution 330 and regulations enacted by other Public Road Agencies in their respective jurisdictions. In connection with the October 30, 2008 Application to IPUC, however, Idaho Power sought to add a new section – "Section 10" – regulating utility relocation on public rights-of-way. R., Vol. I, pp. 22-23.

Notably, while not as exhaustive as Resolution 330, the proposed addition of Section 10 to Rule H was largely patterned after Resolution 330. *See* R., Vol. III, p. 517 ("ACHD's Resolution 330, upon which Idaho Power's Section 10 [of] Rule H is patterned, is a workable, reasonable approach to the problem."). For example, Rule H generally sets forth the same division of relocation costs provided for in Resolution 330 (i.e., that Idaho Power pay the entire cost of relocation where a road improvement requiring utility relocation is funded solely by a Public Road Agency, and that a "third-party beneficiary" pay a percentage of relocation costs equal to the percentage paid by that third-party beneficiary for the road improvement project that requires utility relocation).

While the newly proposed Section 10 of Rule H was "patterned" after Resolution 330, it is different from Resolution 330 in several ways. For example, Section 10 of Rule H would require a developer to pay the cost of utility relocation anytime the developer pays for improvements to a public right-of-way that requires utility relocation. *See* R. Vol. I, p. 23. While Resolution 330 often requires the developer to pay the cost of relocation under those circumstances, Resolution 330 makes an exception to that rule where the right-of-way

improvements that resulted in the need for relocation “were scheduled to have otherwise been made by [ACHD] within three years of the date said improvements are actually commenced.” R. Vol. III, p. 489. Section 10 of Rule H is much less exhaustive than Resolution 330 and does not contain notice and many other provisions contained in Resolution 330. While Resolution 330 applies to all utilities (electric power, gas, telephone, water, railroad, fiber-optics, etc.) and sewer companies, Rule H applies only to Idaho Power. While Resolution 330 requires utilities to relocate upon demand by ACHD and that “all utility or sewer relocations shall be completed prior to the anticipated date of commencement of work on the right-of-way improvement by [ACHD],” Section 10 of Rule H purported to require payment from any third-party beneficiaries “in advance” of Idaho Power’s relocation work. R., Vol. I, p. 23. As proposed, Rule H also contained a definition of “third-party beneficiaries” that included “local improvement districts” in such a way that would require local improvement districts to pay for utility relocations required as a result of road projects funded by a local improvement district. *Id.* Moreover, Section 10 of Rule H would vest IPUC with authority over the Resolution of any disputes related to utility relocation, whereas Resolution 330 leaves the dispute Resolution process under the sole authority of ACHD. *See R.*, Vol. III, p. 535.

5. IPUC Order

On July 1, 2009, the IPUC issued Order No. 30853, granting Idaho Power’s Application to modify Rule H. *See R.*, Vol. II, pp. 313-326. ACHD filed a Petition for Reconsideration, requesting reconsideration and clarification of the IPUC’s approval of Section 10 of Rule H relating to utility relocations. R. Vol., II, pp. 341-357. ACHD requested reconsideration on grounds that Section 10 of Rule H usurps the exclusive jurisdiction of Public Road Agencies

over public rights-of-way and that the portions of Rule H that purport to require Local Improvement Districts to pay any portion of relocation costs violate Article 8 § 2 and Article 7 § 17 of the Idaho Constitution. The Association of Canyon County Highway Districts and the City of Nampa filed similar petitions for reconsideration. *Id.* at pp. 379-382. Additionally, the Building Contractors Association of Southwest Idaho petitioned for reconsideration of unrelated portions of Rule H. *Id.* at pp. 358-372. On August 19, 2009, the IPUC issued Order No. 30883 granting reconsideration, setting forth a briefing schedule and asking Idaho Power to make certain clarifications to its proposed Rule H. *Id.* at V. III, pp. 405-410.

Of significant importance to this appeal, and in recognition that ACHD and ITD have already adopted regulations related to utility relocations on public rights of way, Idaho Power added a new provision to Section 10 of Rule H that purports to explain what happens where those regulations conflict with Section 10 of Rule H. That provision is as follows:

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 relocations costs between the utility and Third-Party Beneficiaries that are substantially similar to the rules set out in Section 10 of Rule H.

Id. at p. 427.

After briefing and a hearing, the IPUC issued Order No. 30955. R. Vol. IV, pp. 648-678. In that Order, the IPUC approved a slightly modified version of Rule H. The IPUC generally held that the Section 10 of Rule H does not usurp the Public Road Agencies' exclusive jurisdiction over public rights-of-way within their districts. However, the IPUC recognized that the provisions in Rule H requiring relocations costs to be paid by Local Improvement Districts would violate the Idaho Constitution. Thus, the IPUC replaced the term "Third-Party

Beneficiaries,” which included Local Improvement Districts, with “Private Beneficiaries,” which does not include any governmental entities. *Id.* at pp. 660-664; 676. The IPUC also struck down the provision of Section 10 of Rule H requiring that payment of relocation costs to Idaho Power “shall be paid in advance of the company’s relocation work.” *Id.* at pp. 665-666. Notably, in striking down that provision, the IPUC did not acknowledge that the provision for “advance payment” usurped the exclusive jurisdiction of Public Road Agencies to demand relocation on terms determined by the Public Road Agencies. Rather, the IPUC simply held that the provision was not necessary because Idaho Power had other ways to recover its relocation costs, including the termination of service to a developer that refuses to pay the relocation costs. *Id.* at 665-666.

The IPUC also approved the newly added provision that Section 10 of Rule H “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 relocations costs between the utility and Third-Party Beneficiaries that are substantially similar to the rules set out in Section 10 of Rule H.” In other words, the IPUC held that regulations adopted by Public Road Agencies are superseded by Section 10 of Rule H unless the Public Road Agencies’ regulations are “substantially similar” to Section 10 of Rule H.

Finally, the IPUC added a new section – “Section 11” – to Rule H. Section 11 purports to mandate that Public Road Agencies and other parties involved in public road projects that may require utility relocation “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.” *Id.* at 659-660; 678.¹

6. This Appeal

ACHD timely appealed from the IPUC’s July 1, 2009 Order No. 30853. R., Vol. IV, pp. 679-684. The Building Contractors Association of Southwest Idaho separately appealed from that same Order, although on unrelated grounds. *Id.* at pp. 685-690; *see also* Supreme Court Docket No. 37293-2010. This Court consolidated the two appeals only for purposes of the Record on Appeal. The two appeals are separate for purposes of briefing and oral argument.

II.

ISSUES PRESENTED ON APPEAL

(1) Whether the IPUC Order approving Section 10 and 11 of Rule H should be set aside because it usurps the Public Road Agencies’ exclusive jurisdiction over public rights-of-way.

(2) Whether the IPUC Order approving Section 10 and 11 of Rule H should be set aside because it abrogates the common law rule that utilities pay the cost of relocating utility lines on public rights-of-way.

¹ A complete copy of the entirety of Rule H is not in the record, but the relevant portions of Rule H, as approved by the IPUC, are found in Volume IV of the Record at pages 676-678. For the Court’s convenience, a copy of those pages and a copy of ACHD’s Resolution 330 are attached as Exhibits 1 and 2 in an addendum at the end of this brief.

III.

STANDARD OF REVIEW

This Court has jurisdiction to review any order of the IPUC. *See* Idaho Constitution, Article V, § 9 (“The Supreme Court shall have jurisdiction to review, upon appeal, ... any order of the public utilities commission.”). IPUC orders are reviewed directly by the Idaho Supreme Court and are not subject to judicial review under the Administrative Procedures Act. *In re Application of Hayden Pines Water Co.*, 111 Idaho 331, 334, 723 P.2d 875, 878 (1986) (citing I.C. § 67-5215(a)). The scope of this Court’s review is governed by I.C. § 61-629, which states in relevant part:

[T]he appeal shall be heard on the record of the commission as certified by it. The review on appeal shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order appealed from violates any right of the appellant under the constitution of the United States or the state of Idaho. Upon the hearing the Supreme Court shall enter judgment, either affirming or setting aside in part the order of the commission.

Id.

Under this standard, an order of the IPUC should be set aside if the order is in excess of the IPUC’s jurisdiction. *See Idaho Power Co. v. Idaho Public Utilities Comm’n*, 99 Idaho 374, 379, 582 P.2d 720, 725 (1978); *Washington Water Power Co. v. Kootenai Envtl. Alliance*, 99 Idaho 875, 878, 591 P.2d 122, 125 (1979) (setting aside an IPUC order where the IPUC was “without jurisdiction to issue the orders which are the subject of this appeal”).

IV.

ARGUMENT

A. Public Road Agencies Have Exclusive Jurisdiction Over Public Highways, Public Streets And Public Rights-Of-Way

The Idaho Legislature has expressly granted Public Road Agencies exclusive general supervision and jurisdiction over all highways and public rights-of-way within their highway system. Idaho Code § 40-1310(1) provides as follows:

(1) The commissioners of a highway district have exclusive general supervision and jurisdiction over all highways and public rights-of-way within their highway system, with full power to construct, maintain, repair, acquire, purchase and improve all highways within their highway system, whether directly or by their own agents and employees or by contract. Except as otherwise provided in this chapter in respect to the highways within their highway system, a highway district shall have all of the powers and duties that would by law be vested in the commissioners of the county and in the district directors of highways if the highway district had not been organized.

Id. (emphasis added).

This broad grant of authority to Public Road Agencies includes the “exclusive general supervisory authority over all public highways, public streets and public rights-of-way under their jurisdiction, with full power to ... establish use standards, pass resolutions and establish regulations ...” *Id.* at § 40-1310(8) (emphasis added). Not only is the grant of authority to Public Road Agencies broad, but it is to be liberally construed and includes broad implied powers. *See* Idaho Code § 40-1312 (providing that the “grant of powers provided in this chapter to highway districts and to their officers and agents, shall be liberally construed, as a broad and general grant of powers, to the end that the control and administration of the districts may be

efficient. The enumeration of certain powers that would be implied without enumeration shall not be construed as a denial or exclusion of other implied powers necessary for the free and efficient exercise of powers expressly granted.”). As the Idaho Court of Appeals has explained, these statutes make “the legislature’s intent clear that in the area of construction, maintenance, and day-to-day operation of highways, the prerogative of the highway commissioners is exclusive.” *Worley Highway District v. Kootenai County*, 104 Idaho 833, 835 P.2d 1135, 1137 (Ct. App. 1983).

In addition to granting broad and exclusive jurisdiction to Public Road Agencies, the Idaho Legislature has expressly mandated that any laws in conflict with the Public Road Agencies’ broad and exclusive jurisdiction are superseded:

The highway commissioners of a county-wide highway district shall exercise all of the powers and duties provided in chapter 13 of this title Wherever any provisions of the existing laws of the state of Idaho are in conflict with the provisions of this chapter, the provisions of this chapter shall control and supersede all such laws

jurisdiction includes the authority to “pass ordinances, rules, and make all regulations, not repugnant to law, as necessary, for carrying into effect or discharging all powers and duties conferred to a county-wide highway district pursuant to this chapter and chapter 13 of this title.” *Id.* (emphasis added).

In *Village of Lapwai v. Alligier*, 78 Idaho 124, 128, 299 P.2d 475, 478 (1956), this Court explained that, “[i]n the exercise of its powers and duties with respect to its streets and alleys, the [highway district] acts as agent of the state. In discharging a mandatory duty imposed by the

state, the municipality performs a governmental function ... within the police power conferred by the state.” *Id.*

B. Consistent With Its Exclusive Jurisdiction Over Public Rights-Of-Way And Its Statutory Authority To Pass Resolutions And Establish Regulations, ACHD Regulates Relocation Of Utilities Within Ada County Through ACHD Resolution 330

As set forth above, ACHD has exclusive general supervision and jurisdiction over all highways and public rights-of-way within its highway system. That exclusive jurisdiction includes “full power to ... establish use standards, pass resolutions and establish regulations” *See* I.C. § 40-1310(8) (emphasis added). Pursuant to its statutory authority, ACHD exercised its exclusive jurisdiction over utility relocations within the Ada County Highway District by adopting Resolution 330 on September 25, 1986. R., Vol. III, pp. 482-482-492. As set forth in more detail above, Resolution 330 regulates utility and sewer relocations in a comprehensive fashion, including assignment of financial responsibility and establishment of operational procedures under various scenarios.

In addition to assigning financial responsibility for utility relocation, Resolution 330 contains detailed regulations regarding notice given to affected parties, coordination meetings that utility and sewer companies are expected to attend and deadlines by which utility or sewer companies are to provide ACHD with engineering plans. Resolution 330 requires utility and/or sewer companies to “coordinate their activities in an attempt to eliminate duplication of roadway restoration work.” *Id.* at p. 486. Resolution 330 provides also that “all utility or sewer relocations shall be completed prior to the anticipated date of commencement of work on the

right-of-way improvement by [ACHD].” *Id.* Resolution 330 applies to all utilities and sewer companies, not just Idaho Power.

The authority of ACHD to regulate utility relocation within its district is not challenged here, nor has it ever been challenged. In fact, IPUC commissioner, Martha Smith, acknowledged during the reconsideration hearing that ACHD was acting within its jurisdiction in adopting Resolution 330.

COMMISSIONER SMITH: Well, the way I would see it that you could adopt your Resolution [330] in whatever form you choose and it is effective because you adopted it and it applies within your area of jurisdiction. The issue is does Rule H apply in that circumstance. I don't see any way a utility tariff could invalidate what a public highway agency did. It just can't because you're operating within your area of jurisdiction. The issue would be does Rule H apply or does it not.

Transcript of October 13, 2009 hearing, p. 60, L. 18 – p. 61, L. 1 (emphasis added); *see also id.* at p. 58, L. 21 – p.59, L. 59) (Commissioner Smith expressing her view that “whatever the highway agency has implemented, that’s what applies and Rule H is not applicable in those circumstances” because “we have no jurisdiction to approve any tariff provision that would affect what the public road agency does”).

ITD has regulated utility relocation on the interstate highway system within its jurisdiction. *See* IDAPA 39.03.43. Just like the highway districts, ITD is statutorily granted broad exclusive jurisdiction and authority over the interstate highway system. *See* Idaho Code § 40-300 *et seq.* In fact, ITD has express statutory authority to “[m]ake reasonable regulations for the ... relocation of facilities of any utility ... on the interstate system, including extensions

within urban areas.”² It is clear that ACHD and other Public Road Agencies have acted within their respective jurisdictions and pursuant to express statutory authority to establish use standards, pass resolutions and establish regulations . . .” See I.C. § 40-1310(8) (emphasis added). The only question is whether the IPUC has authority to regulate utility relocations on public rights-of-way.

C. The IPUC’s Authority Is Limited

In stark contrast with the broad “exclusive” and “liberally construed” authority statutorily granted to Public Road Agencies over public rights-of-way, the IPUC’s jurisdiction is extremely limited. This Court has explained the limited jurisdiction of the IPUC as follows:

The Idaho Public Utilities Commission exercises limited jurisdiction and has no authority other than that expressly granted to it by the legislature . . . The Idaho Public Utilities Commission has no authority other than that given to it by the legislature. It exercises a limited jurisdiction and nothing is presumed in favor of its jurisdiction . . . As a general rule, administrative authorities are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the statutes reposing power in them and they cannot confer it upon themselves, although they may determine whether

² The fact that ITD is expressly granted authority to regulate utility relocation on the interstate system does not mean that ACHD does not have that same authority over utility relocation within its highway district. The section of the Idaho Code setting forth ITD’s powers and authority is much more detailed and specific than the section setting forth the powers and authority of highway districts. Rather than set forth the specific powers and authority of the highway districts, Idaho Code § 40-1310 broadly grants “exclusive jurisdiction” over public rights-of-way to the highway districts. The statute further provides that the grant is to be “liberally construed” and includes other “implied powers necessary for the free and efficient exercise of powers expressly granted.” Idaho Code § 40-1312. Again, ACHD’s authority to regulate utility relocation has never been questioned and was acknowledged by the IPUC at the reconsideration hearing. See Transcript of October 13, 2009 hearing, p. 60, L. 18 – p. 61, L. 1.

they have it. If the provisions of the statutes are not met and compliance is not had with the statutes, no jurisdiction exists.

Alpert v. Boise Water Corporation, 118 Idaho 136, 140, 795 P.2d 298, 302 (1990) (citations omitted).

The Idaho Legislature has granted the IPUC limited rate-making authority. *See* Idaho Code § 61-502 and § 61-503. These statutes authorize the IPUC to determine whether rates or charges by public utilities are “unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provision of law,” and to otherwise fix the rates charged by public utilities. The authority and jurisdiction of the IPUC is limited to this rate-making function.

D. This Court Has Not Hesitated To Invalidate Orders Of The IPUC Where The IPUC Has Attempted To Act Outside Of Its Traditional Rate-Making Function Or Without Express Statutory Authority

This Court has been asked on multiple occasions to determine whether the IPUC has acted within its limited jurisdiction, and this Court has set aside several IPUC orders where the IPUC has overstepped its authority. In reviewing IPUC orders, this Court has repeatedly reaffirmed the general principle that the IPUC has only that jurisdiction expressly granted it by statute. *See United States v. Utah Power & Light Co.*, 98 Idaho 665, 667, 570 P.2d 1353, 1355 (1977) (“We start with the proposition that a public service commission has no inherent power; its powers and jurisdiction derive in entirety from the enabling statutes creating it and nothing is presumed in favor of its jurisdiction.”). Thus, in determining whether the IPUC has acted within its limited jurisdiction, this Court looks for express statutory authority for the IPUC’s action. *See, e.g., Matter of Strand*, 111 Idaho 341, 342, 723 P.2d 885, 886 (1986) (setting aside an IPUC order that prohibited a water company from collecting utility bills that were more than one

month past due as of the date of the IPUC's order because "we have been pointed to no statute which gives the IPUC the authority to prohibit a utility, charging reasonable rates, from collecting on its past due accounts."); *Idaho Power Co. v. Idaho Public Utilities Comm'n*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981) (setting aside an IPUC order that adopted intervenor funding rules in proceedings under the Public Utility Regulatory Policies Act of 1978 because of IPUC lack of authority to do so "in the absence of a specific statute to that effect").

This Court has expressly held that the IPUC's authority under Idaho Code Sections 61-502 and 61-503 is limited to the "traditional and orthodox ratemaking function." *Washington Water Power Co. v. Kootenai Env'tl. Alliance*, 99 Idaho 875, 882, 591 P.2d 122, 129 (1979) (setting aside an IPUC order prohibiting a public utility from mailing political advocacy in its billing envelopes because that order "is not sufficiently within the ratemaking authority granted to it by the legislature"). This Court further clarified the limited jurisdiction of the IPUC by explaining that "[i]f the legislative branch desires the [IPUC] to have such authority, it must be provided by precise language." *Id.*; see also *Application of Boise Water Corp. to Revise and Increase Rates Charged for Water Service*, 128 Idaho 534, 538, 916 P.2d 1259, 1263 (1996) (interpreting Idaho Code Sections 61-502 and 61-503 and holding that "the IPUC's authority may only be exercised in such a way as to fix non-discriminatory and non-preferential rates and charges"); *United States v. Utah Power & Light Co.*, 98 Idaho at 668 (setting aside an IPUC order that invalidated a contract between utilities because "[n]o provision in the public utilities act gives the Commission the authority to indiscriminately set aside contracts Nor do we think such a power can be implied from those statutes which delegate rate-making authority to the Public Utilities Commission.").

E. Section 10 Of Rule H Usurps The Public Road Agencies' Exclusive Jurisdiction Over Public Rights-Of-Way

1. Public Road Agencies Have Exclusive Jurisdiction Over Public Rights-of Way

As set forth above, Public Road Agencies have “exclusive” jurisdiction over public rights-of-way within their respective highway districts. Idaho Code § 40-1310. That exclusive jurisdiction expressly includes the “full power to ... establish use standards, pass resolutions and establish regulations” with regard to the public rights-of-way. *Id.* I.C. § 40-1310(8). The grant of exclusive jurisdiction is to be “liberally construed” and includes other “implied powers necessary for the free and efficient exercise of powers expressly granted.” Idaho Code § 40-1312. Consistent with this broad grant of authority, ACHD has regulated the relocation of utilities on public rights-of-way through Resolution 330, and has done so for over 23 years.

Section 10 of Rule H attempts to usurp the exclusive jurisdiction granted to Public Road Agencies over public rights-of-way. Through the adoption of Section 10 of Rule H, the IPUC will effectively dictate the policies and procedures of Public Road Agencies regarding electric utility relocations, impact the operation of Public Road Agencies in their negotiations and relations with third parties and developers concerning road improvement projects and regulate and control electric utility relocations by assigning financial liability for such relocations. Such is strictly in the power and authority of the Public Road Agencies and should be left in the hands of the Public Road Agencies.

Notably, the Idaho Legislature’s express reason for granting “exclusive” jurisdiction over the rights-of-way to the Public Road Agencies and mandating that such jurisdiction be “liberally construed” is “to the end that the control and administration of the districts may be efficient.”

Idaho Code § 40-1312. Through Resolution 330, ACHD is able to efficiently regulate the relocation of all utility and sewer companies within the rights-of-way through one single set of regulations. That efficiency is lost if IPUC regulates electric utility relocations on public rights-of-way through Section 10 of Rule H. The result is that relocation of Idaho Power's utility lines is governed by Rule H, while the relocation of all other utility (i.e., gas, telephone) and sewer lines is governed by Resolution of 330. According to Rule H, the resolution of any disputes involving Idaho Power falls under the jurisdiction of IPUC, while resolution of all other disputes remains under the jurisdiction of ACHD.

It is easy see how operating under two sets of regulations will reduce efficiency and otherwise complicate utility relocation on public rights-of-way. For example, a road widening project often requires the relocation of multiple utility lines (i.e., water and/or gas) in addition to electric utility lines. For this reason, Resolution 330 requires all affected utility companies to participate in coordinated meetings and provide their engineering plans by specified deadlines. Resolution 330 requires utility and/or sewer companies to "coordinate their activities in an attempt to eliminate duplication of roadway restoration work." R., Vol. III, p. 486. In the event of disputes, ACHD is the ultimate decision-maker and can resolve disputes involving each affected utility or sewer company. For example, scheduling disputes may arise as to which utility will relocate its lines first. If Resolution 330 governs as to all utility and sewer companies, ACHD can efficiently resolve the dispute. However, if Rule H governs as to Idaho Power, then ACHD can only resolve the disputes involving the other utilities and IPUC has jurisdiction over disputes involving Idaho Power, which may result in scheduling conflicts.

2. The IPUC Has No Statutory Authority To Regulate Utility Relocation On Public Rights-Of-Way

The IPUC has “no authority other than that expressly granted to it by the legislature.” *Alpert*, 118 Idaho at 140. “It exercises a limited jurisdiction and nothing is presumed in favor of its jurisdiction.” *Id.* Here, no statute authorizes IPUC to regulate utility relocation on public rights-of-way. The IPUC erroneously concluded that it has authority to regulate utility relocation under Idaho Code §§ 61-502 and 61-503. Under those Sections, the IPUC is granted authority to determine whether a rate charged for any “service or product or commodity” is “unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provision of law.” If the IPUC, after a hearing, determines that the rate charged is “unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provision of law,” the IPUC may “fix” an appropriate rate.

These statutes do not grant the IPUC authority to regulate the relocation of utility lines on public rights-of-way. First, the relocation of a utility line is not within the scope of Idaho Code §§ 61-502 and 61-503 because it is not a “service.” Idaho Code § 61-332A defines “Electric service” as “electricity furnished to an ultimate consumer by an electric supplier.” The relocation of a utility line is not the provision of electricity to a consumer. Rather, a relocation only comes into play when a utility is already providing electricity through a power line on a public right-of-way and the utility is required to move the power line because of a road improvement project. Costs associated with relocation of utility lines are business expenses incurred by the utility, not a “service” provided to a customer.

Second, this is not a situation where the IPUC has determined that a rate charged by Idaho Power is “unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provision of law.” In fact, as the IPUC has acknowledged, the division of relocation costs under Rule H is the same as it is under Resolution 330.

This Court has had several occasions to interpret Idaho Code §§ 61-502 and 61-503 and has expressly held that the IPUC’s authority under these statutes is limited to the “traditional and orthodox ratemaking function.” *Washington Water Power Co. v. Kootenai Env’tl. Alliance*, 99 Idaho 875, 882, 591 P.2d 122, 129 (1979). In *Washington Water Power Co.*, the IPUC asserted that Idaho Code §§ 61-502 and 61-503 authorized it to enter orders regulating whether utilities could mail political advocacy with their billing statement. This Court set aside the IPUC order as “not sufficiently within the ratemaking authority granted to it by the legislature.” *Id.*, 99 Idaho at 880. In setting aside the IPUC’s order, this Court specifically addressed the IPUC’s limited authority to regulate the business expenses incurred by utilities. This Court explained that “[a]n inquiry into such expenses by the Commission will normally only be extended into whether such expenditures may be classified as ‘operating expenses’ and thus passed on to the utility ratepayers.” *Id.* The same analysis applies here to the expenses utilities incur when required to relocate their utility lines on public rights-of-way. Idaho Code §§ 61-502 and 61-503 authorize the IPUC to determine whether utility costs associated with mandatory relocations may be included in a utility’s rate base, but this is the limit of the IPUC’s jurisdiction and authority in this matter. The statutes do not authorize IPUC to intervene in the exclusive jurisdiction of the Public Road Agencies to regulate utility relocation on public rights-of-way. As this Court has

explained, “[i]f the legislative branch desires the [IPUC] to have such authority, it must be provided by precise language.” *Id.* at 882.

In fact, this Court has previously addressed the interplay of jurisdiction between Public Road Agencies and the IPUC with regard to the removal of utility lines on public rights-of-way. In *Village of Lapwai v. Alligier*, 78 Idaho 124, 299 P.2d 475 (1956), a municipality required a utility to remove its utility lines from the certain municipal streets. The utility argued that all utilities are regulated by the IPUC and, therefore, the municipality could not order removal of the utility lines without approval of the IPUC. In rejecting this argument, this Court explained that the regulation of public rights of way, including the removal of utility lines, falls within the jurisdiction of the municipality and is outside the authority of the IPUC. Specifically, this Court held that “the [Public Utilities Law] does not contain any provision diminishing or transferring any of the powers and duties of the municipality to control and maintain its streets and alleys.” *Id.*, 78 Idaho at 129. With regard to the use of public streets by utilities, this Court explained that the legislature “has preserved to the municipality the power to deny their use to a utility, or to impose reasonable regulations thereon, when necessary to the use of such streets and alleys by the public in the usual manner.” In other words, even after the IPUC was created and was granted authority over public utilities, municipalities retained the authority to regulate the utilities’ use of public rights-of-way. *Id.* (explaining that the municipalities’ “control of streets [has] been continued undiminished after the creation of the public utilities commission”).

3. Concurrent Jurisdiction

The most clear usurpation of the Public Road Agencies’ exclusive jurisdiction over the public rights-of-way is found in the following provision of Section 10 of Rule H:

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 relocations costs between the utility and Third-Party Beneficiaries that are substantially similar to the rules set out in Section 10 of Rule H.

(Referred to hereinafter as the “Preemption Clause”) R., Vol. III, p. 427.

In other words, regulations adopted by Public Road Agencies are superseded by Section 10 of Rule H unless the Public Road Agencies’ regulation are “substantially similar” to Section 10 of Rule H. This is a clear intrusion upon the Public Road Agencies’ “exclusive” jurisdiction over public rights-of-way in that it ties the Public Road Agencies’ hands. Public Road Agencies are wholly deprived of jurisdiction if the regulations they pass are superseded unless they are the same as Rule H. In layman’s terms, the IPUC is telling Public Road Agencies that “you can regulate utility relocations, but only if you regulate in exactly the same way the IPUC has regulated utility relocations.”

Notably, in the case of ACHD, the IPUC’s order leaves doubt as to whether Resolution 330 or Rule H governs because it is unclear whether Resolution 330 is “substantially similar” to Rule H. While Rule H was purportedly “patterned” after Resolution 330, there are many differences. Rule H and Resolution 330 conflict with regard to who pays the costs of utility relocation with regard to improvements to public rights-of-way that are paid for by a private developer but that otherwise would have been made by ACHD within three years. *Compare* R., Vol. I, p. 23 to R. Vol. III, p. 489. Rule H lacks many of the detailed provisions contained in Resolution 330 regarding notice, coordination meetings, deadlines for submitting engineering plans and cooperation requirements. Moreover, Rule H purports to give IPUC jurisdiction of disputes, while Resolution 330 leaves dispute resolution in the jurisdiction of

ACHD. In light of these differences, an argument can be made that Resolution 330 is not “substantially similar” to Rule H and that Resolution 330 is, therefore, null and void. Even if Resolution 330 and Rule H are “substantially similar” in their current form, the effect of the Preemption Clause is that ACHD would never be able to modify Resolution 330 because any modification would deviate from Rule H and render Resolution 330 null and void, thus abdicating ACHD’s exclusive jurisdiction.

The IPUC’s conclusion that Rule H preempts any regulations adopted by Public Road Agencies that are not “substantially similar” is backwards. The IPUC has characterized Rule H as allowing IPUC to “exercise its jurisdiction concurrently” with the Public Road Agencies. *See R.*, Vol. II, p. 321. As an initial matter, a system of concurrent jurisdiction over public rights-of-way is in clear contravention of Idaho Code § 40-1310(1), which gives Public Road Agencies “exclusive” jurisdiction and supervision over public rights-of-way.

Moreover, the so-called “concurrent” jurisdiction envisioned by the IPUC is inconsistent with *State v. Poynter*, 70 Idaho 438, 220 P.2d 386 (1950). In *State v. Poynter*, this Court addressed the limitations of “concurrent” jurisdiction where two public agencies regulate the same subject matter. This Court held that “[t]he state and a municipal corporation may have concurrent jurisdiction over the same subject matter and in which event the municipality may make regulations on the subject notwithstanding the exercise of state regulations thereon, provided the regulations or law are not in conflict.” *Id.*, 70 Idaho at 441 (emphasis added). Thus, there cannot be “concurrent” jurisdiction in the event of conflicts between Rule H and regulations adopted by Public Road Agencies. Indeed, the fact that there cannot be “concurrent”

jurisdiction is highlighted by the Preemption Clause, which purports to invalidate any Public Road Agencies' regulations that are not substantially similar to Section 10 of Rule H.

Even if the IPUC had authority to regulate utility relocation on public rights-of-way concurrently with the Public Road Agencies' jurisdiction, the "Preemption Clause" would have to be in the opposite of its current form. Instead of providing that Rule H preempts Public Road Agencies' regulations in the event of a conflict, it should provide that Public Road Agencies' regulations preempt Rule H. This result is mandated by the fact that the Public Road Agencies are given "exclusive" jurisdiction and supervision over the public rights-of-way. It is also mandated by Idaho Code § 40-1406, which provides that Public Road Agencies "may pass ordinances, rules, and make all regulations, not repugnant to law" and that "[w]herever any provisions of the existing laws of the state of Idaho are in conflict with the provisions of this chapter, the provisions of this chapter shall control and supersede all such laws."

Indeed, as quoted above, at least one of the IPUC commissioners acknowledged during the reconsideration hearing that Rule H cannot preempt regulations adopted by Public Road Agencies. *See* Transcript of October 13, 2009 hearing, p. 60, L. 18 – p. 61, L. 1 (explaining that Section 10 of Rule H cannot invalidate Resolution 330 because "you're operating within your area of jurisdiction"); Transcript of October 13, 2009 hearing, p. 60, L. 18 – p. 61, L. 1 (emphasis added); *see also id.* at p. 58, L. 21 – p.59, L. 59) (Commissioner Smith expressing her view that "whatever the highway agency has implemented, that's what applies and Rule H is not applicable in those circumstances" because "we have no jurisdiction to approve any tariff provision that would affect what the public road agency does").

Unfortunately, the IPUC did not adopt Commissioner Smith's view. Rather, the IPUC approved the Preemption Clause, effectively holding that any Public Road Agencies' regulations are null and void if not "substantially similar" to Rule H.

F. Like Section 10, The New Section 11 Of Rule H Also Usurps The Public Road Agencies' Exclusive Jurisdiction Over Public Rights-Of-Way And Is An Unauthorized Attempt To Exercise Jurisdiction Over Public Road Agencies

Subsequent to Idaho Power's application to modify Rule H, the Idaho Legislature enacted new legislation aimed at reducing utility relocation costs. Idaho Code § 40-210 (effective July 1, 2009) expresses 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." *Id.* Accordingly, Section 40-210 provides that Public Road Agencies and affected utilities "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." In furtherance of this objective, Section 40-210 requires Public Road Agencies to "permit the affected utility to participate in project development meetings" related to projects that may require the relocation of utility facilities. In enacting Idaho Code § 40-210, the Idaho Legislature expressly reaffirmed the Public Road Agencies' jurisdiction over public rights-of-way. *Id.* ("No provision of this chapter shall diminish or otherwise limit the authority of this state, highway district or other political subdivision having jurisdiction over the public right-of-way.").

Notably, even prior to this legislation, ACHD engaged in the practices now mandated by Idaho Code § 40-210. ACHD has always attempted to minimize relocation costs and includes affected utilities in project development meetings related to projects that may result in relocation of utilities. In fact, Resolution 330 expressly invites affected utilities to attend such meetings. *See R., Vol. III., p. 488* (“The District will schedule a plan review conference to which representatives of all funding participants and affected utility and/or sewer companies will be asked to attend.”).

Idaho Code § 40-210 makes no mention of the IPUC, much less authorizes the IPUC to enforce its provisions. Nevertheless the IPUC added a new section to Rule H – “Section 11” – through which the IPUC purports to have jurisdiction to enforce the provisions of Idaho Code § 40-210. Specifically, Section 11 of Rule H provides:

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 costs 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.

R., Vol. IV., pp. 659-660; 678.

Under this provision, particularly given that the IPUC asserts jurisdiction to resolve disputes, the IPUC is attempting to take upon itself the authority to police whether Public Road Agencies are complying with their statutory duty to minimize relocation costs. The questions asked and comments made by the IPUC during the October 13, 2009 reconsideration hearing

further indicate the IPUC's belief that it has jurisdiction to regulate and determine whether Public Road Agencies have satisfied the requirements of Idaho Code § 40-210. *See, e.g.*, Transcript of October 13, 2009 hearing, p. 52, LL. 2-11 (explaining ACHD's duties under Idaho Code § 40-210 to eliminate or minimize relocation costs and asking "who is going to make that judgment?"); *id.* at p. 53, L. 17 – p. 54, L. 7 (explaining that ACHD would be free to continue with a project, even if a utility asserted that relocation costs have not being minimized, and expressing the concern that "you can literally write off provisions (a) and (b) [of Idaho Code § 40-210] unless there's something where somebody can have some sort of option to mitigate an arbitrary or capricious decision by ACHD.").

With all due respect, the IPUC has no jurisdiction to enforce Idaho Code § 40-210 or otherwise regulate the actions of Public Road Agencies. In the event that a utility or other interested party believes there has been a violation of Idaho Code § 40-210, that party may raise its concern to a court, but the IPUC has no authority to police the Public Road Agencies.

G. Section 10 Of Rule H Is An Improper Attempt To Abrogate The Common Law Rule

"Under the common law, a utility, placing its facilities along streets and highways, gains no property right and upon demand must move its facilities at its expense." *State ex rel. Rich v. Idaho Power Co.*, 81 Idaho at 501. Over the last several years, utility companies have attempted on many occasions to abrogate this rule. *See, e.g., id.* (striking down a statute that would have required utilities to be reimbursed out of the dedicated State Highway Fund for costs of relocating their utility facilities on the interstate highway system); *Mountain States Tel. and Tel. Co. v. Boise Redevelopment Agency*, 101 Idaho 30, 607 P.2d 1084 (1980) (rejecting the argument that utilities should be permitted to obtain reimbursement of their relocation costs from an urban

renewal agency). In these cases, this Court has expressly refused to abrogate the common law in the absence of legislation. See *Mountain States Telephone*, 101 Idaho at 35 (“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.”).

Under the common law rule, Idaho Power must pay the costs to relocate its facilities at the demand of the Public Road Agencies. Idaho Power cannot circumvent the common law rule through its Rule H Tariff. This principle is explained in *U.S. West Communications, Inc. v. City of Longmont*, 948 P.2d 509, 520 (Colo. 1997), which addresses the respective jurisdictions of Colorado municipalities and the Colorado Public Utilities Commission under statutes similar to the Idaho statutes. There, the Colorado Supreme Court rejected the argument that the Colorado Public Utilities Commission’s power to regulate the services and rates of utilities preempts a municipality’s power to regulate the use of its streets, including relocation of utilities on public streets. The Colorado Supreme Court upheld the common law rule that utilities must pay the cost of relocating their facilities on public streets and specifically rejected the argument that the common law rule could be abrogated by a tariff approved by the Public Utilities Commission. *Id.* at 518 (“Were we to hold otherwise, a utility company could avoid having to pay relocation costs simply by procuring P.U.C. approval of a tariff ...”).

The fact that Idaho Power and/or the IPUC believe some other party should be responsible for the cost of utility relocation does not authorize the abrogation of the common law rule. As this Court explained in *Mountain States Telephone*, the question of who should pay for utility relocation is “a question of policy [that] is not for us to answer, but for the legislature ...”.

The common law rule applies until and unless the legislature has specifically stated otherwise.”
101 Idaho at 35, 607 P.2d at 1089 (citations omitted).

The common law rule cannot be abrogated through a tariff approved by the IPUC. Only the legislature can abrogate the common law rule. Accordingly, Section 10 of Rule H should be set aside.

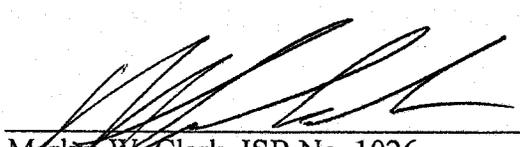
V.

CONCLUSION

If the Idaho Legislature had wanted the IPUC to have jurisdiction over the relocation of utility lines on public rights-of-way, it would have granted that authority to the IPUC. *See Washington Water Power Co. v. Kootenai Envtl. Alliance*, 99 Idaho at 882 (setting aside an IPUC order as in excess of its jurisdiction and explaining that “[i]f the legislative branch desires the [IPUC] to have such authority, it must be provided by precise language”). Instead, it granted the IPUC only a limited rate-making authority and granted Public Road Agencies “exclusive” jurisdiction over public rights-of-way. ACHD and other Public Road Agencies have exercised that exclusive jurisdiction by adopting regulations that govern the relocation of utility lines on public rights-of-way. In approving Sections 10 and 11 of Idaho Power’s Rule H Tariff, the IPUC has acted in excess of its limited jurisdiction and has attempted to usurp the Public Road Agencies’ exclusive jurisdiction over public rights of way. Accordingly, the IPUC’s order approving Sections 10 and 11 of Idaho Power’s Rule H Tariff should be set aside.

RESPECTFULLY SUBMITTED THIS 21st day of May, 2010.

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By 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of May, 2010, I caused to be served a true copy of the foregoing APPELLANT ACHD'S BRIEF by the method indicated below, and addressed to each of the following:

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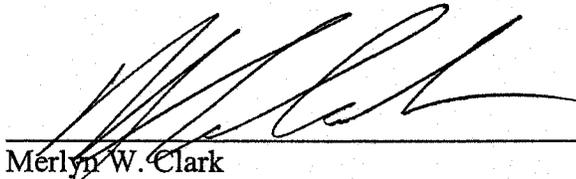
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Merlyn W. Clark

ADDENDUM

EXHIBIT 1

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.

EXHIBIT 2

BY THE ADA COUNTY HIGHWAY DISTRICT COMMISSIONERS:

CHARLES L. WINDER, GLENN J. RHODES, KEITH A. LOVELESS

A RESOLUTION REPEALING RESOLUTION NO. 232 AND ESTABLISHING A REVISED POLICY WITH RESPECT TO THE RELOCATION OF PUBLIC UTILITY AND SEWER FACILITIES WITHIN THOSE PUBLIC RIGHTS-OF-WAY UNDER THE JURISDICTION OF ADA COUNTY HIGHWAY DISTRICT.

WHEREAS, it is deemed to be in the best interests of Ada County Highway District and the various public utility and sewer entities who locate, relocate, install and/or reinstall facilities within the public rights-of-way to establish a revised policy with respect to the relocation of such facilities; and

WHEREAS, representatives of the District, Boise City Department of Public Works and various utility organizations met on December 18, 1985 to establish the guidelines for utility and sewer relocations within those public rights-of-way under the jurisdiction of Ada County Highway District;

NOW, THEREFORE, BE IT RESOLVED AND ORDAINED BY THE ADA COUNTY HIGHWAY DISTRICT BOARD OF COMMISSIONERS that the following policies shall be applicable with respect to the relocation of public utility and sewer facilities within the public rights-of-way under the jurisdiction of Ada County Highway District:

SECTION 1. UTILITY OR SEWER RELOCATIONS REQUIRED AS A RESULT OF RIGHT-OF-WAY IMPROVEMENTS FUNDED BY ADA COUNTY HIGHWAY DISTRICT.

This section is applicable to those instances where utility or relocations are required because improvements sponsored or funded by Ada County Highway District (District) are being undertaken within the public rights-of-way.

- A. Relocation Cost Responsibility - The responsibility for costs associated with the relocation of utility or sewer facilities shall be assigned as follows:
- (1) Should the District require that any facility of a utility or sewer company be relocated from its existing location to a new location within the public right-of-way, all relocation costs shall be the responsibility of the utility or sewer company.

- (2) If a utility or sewer company 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.

B. Operational Procedure:

- (1) Preliminary Notification: The District will provide written notification of potential utility or sewer relocation requirements at the conceptual stage of project development. Any plans provided at this stage shall be noted as preliminary. Where practical, the District shall provide such notification one year in advance of the commencement of right-of-way improvement work. The notification specified herein shall be delivered to affected utility and/or sewer companies with a copy to the the Utility Coordinating Council (U.C.C.). The District shall provide the U.C.C. with a tentative schedule of its work for the ensuing fiscal year at the time of budget approval by the District's Board of Commissioners.
- (2) Preliminary Review: As soon as reasonably possible and no later than forty-five calendar days after receipt of the notification indicating the need for utility or sewer relocations, the affected utility and/or sewer companies shall provide the District with a preliminary engineering plan. That plan shall include the time frame requirements for material acquisition and relocation work and special construction considerations that may affect scheduling.

- (3) Revisions: If revisions are made in the District's preliminary plan which alter the initial utility or sewer relocation requirements, the District will provide the affected utility and/or sewer companies with revised plans. The affected companies shall, as soon as reasonably possible and no later than thirty calendar days after the delivery of the revised plans, provide to the District any revisions in the company's preliminary engineering plan or schedule.
- (4) Final Notification: The District will provide the Utility Coordinating Council with final notification of its intent to proceed with right-of-way improvements and include the anticipated date work will commence thereon. This notification shall indicate that the work to be performed will either be accomplished pursuant to the preliminary plan or will be accomplished pursuant to a revised plan.
- (5) Relocation Activity: Unless otherwise agreed upon, all utility or sewer relocations shall be completed prior to the anticipated date of commencement of work on the right-of-way improvements by the District.

A project construction control line will be established in the field by the District. The location of this control line will be established after review with the utility and/or sewer companies involved.
- (6) Roadway Restoration: Whenever possible, District, utility and/or sewer company construction personnel shall coordinate their activities in an attempt to eliminate duplication of roadway restoration work.

SECTION 2. UTILITY OR SEWER RELOCATIONS REQUIRED AS A RESULT OF
RIGHT-OF-WAY IMPROVEMENTS PARTIALLY FUNDED BY ADA COUNTY HIGHWAY
DISTRICT

This section is applicable to those instances where utility or sewer relocations are required because of improvements being undertaken within the public rights-of-way which are partially funded by the District and partially funded by another individual, firm or entity.

A. Relocation Cost Responsibility: The responsibility for costs associated with the relocation of utility or sewer facilities shall be assigned as follows:

- (1) Where the District requires that any facility of a utility and/or sewer company be relocated from its existing location to a new location within the public right-of-way, the utility and/or sewer company shall be responsible for that portion of the relocation costs that equals the percentage of the District's participation in the right-of-way improvement costs. The remaining utility and/or sewer relocation costs shall be the responsibility of the individual, firm or entity that provides funds for the balance of the right-of-way improvement costs.
- (2) If a utility or sewer company has facilities located on private property, with a right-of-way occupancy other than its right to locate in a public right-of-way, and the District requires any facility so located to be relocated, the actual costs for such relocation shall be the responsibility of the District and the individual, firm or entity providing funds to accomplish the improvements within the public right-of-way. Such costs shall be exclusive of profit allowances.

B. Operational Procedure:

- (1) Plan Review: The District will schedule a plan review conference to which representatives of all funding participants and affected utility and/or sewer companies will be asked to attend. Within thirty calendar days after the date of the plan review conference, the utility and/or sewer company shall provide the District with a project review statement outlining the utility or sewer relocation work required, the estimated cost thereof and the time required therefor. This statement should include the date on which field relocation work could commence and any other special construction considerations that may affect scheduling.
- (2) Revisions: If revisions are made in the preliminary plans which alter the initial utility or sewer relocation requirements, the District will provide the affected companies with revised plans. The affected companies shall, as soon as reasonably possible and no later than thirty calendar days after delivery of the revised plans by the District, provide the District with any revisions to the initial project review statement.
- (3) Final Notification: The District will provide the Utility Coordinating Council with final notification of its intent to proceed with right-of-way improvements and include the anticipated date that work will commence thereon. This notification shall indicate that the work to be performed will either be accomplished pursuant to the preliminary plan or will be accomplished pursuant to a revised plan.
- (4) Relocation Activity: Unless otherwise agreed upon, all utility or sewer relocations shall be completed prior to the anticipated date of commencement of work on the right-of-way improvements.

- (5) Roadway Restoration: Whenever possible, District, utility and/or sewer company construction personnel shall coordinate their activities in an attempt to eliminate duplication of roadway restoration work.

SECTION 3. UTILITY OR SEWER RELOCATIONS REQUIRED AS A RESULT OF RIGHT-OF-WAY IMPROVEMENTS NOT FUNDED BY ADA COUNTY HIGHWAY DISTRICT

This section is applicable to those instances where utility or sewer relocations are required because of improvements being undertaken within the public rights-of-way and do not involve participation or funding by Ada County Highway District (District).

- A. Relocation Cost Responsibility - The responsibility for costs associated with the relocation of utility facilities shall be assigned as follows:
- (1) When utility or sewer relocations are required as a result of improvements being made by a developer within the public rights-of-way which were scheduled to have otherwise been made by the District within three years of the date said improvements are actually commenced, then the responsibility for the costs of utility relocations shall be in conformance with Section 1 of this Resolution.
 - (2) When utility or sewer 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 the District within three years of the date said improvements are actually commenced, then the responsibility for the costs of utility or sewer relocations shall be that of the developer.
 - (3) Roadway Restoration: Whenever possible, District, utility and/or sewer company construction personnel shall coordinate their activities in an attempt to eliminate duplication of roadway restoration work.

B. Operational Procedure:

- (1) Plan Review: The developer shall provide the District and all affected utility and/or sewer companies with preliminary project plans and schedule a plan review conference to be held at the District offices. At the plan review conference each company shall have the right to appeal, adjust and/or negotiate with the District and developer on its own behalf. The utility and/or sewer companies may operate as a technical committee in comprehensive plan review with the District. Each utility and/or sewer company shall provide the developer and the District with a letter of review indicating the magnitude of and time required for relocation of its facilities. Said letter of review is to be provided within thirty calendar days after the date of the plan review conference.
- (2) Revisions: If revisions are made in the preliminary plans which modify the utility or sewer relocation requirements, the companies shall be provided with such revised plans and have thirty calendar days after receipt thereof to review and comment thereon.
- (3) Final Notification: The developer will provide the District, utility and/or sewer companies with final notification of its intent to proceed with the right-of-way improvements and include the anticipated date work will commence thereon. This notification shall indicate that the work to be performed will either be accomplished pursuant to the preliminary plan or will be accomplished pursuant to a revised plan.
- (4) Relocation Activity: Unless otherwise agreed upon, all utility or sewer relocations shall be completed within the times established during the plan review process.

C. Signalized Intersections - Should any utility or sewer relocation activity be in close proximity of an intersection included in the District's Traffic Planning Policy for signalization or intersection turning movements, the developer, the utility and/or sewer company shall meet with the District to determine the responsible cost allocation for signalization or turning movement modifications.

D. Trust Fund Deposits - In those cases where a developer elects or is required to make a deposit to the District's Road Trust Fund Account to provide for future improvements within the public rights-of-way in lieu of the immediate construction thereof, the developer will be required to include in the deposit an amount equal to 110% of the utility and/or sewer company's estimated cost to accomplish the required utility and/or sewer relocation work.

Deposits, administration and disbursements of monies for future utility or sewer improvements or relocations within the public rights-of-way shall be governed by the provisions of the District's then current Resolution regarding the Public Rights-of-Way Trust Fund.

SECTION 4. UTILITY OR SEWER FACILITY UPGRADES WITHIN THE PUBLIC RIGHTS-OF-WAY

When any utility or sewer company upgrades or modifies those facilities located within the public rights-of-way for its own purposes, all costs of the work associated therewith shall be the sole responsibility of the utility company undertaking such activity.

SECTION 5. REPEAL OF RESOLUTION NO. 232

Resolution No. 232, adopted by the Board of Commissioners of Ada County Highway District on August 18, 1983, is hereby repealed.

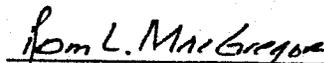
ADOPTED this 25th day of September, 1986 by the
Board of Commissioners, Ada County Highway District.

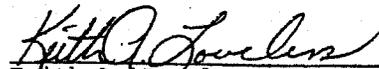

Charles L. Winder, President

(SEAL)

ATTEST:


Glenn J. Rhodes, Vice-President


Tom L. MacGregor, Director


Keith A. Loveless, Secretary