

SUP-E-10-02

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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. )

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. )

**RESPONDENT IDAHO POWER COMPANY'S BRIEF  
IN RESPONSE TO AMICUS CURIAE BRIEF**

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

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## TABLE OF CONTENTS

<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. ARGUMENT.....</b>	<b>1</b>
A. Cost Creation Verses Cost Recovery.....	1
B. The Public Road Agencies Have Misinterpreted Section 10 of Rule H.....	4
<b>III. CONCLUSION.....</b>	<b>6</b>

## TABLE OF AUTHORITIES

### Cases

<i>Alpert v. Boise Water Corporation</i> , 118 Idaho 136, 140, 795 P.2d 298, 302 (1990).....	2
<i>Grindstone Butte Mut. Canal Co. v. Idaho Public Utilities Commission</i> , 102 Idaho 175, 179-182, 627 P.2d 804, 808-810 (1981).....	3
<i>Idaho State Homebuilders v. Washington Water Power</i> , 107 Idaho 415, 419, 690 P.2d 350, 354 (1984).....	3

### Statutes

Idaho Code § 61-315.....	3
Idaho Code § 61-629.....	6

### IPUC Orders

Order No. 30853 .....	2
Order No. 30955 .....	2, 4, 5, 6

### Other Authorities

Ada County Highway District Resolution 330 .....	5
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## I. INTRODUCTION

Respondent Idaho Power Company (“Idaho Power”) hereby responds to the *Amicus Curiae* Brief of the Idaho Association of Highway Districts, the Association of Idaho Cities, and the Idaho Association of Counties (collectively, the “Amicus Road Agencies”). Like the Ada County Highway District (“ACHD”), the Amicus Road Agencies have (1) failed to recognize the jurisdictional distinction between the Public Road Agencies’ authority to create costs for utilities by requiring relocation of utility facilities in public rights-of-way as opposed to the Idaho Public Utilities Commission’s authority over the recovery of costs incurred by the utilities pursuant to the required relocation of facilities in public rights-of-way and (2) have misinterpreted Section 10 of Idaho Power’s line extension tariff.

## II. ARGUMENT

### A. Cost Creation Verses Cost Recovery.

As stated above, the Amicus Road Agencies in their Brief fail to recognize the distinction between the jurisdictional authority to impose costs concerning the location or relocation of public utility facilities in public rights-of-way and the jurisdictional authority over how the public utility will recover the costs that are imposed. At pages 17 and 18 of its Respondent Brief, Idaho Power clearly acknowledges that the Public Road Agencies (including the Amicus Road Agencies) have exclusive jurisdiction and authority to require Idaho Power to relocate its facilities in public road rights-of-way, at no cost to the Public Road Agency, where the facilities would incommode the public use.

The Idaho Public Utilities Commission ("Commission") in Order Nos. 30853 and 30955 acknowledges this authority and has reiterated this position in the Commission's Respondent Brief to this Court. These acknowledgements confirm that this proceeding has nothing to do with the Public Road Agencies' authority to require relocation in the public right-of-way and to impose costs on the public utility, in this case Idaho Power. The only question presented in this appeal is whether a Public Road Agency or the Commission has the jurisdiction to decide how, and from whom, Idaho Power can recover the costs it incurs when a Public Road Agency lawfully requires relocation of utility facilities.

There are a myriad of governmental agencies and private parties that impose costs and fees on Idaho Power. The authority or right to impose those costs is separate from the Commission's jurisdiction to determine how Idaho Power will recover those costs. How the public utility, in this case Idaho Power, will recover the costs imposed for location or relocation of facilities in public rights-of-way is subject to the jurisdiction of the Commission. As is noted in *Alpert v. Boise Water Corporation*, 118 Idaho 136, 140, 795 P.2d 298, 302 (1990):

The public utilities law (Chapters 1-7 of Title 61, Idaho Code) establishes a comprehensive scheme for the regulation of investor-owned public utilities by the Idaho Public Utilities Commission. Idaho Code, tit. 61, chap. 5.<sup>1</sup>

<sup>1</sup> More specifically, the authority granted the IPUC includes the power to investigate and fix rates and regulations, I.C. § 61-503; determine the reasonableness of rates, I.C. § 61-502; investigate proposed interstate rates, I.C. § 61-506; determine rules and regulations affecting the performance of public utilities, I.C. § 61-507; order improvements to utility facilities, I.C. § 61-508; investigate accidents occurring on public utility property arising from its maintenance or operation, I.C. § 61-517; determine standards and practices for the measurement of quantity, quality or

other conditions pertaining to the supply of a public utility product or service, I.C. § 61-520; ascertain the value of public utility property, I.C. § 61-523; and issue certificates of convenience and necessity, I.C. § 61-526.

*See also Grindstone Butte Mut. Canal Co. v. Idaho Public Utilities Commission*, 102 Idaho 175, 179-182, 627 P.2d 804, 808-810 (1981). How Idaho Power will recover in its rates and charges the costs imposed by the Public Road Agencies is clearly within the exclusive jurisdiction of the Commission.

As noted in the *Amicus* Brief at page 1, there are multiple highway districts, counties, and cities which Idaho Power must deal with concerning the use of their respective jurisdictional public rights-of-way. Logic and equity dictate that there must be a uniform method applicable to all customers or persons as to how Idaho Power's costs will be recovered. It is for the Commission to exercise its authority "in such a way as to fix non-discriminatory, and non-preferential rates and charges." *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 419, 690 P.2d 350, 354 (1984). To allow each separate highway district, county, and city to create a method of public utility cost recovery would clearly be in violation of the uniform legal framework the Idaho Legislature created when it established the Public Utilities Law. Without a single entity establishing uniform rules, there would be no uniformity of treatment, a critical element of public utility charge, as required by Idaho Code § 61-315.

Although the *Amicus* Road Agencies do not actually state in their *Amicus* Brief that they contend they have the authority to determine how Idaho Power will recover in its rates and charges the costs that are imposed in the location or relocation of the utility facilities, this is apparently their position. If they do not contend that Public Road Agencies have the authority to

determine how Idaho Power is to recover its location or relocation costs, there is no controversy in this proceeding. The central question that must be asked of the Public Road Agencies is: How do they propose Idaho Power will recover its costs? Are those costs to be recovered by Idaho Power from the particular entity or person that caused the costs to be incurred, or are the costs to be socialized and recovered in the overall rates and charges to all utility customers? Will the recovery method and cost allocation be different for each Public Road Agency's geographical area? Realistically, the only agency with both jurisdiction and experience to establish the required uniform rate treatment is the Commission.

**B. The Public Road Agencies Have Misinterpreted Section 10 of Rule H.**

Apparently, like ACHD, the Amicus Road Agencies have misinterpreted the effect of Section 10 of Idaho Power's line extension tariff. In Order No. 30955, the Commission clearly found that Section 10 only becomes applicable after the Public Road Agency has determined the cost of relocating facilities that would be paid by Idaho Power. The Commission is only concerned with Idaho Power's recovery of costs. This cost recovery issue is within the exclusive jurisdiction of the Commission and has absolutely no financial impact on the Public Road Agencies. As pointed out by the Commission, Section 10 is simply an accommodation to remove friction between the Public Road Agency, a developer, and Idaho Power. It does not usurp any power or jurisdiction from the Public Road Agencies because it is only the recovery of relocation costs by Idaho Power that is at issue before the Commission. As was succinctly stated by the Commission in Order No. 30955, page 11:

The language of Section 10 in no way usurps the authority of ACHD or any other highway district or political subdivision because it does not attempt to give Idaho Power or this Commission any authority that a highway district would otherwise hold. It is because the allocations of Resolution 330 have worked so effectively in the past 20 years that Idaho Power proposed it as a model for the allocation of relocation costs within its Rule H, Section 10. Tr. at 27.

(Tr. Vol. IV, p. 658.) The approval of Section 10, Rule H, of Idaho Power's line extension tariff is clearly within the jurisdiction of the Commission and such approval is fair and reasonable.

The Public Road Agencies have taken strong exception to the following "savings clause" provision of Section 10:

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.

This adverse reaction is baffling in that any Public Road Agency can avoid any problems hypothesized by the Agencies concerning this provision by simply choosing not to implement any "legally binding guidelines" like the ones ACHD implemented in its Resolution 330.

Although the Amicus Road Agencies vaguely refer to "inefficiency, conflict, and other general problems" on page 4 of their *Amicus* Brief, they do not identify any concrete examples of additional administration effort for the Public Road Agencies. Section 10 will not change one thing about how the Public Road Agencies carry out their work. There is a good reason why they have not presented such examples. ACHD has been doing it in the same manner set forth in Order No. 30955 for twenty-three years. Idaho Power will continue to relocate its facilities exactly as it has in the past – in the manner and time schedule agreed to with the Public Road

Agency. The only difference is that Order No. 30955 adds a cost recovery mechanism to the process at the Commission after the Agency-mandated relocation is complete. It has no effect on the Public Road Agencies' management of utility relocation in public rights-of-way.

Of course, pursuant to the provisions of Idaho Code § 61-629, this Court may alter or amend any provision of the Commission's Order to meet any objection of the Court. Although Idaho Power Company does not believe that the above-quoted "savings clause" provision of Section 10 is improper, if the Court sees some problem, it could order that the provision be removed. Nothing would really change as a result of this removal, but the Public Road Agencies' complaint would be addressed.

### **III. CONCLUSION**

The Idaho Public Utilities Commission has exclusive jurisdiction to determine how Idaho Power will recover the cost that it incurs when locating or relocating facilities in public rights-of-way, and Section 10 of Rule H in Idaho Power's line extension tariff is fair, just, and reasonable.

Respectfully submitted this 1<sup>st</sup> day of September 2010.



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LISA D. NORDSTROM

Attorney for Respondent Idaho Power Company

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1<sup>st</sup> day of September 2010 I served a true and correct copy of RESPONDENT IDAHO POWER COMPANY'S BRIEF IN RESPONSE TO *AMICUS CURIAE* BRIEF upon the following named parties by the method indicated below, and addressed to the following:

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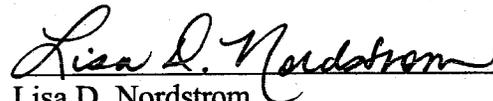
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