

IN THE SUPREME COURT OF THE STATE OF IDAHO

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)

SUP-E-10-02

Supreme Court Docket No. 37294-2010
(IPUC Case No. IPC-E-08-22)

ADA COUNTY HIGHWAY DISTRICT,)

Petitioner-Appellant,)

v.)

IDAHO PUBLIC UTILITIES COMMISSION)
and IDAHO POWER COMPANY,)

Respondents on Appeal.)

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IDAHO PUBLIC UTILITIES COMMISSION

AMICUS CURIAE BRIEF

Appeal from the Idaho Public Utilities Commission
Commissioner Marsha H. Smith, Presiding

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The Idaho Association of Highway Districts, the Association of Idaho Cities and the Idaho Association of Counties (collectively, the “Associations”), by and through their counsel of record, jointly submit this Amicus Brief in the above-entitled matter.

I. INTEREST OF THE AMICUS CURIAE

The Idaho Association of Cities is an association of 190 cities throughout the state of Idaho. The Idaho Association of Counties is an association of 44 counties throughout the state of Idaho. Idaho Code § 40-201 provides for “a system of state highways in the state, a system of county highways in each county, a system of highways in each highway district, and a system of highways in each city.” Accordingly, the various cities and counties in Idaho have formed city street departments, county road departments and highway districts (collectively, “Local Road Agencies”) in the state of Idaho. The Idaho Association of Highway Districts is an association of 64 highway districts. Many counties have multiple highway districts, and two counties have a single, county-wide highway district. For example, the Ada County Highway District (“ACHD”), the Appellant in this matter, is a single, county-wide highway district with responsibility over all public rights-of-way within the City of Boise, Garden City, the City of Meridian, the City of Eagle the City of Star and the City of Kuna, all located within Ada County.

Idaho cities have control of and authority to regulate city streets pursuant to Idaho Code §§ 50-311, 50-313 and 50-314. Likewise, Idaho counties have control of and authority to regulate county roads pursuant to Idaho Code §§ 31-805 and 40-604.

As set forth below, the Associations support Appellant Ada County Highway District (“ACHD”) in its appeal from the Idaho Public Utility Commission’s (“IPUC”) order approving the portions of Idaho Power’s Rule H tariff related to the relocation of utility lines on public rights-of-way. It is important that the Court understand the significant impact that Section 10 of Rule H will have throughout Idaho. Section 10 of Rule H affects all Local Road Agencies in Idaho. The Associations are concerned that the IPUC has purported to usurp the exclusive jurisdictions of Local Road Agencies over the public rights-of-way within their respective jurisdictions. The Associations are also concerned that Section 10 of Rule H will impede the Local Road Agencies’ ability to efficiently manage their road projects.

II. ARGUMENT

Idaho Code § 40-1310 grants highway districts “exclusive jurisdiction over all highway districts and public rights-of-way within their highway system.” This exclusive jurisdiction includes the “full power to ... establish use standards, pass resolutions and establish regulations.” *Id.* at § 40-1310(8). Pursuant to this broad grant of authority, many Idaho highway districts have regulated the relocation of utility lines on public rights-of-way within their respective jurisdictions. ACHD’s Resolution 330 is just one example of how one highway district has regulated utility relocation on public rights-of-way within its highway district. Likewise, many Idaho cities and counties regulate the placement of utilities and the relocation of utilities as part of their development policy manuals.

As a legal matter, this case is very simple. The Local Road Agencies have been statutorily granted broad and exclusive jurisdiction over public rights-of-way, including express authority to establish regulations. See e.g. Idaho Code §§ 40-1310, 40-1312. In contrast, the IPUC cannot point to any statutory authorization to regulate utility relocation on public rights-of-way. Without express statutory authority, Section 10 of Rule H is beyond the IPUC's jurisdiction. See *Alpert v. Boise Water Corporation*, 118 Idaho 136, 140, 795 P.2d 298, 302 (1990) ("The Idaho Public Utilities Commission exercises limited jurisdiction and has no authority other than that expressly granted to it by the legislature."). In short, the Local Road Agencies have jurisdiction to regulate utility relocation on public rights-of-way, and the IPUC does not. Accordingly, Section 10 of Rule H should be set aside.

In addition to the IPUC's lack of jurisdiction, there are several practical reasons why the Local Road Agencies are concerned about Section 10 of Rule H. For example, the legislature granted highways districts "exclusive" jurisdiction over public rights-of-way "to the end that the control and administration of the districts may be efficient." Idaho Code § 40-1312 (emphasis added). When a Local Road Agency regulates utility relocation, it generally regulates the relocation of all utilities (electric power, gas, telephone, water, sewer, cable, fiber-optic, etc.) and sewer lines the same way. Through comprehensive regulations of all utility relocations, a Local Road Agency is able to efficiently manage its road projects that may involve the relocation of various different utility lines and services. Any concerns or disputes related to utility relocation are resolved by the Local Road Agencies.

Section 10 of Rule H would impede the Local Road Agencies' ability to efficiently manage their road projects in that it would take the regulation of just one type of utility relocation (electric power) out of the hands of the Local Road Agencies and into the hands of the IPUC. In the event of a road project that requires the relocation of multiple utility lines and services, the Local Road Agencies would make decisions regarding the relocation of gas, telephone, water, sewer, cable, fiber-optic and other utility facilities, but the IPUC would make decisions regarding Idaho Power facilities. That is a recipe for inefficiency, conflict and other general problems.

In fact, it must be noted that Rule H applies only to Idaho Power, not to all electric power utilities in Idaho. Several Local Road Agencies in Idaho have jurisdiction over rights-of-way involving electric utility lines owned by other electric power utilities, including Avista, Atlanta Power Company and PacifiCorp d/b/a Rocky Mountain Power. Rule H applies only to Idaho Power, and the Associations are not aware of similar Tariffs applicable to the other public utilities. Thus, unless Section 10 of Rule H is set aside, the IPUC will regulate utility relocations involving Idaho Power, but the Local Road Agencies will continue regulating utility relocations involving other electric power utilities and all other types of utilities and services. Again, contrary to the intent of Idaho Code § 40-1312, that scenario does not provide efficiency to the Local Road Agencies.

The IPUC not only lacks the authority to regulate utility locations and relocations within public rights-of-way, the IPUC also lacks the expertise to so regulate. The standards and practices for locating and relocating utility facilities are unique to each community.

Idaho's Local Road Agencies have developed considerable expertise over many years pursuant to their statutory authority and in consideration of the unique circumstances and needs of each local community. Thus, the most efficient way to regulate utility relocations is to utilize the existing expertise of Idaho's Local Road Agencies; not to expand the powers of and create new and conflicting regulatory authority at the IPUC.

From the perspective of the Associations, the most serious problem with Section 10 of Rule H is found in the following provision:

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.

Under this provision, regulations adopted by Local Road Agencies are purportedly superseded by Section 10 of Rule H unless they are "substantially similar" to Section 10 of Rule H. As an initial matter, it is entirely unclear whether the regulations adopted by various Local Road Agencies are "substantially similar" to Section 10 of Rule H. Some are similar in some ways, but none are identical. More importantly, this provision usurps the Local Road Agencies' exclusive jurisdiction to regulate the public rights-of-way within their respective jurisdictions. The Local Road Agencies effectively have no jurisdiction if their regulations are superseded by any conflicting IPUC order. If anything, the preemption of regulations should go the opposite way. Given the Local Road Agencies' statutorily granted authority to pass

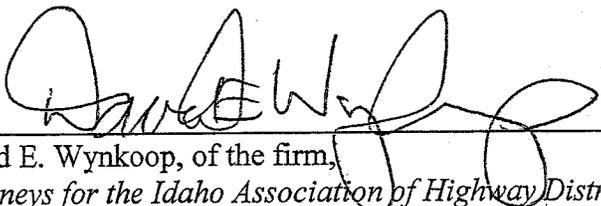
regulations with regard to public rights-of-way and the IPUC's lack of authority, any regulations passed by the Local Road Agencies should supersede any conflicting IPUC order. See e.g. Idaho Code § 40-1406 (providing that county-wide highway districts "shall exercise all of the powers and duties provided in chapter 13 of this title" 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").

III. CONCLUSION

The IPUC does not have statutory authority to regulate the relocation of public utilities on the public rights-of-way. Instead, the Idaho Legislature has granted exclusive jurisdiction over the public rights-of-way to the Local Road Agencies. Section 10 of Rule H not only usurps the Local Road Agencies' exclusive jurisdiction, but it impedes their ability to efficiently manage road projects that require relocation of public utilities. For these reasons, the Associations respectively ask the Court to set aside the IPUC's order approving Section 10 of Rule H.

DATED this 13 day of August, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of August, 2010, I served a true and correct copy of the AMICUS CURIAE BRIEF upon the following named parties by the method indicated below, and addressed to the following:

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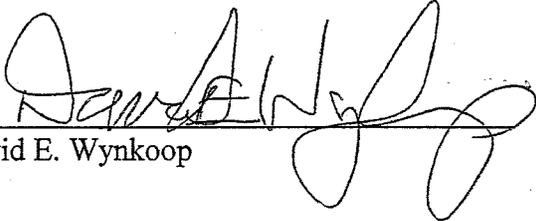
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