

SUP-E-10-02

IN THE SUPREME COURT OF THE STATE OF IDAHO

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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. )

\_\_\_\_\_  
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 TO AMICUS BRIEF

\_\_\_\_\_  
Appeal from the Idaho Public Utilities Commission  
\_\_\_\_\_

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## I. INTRODUCTION

Pursuant to the Court's Order dated July 29, 2010, Appellant Ada County Highway District ("ACHD") submits this reply brief in response to the Amicus Curiae Brief filed by the Idaho Association of Highway Districts, the Association of Idaho Cities and the Idaho Association of Counties and in reply to Idaho Power Company's Brief in Response to Amicus Curiae Brief, filed September 1, 2010 ("Idaho Power Response Brief"). Much of Idaho Power's Response Brief merely restates the positions it has taken throughout this litigation. ACHD will not re-hash each argument made by Idaho Power, but rather will address only the three key issues discussed below.

## II. ARGUMENT

### A. **Section 10 Of Rule H Usurps The Public Road Agencies Exclusive Jurisdiction Over Public Rights-Of-Way**

Idaho Power disagrees with the Amicus Road Agencies' assertion that Section 10 of Rule H usurps the Public Road Agencies' exclusive jurisdiction over public rights-of-way. Notably, Idaho Power does not dispute that ACHD and other Public Road Agencies have exclusive jurisdiction over public rights-of-way, including jurisdiction over utility relocation on public rights-of-way. Rather, Idaho Power contends that jurisdiction over utility relocation should be bifurcated into two areas of jurisdiction. Under Idaho Power's theory, ACHD would retain jurisdiction to require utilities to relocate and to otherwise regulate the practical aspects of utility relocation. However, the Idaho Public Utilities Commission ("IPUC") would have jurisdiction to regulate whether private developers must reimburse Idaho Power for all or a portion of its utility relocation costs. *See* Idaho Power's Brief in Response to Amicus Curiae Brief, p. 2 ("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.”).

This argument ignores the fact that ACHD has long-exercised its jurisdiction to oversee both aspects of utility relocation. ACHD’s resolution 330 regulates whether a private developer is required to reimburse a utility for all or a portions of its relocation costs when ACHD requires it to relocate its facilities on a public right-of-way. R., Vol. III, p. 487 (providing that, where a private developer pays for a percentage of a public road improvement project that results in utility relocation, the private developer must reimburse the public utility for that same percentage of its relocation costs). Neither Idaho Power nor the IPUC has questioned ACHD’s authority to regulate utility relocation in this regard. In fact, Idaho Power cites the similarities between ACHD’s Resolution 330 and Section 10 of Rule H as the reason why Section 10 of Rule H does not usurp ACHD’s exclusive jurisdiction over the public rights-of-way. *See Idaho Power Response Brief*, p. 5; *see also IPUC Respondent’s Brief*, p. 21 (explaining that the IPUC cannot “question a road agency’s cost allocation rules, whether similar to Section 10 or not”).

Idaho Power’s argument misses the point. Given that ACHD has “exclusive” jurisdiction to regulate utility relocation on public rights-of-way, no other governmental entity can have jurisdiction to take over ACHD’s authority to allocate the cost of utility relocation between private developers and utilities. Idaho Power contends that Section 10 of Rule H “has no effect on the Public Road Agencies’ management of utility relocation in public rights-of-way,” (*id.* at p. 6), but it most certainly does. Section 10 of Rule H purports to strip ACHD of its exclusive jurisdiction to regulate utility relocation on public rights-of-way by taking away from ACHD the

authority to determine whether a private beneficiary must reimburse a utility for its relocation costs.

**B. The Idaho Legislature Gave Jurisdiction To The Public Road Agencies, Not To The IPUC**

Idaho Power next calls upon principles of “logic and equity” to argue that the IPUC should have jurisdiction over whether Idaho Power may recover its utility relocation costs from private developers. In this regard, Idaho Power complains that, without Section 10 of Rule H, Idaho Power would have to deal with regulations implemented by multiple Public Road Agencies to recover its costs for utility relocations in different highway districts. Specifically, Idaho Power asserts that “[l]ogic 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.” *See* Idaho Power Response Brief, p. 3.

As an initial matter, Idaho Power’s invocation of “logic and equity” is irrelevant. This appeal has nothing to do with whether it makes more sense for the IPUC or the Public Road Agencies to have jurisdiction over allocating utility relocation costs that result from public road projects. The only question is which entity has been statutorily granted that authority by the Idaho Legislature. The Idaho Legislature has expressly granted Public Road Agencies “exclusive” jurisdiction over public rights-of-way (*see* Idaho Code § 40-1310), and ACHD has exercised that statutorily granted authority to allocate utility relocation costs through its regulation 330. In contrast to the Public Road Agencies broad and exclusive authority, “[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 Corp.*, 118 Idaho 136, 140,

795 P.2d 298, 302 (Idaho 1990). “If the legislative branch desires the Public Utilities Commission to have such authority, it must be provided by precise language.” *Washington Water Power Co.*, 99 Idaho at 882 (emphasis added). Thus, if Idaho Power wants jurisdiction over utility relocation on public rights-of-way to be split as it proposes, it must go to the Idaho Legislature.

Notably, Idaho Power’s complaint that it should not have to deal with various different Public Road Agencies is contrary to the intent of the legislature as expressly set forth in statute. Idaho Code § 40-1310(8) broadly grants “exclusive general supervisory authority” over public rights-of-way. Idaho Code § 40-1312 provides that this grant of authority to the Public Road Agencies should 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.” Thus, the whole reason for the broad grant of authority to the Public Road Agencies is so the Public Road Agencies can oversee all aspects of public rights-of-way in a way that would provide efficiency to the Public Road Agencies.

Through Resolution 330, ACHD enacted regulations that create efficiency for all public road projects within the Ada County Highway District. Resolution 330 regulates not only the practical aspects of utility relocation on public rights-of-way, but it also regulates whether a private developer must reimburse public utilities for their relocation costs. That way, all affected parties – ACHD, the public utilities and private developers – know exactly who will pay the cost of utility relocation by looking to one single set of regulations.

Moreover, it should not be overlooked that Rule H applies only to Idaho Power, not to the many other utilities that are affected by utility relocations. A large public road project will often

require several utilities to relocate their utility lines. Even with Rule H, all utilities except for Idaho Power would be governed by Resolution 330. ACHD would still determine whether a private developer must reimburse every utility other than Idaho Power for its relocation costs. Such a system of concurrent jurisdiction may be more efficient for Idaho Power, but it certainly is not more efficient for the Public Road Agencies.

**C. Section 10 Of Rule H Should Be Amended To Make Clear That It Does Not Apply In Jurisdictions Where A Public Road Agency Regulates Utility Relocation On Public Rights Of Way**

Idaho Power takes issue with the Amicus Road Agencies' concern over the "savings clause" of Section 10 of Rule H. That clause provides that Section 10 of Rule H will not apply in jurisdictions where a Public Road Agency has adopted utility relocation regulations "that are substantially similar to the rules set out in Section 10 of Rule H." *See R.*, Vol. IV, p. 678. The clear intent of this provision is that Section 10 of Rule H would trump any Public Road Agency regulation that is not "substantially similar" to Section 10 of Rule H.

Idaho Power expresses dismay at the Amicus Road Agencies' concerns with this provision. Specifically, Idaho Power responds as follows:

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.

*See Idaho Power's Response Brief*, p. 5. In other words, Idaho Power's position is that a Public Road Agency should simply abstain from regulating utility relocations if it does not want its regulations to be trumped by Section 10 of Rule H. Idaho Power's position confirms two key points. First, it confirms that Section 10 of Rule H purports to trump Public Road Agencies'

regulations. Second, it shows exactly how Section 10 of Rule H usurps the exclusive jurisdiction granted to the Public Road Agencies. Idaho Power's position is that the Public Road Agencies should either implement regulations that are "substantially similar" to Section 10 or Rule H or just not regulate utility relocation at all. Either way, Section 10 of Rule H strips the Public Road Agencies of their jurisdiction over utility relocations on public rights-of-way with regard to whether private developers are required to reimburse public utilities for their relocation costs.

Finally, almost as if conceding that the "savings clause" runs afoul of the Idaho Legislature's grant of authority to the Public Road Agencies, Idaho Power offers a way for the Court to fix the problem. *See Idaho Power Response Brief*, p. 6 ("[I]f the Court sees some problem, it could order that the provision be removed."). ACHD agrees with the proposition that the Court can fix Section 10 of Rule H, but disagrees with the suggestions that the offending provision be "removed." Simply removing the provision would leave ambiguity as to which regulations control where a public Road Agencies' regulations conflict with Section 10 of Rule H. To solve this problem, ACHD respectfully requests that this Court find that Section 10 of Rule H, as written, improperly usurps the Public Road Agencies' jurisdiction over public rights-of-way. Section 10 of rule H should either be stricken in its entirety, or, alternatively, the matter should be remanded to the IPUC with instructions to amend Rule H to make clear that regulations implemented by Public Road Agencies control over Section 10 of Rule H. ACHD suggests that the following provision could replace the "savings clause":

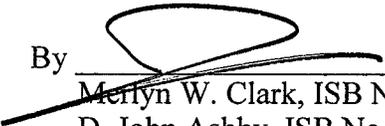
This Section shall not apply to utility Relocations within public road rights-of-way of Public Road Agencies which have adopted rules or regulations for the allocation of utility relocations costs between the utility and other parties. In such a case, the Public Road Agencies' rules or regulations shall govern.

### III. CONCLUSION

For the foregoing reasons, and as set forth in ACHD's prior briefing, Sections 10 and 11 of Rule H exceed the scope of the IPUC's jurisdiction and 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 17 day of September, 2010.

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