

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 REPLY BRIEF

Appeal from the Idaho Public Utilities Commission

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I. INTRODUCTION

Appellant Ada County Highway District (“ACHD”) submits this Reply Brief in response to the briefing submitted by Respondents Idaho Power and the Idaho Public Utilities Commission (“IPUC”). In their briefing, Idaho Power and the IPUC make several arguments as to why the IPUC should be able to regulate whether private developers are required to reimburse Idaho Power for its costs incurred in relocating its utility lines within public rights-of-way. The fact remains, however, that the IPUC’s jurisdiction is extremely limited and that the Idaho Legislature has not granted the IPUC authority to regulate utility relocations within the public rights-of-way. Instead, the Idaho Legislature has granted Public Road Agencies “exclusive” jurisdiction over the public rights-of-way. In fact, the Idaho Legislature recently enacted Idaho Code § 40-210, which requires Public Road Agencies and related parties to minimize utility relocation costs. Rather than grant regulatory authority to the IPUC, the Idaho Legislature reaffirmed that Public Road Agencies’ have jurisdiction over the rights-of-way. *Id.* With that jurisdiction, ACHD regulates utility relocations within its highway district, including detailed regulations as to when private developers are required to reimburse Idaho power and other utilities for their utility relocation costs.

The cost allocation provisions of Rule H conflict with ACHD’s Resolution 330’s cost allocation provisions. R., Vol. III, pp. 484-492. Given the IPUC’s lack of statutory authority and the Public Road Agencies’ “exclusive” jurisdiction over public rights-of-way, the IPUC’s order approving Sections 10 and 11 of Idaho Power’s Rule H Tariff should be set aside for lack of jurisdiction.

II. STANDARD OF REVIEW

Idaho Power and the IPUC have attempted to describe the applicable standard of review as a standard that would grant substantial deference to the IPUC. While IPUC findings of fact may be entitled to deference, this appeal does not involve the review of any findings of fact. Rather, the only question on appeal is whether Sections 10 and 11 of Rule H usurp the exclusive jurisdiction granted to Public Road Agencies over public rights-of-way or are otherwise in excess of the IPUC's jurisdiction.

The IPUC is given no deference with regard to its jurisdiction. To the contrary, the IPUC "exercises a limited jurisdiction and nothing is presumed in favor of its jurisdiction." *Alpert v. Boise Water Corp.*, 118 Idaho 136, 140, 795 P.2d 298, 302 (1990). The IPUC "has no authority other than that expressly granted to it by the legislature." *Id.* Because the IPUC's order approving Sections 10 and 11 of Rule H exceeds the IPUC's jurisdiction, it should be set aside. *Washington Water Power Co. v. Kootenai Envtl. Alliance*, 99 Idaho 875, 878, 591 P.2d 122, 125 (1979).

III. ARGUMENT

A. Public Road Agencies Have Exclusive Jurisdiction Over Public Rights-Of-Way, Including Authority To Regulate Utility Relocation And The Extent To Which Private Developers Must Reimburse Utilities For The Cost Of Utility Relocation

The only dispute in this appeal is whether the IPUC has been granted express, statutory authority to regulate utility relocation on public rights-of-way. Before getting to that dispute, however, it is important to recognize an issue on which there is no dispute. All parties to this appeal agree that Public Road Agencies have been statutorily granted exclusive supervision and jurisdiction over all highways and public rights-of-way within their respective highway systems.

See I.C. § 40-1310. That statutorily granted authority includes the “full power to . . . pass resolutions and establish regulations.” *Id.* at I.C. § 40-1310(8); *see also* I.C. § 40-1406.

Pursuant to this statutory authority, ACHD regulates the relocation of utility lines on public rights-of-way through its Resolution 330. R., Vol. III, pp. 484-492. Resolution 330, which has been in effect without challenge for over 23 years, regulates utility relocations on public rights-of-way in two key ways. First, it regulates the day-to-day practical aspects of utility relocations. For example, it contains regulations regarding the notice that must be given to affected parties, coordination meetings that affected parties must attend and various deadlines applicable to the various entities involved in utility relocations. Second, it regulates who pays for utility relocations, including detailed regulations as to whether a private developer is required to reimburse public utilities for their utility relocation costs. Specifically, Resolution 330 requires a private developer to reimburse utilities for the cost of utility relocations that result from public road projects made for the benefit of that private developer. *Id.* at p. 489. However, Resolution 330 provides that the private developer is not required to reimburse a utility, even if the private developer pays for the public road project, if ACHD had already scheduled the public road project to be made within three years after the project was commenced. *Id.*

The IPUC concedes that ACHD has authority to implement the above regulations, including the authority to regulate whether a private developer is required to reimburse a public

utility for its relocation costs. *See* IPUC Brief, p. 21 (explaining that the IPUC cannot “question a road agency’s cost allocation rules, whether similar to Section 10 or not”).¹

While conceding that ACHD has authority to regulate whether a private developer must reimburse a utility for its relocation costs, the IPUC asserts that it also has authority to regulate whether Idaho Power can seek reimbursement of utility relocation costs from private developers. This argument ignores the fact that Public Road Agencies’ jurisdiction is “exclusive.”

Given that the legislature has granted the Public Road Agencies “exclusive” jurisdiction over public rights-of-way, which includes the authority to assign financial responsibility for utility relocation costs, no other entity has jurisdiction to take upon itself that same authority. This conclusion follows from the following three steps of logic: (1) ACHD has “exclusive” jurisdiction over the public rights-of-way within its highway district; (2) the IPUC concedes that said exclusive jurisdiction includes the authority to regulate utility relocation on public rights-of-way, including the authority to determine whether a private developer must reimburse Idaho Power for all or a portion of its utility relocation costs; and (3) if ACHD has exclusive jurisdiction to determine whether a private developer must reimburse Idaho Power, then the

¹ Oddly, Idaho Power takes a different position. *See* Idaho Power Brief, p. 17 (“The authority to require relocation does not give Public Road Agencies authority to decide if the utility will receive any subsequent reimbursement from third parties other than the general public if private parties also benefit from the facilities relocation.”). This position flies in the face of the fact that ACHD has been regulating all aspects of utility relocation on public rights-of-way, including reimbursement of utility relocation costs by private developers, for over 23 years through Resolution 330. Idaho Power and the IPUC have never questioned ACHD’s authority in that regard. Indeed, Rule H applies only to Idaho Power, not the many other utilities that must relocate their utility lines at ACHD’s request. Thus, ACHD would still allocate utility relocation costs as to those many other utilities even if Rule H is not set aside.

IPUC cannot have jurisdiction to make that same determination (especially where it has no express statutory authority and where its regulations conflict with ACHD's regulations).

B. The IPUC Does Not Have Express Statutory Authority To Regulate Utility Relocation On Public Rights-Of-Way

The IPUC's jurisdiction is extremely limited. As this Court has held, "[t]he Idaho Public Utilities Commission exercises limited jurisdiction and has no authority other than that expressly granted to it by the legislature." *Alpert v. Boise Water Corporation*, 118 Idaho 136, 140, 795 P.2d 298, 302 (1990) (citations omitted) (emphasis added). "It exercises a limited jurisdiction and nothing is presumed in favor of its jurisdiction." *Id.* (emphasis added). Accordingly, this Court has consistently set aside IPUC orders where the IPUC cannot point to a "specific statute" that authorizes its action. *See, e.g., Idaho Power Co. v. Idaho Public Utilities Comm'n*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981).

Respondents do not address these authorities, nor do they point to any statute that expressly authorizes the IPUC to determine whether a private developer must reimburse a utility for its utility relocation costs or to otherwise regulate utility relocations on public rights-of-way. Rather, Respondents contend that the IPUC's authority to assign utility relocation costs should be inferred from the IPUC's general ratemaking authority. *See* IPUC Brief, p. 11 ("The IPUC approved Idaho Power's line extension tariff because the purpose and effect of the tariff falls within the Commission's ratemaking authority . . ."). However, the IPUC's ratemaking authority, set forth in Idaho Code § 61-502, *et seq.*, 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). Those statutes allow the IPUC to "fix" an appropriate rate if it

finds, after a hearing, that the rate charged by a utility is “unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provision of law.” *Id.* at § 61-502. The IPUC’s ratemaking authority would authorize it to determine whether utility costs (including costs associated with relocations) may be included in a utility’s rate base, but that is the limit of the IPUC’s jurisdiction. *See Washington Water Power Co.*, 99 Idaho at 880 (explaining that the IPUC’s ratemaking authority allows it to determine whether a utilities “expenditures may be classified as ‘operating expenses’ and thus passed on to the utility ratepayers”). The IPUC’s ratemaking authority does not extend so far as to allow it to regulate the expenses charged to Idaho Power by other parties.

Notably, Idaho Power cites *Grindstone Butte Mut. Canal Co. v. Idaho Public Utilities Commission*, 102 Idaho 175, 177, 627 P.2d 804, 806 (Idaho, 1981) as an example of a case setting forth the IPUC’s “broad authority over a public utility’s rates and charges.” *See* Idaho Power Brief, p. 22. However, *Grindstone* was a traditional ratemaking case in which this Court affirmed an IPUC order “granting Idaho Power interim rate relief in the form of a 7.09% uniform increase to all rates and charges.” *Id.* ACHD acknowledges the IPUC’s authority to set utility rates. Such authority is expressly granted to the IPUC by statute. However, the IPUC has no authority to allocate utility relocation costs on public rights-of-way because no statute authorizes

such action and because the allocation of utility relocation costs falls within the Public Road Agencies' exclusive jurisdiction over the rights-of-way.²

Respondents' briefs (especially Idaho Power's brief) are filled with a variety of public policy arguments without citation to existing law. For example, Idaho Power discusses the public policy behind growth paying for itself and why Idaho Power should be able to recover its utility relocation costs from private developers that are partially responsible for causing the need for relocation. *See* Idaho Power's Brief, pp. 16-17. These expressions of public policy, whether sound or not, are irrelevant absent statutory adoption. There may be arguments as to why the IPUC should have authority to regulate utility relocations on public rights-of-way, but the fact of the matter is that it does not.

Idaho Power cites ACHD's recent Impact Fee Ordinance as an example of ACHD agreeing with the public policy of growth paying for itself. Notably, however, it was not ACHD that came up with the public policy of growth paying for itself in the context of impact fee ordinances. Rather, the Idaho Legislature codified that public policy in the Idaho Development Impact Fee Act. *See* I.C. § 67-8202(2) (setting forth the public policy that "those who benefit from new growth and development pay a proportionate share of the cost of new public facilities

² Idaho Power also cites a California case, *Pacific Gas & Electric Co. v. Dame Construction Co.*, 191 Cal.App.3d 233, 235, 236 Cal.Rptr. 351, 352 (Cal. App. 1987) as authority that a utility can recover relocation costs from a private developer. However, that case made clear that no government entity required the utility relocation. *Id.* (citing a stipulation that "neither the Board of Supervisors nor any other local government agency specifically required Dame to relocate the PG & E power poles and lines"). Rather, the utility relocated its utility line at the direct request of a private developer. More importantly, that case did not involve a

needed to serve new growth and development”). Moreover, the Idaho Legislature expressly granted government agencies like ACHD the authority to pass impact fee ordinances to further that public policy. *Id.* at § 67-8202(5).

There are two key differences between ACHD’s Impact Fee Ordinance and the IPUC’s attempt to regulate utility relocation. First, the Idaho Legislature has not codified any public policy that any party other than utilities pay for utility relocations resulting from public road projects. To the contrary, Idaho Code § 62-705 provides that the utilities may place their utility lines upon, along, over or under public rights-of-way only “as not to incommode the public use” thereof. This Court has interpreted Idaho Code § 62-705 as requiring that, upon demand, a utility “must move its facilities at its expense.” Second, unlike the Idaho Development Impact Fee Act, which grants express authority to ACHD to pass impact fee ordinances, the Idaho Legislature has not granted the IPUC any authority to regulate whether third parties must reimburse Idaho Power for its utility relocation costs on public rights-of-way. Instead, that authority has been granted to the Public Road Agencies.

Idaho Power’s arguments highlight the reason why the IPUC’s order must be set aside – because the IPUC lacks express statutory authority to regulate utility relocations on public rights-of-way. As this Court has held, “[t]he Idaho Public Utilities Commission exercises limited jurisdiction and has no authority other than that expressly granted to it by the legislature.” *Alpert*, 118 Idaho at 140 (emphasis added). “If the legislative branch desires the Public Utilities

jurisdictional dispute. There was no highway district involved with express authority to regulate and its own regulations as to who pays for utility relocation.

Commission to have such authority, it must be provided by precise language.” *Washington Water Power Co.*, 99 Idaho at 882 (emphasis added). If the legislature wants to grant the IPUC authority to regulate utility relocation on public rights-of-way, it would do so. All it would have to do is amend the statutes setting forth the IPUC’s authority or the statutes addressing utility relocation costs to add a specific provision granting the IPUC authority to allocate utility relocation costs on public rights-of-way. Indeed, just last year (undoubtedly after lobbying by the utility industry) the legislature enacted a new statute addressing utility relocations on public rights-of-way. *See* I.C. § 40-210. That statute requires Public Road Agencies and related parties to work together to minimize utility relocation costs associated with road projects on public rights-of-way. Conspicuously absent from that statute is any mention of the IPUC, much less a specific provision authorizing the IPUC to allocate utility relocation costs. Instead, the statute reaffirms that the regulation of utility relocations on public rights-of-way falls under the jurisdiction of the Public Road Agencies. *See id.* (stating that the statute is not intended to “diminish or otherwise limit the authority of this state, highway district or other political subdivision having jurisdiction over the public right-of-way”). Given the absence of any statutory grant of authority to the IPUC to regulate utility relocations on public rights-of-way, the IPUC’s order should be set aside for lack of jurisdiction.

C. ACHD And The IPUC Cannot Concurrently Regulate Utility Relocation On Public Rights-Of-Way, Especially Where Resolution 330 And Rule H Conflict

Much of the IPUC’s brief is spent attempting to minimize the conflicts between ACHD’s Resolution 330 and the IPUC’s Rule H. However, the IPUC concedes that the two sets of regulations conflict in one key aspect that is particularly important for this appeal. *See* IPUC

Brief, p. 16. In the event that a private developer funds a public road project, both Resolution 330 and Rule H generally would require that developer to reimburse Idaho Power for utility relocation costs caused by that public road project. *Compare* R., Vol. III, p. 489 and R., Vol. IV, p. 677. However, Resolution 330 makes an exception to that general rule where the public road project that resulted in the need for utility relocation was "scheduled to have otherwise been made by [ACHD] within three years of the date said improvements are actually commenced." *See* R., Vol. III, p. 489.

ACHD maintains a detailed schedule of the public road projects it expects to perform over the next several years. Often, a private developer asks ACHD to perform a public road project sooner than ACHD has planned. ACHD may agree to perform a public road project sooner than it had planned in exchange for the private developer paying for a percentage of the public road project. For example, ACHD may agree to commence in 2010 a public road project that it had previously scheduled to commence in 2012 in exchange for the private developer paying a portion of the cost of the public road project. In such a case, there is a significant conflict between ACHD's Resolution 330 and the IPUC's Rule H. Under ACHD's Resolution 330, the private developer would have no obligation to reimburse Idaho Power. Under Rule H, however, the private developer would be required to reimburse Idaho Power for a portion of its utility relocation costs associated with the public road project.

While Respondents generally assert that Rule H has no affect on Resolution 330, both Idaho Power and the IPUC insist that Rule H applies even where it conflicts with Resolution 330. For example, the IPUC recognizes that Rule H's cost allocation provision conflicts with Resolution 330 with regard to any public road project that is funded by a private developer but

that ACHD would have commenced within three years. *See* IPUC Brief, p. 16. While recognizing the conflict and recognizing that Rule H “cannot overrule ACHD’s resolution,” the IPUC still asserts that “[u]nder Idaho Power’s tariff provision the Company should seek reimbursement from the developer so that these costs are not recovered in customer rates.” *Id.*; *see also* Idaho Power Brief, p. 25 (“If the Public Road Agency’s ordinance governing the initial relocation cost allocation is different than Section 10 governing the utility’s subsequent reimbursement of its costs, so be it. They operate sequentially . . .”).

In other words, Respondents assert that Rule H applies despite its conflicts with Resolution 330. Such concurrent jurisdiction is not permitted. *State v. Poynter*, 70 Idaho 438, 220 P.2d 386 (1950) (explaining that there are circumstances under which two government entities can have concurrent jurisdiction over the same subject matter, but only where the “regulations or law are not in conflict”).

Another significant conflict that exemplifies why the Public Road Agencies and the IPUC cannot have concurrent jurisdiction over utility relocations on public rights-of-way is the question of which entity would resolve any conflicts. The IPUC accuses ACHD of “fabricating” an argument that the IPUC would have jurisdiction to resolve conflicts arising out of utility relocations. ACHD did no such thing. Rather, Idaho Power, the drafter of Rule H, is the party that contends that IPUC has conflict resolution authority. *See R.*, Vol. III, p. 535. In fact, Idaho Power repeats that assertion in its appellate briefing. *See* Idaho Power Brief, pp. 30-31 (“If a dispute between Idaho Power and a private beneficiary should arise concerning cost recovery by Idaho Power, the Commission would have jurisdiction to resolve the reimbursement dispute.”).

Who else would have dispute resolution authority over disputes arising out of the application of Rule H if not the IPUC?

Especially in light of the differences between Resolution 330 and Rule H, it is easy to see how disputes will arise. Disputes are particularly likely to arise in the case of a private developer that pays for a percentage of a public road project that ACHD intended to perform within the next three years. That developer would go into the project having been expressly told by ACHD's Resolution 330 (which is an action of the state pursuant to ACHD's police power as per *Village of Lapwai v. Alligier*, 78 Idaho 124, 128 (1956)) that it would have no obligation to reimburse Idaho Power or other utilities for the utility relocation costs. *See R.*, Vol. III, p. 489. After completing the project, however, the IPUC would require the private developer to reimburse Idaho Power pursuant to the cost allocation provisions in Rule H. *See IPUC Brief*, p. 16 and *Idaho Power Brief*, p. 25 (asserting that Rule H would still require the private developer to reimburse Idaho power, despite Resolution 330's provision to the contrary). Thus, the private developer would have been told by one state entity (ACHD) that it has no reimbursement obligation and by another state entity (the IPUC) that it must reimburse Idaho Power. In light of these conflicts, there can be no concurrent jurisdiction.

Moreover, two separate statutes prohibit concurrent jurisdiction over utility relocations on public rights-of-way. First, Idaho Code § 40-1310 grants Public Road Agencies "exclusive" jurisdiction over public rights-of-way. Two agencies cannot have concurrent jurisdiction over a subject matter where one agency has been statutorily granted "exclusive" jurisdiction. Second, Idaho Code § 40-1406, which applies to county-wide highway districts like ACHD, expressly

provides that any laws in conflict with the county-wide highway district's 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

For each of these reasons, Public Road Agencies have the exclusive jurisdiction to regulate utility relocation on public rights-of-way and the IPUC has no authority to exercise concurrent jurisdiction.

D. The Savings (Preemption) Clause Is Backwards

Section 10 of Rule H provides that it does not apply to utility relocations within public rights-of-way if a Public Road Agency has adopted regulations "that are substantially similar to the rules set out in Section 10 of Rule H." R., Vol. IV, p. 678. The clear intent of this provision is that Rule H would govern over any conflicting regulations adopted by a Public Road Agency. Even if a Public Road Agencies' regulations were "substantially similar" (whatever that means) to Rule H, the Public Road Agency would apparently be precluded from amending its regulations in the future in any manner that is not "substantially similar" to rule H. This is yet another example of how Rule H usurps the Public Road Agencies' exclusive jurisdiction.

At page 20 of its Brief, the IPUC states that "the Savings Clause means that Section 10 of the tariff does not apply when ACHD directs road improvements in Idaho Power's service area, foreclosing any possibility of a conflict between Resolution 330 and Section 10." If this were really the case, there would be no need for this appeal. However, both Idaho Power and the

IPUC insist that the cost allocation provisions in Rule H would still apply despite their conflict with Resolution 330's cost allocation provisions. See IPUC Brief, p. 16; Idaho Power Brief, p. 25.

The easiest way to resolve this appeal would be to remand with instructions for the IPUC to clarify that Rule H shall not apply to utility relocations within public rights-of-way in any jurisdiction where a Public Road Agency regulates utility relocations. For example, the applicable portion of Section 10 of Rule H could be stricken and amended as follows:

This Section shall not apply to utility Relocations within public road rights-of-way of Public Road Agencies which have adopted ~~legally binding guidelines~~ rules or regulations for the allocation of utility relocations costs between the utility and other parties that are substantially similar to the rules set out in Section 10 of Rule H. In such a case, the Public Road Agencies' rules or regulations shall govern.

Again, the Public Road Agencies' jurisdiction is "exclusive," so the IPUC cannot regulate utility relocations on public rights-of-way in any jurisdiction in which a Public Road Agency regulates utility relocations. It does not matter whether the Public Road Agencies' regulations are "substantially similar" to Rule H. If a Public Road Agency regulates utility relocations within its jurisdiction pursuant to Idaho Code § 40-1310, Rule H cannot apply in that jurisdiction.

E. Section 11 Of Rule H Exceeds The IPUC's Jurisdiction

Idaho Code § 40-210 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.”

Even though Idaho Code § 40-210 does not grant any authority to the IPUC, the IPUC has assumed jurisdiction to enforce the Public Road Agencies’ compliance with this statute through Section 11 of Rule H. That Section 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 (emphasis added).

Under this provision, the IPUC attempts to take upon itself the authority to police whether Public Road Agencies are complying with their statutory duty to minimize relocation costs. Faced with the clear absence of authority to police the Public Road Agencies’ compliance with Idaho Code § 40-210, the IPUC misconstrues the clear language of Section 11 and attempts to distance itself from the position it took at the reconsideration hearing. The IPUC now characterizes Section 11 as merely expressing an obligation on the part of Idaho Power to minimize relocation costs and asserts that Section 11 “has no effect on ACHD.” *See* IPUC Brief, p. 22. Idaho Power offers the same mischaracterization. *See* Idaho Power Brief, p. 25 (asserting

that Section 11 merely “directs the Company to participate in public road project design or development meetings to eliminate or minimize relocation costs in public road rights-of-way.”

The characterization of Section 11 now offered by Idaho Power and the IPUC ignores the clear language of Section 11, which purports to impose obligations not just on Idaho Power, but on Public Road Agencies. Section 11 requires Idaho Power to participate in project design or development meetings with Public Road Agencies. It then goes on to require that “[t]he 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.” R., Vol. IV., pp. 659-660; 678 (emphasis added).

At the October 13, 2009 reconsideration hearing, the IPUC expressly stated its position that it has authority 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 are 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.”).

The IPUC has no statutory authority to adopt a rule requiring Public Road Agencies to minimize relocation costs or to otherwise police Public Road Agencies' compliance with Idaho Code § 40-210. Accordingly, Section 11 of Rule H should be set aside.

F. This Appeal Raises A Judicial Controversy

In this appeal, ACHD asks this Court to set aside Sections 10 and 11 of Idaho Power's Rule H Tariff, which the IPUC approved in Order No. 30955. The IPUC now contends that this appeal should be dismissed for lack of a "judicial controversy." Specifically, the IPUC contends that "[t]he relief ACHD requests in essence is in the nature of a declaratory judgment" and cites the general rule that "a declaratory judgment can only be rendered in a case where an actual or judicial controversy exists." See IPUC Brief, p. 24 (citing *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988 (1988)). As explained in *Harris*, the "judicial controversy" requirement requires that there be a controversy that is "definite and concrete, touching the legal relations of parties having adverse legal interests It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.*

As an initial matter ACHD has not brought a declaratory judgment action. Rather, ACHD has brought a direct appeal to this Court pursuant to Idaho Code § 61-629 to review whether the IPUC has authority to issue its order. 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)). This Court's review is set forth in Idaho Code § 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. (emphasis added).

The IPUC's argument would deprive ACHD of its right to the Idaho Supreme Court's direct review of the IPUC's order. Under the IPUC's argument, ACHD would not be entitled to review of the IPUC's order, but instead would have to wait until some later date and bring a declaratory judgment action, presumably to a district court.

This appeal seeks the very relief that is authorized under Idaho Code § 61-629. That statute allows the Idaho Supreme Court to review any IPUC order to determine "whether the commission has regularly pursued its authority." Under that standard, this Court determines whether the IPUC's order is in excess of its 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). If the IPUC's order exceeds its limited jurisdiction, the remedy provided by Idaho Code § 61-629 is that the IPUC's order be set aside. *See also Washington Water Power Co.*, 99 Idaho at 878 (setting aside an IPUC order where the IPUC was "without jurisdiction to issue the orders which are the subject of this appeal"). That is exactly the relief that ACHD seeks here. ACHD contends that the IPUC

lacks authority to regulate utility relocation on public rights-of-way and that its attempt to do so through Rule H usurps ACHD's statutory "exclusive" jurisdiction over regulation of the public rights-of-way. The remedy sought by ACHD is not a declaratory judgment, but rather an order setting aside the portion of the IPUC's order that approves Sections 10 and 11 of Rule H.

This appeal easily satisfies the "judicial controversy" requirement, which requires a dispute "touching the legal relations of parties having adverse legal interests" through which a party may obtain "specific relief through a decree of a conclusive character." *Harris*, 106 Idaho at 516. This controversy "touch[es] the legal relations of parties having adverse legal interests" because ACHD contends that the IPUC order usurps its exclusive jurisdiction over public rights-of-way. If ACHD prevails, it will obtain "specific relief through a decree of a conclusive character" in the form of an order setting aside the portion of the IPUC's order that approves Sections 10 and 11 of Rule H" – the relief provided for in Idaho Code § 61-629.

While ACHD has raised some hypothetical examples in its briefing, the purpose of those examples is merely to help this Court see the practical effect Rule H will have on ACHD's exclusive jurisdiction over public rights-of-way and its ability to efficiently manage public road projects. The IPUC's order, itself, usurps ACHD's exclusive jurisdiction.

Notably, this Court has reviewed and set aside many IPUC orders that, like Rule H, establish IPUC rules that are beyond the IPUC's jurisdiction. For example, in *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 416, 690 P.2d 350, 351 (Idaho, 1984), a homebuilder association brought an appeal to review an IPUC order establishing a rule that would impose a non-recurring charge of \$50 per kilowatt on the installation of or conversion

to electric space heating. This Court set aside the IPUC's order on grounds that it "was an act in excess of [the IPUC's] authority." *Id.*

Similarly, in *Idaho State Bar Association v. Idaho Public Utilities Commission*, 102 Idaho 672, 673, 637 P.2d 1168, 1169 (Idaho, 1981), the IPUC issued orders approving new IPUC rules of practice and procedure concerning appearances and representation of parties before the IPUC. Specifically, the Idaho State Bar contended that those rules would allow for the unauthorized practice of law in violation of Idaho Code § 3-104. Much like ACHD's argument here, the Idaho State Bar contended that the IPUC's rules "constitute a usurpation of the authority of this court to define and regulate the practice of law." *Id.*, 102 Idaho at 674. This Court set aside portions of the IPUC's order on grounds that the IPUC was "without authority to adopt those portions of Rule 4.3(b) and (c) which permit representation of a utility, motor carrier or non-profit organization by a non-attorney unconnected with the entity." *Id.* at 677.

ACHD's appeal is properly before this Court for the same reasons the appeals by the Idaho State Homebuilders Association's and the Idaho State Bar Association's appeals were properly before this Court. ACHD seeks the review provided for under Idaho Code § 61-629 to determine whether the IPUC has jurisdiction to adopt Sections 10 and 11 of Rule H. If the IPUC lacks jurisdiction, this Court should set aside the IPUC's order.

IV. CONCLUSION

The Idaho Legislature granted Public Road Agencies "exclusive" jurisdiction over the public rights-of-way. As the IPUC has conceded, that exclusive jurisdiction includes the authority to allocate utility relocation costs between utilities and private developers. Accordingly, no other entity can have concurrent jurisdiction to determine whether private

developers are required to reimburse Idaho Power for its utility relocation costs. If the Idaho Legislature had wanted the IPUC to have jurisdiction to allocate utility relocation costs, it would have expressly granted that authority to the IPUC. 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. Given the absence of express statutory authority, the IPUC's order approving Sections 10 and 11 of Idaho Power's Rule H Tariff should be set aside.

RESPECTFULLY SUBMITTED THIS 6th day of August, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6 day of August, 2010, I caused to be served a true copy of the foregoing APPELLANT ACHD'S REPLY BRIEF by the method indicated below, and addressed to each of the following:

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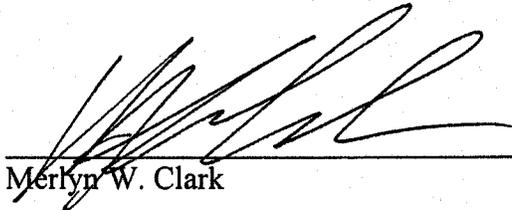
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